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CLE Course Materials
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A Call To Cyberarms: The International Arbitrator’s Duty To Avoid Digital Intrusion

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A CALL TO CYBERARMS: THE INTERNATIONAL ARBITRATOR’S DUTY TO AVOID DIGITAL INTRUSION

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I. INTRODUCTION

International commercial arbitration rests on certain fundamental attributes that cut across the different rule sets and cultural and legal systems in which it operates. There is common ground that any international commercial arbitration regime must encompass integrity and fairness, uphold the legitimate expectations of commercial parties, and respect essential elements of due process such as equal treatment of the parties, a fair opportunity for each party to present its case and neutral adjudicatory proceedings, untainted by illegal conduct.1

The system and its integrity depend substantially on the role of the arbitrator. As Professor Rogers has stated: [T]he authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate.2 Cyberbreaches of the arbitral process, including intrusion

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2. CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 283 (2014).
into arbitration-related data and transmissions, pose a direct and serious threat to the integrity and legitimacy of the process. This article posits that the arbitrator, as the presiding actor, has an important, front-line duty to avoid intrusion into the process.

The focus here on cyberintrusion into the arbitral process does not imply that international arbitration is uniquely vulnerable to data breaches, but only that international arbitration proceedings are not immune to increasingly pervasive cyberattacks against corporations, law firms, government agencies and officials and other custodians of large electronic data sets of sensitive information. Similarly, our focus on the role and responsibilities of the arbitrator should not obscure that cybersecurity is a shared responsibility and that other actors have independent obligations. Arbitrators are not uniquely vulnerable to data breaches and are not guarantors of cybersecurity.

In the highly interdependent landscape of international commercial arbitration, data associated with any arbitration matter will only be as secure as the weakest link. Since data security ultimately depends on the responsible conduct and vigilance of individuals, any individual

3. Though we focus primarily on the threat of data breaches, the analysis here is generally applicable to other forms of unauthorized digital intrusion in proceedings, such as surreptitious surveillance of a hearing or of arbitration counsel in their offices, or the inadvertent recording and disclosure of an otherwise private conversation between members of the tribunal.

4. See infra Part II.

5. Most notably, counsel have ethical duties to protect client confidentiality and to keep abreast of the risks and benefits of technology related to their practice. Further, all actors in the process may have contractual or regulatory obligations to protect sensitive personal or commercial information. See infra Sections III.A and III.C.

6. High profile examples of arbitration-related cyberattacks or data breaches have involved arbitral institutions, counsel, and parties as targets. See Zachary Zagger, Hackers Target Anti-Doping, Appeals Bodies Amid Olympics, LAW360.COM, (Aug. 12, 2016), https://www.law360.com/articles/827962/hackers-target-anti-doping-appeals-bodies-amid-olympics (reporting that hackers attempted to infiltrate the website of the Court of Arbitration for Sport during the Rio Olympic Games); Alison Ross, Tribunal Rules on Admissibility of Hacked Kazakh Emails, GLOBAL ARBITRATION REV., (Sept. 22, 2015), http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails (reporting that privileged e-mails between a government and its arbitration counsel were disclosed by hackers of the government’s internal network); Alison Ross, Cybersecurity and Confidentiality Shocks for PCA, GLOBAL ARBITRATION REV., (July 23, 2015), http://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca (reporting that the Permanent Court of Arbitration website was hacked during a hearing of China-Philippines arbitration and counsel in a Russia-related arbitration received “Trojan downloaders” that, if opened, would have enabled hackers to listen in on conversations).
actor can be that weak link, whatever their practice setting, whatever the infrastructure they rely upon, and whatever role they play in an arbitration.7

We explore in Part II the threat that cybersecurity breaches pose to international commercial arbitrations, using some examples of high-profile breaches that already have occurred.8 We analyze in Part III the obligations that underpin the arbitrator’s duty to avoid intrusion. That duty, in our view, need not be created anew. Rather, it rests securely on well-established duties of arbitrators to safeguard both the confidentiality and the legitimacy and integrity of proceedings, as well as to be competent to handle each individual matter.9 In an era of significant cyberthreats to the international commercial arbitration process, the duty to avoid intrusion is an inherent duty that follows as a matter of necessity from these earlier identified duties.

We then discuss, in Part IV, the nature and scope of the arbitrator’s duty to avoid intrusion, which is bounded and fulfilled by taking reasonable measures to prevent unauthorized digital access to arbitration-related information. There is no bright line list of measures that will fulfill the duty. Rather, assessment of the cybersecurity necessary in international commercial arbitration is an ongoing, risk-

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8. Although the focus of this article is on international commercial arbitration, many of the considerations discussed here will apply as well in investor-state and public international arbitration. Notably, some of the high profile data security breaches discussed in this article occurred in those contexts. See supra note 6. At the same time, however, there may be important differences between the scope of the arbitrator’s duty to avoid intrusion in the two regimes owing to the public interest in investor-state arbitration and initiatives to increase transparency in the settlement of investor-state disputes. See, e.g., UN Convention on Transparency in Treaty-Based Investor-State Arbitration (2015).

based process that requires all participating individuals to understand data security threats in context. As threats evolve, participants must know their own digital architecture and security vulnerabilities (including those that arise from their personal day-to-day work habits) in order to implement protective measures responsive to the threats that apply to their data landscape and individual matters.

The specific protective measures required to satisfy the duty will depend on an analysis of the security risks and on the measures that are practically available, as both will undoubtedly evolve from time to time. They will also depend upon considerations of convenience, cost and efficiency, as the arbitrator may need to balance the duty to avoid intrusion against other duties, including the duty to conduct proceedings in an expeditious and cost-effective manner\(^{10}\) and, in the absence of overriding considerations, consistent with the parties’ choices.\(^{11}\)

Finally, in Part V, we address some practical considerations for arbitrators as they determine what measures to implement to avoid intrusion and, in Part VI, suggest for future dialogue some ways in which all participants in the international commercial arbitration system may collaborate to address the ongoing threats. The fundamentals of effective cybersecurity management are accessible and not unduly burdensome. The arbitrator who keeps abreast of risks and benefits of technology in the arbitration process, is conscious of his or her digital assets and infrastructure, and who implements

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10. See Int’l Chamber of Commerce [ICC], Rules of Arbitration (2017) [hereinafter ICC Rules], art. 22(1) (tribunal shall make every effort to conduct the arbitration in an expeditious and cost-effective manner); Int’l Ctr. for Disp. Res., International Centre for Dispute Resolution International Arbitration Rules (2014) [hereinafter ICDR Rules], art. 20(2) (“The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute”); LCIA Rules, supra note 1, at art. 14.4(ii) (tribunal’s general duty to adopt suitable procedures, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute).

11. See, e.g., UNCITRAL Model Law, supra note 1, at art. 34(2)(a)(iv), (award may be set aside if “the arbitral procedure was not in accordance with the parties’ agreement, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate”); LCIA Rules, supra note 1, at art. 14.2 (“The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal’s general duties . . . ”); ICDR Rules, supra note 10, at 1 (rules apply “subject to modifications that the parties may adopt in writing” except that “where any rule[] is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail”).
reasonable protective measures, will readily meet the obligation to avoid intrusion.

II. DATA SECURITY THREATS IN INTERNATIONAL ARBITRATION

Cyberintrusion, or hacking as it is more commonly known, is often in the news in respect to geo-politics, and major corporate and government records data breaches. Law firms, too, are increasingly
reported as having fallen victim to cyberattacks. As awareness increases that corporations and players in the legal sector are attractive targets for cybercriminals, the multiple players involved in international private commercial arbitrations should realize that they too are vulnerable to cybercriminals. International commercial arbitrations routinely involve sensitive commercial and personal information, including information that is not publicly available and that has a potential to move markets or impact competition. Conveniently for hackers, this information is culled together in large data sets, ranging from pleadings and documents produced in disclosure, documentary evidence, witness statements, expert reports, memorials, transcripts, attorney work product, tribunal deliberation materials, and case management data. As the multiple players involved often live in different countries, the information is frequently exchanged and stored in electronic form, making it vulnerable to malevolent outside actors.

Data custodians, who hold sensitive data to varying degrees, include arbitral institutions, counsel, the parties and members of the arbitral tribunal (along with their respective support staff), as well as experts and vendors, including court reporters, translation services, couriers, and information technology (“IT”) professionals, among others. Hackers may attack individual actors directly or the digital

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14. See, e.g., Nate Raymond, U.S. Accuses Chinese Citizens of Hacking Law Firms, INSIDER TRADING (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5; Michael Schmidt and Steven Lee Myers, Panama Law Firm’s Leaked Files Detail Offshore Accounts Tied to World Leaders, N.Y. TIMES (Apr. 3, 2016), https://www.nytimes.com/2016/04/04/us/politics/leaked-documents-offshore-accounts-putin.html (reporting that 11.5 million documents leaked from Panama law firm exposed the offshore accounts of 140 politicians and public officials). See also New York State Bar Ass’n Ethics Opinion 1019 (Aug. 2014) (“Cyber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks.”).

15. For an overview of the major cyber risks in the practice of international arbitration and the tradecraft of the principal threat actors (hacktivists, state actors, and criminals), see James Pastore, Practical Approaches to Cybersecurity in Arbitration, 40 FORDHAM INT’L L.J. 1023 (2017). See also Verizon Report, supra note 13.

16. A prevalent method of attack that capitalizes on human error is ransomware, a form of malware frequently distributed through spear phishing e-mails sent to targeted individuals. The FBI explains:
infrastructure of their organizations. Moreover, each smartphone, tablet, laptop, thumb drive, other digital device, and cloud service used for the transmission or hosting of arbitration-related data offers a potential portal for unauthorized outsiders to gain access.

The participants in international commercial arbitrations are, to a large degree, digitally interdependent, in that the process typically involves the transmission and hosting of data and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of sensitive data has the potential to affect all participants. Indeed, since participants will frequently play host not only to their own sensitive data, but also to the sensitive data of others, intrusion into data held by one participant may injure another more than the one whose data security was compromised.

Unauthorized access of sensitive data may result in the disclosure, or even acceptance into evidence of, illegally obtained, confidential, or privileged matter in ways that undermine fundamental elements of the adjudicatory process and its baseline due process elements. Disclosure of commercially sensitive information, trade
secrets, or personal information may violate laws or contractual commitments in business-to-business or customer agreements, cause serious reputational and economic harm to individuals or businesses, trigger regulatory sanctions or negligence claims, and impact the integrity of public securities markets. Further, since the parties, counsel and arbitrators frequently reside in different countries and may be subject to differing data security law, privacy regimes and ethical standards, the legal effect of a data breach may be uncertain and complex. Last, and not least, data security breaches, particularly those resulting from a failure to implement reasonable security protocols, threaten to undermine public confidence in the very institution of international private commercial arbitration. We explore the latter consequence further below.

III. SOURCES OF THE ARBITRATOR’S DUTY TO AVOID INTRUSION

The arbitration rules, ethical codes, practice guidelines, and national laws that govern international commercial arbitration do not, by and large, establish an express duty for arbitrators or any other participant in the arbitral process to implement cybersecurity from Kazakhstan’s government computer network, yet excluding other documents on the basis of privilege).


21. See, e.g., Robert Burnson, Yahoo’s Massive Data Breach Draws Negligence Suits by Users, BLOOMBERG TECH. (Sept. 23, 2016), https://www.bloomberg.com/news/articles/2016-09-23/yahoo-s-massive-data-breach-draws-negligence-lawsuit-by-user; See also Shore et al. v. Johnson & Bell, Ltd., No. 1:16-cv-04363 (Verified Complaint) (N.D. Ill. Apr. 15, 2016) (class action alleging a Chicago law firm was negligent and engaged in malpractice by using security practices that left client information vulnerable to hacking, including, for example, a ten-year-old time-entry system that had not been updated with security patches).


measures. Why, then, does the arbitrator bear responsibility to avoid cybersecurity breaches? In our view, the arbitrator’s duty to avoid intrusion rests on well-established arbitral duties: (i) the duty to protect the confidentiality and privacy of the proceedings, which will vary in different arbitrations, but exists to some degree in all proceedings; (ii) a fundamental duty to preserve and protect the integrity and legitimacy of the arbitral process; and (iii) a duty to be competent. In addition to these general duties, some arbitrators may have express or implied cybersecurity obligations by virtue of attorney codes of conduct, national data protection laws or regulations, or agreement with the parties.

A. Duty of Confidentiality

It is by now well-established that although parties generally have a right to keep international commercial arbitrations private (i.e., to exclude third parties from hearings), it cannot be assumed that they have a general duty or right to keep arbitration-related information confidential (i.e., to refrain from disclosing, and to keep others from disclosing, such information to third parties). Arbitrators are on slightly different footing. Although applicable law, governing

24. See Section III.C for a discussion of the ethical obligations of lawyers under the ABA Model Rules of Professional Conduct, which regulate attorney conduct.

25. See Simon Crookenden, Who Should Decide Arbitration Confidentiality Issues? 25 ARB. INT’L 603, 603 (2009) (“The privacy of arbitration proceedings is generally recognised internationally.”); see also, e.g., ICC RULES, supra note 10, at art. 26(3): (“ . . . Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.”); ICCDR RULES, supra note 10, at art. 23(6) (“Hearings are private unless the parties agree otherwise or the law provides to the contrary.”); LCIA RULES, supra note 1, at art. 19.4: (“All hearings shall be held in private, unless the parties agree otherwise in writing.”); SINGAPORE INT’L ARB. CTR., ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (2016) [hereinafter SIAC RULES], art. 24.4 (“Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.”).

26. UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 50 (2016) [hereinafter UNCITRAL Notes], (“there is no uniform approach in domestic laws or arbitration rules regarding the extent to which participants in an arbitration are under a duty to observe the confidentiality of information relating to the arbitral proceedings”); L. Yves Fortier, The Occasionally Unwarranted Assumption of Confidentiality, 15 ARB. INT’L 131 (1999); Leon Trakman, Confidentiality in International Commercial Arbitration, 18 ARB. INT’L 1 (2002).

27. More often than not, whether an arbitrator has a duty of confidentiality is not addressed by national legislation. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2003 (Wolters Kluwer, 2d ed. 2014); see also Joshua Karton, A Conflict of Interests: Seeking a
arbitration rules, and party agreement may vary in the extent to which they obligate an arbitrator to keep all aspects of an arbitration proceeding confidential, it is uncontroversial that the arbitrator has a fundamental duty to keep at least certain aspects of a proceeding confidential. Gary Born takes a broad view of the confidentiality obligation, stemming from the arbitrator’s adjudicatory role:

Even where confidentiality obligations are not imposed upon the parties by either their agreement or applicable national law, the arbitrators are subject to separate confidentiality obligations by virtue of their adjudicative function. One element of the arbitrator’s role is the duty to maintain the confidentiality of the parties’ written and oral submissions, evidence and other materials submitted in the arbitration. It is generally inconsistent with the arbitrator’s mandate to disclose materials from the arbitration to third parties.

The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes is consistent with this view. Canon VI provides that “[a]n


28. Although they differ in scope, most institutional international arbitration rules, with the notable exception of the ICC Rules, impose an express obligation of confidentiality on arbitrators. See, e.g., ICDR RULES, supra note 10, at art. 37(1) (“Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator . . . . [T]he members of the arbitral tribunal . . . shall keep confidential all matters relating to the arbitration or the award.”); LCIA RULES, supra note 1, at art. 30.2 (“The deliberations of the Arbitral Tribunal shall remain confidential to its members . . . .”); SIAC RULES, supra note 25, at art. 39.1 (“Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator . . . shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.”), art. 39.3 (“. . . matters relating to the proceedings” includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain”); JAMS FOUNDATION, JAMS INTERNATIONAL ARBITRATION RULES (2016), art. 17.1 (“Unless otherwise required by law, or unless the parties expressly agree, the Tribunal, the Administrator and JAMS International will maintain the confidentiality of the arbitration.”), art. 17.2 (“Unless otherwise required by law, an award will remain confidential, unless all of the parties consent to its publication.”); INT’L INST. FOR CONFLICT PREVENTION & RES., CPR 2014 RULES FOR ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES (2014) [hereinafter CPR RULES], art. 20 (“Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential . . . .”). But see ICC RULES, supra note 10, at app. I, art. 6 (“The work of the [ICC] Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.”).

arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.” 30 In particular, the arbitrator has a duty to “keep confidential all matters relating to the arbitration proceedings and decision” and “[i]n a proceeding in which there is more than one arbitrator, . . . [not to] inform anyone about the substance of the deliberations of the arbitrators.” 31 Less comprehensively, the IBA Rules of Ethics for Arbitrators specify that the “deliberations of the arbitral tribunal and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation.” 32 At the same time, however, they encapsulate a general duty of confidentiality by stating that arbitrators should be “discreet.” 33

In contrast to arbitrators, who are thus bound by a duty of confidentiality, 34 the parties themselves may not have a duty to keep

30. Similarly, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (Oct. 2009) provides: “A member shall abide by the relationship of trust which exists between those involved in the dispute and (unless otherwise agreed by all the parties, or permitted or required by applicable law), both during and after completion of the dispute resolution process, shall not disclose or use any confidential information acquired in the course of or for the purposes of the process.” CHARTERED INST. OF ARBITRATORS, THE CHARTERED INSTITUTE OF ARBITRATORS CODE OF PROFESSIONAL AND ETHICAL CONDUCT FOR MEMBERS (Oct. 2009) [hereinafter CIARB ETHICS CODE], Rule 8.

31. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI (B), (C). See also Canon I (I) (“An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator’s initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.”).

32. INT’L BAR ASSOC., IBA RULES OF ETHICS FOR ARBITRATORS, article 9. The IBA Rules of Ethics are not binding, but are deemed to reflect internationally acceptable guidelines developed by practicing lawyers from all continents. Id. at Introductory Note.

33. Id.

34. We note that while many arbitrators are lawyers and will have professional ethical obligations to preserve client confidentiality, by their terms, such obligations apply only when a lawyer is acting in a representative capacity for a client and not when serving as an arbitrator, who does not represent any party but has equal duties to all. BORN, supra note 27 at 1970; CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed New Model Rule of Professional Conduct Rule 4.5: The Lawyer as Third-Party Neutral (2002), Rule 4.5.2, comments [1], [3]. Nonetheless, to the extent that lawyers’ duties of confidentiality have been updated to take account of cyberthreats, analysis of those duties may inform how the international arbitrator should view the nature and scope of his or her duty to avoid intrusion. See, e.g., U.K. Information Commission Office, Monetary Penalty Notice under the Data Protection Act 1998, Supervisory Powers of the Information Commissioner (Mar. 10, 2017), https://ico.org.uk/media/action-weve-taken/mpns/2013678/mpn-data-breach-barrister-20170316.pdf (fining UK family law barrister for failing to take “appropriate technical
arbitration proceedings or certain aspects of them confidential. Nonetheless, there is a common expectation among users of international commercial arbitration\(^ {35} \) that the overall process will be confidential.\(^ {36} \) More specifically, parties and institutions expect that the arbitrator will maintain the confidentiality of the arbitration.\(^ {37} \)

measures against the unauthorised or unlawful processing of personal data” in relation to confidential client files where the barrister failed to encrypt such files on her home computer and her husband inadvertently made the files accessible on an online directory while attempting to update software, noting that the Bar Council and barrister’s chambers had issued guidance to barristers that a computer used by family members or others may require encryption of files to prevent unauthorized access to confidential material by shared users).

\(^ {35} \) Notably, expectations of privacy and confidentiality may differ in investor-state arbitration. As explained in the UNCITRAL Notes on Organizing Arbitral Proceedings: “The specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency. Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.” UNCITRAL Notes, supra note 26, at ¶ 55.

\(^ {36} \) Paul D. Friedland, Arbitration Clauses for International Contracts 21 (Juris, 2d ed. 2007) (“Notwithstanding the usual absence of prohibitions on party disclosure, there is an expectation and tradition of confidentiality in arbitration, which a party violates at its own peril vis-à-vis the arbitrators.”); Queen Mary Univ. of London Sch. of Int’l Arb., 2010 International Arbitration Survey: Choices in International Arbitration, at 29, http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf, 29 (Fifty percent of corporations indicated that they “consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules … or agreement”); Int’l Inst. for Conflict Prevention & Res., General Commentary for CPR Rules for Administered Arbitration of International Disputes, available at https://www.cpradr.org/resource-center/rules/international-other/arbitration/international-administered-arbitration-rules (“Parties that choose arbitration over litigation of an international dispute do so primarily to avoid the unfamiliarity and uncertainty of litigation in a foreign court; also out of a need or desire for a proceeding that is confidential and relatively speedy.”); ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ¶ 27 (July 13, 2016) (“The [ICC] Court endeavors to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties.”)

\(^ {37} \) UNCITRAL Notes, supra note 26, at ¶ 53 (“Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.”) (emphasis added); LCIA Notes for Arbitrators, ¶ 6 (June 29, 2015) (“Parties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award. To that end, they are entitled to expect arbitrators: . . . to maintain the confidentiality of the arbitration. . . .”) (emphasis added).
Moreover, in the adversarial and adjudicatory context, each actor in arbitration has legitimate expectations of privacy as to the data that defines or supports its role in the process. Irrespective of the extent to which the proceeding as a whole is entirely confidential or in some respects public, counsel and clients expect that they alone will have access to their communications and case strategy, for example, while arbitrators expect that no one else will have access to their deliberations or draft adjudicative documents and other work product. Those who intrude on these boundaries by hacking or other unauthorized access may break the law 38; at a minimum, they will threaten legitimate expectations as to privacy in any adjudicatory process and the integrity of the process as a whole. In sum, since cyberintrusion undermines or negates the legitimate expectations of confidentiality that exist in international commercial arbitration as well as the legitimate expectations of privacy that exist to some degree in all adjudicatory proceedings, it follows that the arbitrator’s special duty to protect confidentiality extends to an obligation to avoid intrusion by non-participants who are determined to defeat those expectations. 39

B. Duty to Preserve and Protect the Integrity and Legitimacy of the Arbitral Process

The arbitrator’s duty to avoid intrusion also rests on a duty to protect the integrity and legitimacy of the arbitral process. Unauthorized intrusion by hackers or other malevolent actors threatens more than confidentiality: it is a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process. If we accept that hacking threatens the integrity of the process, it follows that the arbitrator’s obligation to protect the integrity of the process encompasses some form of duty to avoid such intrusion.


39. See UNCITRAL Notes, supra note 26, at ¶ 58(b).
Our premise that the arbitrator has a duty to avoid intrusion does not require resolution of the ongoing debate as to whether a commercial arbitrator is a mere independent service provider to the parties or if the arbitrator has a broader, adjudicative role with responsibilities also to society and the rule of law.\textsuperscript{40} Recognizing the deference to party autonomy that characterizes international commercial arbitration, it is well-established that arbitrators also have important and independent responsibilities to maintain their own reputations and probity, to support the interests of society and to uphold the legitimacy and integrity of the arbitral process.\textsuperscript{41} Even the most articulate and well-respected proponents of the arbitrator as service provider model recognize that there are limits to party autonomy and to arbitrators’ fidelity to the parties’ instructions.\textsuperscript{42}

There is little doubt that the use in an arbitration of data illegally obtained by or on behalf of a party would irreparably taint

\textsuperscript{40} See Rogers, supra note 2; Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 392 (1978) (common features of the power to adjudicate delegated by the state to judges and by consent of the parties to arbitrators); Panel Discussion, Arbitrator Ethics Through the Lens of Arbitrator Role: Are Arbitrators Adjudicators or Service Providers?, 10 World Arb. & Med. Rev. 3, 309 (2016); Margaret Moses, The Role of the Arbitrator: Adjudicator or Service Provider?, 10 World Arb. & Med. Rev. 3, 367 (2016)

\textsuperscript{41} See e.g., Julie Bédard, Timothy Nelson and Amanda Kalantirsky, Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process, 3 Paris J. Int’l Arb. 737, 749 (2010); ABA/AAA Code of Ethics for Arbitrators in Com. Disputes, Canon 1 (“An arbitrator should uphold the integrity and fairness of the arbitration process . . . . An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.”); ICC Rules, supra note 10, at art. 5 (“The emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case”); JAMS Foundation, JAMS Arbitrator Ethics Guidelines, 1 (“An arbitrator should uphold the dignity and the integrity of the office of the arbitration process”); CIArb Ethics Code, supra note 30, at Part 2, Rule 2 (“A member shall maintain the integrity and fairness of the dispute resolution process.”).

\textsuperscript{42} See Luca G. Radicati di Brozolo, Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration, in Limits to Party Autonomy in International Commercial Arbitration, 339 (Juris, 2016); see also Teresa Cheng, panelist, The Theory and Reality of the Arbitrator: What is an International Arbitrator? 7 World Arb. & Med. Rev. 4, 639 (2013) (commenting at the 25th Annual Workshop of the Institute for Transnational Arbitration that although arbitrators are independent service providers, there is also a duty to oneself as well as a duty to the arbitral process); Rogers, supra note 2; ILA Report, infra note 47, at 17; Park, Arbitrators and Accuracy, supra note 1, at n.59 (stating faithfulness to the agreement would not justify violation of international public policy.)
proceedings. Different issues arise when external actors compromise the data security of arbitration-related information. Here, the participants are victims of the intrusion and the matter presumably may proceed, with such corrective or ongoing protective steps as the tribunal may deem appropriate. Nonetheless, such an incident, particularly if it follows from a failure to adequately secure data, inevitably will erode the confidence and trust of participants, and potentially the public, in the international private commercial arbitration process. The arbitrator, along with the parties, counsel, and other actors in the process, is in a position to take reasonable protective measures to avoid that risk.

While much attention has been focused on the implied powers of arbitrators to fill in gaps in institutional rules or the parties’ agreement where necessary to protect due process and the legitimacy of the process, less attention has been paid to the scope of the arbitrator’s duties. The ILA Arbitration Committee’s Final Report

44. See Caratube, supra note 18 (considering the admissibility of illegally obtained evidence, accepting some and excluding some).
45. See Jan Paulsson, Metaphors, Maxims and Other Mischief, The Freshfields Arbitration Lecture 2013, 30 ARB. INT’L 4, 630 (2014) (“[P]ublic confidence is perforce at stake in the arbitral context as well [as in the judicial process], because arbitration cannot thrive without the support of the general legal system.”); Charles Brower, Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator, 5 BERKELEY J. OF INT’L L. PUBLICIST, 1 (2010) (“[A]rbitrators and arbitral institutions also have an interest in maintaining legitimacy, both for the mutual acceptance of their awards by the parties before them and for broad public acceptance of the entire law-based system of which they are a part.”).
46. Two widely cited cases involving the appearance of new counsel after an ICSID tribunal was constituted focused on the arbitrator’s role in preserving the integrity of the arbitration proceedings. Although the tribunals reached differing results on applications to disqualify counsel and had differing views on the nature and extent of an arbitrator’s inherent powers, both stated that the arbitrators had some inherent power, and presumably some obligation, to protect the essential integrity of the proceeding. See Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, 15, (2008) (Tribunal’s Ruling Regarding the Participation of David Mildon QC in further Stages of the Proceeding); Rompetrol Group NV v. Romania, ICSID Case No. ARB/06/03, 5-6 (2008) (Decision of the Tribunal on the Participation of a Counsel); see also Bédard, et al., supra note 41 at n.69. Similarly, in Caratube, although the tribunal found that the claimants failed to prove the respondent had engaged in any threatening or intimidating action that could cause an irreparable harm to the claimants’ rights in the arbitration, including a right to the “integrity and the legitimacy of the arbitration,” the tribunal implicitly recognized its authority to take
on The Inherent Powers of Arbitrator in International Commercial Arbitration noted that the implied powers necessary to protect the core functions of arbitration amount to affirmative arbitral duties:

It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal’s jurisdiction and the integrity of its proceedings. Stated differently, these powers are those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailment of procedural abuses, and their exercise may justify overriding party preferences. . . . Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator.47

We conclude, then, that the arbitrator’s duty to uphold the legitimacy and integrity of the arbitral process, and to ensure confidence and trust in arbitration, further supports the premise that the arbitrator has a duty to avoid intrusion.

C. Duty of Competence

It is commonly accepted that an arbitrator has a duty of competence.48 Various arbitrator ethics codes expressly require arbitrators to be “competent.” Canon 1 of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, which requires an arbitrator to uphold the integrity and fairness of the arbitration process, provides that an arbitrator should accept appointment in a

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48. See Henry Gabriel and Anjanette H. Raymond, Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards, 5 WYO. L. REV 453 (2005); ILA REPORT, supra note 47 (stating the duty to protect integrity of the proceeding is core to necessary function of serving as a competent arbitrator).
particular matter only if fully satisfied that he or she is “competent to serve.” The IBA Rules of Ethics for International Arbitrators provide a more general requirement that “international arbitrators should be . . . competent” in addition to a specific requirement that the arbitrator be competent to determine the issues in dispute in a particular matter.49

While the arbitrator ethics codes do not define competence, important context and definition of the meaning of the term may be drawn from the evolution of lawyer ethics codes in recent years. Recognizing the need to provide some definition of competence and to update ethical codes to reflect the rise of globalization and technology, governing bar associations and disciplinary authorities have amended lawyer ethical codes to provide explicit linkage between general competence requirements and the need to keep abreast of technology.50 For example, the American Bar Association (“ABA”) Model Rules of Professional Conduct, first introduced by the ABA in 1983, and adopted over time in various forms by most states in the United States,51 provide the following lawyer competence requirement:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge,

49. See Introductory Note and Rule 2.2; see also CIARB ETHICS CODE, supra note 30, at Part 2, Rule 4 “Competence” (“A member shall accept an appointment or act only if appropriately qualified or experienced.”).

50. Lawyer ethics rules obviously do not bind non-lawyer arbitrators. Indeed, some of the rules are limited to the context of client representation and thus do not expressly apply even to lawyers who, when serving as arbitrators, are not representing clients. For example, ABA Model Rule 1.1, standing alone in the form quoted in the accompanying text, does not apply directly to arbitrators, even if they are lawyers practicing in a jurisdiction where this version of the Model Rules applies. In France, the Règlement Intérieur National, the French code of ethics for lawyers, contains a general competency requirement in respect to client work in Article 1.3 (“L’avocat . . . fait preuve, à l’égard de ses clients, de compétence . . . .”), http://codedeonto.avocatparis.org/acces-article; see also UK SOLICITORS REGULATORY AUTHORITY, SRA CODE OF CONDUCT 2011 (Version 18, 2016) [hereinafter UK SRA CODE OF CONDUCT] at 0-1.5 (“[t]he service you provide to clients is competent . . . .”), http://www.sra.org.uk/solicitors/handbook/code/content.page.

51. A notable exception is California, which maintains its own Rules of Professional Conduct. California Rule 3-110 (A) provides a general competence requirement (“A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”).
skill, thoroughness and preparation reasonably necessary for the representation.

Notably, ABA Model Rule 1.1 is limited by its terms to the lawyer serving in a representational function. However, the Preamble to the Model Rules notes that a lawyer may serve in other roles, including “as a third party neutral, a non-representational role helping the parties to resolve a dispute or other matter,” and goes on to state that, “[i]n all professional functions a lawyer should be competent, prompt and diligent.”52

New York State did not adopt the Model Rules until 2009 and did not adopt the Preamble quoted above. However, Model Rule 1.1 as adopted in New York added a more general competency requirement, in addition to the client-oriented rule: “A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle . . . .” 53

Thus, at least as to lawyers working as arbitrators in jurisdictions that have adopted the ABA Preamble or who have adopted a rule similar to Rule 1.1(b) as in effect in New York State, there is a direct ethical obligation of competence.54 From 2009 to 2013, the ABA Commission


54. Also useful by analogy is The Code of Conduct for Lawyers in the EU, issued by the Council of Bars and Law Societies of the European Union, which bridges the gap from the
on Ethics 20/20 recommended proposed amendments to the Model Rules to account for, among other things, rapid changes in technology affecting the practice of law. In 2012, the ABA House of Delegates adopted a revised Comment 8 to Model Rule 1.1, to provide in respect to competency, that “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology.” In amending Comment 8, the ABA took the position that the revised language did not impose any new obligations on lawyers, but, rather, simply reminded lawyers that in the current environment, an awareness of technology, including the benefits and risks associated with it, is part of the lawyer’s general ethical duty to remain competent. The same may be said in respect to an arbitrator’s competence obligation.

In its 2014 report recommending that New York adopt the revised comment 8 to Model Rule 1.1, the New York State Bar Association Committee on Standards of Professional Conduct noted that:

... to keep abreast of changes in law practice, a lawyer needs to understand the risks and benefits of technology relevant to the lawyer’s particular practice. For example, if a lawyer’s clients are communicating with the lawyer by web-based document-sharing technology or by social media, the lawyer should have some understanding of how to ensure that confidential communications remain confidential. The proposed amendment impresses upon lawyers the key role that technology plays in law practice and creates the expectation that lawyers will keep abreast of the...
benefits and risks associated with the technology relevant to their own legal practice.\textsuperscript{56}

Whether or not adopted in the form encompassing the more general obligation provided in the New York version of the rules, the Model Rules, and particularly Comment 8 to Model Rule 1.1 as it now reads, are relevant to inform and define the meaning of competence as applied to arbitrators, as well as in their direct regulation of lawyer conduct.\textsuperscript{57}

Achieving digital literacy, including an understanding of the measures reasonably necessary to avoid cyberintrusion in an arbitration, is also closely related to the attention institutions, users, and counsel have paid in recent years to the role of the arbitrator in


\textsuperscript{57} See, e.g., In re: Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3, No. SC16-574 (Sept. 29, 2016), at http://www.floridasupremecourt.org/decisions/2016/sc16-574.pdf (amending the comment to rule on competence to address technology); Law Society of Upper Canada, Technology Practice Management Guideline, Guideline 5.5 (“Competent Use of Information Technologies. Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding”) & 5.10 (“Security Measures. Lawyers should be familiar with the security risks inherent in any of the information technologies used in their practices including unauthorized copying of electronic data, computer viruses which may destroy electronic information and hardware, hackers gaining access to lawyers’ electronic files, power failures and electronic storms resulting in damage to hardware or electronic information, theft of vast amounts of electronic information stored in stolen hardware. Lawyers should adopt adequate measures to protect against security threats and, if necessary, to replace hardware and reconstruct electronic information.”), available at http://www.lsucc.on.ca/with.aspx?id=2147491197 (last visited Jan. 22, 2017); Canadian Bar Association, Legal Ethics in a Digital World (Sept. 2, 2015), https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/2015/Legal-Ethics-in-a-Digital-World/guidelines-eng.pdf; Philipe Doyle Gray, The Pillars of Digital Security, BAR NEWS: J. OF THE NEW SOUTH WALES BAR ASSOCIATION (Summer 2014), http://www.philippedoylegray.com/content/view/56/45/ (although the Law Society of New South Wales has not adopted professional conduct rules addressing technology, it has published guidelines for lawyers about the use of technology such as cloud computing and social media); E-Law Committee of the Law Society of South Africa, LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (2014), www.lssa.org.za/index.php?; see also UK SRA CODE OF CONDUCT, supra note 50, at O-4.5 (“You have effective systems and controls in place to enable you to identify risks to client confidentiality . . . .”); O-7.5 (“You comply with . . . data protection legislation.”); IB-7.5 (“Identifying and monitoring . . . IT failures and abuses.”).
case management.58 In the highly digitized and interdependent world of international arbitration, management of technology and baseline data security competence manifestly have become critical components of an arbitrator’s competence to organize and conduct arbitration proceedings.59

D. Global Data Protection Laws and Regulations

In any given arbitration matter, data held by an arbitrator may be subject to specific cybersecurity obligations arising from international or national data protection laws and regulations that govern how certain information can be collected, stored, and transferred.60 While there is no universal international approach to data protection, nearly 110 countries61 have enacted laws aimed at protecting personal information by regulating categories of data or industry sectors, such as the financial and health care industries.62 As the key players in

58. See, e.g., ICC Rules, supra note 10, at app. IV (case management techniques); LCIA Rules, supra note 1, at art. 14 (conduct of the proceedings); ICDR Rules, supra note 10, at art. 20.2 (conduct of the proceedings) (“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.”); College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010) 69 (arbitrators should take control of the arbitration and actively manage it from start to finish); ICC Commission Report, Controlling Time and Costs in Arbitration (2d ed. 2012); Christopher Newmark, Controlling Time and Costs in Arbitration, in LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION supra note 1.

59. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) urge that arbitrators consider issues relating to the means of communication to be used during the proceedings at the outset, noting that the parties and the tribunal “may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.” UNCITRAL Notes, supra note 26, at ¶¶ 56, 58.


61. See UNCTAD on Data Protection at 42 (108 countries have either comprehensive data protection laws or partial data protection laws).

62. In the United States, for example, there is no omnibus privacy or data protection legislation, but a patchwork of federal privacy laws that generally regulate security breach notification statutes by sector and state. See, e.g., Health Insurance Portability and Accountability Act, 42 U.S.C. § 1301 passim [hereinafter HIPPA] (health information); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (consumer protection); Gramm-Leach-
international arbitrations frequently reside in different countries, resulting in continuous cross-border exchanges of information, it follows that the same data may be subject to multiple, and potentially inconsistent, laws. For example, the legal concept of “personal information” or “personally identifiable information” subject to reasonable protection from unauthorized access is defined more broadly under EU law than it is under US law.63

While it is beyond the scope of this article to address the complex conflict-of-law issues that may arise in these situations,64 the global proliferation of data protection laws indicates that: (i) participants in international arbitrations who share the sensitive information of others may have legal obligations to ensure that arbitrators, acting in the capacity of service providers, safeguard that information by complying with certain security standards65; and (ii) increasingly, both participants and non-participants in an arbitration may have legally enforceable interests (or rights)66 in the way that arbitrators secure and handle e-mail correspondence, witness statements,67 and other electronically-exchanged documents that routinely disclose personally identifiable information. Moreover,

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63. See Practical Law, Expert Q&A on Data Security in Arbitration (Dec. 1, 2016) (stemming from the concept in EU countries that privacy is a fundamental human right, a person’s name and place of employment can be considered protected information).
64. Although not the focus of this article, we note that the potential for the application of disparate data protection laws strongly favors early discussions between opposing counsel about how arbitration-related data will be handled as well as discussion of data security with the tribunal by at least the first case management conference.
65. For example, an individual or organization that must comply with health information privacy rules under HIPPA is required to have any “business associate” it engages to help carry out its functions agree to comply with those rules as well. HIPPA, supra note 62. See also EU Directive 2016/1148 (July 6, 2016).
66. See, e.g., Charter of Fundamental Rights of the European Union (2012/C 326/02), art. 7 (“Everyone has the right to respect for his or her private and family life, home and communications”) & 8(1) (“Everyone has the right to the protection of personal data concerning him or her.”).
67. See INT’L BAR ASSOC., IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), art. 4(5) (specifying personal information to be included in fact witness statements).
when security incidents occur, a web of breach notification obligations may be triggered.\textsuperscript{68}

Although it is not evident that the obligations or legal interests that may arise under the current global data protection regime create a bright-line duty, independent of any specific case, for arbitrators to avoid cyberintrusion, their prevalence at least supports the notion that to maintain user confidence in international arbitration process, arbitrators must not only be prepared and competent to handle sensitive information securely, but also appear to the public to be so prepared. Global data protection laws thus behoove arbitrators to be proactive (and not merely reactive, on a case-by-case basis) in dealing with cybersecurity.

\textit{IV. NATURE AND SCOPE OF THE ARBITRATOR'S DUTY TO AVOID INTRUSION}

This article posits that the arbitrator's duty in relation to cybersecurity is one of avoiding intrusion, which we define as the duty to take reasonable measures to prevent unauthorized digital access to arbitration-related information. In the following sections, we first explore the nature and scope of the duty and then discuss some practical measures that will assist the arbitrator in fulfilling the duty.

\textit{A. An Umbrella Obligation}

As we have shown above, the arbitrator's duty in relation to cybersecurity is not a new, independent obligation, but rather a natural extension in the digital age of an arbitrator's existing duties to keep arbitration-related information confidential, to preserve and protect the integrity and legitimacy of the arbitral process, and to be competent. By grouping the implied cybersecurity responsibilities arising under each of these duties under the new umbrella of the “duty to avoid intrusion,” we recognize the unique challenges that cyberthreats pose to the practice of international arbitration in the digital age.

This is a matter of substance, not just terminology. Recognition of the threat and each actor’s acceptance of responsibility to take part in addressing it are key building blocks to effective cybersecurity in

\textsuperscript{68}. Practical Law, \textit{supra} note 63.
the international commercial arbitration regime. In this article, which focuses on the arbitrator’s role, we emphasize that the fulfillment of existing arbitrator duties in the digital age encompasses a duty to be proactive and vigilant in guarding against cyber intrusion.

B. An Interdependent Landscape with Independent Duties

Since the data arbitrators are entrusted to keep confidential generally originates in the arbitration from the parties and their counsel, it may be tempting for arbitrators to view cybersecurity as an issue for the parties, and particularly counsel, to address on a case-by-case basis. Parties and their counsel indisputably do have legal and ethical responsibilities to safeguard the data that they import into an arbitration. In many instances, they will be uniquely positioned to secure that data and to advise the arbitrator regarding specific security precautions necessary in the case or required by law. Any view that purports to isolate any one particular participant in the arbitration process as having sole responsibility for cybersecurity, however, or to relieve the arbitrator from any responsibility for cybersecurity outside of the bounds of individual cases, ignores the interdependent digital landscape discussed above and is shortsighted. Since any break in the custody of sensitive data may affect all participants in the arbitral process, cybersecurity is an inherently shared responsibility.

While interdependent with other actors, the arbitrator’s cybersecurity duty also stands alone. The arbitrator who takes the view that others are primarily responsible abjures the arbitrator’s special role as adjudicator as well as the arbitrator’s underlying duties to safeguard the integrity and legitimacy of the process and the confidentiality of arbitration-related information. The obligations of other players in the arbitral process (including the parties, counsel, arbitral institutions and third party service providers among others) may be governed by differing standards and other legal regimes, only some of which overlap with those governing arbitrators.

Moreover, the arbitrator’s day-to-day data security architecture and practices pre-exist individual matters and persist after the matter is concluded. Thus, the strength of the arbitrator’s routine cybersecurity practices will impact the overall security of arbitration-

69. See supra Section III.D (discussing national data protection laws and regulations); Section III.C (discussing cybersecurity obligations arising from attorney ethical codes).
related data from the first moment the arbitrator becomes involved with a case, before counsel or the parties have an opportunity to address security protocols that may be appropriate for the specific data involved in the matter, and will continue after the matter ends as the arbitrator maintains at least some data for conflicts or other record-keeping purposes.

C. Personal Accountability

As arbitrators are appointed for their personal qualifications and reputational standing, it is broadly accepted in international arbitration that the arbitrator’s mandate is personal and cannot be delegated. While this notion is raised most often in discussions about impermissible delegation of decision-making responsibilities to arbitral secretaries, the personal nature of the arbitrator’s mandate has implications for cybersecurity as well. In particular, it is important for arbitrators to recognize that even if the security of their digital infrastructure is established and monitored by IT personnel, or they work in a large law firm setting where they have little to no influence over firm-wide security policies, they cannot assume that their responsibilities in relation to cybersecurity have been met.

First, effective security depends on individual choices and conduct. Hackers’ most valuable currency is human carelessness.

70. BORN, supra note 27, at 2013. (“Arbitrators are almost always selected because of their personal standing and reputation . . .”).

71. See Eric Schwartz, The Rights and Duties of ICC Arbitrators, in ICC International Court of Arbitration Bulletin, Special Supplement, The Status of the Arbitrator (1995) at 86; see also BORN, supra note 27, at 1999. (“An arbitrator’s obligations include the duty not to delegate his or her responsibilities or tasks to third parties. … Most fundamentally, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating the parties’ submissions and evidence to others: these are the essence of the arbitrator’s adjudicative function and they are personal, non-delegable duties.”).

72. To highlight the fundamental role played by individuals in protecting confidential information, whether reliance is placed on notepads, mobile telephones, or the cloud, Philipe Doyle Gray shares this anecdote:

I regularly walk from the Supreme Court of New South Wales down King Street to stop at the intersection with Elizabeth Street. So too do other lawyers. When it’s raining we huddle under the awning of the Sydney University Law School, but in fine weather we gather around the traffic lights waiting for the signal that it’s safe for pedestrians to cross. Usually, I see paper files or lever-arch folders neatly stating the names of the clients concerned, and sometimes the nature of their confidential affairs. Often, I can’t help but overhear a colleague talking about his matter. A few
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A CALL TO CYBERARMS

Even if an arbitrator operates in an environment with the digital architecture of Fort Knox, important security actions will always remain in the arbitrator’s personal control. Law firm or IT policy may dictate to an arbitrator, for example, that strong, complex passwords be used on all laptops and other devices and that passwords be changed regularly. However, an arbitrator risks completely undermining that security protocol by conveniently storing a reminder of the password du jour on a post-it note stuck to the cover of a laptop,74 and then working away on the laptop in an airport lounge or other public environment, or, worse, forgetting the laptop in the security line or the airplane seat pocket after a long international flight.75 Similarly, although IT policy may dictate that no USB drive can be used in a networked computer before it is manually scanned for viruses by the IT department, an arbitrator sitting in a hearing in Vienna may decide before the flight home to take the USB drive handed out at a recent arbitration conference and use it to transfer

times, sensitive material was inadvertently broadcast to passers-by that happened to include me. Once, I even overheard a colleague—speaking on his mobile phone—discuss settlement negotiations during a mediation that had adjourned over lunch: he openly discussed not only the parties’ respective offers, but his own client’s bottom line. The real security problems lie not in CLOUD COMPUTING, but in ourselves. Gray, supra note 57. See also Harleysville Ins. Co. v. Holding Funeral Home, Case No. 1:15cv00057 (W.D. Va., Feb. 9, 2017), http://bit.ly/2mSkyuu (court held that insurer’s attorney-client privilege was waived where entire claims file was loaded onto a cloud service and made accessible to anyone via hyperlink without password protection, stating this was the “cyber world equivalent of leaving its claims file on a bench in the public square”).

73. In December 2015, The Wall Street Journal reported that “[w]eeks after J.P. Morgan Chase & Co. was hit with a massive data breach that exposed information from 76 million households, the country’s biggest bank by assets sent a fake phishing email as a test to its more than 250,000 employees. Roughly 20% of them clicked on it, according to people familiar with the email.” Robin Sidel, Banks Battle Staffers’ Vulnerability to Hacks, WALL S T. J., (Dec. 21, 2015), https://www.wsj.com/articles/the-weakest-link-in-banks-fight-against-hackers-1450607401. See Int’l Chamber of Commerce [ICC], Cyber Security Guide for Business, at 8, ICC Doc. 450/1081-5 (2015) (“35% of security incidents are a result of human error rather than deliberate attacks. More than half of the remaining security incidents were the result of a deliberate attack that could have been avoided if people had handled information in a more secure manner.”).

74. According to Verizon’s 2016 Data Breach Investigations Report, “63% of confirmed data breaches involved weak, default or stolen passwords.” Verizon Report, supra note 13, at 20. See also Fox-Brewster, supra note 7 (Sony hack revealed chief executive’s password was “guessable to any semi-skilled hacker” and that passwords to internal accounts were stored in a file marked “passwords”).

75. Laptops and other devices are reportedly lost over 100 times more frequently than they are stolen. Verizon Report, supra note 13, at 44.
notes from deliberations stored on her laptop to a public computer in the hotel business center for printing.

Second, there is danger in complacency. Arbitrators understandably want to spend time on the practice of arbitration, not on routine practice management. However, an arbitrator who dismisses cybersecurity as an “IT issue” and who assumes that “others are taking care of it” fails to appreciate how a failure to heed cybersecurity may undermine his or her ability to keep arbitration-related information confidential as well as user trust and confidence in the integrity of the international arbitration regime. Notwithstanding the steady flow of news reports about cyberbreaches, it appears that “many [attorneys and law firms] are not using security measures that are viewed as basic by security professionals and are used more frequently in other businesses and professions.”76 Arbitrators who rely on IT personnel to support their practice should thus bear in mind that their existing data security framework and digital architecture may well require an upgrade or adaptation to the unique aspects of international arbitration. Indeed, just as an arbitrator should not entrust (but may be aided by) the conflicts department in his or her law firm to determine whether he or she is bound to make any disclosures in an arbitration,77 an arbitrator may be assisted by, but should not entrust, an IT department to fulfill the duty to avoid intrusion.78


D. Continuous and Evolving

The duty to avoid intrusion is a continuous obligation, which is not limited in time. In part, this follows from the nature of the arbitrator’s duty of confidentiality. Since arbitrators may maintain digital information from their cases beyond the lifetime of an individual matter, ranging from case administration data (including as part of conflicts or billing systems), correspondence, procedural decisions, awards, and parties’ evidentiary submissions, parties and other participants have a reasonable expectation that arbitrators will continue to safeguard the confidentiality of such information once a case ends. \footnote{Int’l Law Ass’n, Draft Report of the Committee on International Commercial Arbitration for the 2010 Hague Conference, Confidentiality in International Arbitration, at 18 (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/19 (although there is uncertainty regarding the duration of duties of confidentiality in arbitration, the “fact that the duty of confidentiality usually covers the award seems to point to an expectation that the regime of confidentiality should outlive the arbitral proceedings and that the obligations will not cease after the end of the arbitration.”).} Furthermore, as we have discussed above, because arbitrators accept appointments in new matters with a digital architecture and certain security practices already in place, parties and other participants have a reasonable expectation that arbitrators will heed cybersecurity from the time of appointment (and necessarily before).

The ongoing nature of the arbitrator’s duty to avoid intrusion also flows from the underlying duty to be competent. Because cyberthreats are constantly evolving alongside advancing technology, an arbitrator cannot take effective steps to avoid intrusion unless he or she keeps abreast of the changing nature and scope of cyberrisks. Otherwise, the arbitrator will not be in any position to analyze risks and weigh appropriate responses, including, for example, with respect to whether new or additional security measures may be warranted, what work-arounds might be acceptable when complying with an established security protocol proves to be impossible or impractical, or whether a new product or service is adequately secure.

E. Bounded by Reasonableness

Cybersecurity professionals routinely advise that in today’s environment of ever-escalating data breaches, there is no longer any question of if one’s digital infrastructure and data will be hacked, but
only when.\textsuperscript{80} As a practical reality, it follows that the arbitrator cannot guarantee that arbitration-related information will remain safe from hackers, \textsuperscript{81} but can only take steps to mitigate the risks of cyberintrusion. In \textit{LabMD, Inc. v. Federal Trade Commission}, the U.S. Federal Trade Commission (\textquotedblright FTC\textquotedblright) explained why \textquotedblright reasonableness,\textquotedblright assessed \textquotedblright in light of the sensitivity and volume of consumer information [a company] holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities,\textquotedblright is an appropriate touchstone for determining whether a company has implemented appropriate data security measures:

\begin{quote}
[The FTC] has made clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law.\textsuperscript{82}
\end{quote}

Notably, reasonableness, not perfection, also bounds the lawyer\'s confidentiality duty under the ABA Model Rules to protect information relating to the representation of a client from unauthorized access.\textsuperscript{83}

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80. U.S. Attorney Preet Bharara recently made such a pronouncement in announcing criminal indictments of hackers who traded on confidential law firm information, saying, \textquotedblright This case of cyber meets securities fraud should serve as a wake-up call for law firms around the world: you are and will be targets of cyber hacking, because you have information valuable to would-be criminals.\textquotedblright Nate Raymond, \textit{U.S. Accuses Chinese Citizens of Hacking Law Firms, Insider Trading}, \textsc{Reuters}, (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5. See also, e.g., Verizon Report, \textit{supra} note 13, at 3 (\textquotedblright No locale, industry or organization is bulletproof when it comes to the compromise of data.\textquotedblright); ICC, \textit{Cyber Security Guide for Business, supra} note 73, at 10 (\textquotedblright Even the best protected enterprise will at some point experience an information security breach. We live in an environment where this is a question of when, not if.\textquotedblright).

81. ICC, \textit{Cyber Security Guide for Business, supra} note 73, at 4 (2015) (\textquotedblright [A]ll business managers including executives and directors must recognize that cyber risk management is an on-going process where no absolute security is, or will be, available.\textquotedblright).

82. \textit{LabMD, Inc., F.T.C. No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016). California\'s Attorney General notes in her Breach Report 2016 that \textquotedblright reasonable security\textquotedblright is the general standard for information security adopted not only in California but also the major United States federal data security laws and regulations. \textit{See infra}, note 111.

83. Model Rule 1.6(c) provides \textquotedblright[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.\textquotedblright \textsc{Model Rules of Prof\'l Conduct}, r. 1.6(c) (\textsc{Am. Bar Assn'}, 1983). (emphasis added)
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A risk-based approach, bounded by reasonableness, is similarly appropriate as we examine the scope and boundaries of the arbitrator’s duty to avoid the ever-evolving threats of cyberintrusion in international commercial arbitration. It follows from the conclusion there is no one-size-fits-all data security program for consumer-facing corporations that there is no one-size fits-all data security program for international commercial arbitrators; any such program would risk obsolescence and fail to account for significant contextual differences. Furthermore, as Pastore argues, a de-contextualized approach to data security may be counterproductive “in that it over-designates [sensitive] information (desensitizing practitioners to the truly critical information) and results in overly cumbersome processes for information that, in reality, needs little to no additional protections.” 84

In addition, a standard of reasonableness under the circumstances is familiar in the law, particularly in areas where the facts and circumstances vary widely and evolve over time. The reasonableness approach enables consideration of the trade-offs that will sometimes exist between increased security measures and other interests. 85 To the extent the arbitrator’s duty to avoid intrusion is in tension with other important values such as conducting the proceedings expeditiously and cost-effectively and in accordance with the parties’ preferences 86 arbitrators should be entitled to weigh all of the relevant circumstances to determine the correct balance. 87 Arbitrators, institutions, users, and counsel should be able to understand and embrace such a standard for cybersecurity.

Accordingly, it is appropriate to limit the arbitrator’s duty to an obligation to take such measures to protect digital security as he or she deems reasonable in light of the relevant facts and circumstances, including developments in technology and evolving security risks, the arbitrator’s individual practice setting and digital architecture, the sensitivity of the data to be protected, and any party preferences or

84. Pastore, supra note 15.
85. See generally Pastore, supra note 15.
86. See supra note 10.
87. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) note that data security is but one factor to be considered when deciding whether to use electronic means of communication for proceedings. Other factors to be considered may include compatibility, storage, access and related costs. See UNCITRAL Notes, supra note 26.
other case-specific factors present in the matters over which the arbitrator presides.

V. IMPLEMENTING THE DUTY TO AVOID INTRUSION

In the absence of a detailed roadmap for data security, the challenge for international arbitrators is to determine what specific measures they should implement to avoid intrusion, in their own infrastructure and in arbitrations over which they preside, given that what constitutes “reasonable” measures will vary based on a risk assessment of the arbitrator’s individual digital architecture and data assets, the prevalent data security threats, available protective measures and, in relation to individual matters, case-specific factors.88 Although it is by no means comprehensive, in this Part, we aim to highlight certain practical measures and general principles that are likely to be relevant for all international arbitrators, regardless of practice setting and individual risk profile.89 In doing so, we further aim to show that the fundamentals of effective cyberrisk management need not be overwhelming or unduly burdensome. In addition, since cyberintrusion in the arbitral process can potentially arise from both intentional, targeted attacks on arbitral participants90 and from the


89. A recent working paper from the Washington Legal Foundation suggests eight data security best practices based on an analysis of FTC enforcement actions:
   • Limit the collection, retention, and use of sensitive data;
   • Restrict access to sensitive data;
   • Implement robust authentication procedures;
   • Store and transmit sensitive information securely;
   • Implement procedures to identify and address vulnerabilities;
   • Develop and test new products and services with privacy and security in mind;
   • Require service providers to implement appropriate security measures;
   • Properly secure documents, media, and devices.


90. See supra notes 13-14.
inadvertent disclosure or compromise of arbitration-related information (e.g., by way of a weak password, lost mobile device, or other human error). We discuss below potential responses to external threats and safeguards to prevent or mitigate damage if data security is compromised.

A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks

There are readily accessible resources for arbitrators to educate themselves as to the evolving nature and scope of major data security threats, with a view to understanding the significance and effectiveness of specific security protocols, such as standards for passwords. These resources have been developed by bar associations, law firms, and others. For example, the ABA has taken the lead internationally in developing guidance for legal practitioners in responding to the challenges of the digital world and regularly posts short, digestible articles online on topics such as ransomware and encryption, in addition to offering educational webinars and seminars. Such resources frequently highlight ethical opinions from state bar associations on the responsible use of technology in the legal

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91. Even a single misdirected e-mail—within an arbitration proceeding—can have serious consequences for the perceived integrity and legitimacy of proceedings. In Horndom Ltd. v. White Sail Shipping, Optima Shipping and Integral Petroleum (SCC Arbitration V094/2011), the respondents challenged their own appointee to the tribunal after he accidentally copied one of the parties’ lawyers on an e-mail complaining that counsel were getting “above their station” and that he was “rather sick of these parties.” While the arbitrator admitted that disagreement over the hearing date resulted in his “frustration with procedural matters” and “intemperate expression,” according to the respondents, the inadvertent disclosure of this otherwise private exchange among tribunal members revealed the arbitrator’s “personal animosity” toward counsel and raised justifiable doubts about his impartiality. See also Alison Ross, Accidental cc Triggers Double Arbitrator Challenge in Stockholm, GLOB. ARB. REV. (Oct. 17, 2016), http://globalarbitrationreview.com/article/1069329/accidental-cc-triggers-double-arbitrator-challenge-in-stockholm.

92. An episode of the popular CBS TV show The Good Wife was based on the disclosure of confidential information resulting from an open feed when a video camera was mistakenly left on after a teleconferenced deposition. The Good Wife, (CBS, 2014), http://www.cbs.com/shows/the_good_wife/episodes/213197/.

93. See, e.g., supra note 88 and accompanying text.

profession. One particularly noteworthy resource, available only to ABA members, are e-mail alerts from the FBI about evolving cyberrisks and threats targeting law firms.

Other bar associations worldwide, such as the Law Society of Upper Canada, also have developed helpful online resources. For the most part, such resources are available for free online (i.e., to members and non-members alike) and can assist arbitrators in finding quick, practical answers to technical questions written for legal professionals (such as what are the risks of public wifi and what alternatives are available for mobile wifi access). Meanwhile, to keep a handle on evolving data protection obligations internationally, now that most major law firms have a dedicated data privacy or cybersecurity practice group, arbitrators may also find it helpful to sign up for e-mail alerts from several law firms based in different jurisdictions.

B. Implementing Baseline Security

Cybersecurity experts agree that good cyber “hygiene”—basic everyday habits relating to technological use—is essential to a strong, baseline defense. Significantly, these are habits that every arbitrator, regardless of practice setting, can readily implement, with minimal cost and without the need for IT support. Basic cyber hygiene best practices include:

- creating access controls, including strong, complex passwords and two-factor authentication when available,

95. See Technology Practice Tips, LAW SOCIETY OF UPPER CANADA http://www.lsuc.on.ca/technology-practice-tips-podcasts-list/ (podcasts on “everything you ever wanted to know about technology, but were afraid to ask” including “[p]ractical and important information about passwords, encryption, social media, smartphone security, websites and much more . . . in an accessible, conversational manner.”).


97. On some devices, including many phones and tablets, biometric authentication technologies such as fingerprint scanners now are available to perform the authentication and access control function. See PWC Report, supra note 13, at 9-12.

98. Many services and sites that store sensitive information, including cloud storage and e-mail providers, offer two-factor authentication whereby access requires a password plus something else that you have; typically, a security code that is either sent by text message or e-mail to a separate device or generated via an app that works offline such as Google Authenticator, or a biometric like a fingerprint. See Two-Factor Authentication for AppleID,
guarding digital “perimeters” with firewalls, antivirus and antisyware software, operating system updates and other software patches;

- adopting secure protocols such as encryption for the storage and transmission of sensitive data;

- being mindful of public internet use in hotel lobbies, airports, coffee shops, and elsewhere and considering making use of personal cellular hotspots and virtual private networks; and

- being mindful of what one downloads.

C. Taking a Thoughtful Approach to Assets and Architecture

As Pastore explains, determining what cybersecurity should be implemented turns on knowledge of one’s “assets” and “architecture.” That is, what sensitive information do you have (e.g., customer lists of a client, sensitive trade secrets developed through substantial R&D expenditures, or potentially market-moving information about future business plans), and where do you store it (e.g., with a third-party cloud provider, on portable (and easily lost) external media like thumb drives, or on networks accessible by other practitioners in the firm without regard to whether the need access to such data). This exercise will be relevant in respect to the arbitrator’s own practice-related data, such as conflicts and billing records, closed case records, as well as the data received in matters where the arbitrator is presiding. If the arbitrator works in an organizational setting, it will also be relevant in respect to the arbitrator’s use of personal devices, which are often not subject to


100. See e.g., Alex Castle, How to Encrypt Almost Anything, PC WORLD, (Jan, 18, 2013), http://www.pcworld.com/article/2025462/how-to-encrypt-almost-anything.html.


102. See supra note 99.

103. In this article, we frequently refer synonymously to one’s digital “infrastructure.”

104. Pastore, supra note 15.
established security protocols.105

Once the arbitrator knows and classifies the sensitivity of the different data he or she holds and knows where it is located, the arbitrator will be in a position to assess what protocols may be appropriate for storage and transfer of the information.106 In addition, the arbitrator will be in a position to consider what steps can be taken to reduce the risk that sensitive data will be compromised in a cyberattack or following human error. For example:

- Though the arbitrator may own both a tablet and laptop, do arbitration-related documents need to be accessible on both devices, or is it sufficient that they are loaded on one? (Here, an important consideration is whether the data really needs to be loaded onto a portable device and subjected to the enhanced risks of travel.)

- Can the arbitrator enable notifications for e-mail107 or cloud services108 when unauthorized data access may have occurred and remotely revoke that access or wipe data?

- When working at home, does the arbitrator use a separate device in lieu of a shared family computer? If not, are there other steps the arbitrator can take to segregate business data (e.g., by using separate computer logins)?

By the same token, at the conclusion of a case, the arbitrator should seek to avoid holding onto case-related data longer than is

105. According to the ABA TechReport 2016, most lawyers (74%) use a personal rather than firm-issued phone for their legal work and a majority (51%) use a tablet for legal work, the vast majority of which (81%) are personal devices. Nonetheless, “only 43% of lawyers reported having a mobile technology policy for their firm, meaning the majority of law firms don’t even have a policy for how mobile devices should be used and how client data should be stored and transmitted on them.” Aaron Street, Mobile Technology, ABA TECHREPORT (2016), http://www.americanbar.org/publications/techreport/2016/mobile.html.

106. Pastore discusses this analysis in greater detail. See Pastore supra note 15.

107. Such measures are generally not available for free consumer e-mail services. Thus it is generally preferable to use paid professional versions of these services, which have more robust security protocols.

108. Numerous lawyer ethics opinions have considered whether the use of cloud services is compatible with an attorney’s obligation to maintain confidentiality. The decisions generally have concluded that lawyers may use the services, provided that they take reasonable steps to select a reliable vendor, implement available security and address the potential risks. See Cloud Ethics Opinions Around the U.S., AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html
necessary. With a view to developing an individualized document retention policy, the arbitrator should give thought to what information will be kept, why, for how long, where case information resides now (across which devices and in what applications/programs), and where the materials will be stored. At a minimum, the arbitrator will want to retain basic case administration data for the purposes of future conflicts checks. Otherwise, the arbitrator may wish to consider questions such as:

- During the life of a case, can the arbitrator use file-naming conventions to facilitate identifying and segregating types of documents, such as pleadings and exhibits, that the arbitrator is unlikely to have any interest in retaining after a case ends?
- Does applicable law preclude the arbitrator from retaining certain data or mandate that it be stored or disposed of in any particular fashion?
- To the extent that it is desirable and appropriate to retain arbitrator work product, such as procedural orders and awards, for personal future reference, would it be workable to retain anonymized Word documents in lieu of final PDF copies?
- If the arbitrator practices in an organizational setting that has a document retention policy, are documents kept longer than necessary to comply with rules applicable to the attorney-client relationship, which do not apply to service as an arbitrator?

D. Planning for a Data Breach

Separate from considering data breach protocols for individual cases, there are a number of useful reasons for the arbitrator to consider more generally how he or she would respond to a data breach if and when one arises. First, by thinking through what steps should be taken in the event of various scenarios, the arbitrator may be able to identify and remediate security vulnerabilities that he or she had not considered. Second, the arbitrator will be in a better position to react quickly to control or limit the damage that flows from a security incident, and possibly avoid triggering duties to notify data owners, regulators, insurers, law enforcement, or others that a security

incident occurred. This exercise is particularly important for international arbitrators for whom international travel is a fact of life, as travel creates special risks of inadvertent data loss and vulnerability to unlawful intrusion.

The prospect of a lost laptop, for example, may prompt an arbitrator to consider:

- Is the laptop protected by a strong password?
- Is full disk encryption enabled?
- Can the arbitrator make use of location tracking and/or remote data wiping to minimize potential disclosure of sensitive information?
- Can the arbitrator provide the police with the serial number for the laptop?
- Can the arbitrator avoid lost productivity by restoring information on the laptop from a back-up?
- Is there sensitive data on the laptop that could trigger breach notification duties? If so, could that data be handled differently (e.g., securely destroyed or encrypted)?

E. Case Management Considerations

In our view, the arbitrator must be attuned to data security issues in the organizing phase of the arbitration. Taking into account such

110. See, e.g., U.S. Department of Health & Human Services, Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA), https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/_edn1 (last accessed Jan. 21, 2017) (explaining that there is often a safe harbor for data breach notification if sensitive information has been encrypted or otherwise de-sensitized); Kamala D. Harris, Attorney General California, Department of Justice, Breach Report 2016, available at https://oag.ca.gov/breachreport2016 (last accessed Jan. 21, 2017) (explaining major differences between state notification statutes); See Cal. Civil Code § 1798.82 (demonstrating that in 2016, California amended its data breach notification law effective January 1, 2017 to trigger notification obligations not only if unencrypted data is compromised, but also if encrypted data is breached along with any encryption key that could render the data readable or useable).


112. These measures are available for Apple devices including laptops, for example, but only if the “find my iPhone” feature has been activated first.
factors as the size and complexity of the case, the likelihood that confidential or sensitive data will be stored or transmitted, the parties’ resources, sophistication, and preferences, as well as potential legal obligations arising under applicable law or rules in relation to data privacy or confidentiality, the arbitrator should consider whether to raise the topic of data security at the initial case management or procedural conference. Thereafter, the continuing scope of the arbitrator’s duty will depend on factors such as the extent to which the parties or their counsel assume responsibility for data security and the arbitrator’s own assessment of the ongoing risks and the measures he or she can reasonably implement in addition to or in lieu of measures other actors are undertaking.

The arbitrator may also seek the cooperation of the parties and counsel in avoiding the unnecessary transmission of sensitive data to the tribunal. For example, at the outset of an arbitration, the arbitrator may consider telling counsel that, apart from reliance documents submitted with the parties’ memorials, the arbitrator is not to be copied on, or provided with, any pre-hearing disclosure that the parties may otherwise exchange. Likewise, if the arbitrator can anticipate that sensitive personal information (such as tax returns) or commercial information (such as pricing information or trade secrets) will be exchanged, consideration may be given to having irrelevant information redacted (e.g., to show only the last four digits of a social security number). Alternatively, it may be possible to aggregate or anonymize data before it is provided to the arbitrator without diminishing either party’s ability to fairly present its case.

VI. LOOKING TO THE FUTURE

We conclude this article with the well-worn maxim that “it takes a village.” We hope that the challenge we present to arbitrators will stimulate discussion in the international commercial arbitration community and prompt other participants to focus on their own responsibilities and how their individual security architecture and practices may undermine or support the security measures taken by

113. See UNCITRAL Notes, supra note 26. Consistent with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, we do not intend to suggest a binding requirement for the tribunal or parties to act in any particular manner.
others. As awareness of cybersecurity risks in arbitration increases, we hope to see dialogue around questions such as the following:

- Should arbitral institutions amend their rules to flag data security for consideration in the initial organizing phase of an arbitration, as their rules now do with respect to other important topics,114 and/or should they expressly establish duties for the parties, counsel, institution and arbitrators to implement reasonable measures to avoid intrusion?

- Should counsel be charged with developing a data security plan in individual arbitration matters115 and/or providing a secure platform for the transmission and storage of data in each matter?

- How should tribunals resolve party conflicts about appropriate security measures, breach notification obligations, and related costs?

- Should arbitrators routinely disclose their data security practices to parties and counsel (e.g., in relation to cloud computing or post-award document retention) and should those practices be subject to the parties’ comments and consent?

- Should arbitral institutions or other participants develop shared secured platforms for data storage and transmission that would be available to parties as a non-exclusive choice?

- What kinds of training and education programs should be developed for parties, counsel, arbitrators, and other participants to provide baseline knowledge, as well as updated information on evolving data security threats and updates on available protective measures?

114. See e.g., ICC RULES, supra note 10, at art. 22, (effective case management) and Appendix IV (case management techniques); ICDR RULES, supra note 10, at art. 20(2) (noting that the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings) and art. 20(7) (establishing the parties’ duty to avoid unnecessary delay and expense and the tribunal’s power to “allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration”); LCIA RULES, supra note 1, at art. 14 (avoiding unnecessary delay and expense) and art. 30 (confidentiality).

115. See David J. Kessler, et al., Protective Orders in the Age of Hacking, NYLJ, (Mar. 16, 2015), reprint at 1 (“In the age of cyber attacks, hacking, and digital corporate espionage… [p]rotective orders should be upgraded to require reasonable levels of security to protect an opponents’ data and more stringent notification requirements if unauthorized access does occur . . .”).
Should institutions that maintain rosters of arbitrators require their arbitrators to complete mandatory cybersecurity training?

Should arbitrator ethical codes be updated to define competence to include an obligation to keep abreast of new developments in arbitration and its practice, and to consider the benefits and risks associated with technology?

Should professional organizations like the International Bar Association or the Chartered Institute of Arbitrators develop cybersecurity checklists or guidance notes for arbitrators, counsel, or other participants?

There will no right answer to these and other relevant questions, but we are confident that dialogue will be constructive. What will constitute a reasonable data security program and what reasonable measures individual participants in the process should take will continue to evolve. Our hope is that increased awareness will ensure that a process will emerge in every arbitration to identify data security risks and develop a response, having regard to the nature and scope of the risks, the desires and resources of the parties, and other relevant factors.
DRAFT CYBERSECURITY PROTOCOL
FOR INTERNATIONAL ARBITRATION

CONSULTATION DRAFT
Announcement of Cybersecurity Protocol Consultation

International arbitration in the digital landscape warrants consideration of what constitutes reasonable cybersecurity measures to protect the information exchanged during the process.

Recognizing this need, the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association have established a Working Group on Cybersecurity in Arbitration (the “Working Group”). The Working Group has promulgated a Draft Cybersecurity Protocol for International Arbitration (the “Protocol”) and is now pleased to proffer this draft Protocol for public consultation. The draft Protocol is attached hereto.

The consultative period will last until 31 December 2018. All interested parties are encouraged to provide detailed thoughts and comments on the draft protocol, or to provide general feedback. The Working Group will hold a number of public workshops in different parts of the world to solicit and discuss the views of interested parties. In addition, the Working Group welcomes written comments from interested parties which should be submitted no later than 30 September 2018, through the Working Group’s page on ICCA’s website at <http://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration>.

In anticipation of the public consultation, which the Working Group anticipates will include input from a variety of sources with differing views, the draft Protocol refrains in Schedule A from offering specific cybersecurity measures for possible inclusion in arbitration agreements or procedural orders. Instead the Protocol suggests a procedural framework for developing specific cybersecurity measures within the context of individual cases, recognizing that what constitutes reasonable cybersecurity measures will vary from case-to-case based on a multitude of factors. Depending on the feedback received, the final Protocol may or may not include such proposed measures in Schedule A.

Following the consultation period, the Protocol will be revised, refined, and finalized in accordance with the input and comments received. After that time, the Working Group anticipates that there will be an ongoing review and revision process, as cybersecurity issues will evolve with changing technology, new cyberthreats, changing laws and regulatory schemes, and emerging consensus as to best practices.

The Working Group is chaired by Brandon Malone (Chairman of the Scottish Arbitration Centre and the principal of Brandon Malone & Company). Its members include Olivier André (CPR), Paul Cohen (4-5 Gray’s Inn Square Chambers), Stephanie Cohen (independent arbitrator), Hagit Elul (Hughes Hubbard & Reed), Lea Haber Kuck (Skadden, Arps, Slate, Meagher & Flom LLP), Micaela McMurrough (Covington & Burling), Mark Morril (independent arbitrator), Kathleen Paisley (Ambos Law) and Eva Y. Chan (Skadden, Arps, Slate, Meagher & Flom LLP) as Secretary to the Working Group.
I. Introduction: Importance of Cybersecurity in Arbitration

A. Most exchanges of information today are digital, including in international arbitration and other forms of dispute resolution.

B. Parties expect that the providers of dispute resolution services and other participants in the dispute resolution process will take reasonable measures to protect non-public exchanges of information, including reasonable cybersecurity measures, to safeguard digital information from unauthorized access and disclosure.

C. Cybersecurity may be legally mandated when the information at issue is personal or industry-regulated data, or if the information is relevant to national security or other matters of public interest.

D. In an increasingly digital landscape, the credibility of any dispute resolution system, including arbitration, depends on maintaining a reasonable degree of protection of the digital information exchanged during the process, except where the parties intend for the information to become public. Arbitration proceedings are not immune to increasingly pervasive cyberattacks against businesses, law firms, governmental actors, educational institutions and other custodians of large electronic information repositories. This means that attention to cybersecurity is required in international arbitration as it is in other sectors.

E. Arbitration has the benefit over other dispute resolution processes of enabling parties to maintain the confidentiality of the dispute resolution process itself where they want to, and the information exchanged within it. Reasonable cybersecurity measures are essential to ensure that international arbitration maintains this advantage.

F. Even where an arbitration has not been made confidential by agreement of the parties or by application of arbitral rules or law, maintaining the legitimacy of the process may require that certain aspects of the arbitral process remain confidential. For example, interactions between an administering institution and the parties, tribunal deliberations, and draft awards are generally intended to remain private and secure.

G. Although a reasonable degree of cybersecurity is critical for international arbitration in the digital world, what is reasonable in any given circumstance depends on various factors discussed herein.

* Proposed by the Working Group on Cybersecurity in Arbitration established by the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association. Pending a period of public consultation, the Protocol is being issued as a draft for debate and comment. The Working Group anticipates that a final version of the Protocol will be released in 2019.

1. This Protocol uses the broad term “information” to include all types of electronic and non-electronic information of any type and in any form, including both commercial and personal information. When referring to personal information specifically, we use the term “personal data” employed in many data protection laws and regulations. This is also a very broad term and typically includes all information of any nature whatsoever that individually or collectively could be used to identify an individual (including for example, work-related emails, lab notebooks, agreements, handwritten notes, etc.).
H. Cybersecurity is a shared responsibility of all Participants in the international arbitration process. Security of information ultimately depends on the responsible conduct and vigilance of individuals. Many breaches arise from individual conduct; any individual actor can be the “weak link”, no matter how robust the security of its infrastructure.

I. The Participants in international arbitrations are, to a large degree, digitally interdependent, because the process typically involves the transmission and hosting of information and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of arbitral information has the potential to affect all Participants. Indeed, since Participants will frequently host not only their own arbitral information, but also the information of others, intrusion into the information held by one Participant may injure another more than the one whose information security was compromised.

J. All Participants should take into consideration their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants’ day-to-day security practices and infrastructure pre-exist individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information. Schedule C hereto highlights general cybersecurity practices that all Participants in an international arbitration should take into consideration.

II. Cybersecurity Risks in International Arbitration

A. Cybersecurity refers to the means employed to protect digitally stored information from intrusion by threat actors not authorized to have access to that information.

B. As a matter of good practice, reasonable cybersecurity measures should be employed whenever large amounts of digital information are processed. This includes international arbitration.

C. While not unique, the need for reasonable cybersecurity measures in international arbitrations is highlighted by:

1. the litigious backdrop, which can lead to targeting of information;

2. the high-value, high-stakes nature of disputes, which increases the risk of breaches and the likelihood that those breaches will cause significant loss;

3. the exchange of information that is often sensitive or high-value confidential commercial information and/or regulated personal or other data; and

4. the cross-border nature of the process, which creates heightened challenges in complying with applicable legal requirements and makes the consequences of a breach more substantial.

2. The term “Arbitral Participants” or “Participant” refers to anyone who receives information that s/he would not otherwise have as a result of the arbitral process. Hence, it includes the parties, counsel, arbitrators, arbitral institutions, experts, and Vendors. Capitalized terms not otherwise defined herein are defined in the Glossary attached as Schedule D, which also includes a general glossary of terms relevant to cybersecurity that are not used in this Protocol.
D. The specific consequences that may result include:

1. economic loss to parties, arbitrators, institutions, witnesses or other persons/entities whose commercial information or personal data is compromised;

2. reputational damage to arbitral institutions, arbitrators and counsel, as well as to the system of arbitration overall; and

3. potential liability under applicable laws and other regulatory frameworks.

E. With respect to the legal and regulatory framework, the vast amounts of digital information available today have led to increasing regulation of the security and use of information, particularly personal data. These data protection regimes require, among other things, reasonable cybersecurity measures whenever personal data is exchanged. This legal infrastructure has the potential to apply to, and shape how, information is managed in international arbitrations.

F. Applicable law may vary from jurisdiction to jurisdiction, and non-compliance with applicable law may result in substantial penalties and/or litigation risk. Furthermore, data protection enforcement and other legislative risk may be inconsistent in different jurisdictions and create obstacles to trans-border information exchanges and indirectly international arbitration.

G. However, the determination of what law(s) apply(ies) in a particular arbitration may be a complex issue and it may be difficult to reconcile requirements of different jurisdictions.

H. Given the substantial risk of non-compliance, we can expect that parties will increasingly drive data protection compliance in all fields, including international dispute resolution, with the starting point being that reasonable cybersecurity may be required as a matter of law, whenever personal or other regulated data is exchanged, and good practice, whenever important information is exchanged during an arbitration. The baseline reasonableness standard will ensure consideration of the facts and circumstances of individual cases, including the parties’ preferences and resources.

III. Purpose of the Cybersecurity Protocol

A. The Draft Cybersecurity Protocol for International Arbitration set forth in Section IV (the “Cybersecurity Protocol” or the “Protocol”) is intended to encourage Participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchanged in the arbitral process.

B. The Protocol is intended to provide a framework that parties and arbitrators can consult in order to determine reasonable cybersecurity measures for their individual matters. The Protocol will not apply in any given case unless it is adopted by agreement of the parties or an arbitral tribunal determines that it will apply.

C. Although following the Protocol may assist in identifying applicable legal requirements, it does not supersede applicable laws or regulations which may require that specific cybersecurity measures be implemented. Furthermore, it is solely addressed at cybersecurity and does not attempt to address any other potentially applicable data protection or other measures that may be required.
D. The Protocol therefore purposefully does not adopt a one-size-fits-all approach, but rather guides parties and arbitrators in undertaking a risk-based approach to determine reasonable cybersecurity measures for a particular matter.

E. Rather than obligating the parties to follow a specific and immutable set of cybersecurity measures, the Protocol provides flexibility to accommodate party preferences and risk tolerance in light of the individual circumstances of each case.

F. It is expected that the Protocol will necessarily evolve over time in light of:

1. Changing technology;
2. New and prevalent cyberthreats;
3. New laws/regulations;
4. Any consensus that might emerge as to reasonable measures/arbitration best practices; and
5. New cybersecurity initiatives by institutions or others.

G. Although the Protocol is drafted with international commercial arbitrations in mind, Arbitral Participants may find it a useful starting point for domestic arbitration matters and/or investor-state arbitrations.

IV. Cybersecurity Protocol for International Arbitration

A. The Cybersecurity Protocol is structured as follows:

1. Articles 1-3 address general issues;
2. Articles 4-6 address the tribunal’s authority to order cybersecurity measures and the potential scope of such measures;
3. Articles 7-12 address the factors to be considered when determining what cybersecurity measures to adopt;
4. Articles 13-17 suggest a procedural framework for adopting cybersecurity measures during an arbitration;
5. Article 18 addresses cybersecurity breaches; and
6. Article 19 clarifies what is not covered.
General Provisions

1. This Cybersecurity Protocol governs issues of information security in an arbitration where the parties have agreed to follow it, or the arbitral tribunal has determined to employ it.

Commentary to Article 1

(a) Article 1 recognizes the importance of party autonomy in the conduct of international arbitrations, as well as the important role played by the tribunal in determining what cybersecurity measures are reasonable in any given case. Among other things, the arbitral tribunal may have to interpret any agreements reached by the parties, resolve any conflicts with applicable arbitration rules or mandatory provisions of law, consider the interests of other Participants such as third parties or administering arbitral institutions, and fulfill its own responsibility to maintain the integrity and legitimacy of the adjudicatory process.

(b) Subsequent Articles more fully address the role played by Arbitral Participants. In particular, Article 4 addresses the tribunal’s authority over issues of cybersecurity in the arbitration, and Article 13 addresses when and how parties are recommended to enter into an agreement addressing cybersecurity.

(c) The Protocol has been prepared as a unified set of guidelines and is not intended or recommended to be applied in a piecemeal fashion.

2. The Protocol does not supersede applicable law, regulations, professional or ethical obligations.

Commentary to Article 2

(a) The Protocol is not intended to ensure compliance with any applicable law or regulation and adherence to the Protocol does not provide any liability shield or presumptions.

(b) Article 11 reminds Participants that, in determining what cybersecurity measures are reasonable for their individual matter, applicable law and regulations should be taken into account.

(c) There are multiple sources of mandatory cybersecurity regimes including those contained in many of the more than 100 national data protection laws, regulations, and industry norms applicable across the globe to certain types of personal data and data of public importance, including, for example, the European Union General Data Protection Regulation (“GDPR”) and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) in the United States.

(d) The GDPR, for example, includes a broad-reaching set of mandatory legal requirements applicable to the collection and processing of individuals’ personal data. There is no exception for arbitrations and the penalties for breach may be substantial.

(e) The Protocol is limited to cybersecurity, and purposefully does not address the broader subject of how the application of data protection rules to any personal or other data exchanged in an arbitration will impact the process. However, while the security required differs among jurisdictions, to the extent personal data is exchanged during an arbitration, under the GDPR and virtually all extant data protection regimes, keeping that information secure, including implementing reasonable and proportionate cybersecurity adequate to such purpose, is mandatory.
Legal requirements may apply to all who either process or control the information, including personal data, which may include all Arbitral Participants.

It is therefore important in each case for all the Arbitral Participants to understand their obligations under the law(s) that may be applied to the processing of the information, including personal data. Counsel’s obligations in some instances may extend to informing other relevant actors of applicable legal requirements and how they will be addressed.

It is also important for counsel and arbitrators to be aware of any ethical and professional obligations of their own that have implications for cybersecurity.

The Protocol does not establish any liability standard for any purpose, including, but not limited to, liability in contract, for professional malpractice, or negligence.

Commentary to Article 3

(a) Article 3 makes clear that the Protocol is not intended to establish any liability standard.

(b) The Protocol proposes a mechanism for the adoption of reasonable case-specific cybersecurity measures, rather than providing what those measures should be.

(c) Article 3 is not intended to limit the rights of the parties to make agreements with respect to cybersecurity as set forth in Article 13 or the right of the arbitral tribunal to issue directives regarding cybersecurity as set forth in Article 4.

Authority to Order Cybersecurity Measures and their Potential Application

The arbitral tribunal has the authority to determine what security measures, if any, are reasonable in the circumstances of the case, taking into account the views of the parties (and the other Arbitral Participants, to the extent the tribunal considers to be appropriate) and to order the implementation of such measures.

Commentary to Article 4

(a) Article 4 recognizes the tribunal’s express authority to determine the cybersecurity measures, if any, that are reasonable in the case. This authority is implied in the tribunal’s general powers, but is expressly recognized in Article 4.

(b) In making any determination on cybersecurity, the tribunal shall take the parties’ views into account.

(c) As further set forth in Article 13, in cases of party agreement, the tribunal should respect the parties’ agreement on the cybersecurity measures to be employed, unless other significant countervailing factors exist that in the tribunal’s view outweigh the significant weight to be given to party autonomy.

(d) Article 4 also recognizes that in some cases, third parties as well as Arbitral Participants other than the parties, also may have an interest in the cybersecurity measures to be employed, and recognizes the tribunal’s right to take such views into account where appropriate.
5. In administered arbitrations, counsel and the arbitral tribunal should consider whether the application of certain cybersecurity measures may depend upon the consent of the arbitral institution or may need to be adapted to respond to the institutional rules, practices or capabilities.

Commentary to Article 5

(a) If an arbitration is administered by an institution, it may be necessary for the parties and the arbitral tribunal to consult and coordinate with that institution prior to adopting cybersecurity measures, in order to ensure that the measures are consistent with, and can be implemented pursuant to, the institution’s rules, practices and technical capabilities.

(b) Depending on the degree of confidentiality of the information involved, it may be necessary to coordinate with the institution when the arbitration is being commenced (e.g., to determine whether the secure notification of a request for arbitration or request for emergency relief can be made or if a more limited filing is appropriate initially; or, to request institutional attention to the secure handling of confidential information by potential arbitrators.)

(c) As cybersecurity receives increasing attention, some arbitral institutions may adopt their own rules or practices relating to information security. For example, an institution might adopt or endorse a hosting platform for some or all of the information related to arbitrations they administer, such as a secure hosting platform for the transmission of communications and documents between the parties, the tribunal and the institution.

(d) The institution’s rules and practices may or may not be deemed mandatory by the institution.

6. In determining what information security measures will be adopted in the arbitration, consideration may be given to establishing procedures for the following:

i. the transmission of communications, pleadings, disclosure materials and evidence by the parties;

ii. communications among arbitrators and between the arbitrators and any administering institution;

iii. storage of arbitration-related information;

iv. sharing arbitration-related information with authorized third parties such as experts, interpreters, stenographers, and tribunal secretaries;

v. vulnerability monitoring and breach detection;

vi. security breach notification and risk mitigation; and

vii. post-arbitration document retention and destruction.

Commentary to Article 6

(a) With respect to the transmission of communications, pleadings, disclosure materials and evidence, the following measures, among others, may be considered:

(i) limiting all exchanges and transfers of confidential commercial information and personal data in relation to the arbitration;
(ii) without prejudice to disclosure obligations, limiting the disclosure of confidential commercial information and personal data (i.e., in addition to the narrow standard generally applied to document exchange in international arbitration, the parties may consider protective measures such as redaction, pseudonymization, or anonymization of information before it is exchanged);

(iii) restricting access to arbitration-related information on a least privilege and need-to-know basis, or limiting certain information to attorneys’ eyes only (e.g., under ordinary circumstances, disclosure material need not be shared with the arbitral tribunal or the institution, except in respect to disclosure disputes, in which event the material shared should be limited to what is relevant to the tribunal’s resolution of the dispute); and

(iv) the method of transmission (e.g., e-mail, third-party platform or virtual data room, USB drive or other portable storage device) and corresponding protective measures (e.g., encryption; procedure for transmitting the password for a portable storage drive separately from the drive itself).

(b) If a third-party data storage platform is being considered, counsel should seek to agree on the party or other individual or entity that will host it, who will have access to the platform, and for how long.

(c) In considering which data storage platform to use, if any, counsel should consider the nature and amount of information, the amount of time it will need to be stored, whether it includes personal or other regulated data or confidential commercial information, and other issues related to the data being stored.

(d) Security breaches are addressed in Article 18 and accompanying Commentary.

(e) Issues to be considered with respect to post-arbitration document retention and destruction may include:

(i) whether to require that arbitration-related information be returned or safely disposed of (or certified as having been safely disposed of); and

(ii) the timing of any such requirement, with due consideration for applicable legal or ethical obligations, award recognition/enforcement proceedings, and legitimate interests in retaining work product.

Factors to be Considered in Developing Cybersecurity Measures

7. The cybersecurity measures to be adopted for the arbitration shall be those that are reasonable, taking into consideration: the nature of the information at issue; the potential security threats and consequences of a potential information breach; the available security capabilities of Arbitral Participants; applicable rules and legal obligations; the Purpose of the Protocol as set forth in Section III supra, and other relevant circumstances of the case.
Commentary to Article 7

(a) Article 7 sets out the elements of a risk-based approach to determining what cybersecurity measures are reasonable in individual arbitration matters. Articles 8-12 provide more detailed guidance as to each aspect of the risk analysis.

(b) By assessing risk according to the individual circumstances of a case and adopting a standard of reasonableness, Article 7 recognizes that there is no one-size-fits-all approach to cybersecurity in arbitration matters.

(c) The reasonableness standard adopted by the Protocol is consistent with an emerging global trend in favor of requiring “reasonable”, “reasonable and proportionate”, or “appropriate” cybersecurity measures when attention to cybersecurity is legally or ethically required.

(d) This approach provides flexibility to accommodate changes in technology, best practices and threats current at the time of an actual dispute, rather than obligating the parties to follow a specific and immutable set of steps.

(e) This individualized approach recognizes that implementation of cybersecurity measures entails balancing potentially competing considerations (such as cost and convenience) and that similarly situated parties may make different but equally legitimate choices based on their own preferences, including considerations of cost and proportionality, risk tolerance and technical capabilities, among others.

(f) Article 7 recognizes that there will exist categories of cases where enhanced data security protection will be necessary in light of the sensitivity of information, legal considerations, special risks or other factors. Provided it is legally permissible, there may also be cases in which parties consider that information security protection somewhat below a baseline standard is sufficient and appropriate (e.g., due to the parties’ lack of resources or infrastructure or the low-value nature of the case).

8. With respect to the nature of the information in the arbitration, the following factors, among others, may be considered:

i. what information is likely to be relevant and material in the arbitration;

ii. whether confidential commercial information will be exchanged;

iii. whether personal data will be exchanged;

iv. how much confidential commercial information and personal data is likely to be exchanged in the arbitration;

v. who has or should have access to the information exchanged during the arbitration;

vi. who “owns” the information;

vii. where the information is stored; and

viii. whether the confidential commercial information and/or personal data is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data protection/privacy, cross-border data transfer, breach notification, and/or privilege.
Commentary to Article 8

(a) Article 8 seeks to identify what information might be vulnerable to cyberthreats or increased legal risk in an arbitration.

(b) Consideration of what information is likely to be relevant and material in the arbitration can be useful in identifying types of data that are likely to be exchanged by the parties in the case.

(c) Examples of types of confidential commercial information and/or personal data that may require special care include:

(i) intellectual property;

(ii) trade secrets or other commercially sensitive information;

(iii) health or medical information;

(iv) payment card information;

(v) non-payment card financial information;

(vi) personal data, which is also referred to as personally identifying information (“PII”);

(vii) information subject to professional legal privilege;

(viii) information related to or belonging to a government or governmental body (including classified data and politically sensitive information); and

(ix) information that is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data privacy, cross-border data transfer, breach notification, and/or privilege.

9. With respect to the potential cybersecurity threats and consequences of a potential breach, the following factors, among others, may be considered:

i. further to the analysis conducted under Article 8, the nature of the information likely to be involved in the arbitration;

ii. the identity of the parties, key witnesses, and other Arbitral Participants;

iii. the industry/subject matter of the dispute;

iv. the size and value of the dispute;

v. the prevalence of cyberthreats;

vi. the nature and frequency of international travel likely to be required for the arbitration; and

vii. the severity of potential consequences if there is a breach of information security.
Commentary to Article 9

(a) Article 9 sets out some factors that may be relevant in analyzing information security risk in the arbitration. The risk is a function of the likelihood of a cybersecurity breach and the consequences of that breach. Typically, parties and/or the tribunal will wish to determine whether the risk of a cyberattack or other information security breach in the particular circumstances of the arbitration is high or low, and whether the consequences of a breach are likely to be minor, moderate, or severe.

(b) The threat of a cyberattack and consequent desirability of cybersecurity measures can be plotted on a chart as follows:

![Risk vs. Consequence Chart](chart.png)

(c) A case with a large counsel team, for example, will have more points of vulnerability and may necessitate stricter cybersecurity measures.

(d) Some issues to consider in analyzing the information security risk that may attach to the identity of the parties, key witnesses, and other Arbitral Participants (including the arbitral institution, experts, and counsel) include:

(i) Whether the matter involves a party or other Arbitral Participant with a history of being targeted for cyberattacks;

(ii) Whether the matter involves parties that handle large amounts of high-value confidential commercial information and/or personal data;

(iii) Whether the matter involves a public figure, high-ranking official or executive, or a celebrity; and

(iv) Whether the matter touches upon any government, government information, or government figure.
(e) Travel tends to increase information security risk. Consideration should be given to how often and to where Participants are likely to travel with arbitration-related information and whether there are particular risks associated with a particular destination. Some jurisdictions may assert the right to access information on portable devices as a condition of entry, for example. Consideration should also be given to how arbitration-related information is likely to be transported (e.g., whether it will be downloaded on portable devices or accessed via a secure server).

(f) Some questions to consider in analyzing the consequences and severity of a potential breach of information security may include:

(i) The value of the information to the parties;

(ii) The value of the information to third parties;

(iii) The nature, type, and amount of personal data being processed and whether it is legally regulated;

(iv) Potential embarrassment or damage caused by public disclosure of the information;

(v) Whether and how the information could be (mis)used by a third party (e.g., politically, for extortion purposes, for insider trading purposes, or to obtain a competitive advantage).

(g) In addition to considering the potential impact of a breach on the Arbitral Participants, consideration should be given to the potential impact on persons outside of the arbitration process, including but not limited to the persons to whom personal data relates. An information breach suffered by one Arbitral Participant may cause injury to other Participants or third parties.

10. With respect to the available security capabilities, the existing digital infrastructure of Arbitral Participants and any potential technical impediments to implementing cybersecurity measures should be considered.

Commentary to Article 10

(a) Once parties and the tribunal have assessed the seriousness of the cybersecurity threat in the circumstances of the particular arbitration and the desirability of cybersecurity measures, it is then necessary to weigh the degree of cybersecurity measures suggested by the threat against practical considerations, including what measures are proportionate to the size and value of the dispute.

(b) Article 10 recognizes that the Arbitral Participants, including the parties, counsel, the arbitrators, and administering institutions, may have differing technical resources and constraints on their technical capacity that will influence what may be reasonable in a particular case.

(c) General cyber awareness by the Participants, including their day-to-day security practices and digital infrastructure, may also determine what security measures may be warranted in any given arbitration matter. For example, when all Participants already employ a high level of cybersecurity, additional measures may not be needed. Schedule C highlights general cybersecurity practices that all Arbitral Participants should take into consideration.

(d) While the limitations of a party’s resources are an important factor, consideration also should be given to the security needs of the case, the accessibility and affordability of security resources, and measures that may be taken without significant expenditure.
11. Applicable rules and legal obligations may dictate that certain types of cybersecurity measures be adopted regardless of the threat inherent in the individual circumstances of the arbitration. Among the factors that may be considered are the following:

i. contractual obligations such as confidentiality agreements;

ii. relevant arbitration rules;

iii. ethical and professional obligations; and

iv. regulatory obligations including those that are industry-related (e.g., HIPAA) and those that are information-related, including those applicable to personal data (e.g., GDPR and other data protection laws and other privacy rights).

Commentary to Article 11

(a) As discussed in the Commentary to Article 2, the Protocol is not intended to assure compliance with, and does not supersede, applicable law, regulations, professional or ethical obligations.

(b) Arbitrators and parties may also be faced with differing or conflicting mandatory obligations. The arbitral tribunal will have to determine how to harmonize such obligations, taking into consideration the consequences of non-compliance as well as due process considerations for all concerned.

12. Other relevant considerations in determining what measures are reasonable may include, but are not limited to:

i. workflow needs and preferences;

ii. cost;

iii. proportionality;

iv. burden/relative resources; and

v. efficiency.

Commentary to Article 12

(a) Article 12 recognizes that if proposed cybersecurity measures would be so onerous as to prevent the arbitration from proceeding in an orderly fashion, then the balance of “reasonableness” may weigh against their adoption.

(b) In particular, cybersecurity measures that are too strict or difficult: (i) risk being ignored or evaded; and (ii) may have a negative impact on the ability of Participants to accomplish necessary tasks.
13. In the first instance, the parties should attempt to agree on reasonable cybersecurity measures, if any. Any agreement is subject to approval by the arbitral tribunal.

Commentary to Article 13

(a) Article 13 recognizes the importance of party autonomy. Normally, counsel should be responsible in the first instance to meet and confer on the information security protection measures to be implemented in a particular arbitration, taking into account existing cybersecurity measures already employed by the Arbitral Participants.

(b) Issues that counsel should consider discussing with their clients and opposing counsel may overlap with issues ordinarily considered in the context of disclosure and document preservation.

(c) In principle, where possible, the parties should agree on the cybersecurity measures to be employed, which should be reasonable taking into account the factors discussed above in Articles 7-12.

(d) Notwithstanding the principle of party autonomy, the parties cannot bind the arbitral tribunal. Nor can the parties bind the institution administering the arbitration. Any preliminary agreement should be formalized only after consultation with the tribunal and, where appropriate or required, the arbitral institution.

14. The tribunal should consider issues of cybersecurity, including any agreement that may have been reached by the parties, as early as practicable, which ordinarily will not be later than the first case management conference.

Commentary to Article 14

(a) The expectation generally is for issues of cybersecurity to be discussed with the parties in preparation for, and during, the initial case management conference or procedural hearing, and then to be incorporated in a procedural order.

(b) However, in certain cases, the initial hearing or conference may either be too late or too early; hence, any party may raise cybersecurity measures for consideration at any time.

(c) At the initial conference, the arbitral tribunal should be prepared to:

   (i) discuss the ability and willingness of its members to adopt specific security measures;

   (ii) engage counsel in a discussion about reasonable cybersecurity measures;

   (iii) resolve any disputes about reasonable cybersecurity measures;

   (iv) express its own interests in preserving the integrity of the arbitration process, taking into account the parties’ concerns and preferences, the capabilities of any administering institution and other factors discussed in this Protocol; and

   (v) render an appropriate order or include cybersecurity provisions in an early procedural order.
(d) Cybersecurity measures may also be set forth in a stipulation of the parties approved by the tribunal.

(e) Ordinarily the tribunal should defer to the parties’ agreement, but there may be circumstances for departure. Such circumstances may include but are not limited to:

   (i) measures to protect third-party interests, including other Arbitral Participants or third-party witnesses;

   (ii) applicability of mandatory legal and regulatory requirements and other rules;

   (iii) capabilities of the arbitrators and administering institution;

   (iv) the tribunal’s own interest in protecting the integrity of the process, including the security of its own communications and deliberations.

(f) The procedures adopted at the outset of the arbitration should allow for modification as necessary throughout the course of the proceeding, including updates as to: (i) what qualifies as the nature of the information being processed; (ii) required procedures based on the specific circumstances of the case as it develops; and (iii) changed circumstances, such as changes in applicable law, risks in the proceeding, institutional rules/requirements, or technological developments. Such updates should be made after consultation with the parties and any administering arbitral institution.

(g) The tribunal may modify the measures previously agreed to by the parties or determined by the tribunal at the reasoned request of any party, or on its own initiative in light of the evolving circumstances of the case.

15. Arbitral Participants and fact witnesses should be informed of the cybersecurity measures in place and shall agree in writing to comply with such measures before receiving any arbitration-related information, provided that where an essential third-party expert, fact witness or Vendor is unable or unwilling to comply with the agreed standards, the matter shall be referred to the tribunal for consideration, and, if necessary, direction.

16. The technical capability of Vendors should be no less than the minimum requirements designated by the parties.

Commentary to Articles 15-16

(a) Third parties present a difficult area for the protection of confidential information in general and electronically stored information in particular. They are not under the control of the tribunal and may not suffer directly from the consequences of a cybersecurity breach. Nevertheless, there is little point in agreeing to stringent cybersecurity measures for the parties, counsel, the tribunal and institution if the same information is to be sent to third parties without adequate safeguards. Further, to the extent that legal requirements apply, these may require third parties to agree to adequate safeguards before the information is shared.

(b) Where possible, counsel should obtain the written agreements of third parties to abide by cybersecurity measures that have been agreed or ordered by the tribunal.

(c) Where third parties either cannot or will not agree to comply, the tribunal shall be informed and direction given where appropriate.
17. Cybersecurity is the shared responsibility of all Arbitral Participants involved in an arbitration. Arbitral Participants are responsible for ensuring that all personnel directly or indirectly involved in an arbitration are aware of, and follow, cybersecurity measures being adopted in a proceeding as well as the potential impact of a cybersecurity breach.

Commentary to Article 17

(a) The security of information in an arbitral proceeding ultimately depends on the decisions and actions of all individuals involved, and any individual actor can be the cause of a cybersecurity breach. Many security breaches result from individual conduct rather than a breach of systems or infrastructure.

(b) In a case with multiple parties and large counsel teams, for example, it is necessary for Arbitral Participants to make persons directly or indirectly involved aware of any cybersecurity measures, and of their agreement to be bound by them, whether by express agreement or as part of their employment conditions or consulting agreement.

(c) The Arbitral Participant providing access to arbitral information covered by cybersecurity measures is responsible for ensuring that the persons with whom it is shared are aware of those measures and agree to follow them.

(d) This may involve a large number of people, each of whom could prove to be the weak link.

(e) Arbitral Participants should identify the various team members who support them and have access to digital information. For example, counsel appearing on behalf of a party in an arbitration may be supported in the background by additional lawyers who are not known to the other party or tribunal, administrative staff, and legal assistants or law clerks.

(f) Similarly, within an arbitral institution, case administration may involve a team of case management personnel, administrative support staff, and members of the institution’s standing court of arbitration practitioners. To mitigate the risk of data breaches, cybersecurity awareness must permeate organizational structures and extend beyond the core Participants in the arbitral process to such team members and support personnel.

Cybersecurity Breaches

18. The cybersecurity measures adopted for the arbitration may address material issues related to possible information security breaches, including, among other things:

i. what constitutes a security breach;

ii. who shall be notified of a breach;

iii. timing of the notification; and

iv. specific steps to be taken to mitigate any information breach.
Commentary to Article 18

(a) Steps that may be taken to mitigate any information security breach may include, depending on the circumstances:

(i) implementing measures to identify the specific source of the breach;

(ii) taking steps to correct any weaknesses in security systems in order to mitigate the impact of a breach and/or prevent further breaches;

(iii) informing all affected parties that a breach occurred, consistent with any applicable legal obligations, in a timely manner and in a manner best preserving the confidentiality of the arbitration;

(iv) if appropriate, taking systems and applications offline to prevent further loss of information;

(v) taking steps to retrieve lost information and to ensure that unauthorized recipients delete or return information;

(vi) if appropriate, enlisting Vendors to manage effects of breach; and

(vii) if appropriate, involving law enforcement.

(b) Applicable laws may dictate the required procedures for addressing cybersecurity breaches. The GDPR, for example, includes strict mandatory 72-hour breach notification requirements. Some U.S. states have also adopted harm triggers; for example, if a lost laptop has full-disk-encryption-enabled, no notification would be required.

(c) There may also be a need to assess the nature of the breach, whether there has been unauthorized access to information, and whether there is an urgent need to take corrective action to prevent further breaches.

(d) Until a breach occurs, it may not be possible to determine what breach notification obligations exist as a matter of law even if compliance may require swift action.

Matters Not Covered by the Protocol

19. The following matters are beyond the scope of this Protocol:

i. the allocation of costs arising from the implementation of the Protocol and/or from any data breach or alleged failure to implement information security measures as directed by the arbitral tribunal; and

ii. the nature and scope of any authority of the arbitral tribunal to impose sanctions in the event of a data breach or alleged failure to implement information security measures as directed by the arbitral tribunal.
Commentary to Article 19

(a) The Protocol purposefully does not address either the allocation of costs or the tribunal’s authority to order sanctions arising from data breaches or an alleged failure to implement information security measures as directed by the arbitral tribunal.

(b) However, while the Protocol does not expressly address such issues, it is not intended to negate authority otherwise available to the tribunal to allocate costs or impose sanctions.
CONSULTATION DRAFT

Schedule A
Arbitration Agreement

It is not recommended that parties specify particular cybersecurity measures in their arbitration agreement because technology may change materially by the time the dispute arises, and the circumstances of the subsequent dispute may inform the cybersecurity measures that the parties choose to adopt. However, the parties may want to provide generally in their arbitration agreement that the arbitration shall be conducted in a secure manner in line with the Cybersecurity Protocol for International Arbitration. The following language would be appropriate for inclusion in the arbitration agreement:

The parties agree that the arbitration shall be conducted in a secure manner as determined by the arbitral tribunal, taking into consideration the views of the parties and the Cybersecurity Protocol for International Arbitration.
Schedule B
Model Language for Specific Cybersecurity Measures*

Article 13 of the Protocol provides that parties should in principle agree on the cybersecurity measures to be employed, but that these measures should not be adopted without the approval of the tribunal. Further, Article 14 provides that the tribunal should typically adopt such language into a procedural order or by stipulation of the parties after the first case management conference, to be updated as the case proceeds.

The language set forth below providing for specific cybersecurity measures and related issues may be considered for inclusion in party agreements and/or tribunal orders. The adoption of case-specific cybersecurity measures whether by agreement of the parties, which will typically require tribunal approval, or by tribunal order, may include the language set forth below or some variation thereof depending on the circumstances.

1. [Model Language Re: Baseline Cybersecurity Measures]
2. [Model Language Re: Enhanced Cybersecurity Measures]
3. [Model Language Re: No Additional Cybersecurity Measures]
4. [Model Language Re: Notification of Data Breach and/or Breach of the Cybersecurity Measures]
5. [Model Language Re: Cybersecurity Dispute Resolution]
6. [Model Language Re: Use of Special Expert on Cybersecurity Issues]
7. [Model Language Re: Damages for Breach of Cybersecurity Measures]
8. [Model Language for inclusion in Vendor Agreements]
10. [Possible Model Procedural Order (standard provisions subject to adaptation in individual cases)]

* Inclusion of Model Language to be considered based on feedback from the Consultation Process.
Schedule C
General Cybersecurity Practices

1. Because the Participants in international arbitration are, to a large degree, digitally interdependent, all Participants (including counsel, witnesses, experts, arbitrators, Vendors and arbitral institutions) involved in the arbitration should be conscious of good general cybersecurity practices for storing and processing information obtained during the arbitral process.

2. All Participants should be conscious of their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants’ day-to-day security practices and infrastructure pre-date individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information.

3. Depending on the circumstances, examples of good general cybersecurity practices may include:

   (a) Creating access controls, such as strong, complex passwords and multi-factor authentication when appropriate and secure password storage and controls.

      (i) Access controls, including user account management, passwords, and multi-factor authentication, determine who has authority to access information and what privileges s/he has to use it.

      (ii) In June 2017, the National Institute of Science and Technology (“NIST”) substantially revised longstanding password guidance (see NIST Special Publication 800-63B). Key recommendations include that passwords should be based on unique passphrases, at least 8 characters long, and easily remembered (“memorized secrets”). In addition, common dictionary words, past passwords, repetitive or sequential characters, and context-specific words (such as derivatives of the service being used) should be avoided, and mixtures of different character types are unnecessary. The NIST further recognizes that in many cases, password managers increase the likelihood that users will choose stronger memorized secrets.

      (iii) Multi-factor authentication allows a user to safeguard a digital account (such as an e-mail account) from unauthorized access by requiring that the user provide additional proof of identity beyond a password. Given the frequency with which Participants in international arbitrations travel, to the extent they consider it is warranted to use multi-factor authentication, they may wish to ensure that any method they use is available offline.

   (b) Guarding digital “perimeters” using measures such as firewalls, antivirus and antispyware software, operating system updates and other software patches.

   (c) Adopting secure protocols, such as encryption for the storage and transmission of arbitral information, that are reasonable, taking into account the nature of the data and its required use within the arbitral process.

      (i) Arbitral information should generally be protected during transmission using industry-standard encryption technology, which prevents communications from being intercepted and read as they travel from end-to-end. It may also be appropriate under certain circumstances and depending on the nature of the data to encrypt individual file attachments.
(ii) To guard against unauthorized access of digital information due to loss or theft of a laptop or other mobile devices, it may be reasonable to enable full disk encryption (which is often built into device operating systems) to protect all data stored on the device while it is at rest.

(iii) If information is stored in the cloud, depending on the nature of the information, it may sometimes be appropriate to encrypt the information before it is uploaded and to keep control of the encryption key out of the hands of the cloud provider.

(d) Being mindful of public internet use in hotels, airports, coffee shops and elsewhere and considering protective measures such as personal cellular hotspots or virtual private networks (VPNs) where warranted in light of encryption and other measures being employed. Public Wi-Fi may provide hackers with access to unsecured devices on the same network, allow them to intercept password credentials, or to distribute malware. As an alternative to public Wi-Fi, Arbitral Participants may wish to use a mobile hotspot to establish an internet connection. Where appropriate, other protective measures could include using a VPN to encrypt communications traveling on the unsecured network connection and/or avoid connecting to any websites that fail to use HTTPS security.

(e) Being mindful to download programs and digital content only from legitimate sources and not to open attachments from unknown email senders.

(f) Keeping mobile devices close and making use of available protective measures in case of loss or theft, possibly including full disk encryption and remote tracking and wiping.

(g) Making routine secure and redundant data back-ups. Redundant data back-ups allow users to recover information in the event data is lost or corrupted due to human error, hardware failure, ransomware attack, or otherwise. One possible approach is to follow the so-called 3-2-1 rule, which means there should be 3 copies of the data, 2 should be stored locally on different storage media, and 1 copy should be stored offsite.

(h) Knowing one’s data security infrastructure, including professional and personal networks, computers and portable devices, cloud services, software program and apps, remote access tools and back-up services.

(i) Implementing document and data preservation policies to minimize storage of data no longer required.

(j) Making reasonable on-going efforts to be educated about evolving cybersecurity risks and best practices.

4. All Arbitral Participants should have an understanding (if not a written inventory) of where data resides in, and flows through, their digital infrastructure, in order that appropriate controls and safeguards may be implemented. An arbitrator who regularly uses a personal tablet to review pleadings and exhibits, for example, should know whether the documents will be stored locally on the tablet by default, on servers for the application(s) used to review the documents, and/or personal cloud storage.

5. Once Arbitral Participants are cognizant of their own digital architecture, they can take steps to mitigate the risk of data breaches from basic security vulnerabilities. More often than not, data breaches arise from malicious actors who look for and find security vulnerabilities to exploit rather than from targeted attacks. Many of these security vulnerabilities arise from a failure to implement and/or maintain basic, well-established security practices that do not require any significant financial resources, technological support, or infrastructure investment.
Schedule D
Glossary

(Please note that not all of the terms defined below appear in the draft document.)

Access Control – The process of granting or denying specific requests to: (i) obtain and use information and related information processing services; and (ii) enter specific physical facilities.

Antispyware Software – A program that specializes in detecting both malware and non-malware forms of spyware.

Antivirus Software – A program specifically designed to detect many forms of malware and prevent them from infecting computers, as well as cleaning computers that have already been infected.

Attribution – The process of tracking, identifying and laying blame on the perpetrator of a cyberattack or other hacking exploit.

Authentication [includes multi-factor authentication and dual-factor authentication] – Verifying the identity of a user, process, or device, often as a prerequisite to allowing access to resources in an information system.

Backing Up – The act of making a copy of files and programs to facilitate recovery, if necessary. (See also Data Backup.)

Breach Notification – Notification of the unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Business Continuity Management – The documentation of a predetermined set of instructions or procedures that describe how an organization’s mission/business processes will be sustained during and after a significant disruption.

Chief Information Security Officer (CISO) – The individual responsible for overseeing and implementing an entity’s cybersecurity program and enforcing its cybersecurity policies.

Cloud – A model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.

Computer Forensics – The application of computer science and investigative procedures involving the examination of digital evidence – following proper search authority, chain of custody, validation with mathematics, use of validated tools, repeatability, reporting, and possibly expert testimony.

Cyberattack – An attack, via cyberspace, targeting an enterprise’s use of cyberspace for the purpose of disrupting, disabling, destroying, or maliciously controlling a computing environment/infrastructure; or destroying the integrity of the data or stealing controlled information.

Cybersecurity – The ability to protect or defend the use of cyberspace from cyberattacks.

Cyber Exercise – A simulation of an emergency designed to validate the viability of one or more aspects of an IT plan. (See also Information Technology (IT).)
Cyber Incident – Actions taken through the use of an information system or network that result in an actual or potentially adverse effect on an information system, network, and/or the information residing therein.

Cyber Incident Response Plan – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization’s information system(s).

Cyber Risk – The potential of loss or harm related to technical infrastructure or the use of technology within an organization.

Data Backup – A copy of files and programs made to facilitate recovery, if necessary.

Data Breach – The unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Data Integrity – The property that data has not been altered in an unauthorized manner. Data integrity covers data in storage, during processing, and while in transit.

Data Loss – The exposure of proprietary, sensitive, or classified information through either data theft or data leakage.

Data Privacy – Assurance that the confidentiality of, and access to, certain information about an entity or individual is protected.

Data Recovery – The process of restoring data that has been lost, accidentally deleted, corrupted or made inaccessible.

Data Storage – Retrievable retention of data. Electronic, electrostatic, or electrical hardware or other elements (media) into which data may be entered, and from which data may be retrieved.

Data Transfer – The act of electronically sending information from one location to one or more other locations.

Data Wiping – Overwriting media or portions of media with random or constant values to hinder the collection of data.

Decryption – The process of transforming ciphertext into plaintext using a cryptographic algorithm and key.

Denial of Service – Actions that prevent a system from functioning in accordance with its intended purpose. A piece of equipment or entity may be rendered inoperable or forced to operate in a degraded state; operations that depend on timeliness may be delayed.

Digital Perimeter – A physical or logical boundary that is defined for a system, domain, or enclave, within which a particular security policy or security architecture is applied.

Document Destruction – Destroying, overwriting, deleting, or otherwise rendering digital, electronic, or physical documents unusable.

Document Retention – The identification, storage, retrieval, and maintaining of digital, electronic, or physical documents, files, or records pursuant to legal, specific contract, or other obligations.

Encryption – Any procedure used in cryptography to convert plaintext into ciphertext to prevent anyone but the intended recipient from reading that data.
Endpoint Monitoring – Automated tools, software, and procedures that track and ensure the security of network devices and systems.

Firewall – A gateway that limits access between networks in accordance with local security policy.

Full Disk Encryption – The process of encrypting all the data on the hard drive used to boot a computer, including the computer’s operating system, and permitting access to the data only after successful authentication with the full disk encryption product.

General Disruption – An unplanned event that causes an information system to be inoperable for a length of time (e.g., minor or extended power outage, extended unavailable network, or equipment or facility damage or destruction).

Hacker – Unauthorized user who attempts to or gains access to an information system.

Hacking – The act of gaining unauthorized access to a digital device, network, system, account or other electronic repository. (See also Hacker.)

Identity Theft – Wrongfully obtaining and using another person’s personal data in some way that involves fraud or deception, typically for economic gain.

Incident Response – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization’s information systems(s). (See also Cyber Incident Response Plan.)

Information Technology (IT) – Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an entity or individual. The term information technology includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.

Intrusion Detection System (IDS) – A security service that monitors and analyzes network or system events for the purpose of finding, and providing real-time or near real-time warning of, attempts to access system resources in an unauthorized manner.

Intrusion Prevention System (IPS) – A system that can detect an intrusive activity and can also attempt to stop the activity, ideally before it reaches its targets.

Keyboard Logger (also “Keylogger”) – A program designed to record which keys are pressed on a computer keyboard, often used to obtain passwords or encryption keys and thus bypass other security measures.

Malware – A computer program that is covertly placed onto a computer with the intent to compromise the privacy, accuracy, or reliability of the computer’s data, applications, or operating system. Common types of malware threats include viruses, worms, malicious mobile code, Trojan horses, rootkits, and spyware.

Managed Services – A service provider that remotely manages a customer’s IT infrastructure and/or end-user systems, typically on a proactive basis and under a subscription model.

Multi-Factor Authentication (MFA) Proxy Server – Authentication using a server that services the requests of its clients by forwarding those requests to other servers and uses two or more different factors to achieve
authentication. Factors include: (i) something you know (e.g., password/PIN); (ii) something you have (e.g., cryptographic identification device, token); or (iii) something you are (e.g., biometric).

**Password** – A string of characters (letters, numbers, and other symbols) used to authenticate an identity or to verify access authorization.

**Payment Card Industry (PCI)** – Commonly refers to the Payment Card Industry Data Security Standard (PCI DSS), which is a set of policies and procedures developed to protect credit, debit, and cash card transactions and prevent the misuse of cardholders’ personal information. PCI DSS compliance is required by all card brands.

**PCI Forensic Investigator (PFI)** – Companies, organizations or other legal entities charged with investigating cyber incidents related to Payment Card Industry information; organizations in compliance with all PFI Company requirements (as defined by the Payment Card Industry Security Standards Council (PCI SSC)) and have been qualified as PFI Companies by PCI SSC for purposes of performing PFI Investigations.

**Personal Cellular Hotspot** – A mobile hotspot is an *ad hoc* wireless access point created by a dedicated hardware device or a smartphone feature that shares the cellular data.

**Personally Identifying Information (PII)** – Information which can be used to distinguish or trace the identity of an individual (e.g., name, social security number, biometric records, etc.) alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual (e.g., date and place of birth, mother’s maiden name, etc.).

**Phishing** – Tricking individuals into disclosing sensitive personal information by claiming to be a trustworthy entity in an electronic communication.

**Ransomware** – A type of malware that is a form of extortion. The malware works by encrypting a victim’s hard drive, thus denying the victim access to encrypted files. The victim must then pay a ransom to obtain a key to decrypt the files and gain access to them again.

**Remote Desktop Protocol (RDP)** – Provides remote display and input capabilities over network connections for Windows-based applications running on a server. RDP is designed to support different types of network topologies and multiple Local Area Network (LAN) protocols.

**Remote Tracking** – A tool designed to help remotely and proactively monitor mobile devices, laptops, or other systems.

**Server Message Block (SMB)** – A network protocol used by Windows-based computers that allows systems within the same network to share files. It allows computers connected to the same network or domain to access files from other local computers as easily as if they were on the computer’s local hard drive.

**Software Patch** – A software component that, when installed, directly modifies files or device settings related to a different software component without changing the version number or release details for the related software component.

**Spoofing** – Faking the sending address of a transmission to gain illegal entry into a secure system.

**Spyware** – Software that is secretly or surreptitiously installed into an information system to gather information on individuals or organizations without their knowledge; a type of malicious code.
Trojan Horse – A computer program that appears to have a useful function, but also has a hidden and potentially malicious function that evades security mechanisms, sometimes by exploiting legitimate authorizations of a system entity that invokes the program.

Virtual Private Network (VPN) – A restricted-use, logical (i.e., artificial or simulated) computer network that is constructed from the system resources of a relatively public, physical (i.e., real) network (such as the internet), often by using encryption (located at hosts or gateways), and often by tunneling links of the virtual network across the real network.

Vulnerability – Weakness in an information system, system security procedures, internal controls, or implementation that could be exploited by a threat source.

Worm – A computer program that can run independently, can propagate a complete working version of itself onto other hosts on a network, and may consume sources destructively.
The Sedona Conference


(May 2018)


WG6 began the dialogue that led to International Investigations Principles because while it recognized that its International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation & Discovery of Protected Data in U.S. Litigation (“International Litigation Principles”) offers helpful guidance to practitioners and courts in reconciling U.S. Litigation discovery obligations with data protection rights, it also recognized that International Litigation Principles is not always helpful, or even applicable, in the context of investigations.

The resulting International Investigations Principles provides eight Principles to guide Organizations in planning for and responding to investigations while ensuring that Protected Data is safeguarded at all times against avoidable risks of disclosure.

The eight Principles are:

1. Organizations doing business across international borders, in furtherance of corporate compliance policies, should develop a framework and protocols to identify, locate, process, transfer, or disclose Protected Data across borders in a lawful, efficient, and timely manner in response to Government and Internal Investigations.

2. Data Protection Authorities and other stakeholders should give due regard to an Organization’s need to conduct Internal Investigations for the purposes of regulatory
compliance and other legitimate interests affecting corporate governance, and to respond adequately to Government Investigations.

3. Courts and Investigating Authorities should give due regard both to the competing legal obligations, and the costs, risks, and burdens confronting an Organization that must retain and produce information relevant to a legitimate Government Investigation, and the privacy and data protection interests of Data Subjects whose personal data may be implicated in a cross-border investigation.

4. Where the laws and practices of the country conducting an investigation allow it, the Organization should at an early stage of a Government Investigation engage in dialogue with the Investigating Authority concerning the nature and scope of the investigation and any concerns about the need to produce information that is protected by the laws of another nation.

5. Organizations should consider whether and when to consent to exchanges of information among Investigating Authorities of different jurisdictions in parallel investigations to help minimize conflicts among Data Protection Laws.

6. Investigating Authorities should consider whether they can share information about, and coordinate, parallel investigations to expedite their inquiries and avoid, where possible, inconsistent or conflicting results and minimize conflicts with Data Protection Laws.

7. Courts and Data Protection Authorities should give due regard to the interests of a foreign sovereign seeking to investigate potential violations of its domestic laws.

8. A party’s conduct in undertaking Internal Investigations and complying with Investigating Authorities’ requests or demands should be judged by a court, Investigating Authority, or Data Protection Authority under a standard of good faith and reasonableness.

The full text of The Sedona Conference

is available free for individual download from The Sedona Conference website at

Collective action under GDPR: A civil law perspective from Spain

Javier Fernández-Samaniego, Blas Piñar Guzmán and Manuela Rojas of Samaniego Law report from Madrid.

Since Spain’s first Data Protection Law entered into force almost 25 years ago Spain has been, without exaggeration, the EU Member State with the most stringent system of data protection law enforcement in the EU. Its legal system provides for penalties for non-compliance of up to €600,000 and a strict Supervisory Authority (the “Agencia Española de Protección de Datos” – the “Agencia”) imposing an average total of €20 million in fines per year to private sector organisations.

In that context, one – particularly if coming from the US – could think that judicial remedies for breaches of Spanish DP Law and compensation for damages suffered as a result of unlawful processing operations1 were also amounting to millions. But the reality is that claims for compensations in the civil courts were limited to a relatively small number of individual cases mainly based on unlawful inclusion in bad debtors data files/credit bureaus. For the time being, the maximum compensation awarded by Spanish Courts to an individual, due to immaterial damage suffered by unlawful processing, has been circa €10,0002.

The influential Spanish consumers association OCU3 launched a campaign on 30 May this year (“My data is mine”4) together with its allied organizations from Portugal, Italy and Belgium (Euroconsumers), announcing a collective action against Facebook to seek compensation for damages suffered by unlawful processing, has been circa €10,0005.

The collective claims’ mechanism is Spain’s current Data Protection Bill does not automatically allow to represent data subjects for the purposes of Article 80 GDPR, which refers to the not-for-profit body, organization or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data. That means that only what will be regarded as Privacy Not for Profit Organisations (NPOs) – which comply with requirements of Article 80 – have the right to represent data subjects for these purposes.

1. Consumer organizations are not per se automatically allowed to represent data subjects for the purposes of Article 80 GDPR, which refers to the not-for-profit body, organization or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data. That means that only what will be regarded as Privacy Not for Profit Organisations (NPOs) – which comply with requirements of Article 80 – have the right to represent data subjects for these purposes.

2. Article 80 of the GDPR provides Privacy NPOs with rights of action both with a mandate and without a mandate from data subjects. Having said that, it is important to highlight that the actions available to Privacy NPOs without a data subject’s mandate under Article 80.2 GDPR (such as the right to lodge complaints before supervisory authorities and to exercise the rights referred to in Articles 78 and 79 GDPR) do not include the right to receive compensation for damages suffered (Article 82 GDPR) which would always require a data subject’s mandate.

3. The actions provided by EU Member States to consumer organisations under EU Consumer Directives are not exactly the same as the actions provided to Privacy NPOs by the GDPR. Article 80.1 GDPR refers to the procedural regulations of EU Member States in relation to the possibility of initiating a claim’s consolidation mechanism i.e. to collect mandates of data subjects prior to claiming for compensation on their behalf. So the key is in the national/Member State rules on mechanisms for collective claims.

Collective actions in Spain

Spain’s current Data Protection Bill does not refer to collective actions so the relevant regulation governing the collective claims’ mechanism is Spain’s Civil Procedure Law. The collective redress mechanisms provided in this law aims to protect consumers’ rights and interests and not the protection of data protection rights, which are two different areas of law, as stated above. However, it could be the case that some unlawful processing of personal data could also be deemed an infringement harming the collective interest of consumers. The discussion below refers to these cases.

In accordance with the EU Injunction Directive for the protection of consumers’ interests as implemented in Spain, Spanish Law provides (i) injunctive redress and (ii) compensatory redress in cases where a group/class of affected consumers launch a collective action for compensatory redress if it meets certain requirements.

1. Collective actions aiming to receive compensation (Compensatory collective redress): As stated above and as per Article 80.1 GDPR, Privacy NPOs are not entitled to start an action without the mandate of data subjects claiming compensation for damages suffered based on Article 82 GDPR. Having said that, in those infringements of GDPR which could also be deemed a consumers’ infringement subject to compensation, Spain’s Procedure Law provides the

Divergence across the EU

The Charter of Fundamental Rights of the EU (“Charter”) and most of the EU States’ constitutions clearly differentiate:

• the legal regime for the protection of personal data (Article 8 of the Charter) and,

• a high level of consumer protection (Article 38 of the Charter).

These areas have a different legal nature, regulatory framework, scope, remedies, liabilities, actions and judicial redress mechanisms. In this regard, several aspects must be highlighted:

1. Collective actions aiming to receive compensation (Compensatory collective redress): As stated above and as per Article 80.1 GDPR, Privacy NPOs are not entitled to start an action without the mandate of data subjects claiming compensation for damages suffered based on Article 82 GDPR. Having said that, in those infringements of GDPR which could also be deemed a consumers’ infringement subject to compensation, Spain’s Procedure Law provides the...
possibility of a compensatory collective redress with the following aspects to be considered:

Entitlement to claim or standing to sue: If the group of consumers harmed is identified or easily identifiable – a classic example is a group victim of a food poisoning by a restaurant – standing to sue is in:

1. the group of harmed people to the extent the claim is sustained by the majority of the harmed group (Articles 6.1.7 and 11.2 Spain’s Procedure Law);
2. consumers and users associations, and
3. legal entities incorporated for the protection of the harmed identifiable or easily identifiable group - for instance and in the example above, an association of consumers affected by the food poisoning which is incorporated ad hoc for that purpose.

If the group of consumers harmed is vague and difficult to identify, the standing to sue is exclusively based on the legally deemed representative consumers’ and users’ associations (Article 11.3 of Spain’s Procedure Act).

Procedural mechanisms and publicity measures to allow opt-in: In order to allow the group of harmed people to gain standing to sue and be able to join together as the majority of the harmed consumers, Article 256.1.6 of Spain’s Procedure Law sets out a preparatory measure aimed to identify the harmed consumers, which also allows a limited discovery against the future defendant, so it cooperates in the identification of specific harmed individuals.

Furthermore, Article 15 of Spain’s Procedure Law requires that in cases of vague groups which are difficult to be identified, once the claim is submitted before the Courts, it must be advertised in the media. The proceedings are then suspended for two months so that any consumers who have suffered harm may opt-in to specify their individual harm. In case of identified or easily identifiable harmed consumers, there is a requirement for the claimant to demonstrate that it has called for or collected mandates from all harmed consumers who may opt-in.

Effects of the judgment and enforcement: Courts awarding compensatory damages must name individuals who have benefited from the Judgements or the requirements and criteria to be met in order to benefit from the right to compensation granted for those who were not in the proceedings but who wish to benefit from enforcement (Article 221 and 519 Spain’s Procedure Law).

Despite not granting an opt-out option for the collective redress group, Spain’s Procedure allows people who have suffered harm, and who do not want to take part in the collective action, to bring individual actions.

2. Collective actions seeking an injunction (Injunctive collective redress): Spain’s Procedure Law has implemented the EU Injunctions Directive and includes a collective injunctive redress mechanism. These injunctions include obtaining Judgements that may order the cessation or prohibition of any infringement (including the use of abusive terms and conditions). Therefore, actions for injunctions seeking the cessation of abusive Privacy Policies cannot be rejected by the court, for instance to the extent it could be deemed a consumer law infringement (Article 53 of the Consumers Statute) which could involve measures such as the publication of the decision (Article 221.2 Spain’s Procedure Law).

The qualified entities to bring an action for an injunction are the ones set out above depending on whether the claimants seeking an injunction are identified or easily identifiable. Furthermore, those entitled to bring an action for the protection of so-called “diffused interests” are listed in the Official Gazette of the EU as complying with the European Injunctions Directive (Art. 6.1.8 of Spain’s Procedure Law in relation to Article 54 of the Consumers Statute). Furthermore, the Public Prosecutors and the National Institute for the Protection of Consumers are entitled to bring an action for an injunction, although this is not common in practice.

The way forward

According to public sources and the news, the main campaign for collective action in which a consumer’s organization is collecting mandates in Spain is the so-called “My data is mine” against Facebook brought by OCU. However, it is still early days to predict what the outcome will be as, due to the procedural landscape described, this action may be subject to a number of procedural pitfalls and challenges.

Other consumer associations are focusing on lodging complaints before Spain’s Data Protection Agency targeting alleged breaches of Data Protection regulations with social networks and their data breaches.

Both the EU Data Protection and Consumer Protection authorities have been very clear stating that the representative actions and collective redress in the EU extend to consumers’ protection when they are online, and will be distinctly different from US-style class actions. In words of Věra Jourová, Commissioner for Justice, Consumers and Gender Equality: “Representative actions, in the European way, will bring more fairness to consumers, not more business for law firms”. One thing is sure, a door has been opened by Article 80 GDPR and all the stakeholders must have eyes wide open to ensure that this right is used properly and not abused.

References:

2. Inter alia Judgement of the Spanish Supreme Court Civil Chamber, of 26 April 2017, confirming a compensation of €7,000 for “moral damage”, or Judgement of the Spanish Supreme Court, Social Chamber, of 3 May 2016, granting a compensation of €10,000 for somewhat similar circumstances.
3. www.oci.org/especiales/ misdatossonmios/
4. www.mydataismine.com
5. www.test-achats.be/actions-collectives/facebook

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3. www.oci.org/especiales/ misdatossonmios/
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`Cybersecurity:
When it required by the Ethics Rules
and what considerations apply?

Fordham 2018 GDPR Panel
With thanks to Stephanie Cohen and Mark Morril`
Cybersecurity

What are we really talking about in a case with baseline security requirements:

• Encrypted email (no Gmail please)
• Secure FTP for data transfers (no Drop Box)
• Locked documents when justified (like the draft Award)
• VPNs (no hotel WIFI unless you are using an encrypted system)
• Safe travel habits (Do you really need to bring those files with you?)
• WhatsApp instead of messaging
• Encrypted Cloud
• Secure platforms (no FaceBook, MS or Google; who will provide and pay for these?)
Attorney Ethics Rules

• Familiar standards applied to set broad conduct standards
• Some ethics opinions are specific and prescriptive – also evolve over time
• Potential safe harbors
• Rules are not arbitration (or other practice) specific
• Focus on client obligations
Chapter 4 of the Solicitor’s Code of Conduct

• Protection of confidential information is a fundamental feature relationship with clients. It exists as a concept both as a matter of law and as a matter of conduct. Duty continues despite the end of the retainer and even after the client’s death.

• Lawyer must keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents.

• Must have effective systems and controls in place to enable lawyer to identify risks to client confidentiality and to mitigate those risks.
Model Rules of Professional Conduct

• Rule 1.1 Competence

Revised Comment 8:

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.
Model Rules of Professional Conduct

• Rule 1.6 Confidentiality of Information

  (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Comment 18 to Rule 1.6

- Rule 1.6 (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure.

- Unauthorized access to, or the inadvertent or unauthorized disclosure does not constitute a violation of (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.
Comment 18 to Rule 1.6

• Reasonableness factors
  – Sensitivity of the information
  – Likelihood of disclosure without safeguards
  – Cost/difficulty of implementing safeguards
  – Adverse impact of safeguards (e.g., excessive difficulty)
  – Client may require more or give informed consent to forego.
Comment 19 to Rule 1.6

• When transmitting information relating to representation of a client, lawyer must take reasonable precautions to prevent the information from coming into the hands of unauthorized recipients.

• Duty does not require “special security measures” if method affords “reasonable expectation of privacy.”

• Special circumstances may require special precautions.
Ethics Opinions more prescriptive

- ABA 477R (2017): reasonable efforts to prevent unauthorized disclosure or access to confidential matter requires fact-specific process to assess risks, implement appropriate security measures and ensure they are updated.
- ABA 483 (2018): Ethical obligations when a data breach exposes confidential information.
- Encryption: evolving standard
  - CA 2010-179: Should not use public Wi-Fi without encryption.
  - PA 2011-200: “reasonable precautions” may include encryption or strong passwords.
- Outsourcing
  - Consider rules of jurisdiction where performed.
  - Duty to supervise (Rule 5.3).
  - Generally, ABA 08-451, NYC 2006-3.
Ethics Opinions more prescriptive

• Security of electronic devices
  – *See, e.g.*, NY City Bar Formal Opinion 2017-5: An Attorney’s Ethical Duties Regarding U.S. Border Searches of Electronic Devices Containing Clients’ Confidential Information

• Cloud Computing
  – Duty to ensure confidential info is protected
  – Diligence
  – Vendor agreements
    • No claim to ownership of data
    • Notification of requests to produce
    • Geographic location of storage specified
    • Technology reasonably responsive to threats
    • Right/ability to retrieve, audit
  – Generally, CA 2012-84, MA 12-03, NYSBA 842, PA 2011-200
Arbitrator-Specific Provisions

• AAA Canon 6: Arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office
• CI Arb Rule 8 (2009): Trust and Confidence
• IBA (2009):
  – Introductory Note: International arbitrators should be impartial, independent, competent, diligent and discreet
  – Rule 9 - Confidentiality of the deliberations
### Template Data Protection Protocol for Arbitrators

<table>
<thead>
<tr>
<th>ACTION ITEM</th>
<th>INFORMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data controllers and processors</td>
<td>Identify who will act as controllers and processors of Personal Arbitral Data during the arbitration. Each data controller and processor should sign the Arbitral Data Protection Protocol. Identify the Initial Data Controller who engaged in the original processing of the data (typically a party to the arbitration) and who should be responsible in the first instance for complying with certain data subject rights. Consider the additional obligations of the Initial Data Controllers and any indemnities they should provide to the other secondary controllers. If relevant, identify others who may need to be consulted with responsibility for data protection implementation (e.g., the company’s data protection officer or works council; government data protection authority); explain their involvement and means of notification.</td>
</tr>
<tr>
<td>Member State Exemptions</td>
<td>Identify any Member State exemptions being relied upon to limit the data subject rights and which controllers are covered by such exemptions.</td>
</tr>
<tr>
<td>Categories of Personal Arbitral Data to be processed during the arbitration</td>
<td>Identify categories of Personal Arbitral Data that will be processed and transferred during the arbitration (e.g., types information that is likely to identify data subjects (emails, lab notebooks, agreements, construction logs, pleadings, witness statements, awards, etc.), as well as commercially sensitive and/or restricted or highly confidential data. Will any and special category data require processing? Identify the extent to which the data subjects have already been put on contented to, or been put on notice of, the possibility of their data being used for an arbitration.</td>
</tr>
<tr>
<td>Legal basis for the processing</td>
<td>Identify the legal basis for the processing (usually avoiding consent) and what has been done to comply with the requirements imposed by the GDPR on processing for that purpose. If special category data will be processed, provide justification for the processing of that data.</td>
</tr>
</tbody>
</table>

---


2. All references in this ARBITRAL DP PROTOCOL to the GDPR should be deemed to include applicable Member State laws implementing the GDPR.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Onward data transfer</td>
<td>Is everyone involved in the arbitration subject to the GDPR (institution, arbitrators, parties, experts, etc)? If so, there should not be any onward transfer issues when the data is transferred outside the EEA (although there will be cybersecurity concerns when data is transferred outside the EEA). If individuals or entities are involved who are not subject to the GDPR, identify whether any Personal Arbitral Data will be transferred outside the EEA and the legal basis for the onward transfer. Identify what has been done to comply with the legal requirements including notice that may be imposed on transfer. Identify the means by which data may be transferred outside the EEA and whether Personal Arbitral Data can be downloaded, emailed, or stored on computers outside the EEA.</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Identify whether the arbitral process will be confidential and consider entering into confidentiality agreements addressing specific issues. Consider the confidentiality of the award and whether it can/should be redacted to ensure that Personal Arbitral Data will not be made public.</td>
</tr>
<tr>
<td>Cybersecurity</td>
<td>Identify the cybersecurity measures that will be employed to protect the data, including the principles discussed in GDPR and the ICCA Cybersecurity Protocol to the extent consistent with the GDPR (e.g., use of the cloud, nature and type of encryption, password protection, access limitation and control, data minimization, etc.). Consider the impact of travel and how Personal Arbitral Data can be stored or retrieved during travel outside the EEA.</td>
</tr>
<tr>
<td>Data Minimization</td>
<td>Identify the steps to be undertaken to ensure that only relevant and necessary data is processed during the arbitration. Where required, explain the methodology to be applied to narrow and cull Personal Arbitral Data for processing and transfer during the arbitration to include only relevant and necessary material (e.g., use of preliminary questionnaires and interviews; use of technology and processes to de-duplicate and apply iterative searches; identification and elimination of special category data where possible, consideration of pseudonymization where possible, filtering and compiling information in an EU country, etc.)</td>
</tr>
<tr>
<td>Transparency/Data Privacy Notices</td>
<td>Identify what steps are required to make information available to data subjects about the processing, transfer, and onward transfer of Personal Arbitral Data for purposes of the arbitration (e.g., internal communications; posted notice). Consider whether additional data privacy notices may be required and the</td>
</tr>
<tr>
<td><strong>Data rectification, erasure, and no further processing</strong></td>
<td><strong>Consider whether the Initial Data Controller should be primarily responsible for meeting such transparency requirements and providing any required notices. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to provide adequate notice or other data subject rights under its control.</strong></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Data retention</strong></td>
<td><strong>Identify what steps will be undertaken if a data subject exercises its right to rectify, erasure or stop processing of its Personal Arbitral Data. Confirm whether the Initial Data Controller should be primarily responsible for addressing such requests in the first instance and consider how the tribunal will be informed of the request and if the data has been altered as a result. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to comply with the data subject rights under its control.</strong></td>
</tr>
<tr>
<td><strong>Data Breach Notices</strong></td>
<td><strong>Describe how long data will be retained for purposes of the arbitration and how it will be disposed of (e.g., destruction or return of Personal Arbitral Data) when no longer needed to fulfill obligations of the controllers of the data. The disposal date is likely to differ for each controller given their legal and ethical retention obligations.</strong></td>
</tr>
<tr>
<td><strong>Identify the exact process that will be undertaken if a data breach occurs, and the notification deadlines imposed taking into account the very strict 72-hour deadline established in the GDPR for informing the relevant supervisory authorities. Describe exactly what will be considered a data breach.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Indemnification</strong></td>
<td><strong>Consider whether the Initial Data Controllers should provide indemnities to the other secondary controllers for failure to comply with mandatory data subject rights.</strong></td>
</tr>
</tbody>
</table>
It’s All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration

Kathleen Paisley*
ARTICLE

IT’S ALL ABOUT THE DATA:

THE IMPACT OF THE EU GENERAL DATA PROTECTION REGULATION ON INTERNATIONAL ARBITRATION

Kathleen Paisley

ABSTRACT

This Article addresses the application of the EU General Data Protection Regulation (GDPR) to international commercial arbitration. The GDPR has a broad reach and where applicable imposes significant obligations on the processing of personal data during arbitrations. The GDPR imposes potential criminal liability and fines of up to the higher of 4% of global gross revenue or EU €20 million, as well as granting data subject’s individual rights of action for damages, which means the risks of non-compliance are steep.

The GDPR covers all data custodians with an EU establishment or that target EU data subjects, including the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors, each of whom has individual liability for GDPR compliance. Furthermore, the purposefully broad definitions of what constitutes both personal data and data processing mean that literally all arbitral activities involving data that either identifies or could identify an individual are likely to be caught by the regulation (including evidence (e.g., emails, contracts, lab notebooks, construction logs), memorials, witness statements, expert reports, and the award itself).

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The GDPR prohibits the processing of personal data and its transfer outside the European Union, including during an arbitration, except under certain limited conditions. When personal data processing is permitted, it must be undertaken in a manner that is legitimate, fair and transparent, data minimization and adequate cybersecurity measures are required, and data retention is circumscribed. The GDPR also grants other significant rights to data subjects, which includes anyone identifiable from a document or the evidence, including the right to transparent information (which may include data privacy notices) and to review and to rectify data, among other things. This could cover literally hundreds of individuals in a complex case.

Needless to say, reconciling these broad-ranging rights and obligations with the cross-border, consensual, decision-making function of international arbitration will be challenging, whereas EU courts are largely exempt from the GDPR. This is further complicated by the fact that the GDPR’s most strenuous obligations fall on “controllers” of data, which is defined in a manner that includes virtually everyone involved in an arbitration, thereby creating overlapping and potentially conflicting obligations with corresponding liability attaching to each.

This Article reviews the GDPR’s legal framework as it applies to international commercial arbitration, and its practical application to the arbitral process. The Author stresses the importance of addressing data protection early through the adoption of a data protection protocol or other measure to address compliance, and considers the GDPR’s potential impact on data disclosure. Furthermore, given the complexities and the significant risk, the Author suggests that the international arbitration community should consider creating increased certainty by proactively addressing the application of the GDPR to international arbitration with the relevant regulators to develop an agreed framework for GDPR compliance within the arbitral process.
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I. INTRODUCTION

Data processing is an essential component of modern international arbitration. The confluence of three factors over the last two decades has changed (or will change) international arbitration: (1) globalization has caused a dramatic increase in the importance of international commercial arbitration as a dispute settlement mechanism; (2) digitalization has created a significant increase in the amount and complexity of data processed during a typical international commercial arbitration; and (3) led by the European Union the data protection laws potentially applicable to that data have proliferated and, with the adoption of the EU General Data Protection Regulation (“GDPR”), have become key compliance imperatives. The result is that access to, and processing of, digital data is key to the efficient and effective resolution of complex commercial disputes through international arbitration. Therefore, while international commercial arbitration’s function remains to decide disputes according to a binding and often confidential process

1. The current twenty-eight EU Member States are: Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom. EU Member Countries in Brief, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries/member-countries_en (last updated Mar. 18, 2018). The General Data Protection Regulation (“GDPR”) will initially apply to the European Union and will then be implemented into the Agreement on the European Economic Area (the “EEA Agreement”) at which point its application will be extended to the entire European Economic Area (“EEA”). The EEA Agreement encompasses the 28 EU Member States and the three EEA EFTA states (Iceland, Liechtenstein and Norway), establishing an internal market governed by the same basic rules regarding free movement of goods, services, persons and capital. EU acts such as the GDPR that are deemed to be EEA Relevant are incorporated into the EEA Agreement. A draft Joint Committee Decision (JCD) is under consideration by the European Union and the EEA EFTA States with the goal that the GDPR will be incorporated into the EEA Agreement on June 1, 2018. See Incorporation of the GDPR into the EEA Agreement, EUROPEAN FREE TRADE ASSOCIATION (Apr. 13, 2018). http://www.efta.int/EEA/news/Incorporation-GDPR-EEA-Agreement-508041 [https://perma.cc/V8XC-262J] (archived Apr. 27, 2018). Therefore, all references in this Article to “European Union” or “EU” should be read to include the 31 EEA countries after implementation of the GDPR into the EEA Agreement is completed. The Article was finalized in May 2018, and the information is current as of that date.


3. This Article is focused solely on international commercial arbitration, although the principles addressed herein impact investor-State arbitration and domestic arbitration when EU personal data is processed therein.
agreed to by the parties, it has also become a data management exercise requiring data to be processed, often across borders, and requiring compliance with relevant data protection laws, including the GDPR.

While many of these laws have been in place for decades, this issue is currently coming to the fore because an increasing number of entities both within and without the European Union are subject to EU-style data protection obligations and, at least in the case of the GDPR, the risk of noncompliance has become significant and is expected to take a seat in the board room alongside antitrust and anticorruption. This has been aptly referred to by a leading EU data protection expert as the “Brussels Effect,” and has led Fortune 500 companies to spend an estimated EU€8 billion in efforts to comply with the GDPR even before it has come into effect. However, Brussels Effect notwithstanding, at the moment there is very little dialogue between the data protection and international arbitration communities. The application of the data protection laws to the taking of evidence in international arbitration is not expressly addressed by the highly influential 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) nor any of the protocols that address the exchange of evidence in international arbitration. Furthermore, while the principles contained in the GDPR apply to arbitration, the GDPR does not directly address how it is to be applied to arbitration, which has created significant


5. Id. (referencing a conversation with Christopher Kuner, co-chair of the Brussels Privacy Hub at the Vrije Universiteit Brussel).

6. See Mehreen Khan, Companies Face High Cost to Meet New EU Data Protection Rules, FINANCIAL TIMES (Nov. 19, 2017), https://www.ft.com/content/0d47ffe4-ccb6-11e7-b781-794ce08b24dc.

7. See generally IBA RULES ON THE TAKING OF EVIDENCE IN INT’L ARBITRATION (INT’L BAR ASS’N, 2010) [hereinafter IBA RULES]; ICDR GUIDELINES FOR INFORMATION DISCLOSURE AND EXCHANGE IN INTERNATIONAL ARBITRATION PROCEEDINGS (INT’L CTR. FOR DISPUTE RESOLUTION, 2008); CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, 2008); PROTOCOL FOR E-DISCLOSURE IN INTERNATIONAL ARBITRATION (CHARTERED INST. OF ARBITRATORS, 2008).
confusion and uncertainty within the international arbitration community about what it needs to do to comply.8

This confusion and uncertainty is enhanced by the fact that Member States have taken different approaches to the regulation of the data that may be covered during an arbitration, leading to potentially conflicting regulatory frameworks even within the European Union.9 The GDPR’s impact on arbitration will therefore be an iterative process as data custodians covered by its terms receive further guidance from the EU institutions, Member State laws implementing the GDPR, and Member State data protection authorities. However, as the GDPR becomes effective immediately, arbitral data custodians falling within its scope will need to make a good faith attempt to apply its provisions to the arbitrations in which they are involved or risk fines and other criminal or civil sanctions.10

This Article addresses the impact of the GDPR on international arbitration and the custodians of the data exchanged during the arbitral process, including the parties, their counsel, arbitral institutions, counsel, members of the arbitral tribunal, experts and vendors, and the support staff working for each of them (referred to as “Arbitral Data Custodians”). The Article is geared at making an initial attempt to bridge the knowledge gap between international arbitration practitioners and data protection specialists.13 It is not intended as either a treatise on international arbitration or the GDPR,

---

8. See GDPR, supra note 2, recital 52 at 10 (stating that special categories of data may be processed “where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure.” This reference to “out-of-court procedure is used only two times in the GDPR and is not defined.)


11. The term arbitral tribunal or tribunal is used to refer to the arbitrators who decide the case, whether it be a sole arbitrator or a panel of three.

12. Vendors may include e-discovery experts, information technology (“IT”) professionals, court reporters, translation services, couriers and among others.

13. For an excellent discussion of the policy considerations underpinning the issues addressed in this article, see CHRISTOPHER KUNER & DANIEL COOPER, DATA PROTECTION LAW AND INTERNATIONAL DISPUTE RESOLUTION, VOLUME 382 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE, HAGUE ACADEMY OF INTERNATIONAL LAW (BRILL/NIJHOFF) 9-174 (2017) [hereinafter KUNER & COOPER].
but rather seeks to provide a broad understanding of how the two may work together going forward, with the caveat that at the time the Article was written, the GDPR was just coming into force and many of the laws implementing it into Member State law are yet to be finalized.

The Article begins by providing a general background to EU data protection laws, with a focus on the GDPR and the changes it brings from the Data Protection Directive ("DP Directive") previously in place. The Article then describes the legal framework established by the GDPR and its potential impact on international arbitration. Given the significant uncertainty about the application of the GDPR in practice, and the lack of any specific guidance on its application to arbitration, the focus is on raising the relevant questions to be considered, with the realization that the solutions to these questions are highly case and party specific and will vary depending on the nature and location of the data and the data custodians who will process it. The final section of the Article analyzes how the data protection principles found in the GDPR have the potential to affect the management of data in a complex international commercial arbitration by posing some of the relevant legal questions raised and how they are likely to be resolved based on the most relevant precedent promulgated under the previous DP Directive, again with an understanding that this is a work in progress. The principles discussed herein are applicable under the data protection laws of many countries, however, this Article focuses on the application of the GDPR because of its sweeping application and broad-ranging implications.


15. For interesting discussions of some of the issues addressed in this article in the context of the DP Directive, see Karin Retzer & Sherman Khan, Balancing Discovery with EU Data Protection in International Arbitration Proceedings, 3 N.Y. DISP. RESOL. L., (Spring 2010), at 47; Markus Burianski & Martin Reindl, Truth or Dare? The Conflict Between E-discovery in International Arbitration and German Data Protection Rules, 2010 Zeitschrift für Schiedsverfahren [SchiedsVZ] 187, 187-200. [hereinafter Burianski & Reindl]

II. BACKGROUND TO EU DATA PROTECTION

The right to privacy was first espoused by Samuel Warren and Louis Brandeis in their seminal article aptly entitled “The Right to Privacy” published in the Harvard Law Review in 1890. The modern era of data protection law, which is similar to, but not the same as, the right to privacy, started just over two decades ago with the European Union’s adoption of the DP Directive in 1995, which was recently replaced by the GDPR. The DP Directive led the way for more than 100 countries (including EU Member States) to adopt data protection or privacy regimes “enshrining” an individual’s rights in his or her personal data and providing data subjects with broad ranging protections and corresponding obligations. Many of these laws are based in large part on the DP Directive.

The DP Directive covered a very broad range of “personal data” and included detailed rules on if, and if so, when, where, and how personal data could be processed and placed obligations on data “controllers” and “processors” for compliance with its terms. Although counterintuitive in a digital environment, the premise of the DP Directive (and the GDPR) is that the processing of personal data by a third party is prohibited unless expressly allowed by the GDPR. It is necessary to make this mind shift in order to understand how the GDPR operates and how it applies to international arbitration. Many of the principles established by the DP Directive are unchanged in the GDPR. However, important new rights have been added (including for example the right to rectification and erasure) and significant changes have been made to the procedure by which the rules are

18. The right to privacy set forth by Warren and Brandies is closely related to the data protection principles set forth in the DP Directive and the GDPR and discussed in this Article, but they are not the same in that privacy focuses more on the individuals’ right and data protection refers to legal rules that govern the processing of the data. See KUNER & COOPER, supra note 13, at 25.
21. See id. at 33.
enforced. Furthermore, the sanctions for noncompliance have been enhanced including individual rights of action by data subjects, criminal sanctions and greatly increased penalties, the largest of which apply to unlawful data transfer outside the European Union (an issue that is often raised in international arbitration).

A. Change to a Regulation

The first principle to be understood about the GDPR is that it is a regulation rather than a directive and how this impacts its enforcement under EU law. As a directive, the DP Directive had to be implemented into a Member State’s national law to become effective, which left significant room for differences in the Member States’ implementation of certain of its provisions. This led to fragmentation in how data was regulated across the European Union with resulting difficulties in compliance and concerns about digital market disruption caused by the unclear playing field. Furthermore, when the DP Directive was being drafted and debated, use of the internet was in its infancy, hence its provisions were not originally drafted with a complete understanding of how they would be applied in a digital landscape. Furthermore, the lack of serious fines and other adverse consequences for breach caused some to refer to the DP Directive as a “toothless tiger.”

In an attempt to address these and other concerns, after four years of debate and compromise, the European Union adopted the GDPR in 2016, which replaced the DP Directive on May 25, 2018. As a regulation, the GDPR is a law enforceable across the European Union.

24. See GDPR, supra note 2, arts. 16-17, at 43-44; (defining the rights of rectification and erasure); arts. 51-76, at 65-79 (describing roles and responsibilities of supervisory authorities).
25. See id., arts. 77-84, at 80-83 (addressing fines and penalties).
27. See id.
30. See GDPR, supra note 2, arts. 94(1), 99, at 86-87.
Union without the need for Member State implementing legislation.\textsuperscript{31} However, the enactment of the GDPR does not mean that the Member States will cease having data protection laws, indeed, Member States are in the process of amending their existing laws implementing the DP Directive to bring them in line with the GDPR.\textsuperscript{32}

The GDPR also includes a number of areas where Member States are expressly allowed to derogate from its terms, and important differences have already been observed in the ways that existing Member State data protection laws are being brought into line with the GDPR.\textsuperscript{33} This includes the right to exempt “judicial proceedings” and “the enforcement of civil law claims” from the application of some of the more strenuous rights and obligations imposed by the GDPR provided other safeguards are put in place.\textsuperscript{34} Some Member States, for example Ireland, have applied this exemption broadly in a manner that exempts certain types of data that is typically processed during an arbitration from these rights, although the other provisions of the GDPR remain applicable. It remains to be seen if other Member States will follow suit and whether the European Union will take a position on these exemptions.\textsuperscript{35} The GDPR also includes a broad right to derogate with respect to employee data, which is also likely to impact international arbitration.\textsuperscript{36}

\hspace{1em} \hspace{1em} \textbf{B. Internal Compliance Requirements}

The GDPR also moves away from the notification system established by the DP Directive, whereby data custodians could gain comfort from notifying their data protection operations to their local data protection authority, to a largely self-regulation system.\textsuperscript{37} For

\begin{itemize}
\item 31. 2018 Communication, supra note 26, at 2-3.
\item 33. See GDPR Conundrums Part 1, supra note 32.
\item 34. See GDPR, supra note 2, art. 23 at 46—47.
\item 35. See Irish DB Bill, supra note 9, art. 161 at 136-137.
\item 36. GDPR, supra note 2, art. 88, at 84.
\item 37. See generally, GDPR, supra note 2. This fundamental change from a notification system to one of self-regulation can broadly be analogized to the changes made to EU competition laws over the last two decades, with the European Union moving from a
entities with large and potentially risky data processing operations, this self-regulatory system requires appointing an independent and autonomous data protection officer (“DPO”) to monitor compliance and others may voluntarily appoint a DPO in which case the same rules apply.\textsuperscript{38} Formal data protection impact assessments will be required where data processing is undertaken that “is likely to result in a high risk to the rights and freedoms of natural persons.”\textsuperscript{39} Furthermore, data protection principles must be imbedded into all new data processing operations from the outset (e.g. data minimization) either through so-called “privacy by design” or by default to the strictest measures.\textsuperscript{40}

To help ensure these rules are followed, the GDPR makes the data controller accountable for compliance and requires the controller to be able to “demonstrate” compliance.\textsuperscript{41} This means keeping records of what decisions were made with respect to the protection of personal data and why, and being able to produce those records if requested. Importantly for arbitrators and smaller law firms, the GDPR’s strict record keeping requirements typically do not apply to small and medium-sized enterprises having fewer than 250 employees (“SMEs”), although SME’s still need to demonstrate compliance.\textsuperscript{42} This means that, as a practical matter, from the outset of an arbitration where personal data covered by the GDPR may be impacted, steps will need to be undertaken to ensure that data protection principles are properly respected during the arbitral process and to be able to demonstrate compliance.

C. One-Stop Shop

With respect to the regulatory structure, the GDPR moves from the decentralized regulatory framework established by the DP Directive - whereby each Member State supervisory authority had broad authority to enforce its national data protection laws - towards a

\begin{itemize}
  \item 38. See GDPR, supra note 2, art. 37-39, at 55-56.
  \item 39. Id., art. 35, at 53.
  \item 40. See id, art. 25, at 48
  \item 41. Id., art. 5(2), at 36; art. 30, at 57-58.
  \item 42. Id., art. 30(5), at 58.
\end{itemize}
one-stop-shop style system. Under this system, for certain cross-border data processing within the European Union, a lead supervisory authority (the “Lead SA”) is given the authority to enforce the GDPR for data custodians having their sole or “main establishment” as defined by the GDPR in that country. The European Union hoped to establish a real one-stop shop whereby one supervisory authority would have exclusive competence, but in the end a compromise was reached whereby issues can typically be raised with the Lead SA or with any “supervisory authority concerned,” and a system is established for coordination between the Lead SA and the concerned supervisory authority where necessary. The effect of these rules should be that only one decision is reached on any issue, but who renders it depends on the application of the principles contained in the GDPR, with deference typically given to the Lead SA, if it so requests. When data protection issues affect only one Member State, that country’s supervisory authority has authority. Furthermore, when an entity does not have an EU establishment, it must designate in writing a representative in the Union. However, any supervisory authority within the European Union has regulatory authority over that entity without reference to a Lead SA.

As a practical matter, early data mapping will enable parties and their advisors to anticipate what data protection laws will apply, what data protection authority will be the Lead SA, and what other concerned supervisory authorities might be for different aspects of the arbitration and for different data custodians. This will allow the

43. See GDPR, supra note 2, art. 60 at 72; Guidelines for Identifying a Controller or Processor’s Lead Supervisory Authority 10 (Article 29 Data Protection Working Party, 16/EN WP 244 rev. 01, 2017). [hereinafter “Lead SA Guidelines”]
45. “Supervisory authority concerned” is defined as a supervisory authority which is concerned by the processing of personal data because:
(a) the controller or processor is established on the territory of the Member State of that supervisory authority;
(b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
(c) a complaint has been lodged with that supervisory authority.
See GDPR, supra note 2, Art. 4 (22) at 35.
46. See id.
47. See GDPR, supra note 2, art. 27(1), at 48.
48. See Lead SA Guidelines, supra note 43.
parties and others subject to the GDPR to foresee how those laws and authorities are likely to address the data protection issues that may arise during the arbitration. This information will enable the development of an overall approach to minimize the data protection risks and for managing them during the arbitral process.

D. Global Reach

Due to the inherently trans-border nature of international arbitration, the issue that has received the most attention to date from the international arbitration community to the EU data protection laws are the measures restricting the transfer of personal data outside the European Union. The European Commission has stated that its intent is not to keep EU data in the European Union, but rather to export EU data protection standards by ensuring that the protections move with the data and by encouraging other countries to adopt similar laws so that data moves freely but with an adequate level of protection and data subject rights. Therefore, while the GDPR is obviously not of universal application, the European Union has declared its intent for the GDPR to become the *de facto* international standard for the protection of personal data, through the following general approach:

1. the use of transfer restrictions to impose GDPR-style obligations whenever EU data is transferred to third countries outside the European Union (referred to as “third countries”);

2. the potential imposition of substantial penalties for violations to ensure compliance;

3. the extension of the GDPR to the processing of data relating to EU data subjects in third countries where the controller or processor is not based in the European Union but has purposefully targeted the provision of goods and services within the European Union or engaged in monitoring of EU data subjects; and

4. the insistence on trading partners adopting adequate data protection regimes as a condition of EU trade deals—the European Commission has recently said “the

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protection of personal data is non-negotiable in trade agreements.50

The European Union has been surprisingly successful in this endeavor, with the major holdouts being the United States (except for the Data Privacy Shield), China, and Russia.51

Specifically concerning the data transfer restrictions in the GDPR, the European Commission’s view is that “the EU regime on international data transfers . . . provides a broad and varied toolkit to enable data flows in different situations while ensuring a high level of protection.”52 The GDPR “toolkit” referred to is discussed in the following Section of this Article in the context of data transfers to third countries during international arbitration.53 The impact of these restrictions is that, when data transfer is permissible, which may or may not be the case, it is always necessary to ensure that adequate safeguards are in place to protect the data after it is transferred either by operation of law or by agreement.54

E. Sanctions

Although the DP Directive allowed Member States to access appropriate fines, the fines imposed were not sufficient to create a culture of compliance. This has changed dramatically under the GDPR and is the most important driver behind the unprecedented focus on GDPR compliance.55 The potential fines set forth in the GDPR are up to the higher of four percent of a violator’s worldwide revenue or EU€20 million for the most serious violations and half of that for less serious infractions.56 Data subjects also have the right to enforcement before courts and regulatory authorities and to obtain damages, and there is a possibility of criminal sanctions.57

A set of guidelines on the assessment of fines under the GDPR has already been issued, which is helpful in understanding how fines will be assessed.58 During the initial stages of GDPR implementation,
large fines are not expected absent serious violations and provided
good faith efforts at compliance are undertaken. However, the threat
of such fines and other sanctions together with the compliance
imperative that has developed around the GDPR means that senior
management and directors of companies are now increasingly focused
on GDPR compliance. In turn, this means that parties will start to
proactively manage the GDPR risk arising from international
arbitration. Furthermore, the fact that all Arbitral Data Custodians
(including arbitrators) are potentially caught within the GDPR’s reach
means that everyone has a compliance incentive. The combined
impact of these factors means that, when the GDPR is applicable, data
protection compliance will become part of the arbitral process. The
following Section of this Article addresses the legal framework
established by the GDPR and how this applies to international
commercial arbitration, followed by a Section addressing the GDPR’s
potential practical impact on arbitration.

III. GENERAL APPLICATION OF THE GDPR TO
INTERNATIONAL ARBITRATION

The GDPR grants data subjects extensive rights with respect
their personal data.59 Many of these rights are difficult to reconcile
when applied to international arbitration because of its decision-
making function and other characteristics (often including
confidentiality). It is important to note that the same concerns arise in
the context of court litigation, which is why the GDPR excludes
Member State courts and other judicial authorities from supervision
by the data protection supervisory authority to preserve their
independence. The GDPR suggests instead that the judicial
authorities themselves regulate the data used in the judicial capacity.60
Recital 20 of the GDPR provides as follows:

While this Regulation applies, inter alia, to the activities of courts
and other judicial authorities, Union or Member State law could
specify the processing operations and processing procedures in
relation to the processing of personal data by courts and other
judicial authorities. The competence of the supervisory
authorities should not cover the processing of personal data when
courts are acting in their judicial capacity, in order to safeguard

59. See generally GDPR, supra note 2, art. 12-22, at 39-46.
60. See id., recital 20, at 4.
the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations.\(^{61}\)

The language refers to “processing of data by courts and other judicial authorities.”\(^{62}\) While the general reference to “judicial authorities” could conceivably cover arbitration, which has a decision-making function similar to a court, this exemption from oversight by the Member State supervisory authority is replaced by enforcement by the Member State court system, which courts do not supervise arbitration. Article 55 of the GDPR provides that “Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity,” without any reference to arbitration.\(^{63}\) Therefore, this general exemption from the supervisory authority does not apply to arbitration nor does it apply to non-EU courts.\(^{64}\) Furthermore, the exemption of Member State courts from oversight by the supervisory authority does not mean that the GDPR does not apply to the courts, rather it means that that the rules are enforced by the judicial authorities themselves rather than the supervisory authorities.

However, Article 23 of the GDPR does grant the Member States the right to exempt certain activities from the application of many of the specific rights granted to data subjects. This right for Member States to grant exemptions applies “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard,” among other things, “the protection of judicial independence and judicial proceedings” and “the enforcement of civil law claims.” This is subject to the proviso that the Member States puts in place adequate safeguards to protect the data subject rights that have been exempted.\(^{65}\) As mentioned above, Ireland is an example of a Member

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61. Id.
62. Id.
63. Id., art. 55, at 67.
64. Burianski & Reindl, supra note 15, at 187 (authors reach a similar conclusion under the DP Directive).
65. See, e.g., GDPR, supra note 2, art. 23(2), at 47.
State that has relied on Article 23 to exempt certain data subject rights, to the extent that the restrictions are “necessary and proportionate,” for the processing of personal data “in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings whether before a court, statutory tribunal, statutory body or an administrative or out-of-court procedure.” 66 The references in the Irish exemption to “out-of-court procedure” covers arbitration.

Application of the Article 23 exemption (including the Irish DP Bill) does not mean the data is excluded from the GDPR, but rather that certain of the data subject rights do not apply. The data subject rights that can be exempted (and which Ireland has exempted) include the rights of the data subject to transparent information (potentially including data privacy notices) (Articles 12, 13 and 14), access to data (Article 15), rectification and erasure (Articles 16 and 17), to restrict further processing (Article 18), data portability (Article 20) and the rights to object and to automated decision making (Articles 21 and 22). 67 These rights are particularly difficult to apply to an arbitration, and can be inconsistent with the arbitrator’s decision-making function, including the interactions among arbitrators, and with the institution. The exemption of these rights makes the GDPR more consistent with international arbitration, while at the same time protecting the fundamental goal of the GDPR to protect the personal data of data subjects. It is beyond the scope of this Article to analyze each of the GDPR’s provisions in light of the exemptions adopted by the 28 Member States, many of which have yet to be finalized at the time of writing. This Article therefore focuses on the text of the GDPR and the precedents established under the previous DP Directive as they would apply to international commercial arbitration, however, in practice, it will be important to consider Member State laws as well (as well as third country laws).

In addition to the right granted to Member States to exempt certain data and data processing under Article 23, the GDPR itself already contains express exemptions from some provisions for data that is “necessary for the establishment, exercise or defence of legal claims”, which, although subject to interpretation with respect to what

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66. See Irish DP Bill, supra note 9, art. 60 (3)(a)(iv), at 46; see also Irish DP Bill, supra note 9, art. 161, at 136-137.
67. See, e.g., GDPR, supra note 2, arts 12-22, at 39-46.
is “necessary”, applies to arbitration.\textsuperscript{68} The GDPR explains in a recital that, at least in the context of special categories of data, processing should be allowed “where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure” and similar language is included in another recital in the context of data transfers.\textsuperscript{69} “Out-of-court procedure” is not defined and the text of the GDPR does not further illuminate what is covered by data processing that is “necessary for the establishment, exercise or defence of legal claims” but on any definition arbitration includes the processing of data “necessary for the establishment, exercise or defence of legal claims” (sometimes referred to herein as the “legal claims exemption”).\textsuperscript{70}

The legal claims exemption in the GDPR itself applies only to allow the processing of special categories of data, and to exempt data processing from the data subject rights to erasure and to restrict processing (Articles 17 and 18) and the right to object to further processing (Article 21), and as a basis to allow data transfer to third countries. However, Article 23 allows Member State exemption of a much broader category of rights for “the protection of judicial independence and judicial proceedings” and “the enforcement of civil law claims.” The other rights covered by Article 23 (especially the rights to data transparency, access to data, and rectification) are difficult to apply to international arbitration and potentially inconsistent with its decision-making function, which led Ireland and potentially other Member States to exempt out-of-court procedures from them. International commercial arbitration has a decision-making function, which is of a judicial character. Reconciling these rights with international arbitration will be challenging, and argues in favor of exempting data subject rights that are inconsistent with the cross-border, consensual, decision-making function of international commercial arbitration, and taking into consideration the fact that it is often confidential.

The remainder of this Section will address each of these questions under the legal framework adopted by the GDPR. The main source of guidance about the application of the data protection rules under the existing system established under the DP Directive is the

\textsuperscript{68} See, e.g., id., recital 52, at 10.

\textsuperscript{69} See id., recital 111, at 21 (emphasis added).

\textsuperscript{70} See, e.g., id, art 18, at 43.
The Working Party was established under Article 29 of the EU Data Protection Directive, hence its name. It is made up of Member State data protection authorities and relevant EU officials and provide guidance on the application of the DP Directive. The GDPR will replace WP29 with the European Data Protection Board (the “EDPB”). The EDPB is empowered to issue guidelines, recommendations, and best practices to encourage consistent application of the GDPR and in the setting of administrative fines. However, the EDPB has yet to be established, therefore, the initial guidelines on the application of the GDPR have also been established by WP29.

WP29 has never addressed the application of the DP Directive or the GDPR to arbitration, although it has addressed the application of the DP Directive to cross border data disclosure for purposes of US litigation. In this context, WP29 has provided a set of guidelines focused primarily on data transfers necessary to comply with US discovery requests (the “Disclosure Guidelines”). Given the lack of direct guidance about the application of the GDPR to arbitration, the Disclosure Guidelines and other relevant guidance issued by WP29 under the DP Directive provide useful resources on how these issues may be addressed in the context of international arbitration and will be discussed throughout this Article. However, it remains to be seen how this will actually operate under the GDPR (as opposed to the DP Directive).

72. See GDPR, supra note 2, art. 70, at 76-78.
73. Id.
74. For an excellent overview of EU and national laws concerning data disclosure for litigation, see E-DISCOVERY AND DATA PRIVACY: A PRACTICAL GUIDE (Catrien Noorda & Stefan Hanlose eds., 2011).
76. The Disclosure Guidelines refer to the work of the highly-regarded Sedona Conference, which issued “International Principles on Discovery, Disclosure & Data Protection in Civil Litigation” and a draft protocol for how these issues should be addressed by a court, but nothing similar has been developed for international arbitration. See generally SEDONA CONFERENCE WORKING GROUP, THE SEDONA CONFERENCE: INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION IN CIVIL LITIGATION (TRANSITIONAL EDITION), App. D: Cross-Border Data Safeguarding Process + Transfer Protocol (2017) [hereinafter SEDONA PROTOCOL]. The Sedona Protocol for U.S. litigation is set forth in Appendix C of this Article.
Directive) and whether the same principles will be applied to commercial arbitration (as opposed to US litigation) given that arbitration is different from a court proceeding in many ways, including, among other things, that it is often confidential and always consensual. Furthermore, as previously addressed, although it is a regulation, the GDPR will be enacted into Member State laws, which may exempt certain data and data processing during an arbitration from coverage, which means that any consideration of the application of data protection to an arbitration will always begin with applicable law.

A. What does the GDPR apply to in the context of international commercial arbitration?

The GDPR applies to:
- the “processing” of “personal data” in the context of the activities of an establishment of a controller or a processor in the Union, whether or not the processing takes place in the Union; and
- to the “processing” of “personal data” of data subjects who are in the Union by a controller or processor not established in the Union where the processing relates to the offering of goods or services (whether free or paid for) or the monitoring of behavior which takes place within the European Union.77

Appreciating the potential application of the GDPR to arbitration therefore requires understanding:
- What “personal data” is typically reviewed during the context of an international arbitration;
- When and how does the arbitral process constitute the “processing” of personal data;
- Who is covered;
- What obligations apply to covered parties;
- What principles apply to the processing;
- When processing is lawful;
- When can data be transferred to third countries; and
- What this means for international arbitration.78

77. See GDPR, supra note 2, art 3, 32-33.
78. GDPR, supra note 2, art. 3, at 32-33.
The following discussion will consider each of these questions separately in the context of international commercial arbitration.

B. What “Personal Data” is Typically Reviewed in the Context of an International Arbitration?

With the proliferation of the internet, email, and other forms of digital communication, the data reviewed during the course of an arbitration by the parties, experts, institution, and the arbitrators has become increasingly vast and almost exclusively digital. This data is covered by the GDPR whenever it contains “personal data.” The GDPR defines “personal data” as any information relating to an identified or identifiable natural person, who is referred to as the “data subject.” An identifiable person is one “who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.”

The European Commission has provided the following examples of personal data:

- a name and surname;
- a home address;
- an email address such as name.surname@company.com;
- an identification card number;
- location data (for example the location data function on a mobile phone);
- an Internet Protocol (IP) address;
- a cookie ID;
- the advertising identifier of [a] phone;
- data held by a hospital or doctor, which could be a symbol that uniquely identifies a person.

The following examples of data are not considered personal data:

79. See id., Art 4(1), at 33
80. Id.
• a company registration number
• an email address such as info@company.com;
• anonymized data.82

These examples demonstrate that it is irrelevant to the application of the GDPR that covered personal information is contained in a business-related document (such as work emails, lab notebooks, agreements, construction logs, etc.) provided that an individual is identified or identifiable, as exemplified by the Commission’s express inclusion of an individual’s business email address as one of the listed items constituting personal data.83

This means that all business-related information exchanged during a typical arbitration containing information by which an individual is, or could be, identified is “personal data” as defined by the GDPR. This includes whether that information is contained in a single document or any combination of documents.84 Needless to say, this covers much of the data exchanged during a typical international arbitration. While the evidence submitted and exchanged is typically thought of as being the source of potential data protection concerns, the memorials, witness statements, expert reports, and the award itself are also likely to identify individuals. Therefore, they are also likely to contain personal data covered by the GDPR. Any material of any nature containing personal data covered by the GDPR will be referred to herein as “Personal Arbitral Data.”

C. When and How Does the Arbitral Process Constitute the “Processing” of Personal Data?

The GDPR covers all “processing” of Personal Arbitral Data and defines “processing” broadly to include the “collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction,

82. Id.
83. See id.
84. See GDPR, supra note 2, recital 26, at 5. The GDPR applies to all data by which an individual is identifiable and in determining whether a natural person is identifiable, “account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly.” Id.
erasure or destruction of personal data.\textsuperscript{85} The GDPR further clarifies that its application is “technologically neutral” and does not depend on the techniques used to process the data and that it applies to the processing of personal data by automated means, as well as to manual processing.\textsuperscript{86} The European Commission has also provided a list of examples of what it considers to constitute processing:

- staff management and payroll administration;
- access to/consultation of a contacts database containing personal data;
- sending promotional emails;
- shredding documents containing personal data;
- posting/putting a photo of a person on a website;
- storing IP addresses or MAC addresses;
- video recording (“CCTV”).\textsuperscript{87}

Under such an expansive definition, virtually any activity undertaken during an arbitration relating to documents including Personal Arbitral Data is likely to be considered processing covered by the GDPR, even if it is just shredding documents or taking notes including the names of individuals. During the course of a typical complex international arbitration, the following activities, among others, relating to documents containing Personal Arbitral Data would likely be considered processing covered by the GDPR:

- Document retention;
- Document review;
- Document transfer to a third party engaged to assist during the process, including external providers of electronic data review services, external counsel, or an independent expert engaged by a party;
- Disclosure of materials during the arbitral process to the other party, their counsel or expert, the arbitral

\textsuperscript{85} See GDPR, supra note 2, art. 4(2), at 33. The definition requires “the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should not fall within the scope of this Regulation.” Id., at 3. Given the way that documents are filed in international arbitrations, this exclusion is unlikely to apply.

\textsuperscript{86} Id., recital 15, at 3.

institution or the tribunal (e.g. document disclosure, submitted evidence, witness statements, expert reports, memorials);

- Tribunal-ordered disclosure of materials;
- Preparation, exchange and issuance of an award; or
- Document destruction.

The Disclosure Guidelines issued by WP29 under the DP Directive clarify that in the context of data disclosure for US litigation, “there are different stages during the litigation process,” including “retention, disclosure, onward transferring, and secondary processing.”88 The use of personal data at each of these stages will amount to processing requiring an appropriate legal basis on which to base the processing.”89 This means that where the GDPR applies to an Arbitral Data Custodian, compliance obligations apply from the time that it is decided to review or retain potential Personal Arbitral Data for later use in an arbitration until the documents containing Personal Arbitral Data are finally destroyed, and every step in between. Thus, it behooves anyone involved in an arbitration where the GDPR is potentially implicated to understand what potential obligations may apply to them.

D. Who is Covered?

Entities that are established in the European Union are covered by the GDPR with respect to all data processed in the context of their activities.90 This means that Arbitral Data Custodians established in the European Union must comply with the GDPR with respect to all the Personal Arbitral Data they process in the context of those activities.91 For entities established in the European Union, this includes all processing of personal data wherever it is processed and regardless of whether it relates to EU data subjects.

89. See id.
90. See GDPR, supra note 2, art. 3(1), at 32.
91. Special rules apply to international organisation institutions, which may include, for example, the Permanent Court of Arbitration and the International Court of Justice. Entities established under international law or by an agreement between countries are treated as though they are outside the European Union such that transfer to them is prohibited absent adequate safeguards. See GDPR, supra note 2, art 4(26) at 35 (defining international organisations), art. 46 (1) at 62 (addressing transfers to international organisations).
Unlike the DP Directive, the GDPR also applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the European Union where the processing relates to the offering of goods or services (whether free or paid for) or the monitoring of behavior which takes place within the European Union. 92 Entities falling within this category are required to designate in writing a representative in the Union unless the processing is “occasional, does not include, on a large scale, processing of special categories of data [. . .], and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing.”93 This does not mean that anyone who acquires personal data of an EU data subject anywhere in the world in the context of passively offering a good or service within the European Union is governed by the GDPR. Rather it must be shown that the entity intended to offer goods or services to “data subjects in one or more Member States in the Union.”94 The “mere accessibility” of a website or an email address from the European Union is:

insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.95

It is unclear whether this provision applies solely to the processing of EU data in the context of targeted sales of goods and services directly to EU data subjects, which does not include legal entities, or also to the processing of EU data where the processing “relates” to a targeted sale of goods or services to an EU business. The language of the recitals would seem to require that the sales must be targeted to EU data subjects, rather than EU businesses, but this is not clear from the text of the regulation itself and it remains to be seen how this will be interpreted.96 This distinction could impact the extent

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92. GDPR, supra note 2, art. 3, at 33.
93. Id., art. 27(1)-(2), at 48.
94. Id., recital 23, at 5.
95. Id.
96. The language of the recitals to the GDPR support the view that it was only intended to cover sales to, and monitoring of, EU consumers. See id. Furthermore, Article 3 states that “this Regulation applies to the processing of personal data of data subjects who are in the
to which the GDPR applies directly to parties, counsel, experts, arbitral institutions, and arbitrators, that are not established in the European Union but that make targeted efforts to encourage EU parties to use their services, for example by translating their rules into EU languages, making EU road shows, visiting potential EU parties, posting information about EU-specific capabilities, sponsoring EU conferences, actively having their names included for consideration as arbitrators by EU institutions, or other similar activities, but do not target EU data subjects as such. Applying the narrower construction, these parties would not be covered by the GDPR, but it remains to be seen how this language will be applied in practice to entities or individuals that target EU businesses as a result of which personal data of EU data subjects is processed (including in the context of international arbitration).

E. What Obligations Apply?

Whenever Personal Arbitral Data is processed by an Arbitral Data Custodian falling within the reach of the GDPR, the mandatory rules of the GDPR apply. This means that if a party has undertaken the analysis set forth above and has decided that in the context of the arbitration, it will be processing Personal Arbitral Data in a manner covered by the GDPR, the next question is what rules apply to the processing of that data. The discussion in this sub-Section focuses on the nature of the applicable legal framework, the practical impact of which is addressed in the next Section of this Article.

1. Controllers Versus Processors

The primary obligation for compliance with the GDPR rests on the controller of the Personal Arbitral Data, which is defined by the GDPR as “the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the

Union by a controller or processor not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- (b) the monitoring of their behavior as far as their behavior takes place within the Union.

See id, art. 3, at 32-33.

97. See GDPR, supra note 2, arts. 1-3, at 32-33.

98. See supra Part IV.
purposes and means of the processing of personal data.” 99 WP29 has clarified that “the first and foremost role of the concept of controller is to determine who shall be responsible for compliance with data protection rules, and how data subjects can exercise the rights in practice. In other words: to allocate responsibility. 100 This means that “it is most important to ensure that the responsibility for data processing is clearly defined and can be applied effectively.” 101

A data controller can also delegate the processing of the data under its control to a data “processor” which is defined as “a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.” 102 Under the GDPR, data controllers can only engage data processors who commit to complying with its terms in an enforceable agreement in the manner established in the GDPR. 103 These agreements must “set out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller,” and shall “stipulate, in particular, that the processor processes the personal data only on documented instructions from the controller.” 104

Both the data controller and the data processor are liable for compliance with the GDPR, but the data processor’s liability is more limited because it is acting at the behest of the data controller. Given the complexity of modern data processing arrangements, the GDPR also provides for joint controllers of data when more than one entity jointly determines the purpose and means by which the data is to be processed. 105 In cases of joint control, the GDPR requires the joint controllers to enter into a transparent arrangement allocating the compliance obligations and to inform the data subject thereof. 106 Furthermore, data subjects have an independent right of action against each joint controller. 107

99. GDPR, supra note 2, art. 4(7), at 33.
101. Id. at 7.
102. GDPR, supra note 2, art. 4(8), at 33.
103. See id., art. 28, at 49.
104. Id., art. 28(3), at 49.
105. See id., art. 26(1), at 48.
106. See id., art. 26(1), at 48.
107. See id., art 26(3), at 48.
Considering the stringent obligations imposed by the GDPR on data controllers, there may be a tendency towards increased use of data processing agreements. However, this will only be possible when the nature of the activity supports its characterization as “processing” and where the data controller is willing to accept the increased risk created by taking responsibility for the actions of the data processor. Both the GDPR and relevant case law make clear that even if a data processing agreement complying with the terms of the GDPR is in place, the facts could outweigh that agreement, particularly where the facts support a finding that the data processor determined the purpose for all or part of the processing.108

2. General Application to International Arbitration

As set forth above, the GDPR establishes that the controller of the Personal Arbitral Data exchanged during an arbitration is the entity or individual that either alone or with others has the ability to “determine” the “purpose and means” of the processing of Personal Arbitral Data. 109 When applying these concepts, it is important to recall that it is the ability to determine the purpose and means of the processing itself that is determinative.110 The question is who decides why and how the Personal Arbitral Data is processed in order to undertake its role in the arbitral process, whether it be as a party, a data analyst or lawyer doing an electronic data review to retrieve relevant evidence, counsel preparing a memorial, an independent expert writing a report, a tribunal preparing the award, or an arbitral institution reviewing the award. WP29 has explained that the capacity to “determine” the ways and means of data processing:

would usually stem from an analysis of the factual elements or circumstances of the case: one should look at the specific processing operations in question and understand who determines them, by replying in a first stage to the questions ‘why is this processing taking place? Who initiated it?’ Being a controller is primarily the consequence of the factual circumstance that an entity has chosen to process personal data for its own purposes.111

108. Controller Opinion, supra note 100 at 11.
109. GDPR, supra note 2, art. 4(7)
110. See id.
111. See Controller Opinion, supra note 100, at 8 (emphasis in original).
Further, “the concept of controller is a functional concept, intended to allocate responsibilities where the factual influence is, and thus based on a factual rather than a formal analysis.”112

Absent data processing agreements, for purposes of the GDPR, as discussed in detail in the following Section of this Article,113 all Arbitral Data Custodians are likely to be considered data controllers both because such control is inherent in their function as counsel, expert, arbitral institution, or arbitrator, and because, as a matter of fact, they “determine” the “purpose and means” by which the Personal Arbitral Data is processed in order to perform that function. Arbitral Data Custodians may be able to alter this designation by entering into data processing agreements in certain contexts, but avoiding controller status will be difficult to achieve given the nature of the arbitral process (except for certain data analysts and potentially lawyers performing that function). This means that in arbitrations covered by the GDPR there likely will be a number of different data controllers each with overlapping obligations (for example to provide data privacy notices) and individual legal liability for each controller for failure to comply with these duties.114 For arbitration to be efficient, these overlapping rights and duties will need to be allocated amongst the party that first collected the data during its business operations or from employees, typically a party to the dispute (referred to as the “Initial Data Controller”), and the secondary data controllers in a data protection protocol or other legal instrument (such as is foreseen by the GDPR for joint controllers).

F. Principles Applicable to Data Processing

The GDPR requires the data controller to “implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation.”115 These measures should take into account “the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons.”116 This extent to which this risk-based approach may

112. Id. at 9 (emphasis in original).
113. See supra Section IV.C.1.
114. GDPR, supra note 2, art. 83, at 82.
115. Id., art. 24 (1), at 47.
116. Id.
be applied to limit the types of measures that must be employed remains unclear. The text would indicate that the measures adopted should be proportionate to the risk, however, WP29 has clarified that the data subject rights must always be adequately protected regardless of the degree of the risk however, the controller’s accountability obligation may vary – “for example where processing is small scale, simple and low risk.”117 In other words, according to WP29, it seems that the data protection measures must always be adequate to protect the data subjects rights, but the means of documenting compliance can be more limited depending on the risk.118 It remains to be seen how this will be applied in practice under the GDPR.

The GDPR establishes the following principles applicable to the processing of personal data covered by its terms:

(a) [P]rocessed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);

(b) [C]ollected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes (so-called “secondary processing”);

(c) [A]dequate, relevant, and limited to what is necessary in relation to the purposes for which the data is processed (“data minimization”);

(d) Accurate and, where necessary, kept up to date;

(e) Kept in a form that permits identification of data subjects for no longer than necessary given the purposes for which the personal data is processed (which limits data retention);

(f) Processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures.119

118. Id.
119. See GDPR, supra note 2, art. 5(1), at 35-36.
Data controllers are “responsible for, and must be able to demonstrate compliance with,” these principles. The GDPR contains no exemptions from these basic principles.

The GDPR establishes stricter rules for the processing of “special categories” of personal data (previously referred to in the DP Directive as “sensitive data”). Special categories of data are those that reveal “racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.” The processing of this data is expressly prohibited except in certain limited circumstances, including where “processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.” Hence “special categories” of data may be processed during an arbitration when “necessary for the establishment, exercise or defense of the claims.” The meaning of necessary in this context is not defined in the GDPR nor is guidance given about how it might be applied.

G. When Processing Personal Arbitral Data Is Lawful

Under the approach adopted by the GDPR, all processing of personal data is prohibited unless it is expressly allowed. Although counterintuitive in a digital world, this is the way the GDPR and the DP Directive operate. Article 6 of the GDPR provides that:

Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

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120. Id., art. 5(2), at 36.
121. See id., art. 23 at 46-47.
122. Id. art. 9(1), at 38.
123. Id. art. 9(2)(f), at 38.
124. Id., art. 24, at 47.
(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.125

The Disclosure Guidelines expressly address the lawfulness of data processing for disclosure purposes, among other things. Although not directly on point because they address discovery for US civil litigation, rather than international arbitration, and they were issued under the DP Directive rather than the GDPR, they provide useful guidance on this and other issues.126 The Disclosure Guidelines recognized the tension between compliance with EU data protection laws and disclosure obligations and further that parties “have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought.”127 With respect to when data may be lawfully processed for purposes of disclosure, the Disclosure Guidelines considered that data processing for disclosure purposes is potentially lawful only when one of three of the exceptions listed in Article 6 of the GDPR is applicable (which were also lawful bases under the DP Directive), namely, the data subject gives consent, the disclosure is necessary for compliance with a legal obligation, or the disclosure is necessary for the legitimate interests of the controller.128 Note that the legal claims exemption does not constitute a lawful basis for processing under either the DP Directive

125. Id., art. 6(1), at 36.
126. See generally Disclosure Guidelines, supra note 75.
127. Id. at 2.
128. See GDPR, supra note 2, arts. 6(a), (d) and (f), at 36-37. Although arbitration is creature of contract, the arbitration agreement is not typically with the data subject whose personal data is included in the Personal Arbitral Data provided by a party to the arbitration. Rather, the agreement to arbitrate is usually between the data subject’s employer or business partner, etc., and a third party. Provisions (b) and (c) allowing processing in the context of contractual arrangement would therefore usually not apply to data processing in an arbitration. See GDPR, supra note 2, arts. 6 (b)-(c), at 36.
or the GDPR, although it has been added as a lawful basis for transfer under the GDPR (and query how one could transfer without processing).  

1. Consent

The Disclosure Guidelines recognized that consent is a lawful basis for data processing under the DP Directive, but took the view that consent alone should not be considered lawful grounds for transferring EU data to the United States for the purposes of litigation unless the controller can produce:

[C]lear evidence of the data subject’s consent in any particular case and may [also] be required to demonstrate that the data subject was informed as required. If the personal data sought is that of a third party, for example, a customer, it is at present unlikely that the controller would be able to demonstrate that the subject was properly informed and received notification of the processing.

Similarly, valid consent means that the data subject must have a real opportunity to withhold his consent without suffering any penalty, or to withdraw it subsequently if s/he changes his or her mind. This can be particularly relevant if it is employee’s consent that is being sought. As the Article 29 Working Party states in its paper on the interpretation of Article 26(1) of the DP Directive: “relying on consent may . . . prove to be a ‘false good solution’, simple at first glance but in reality complex and cumbersome.”  

The Working Party does recognize that there may be situations where the individual is aware of, or even involved in the litigation process and his or her consent may properly be relied upon as a ground for processing.

This would seem to mean that individuals who are closely involved in the arbitration (for example senior executives engaged in the underlying transaction that is the subject of the arbitration and potentially other witnesses) sometimes may be able to give valid consent. However, this would be a factual determination and highly fact specific. Furthermore, the GDPR clarifies that consent must be as

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129. See GDPR, supra note 2, art. 49 (1) (e), at 64-65.
131. See supra Section III (introduction) discussing the Disclosure Guidelines, supra note 75, at 8.
easy to withdraw as to give,\textsuperscript{132} which limits its usefulness as a basis for data processing in international arbitration because once the documents have been relied upon they cannot simply be withdrawn.

2. Necessary for Compliance with Legal Obligation

The Disclosure Guidelines clarified, which is now enshrined in the GDPR, that the need to comply with a legal obligation only legalizes data processing where the legal obligation is created under Member State law, not third country law. Further, this only applies where the data transfer is required to comply with such a legal obligation, which would not include a tribunal order to produce documents.\textsuperscript{133} This means that this ground for lawful processing typically would not apply to international arbitration except perhaps in rare circumstances.

3. Legitimate Interest

The Disclosure Guidelines take the view that the legitimate interests\textsuperscript{134} of the controller or a third party could support the lawfulness of data processing for disclosure purposes, if this interest is not overridden by the interests or fundamental rights and freedoms of the data subject. WP29 has explained as follows:

Clearly the interests of justice would be served by not unnecessarily limiting the ability of an organization to act to promote or defend a legal right. The aim of the discovery process is the preservation and production of information that is potentially relevant to the litigation. The aim is to provide each party with access to such relevant information as is necessary to support its claim or defence, with the goal of providing for fairness in the proceedings and reaching a just outcome.

\textsuperscript{132} See GDPR, supra note 2, art. 7(3), at 37.

\textsuperscript{133} See Disclosure Guidelines, supra note 75, at 9.

\textsuperscript{134} GDPR, supra note 2, recital 47, at 12 (stating that a “legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing.”)
Against these aims have to be weighed the rights and freedoms of
the data subject who has no direct involvement in the litigation
process and whose involvement is by virtue of the fact that his
personal data is held by one of the litigating parties and is
deemed relevant to the issues in hand, e.g. employees and
customers.

This balance of interest test should take into account issues of
proportionality, the relevance of the personal data to the litigation
and the consequences for the data subject. Adequate safeguards
would also have to be put in place and in particular, there must be
recognition for the rights of the data subject to object [to the
processing . . . ] and, in the absence of national legislation
providing otherwise, there are compelling legitimate grounds
relating to the data subject’s particular situation.

As a first step controllers should restrict disclosure if possible to
anonimised or at least pseudonymised data. After filtering
(“culling”) the irrelevant data – possibly by a trusted third party
in the European Union – a much more limited set of personal
data may be disclosed as a second step.\(^\text{135}\)

The principles established in the Disclosure Guidelines for the
lawfulness of data processing for litigation discovery are likely be
applied to the lawfulness of data processing for arbitration, but taking
into account the consensual nature of arbitration and any
confidentiality provisions. These principles established by the
Disclosure Guideline support the lawfulness of the processing under
the legitimate interest standard provided the data being processed
during the arbitration is proportional, relevant, and adequate
safeguards are put in place to protect the data subject, including
culling data before disclosure and where possible anonymizing or
pseudonymizing the data. This argues in favor of limiting the amount
of data being processed in order to comply with this guidance.

H. When Personal Arbitral Data Can Be Lawfully Transferred
Outside the European Union

The GDPR prohibits transfers of personal data to third countries
unless this is expressly allowed by the GDPR. The GDPR establishes
rules allowing third country data transfers where:

\(^{135}\) See Disclosure Guidelines, supra note 75, at 9-10.
(1) a tribunal has ordered the disclosure of documents under a treaty,
(2) the country has been deemed to provide adequate protections (including the US privacy shield),
(3) the controller or processor has put in place “appropriate safeguards” to protect the data in one of the means expressly prescribed by the GDPR, or
(4) one of a list of specified derogations apply, including where the processing is “necessary for the establishment, exercise or defence of legal claims.” 136

Furthermore, regardless of the means employed by a party to transfer personal data out of the European Union, the recipient of the data must be required by law or by agreement to apply adequate protections, including the main principles of the GDPR, to the data after it is transferred.137

1. Transfers Ordered by Tribunals

With respect to transfers of data ordered by a tribunal, the GDPR provides that:

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer.” 138

The GDPR is therefore clear that if the data transfer order is not based on an international treaty, this provision does not apply. Given the lack of an applicable legal instrument for data transfers in support of arbitration, this provision will not apply in international arbitrations except in rare circumstances. Data transfer to third countries in support of arbitration will therefore need to fall under one of the other categories of data transfers generally permitted.

136. See GDPR, supra note 2, arts. 45-49, at 61-65
137. See id., art. 44 at 60.
138. Id., art. 48, at 64 (emphasis added).
2. General Third Country Transfer Restrictions

WP29 has explained that the exceptions allowing data transfers follow a cascade approach. Where there is an adequacy decision allowing data transfers to that country, this will apply. When data is to be transferred to a country without an adequacy decision, one of the expressly listed “adequate safeguards,” should be put in place where feasible, rather than reliance on a derogation. The derogations therefore should be relied upon only when there is no adequacy decision and adequate safeguards are not feasible. Lastly, only when the express derogations are not applicable, may a party rely on its “legitimate interests” as a basis for transfer.

The first question is therefore whether the third country to which data would be transferred has been found to have an adequate level of protection. An adequacy decision is when the European Union has decided based on established set of criteria that a country’s data protection laws are adequate, which allows data to be transferred without any further authorization or notice because adequate protections apply as a matter of law. Applying this standard, the European Union has issued favorable adequacy decisions allowing free data transfers to a number of countries, including to the United States where the entity has signed up to the Privacy Shield (only) and Canada for commercial organizations (only). Where data is to be transferred to a country without an adequacy decision, including to the United States unless the recipient has signed up to the Privacy Shield, the GDPR allows third country data transfers where “appropriate safeguards” are put in place by the controller or processor to ensure protection of the data through a series of mechanisms, including:

(1) Binding corporate rules, which establish a binding code of conduct for a group of companies or a group of

139. See Article 26 Interpretation, supra note 130, at 4-10.
140. Id.
141. See GDPR, supra note 2, art. 45, at 61.
142. See id., art. 45 (3) at 61.
143. See GDPR, supra note 2, art. 45(1), at 61. The European Union considers that the data protection laws of Andorra, Argentina, Canada (commercial organizations only), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, United States (privacy shield only), and Uruguay are adequate. Japan and South Korea are in the process of adequacy discussions as part of their trade deals with the European Union. See Commission Communication, supra note 49 at 7.
144. See GDPR, supra note 2, art. 46(1), at 62.
companies engaged in a joint economic activity that they will comply with an approved set of data protection rules;\textsuperscript{145} (2) Verbatim adoption of standard contractual clauses that have previously been approved by the European Commission;\textsuperscript{146} (3) Binding commitments to adhere to approved codes of conduct or certifications; or (4) \textit{Ad hoc} contractual arrangements between the EU transferor and the third country recipient of the data that have been approved by a concerned supervisory authority.\textsuperscript{147}

The GDPR then establishes the approval methods and other procedural safeguards applicable to each mechanism, which vary.\textsuperscript{148} To date under the DP Directive, these approval mechanisms have been time consuming and expensive, although the European Commission has issued assurances that this will improve under the GDPR.\textsuperscript{149}

WP29 recognized that in the context of litigation, adequate safeguards may not be feasible, but safeguards are the preferred route when they are. Where putting adequate safeguards in place is not feasible, the GDPR contains a list of seven derogations where data can permissibly be transferred without an adequacy decision or appropriate safeguards, namely:

(a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfer for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject’s request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

\begin{flushleft}
\textsuperscript{145} See \textit{id.}, arts. 46-47, at 62-63.  \\
\textsuperscript{146} See \textit{id.}, arts. 46, 93(2), at 69, 95.  \\
\textsuperscript{147} See \textit{id.}, arts. 46, 93(2), at 69, 86.  \\
\textsuperscript{148} See \textit{id.}, arts. 45-49, at 61-65.  \\
\textsuperscript{149} See 2018 Communication, \textit{supra} note 26.
\end{flushleft}
(d) the transfer is necessary for important reasons of public interest;
(e) the transfer is necessary for the establishment, exercise or defence of legal claims;
(f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
(g) the transfer is made from a [public] register. 150

The GDPR therefore contains a derogation provision that expressly allows data transfers to third countries where the transfer is “necessary for the establishment, exercise or defence of legal claims.”151 Further, as discussed above,152 although the language is somewhat opaque, Recital 111 of the GDPR expressly states that the reference to a legal claim applies “regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies.”153 This will therefore form a possible basis for third country data transfers of data “necessary for the establishment, exercise or defence of legal claims” in international arbitrations.

Furthermore, where a transfer “could not” be based either on an adequacy decision, an adequate safeguard, or one of the specific seven derogations listed above, the GDPR also allows:

transfer to a third country or an international organisation . . . only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights of the data subject and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall [also] . . . inform the data subject of the transfer and of the compelling legitimate interests pursued.154

150. See GDPR, supra note 2, art. 49(1), at 64 (emphasis added).
151. Id., art. 49(1)(e), at 64.
152. See infra Section III (introduction).
153. See GDPR, supra note 2, recital 111, at 21.
154. Id., art. 49, at 71.
However, because the GDPR expressly allows transfers that are necessary for the establishment, exercise, or defense of a legal claim, which would apply to certain aspects of an arbitration, the general derogation for legitimate interests would usually not be applicable to data transfers in arbitration (although it could be relied upon for data not covered by the legal claims exemption). Furthermore, because the legitimate interest derogation for third country transfers requires notification of the transfer to a supervisory authority and to the data subject and the derogation for legal claims does not, Arbitral Data Custodians are more likely to rely upon the legal claims derogation where applicable.

The GDPR provides generally that all third country transfer provisions “shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.” WP29 has reiterated that even when a derogation is relied on for transfer, safeguards must be put in place to ensure that the processing is carried out with an adequate level of protection and the data subject rights are not circumscribed. Further, advance notice of the transfer should be given to the data subject at least when the transfer is undertaken pursuant to the legitimate interest standard.

As discussed below, in the context of an arbitration, these safeguards would be based on party agreement where possible, but also would need to be agreed to by the tribunal and the institution with respect to the Personal Arbitral Data they process or transfer cross border. This is likely to be done by agreement of the parties and set forth in a data protection protocol that is implemented through a stipulation or tribunal order signed by everyone receiving Personal Arbitral Data during the course of the arbitration. Among other things, the data protection protocol should set forth the basic standards applied to all parties in the process and establish responsibilities for compliance among Initial Data Controllers and secondary controllers.

155. Id., art. 44, at 60.
156. See Article 26 Interpretation, supra note 130, at 9; GDPR, supra note 2, art. 44, at 60.
157. See GDPR, supra note 2, art. 13(1)(f), at 46; art. 14(1)(f), at 47; art. 49 (1) at 71.
158. See infra Section IV.C.
IV. PRACTICAL IMPACT OF THE GDPR ON THE ARBITRAL PROCESS

Multinational companies today have data protection policies and systems in place. However, the possible application of the GDPR’s data protection policies to future arbitral disputes was usually not the first consideration when those policies were formulated. Further, the individuals charged with deciding the dispute resolution systems to be employed by the company were rarely focused on how the data protection rules could impact a later arbitration or other legal proceeding. This lack of alignment can lead to unwelcome surprises.

Although the relevant data set reviewed for an international commercial arbitration is typically smaller in international arbitration than it would be in US litigation, in major arbitration cases the amount of data collected and reviewed is significant. This data set is typically collected or assessed voluntarily by the party bringing the claim, before any claim is brought, and is much larger than the data that is used in the arbitration. Where it applies, the GDPR will need to be complied with respect to the processing of all this data.

The issues raised by the document review typically undertaken in a complex international arbitration are not unique, and the principles that have been adopted to deal with these issues when they arise in civil litigation are relevant to international arbitration. However, in the litigation context, these issues have typically arisen mainly in relation to common law litigation, usually in the United States. This is because European civil law systems are typically not document-intensive and do not require significant document disclosure. As others have rightly pointed out, this means that the provisions of the European data protection law are not tailored for the document-intensive nature of today’s typical complex international arbitration process and the principles are not always easy to reconcile. Indeed, while the GDPR expressly addresses the legal obligations imposed by Member State law and excludes its application to Member State judicial proceedings, it expressly refers to “out-of-court procedures” only twice, both times in recitals only, and with no explanation of what this covers or what rules would apply. Hence, until the supervisory authorities, EDPB, the Member

159. Burianski & Reindl, supra note 15, at 188.
160. See id. at 199; KUNER & COOPER, supra note 13, at Sections 4.86-4.89, 146-147.
States or the EU provide guidance, the GDPR will be applied to arbitration on an *ad hoc* basis, which creates significant uncertainty about how it will impact arbitral proceedings.

This Section of the Article will consider the potential practical impact of the GDPR on international arbitration. It is divided into three subsections according to the time-line of a potential arbitration. Subsection A addresses the issues that arise before any dispute is raised in putting in place data protection policies that are consistent with international arbitration. Subsection B addresses the data protection implications during the second stage of the arbitral process when the dispute has arisen but before the arbitral tribunal has been appointed. Subsection C addresses how data protection rules may impact the arbitration itself after the tribunal has been appointed, including what data protection rules may apply, the adoption of data protection protocols, and the impact of data protection on disclosure. Appendix A to this Article contains a list of some of the questions that the parties and their counsel may consider asking themselves in planning for the arbitration during stages one and two. Appendix B includes a list of some of the questions that Arbitral Data Custodians could consider during the arbitration. Appendix C includes a sample protocol addressing data protection in the context of US discovery that was developed by the Sedona Conference. Appendix D provides a proposed template of a data protection protocol for arbitrators and the parties to address data protection compliance in international commercial arbitration cases where the GDPR applies (hereinafter “*ARBITRAL DATA PROTECTION PROTOCOL*”). The issues addressed herein and included in the Appendixes are not intended to be exhaustive.

### A. Pre-Dispute Framework

This subsection of the Article addresses the issues that arise before any dispute is raised in putting in place data protection policies that are consistent with international arbitration. Companies subject to the GDPR are currently in the process of constructing and executing a path for compliance with its terms at significant expense, potentially including dispute resolution. From the outset, the individuals tasked with GDPR compliance should work with the in-house and external counsel to consider whether, and if so, how, the GDPR could impact arbitration agreements and existing and future international arbitrations. Where the GDPR is applicable, this includes building
means into the arbitration for ensuring compliance during the arbitral process in a manner that is proportionate to the risk and does not infringe on the due process rights of the parties. 161

Companies subject to the GDPR that are likely to be engaged in international arbitration should state in their data protection policies that personal data may be processed during future dispute resolution procedures and providing the legal basis for that processing. If it is possible that the personal data will be transferred outside the European Union as part of the dispute resolution process, this should be included in the policy. The information must be provided to the data subject in a concise, transparent, intelligible, and easily accessible form, using clear and plain language.162 The GDPR states in this context that “the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data.” 163

1. Secondary Processing for Arbitration

Most of the Personal Arbitral Data presented during an arbitration will have originally been collected in the context of an employment or business relationship and its original purpose was to fulfill those functions. Now a dispute has arisen, and the issue is whether that data can be processed in the arbitration. This is often referred to as secondary processing and the rules applicable thereto apply.

The GDPR provides in Article 5 that personal data must be processed “in a transparent manner in relation to the data subject” 164 and must be “collected only for specific, explicit and legitimate purposes and may not be further processed in a manner that is inconsistent with those purposes.” Article 6 allows secondary processing for purposes that are “compatible” with the original purpose.165 In deciding whether the purpose is compatible, the following is to be considered:

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161. See generally GDPR, supra note 2, art. 25 at 55.
162. Id., art. Art. 12, at 39.
163. Id., recital 39, at 7.
164. Id., art 5 (1) and (b), at 35.
165. Id., art. 6(4), at 37.
(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
(c) the nature of the personal data, in particular whether special categories of personal data are processed . . . or whether personal data related to criminal convictions and offences are processed;
(d) the possible consequences of the intended further processing for data subjects;
(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.\(^{166}\)

This is a highly case and fact specific analysis. For example, the use of employee and business-related information in an arbitration of a claim in which the data subject’s actions are at issue would often be linked to the purpose for which the data was collected, and, depending on the employee’s role, expected in the context in which it was collected. In making this determination, although not determinative, it is helpful that the data subject was informed in advance of the possibility that his or her personal data could be used in a later dispute resolution procedure, and preferably have consented.

2. Data Retention for Future Disputes

Data retention is considered “processing” under the GDPR.\(^{167}\) The GDPR requires controllers to set retention periods at the time of data collection with the goal of minimizing the data being processed.\(^{168}\) However, retention is an area where it is potentially difficult to reconcile the requirements of the GDPR with those of international arbitration. Concerning data retention for US litigation, WP29 stated in the Disclosure Guidelines issued under the DP Directive that:

Various issues are raised in relation to retention . . . . It is unlikely that the data subjects would have been informed that their personal data could be the subject of litigation whether in their own country or in another jurisdiction. Similar to the

\(^{166}\) Id.
\(^{167}\) See art. 5 (1) (e) at 36; Disclosure Guidelines, supra note 75, at 7-8.
\(^{168}\) See GDPR supra note 2, art. 5 (1) (b), (c) and (e) at 35-36.
different time limits for bringing claims in different countries, it is not possible to provide for a particular period for retention of data.

Controllers in the European Union have no legal ground to store personal data at random for an unlimited period of time because of the possibility of litigation in the United States however remote this may be. The US rules on civil procedure only require the disclosure of existing information. If the controller has a clear policy on records management which provides for short retention periods based on local legal requirements it will not be found at fault with US law. It should be noted that even in the United States there has recently been a tendency to adopt restrictive retention policies to reduce the likelihood of discovery requests.

If on the other hand the personal data is relevant and to be used in a specific or imminent litigation process, it should be retained until the conclusion of the proceedings and any period allowed for an appeal in the particular case. Spoliation of evidence may lead to severe procedural and other sanctions.

There may be a requirement for “litigation hold” or pre-emptive retention of information, including personal data. In effect this is the suspension of the company’s retention and destruction policies for documents which may be relevant to the legal claim that has been filed at court or where it is “reasonably anticipated”.

There may however be a further difficulty where the information is required for additional pending litigation or where future litigation is reasonably foreseeable. The mere or unsubstantiated possibility that an action may be brought before the U.S. courts is not sufficient.

Although in the US the storage of personal data for litigation hold is not considered to be processing, under Directive 95/46 any retention, preservation, or archiving of data for such purposes would amount to processing. Any such retention of data for purposes of future litigation may only justified under Article 7(c) or 7(f) of Directive 95/46.169

This language implies that the need to have access to data for a later arbitration may not be a sufficient basis on its own to retain data longer than is otherwise reasonable. On the other hand, an arbitration can take place long after the disputed facts occurred and the decision-

making based on those facts may be significantly hindered if contemporaneous data is not available about the factual context in which the dispute arose. Data retention therefore will be an area where it is important for the data protection team to have detailed input from the legal department and external counsel before establishing the retention policies, as balances may have to be struck.

3. Consent to Processing for Future Disputes

When possible, companies likely to be engaged in international arbitrations should consider having data subjects give express “freely given, specific, informed, unambiguous,”170 consent to the processing of his or her data for the purpose of future disputes. This consent should include a complete, understandable description of the potential data protection risks this could entail. If future disputes could involve the transfer of data to third countries, this should be expressly explained in the data protection policy or agreement along with a description of the potential risks that could be raised. When possible, consent should be obtained before any business, contractual or employment relationship is formed, because this increases the chances that consent will be considered freely given.171

As discussed above,172 the processing of Personal Arbitral Data requires a legal basis, one of which is consent. WP29 has stated that consent is unlikely to be a sufficient basis for large-scale processing of personal data during litigation,173 and this rationale is likely to be applied to international arbitration. However, depending on the facts of this dispute, WP29 also left the door open that for the key players in a dispute, consent may be effective, especially when they are somehow involved in the proceeding, although this consent can always be withdrawn. Furthermore, even when consent does not on its own provide a sufficient basis under the GDPR for processing or transfer, consent is helpful to have when applying the other principles contained in the GDPR to arbitration.174

170. GDPR, supra note 2, recital 32, at 6.
171. See Disclosure Guidelines, supra note 75, at 7-8.
172. See supra Section III.G.
174. Id.
4. Contractual Arrangements and Arbitration Agreements

Companies and other entities subject to the GDPR are currently in the process of reviewing their agreements to insure compliance. In undertaking that review, companies should consider revisiting how the GDPR affects their existing dispute resolution provisions. Furthermore, consideration should be given in the future to how the GDPR affects dispute resolution obligations in crafting both the underlying agreements and the arbitration agreement.

Where data needs to be transferred outside the European Union during an international arbitration, (for example, because a counterparty or the arbitral institution is not based in the European Union, the arbitration is seated outside the European Union, or an arbitrator or counsel is based outside the European Union or travels outside the European Union and requires access to documents), the first question to be considered is where the data would be transferred and whether the European Union has made an adequacy finding with respect to that country or whether the transferee has signed up to the Privacy Shield in the United States.\textsuperscript{175} If that is not the case, an increasing number of agreements will contain express provisions addressing data protection obligations either in the form of the standard contract clauses already approved by the European Commission or on an ad hoc basis approved by a competent supervisory authority. If properly crafted, these can be relied upon to transfer Personal Arbitral Data to the counterparty and potentially others if they agree to comply with them.

With respect to the dispute resolution provisions, the parties to an agreement should undertake a data mapping exercise to consider whether any Personal Arbitral Data covered by relevant data protection regimes, including the GDPR, is likely to be exchanged during the arbitration, and, if so, how this affects the potential dispute resolution options and whether this should be reflected in the arbitration agreement. Although third country transfer should be possible for the reasons outlined above, avoiding the additional time, cost, and restrictions this entails may lead EU companies that will need to exchange Personal Arbitral Data to use GDPR compliance risk as a basis to insist on arbitration being seated in the European Union and subject to the rules of an institution established either in

\textsuperscript{175} GDPR \textit{supra} note 2, art. 45, at 68.
the European Union or in a third country with an adequacy decision.\textsuperscript{176}

Concerning important arbitration centers outside the European Union, Switzerland has an adequacy decision.\textsuperscript{177} Although it remains to be seen, after Brexit it is expected that a system will be put in place to allow free data transfers to the United Kingdom, which means that arbitrators based in London and arbitration in the United Kingdom (including the London Court of International Arbitration) are likely to be covered in some way.\textsuperscript{178} Notably, no major Asian arbitral institution is based in a country with an adequacy decision, although New Zealand has an adequacy decision in place and Japan and Korea are currently undertaking adequacy discussions with the European Union as part of their trade deals.\textsuperscript{179} Many Asian institutions, including the Hong Kong and Singapore International Arbitration Centers, are based in jurisdictions with data protection regimes, but unfortunately those countries have yet to receive an adequacy decision.

In addition to location, parties should consider including provisions in their arbitration clauses expressly addressing data protection at least generally. For example, in an appropriate agreement a clause could be added providing that:

\begin{quote}
The Parties agree to apply, and that the tribunal and the institution shall apply, mandatory data protection obligations during the arbitration in a manner that is proportionate to the risk and that adequately protects data subject rights, while preserving the parties’ due process rights.
\end{quote}

This type of general language may be useful in guiding the parties, counsel, the tribunal and the arbitral institution if data protection issues arise during the course of the arbitration.

\textbf{B. Commencing the Arbitration}

This subsection of the Article addresses the data protection implications during the second stage of the arbitral process when the

\begin{enumerate}
\item \textsuperscript{176} See supra at Section III.H.2.
\item \textsuperscript{177} See supra note 143.
\item \textsuperscript{179} See Commission Communication, supra note 49, at 8.
\end{enumerate}
dispute has arisen but before the arbitral tribunal has been appointed. This includes the importance of including the data protection team in planning the arbitration process, data mapping to determine the applicable data protection rules and how they will be enforced, retaining and consulting with external counsel, drafting the arbitration notice, and selecting the arbitrator. Data protection considerations have the potential to impact each of these pre-arbitration steps.

1. Consulting with the Data Protection Compliance Team

The GDPR imposes detailed obligations on companies not only to comply with its provisions but also to be able to demonstrate compliance. This includes documenting the decisions that are taken to ensure GDPR compliance and the rationale for those decisions. SMEs are exempted from some of the more strenuous documentation requirements, and Member States are encouraged to take the needs of SMEs into account when enforcing the GDPR, but SMEs still need to be able to show that reasonable and proportionate compliance efforts were undertaken to comply.

Many companies have or will appoint an independent and autonomous DPO either because they are required to or will did so voluntarily. If a DPO has been appointed, the detailed rules established in the GDPR for consultation with the DPO apply. Thus, if a company has a DPO, that person should be the first stop when arbitration is contemplated. WP29 has issued guidelines on DPOs, which are useful to review in understanding their intended function.

The GDPR also requires the preparation of a data protection impact assessment (“DPIA”) for certain types of high risk processing. Absent specific risks, it is unlikely that a DPIA will be required for a typical international commercial arbitration. Nonetheless, this should be considered as part of the documentation of compliance and it is expected that companies may use DPIAs as a

180. See GDPR, supra note 2, art. 5(2), at 39.
181. See id., art. 30, at 57.
182. See id., art. 30 (5), at 58.
183. See id., art. 37, at 62.
184. See id., art. 39, at 63.
186. See GDPR, supra note 2, art. 35, at 60.
means of limiting their exposure even when they are not required by the GDPR.

As a practical matter, this means that from the moment that a dispute starts to percolate where personal data covered by the GDPR may be impacted, in-house counsel responsible for the arbitration will be required to work with the GDPR compliance team to undertake steps to ensure that data protection principles are properly taken into consideration when developing the arbitral process and to document what decisions are taken and why. This will be uncharted territory in many companies and differences of view may be exacerbated as the individuals responsible for dispute resolution and data protection and will each consider their needs to be paramount (i.e. winning the arbitration versus avoiding potentially serious compliance risk). Given the attention the GDPR is currently receiving, companies should be careful to not to lean too far in that direction in ways that will unnecessarily hamstring current and future arbitrations. The goal should be to comply with the GDPR, while at the same time ensuring that this does not unnecessarily impact the arbitral process.

2. Data Mapping

Early data mapping of where the data relevant to the dispute is located and where it needs to move is essential to data protection compliance. The data protection and legal teams should work together on this process early on when drafting the arbitration agreement and later when a claim arises but before the arbitration is launched. This collaboration permits strategic long-term decisions to be made with respect to how and where data will be reviewed and transferred, which may impact their choices (including counsel, arbitrator, service providers). For example, the teams could employ creative solutions to allow data review from a data room or onsite. However creative solutions often require early thinking and planning, which favors prompt consideration of these issues.

3. Engaging External Counsel

When disputes arise in a relationship that is subject to an arbitration agreement, companies typically consult with external counsel at an early stage in the dispute resolution process. The selection of external counsel is another area where in the future GDPR compliance may become relevant. Exchanging Personal
Arbitral Data with external counsel is covered by the GDPR, which means, for example, that when Personal Arbitral Data is transferred to a third country for purposes of instructing counsel, the transfer must satisfy one of the criteria allowing for transfer discussed above.\textsuperscript{187}

Major international law firms will usually have systems in place allowing such transfer (but this is not necessarily the case) and may not be true of smaller or local firms. Moreover, it is easier and less costly for the application of the data protection rules if all the Arbitral Data Custodians have an establishment in the European Union or in a country with an adequacy decision (including the US Privacy Shield) because it will not be necessary to meet the requirements for third country data transfer. Furthermore, parties should be aware that if they voluntarily transfer Personal Arbitral Data out of the European Union, a tribunal may take this into account when deciding whether the data needs to be disclosed to the other side if data protection concerns about the transfer are raised during disclosure. Of course, this decision will depend on the details of each data transfer, but data transfers outside the European Union to countries without either an adequacy decision or adequate safeguards may weigh against prohibiting disclosure of data later in the arbitration due to data protection concerns relating to transfer. In a sense, a party may be considered to have waived the right to object.

4. Notice of Arbitration or Reply to Notice

If a party considers that the GDPR or other applicable data protection laws may have a major impact on the proceedings it may consider including this already in the Arbitration Notice or the Reply. This will put everyone on notice of these concerns early so that they can plan around them from the outset. This will also give credibility to the data protection concerns when they are raised later in the proceedings.

5. Selection of the Arbitrator

In the same way that data protection obligations could play a role in selection of counsel, if a party has serious concerns under the GDPR, it may consider appointing an arbitrator that is established in the European Union or a country with an adequacy decision. The

\textsuperscript{187} See \textit{infra} Section III.H.2.
recitals to the GDPR state that an establishment implies the effective and real exercise of activity through stable arrangements. The form of the arrangements, for example, whether they are carried out through a branch or a subsidiary, is not relevant. For these purposes, arbitrators from outside the European Union that are associated with an English chambers or other Member State entity, would likely be considered to have an establishment in the European Union for these purposes, particularly if they undertake their services for the arbitration through that chambers. While this would rarely be the deciding factor in an appointment, it might tip the balance between two similarly situated candidates in cases where the transfer of data is expected to be of critical importance.

C. Proceedings

This Section of the Article addresses how the data protection rules contained in the GDPR may impact the arbitration itself after the tribunal has been appointed, including what data protection rules apply, adoption of data protection protocols and the impact of data protection on disclosure. The question of what obligations apply to whom and for which data set is complicated during the arbitral process and is key to understanding the respective responsibilities under the GDPR. This Section of the Article addresses the following issues that may arise during an arbitral proceeding:

- Who controls the Personal Arbitral Data processed during an arbitration?
- What rules apply to the processing of Personal Arbitral Data?
- How will GDPR compliance impact the arbitral process and how can this be managed?

1. Who Controls the Personal Arbitral Data Processed During an Arbitration?

As already briefly discussed above, the obligations contained in the GDPR apply to all Arbitral Data Custodians who are either “controllers” or “processors” of the data. The result of this analysis is that most Arbitral Data Custodians will be considered data controllers subject to the terms of the GDPR, except to the limited extent they

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188. See infra Section III.E.
may be processors. The parties will typically be the original controllers of the Personal Arbitral Data for the primary purpose for which it was originally collected—doing business, as well as during the course of the arbitration (referred to as the “Initial Data Controllers”). Given the role played by counsel, experts, arbitrators, and the institution in a complex commercial arbitration there are likely to be multiple secondary controllers who engage in secondary processing of the data. The secondary Arbitral Data Custodians will be the controllers or processors only of the Personal Arbitral Data that they actually receive during the course of the arbitration for the secondary purpose of the arbitration itself. This means that the GDPR obligations applicable to them will be limited to the data they process during the course of the arbitration, whereas the Initial Data Controllers will typically control the entire data set.

These overlapping and potentially conflicting commitments of the Arbitral Data Custodians creates complexity and potential confusion in applying the GDPR to the Personal Arbitral Data processed during a complex international commercial arbitration. Interestingly, in the context of data security, WP29 in its Disclosure Guidelines seemed to differentiate the role of the Initial Data Controllers from counsel and other secondary controllers who process the data, but without providing further explanation or guidance as to how these overlapping roles interact. The following discussion will consider the status of each the Arbitral Data Custodians when they process Personal Arbitral Data during an arbitration.

a. Parties

In a typical arbitration, depending on whether one or both of the parties are covered by the GDPR or another data protection law, one or both of the parties will be the Initial Data Controllers of the Personal Arbitral Data under the GDPR. This is because the data will have been originally collected and processed in the context of the party’s business operations that are the subject of the arbitration and for which the party controlled the purpose and means of the original processing of the data typically in the context of a business or employee relationship. This means that the initial obligation for compliance with the GDPR in the context of an arbitration typically falls on the parties as the Initial Data Controllers.

189. Id.
b. External Counsel

The function of external counsel in an international arbitration is to represent the parties and to decide how to present their case based on the evidence, which typically includes Personal Arbitral Data. Counsel must determine how and why to process that data, which means that they will control the Personal Arbitral Data provided to them by the parties for the purposes of the GDPR. WP29 has taken this view expressly in the context of a barrister processing data in the course of representing a party based on the following reasoning, which could be applied equally to most Arbitral Data Custodians:

A barrister represents his/her client in court, and in relation to this mission, processes personal data related to the client’s case. The legal ground for making use of the necessary information is the client’s mandate. However, this mandate is not focused on processing data but on representation in court, for which activity such professions have traditionally their own legal basis. Such professions are therefore to be regarded as independent ‘controllers’ when processing data in the course of legally representing their clients.190

Similarly, WP29 has foreseen that accountants will typically be considered data controllers under the GDPR because of the nature of their duties, however, WP29 has also explained that accountants could also be considered processors when they are performing a specific data processing activity under the direction and control of the client.191 Following the same logic, legal counsel covered by the GDPR may try to limit their compliance obligations by entering into data processing agreements when they are asked to review large amounts of data in a function akin to that of the data analyst discussed below.192 However, limiting counsel’s obligations under the GDPR requires the law firm and the client to enter into a data processing agreement as set forth in the GDPR, which may be difficult given the nature of the attorney-client relationship and because of client resistance (although at the end it may be a question of cost and risk).

These issues are not easy to resolve, but counsel concerned about additional risk can reduce the amount of data that they review by having the parties conduct the initial data review and scrub the

190. Controller Opinion, supra note 100, at 28.
191. Id. at 29.
192. See infra Section IV.C.1.c.
data internally or by using data analysts. This limits the data being transferred to them, hence reducing their GDPR compliance risk, but at the same time relinquishes counsel’s control over the initial data review. This is happening anyway for cost reasons and as data review becomes increasingly sophisticated through the use of artificial intelligence, but data protection concerns may prove to be an additional driver towards the use of specialized data analysis and e-discovery services.

c. Data Analysts

A data analyst or other e-discovery professional typically processes data on behalf of either the party or its counsel. The use of data analysts is increasingly becoming the norm in conducting the initial data review to scrub and cull electronic data before it is provided to counsel. Using a data analyst requires a high degree of trust because the analyst will be responsible for reducing the data set provided to counsel and to the parties to review for the arbitration and potentially provide to opposing counsel.

A data analyst will typically be considered a “data processor” under the GDPR, rather than a controller, when it:

1. acts under the instruction of the party or the lawyer in undertaking its tasks,
2. does not decide the purpose of the data processing and,
3. is retained under a GDPR-compliant data processing agreement.

This is the view adopted by WP29 in the Disclosure Guidelines. However, there may be circumstances where the data analyst works so closely with the law firm or a party that the data analyst would properly be considered a “joint controller” under the GDPR. Furthermore, even if a data analyst is deemed to be a data processor, WP29 has taken the view in the context of the DP Directive:

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194. Id.
195. See generally Disclosure Guidelines, supra note 75.
196. See id.
The external service providers will also have to comply with the principles of the [DP] Directive. They shall ensure that the information is collected and processed in accordance with the principles of the Directive and that the information is only processed for the specific purposes for which it was collected. In particular they must abide by strict confidentiality obligations and communicate the information processed only to specific persons. They must also comply with the retention periods by which the data controller is bound. The data controller must also periodically verify compliance by external providers.\textsuperscript{197}

These principles are now enshrined in the GDPR.

d. Independent Experts

Parties to complex international commercial arbitrations often engage independent experts to address technical or quantum issues. To prepare their opinions, these experts typically require access to evidence, which will likely include Personal Arbitral Data. WP29 suggested in the context of the DP Directive that an expert in a litigation might act as a data processor.\textsuperscript{198} However, one wonders whether the defined limits on data processors would be consistent with the function of an independent expert. Similar to the barrister example given by WP29 that was discussed above,\textsuperscript{199} if the expert is processing the data to prepare an independent report, how could counsel or a party tell the independent expert the purpose or manner in which it could process the data to prepare that report while maintaining the expert’s independence? While it may be possible to construct such an arrangement, in principle this seems inconsistent with the role of an independent expert.

e. Arbitral Institution

The function of an arbitral institution is to administer arbitrations according to the institution’s rules and practices, which often require the parties to include the institution on communications exchanged with the tribunal, including all filings.\textsuperscript{200} The institution determines the purpose and means of the processing of the Personal Arbitral Data uncontrolled by either the parties or counsel; like the barrister in the

\textsuperscript{197} Id. at 13.
\textsuperscript{198} See Controller Opinion, supra note 100, at 13.
\textsuperscript{199} See supra Section IV.C.1.b.
\textsuperscript{200} See, e.g., London Court of International Arbitration Rules, art. 3.3 (2014).
example above, the arbitral institution is an independent entity and processes the data it receives for its own purposes. Thus, for purposes of the GDPR, the arbitral institution processes the data contained in those communications and filings, which in turn means that the institution is a controller of the Personal Arbitral Data under the GDPR.

While the arbitral institutions located in the European Union are expected to be prepared to comply with their obligations under the GDPR, this may be less true of arbitral institutions outside the European Union that may have direct or indirect compliance obligations when they process Personal Arbitral Data governed by the GDPR. Although many of those institutions are situated in jurisdictions with data protection regimes, it remains to be seen how this will operate in practice. Furthermore, even EU institutions may struggle with certain of the transfer, data transparency (potentially including data privacy notices), and other restrictions contained in the GDPR, particularly as those obligations apply to case work.

f. Arbitral Tribunal

It is inherent in the arbitral tribunal’s function that the arbitrators control the purpose and means by which they process the documents and evidence presented by the parties, which in turn means that they control the data they receive from the parties and the institution during the course of the arbitration. This means that the arbitrators are subject to the GDPR with respect to their activities that constitute the processing of Personal Arbitral Data. Further, the arbitrators will be required to comply with all the GDPR’s rules that have not been expressly exempted, including for example, data minimization, data transparency (potentially including data privacy notices), data transfer restrictions, cyber security, and respecting the data subjects others rights. Where not exempted by Member State Law, this raises serious concerns particularly, for example, where the data transparency requirements could be interpreted to require the disclosure of confidential communications among the tribunal members or between arbitrators and the institution. This argues in favor of exempting these rights from their application to international arbitration especially to the extent they impact the arbitral tribunal’s decision-making function.

Where consistent with the parties’ due process rights, this argues in favor of the tribunal limiting the amount of data presented in order
to limit the data protection risk. For example, the latest version of the IBA Rules make optional whether the tribunal is copied on the disclosure it orders, and data protection risk would strongly argue against the tribunal receiving any additional data. Furthermore, data protection argues in favor of limited document review and defined evidentiary requirements.

\[\text{g. Summary Re Controllers}\]

For the reasons set forth above, when the GDPR applies to the processing of Personal Arbitral Data in an arbitration, the Arbitral Data Custodians generally will be considered controllers of the personal data they process, except the more limited circumstances in which they meet the requirements to be data processors. However, for each Arbitral Data Custodian, the GDPR applies only to the data that it actually processes. This argues in favor of reasonable restrictions on the amount of data being processed. The impact of these rules on the arbitral process is discussed in more detail in the following Section.

2. What Rules Apply to the Processing of Personal Arbitral Data?

The application of the GDPR and other data protection regimes to international commercial arbitration means that whenever Personal Arbitral Data is processed during an arbitration the following will be legally mandated unless exempted by Member State law (among other things): adequate data security, data minimization, transparent data retention policies, transparent processing information (potentially including data privacy notices), third country transfer restrictions, and data breach notifications.\(^{201}\) The rights to data portability and to erasure and to restrict processing may also be raised, although these rights do not apply where the legal claims exemption applies.

Respecting these rights requires a coordinated compliance effort in a manner that is proportional to the risk while at the same time ensuring the tribunals’ decision-making function and the parties’ due process rights are respected. Although not directly on point, the guidance from WP29 in the Disclosure Guidelines is helpful in gaining an understanding of how the corresponding obligations in the GDPR may be applied to the processing of Personal Arbitral Data in the context of international arbitration and is referred to in this

discussion where relevant. This will often result in the parties and the tribunal agreeing a data protection protocol addressing these issues, which is discussed below.\textsuperscript{202}

a. Cybersecurity

Important efforts are underway to implement cybersecurity for international arbitration. This includes the Debevoise & Plimpton \textit{Protocol to Promote Cybersecurity in International Arbitration} launched in 2017\textsuperscript{203} and the ICCA/NY Bar/CPR \textit{Draft Cybersecurity Protocol for International Arbitration}, released for consultation in 2018.\textsuperscript{204} While not directly on point with respect to the data security requirements of the GDPR, together with the Sedona Protocol,\textsuperscript{205} they will provide a useful starting point for applying a risk-based analysis to cybersecurity, and as a structure for how data protection may be addressed in international arbitration. However, it is important to keep in mind that whenever the GDPR applies to Personal Arbitral Data processed in an arbitration, adequate cyber security is mandatory. The GDPR requires the following measures be taken to secure all data covered by its terms:

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
   (a) the pseudonymisation and encryption of personal data;
   (b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} See ICCA Cybersecurity Protocol, supra note 202. See also the excellent discussion the cybersecurity issues raised by international arbitration in Stephanie Cohen and Mark Morrill, \textit{A Call To Cyberarms: The International Arbitrator’s Duty To Avoid Digital Intrusion}, 40 \textit{Fordham Int’l L.J.} 981 (2017).
\item \textsuperscript{205} See Sedona Protocol, supra note 76, Appendix C.
\end{itemize}
\end{footnotesize}
(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.206

Similarly, in the specific context of US litigation under the DP Directive, WP29 has said that the data controller shall take all:

reasonable technical and organisational precautions to preserve the security of the data to protect it from accidental or unlawful destruction or accidental loss and unauthorised disclosure or access. These measures must be proportionate to the purposes of investigating the issues raised in accordance with the security regulations established in the different Member States. These requirements are to be imposed not just on the data controller but such measures as are appropriate should also be provided by the law firms who are dealing with the litigation together with any litigation support services and all other experts who are involved with the collection or review of the information. This would also include a requirement for sufficient security measures to be placed upon the court service in the relevant jurisdiction as much of the personal data relevant to the case would be held by the courts for the purposes of determining the outcome of the case.207

It is interesting to note that this language from the Disclosure Notice seems to suppose that the law firm is not an independent data controller in its own right, which conflicts with other advice from WP29.208 Given the significant risk of getting this wrong, the safer course is for lawyers to consider themselves to be controllers in their own right, but this language supports the view that it would be appropriate to use a data protection protocol to allocate these roles and responsibilities in much the same way the GDPR does for joint controllers.

206. GDPR, supra note 2, art. 32, at 51.
207. Disclosure Guidelines, supra note 75, at 12.
208. See Controller Opinion, supra note 100, at 28 (finding barristers to be controllers).
It will be for the parties in the first instance to agree what security measures are required by the GDPR during the arbitration. This process of agreeing reasonable data security measures involves a risk analysis of the types and importance of the Personal Arbitral Data being exchanged, the laws applicable to the transfer and processing of the Personal Arbitral Data, the cybersecurity systems and capabilities of all the Arbitral Data Custodians that will be receiving and processing Personal Arbitral Data, the risks if the data were to be exposed, etc. Where parties are not able to agree reasonable and proportionate data protection measures, tribunals will be asked to assist in this process and ultimately may be required to impose such measures where agreement proves allusive.

b. Data Minimization

When the GDPR applies to the Personal Arbitral Data being processed during an arbitration, data minimization is mandatory. This may include data scrubbing for relevant data and to eliminate sensitive data as a first step before the data is even processed for the arbitration, and potentially pseudonymization of the relevant data where feasible. With respect to data minimization, WP29 has explained in the context of US discovery under the DP Directive that:

There is a duty upon the data controllers involved in litigation to take such steps as are appropriate (in view of the sensitivity of the data in question and of alternative sources of the information) to limit the discovery of personal data to that which is objectively relevant to the issues being litigated. There are various stages to this filtering activity including determining the information that is relevant to the case, then moving on to assessing the extent to which this includes personal data. Once personal data has been identified, the data controller would need to consider whether it is necessary for all of the personal data to be processed, or for example, could it be produced in a more anonymised or redacted form. Where the identity of the individual data subject’s is not relevant to the cause of action in the litigation, there is no need to provide such information in the first instance. However, at a later stage it may be required by the court which may give rise to

210. See generally GDPR, supra note 2, recital 4, at 3.
211. See, e.g., ICCA Cybersecurity Protocol, supra note 202, art. 13.
212. GDPR, supra note 2, recital 39, 7
another “filtering” process. In most cases it will be sufficient to provide the personal data in a pseudonymised form with individual identifiers other than the data subject’s name.

When personal data are needed the “filtering” activity should be carried out locally in the country in which the personal data is found before the personal data that is deemed to be relevant to the litigation is transferred to another jurisdiction outside the EU.213

Special category data should also be culled and not processed unless necessary to decide the dispute.214 Although the GDPR allows the transfer of sensitive data when necessary for the establishment, exercise or defense of a legal claim, only the limited data that is deemed to be necessary for that purpose should be transferred.215 As discussed below, data minimization will also argue in favour of a careful application of the IBA Rules to limit the amount of data disclosed during the arbitration.216

c. Pseudonymized Personal Data

WP29 has made clear in the Disclosure Guidelines that it prefers for data that is going to be processed during a dispute resolution process to be pseudonymized using a coding system especially where it will be transferred to a third county. Pseudomization is when data is coded so that the personal data subject is not identified, but in a manner such that the data can later be decoded. This system allows the data to be matched to the data subject if needed during the arbitral process but at least during the early stages of review, names would not be included. Pseudonymization does not fit well with the arbitral process. Technology, of course, makes pseudonymization possible but at a cost, and it is difficult to see how it would work efficiently and cost-effectively in practice given the highly fact-driven nature of the arbitral process. Parties are expected to resist pseudonymization given the difficulties and cost that will be involved. While not determinative, factors weighing against requiring pseudonymization under a proportionality standard would include that the Personal Arbitral Data exchanged be:

214. See id. at 10.
215. See id.
216. See infra Section IV.C.3.b.
• Minimized and targeted at the issues in dispute (as would be the case if the IBA Rules discussed below are applied carefully);
• Scrubbed to eliminate any sensitive or nonresponsive data; and
• Originally obtained by the arbitral party with the knowledge and preferably consent of the data subject who was placed on notice of the possibility of processing for dispute resolution at the time of data collection.

d. Data Rectification

The GDPR grants data subjects “the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.” 217 This right does not contain an legal claims exemption and, hence, will apply to international commercial arbitration unless validly exempted by a Member State law. However, WP29 has recognized the tension between this right and the requirements of data discovery in the context of disclosure for US litigation and has said:

[t]hese rights may only be restricted . . . on a case by case basis for example where it is necessary to protect the rights and freedoms of others. The Working Party is clear that the rights of the data subject continue to exist during the litigation process and there is no general waiver of the rights to access or amend.

It should be noted however that this right could give rise to a conflict with the requirements of the litigation process to retain data as at a particular date in time and any changes (whilst only for correction purposes) would have the effect of altering the evidence in the litigation.218

As WP29 recognized, this right to rectify personal data that has been submitted as evidence in an international arbitration creates tension.219 It therefore seems unusual, and problematic, that neither this right, nor the right to data transparency includes an exemption for

217. GDPR, supra note 2, art. 16, at 43
218. Disclosure Guidelines, supra note 75, at 12 (emphasis added).
219. Id.
legal claims, which are exempted from the rights of erasure and to preclude data processing and which raise similar tensions. However, data subjects can be required to include a rationale for the rectification, which would be submitted to the tribunal as a basis for the rectification. This means the tribunal would be aware of the rectification and be able to take it into account in its decision making.

e. Rights to Erasure or “Right to be Forgotten” and to Restrict Processing

The data subject has the right to request erasure of his or her personal data. This right is available when:

(i) processing is no longer necessary for the intended purpose,
(ii) the data subject withdraws his or her consent,
(iii) the data subject objects to the processing and there are no overriding legitimate grounds for the processing,
(iv) the processing is unlawful, or
(v) erasure is necessary for compliance with a legal obligation.

In addition to erasing the data, when a controller has made the personal data public, the controller must take reasonable steps, including technical measures, to inform the controllers processing the data of the data subject’s request to erase this personal data. Alternatively, a data subject can also request a restriction on the processing of his or her personal data when:

(i) the data subject contests the accuracy of the data,
(ii) the processing is unlawful and the data subject does not want to exercise the right to erasure,
(iii) the controller no longer needs the data for the purposes of the processing but the data subject needs the data to defend a legal claim, or
(iv) (if) a decision on a complaint lodged by the data subject is pending.

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220. See GDPR, supra note 2, art. 17, at 43; rec. 65, at 12.
221. See id.
222. Id. art. 18, at 44.
223. Id.
Importantly, the rights to erasure, and to data processing restrictions, which would be problematic to apply in the context of international arbitration, contain a legal claims exemption for processing that is “necessary for the establishment, exercise or defence of legal claims. This means that the rights of erasure and to processing restrictions would not be applied to international arbitration where the data is deemed “necessary” to the claims or defences. The question will be what is deemed “necessary,” which is not defined by the GDPR and may be influenced by the applicable Member State law, at least until the EDPB takes a view.

f. Data Retention

Data retention is another area where the GDPR is difficult to reconcile with international arbitration. Arbitration is a highly fact driven process and in a complex case both sides will want to review the record and process Personal Arbitral Data for the time period in question. However, at least in the context of US discovery of EU personal data, WP29 has taken the view that unlimited retention of data for the purpose of later disputes, for example, until the statute of limitations expires, may be unlawful. Applying this logic to arbitration implies that the need to have access to data for a later arbitration is unlikely to be a sufficient basis on its own to retain data longer than would otherwise reasonable. However, the Disclosure Guidelines were adopted in the context of general litigation discovery in the United States, which is very different to the more limited data disclosure in international arbitration. Furthermore, the data retained for an international commercial arbitration would be limited to the data related to the circumstances surrounding the agreement containing the specific arbitration clause. When there is a specific agreement containing an arbitration clause, retention of the data relating to that contract may be considered more reasonable than the general litigation risk considered in the Disclosure Guidelines.

As a matter of practice, GDPR compliance is likely to necessitate limiting the data retained to that which is considered to be “necessary” for a future arbitration. Data retention therefore may lead to disputes during the arbitral process as parties not subject to the GDPR may retain more robust data than those applying the GDPR

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224. See Disclosure Guidelines, supra note 75, at 12.
225. See id.
and therefore will have more contemporaneous data available to support their claims. On the other hand, companies that retain more data may be required to disclose more data, which the other side may have decided not to retain either for strategic or legal reasons, potentially including data protection risk. This imbalance will need to be addressed and depending on the circumstances may have to be rectified to ensure due process.

g. Data Transparency (Including Data Privacy Notices)

At the time data is collected from a data subject, the data subject must be provided with detailed information about the manner and means by which the data will be processed as described in the GDPR. Similar rights attach when the controller did not collect the data in the first place, which often is the case in international arbitration. For example, the law firm did not originally collect the data that it controls after a party transfers data to it for use in an arbitration. The same is true of the arbitrators. Compliance with the transparency requirements of the GDPR obligates all the controllers of Personal Arbitral Data to ensure that data subjects whose personal data may by disclosed as a part of an arbitration are provided with transparent information complying with Articles 12, 13, and 14 of the GDPR, including, among other things, the purpose and legal basis for the processing, the potential for (or fact of) arbitration, the names and details of any recipient of each data subject’s data, how the data subject’s data may be used in the arbitration, and whether data transfer outside the European Union is contemplated by the arbitration. In a complex arbitration, if applied literally, this could mean potentially tens of data controllers being required to send multiple data privacy notices to potentially hundreds of individual data subjects named in the evidence. Serious concerns have also been raised about data subjects relying on these rights to request data relating to the confidential tribunal communications, potentially including draft awards.

WP29 has made clear that data subject rights to transparent information about the processing of his or her data, access to that data, and the right to rectify it, continue to apply to data when processed for litigation purposes, which seemingly would also include

226. See GDPR, supra note 2, art. 13, at 40-41
227. See id. art. 14, at 41.
arbitration.\textsuperscript{228} With respect to the access and notice requirements, WP29 said that “in the context of pre-trial discovery, [transparency] would require advance, general notice of the possibility of personal data being processed for litigation. Where the personal data is actually processed for litigation purposes, notice should be given of the identity of any recipients, the purposes of the processing, the categories of data concerned and the existence of their rights.”\textsuperscript{229} Therefore, any justification for withholding such notice in the arbitration context would seemingly need to be something unique to arbitration, for example, confidentiality. However, the GDPR provides that confidentiality can only be a basis for not providing the requisite data privacy notice when “the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.” This standard will typically not be met by arbitral confidentiality generally, although it may apply to counsel who is subject to legal privilege and to the arbitrator’s duty of confidentiality.

The GDPR provides that only one data privacy notice needs to be sent to a data subject. However, it does not explain how this should work in practice when there are multiple controllers all of whom are potentially liable (as in the case of arbitration). WP29 seemed to differentiate between the “controller” who had originally collected the personal data involved in the litigation and others (like the law firm and the courts), but without providing any further guidance. One possibility, which is indirectly supported by the Disclosure Notice, would be for the Arbitral Data Custodians to agree in a data protection protocol that the parties, as the Initial Data Controllers, will provide the transparent information about the processing including any required data privacy notices, and that the other secondary controllers would rely on those notices. Moreover, arbitrators and the institution should be excluded from any duty of transparency as it relates to the internal workings of the tribunal and its decision-making function.

This is consistent with the approach taken to joint controllers in the GDPR and is sensible as the Initial Data Controllers are the only ones who have any relationship with the data subjects. However, this

\textsuperscript{228} See Disclosure Guidelines, \textit{supra} note 75, at 12.

\textsuperscript{229} \textit{Id.}
would not seem to shield the other secondary controllers from liability, which raises the question as to whether the Initial Data Controller should provide indemnities to the other Arbitral Data Custodians, which could also be included in a data protection protocol. It should also be noted that in cases involving extensive records, requiring data privacy notices for all data subjects named in the evidence is not only a significant burden but may also effectively mean that the arbitration is no longer confidential because so many persons will potentially be required to be informed, which is further complicated in sensitive cases when the provision of notice itself could be problematic. Transparent processing information (including data privacy notices) exemplify the problems created by applying the GDPR to arbitration absent a detailed thought-through set of rules for how this is going to work.

h. Third Country Transfers

The third country transfer restrictions apply to any data transfer outside the EU of Personal Arbitral Data during an arbitration by the Arbitral Data Custodians including the parties, counsel, arbitrators, witnesses, data analysts, or the institution. Furthermore, transfer is very broadly interpreted to include, for example, any downloading of a document or an email while outside the European Union, or carrying a laptop storing documents containing Personal Arbitral Data outside the European Union. Each of these transfers of data outside the European Union requires (1) a legal basis and (2) adequate safeguards.230 This means that when Arbitral Data Custodians are involved in an arbitration that are not established in the European Union (or a country with an adequacy decision) or who would like to access documents from outside the European Union (or a country with an adequacy decision), it will be necessary to agree a framework for exactly how and on what basis Personal Arbitral Data will be transferred (including Memorials, witness statements, evidence, expert reports, etc.). The basis for transfer may be different for different Arbitral Data Controllers, but it is necessary to have this established in advance of transfer.

Voluntary data transfers between the parties and their counsel, and between opposing counsel, will often be undertaken without involving the tribunal, however, it may be required to give data

subjects and the supervisory authority notice of the transfer depending on the legal basis on which it is made. For transfers of Personal Arbitral Data outside the European Union involving the tribunal or the arbitral institution, it will be necessary to memorialize such transfers in a protocol or other document to be signed by all Arbitral Data Custodians receiving or sending such data outside the European Union. This will likely include the legal basis for the transfer and any restrictions imposed on the processing as a basis for the transfer.

i. Data Breach Notification

The GDPR contains strict notification requirements in the case of a data breach, which are likely to apply to all Arbitral Data Custodians.\textsuperscript{231} Data controllers are required to notify the supervisory authorities of “a data breach that is likely to result in a risk for the rights and freedoms of the data subject within 72 hours of discovery of the breach.”\textsuperscript{232} Data subjects must also be notified of the breach without undue delay if the data breach “presents a high risk for the rights and freedoms of individuals,” whereas if the data breach only presents some risk for individuals, only the data protection authority will need to be notified and not the individual data subjects.\textsuperscript{233} The data breach notification must include the cause and nature of the breach (if known) and recommendations for how the potentially affected individuals can mitigate the risks of the breach. The burden to prove the absence of risk in a data breach rests on the controller.\textsuperscript{234}

It will be very important to agree upfront exactly what will trigger a breach notification and the process for how data breach notifications will be given and to whom. The 72-hour time period is for notification to the DPA, which means that a shorter time line may apply if there are intermediate steps, for example, notification by an arbitrator, counsel, expert, or institution of a data breach to the parties, who will then notify the supervisory authority and potentially the data subjects affected.\textsuperscript{235} The fines for violating the data breach notification requirements are up to EU€10 million or two percent of

\textsuperscript{231} See GDPR, supra note 2, arts. 33-34, at 52.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.

annual global turnover gross revenue, which argues in favour of a rigorous data breach notification policy.236

j. Right to Data Portability

When a data subject directly provides a controller with his or her personal data, the data subject must be able to request a copy of the data concerned in a “structured, commonly used and machine-readable format” from the controller, if the data was provided on the grounds of consent or a contractual agreement and is subject to automated processing.237 This allows the data subject to easily transmit the processed personal data to another controller of his or her choice without hindrance by the controller that collected the data in the first place. In international arbitration, this right would potentially apply only to the Initial Data Controller who originally collected the data and typically would not impact the proceedings. The other Arbitral Data Custodians will typically be not be Initial Data Controllers subject to this obligation.

3. How will GDPR Compliance Impact the Arbitral Process and How Can This be Managed?

a. Data Protection Protocols

Data protection issues should be raised and addressed at the earliest possibility during the arbitral process, typically the procedural conference, if not before.238 Compliance with the requirements imposed by the GDPR or other data protection regimes may necessitate putting in place a data protection protocol or other agreement at the outset of the arbitration addressing a number of data compliance issues affecting not only the parties, but everyone who processes Personal Arbitral Data during the arbitration.239 Given the circumstances, this may take the form of a party agreement, a

236. Id., art. 83(4), at 82.
237. Id., art 20, at 45.
238. See ICCA Cybersecurity Protocol, supra note 202, art. 14, at 16 (addressing cybersecurity only).
239. Cf. generally ICCA Cybersecurity Protocol, supra note 202 (addressing cybersecurity only); with SEDONA PROTOCOL, supra note 76, at Appendix C (addressing discovery for litigation only). The ARBITRAL DATA PROTECTION PROTOCOL found at Appendix D provides a template of a data protection protocol created by the Author to provide guidance to arbitrators when addressing these issues under the GDPR in international commercial arbitration cases.
stipulation, or tribunal order (all of which will be referred to herein for simplicity as “data protection protocols” or “protocols”). Depending on the facts, these protocols are likely to cover, among other things, transparent data processing information (potentially including data privacy notices), cybersecurity, third country data transfers, data breach notifications, and the allocation of roles and responsibilities with respect to compliance with the data subject’s other rights. These protocols will typically be signed and confirmed by everyone receiving Personal Arbitral Data during the course of the arbitration to insure compliance and will often impact the taking of evidence.

It is preferable for the parties to agree a reasonable data protection protocol, taking into consideration the views of the arbitrators and the institution that will also have to apply them. This process of agreeing a data protection protocol involves understanding the applicable data protection laws, the types and importance of the data being exchanged, the cybersecurity systems and capabilities of all the Arbitral Data Custodians that will be receiving and processing Personal Arbitral Data, the risks if the data were to be exposed, etc. Where parties are not able to agree reasonable data protection measures, tribunals will be asked to assist in this process and ultimately to decide where agreement is not possible.

This is further impacted by the fact that the IBA Guidelines and other rules and protocols potentially applicable to data disclosure in international arbitration do not expressly address how the data protection rules may impact an arbitration, nor do the data protection rules (including the GDPR) contain express provisions addressing their application to international arbitration. While each set of rules may contain provisions that could be used to reconcile the two systems, they are not explicit about their relationship to each other. To leave this for a case-to-case determination allows for tailoring the process given the multitude of conflicting rules applicable to arbitral disclosure and data protection worldwide. However, it also creates significant uncertainty and leaves parties, external counsel,

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240. See SEDONA PROTOCOL, supra note 76, at Appendix C to this Article (addressing discovery for litigation only); see also ARBITRAL DATA PROTECTION PROTOCOL, Appendix D.
241. See id.
242. See ICCA Cybersecurity Protocol, supra note 202, at 13, at 13 (addressing cybersecurity only).
243. See id., at art. 14, at 13 (addressing cybersecurity only).
institutions and arbitrators with the unenviable task of considering in each case how the data protection rules may limit the ways in which they can gather, process, use, transfer, and protect Personal Arbitral Data and the means by which the rights granted to data subjects will be complied with.

In practice, data protection protocols will be agreed to help maximize arbitral efficiency while minimizing data protection risks. This is a highly case specific enquiry, and is likely to lead to different rules being applied in each case and within the same case for different Arbitral Data Custodians and even between data sets. But if properly analysed early in the process, reasonable compliance measures can be put in place to minimize these risks without significantly impacting the arbitral process. Further, while it is beyond the scope of this Article to address liability, the protocol may need to include indemnification provisions where the original data processors agree to comply with the data subject rights (for example, data transparency potentially including data privacy notices) on behalf of other Arbitral Data Custodians (for example, the institution and/or the arbitrators).

This is consistent with the approach adopted by the IBA Rules. While not addressing data protection specifically, the IBA Rules provide in the newly added Article 2 that:

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:

   (c) the requirements, procedure and format applicable to the production of Documents;

   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and

   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence. 244

The Official Commentary on the IBA Rules explains that the addition of a mandatory conference on evidentiary issues early in the proceedings was intended to address the needs posed by increasingly

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244. IBA Rules, supra note 7, art. 2, at 6.
large and complex arbitrations to ensure that evidentiary issues are addressed in a manner that promotes efficient and fair proceedings. The items listed for discussion are not intended to be exhaustive. The extent to which data protection issues may impact the taking of evidence fits within the types of issues to be addressed early, and if the parties do not put this on the agenda for the procedural conference, the tribunal should do so as the data protection rules potentially apply to the tribunal itself and other Arbitral Data Custodians beyond the parties (and to avoid surprises later). In addition to minimizing general data protection risk, this practice fosters compliance and encourages data protection concerns to be voiced at the outset, rather than later on in the proceedings (for example in response to a disclosure request), which could create delays. Further, by giving the parties the opportunity to plan the arbitral process from the outset in a way that minimizes data protection risks, parties are limited in their ability to later claim that these issues were not properly taken into consideration.

b. Document Disclosure

The IBA Rules foresee in Article 3 a system for the voluntary exchange of data between the parties and as ordered by the tribunal when the parties cannot agree. The GDPR requires among other things that the processing of personal data be minimized. This may impact the amount of documentary evidence to be reviewed and exchanged during the course of the arbitration both voluntarily and as ordered by the tribunal, as well as the evidence submitted to the tribunal. Minimizing the amount of data exchanged in compliance with the GDPR will be assisted by early tribunal input as to the extent and nature of the proof to be submitted in support and defense of the claims. In high value complex disputes, the parties will be inclined to submit as much proof as possible through extensive document review of their own documents and those obtained from the other side, but

246. Id.
248. See IBA Rules, supra note 7, art. 3.
249. See GDPR, supra note 2, art. 17, rec. 65, at 12.
this may increasingly need to be tempered by data protection concerns, including data minimization.

The process foreseen by the IBA Rules provides that each party shall first submit their reliance documents, followed by any production requests for documents from the opposing party. With respect to the production of documents from the opposing party, Article 3 (3) of the IBA Rules provides that a Request to Produce should contain:

(a) (i) a description of each requested Document sufficient to identify it, or
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

When objections to the production are raised:

the Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article

250. IBA RULES, supra note 7, art. 3.
9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.\(^{251}\)

The question is what role data protection issues including data minimization should play in making this determination.

Article 9(2) of the IBA Rules provides further that:

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

   (c) unreasonable burden to produce the requested evidence; \([\text{or}]\)

   . . .

   (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.\(^{252}\)

Article 9(2) provides that an arbitral tribunal can exclude evidence because of a legal impediment. The Official Commentary to the IBA Rules explains that the legal impediment provision found in Article 9(2)(b) was geared at privileged documents and communications, rather than other legal impediments such as those contained in the GDPR.\(^{253}\) However, the underlying principle could be applied to GDPR-related legal impediments. Furthermore, data protection restrictions could also be deemed to make the burden of producing the document unreasonable under (9(2)(c) and to be relevant to the tribunal’s consideration under 9(2)(g) of “procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”\(^ {254}\)

Going forward under the GDPR, one can expect that data protection considerations will increasingly be raised in deciding on disclosure requests. This will require a balancing of the requesting party’s need for the documents against the data protection risks created and reasonable means to limit those risks.\(^ {255}\) This will
typically include establishing a data protection protocol that will form the basis for the disclosure as well as the other processing of Personal Arbitral Data. WP29 has said in the context of US litigation discovery that data protection concerns favor limiting data disclosure as much as reasonable by undertaking local data review and scrubbing before data is disclosed or transferred outside the European Union, as well as pseudonymization where possible.\footnote{Disclosure Guidelines, supra note 75, at 12.} However, the narrowly focused nature of disclosure in international arbitration means that the data disclosure requests will be much more limited. Furthermore, the arbitral process is often confidential (or can be made so), which means that the risks created by disclosure are minimized compared with the use of data in court proceedings.

Issues to be considered by the tribunal in balancing these competing concerns may include, among other things, procedures for limiting the data protection exposure though data protection protocols and other procedures limiting the risks, reasonable measures to avoid unnecessary third country data transfers, the objecting party’s previous treatment of the data, pseudonymization where feasible, the scope of the compliance risk, and the importance of the data for the arbitration. In deciding these issues, the GDPR applies a risk-based analysis to compliance based on proportionality (as also set forth in Article 9(2)(g) of the IBA Rules above) and taking into account “the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons.”\footnote{GDPR, supra note 2, art. 24(1), at 47.} WP29 has already taken the express view that parties “have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought.”\footnote{Disclosure Guidelines, supra note 75, at 1.}

It is beyond the scope of this Article to address liability issues or how data protection might impact enforcement of the award. However, in measuring the risk of non-compliance, the tribunal will be cognizant of the fact that the GDPR will be enforced primarily by Member State supervisory authorities acting as independent agencies with the authority to investigate and issue significant fines and criminal sanctions, and further that each data controller is independently liable for infractions.\footnote{See GDPR, supra note 2, art. 58, at 69.} With serious GDPR violations
(including unlawful transfer) carrying fines of up to EUR20 million or four percent of annual global gross revenue, supervisory authorities carry significant clout, which risk will need to be taken into account in addressing these issues by the parties, their counsel, and the tribunal.260

V. CONCLUSION

The GDPR is of potential application to virtually all data processing in arbitrations with a nexus to the European Union. The GDPR imposes extensive requirements on the processing of data during an arbitration which are challenging to apply in the arbitral context in that they apply across the board to virtually everyone in the process and create overlapping rights and duties. Furthermore, both third countries and all twenty-eight Member States are likely to have somewhat different data protection laws as they apply to arbitration given that the GDPR allows for derogations, some of which apply to arbitrations. The reality is that determining the matrix of data protection laws potentially applicable to a dispute will itself be a complex exercise and will likely result in the application of many countries’ laws to the same dispute and the various Arbitral Data Custodians, which could also create overlapping and conflicting obligations (and significant confusion). However, notwithstanding these difficulties, all Arbitral Data Custodians covered by the GDPR should make good faith efforts at compliance because the data protection rules established in the GDPR are of mandatory application and the risk of noncompliance is steep.

Interestingly, while these issues have been considered extensively in the context of litigation, international arbitration is virtually a green field.261 The reasons for this are unclear and are likely to be numerous, but the lack of attention may stem in part from the fact that the expansion of data protection laws has been led by the European Union, which, until recently, has for the most part avoided international arbitration. This has now changed and the European Union is highly focused on arbitration at least in the investor-State context. At the same time, the GDPR has become a compliance imperative on par with antitrust and anticorruption for the companies that use international arbitration services. Over time, these companies

260. See, id., art. 83, at 82.
261. See, Burianski & Reindl, supra note 15 (taking the same view).
will likely make data protection compliance an imperative for international arbitration in the same way they have for the other aspects of their businesses. Moreover, arbitrators and other Arbitral Data Custodians will all be concerned about their own liability, which itself will create a further compliance incentive.

In deciding what this means in practice, the Sedona Protocol and the Disclosure Guidance issued by WP29 in the context of discovery for US civil litigation provide useful starting points for addressing data protection compliance in international commercial arbitration. However, the issues raised by wide-ranging US discovery demands and the limited data disclosed during an international arbitration are obviously different. In addition to the more limited scope of disclosure in international arbitration, relevant differences include the fact that arbitration is a consensual process based in contract. Further, international commercial arbitration is often confidential, or could be made so, which further lowers the data protection risk.

As addressed herein, this will all need to be taken into account in applying the GDPR to international arbitration. When obligations conflict, decisions will have to made about how to comply, which should reflect a reasonable good faith effort to comply with GDPR principles and to protect the data subject’s rights in line with those principles, within the constraints of the arbitral process and the requirements of due process. The role of the parties, their counsel, and the tribunal is to undertake a careful and practical analysis of the need for the data. This need for the data will then need to be balanced against the data protection risks and how those risks might be mitigated taking into account proportionality. As set forth in Appendix D, this should be reflected when designing and implementing a reasonable data protection protocol and deciding disclosure requests within the context of an arbitration, while at the same protecting the due process rights of the parties.

The arbitration community should consider whether to engage proactively with the European Data Protection Board (which will replace WP29) and/or Member State supervisory authorities, to address these issues proactively, keeping in mind that, while clarity is preferable, it may come at a price in terms of compliance obligations. One possibility would be the development of an approved Code of Conduct for data processing in international arbitration. The European Union has strongly encouraged the development of such codes generally, which the European Commission has said in the context of
third country data transfers are intended to “allow the development of more tailor-made solutions for international transfers, reflecting, for instance, the specific features and needs of a given sector or industry, or of particular data flows.” Under the DP Directive only one code of conduct has ever been approved, but the European Commission would like this to change under the GDPR. However, this will remain a time consuming and arduous process with an uncertain outcome. However, the current uncertainty, combined with the increased compliance risk to all Arbitral Data Custodians, may mean that they will err on the side of caution in ways that are even more damaging to the arbitral process.

In sum, the application of the GDPR to international commercial arbitration will be challenging. It is therefore fortuitous that one of arbitrations many strengths is its flexibility. This should enable the GDPR to be applied to arbitration in a manner that respects both the data subject’s rights under the regulation and the parties’ rights in the arbitration, as well as the arbitrators’ duties. This is subject to the provision that when applying the GDPR to international commercial arbitration the regulators respect its decision-making function, and recognize the cross border, consensual and potentially confidential nature of the arbitrable process.

262. See Commission Communication, supra note 49; GDPR, supra note 2, arts. 40, 46, at 63-64, 69.
APPENDIX A

Data Protection Questions to Pose in Planning an Arbitration

1. Does the arbitration agreement address data protection?
2. What does the applicable data retention policy provide?
3. What does the data protection policy or agreements say about use of the data for dispute resolution?
4. Where is the data?
5. How will the data be collected? Who will collect the data?
6. What kind of data is it?
7. Is the data considered “personal data” or otherwise covered under applicable the data protection laws? If so, where?
8. Is any of the data “special category data” or covered by more stringent data protection laws?
9. Does the collection and use of the data for a potential arbitral claim or defense provide an adequate basis for processing the data under the relevant data protection laws? If not, what needs to be done to ensure compliance?
10. Is the amount of data being collected fair and proportionate to the claim? Have efforts been taken to minimize the amount of data collected? How and where will it be culled? Is pseudonymization feasible?
11. Is it required to send a data privacy notice informing the individual “data subjects” that their data is being collected for use in a potential arbitration or is this already covered by applicable data protection policies? Is this practically possible if data from many individuals are collected? What impact would notification have on any confidentiality of the proceedings (that may have yet to be brought)?
12. Does the proposed method of data collection and review provide adequate data security?
13. Does the data collection and review require the transfer to third countries, and, if so, is this transfer lawful?
14. What external counsel would be best for the case? Where are they located? Do they have an EU establishment? Are any data transfer restrictions implicated? How will travel be impacted?

15. What would be the preferred candidate for arbitrator? Where are they located? Do they have an EU establishment? What is their data infrastructure?
APPENDIX B

Data Protection Questions to Consider in Crafting the Arbitral Procedure

1. What kinds of Personal Arbitral Data will be processed during the arbitration?

2. Is any Personal Arbitral Data potentially covered by the GDPR or other applicable data protection laws? If so, where? What legal obligations are imposed under the GDPR, Member State law, or third country laws?

3. What kind of activities will be undertaken with the Personal Arbitral Data during the arbitration itself? Where will it be processed? How will it be culled? Who will undertake the data analysis? Is pseudonymization an option?

4. Does the Personal Arbitral Data include special categories of data under the GDPR or the laws or regulations of any other countries? Is it covered by any specific laws or rules (like HIPPA in the United States)?

5. How will any applicable data protection laws potentially impact the processing of the data during the arbitration? What is the legal basis for the processing?

6. How will any applicable data protection laws potentially impact the disclosure of the data for the arbitration? To opposing counsel and experts? The institution? The arbitral tribunal?

7. Will the data be transferred outside the European Union? Can the transfer of Personal Arbitral Data outside the European Union during the arbitral process be minimized? For example, should restrictions be placed on access to documents from outside the European Union? How will travel impact third country data transfer?

8. Are data privacy notices required and if so when? By whom? How will the data privacy notice or other communications with the data subjects address the specifics of the arbitral process (including arbitrator confidentiality)?
9. Before Personal Arbitral Data is transferred or disclosed during the arbitration, what should the disclosing party do to ensure compliance by the transferor with any applicable data protection laws? Will this be implemented through a data protection protocol by agreement or tribunal order?

10. Where is the party to which data may be disclosed located? If necessary could Personal Arbitral Data be lawfully transferred to (1) opposing party, (2) opposing counsel, (3) any experts, (4) the arbitrator(s), (5) the arbitral institution, and (6) amongst arbitrators? What and how will adequate safeguards be implemented?

11. What responsibilities does the party to whom Personal Arbitral Data is disclosed have under the law? By agreement? Through a data protection protocol?

12. What cybersecurity and other legal requirements should be imposed on the processing of Personal Arbitral Data during the arbitration?

13. What rights does the data subject have and how will these rights be respected? To the extent that these rights are overlapping and apply to all the Arbitral Data Custodians, should the Initial Data Controllers (typically the parties) be allocated responsibility for compliance with those rights that require communication with the data subject (e.g., transparency obligations (including any required data privacy and transfer notices), right to review and rectification, etc.)? If so, will indemnification obligations will be put in place in the case of breach?

14. What notifications apply if Personal Arbitral Data is breached?

15. Who is legally responsible if the cybersecurity and other legal requirements imposed on the processing of Personal Arbitral Data are violated?

16. What role should the arbitral tribunal play in addressing data protection issues? between the parties? The institution?

17. To what extent do these rules and obligations apply to the arbitral tribunal? The institution? Can this risk be minimized?
18. Will a data protection protocol be put in place? Who is responsible for preparing the protocol? Who will sign it? When should it be implemented?

19. Does the potential that the award may be made public during the enforcement stage limit the extent to which reference can be made to Personal Arbitral Data in the award? How should this be addressed?
APPENDIX C

The Sedona Conference Cross-Border
Data Safeguarding Process + Transfer Protocol

United States Discovery for Civil Litigation

INSTRUCTIONS

The Sedona Conference Cross-Border Data Safeguarding Process + Transfer Protocol (the “Protocol”) has two interrelated purposes. First, it is an ease-of-reference guide that identifies common techniques used to achieve best possible legal compliance with conflicting U.S. eDiscovery rules and extra-U.S. Data Protection Laws when foreign data needs to be processed and transferred for the purposes of U.S. Litigation. Second, the Protocol creates a record that can be presented to those with regulatory responsibilities for Data Protection, evidencing the steps taken to best comply with Data Protection Laws. The Protocol must be customized to record fully the actions undertaken to maximize legal compliance and should include a detailed explanation of the circumstances and factors taken into account. The following instructions should be used with the chart below:

1. Explain the reasons for preserving or collecting the data. Identify clearly the U.S. proceedings for which the Protected Data is processed and transferred. If the Protected Data is to be preserved or collected for reasons other than litigation, identify the legal proceeding requiring the processing and transfer.

2. Determine whether data required to be preserved, processed, or disclosed in the U.S. is subject to Data Protection Laws and, if so, which laws apply. Assess whether alternative, non-protected, sources of that relevant data exist. To the extent possible, produce non-protected sources of data, making production of relevant Protected Data less necessary. Determine the sources of relevant Protected Data, the methods of preservation, if it has been or will be further processed, and where it will ultimately be transferred.

3. Describe measures taken to minimize the processing and transfer of Protected Data, explaining the methodology
used to filter and eliminate irrelevant Protected Data. These culling activities may begin with a questionnaire or an in-person interview, followed by iterative use of software tools and other processes, creating a subset of relevant and necessary Protected Data for disclosure. Consider compiling Protected Data locally or in a country that is not subject to the transfer restrictions under the applicable Data Protection law. Identify categories of Protected Data potentially affected by the applicable Data Protection Laws.

4. Describe the various categories of Protected Data that will be processed or transferred by type, including personal and sensitive personal data, trade secrets data, restricted data, consumer data, state secrets, etc.

5. If appropriate, consider using the Model U.S. Federal Court Protective Order, or similar protective orders, or stipulations with data protection language providing agreed-upon or court-ordered restrictions on the use, disclosure, and dissemination of Protected Data. Consider including options to redact and designate Protected Data as “Confidential” or “Highly Confidential.” Further, consider restrictions related to the onward transfer of data once it reaches the U.S.

6. Strive to provide a transparent processing and transfer protocol to the Data Subjects, identifying impacted Data Subjects and the means to communicate to them the purpose for the processing and transfer of Protected Data, the categories of Protected Data at issue, the duties and obligations attendant to that Protected Data, data protection measures that will or have been put in place, and such other factors as may be required or appropriate under the circumstances. Such communications to Data Subjects may include postings, one-on-one meetings, group presentations, or notice and acknowledgement documentation requesting consent and providing question and answer information, in writing or orally, in both English and the local language.

7. Identify steps taken to secure Protected Data by describing the protective measures undertaken by the Data Controller, including, for example, agreements with
third parties, use of a protective order, the nature and type of encryption at rest and in transit, limitations on access to the Protected Data, and any other means of securing the Protected Data. Also describe procedures for responding in the event of a data breach.

8. Describe the efforts undertaken if notice is contemplated or required. Others to be consulted may include the Data Controller’s data protection personnel such as data protection officers, data protection authorities with jurisdiction over the Protected Data, or local company organizations such as works councils.

9. Identify mechanism(s) used to legitimize the transfer of Protected Data. For the EU, depending on the U.S. recipient and transfer purpose, these mechanisms typically include the use of Binding Corporate Rules (intra-group transfers only), the new Privacy Shield certification,263 Model Contracts, or some other means of satisfying transfer safeguard requirements.

10. Document procedures used to destroy or return Protected Data to the Data Controller when it is no longer necessary.

11. Consider identifying those responsible for overseeing preservation, processing, and transfer of the Protected Data and obtaining their signatures to signify that the steps recorded were in fact taken.

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<tr>
<th>ACTION ITEM</th>
<th>INFORMATION</th>
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</thead>
<tbody>
<tr>
<td>1. Purpose for processing and transfer of Protected Data</td>
<td>Identify the type of legal proceeding for which Protected Data is being processed or transferred (e.g., reasonably anticipated or active civil litigation; government investigation; subpoena) with specific identification information (e.g., case name, docket number, filing location, filing date, description of legal proceeding).</td>
</tr>
<tr>
<td>2. Data Protection Laws at issue and specific sources of Protected Data</td>
<td>Identify the country whose Data Protection Laws are at issue, the specific Data Protection Laws implicated, and the significance of each; identify the location of the Protected Data, where it is processed, and the location to which it will be transferred.</td>
</tr>
<tr>
<td>3. Measures taken to minimize the processing and transfer of Protected Data</td>
<td>Explain methodology used to narrow and cull Protected Data for processing and transfer purposes to include only relevant and necessary material (e.g., use of preliminary questionnaires and interviews; use of technology and processes to de-duplicate and apply iterative searches; filter and compile information in a country not subject to transfer restrictions under the applicable Data Protection Laws).</td>
</tr>
<tr>
<td>4. Categories of Protected Data processed and transferred</td>
<td>Identify categories of Protected Data processed and transferred (e.g., information that is likely to identify the Data Subject, sensitive personal data, trade secret data, restricted data).</td>
</tr>
</tbody>
</table>
5. Limitation on use and dissemination of Protected Data

Identify stipulations or protective orders and their material terms or attach a copy (e.g., *Model U.S. Federal Court Protective Order*; general protective order; confidentiality agreement; Data Protection stipulation).

<table>
<thead>
<tr>
<th>6. Transparency of processes and transfers concerning Protected Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify steps taken (if and as appropriate or feasible) to make information available or to notify Data Subjects of processing, transfer, and onward transfer of Protected Data (e.g., internal communications; posted notice).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7. Steps taken to secure transferred Protected Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify steps taken to secure Protected Data (e.g., third-party agreements, nature and type of encryption, password protection, access limitation and control).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>8. Compliance with notification obligations (if any) to others with oversight of data protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify others involved or who may need to be consulted with responsibility for Data Protection implementation (e.g., the company’s data protection officer or works council; government data protection authority); explain their involvement and means of notification.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>9. Bases upon which Protected Data is transferred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify Protected Data transfer mechanisms relied on for each U.S. recipient (e.g., EU/U.S. Privacy Shield Certification, EU Model Contract Clauses, Binding Corporate Rules, or other means of satisfying transfer safeguard).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10. Disposition of transferred Protected Data when no longer needed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Describe disposition of processed and transferred Protected Data (e.g., destruction or return of Protected Data) when no longer needed to fulfill obligations of the specific matter.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11. Person responsible for transfer and processing of Protected Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consider identifying the person or persons ultimately responsible for processing and transferring Protected Data and requiring their signed acknowledgement that the steps recorded have been taken.</td>
</tr>
</tbody>
</table>
APPENDIX D

Template Data Protection Protocol for Arbitrators

Background

When the GDPR applies to an arbitration, compliance inevitably requires the adoption of a data protection protocol. The highly regarded SEDONA PROTOCOL set forth in Appendix C of this Article was developed in the context of data transfer for the purposes of discovery for US litigation. The principles contained in the SEDONA PROTOCOL are relevant to disclosure for purposes of international arbitration. However, given that it was adopted in the context of cross border discovery for United States litigation, it requires modification when applied to disclosure for international arbitration.

To assist arbitrators in this process, this ARBITRAL DATA PROTECTION PROTOCOL proposes a template for arbitrators to use as a guideline in developing a data protection protocol for use in international commercial arbitrations governed by the GDPR. Like the SEDONA PROTOCOL, it is intended to provide “an ease-of-reference guide that identifies common techniques used to achieve best possible legal compliance with conflicting” requirements for data processing in international arbitration covered by the GDPR, and at the same time creating “a record that can be presented to those with regulatory responsibilities for Data Protection, evidencing the steps taken to best comply with applicable data protection laws.” While the parties may adopt a broader data protection agreement, this template is geared towards the issues that will typically need to be addressed during the arbitral process itself. It will require customization on a case-by-case basis to demonstrate the steps taken to comply with the GDPR and an explanation of the circumstances and factors taken into account in constructing the protocol. The principles set forth in this Article and the instructions described Appendix C with respect to the SEDONA PROTOCOL will be helpful in applying the concepts set forth in this ARBITRAL DATA PROTECTION PROTOCOL.

264. See SEDONA PROTOCOL, supra note 77, Appendix C of this Article.
265. Id.
<table>
<thead>
<tr>
<th>ACTION ITEM</th>
<th>INFORMATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data controllers and processors</td>
<td>Identify who will act as controllers and processors of Personal Arbitral Data during the arbitration. Each data controller and processer should sign the <a href="#">ARBITRAL DATA PROTECTION PROTOCOL</a>. Identify the Initial Data Controller who engaged in the original processing of the data (typically a party to the arbitration) and who will be responsible in the first instance for complying with certain data subject rights. Consider the additional obligations of the Initial Data Controllers and any indemnities they should provide to the other secondary controllers. If relevant, identify others who may need to be consulted with responsibility for data protection implementation; explain their involvement and means of notification.</td>
</tr>
<tr>
<td>Member State Exemptions</td>
<td>Identify any Member State exemptions being replied upon to limit the data subject rights and which controllers are covered by such exemptions.</td>
</tr>
<tr>
<td>Categories of Personal Arbitral Data to be processed during the arbitration</td>
<td>Identify categories of Personal Arbitral Data that will be processed and transferred during the arbitration (<em>e.g.</em>, types information that is likely to identify data subjects (emails, lab notebooks, agreements, construction logs, pleadings, witness statements, awards, <em>etc.</em>, and special category data), as well as commercially sensitive and/or restricted or highly confidential data).</td>
</tr>
</tbody>
</table>

---

267. Originally promulgated by the Sedona Conference, and adapted by the Author for use in international commercial arbitrations governed by the GDPR.
<table>
<thead>
<tr>
<th>Legal basis for the processing</th>
<th>Identify the legal basis for the processing (typically the legitimate interests of the controller) and what has been done to comply with the requirements imposed by the GDPR[268] on processing for that purpose. If special category data will be processed, provide justification for the processing of that data.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third-country data transfer</td>
<td>Identify whether any Personal Arbitral Data will be transferred outside the European Union and the legal basis for the transfer (usually the legal claims exemption and/or the legitimate interests of the data controller). Identify what has been done to comply with the legal requirements including notice that may be imposed on transfer. Identify the means by which data may be transferred outside the European Union and whether Personal Arbitral Data can be downloaded, emailed, or stored on computers outside the European Union. Consider the impact of travel on data transfer.</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>Identify whether the arbitral process will be confidential and consider entering into confidentiality agreements addressing specific issues. Consider the confidentiality of the award and whether it can/should be redacted to ensure that Personal Arbitral Data will not be made public. Address the confidentiality of arbitrator communications within the tribunal and with the institution.</td>
</tr>
</tbody>
</table>

268. All references in this ARBITRAL DATA PROTECTION PROTOCOL to the GDPR should be deemed to include applicable Member State laws implementing the GDPR.
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cybersecurity</td>
<td>Identify the cybersecurity measures that will be employed to protect the data, including the principles discussed in GDPR and the ICCA Cybersecurity Protocol to the extent consistent with the GDPR (e.g., use of the cloud, nature and type of encryption, password protection, access limitation and control, etc.). Consider the impact of travel and how Personal Arbitral Data can be stored or retrieved during travel outside the European Union.</td>
</tr>
<tr>
<td>Data Minimization</td>
<td>Identify the steps to be undertaken to ensure that only relevant and necessary data is processed during the arbitration. Explain the methodology to be applied to narrow and cull Personal Arbitral Data for processing and transfer during the arbitration to include only relevant and necessary material (e.g., use of preliminary questionnaires and interviews; use of technology and processes to de-duplicate and apply iterative searches; identification and elimination of special category data where possible, consideration of pseudonymization where possible, filtering and compiling information in an EU country, etc.).</td>
</tr>
<tr>
<td>Transparency/Data Privacy</td>
<td>Identify what steps are required to make information available to data subjects about the processing, transfer, and onward transfer of Personal Arbitral Data for purposes of the arbitration (e.g., internal communications; posted notice). Consider whether additional data privacy notices may be required. Consider whether the Initial Data Controller should be primarily responsible for meeting such transparency requirements and providing any required notices. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to provide adequate notice or other rights under its control. Address the</td>
</tr>
<tr>
<td>Confidentiality of arbitrator communications</td>
<td>confidentiality of arbitrator communications within the arbitral tribunal and with the institution and the impact this has on transparency obligations.</td>
</tr>
<tr>
<td>Data rectification, erasure, and no further processing</td>
<td>Identify what steps will be undertaken if a data subject exercises its right to rectify, erasure or stop processing of its Personal Arbitral Data. Confirm whether the Initial Data Controller should be primarily responsible for addressing such requests in the first instance and consider how the tribunal will be informed of the request and if the data has been altered as a result. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to comply with the data subject rights under its control.</td>
</tr>
<tr>
<td>Data retention</td>
<td>Describe how long data will be retained for purposes of the arbitration and how it will be disposed of (e.g., destruction or return of Personal Arbitral Data) when no longer needed to fulfill obligations of the controllers of the data. The disposal date is likely to differ for each controller given their legal and ethical retention obligations.</td>
</tr>
<tr>
<td>Data Breach Notices</td>
<td>Identify the exact process that will be undertaken if a data breach occurs, and the notification deadlines imposed taking into account the very strict 72-hour deadline established in the GDPR for informing the relevant supervisory authorities. Describe exactly what will be considered a data breach.</td>
</tr>
<tr>
<td>Indemnification</td>
<td>Consider whether the Initial Data Controllers should provide indemnities to the other secondary controllers for failure to comply with mandatory data subject rights.</td>
</tr>
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• What Users Want and How to Address Their Needs and Expectations Using the Results of the Global Pound Conference
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Data Protection Meets International Arbitration: The Impact of the GDPR on Arbitration

By Kathleen Paisley

When it applies to a case, the GDPR sets rules for when, where, how, and how much personal data can be processed during an arbitration, and, unless exempted, grants data subjects rights to transparent information about the use of his or her data during the arbitration (which may include data privacy notices), to review and rectify data, to erasure and to deny processing, among other things. The application of these rules may result in less data being processed more securely during arbitrations governed by the GDPR. However, in applying them both during the arbitral process and by the regulators, it is critical that the cross-border, often confidential, consensual, decision-making function, including the protection of the parties due process rights, be taken into consideration. This Article proposes a case-by-case approach to GDPR compliance that uses data protection protocols to allow the arbitral process to work effectively within the GDPR framework.

As anyone who has an email account likely knows, the EU General Data Protection Regulation (GDPR) recently came into force and has been the subject of previously unseen compliance efforts due to the risk of criminal liability, individual and collective claims by data subjects, and fines of up to the higher of 4 percent of global gross revenue or €20 million. In contrast to most U.S. data protection laws, the GDPR prohibits the processing of personal data by a third party (including during an arbitration) unless expressly allowed by the terms of the regulation. When applicable, the GDPR also sets rules for where, where, how, and how much personal data can be processed during an arbitration. After explaining when the GDPR applies to arbitration, this article considers the regulation’s practical impact on a complex international arbitration and how binding data protection measures can be used to provide predictability and enhance compliance.

Application of the GDPR to Arbitration

The GDPR applies broadly to all arbitrations where “personal data” is “processed” by the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors (“arbitral participants”). The European conception of what is “personal data” is significantly broader than that applied in the United States. For purposes of the GDPR, personal data processing during an arbitration includes any review or other treatment of arbitral information or evidence of any kind by which an individual is identified or identifiable even when the personal data is contained in a business-related document (such as work emails, lab notebooks, agreements or construction logs) (“personal arbitral data”). This means that virtually any treatment of any piece of evidence, notes, filings, draft awards and the award itself during an arbitration will likely constitute the processing of personal arbitral data covered by the GDPR when it applies (“arbitral data processing”). Put simply, when the GDPR applies, every time a person is named or identifiable, anything an arbitral participant does with or to that document is covered.

Complying With the GDPR During the Arbitral Process

The GDPR applies to arbitral participants who are either established in the European Economic Area (EEA), or that target EEA data subjects, and its reach is effectively extended by the international data transfer rules. Each arbitral participant should therefore consider at the outset of an arbitration whether the GDPR applies to its processing of personal data during the arbitration, and, if so, what rules apply.

The GDPR imposes obligations on data “controllers” and data “processors” with more extensive duties imposed on the controllers of data. Data controllers are those who make decisions about the processing, whereas data processors must process the data at the behest of a controller. Given the nature of the activities typically undertaken by arbitral participants during an arbitration, they will often be considered both data controllers and data processors during the course of the arbitral process, and hence must apply the more stringent data controller rules.

As a practical matter, this creates overlapping data protection rights and duties on the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors, each of whom may have individual liability for GDPR compliance. Furthermore, each of these participants may be subject to the jurisdiction of a different Member State supervisory authority and may take a different view of how the rules apply to the arbitration. This creates significant uncertainty and concern about how the GDPR may affect the arbitral process.

From a case-specific perspective, GDPR compliance usually should be addressed at the initial procedural conference or even earlier, but an issue may arise as to whether the tribunal should raise data protection or wait for the parties to raise it and what to do if the parties do not raise it. Arbitration is a party-driven process and it usually goes beyond the scope of the tribunal’s duties to raise legal issues that have not been raised by the parties. However, where the legal principles potentially at issue extend liability not only to the parties, but also to the tribunal itself (and potentially the institution), it would seem appropriate for the tribunal to raise these issues on its own initiative, at least to the extent necessary to ensure its own compliance.
When applicable, GDPR compliance may be bolstered by adopting a signed binding data protection protocol or other binding measure agreeing how the rules will be applied to a particular case and who is responsible for what. This can be done in the Terms of Reference or the First Procedural Order or in another instrument addressing:

- The legal obligations imposed by the GDPR and other applicable laws;
- What measures are required for compliance with those legal obligations;
- Who will be responsible for compliance;
- The impact of data protection on the arbitration (data transparency, cybersecurity, document disclosure, data transfer, travel etc.); and
- Provide for any indemnities.

For ease of reference, this will be referred to as a “binding data protection instrument,” and the remainder of this article considers how a binding data protection instrument may address data protection in the context of a specific case.

**Permissible Data Processing**

The processing of personal arbitral data requires a legal basis under the GDPR. The GDPR contains no express provision allowing processing for arbitration. Arbitral data processing therefore must be justified under one of the general permissible bases for processing, which for purposes of arbitration are usually limited to either informed consent and the legitimate interest of the data controller.

Informed consent must be obtained from each data subject, which is difficult in an arbitration given the nature of the consent required and that it can be withdrawn at any moment by the individual data subject, which creates risks for relying on consent as a basis for arbitral data processing. For example, it is difficult to obtain consent from employees because, unlike United States law, European law may not recognize employee consent as legitimate because of the leverage the employer has over the employee to extract consent. This means that most arbitral data processing will require justification under the legitimate interest standard.

The legitimate interest basis for data processing recognizes that there may be a legitimate need for a data controller or a third party to process personal data, but then considers whether the interests of data subject(s) outweigh that legitimate interest, taking into consideration the riskiness of the processing. The relevant EU data protection authority has recognized that the pursuit of legal claims may fall within the legitimate interest standard, provided the data processed is limited and data subject rights are not infringed by the processing. As a practical matter, this means that GDPR compliance may narrow the amounts and types of personal data that is reviewed during an arbitration by the parties, vendors, outside counsel, and the experts, including during document disclosure, where personal data is covered by the GDPR.

**Binding Data Protection Instrument**

The binding data protection instrument should state the basis or bases being relied upon for the processing of the personal arbitral data during the arbitration.

**International Data Transfers**

The GDPR’s rules are even stricter when data is transferred outside the EEA. The transfer of personal data outside the EEA is prohibited, including during an arbitration, unless expressly allowed by the GDPR. Transfer is defined broadly and is likely to include downloading a document from the cloud, opening an email, or even storing it on a computer that is carried outside the EEA, including during an arbitration. These data transfer restrictions are in addition to those applicable to data protection generally.

It is beyond the scope of this article to undertake an in-depth analysis of the application of the international transfer restrictions to arbitration. Briefly, a transfer of personal data outside the EEA, including in the context of an arbitration, must be justified on one of four bases: (1) an EU adequacy finding; (2) implementation of adequate safeguards; (3) application of a specific derogation; or (4) if nothing else is feasible, application of the general derogation allowing for transfers where the data controller has a compelling legitimate interest, but this only applies to one-time transfers and requires notification to the relevant Member State supervisory authority.

When an arbitration requires transferring personal data outside the EEA to a country without an adequacy finding, the GDPR provides a specific derogation allowing occasional transfers where “necessary for the establishment, exercise or defence of legal claims,” expressly including out-of-court procedures. However, the personal data transferred must be (i) “necessary” for the claim or defense, (ii) minimized, (iii) protected after transfer, and (iv) the data subject may need to be notified of the transfer. The explicit consent and compelling legitimate interests standards are also possible bases for arbitral data transfer, but are unlikely to be feasible for most arbitral data transfers due to the nature of the consent required and the need for multiple international transfers.

Another approach worth exploring when the legal claims derogation is too limiting is that the GDPR also expressly allows international data transfers pursuant to contractual arrangements provided they have been authorized by the relevant Member State supervisory authority in advance. This would allow arbitral participants to develop a set of contractual undertakings complying with the most important provisions of the GDPR, which, when agreed to by the arbitral participants, would allow the free transfer of data internationally among those who have entered into the undertakings. For example, an
arbitrator or institution could have a pre-approved set of contractual clauses that would then be agreed to by the other participants allowing transfer amongst them. Some arbitrators and counsel will be uncomfortable with this approach, and it remains to be seen whether it would hold muster with the relevant EU and Member State supervisory authorities, but, where appropriate, it could allow data transfer that would otherwise be prohibited and hence be worthy of consideration.

**Binding Data Protection Instrument:** When international data transfers are required during an arbitration, any binding data protection instrument should state the basis or bases being relied upon for the data transfers.

**Cybersecurity**

Adequate cybersecurity is mandatory whenever the GDPR applies, including the implementation of “appropriate technical and organisational measures to ensure a level of security appropriate to the risk,” taking into account “the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons,” which may include pseudonymization or anonymization. Pseudonymization means eliminating personal data (for example redaction) in a manner whereby it can be reinstated, anonymization means permanent deletion.

While not applying the GDPR standard, the ICCA/NYC Bar/CPR Draft Cybersecurity Protocol for International Arbitration, released for consultation in 2018, and the Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration, launched in 2017, are helpful to consider when adopting cybersecurity measures.

**Binding Data Protection Instrument:** Any binding data protection instrument should state the cybersecurity measures being undertaken and why they are considered adequate under the GDPR standard.

**Data Minimization**

The GDPR generally requires the processing of personal data to be minimized. Data minimization starts with the initial internal collection of data by the parties and extends throughout the process. In the context of document production for United States litigation, the principles of which would be expected to be applied to arbitration, the relevant EU data protection authority has said that before personal data is reviewed for litigation it should be culled for relevance and to exclude sensitive information, preferably by the party or an expert data analyst, and pseudonymized or anonymized where possible. Application of the data minimization principle, especially when data will be transferred outside the EEA, may eventually lead to less data being reviewed and disclosed in arbitration cases governed by the GDPR.

**Binding Data Protection Instrument:** The binding data protection instrument should address the efforts undertaken to minimize the data being processed, including during any data disclosure process (especially when tribunal-ordered).

**Data Retention and Destruction**

Data retention and destruction are considered “processing” under the GDPR. The GDPR requires retention periods to be set at the time of data collection with the goal of minimizing the data being processed, which are applicable to arbitration.

**Binding Data Protection Instrument:** The binding data protection instrument should address data retention. From the tribunal’s perspective, it will be important to confirm that any data provided to the arbitrators can be retained as long as required by law or any relevant bar or other ethical rules. The parties’ data retention policies may also be relevant to data disclosure and other issues addressed in the binding data protection instrument.

**Data Subject Rights.**

The GDPR grants data subjects significant rights, including the right to transparent information about the use of his or her data (which may include data privacy notices), to review and rectify data, to erasure and to deny processing, among other things. These rights could apply to literally hundreds of individuals in a complex case and exemplify the difficulties in reconciling the GDPR with arbitration.

The first step is to consider what rights apply. Arbitration is exempted from certain of data subject rights when the data processing is “necessary for the establishment, exercise or defence of legal claims,” and the GDPR further allows Member States to exempt other data subject rights when required for “the protection of judicial independence and judicial proceedings” and “the enforcement of civil law claims,” which have been extended to arbitration in at least one EU country.

After it is decided exactly what rights apply, the question is who is responsible for compliance? Under the GDPR, all data controllers are responsible and liable for complying with data subject rights (and, as discussed, there are likely to be many data controllers in an arbitration). However, for some data subject rights, like the provision of data protection notices, it is not feasible for all arbitral data participants to comply simultaneously. The GDPR wants the data subject to get one clear notice, not numerous different notices. But each arbitral participant is legally responsible for compliance and risks liability; although there is an exception where notification would be overly onerous.

**Binding Data Protection Instrument:** The binding data protection instrument should describe what data subject rights apply, who will comply and how, and describe the
Looking Forward

The relevant EU and Member State data protection authorities have yet to provide guidance about the application of the GDPR to arbitration, which would create increased certainty and uniformity. However, it is important for any guidance provided to properly reflect the realities of complex commercial arbitration and its cross-border, often confidential, consensual, decision-making function, including the protection of the parties due process rights. In the meantime, the case-by-case approach to GDPR compliance suggested in this article is imperfect but allows the arbitral process to work effectively within the GDPR framework.

Endnotes

1. Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. L 119/1 [hereinafter GDPR]. The GDPR applies to the current 28 EU Member States, which are Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom. The GDPR has also been implemented into the Agreement on the European Economic Area (the “EEA Agreement”) and therefore also applies to the three EFTA States (Iceland, Liechtenstein and Norway).

2. The term “data subject” refers to the individual that is identified or identifiable by the data. In the arbitration context, for example, this would be the person referred to or copied on an email, contract, lab report, etc. that is submitted in evidence, or is mentioned in a witness statement, brief, draft award etc. So in a complex arbitration, this could be hundreds of people.

3. GDPR supra note 1 at Art. 83.

4. GDPR supra note 1 at Art 6 (1).

5. The author has recently published an extensive treatment of these issues in the Fordham International Law Journal, It’s All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration Volume 41, Issue 4 (2018), some of which were also addressed in the Global Arbitration Review at the time the GDPR came into force in Managing Arbitral Data under the GDPR (29 May 2018) https://globalarbitrationreview.com/article/1170035/managing-arbitral-data-under-the-gdpr.

6. GDPR supra note 1 at Art. 5.

7. See id. at Art. 4 (containing the definitions of the terms used in the regulation).

8. See id. at Art 3.


10. See id. at Art 29.

11. For cases existing when the GDPR came into force, if data protection has not already been considered, these issues should be raised as soon as they come to light to address compliance going forward.

12. See GDPR, supra note 1, at Art 6 (1).

13. See id.

14. See id.

15. The term “relevant EU data protection authority” refers both to the previous Article 29 Working Party established under the Data Protection Directive, and the European Data Protection Board established by the GDPR to issue guidelines, recommendations, and best practices to encourage consistent application of the GDPR and specify guidelines concerning the setting of administrative fines. The opinions of the Article 29 Working Party remain valid until modified under the GDPR.

16. See GDPR, supra note 1, at Art. 44.


18. When a country has an adequacy finding data can flow freely to that country. The United States does not have a general adequacy finding but data can flow freely to entities agreeing to the Privacy Shield. The other countries having an adequacy finding are Andorra, Argentina, Canada (commercial organizations only), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, and Uruguay (and Japan and South Korea are negotiating with the EU).


20. See id.

21. See GDPR supra note 1 at Art. 46 (3). Note that the GDPR also foresees pre-approved “standard contractual clauses” but these include provisions that are unacceptable for arbitration, including audit rights.

22. See GDPR supra note 1, at Art. 32.


24. See GDPR supra note 1, at Art 5 (1) (c).

25. Given their judicial function, EEA Member State courts are exempted from regulation by the data protection authorities, in deference to court supervision.


27. See id.

28. See id.

29. See GDPR supra note 1, at Arts. 12-22.

30. See id., at Art. 17 (3) (e).

31. See id., at Art. 23 (1) (f) and (j). Ireland has relied on this language to exempt the processing of personal data from certain data subject rights during out-of-court procedures. See Irish Data Protection Bill 2018 Art . 61 (No. 10b of 2018).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BCB HOLDINGS LIMITED and
THE BELIZE BANK LIMITED,

Petitioners/Plaintiffs

v.

THE GOVERNMENT OF BELIZE,

Respondent/Defendant.

Civil Action No. 14-1123 (CKK)

MEMORANDUM OPINION
(February 6, 2017)

This matter comes before the Court on Petitioners’ [53] Motion for an Order Pursuant to 28 U.S.C. § 1610(c) Authorizing Enforcement of Judgment and [54] Motion for Anti-Suit Injunction and Temporary Restraining Order. Petitioners BCB Holdings Limited (“Holdings”) and the Belize Bank Limited (“BBL”) (collectively “Petitioners”) initiated an arbitration against the Government of Belize (“GOB”) on October 16, 2008, before the London Court of International Arbitration (“LCIA”) in London, England. The LCIA issued an award in favor of Petitioners, and this Court subsequently confirmed that award and entered judgment in favor of Petitioners. The GOB apparently does not intend on paying the judgment entered by this Court.

Petitioners now request an order authorizing the enforcement of that judgment and also seek an anti-suit injunction enjoining the GOB from taking certain actions in Belize that would effectively prevent Petitioners from enforcing this Court’s judgment. For the reasons set forth below, the Court GRANTS Petitioners’ [53] Motion for an Order Authorizing Enforcement of Judgment, DENIES WITHOUT PREJUDICE Petitioners’ [54] Motion for Anti-Suit Injunction.
on the present record, and DENIES Petitioners’ [54] Motion for a Temporary Restraining Order on the grounds asserted in this case.

I. BACKGROUND

Aggrieved by the repudiation of a Settlement Deed entered into between the parties, Petitioners initiated an arbitration against the GOB on October 16, 2008, before the LCIA in London, England. Decl. of Jessica Wells, ECF No. 32-3, at ¶ 5(c). The GOB opted to abstain from the arbitration, and the proceedings were accordingly conducted ex parte. Id. On August 18, 2009, the arbitral tribunal issued an award in favor of Petitioners and concluded that the GOB owed Petitioners BZ $40,843,272.34 in damages plus interest and costs. Id. at ¶ 5(f).

On August 21, 2009, Petitioners sought to enforce their arbitral award in Belize. Decl. of Louis Kimmelman, ECF No. 1-2, at ¶ 16. The GOB opposed the enforcement of the award, arguing that it was contrary to the law and public policy of Belize. Id. The Supreme Court of Belize enforced the Award in late 2010, and the GOB appealed this decision in early 2011 to the Belize Court of Appeals. Id. at 17-18. The appellate court reversed the decision below and held that the Award would not be enforced. Id. at 19. On July 26, 2013, the Caribbean Court of Justice (“CCJ”), Belize’s final court of appeal, affirmed on public policy grounds. Id. at 20.

On July 1, 2014, Holdings and BBL filed in this Court a Petition to Confirm Foreign Arbitration Award and to Enter Judgment or, Alternatively, Complaint to Recognize and Enforce Foreign Money Judgment. See Petition to Enforce, ECF No. 1. This Court confirmed Petitioners’ arbitration award on June 24, 2015. See BCB Holdings Ltd. v. Gov’t of Belize, 110 F. Supp. 3d 233 (D.D.C. 2015), aff’d, 650 F. App’x 17 (D.C. Cir. 2016), cert. denied, No. 16-136, 2017 WL 69187 (U.S. Jan. 9, 2017). A copy of this opinion is attached hereto as Exhibit A.
The Court then entered judgment confirming the Award and converting it into U.S. dollars, plus prejudgment interest, in the total amount of $27,429,996.56. ECF No. 47.

Respondents opposed the petition to confirm the award on numerous grounds, one of which is of particular note here. Respondents claimed that the final judgment rendered by the CCJ refusing to enforce the arbitration award prevented the Petitioners from enforcing the award in this jurisdiction. See BCB Holdings Ltd., 110 F. Supp. 3d at 245-46. Specifically, Respondents argued that the doctrines of res judicata, collateral estoppel, and international comity barred the petition to confirm because a competent court, the CCJ, had already issued a final judgment refusing to enforce the Award. Id. at 245. The Court rejected this argument. Id. The Court explained that only the country in which an award is made, referred to as the primary jurisdiction, may set aside an award. Id. at 246. All other member-countries to the New York Convention are designated as secondary jurisdictions. Although these secondary jurisdictions may refuse to enforce an award, their doing so does not preclude other jurisdictions from enforcing it. Id. In this case, England—which did recognize and confirm the award—was the primary jurisdiction, and accordingly the CCJ decision did not prevent this Court from enforcing Petitioners’ award. Id.

Respondents appealed this decision to the Court of Appeals for the D.C. Circuit, which affirmed this Court’s judgment in its entirety. See BCB Holdings Ltd. v. Gov’t of Belize, 650 F. App’x 17, 20 (D.C. Cir. 2016), cert. denied, No. 16-136, 2017 WL 69187 (U.S. Jan. 9, 2017). A copy of this opinion is attached hereto as Exhibit B. The United States Supreme Court then denied Respondent’s petition for certiorari on January 9, 2017. See Gov’t of Belize v. BCB Holdings Ltd., No. 16-136, 2017 WL 69187, at *1 (U.S. Jan. 9, 2017). On January 23, 2017,
Petitioners filed a motion for an order pursuant to 28 U.S.C. § 1610(c) authorizing enforcement of the judgment, which is now pending before this Court.

Thereafter, Belize took a number of steps that were apparently aimed at preventing Petitioners from taking any further actions to enforce their judgment from this Court. On January 27, 2017, Belize introduced legislation in the Belizean Parliament entitled The Crown Proceedings (Amendment) Act 2017. This Act criminalizes efforts to enforce foreign judgments against Belize in any court outside Belize. The Act states: “Where it has been determined by a court in Belize, that a foreign judgment is unlawful, void or otherwise invalid, a person who, whether in or outside of Belize, and whether by the institution of proceedings or otherwise, enforces or attempts to enforce the foreign judgment commits an offence.” Pets.’ Ex. A, ECF No. 54-2 (Crown Proceedings (Amendment) Act 2017), § 3–29B(1). Violation of this Act results in criminal penalties for individuals consisting of fines not exceeding BZ $150,000, or terms of imprisonment not exceeding two years, or both. Id., § 3–29B(2). The statute states that “[a]n application shall lie to the Supreme Court to issue an injunction against a person restraining the person from commencing, intervening in or continuing any proceedings for enforcement of a foreign judgment, whether in or outside of Belize, on the basis that a competent court in Belize has declared such foreign judgment unlawful, void or otherwise invalid.” Id., § 3–29B(3).

On the same day, Belize introduced legislation entitled The Central Bank of Belize (International Immunities) Act, 2017. This Act states that “[a] person commits an offence who, whether in Belize or outside of Belize, and whether in respect of a matter occurring before or after the coming into operation of this Act . . . (a) has instituted, intervened in or sought the conduct of proceedings in any foreign State, being proceedings from which the Bank or the property of the Bank would, by virtue of section 3, be immune . . . .” Pets.’ Ex. B, ECF No. 54-3
(Central Bank of Belize (International Immunities) Act, 2017), § 4–(1). Section 3 of the act purports to immunize the property of the Central Bank of Belize from proceedings for attachment, arrest or execution in any foreign court. *Id.*, § 3.

There is no dispute as to the purpose of these statutes. On January 27, 2017, the Prime Minister of Belize expressly stated in a speech to the Belize Parliament that the statutes are intended to interfere with Petitioners’ efforts to enforce this Court’s judgment against the GOB:

Well, not to put too fine a point on it, and in fact, to speak to circumstances that we’re all already familiar with, we had thought it prudent to do this because of the fact that the Ashcroft Concerns, BSDL, BCB Holdings, Ltd., which I gather is now trading—has changed its name to Caribbean Investment Holdings, Ltd.—and The Belize Bank, Ltd. have obtained final judgment in the United States on arbitral awards given against the government of Belize and in favor of BSDL, Belize Bank, Ltd., and BCB Holdings, Ltd. Last Tuesday, those entities filed a motion in the District Court in Washington, D.C., filed an application to be allowed to enforce those judgments against the government of Belize. Notwithstanding that certainly in one case, as all Belize, and indeed now all the world knows, the final judgment flies completely in the face of the decision of our highest court, the CCJ, which decision says that that arbitral award is unenforceable, because it is repugnant to public policy, and it is void and illegal.

Decl. of Louis B. Kimmelman, ECF No. 54-1, ¶ 15. On January 31, 2017, the Belizean legislature enacted both statutes. *Id.* ¶ 16.

On February 1, 2017, the GOB sent the Registrar for the CCJ a letter stating that it “will tomorrow file with the [CCJ] an urgent inter party application for an Anti-Enforcement Injunction to restrain [Petitioners] from enforcing or causing to be enforced the very same LCIA Final Award for which this Honourable Court, in the matter at caption, has declined enforcement by its judgment dated July 26, 2013.” Pets.’ Ex. C, ECF No. 54-4 at 1. The GOB represented to
the CCJ that the need for injunctive relief was urgent because Petitioners had filed a motion for an order authorizing enforcement of judgment in this Court. *Id.* at 1-2.

On February 2, 2017, the Registrar responded to the GOB’s letter, explaining that the CCJ “has not observed from the content of your communication any basis on which it can exercise powers which are ordinarily exercised by the Supreme Court. Accordingly, it may be more appropriate to file your application in the Supreme Court of Belize unless you can show the Caribbean Court of Justice has jurisdiction.” Pets.’ Ex. D, ECF No. 54-5 at 4. The GOB filed its application for injunctive relief with the CCJ regardless, seeking “[a]n Order restraining [Petitioners,] their successors, assigns, and/or subsidiaries whether by themselves, their officers, servants, affiliates, or agents from enforcing or causing to be enforced the said LCIA Final Award or any judgment upon the said award, in any jurisdiction or to commence or continue any other legal or arbitral proceedings in any country or jurisdiction whether in or outside of Belize relating to or arising out of the said final Award.” Pets.’ Ex. G, ECF No. 54-8 at 2. The CCJ immediately denied the GOB’s application, holding that “the application for injunctive relief filed by the Respondent/Applicant on the 2nd day of February, 2017 is hereby dismissed for lack of jurisdiction, there being no pending appeal before the Court.” Pets.’ Ex. I, ECF No. 54-10.

Later that day, the GOB notified Petitioners that it would seek this same injunctive relief in the Supreme Court of Belize. Pets.’ Ex. J, ECF No. 54-11. The GOB provided a draft of the application it intended to file, which sought an order that Petitioners “be restrained from enforcing or causing to be enforced the Final Award issued by the London Court of International Arbitration (LCIA) in Arbitration No. 81169 in the sum of BZ $40,843,272.34 in Damages, £206,248.14 in arbitration costs and BZ $2,960,735.69 in legal and professional costs in favour of the Respondents (‘the Award’) or upon any judgment upon the said Award in any jurisdiction
or to commence or continue any other legal or arbitral proceedings in any country or jurisdiction
whether in or outside of Belize relating to or arising out of the said final Award or upon any
judgment upon the said Award.” Pets.’ Ex. K, ECF No. 54-12, at 2.

On Friday, February 3, 2017, after being notified of this application, Petitioners filed the
pending motion for an anti-suit injunction and a temporary restraining order in this Court. ECF
No. 54. Petitioners sought from this Court an injunction preventing the GOB from “(i) initiating,
prosecuting or maintaining any proceeding for injunctive relief in the courts of Belize, or in any
other foreign court, against Holdings that seeks to restrain, interfere with or prevent Holdings
from enforcing this Court’s Judgment (and the underlying arbitral award) in the United States or
(ii) threatening Holdings with any injunction or other court order that seeks to restrain, interfere
with or prevent Holdings from enforcing this Court’s Judgment (and the underlying arbitral
award) in the United States.” Proposed Order, ECF No. 54-15.

The Court held a teleconference with the parties on Petitioners’ motion the afternoon it
was filed, during which counsel for the GOB represented to the Court and to Petitioners that the
GOB had already gone before the Supreme Court of Belize earlier that day to submit its
application and provide oral argument. See Transcript of February 3, 2017 Telephone
Conference, ECF No. 57-5 at 10:11-15 (“within the last hour the Government of Belize already
gone into court, already presented oral argument on their request for an injunction, and the judge
has taken the matter under submission”). Counsel for Petitioners was not able to attend the
argument on the extremely short notice. Id. at 13:22-14:7. At the conclusion of this
teleconference, the Court ordered the GOB to respond to Petitioners’ motion for a temporary
restraining order pending the Court’s decision on Petitioners’ motion for an anti-suit injunction
by no later than 10:00 a.m. on Monday, February 6, 2017. 2/3/2017 Min. Order. The Court also
ordered the parties to appear for a hearing on the temporary restraining order at 11:00 a.m. Monday morning. *Id.*

La t e Sunday night, Respondents filed a response to Petitioners’ Motion for an Order Authorizing Enforcement of Judgment. ECF No. 56. Although challenging the scope and wording of the order sought by Petitioners in that motion, Respondents conceded that Petitioners were entitled to an order pursuant to section 1610(c) “confirming that a reasonable period of time has elapsed since entry of the Judgment, and that GOB has been given notice of entry of Judgment required by Section 1608(e).” *Id.* at 1.

On Monday morning the GOB filed its opposition to Petitioners’ motion for a temporary restraining order. ECF No. 57. The GOB revealed therein that since the teleconference on Friday afternoon, the GOB had succeeded in obtaining the sought injunction from the Supreme Court of Belize, preventing Petitioners from doing anything further to enforce the judgment issued by this Court. *Id.* An hour later, the Court held a hearing on the record on Petitioners’ pending motions. Counsel for the GOB appeared by telephone. Petitioner BBL did not attend at all, for fear of the criminal penalties that would result from violating the Belize injunction. Counsel for Petitioner Holdings appeared pro forma, but did not present any argument or otherwise take any action that could be construed as attempting to enforce or causing to be enforced the judgment in this case. Counsel for GOB warned counsel for Holdings that making any representations to the Court could result in Holdings being criminally punished for violating the Belize injunction.
II. DISCUSSION

A. Petitioners’ Motion for an Order Authorizing Enforcement of Judgment

The Court is in receipt of Petitioners’ Motion for an Order Authorizing Enforcement of Judgment and Respondents’ response to that motion. Both sides have had an opportunity to brief this matter and the Court considers it fully submitted. In their motion, Petitioners seek an order pursuant to 28 U.S.C. § 1610(c), authorizing enforcement of the judgment against the GOB. Section 1610(c) states that:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

28 U.S.C. § 1610(c). Petitioners argue that the GOB has had sufficient notice of the judgment, and that a reasonable amount of time has passed following entry of judgment, for it to seek attachment or execution.

Respondent concedes, at least for the purposes of this motion, that Petitioners are entitled to an order pursuant to section 1610(c) “confirming that a reasonable period of time has elapsed since entry of the Judgment, and that GOB has been given notice of entry of Judgment required by Section 1608(e).” See Resp.’s Opp’n to Mot. for Order Authorizing Enforcement of Judgment, ECF No. 56, at 1. Respondent only opposes Petitioners’ motion to the extent it more broadly requests an order that Petitioners are “authorized to enforce” this Court’s judgment. Respondent requests a more narrowly drafted order that states only that the notice and time requirements of section 1610(c) are satisfied.

The Court GRANTS Petitioners’ motion. The Court notes that it does not interpret Petitioners’ motion as asking for anything broader than what Respondents concede Petitioners are entitled to: a determination “that a reasonable period of time has elapsed following the entry
of judgment and the giving of any notice required under section 1608(e) of this chapter.” Id. at 5. Accordingly, the Petitioners’ motion is GRANTED to the extent it seeks this determination. The Petitioners’ motion is also GRANTED in that the Court orders that Petitioners are authorized to seek to enforce their judgment via attachment or execution of GOB property in the appropriate jurisdiction. The Court does not make any determination as to the propriety of attachment or execution of any particular property under subsections (a) or (b) of section 1610. See Agudas Chasidei Chabad of U.S. v. Russian Fed’n, 798 F. Supp. 2d 260, 270-71 (D.D.C. 2011) (“A 1610(c) order, in the context of this case, does not authorize the attachment or execution of particular property—or any property at all . . . Any court, whether this or another, would be required to evaluate a proposed attachment of specific property in this case by reviewing the jurisdictional provisions of § 1610(a)-(b), as well as any other immunities that might apply.”).

B. Petitioners’ Motion for Anti-Suit Injunction and Temporary Restraining Order

Having granted Petitioners’ motion under section 1610(c), there is no longer any need for this Court, on the present record, to issue an anti-suit injunction. Anti-suit injunctions are intended to protect the Court’s jurisdiction. See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) (“Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.”). Although the actions of the GOB are apparently aimed at preventing Petitioners from enforcing the judgment of this Court, at this time they do not interfere with this Court’s jurisdiction. This Court has confirmed Petitioners’ arbitration award, entered judgment in favor of Petitioners, and now authorized Petitioners to proceed to seek to enforce this judgment in the appropriate jurisdiction in which it can find attachable property of the GOB. Presently there is no issue left for this Court
to adjudicate. Accordingly, strictly on the present record before the Court, the need to protect this Court’s jurisdiction does not warrant issuing an anti-suit injunction. Petitioners’ motion for an anti-suit injunction is therefore DENIED WITHOUT PREJUDICE. Given that the temporary restraining order Petitioners sought was intended to preserve the status quo pending resolution of the Petitioners’ motion for an anti-suit injunction, the Court will likewise DENY Petitioners’ motion for a temporary restraining order on the grounds asserted.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS Petitioners’ [53] Motion for an Order Pursuant to 28 U.S.C. § 1610(c) Authorizing Enforcement of Judgment. The Court determines that the GOB has been given all required notice and that a reasonable period of time has elapsed following the entry of judgment in this matter and the giving of such notice for Petitioners to now seek attachment or execution pursuant to 28 U.S.C. § 1610(a)-(b). The Court further orders that Petitioners may now seek attachment or execution of GOB property to satisfy this Court’s judgment pursuant to 28 U.S.C. § 1610(a)-(b) in the jurisdictions where such attachment or execution is appropriate. Additionally, the Court DENIES WITHOUT PREJUDICE Petitioners’ [54] Motion for Anti-Suit Injunction on the present record, and DENIES Petitioners’ [54] Motion for Temporary Restraining Order on the grounds asserted therein.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Attachments.
Synopsis

Background: Belize-registered parent holding company and its banking subsidiary petitioned to confirm foreign arbitral award, pursuant to Federal Arbitration Act (FAA) and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to convert award plus costs and interests to United States dollars, and to enter judgment in their favor against Government of Belize (GOB) or, alternatively, filed complaint to recognize and enforce foreign money judgment pursuant to District of Columbia Foreign-Money Judgments Recognition Act. GOB moved to dismiss petition and complaint.

Holdings: The District Court, Colleen Kollar-Kotelly, J., held that:

[1] New York Convention applied;

[2] Foreign Sovereign Immunities Act (FSIA) arbitration exception applied;

[3] personal jurisdiction was exercisable over GOB;

[4] petition was not time barred;

[5] petition was not barred by res judicata;

[6] forum non conveniens dismissal was not warranted;

[7] arbitration agreement in settlement deed was valid;

[8] subject matter was appropriate for arbitration; and

[9] enforcement of award would not violate public policy.

Petition granted; motion denied.

Attorneys and Law Firms

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MEMORANDUM OPINION

COLLEEN KOLLAR-KOTELLY United States District Judge

This matter comes before the Court on review of an arbitration award pursuant to 9 U.S.C. § 207 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”). Petitioners BCB Holdings Limited and the Belize Bank Limited (“BBL”) (collectively “petitioners”) initiated an arbitration on October 16, 2008, before the London Court of International Arbitration (“LCIA”) in London, England. The Government of Belize (“GOB”) opted to abstain from the arbitration, and the proceedings were conducted ex parte. On August 18, 2009, the arbitral tribunal issued an award in favor of petitioners and concluded that the GOB owed petitioners BZ$40,843,272.34 in damages plus interest and costs (“Award”).¹ On July 1, 2014, BCB and BBL filed a Petition to Confirm Foreign Arbitration Award and to Enter Judgment or, Alternatively, Complaint to Recognize and Enforce Foreign Money Judgment. See Petition to Enforce (July 01, 2014), Docket No. [1] (“Pet.”). On January 30, 2015, the GOB filed a motion to dismiss the petition and complaint (see Motion to Dismiss (Jan. 30, 2015), Docket No. [26] “Mot.”) and a response to the petition (see Response to Petition (Jan. 30, 2015), Docket No. [28] “Resp. to Pet.”). For the reasons explained below, the Court shall GRANT the petition and DENY respondent's motion to dismiss.
I. BACKGROUND

BCB Holdings, previously known as Carlisle Holdings Limited, entered into a Settlement Deed with the GOB on March 22, 2005. See Pet. ¶ 4. The Settlement Deed was subsequently amended on June 21, 2006. See id. The Settlement Deed contains an arbitration clause which memorialized the parties’ intention to arbitrate all disputes pursuant to the arbitration rules of the LCIA. See id. ¶ 20. In 2008, a dispute arose between the parties related to Clauses 4.1 and 4.2 of the Settlement Deed, in which the GOB agreed to provide favorable tax treatment to BBL and BCB Holdings. See id. ¶ 21. Specifically, in August 2008, the Belize Commissioner of Income Tax rejected tax returns that were filed by BBL in accordance with the Settlement Deed. See id. ¶ 22. Petitioners considered this rejection a repudiation of the Settlement Deed and sought to engage the GOB in arbitration before the LCIA on October 16, 2008. See id. ¶ 23. The GOB did not participate in the arbitral proceedings. See id. ¶ 24.

The arbitral tribunal, consisting of three arbitrators, unanimously rendered a foreign arbitral award in favor of petitioners on August 18, 2009. See id. ¶ 27. The arbitral tribunal concluded that the GOB had promised to provide certain tax treatment to petitioners and that “[i]n refusing to accept [petitioners’] tax returns based on this treatment, Respondent [GOB] breached its contractual warranty and clearly evinced its intention not to honour the agreement.” Award ¶ 97; Pet. ¶ 27. The arbitral tribunal also awarded petitioners BZS40,843,272.34 in damages plus interest and costs to be paid by the GOB for breach of contract. See Pet. ¶ 27.

On August 21, 2009, petitioners sought to enforce the arbitral award in Belize. See id. ¶ 55. Opposing the enforcement of the Award, the GOB argued that the Award was contrary to the law and public policy of Belize. See id. The Supreme Court of Belize enforced the Award in late 2010, and the GOB appealed this decision in early 2011 to the Belize Court of Appeals. See id. ¶¶ 56–57. The appellate court reversed the decision below and held that the Award would not be enforced. See id. ¶ 58. On July 26, 2013, the Caribbean Court of Justice (“CCJ”), Belize’s final court of appeal, affirmed on public policy grounds, holding that the implementation of the tax treatment provisions of the Settlement Deed were not legislatively approved, which was “repugnant to the established legal order of Belize.” Id. ¶ 59 (quoting BCB Holdings Ltd., et al., v. Attorney General of Belize, CCJ Appeal No. CV 7 of 2012, ¶ 53).

Petitioners also sought enforcement of the Award in England. The High Court of Justice, Queen's Bench Division, Commercial Court, in the United Kingdom, granted petitioners leave to enforce the Award as a judgment and issued a foreign money judgment on February 26, 2013 (“U.K. Judgment”). See Pet. ¶ 84–87. The U.K. Judgment recognized and confirmed the arbitral award and provided pre- and post-judgment interest at an annual rate of 3.38%, compounded annually, and past and future costs of the arbitration. See id. ¶ 87.

On March 31, 2010, the GOB enacted a criminal statute that penalized parties that violated Belize Supreme Court injunctions and those that aided such violations. See id. ¶ 41. Penalties included mandatory fines between $50,000 and $250,000 and/or imprisonment for a minimum of five years. See id. ¶¶ 42–43. This statute applied to offenses committed both in Belize and in other jurisdictions. See id. ¶ 43. In the meantime, the GOB initiated litigation to enjoin several enforcement proceedings in any forum other than Belize courts. See id. ¶ 29. According to Petitioners, “the ease with which the GOB obtained injunctive relief in the Belize courts, coupled with the new mandatory penalties for violating such injunctions, had a chilling effect upon companies in Belize asserting legal claims against the GOB outside of Belize.” Id.

BCB Holdings, BBL, and other companies challenged this criminal statute in legal proceedings in Belize. See id. ¶ 47. Although the Belize Supreme Court upheld the law, the Belize Court of Appeals and the CCJ concluded in 2012 and 2014 respectively, that the sections of the law that created a criminal offense with mandatory penalties for violating Belize Supreme Court injunctions were unconstitutional and unenforceable. See id. ¶¶ 49–50. In its final decision on the validity of the 2010 criminal statute, the CCJ outlined limited circumstances in which the Belize Supreme Court could issue injunctions related to arbitration proceedings. See id. ¶ 52.

Between early 2009 and January 2014, while the mandatory penalties on parties who violated Belize court injunctions were still in effect, the GOB obtained numerous injunctions against parties with claims against
the GOB. See id. ¶ 54. One such injunction was obtained against the British Caribbean Bank ("BCB Bank"), a subsidiary of BCB Holdings. BCB Bank had filed a treaty arbitration against the GOB in 2010, but the GOB filed a claim in Belize Supreme Court seeking a declaration that the Belize Supreme Court was the proper forum for addressing a dispute between the parties. See id. ¶¶ 39–40. In so doing, the GOB obtained an anti-arbitration injunction against BCB Bank that restrained BCB Bank from pursuing the arbitration outside of Belize. See id. ¶ 40. This injunction was only discharged by the CCJ in 2013. See id. ¶¶ 51–52. The GOB did not request or obtain a similar injunction against BCB Holdings or BBL.

Petitioners filed this action on July 1, 2014, to confirm the arbitral Award pursuant to Section 207 of the Federal Arbitration Act ("FAA"), convert the Award plus costs and interests to United States dollars, and enter judgment in favor of petitioners. In the alternative, petitioners filed a complaint to recognize and enforce a foreign money judgment (U.K.Judgment) pursuant to the District of Columbia Foreign–Money Judgments Recognition Act of 2011, D.C.Code § 15–361 et seq.

The GOB timely filed a motion to dismiss the petition and motion to dismiss or strike the complaint. In addition, the GOB also submitted a response to the petition. In these two filings, the GOB lodges a series of arguments why this Court should not confirm the arbitral award or enforce the U.K. judgment. Namely, the Settlement Deed containing the arbitration clause is invalid; enforcement would violate the revenue rule; the Award is against U.S. public policy; the New York Convention does not apply to the dispute between the parties; the Court lacks subject-matter jurisdiction because Belize is entitled to foreign sovereign immunity; the Court lacks personal jurisdiction; the petition is time barred; the doctrines of res judicata, collateral estoppel, or international comity preclude enforcement of the Award; and there is a more convenient alternative forum. See Resp. to Pet. at 1; Mot. at 1. In addition, the GOB urges the Court to dismiss the complaint to recognize the U.K. Judgment because it was improperly joined with this confirmation action, the Court lacks subject matter and personal jurisdiction, res judicata and international comity must be applied, the foreign judgment is against public policy, and it conflicts with the final CCJ judgment. See Mot. at 2. Petitioners oppose all of these arguments. See Pet'r Opp. to Mot. (Mar. 2, 2015), Docket No. [29]; Opp. to Resp. to Pet. (Mar. 2, 2015), Docket No. [30].

II. LEGAL BACKGROUND


[2] [3] This Court has jurisdiction to enforce an arbitral award against a foreign state pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 et seq ("FSIA"). See 28 U.S.C. § 1330(a) (“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity.”). It is undisputed that the GOB is a foreign state under 28 U.S.C. § 1603(a). Under the FSIA, [a] foreign state shall not be immune from the jurisdiction of courts of the United States in any case—...
international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.


[4] United States courts have little discretion to refuse to confirm an award under the FAA. The FAA provides that in exercising its original jurisdiction over enforcing international arbitral awards, the district court “shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the ... Convention.” 9 U.S.C. § 207. See Yusuf Ahmed Alghanim & Sons, W.I.L. v. Toys “R” Us, Inc., 126 F.3d 15, 20 (2d Cir.1997) (“There is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award.”). The grounds for refusal enumerated in the Convention are as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings ...; or

*242  (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration ...; or

(c) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.


In its response to the petition to enforce the award and enter judgment, the GOB argues that the Court should refuse to enforce the award pursuant to Article V(1) (a), 2(a), and (2)(b) of the New York Convention. See Resp. to Pet. at 1. In its motion to dismiss, the GOB submitted numerous defenses to enforcing the Award, none of which fall within Article V of the New York Convention because, according to the GOB, the New York Convention does not apply because 1) the dispute between the parties was not commercial, and 2) Belize has not ratified the Convention. See Mot. at 16. Although, as discussed above, the Court may only refuse to enforce an award pursuant to Article V of the New York Convention, the Court will first take up the GOB’s jurisdictional and other non-Article V arguments. It will then address the merits of the GOB’s Article V arguments.

III. DISCUSSION

A. Jurisdiction

1. Applicability of the New York Convention

Petitioners rightly argue that the New York Convention governs the enforcement of the Award. See Pet'r Opp. to Mot. at 7–10. The New York Convention covers “the
recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” N.Y. Convention, art. I(1). Pursuant to the framework set forth by the New York Convention, “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” Id. at art. III.

[5] [6] [7] Under the FAA, arbitration agreements arising out of a legal relationship that are considered commercial fall under the New York Convention. See 9 U.S.C. § 202. This affirms the notion that the purpose of the New York Convention is “to ‘encourage the recognition and enforcement of commercial arbitration agreements in international contracts.’ ” TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 1289, 1298 (11th Cir.2005) (quoting Scherk v. Alberto–Culver Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). The commercial relationship requirement, however, is construed broadly. *243 See Bautista v. Star Cruises, 396 F.3d 1289, 1298 (11th Cir.2005) (“Congress meant for ‘commercial’ legal relationships to consist of contracts evidencing a commercial transaction ... as well as similar agreements.”) The Settlement Deed resolved a previous dispute between the parties that arose from the GOB's purchase of shares of stock in Belize Telecommunications Limited from Carlisle Holdings Limited, the predecessor of BCB Holdings. See Opp. to Resp. to Pet. at 9. The Settlement Deed and included arbitration agreement “resolved the dispute between the parties relating to this purchase and sale of stock.” Id. The underlying transaction was commercial, and the agreement to resolve the dispute arising out of this transaction facilitated the commercial legal relationship between the parties. Therefore, the Settlement Deed was indeed commercial for purposes of the FAA and the New York Convention.

[8] In Belize Soc. Dev. Ltd. v. Gov't of Belize, the D.C. Circuit confronted nearly identical facts as those at hand. Specifically, the former Prime Minister of Belize executed an agreement with Belize Telemedia Limited on behalf of the GOB that included an agreement to submit any unresolvable disputes to arbitration under the LCIA rules. See 668 F.3d 724, 728 (D.C.Cir.2012). In 2008, Belize's newly appointed Prime Minister declared that the contractual agreement and the included agreement to arbitrate were invalid, and the GOB declined to participate in the subsequent arbitration proceedings. See id. The arbitral tribunal issued a final award stating that it had jurisdiction over Telemedia's claim, that the agreement was valid, and that Telemedia was entitled to relief. See id. Subsequently, Telemedia filed a petition to enforce the award in the District Court for the District of Columbia, and on appeal of an Order to Stay, the D.C. Circuit analyzed the claims within the framework of the New York Convention. See id. at 727. “The fact that Belize is not a party to the New York Convention is irrelevant. If the place of the award is ‘in the territory of a party to the Convention, all other Convention States are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration.’ ” Id. at 731 n. 3 (quoting Creighton, 181 F.3d at 121). Similarly, the arbitral tribunal in the case at bar issued the Award in England and petitioners seek enforcement of it in the United States. Both the United States and England are parties to the New York Convention, and thus, the New York Convention applies.

2. Subject-matter jurisdiction

The GOB also argues that this Court does not have subject matter jurisdiction. The GOB argues that the FSIA exception to sovereign immunity for arbitration governed by an international treaty does not apply, and the former Prime Minister lacked authority to enter into the initial agreement with BCB Holdings, and consequently, Belize did not agree to arbitrate. See Mot. at 21. The Court is satisfied that it has subject matter jurisdiction in this matter.

above). Despite the GOB's arguments to the contrary, all of these requirements have been met.

[12] The GOB argues that the arbitration exception to foreign sovereign immunity does not apply because the agreement to arbitrate is void ab initio because the former Prime Minister of Belize lacked actual authority to execute the Settlement Deed, including the arbitration clause. See Mot. at 22–23. However, the proposition that this Court must conduct a de novo review of the arbitrability of the dispute to find subject-matter jurisdiction “runs counter to the clear teaching of this Circuit on the purpose and role of the FSIA. The FSIA is a jurisdictional statute that ‘speak[s] to the power of the court rather than to the rights and obligations of the parties.’ ” Chevron Corp. v. Republic of Ecuador, 949 F.Supp.2d 57, 63 (D.D.C.2013) (quoting Creighton, 181 F.3d at 124). Inquiring into the merits of whether this dispute was rightly submitted to arbitration is beyond the scope of the FSIA's jurisdictional framework. See id. at 63–64 (reviewing case law and concluding that in assessing subject-matter jurisdiction, federal courts have examined only “whether the award was made pursuant to an appropriate arbitration agreement with a foreign state and whether the award ‘is or may be’ governed by a relevant recognition treaty.”) Regardless, the Court considers the merits of the GOB's argument pursuant to Article V of the Convention in Section III(E)(1) of this opinion. However, as to the FSIA exception, the Court is satisfied that the FSIA's arbitration exception applies, and the Court has subject-matter jurisdiction to enforce the Award.

3. Personal Jurisdiction

[13] [14] The GOB also argues that this Court does not have personal jurisdiction over Belize because “[t]he minimum contacts requirements of Due Process cannot be satisfied as to GOB.” Mot. at 32. The GOB asserts that “compelling reasons exist to safeguard sovereigns against the unfettered exercise of personal jurisdiction.” Id. However, “foreign sovereigns and their extensively-controlled instrumentalities are not ‘persons’ under the Fifth Amendment's Due Process Clause—and thus have no right to assert a personal jurisdiction defense.” GSS Group Ltd. v. Nat'l Port Auth., 680 F.3d 805, 809 (D.C.Cir.2012) (citing TMR Energy, 411 F.3d at 300–01; Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96–97 (D.C.Cir.2002)). The D.C. Circuit has held that the FSIA requirements suffice, and therefore, “subject matter jurisdiction plus service of process equals personal jurisdiction.” Practical Concepts, 811 F.2d at 1548 n. 11 (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir.1981)) (internal quotation marks omitted); see also FSIA 28 U.S.C. § 1330(b) (“Personal jurisdiction over a foreign state shall exist as to every claim for relief over which district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.”). The GOB has not contested proper service.

B. Statute of Limitations

The FAA provides that “[w]ithin three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.” 9 U.S.C. § 207. The arbitral panel issued the award on August 18, 2009, and petitioners filed their petition for enforcement of the award on July 1, 2014. The GOB argues that the petition is time-barred by the FAA, and petitioners' right of action was not equitably tolled by the 2010 criminal statute. See Mot. at 8. The Court disagrees.

[15] [16] A “petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (internal quotation marks omitted). Petitioners have shown that they have been pursuing their rights to the arbitral award diligently since 2009. On August 21, 2009, petitioners sought enforcement of the award in Belize. They also brought their claim to the United Kingdom and received a foreign money judgment in 2013. In April 2010, petitioners joined in litigation challenging the constitutionality of the 2010 criminal statute. See Pet'r ¶ 47; see also Pet'r Opp. to Mot. at 14. Also, BCB Bank, a BCB Holdings subsidiary, appealed an injunction issued by the Belize Supreme Court that prevented it from resolving its arbitration claim outside of Belize. See Pet'r Opp. to Mot. at 14. The 2010 criminal statute was dismantled by the CCJ in January 2014, and petitioners initiated this action six months later in July 2014. Petitioners have diligently sought the enforcement and confirmation of the Award.
since it was issued in 2009 through both enforcement actions and litigation of the statute that created a risk of exposure to criminal penalties if petitioners had filed this action within the three-year limitations period.

Petitioners have also shown that they faced extraordinary circumstances that prevented them from timely filing an enforcement action. The mandatory criminal penalties in effect between 2010 and 2014 subjected petitioners and their attorneys to the risk of imprisonment and a substantial fine if they attempted to enforce the award in this or any other jurisdiction. Although these facts were described in detail in the petition, the GOB did not contest them in its motion. Instead, the GOB argues that petitioners slept on their rights because the criminal statute did not affect petitioners considering that the Belize Supreme Court had not issued an injunction specifically barring their recovery. See Mot. at 9. However, petitioners have demonstrated that the 2010 criminal statute had a “chilling effect” on seeking enforcement of the Award. See Pet. ¶ 29. And once this impediment to enforcement was lifted in 2014, petitioners immediately took advantage of the changed circumstances and filed this action.

Petitioners have satisfied the criteria for equitable tolling, and the period during which they were barred from pursuing their rights while the 2010 criminal statute was in effect is excluded from the limitations period. Thus, petitioners are not time-barred from seeking enforcement of the arbitral award.

C. Effect of CCJ Decision
The GOB argues that the final judgment rendered by the CCJ prevents petitioners from attempting to enforce the Award in this jurisdiction. Specifically, the doctrines of res judicata, collateral estoppel, and international comity bar the Petition because a competent court, the CCJ, issued a final judgment refusing to enforce the Award. See Mot. at 10–15. These arguments are unavailing.

[17] [18] *246 The New York Convention provides that “1. Recognition and enforcement of the award may be refused ... if ... (e) [t]he award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” N.Y. Convention, art. V(1) (e). The country under which an award was made is considered the primary jurisdiction whilst other member-countries to the New York Convention are designated as secondary jurisdictions. Secondary jurisdictions may refuse to enforce an award, but these decisions do not preclude other jurisdictions from enforcing it. By contrast, only a primary jurisdiction may set aside an award. See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 364 (5th Cir.2003) (“Under the Convention, ‘the country in which, or under the [arbitration] law of which, [an] award was made’ is said to have primary jurisdiction over the arbitration award. All other signatory States are secondary jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.”) Thus, the GOB must show that Belize is a country under the law of which the award was made in order to succeed on its argument that the CCJ decision to refuse enforcement of the award precludes this Court from granting the petition.

[19] The GOB cannot make such a showing. The Settlement Deed provides that any disputes that cannot be resolved by the parties shall be referred to and resolved by “arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this clause.” Award ¶ 20 (quoting Settlement Deed); see also Settlement Deed at 11.2. “The phrase ‘under the law of which’ in Article V(1)(e) ... refers to the procedural law governing the arbitration.” Belize Soc. Dev. Ltd., 668 F.3d at 731 (citing Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 289 (5th Cir.2004)). Because the arbitration was conducted in England under English arbitral laws, England is the country with primary jurisdiction. See, e.g., Steel Corp. of the Philippines v. Int'l Steel Servs., Inc., 354 Fed.Appx. 689, 692 (3d Cir.2009) (concluding that Singapore is the country with primary jurisdiction because the arbitrator applied Singapore procedural law in reaching the award). As England is the country with primary jurisdiction, only an English court may set aside the arbitral award issued by the LCIA. Consequently, although the CCJ decided not to enforce the award, its decision to do so does not hold preclusive effect on this Court.

D. Forum Non Conveniens
[20] [21] [22] The GOB also argues that dismissal is warranted on forum non conveniens grounds. See Mot. at 36. Under this doctrine, the Court “must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and
The GOB cannot satisfy the first step of the *forum non conveniens* test: “only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.” TMR Energy, 411 F.3d at 303. The GOB argues that the D.C. Circuit's holding in TMR Energy is no longer good law because of the Supreme Court's holding in Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp. that “[a] federal court has discretion to dismiss a case on the ground of *forum non conveniens* ‘when an alternative forum has jurisdiction to hear [the] case.’” 549 U.S. 422, 429, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007). However, these two cases are not in conflict. In Sinochem, the Supreme Court held that courts may dismiss a case on *forum non conveniens* considerations before definitively determining jurisdiction when such an inquiry is burdensome. 549 U.S. at 436, 127 S.Ct. 1184. By contrast, in TMR Energy, the Court did not address the timing of assessing the appropriateness of the forum, but rather, the D.C. Circuit plainly stated that there is no alternative forum that has jurisdiction to attach the commercial property of a foreign nation located in the United States. 411 F.3d 296 at 303. Thus, TMR Energy controls the specific *forum non conveniens* question before the Court. The GOB cannot show that an alternative forum exists, so the Court need not engage in the balancing step of the *forum non conveniens* test. TMR Energy, 411 F.3d at 303 (“The district court need not weigh any factors favoring dismissal ... if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose.”).

E. New York Convention

[23] [24] [25] As discussed above, courts “may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.” TermoRio, 487 F.3d at 935 (quoting Yusuf Ahmed Alghanim, 126 F.3d at 23) (internal quotation marks omitted). Because “the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature.” *Intl' Trading and Indus. Inv. Co. v. DynCorp Aerospace Technology*, 763 F.Supp.2d 12, 20 (D.D.C.2011). “[T]he burden of establishing the requisite factual predicate to deny confirmation of an arbitral award rests with the party resisting confirmation,” and “the showing required to avoid summary confirmation is high.” *Id.* (quoting *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir.1976); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir.1987)) (internal quotation marks omitted).

The GOB has brought three defenses under Article V to the New York Convention against the enforcement of the Award. For the reasons stated below, the GOB cannot meet its burden under Article V.

1. Article V(1)(a)—Validity of the Agreement

The GOB argues enforcement of the Award should be refused pursuant to Article V(1)(a). Specifically, the GOB argues that the Settlement Deed was not valid under Belizean law because the former Prime Minister did not have actual authority to agree to it. *See* Resp. to Pet. at 13–15. As a result, the GOB was not a party to the contract and was not able to agree to arbitrate any disputes thereto. *See* id. at 15. The GOB has not challenged the validity of the arbitration agreement itself beyond the assertion that the arbitration provision is part of the allegedly invalid contract.

The GOB relies on *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003) for the proposition that this Court must review the validity of the contract as a whole. *See* Resp. to Pet. at 13–14. In *China Minmetals*, the party resisting enforcement of the arbitral award claimed the contract containing the arbitration clause had been forged, so the parties had never agreed to arbitrate. *See* 334 F.3d at 277. Without issuing a written opinion, the district court enforced the arbitral award. The Third Circuit framed the *question before it as “whether a foreign arbitration award might be enforceable regardless of the validity of the arbitration clause on which the foreign body rested its jurisdiction.” Id. at 279. Applying the rule articulated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) to the international arbitration context, the court stated that the common principles in arbitration decisions “suggest that the district court here had an obligation to determine independently the existence of an agreement to arbitrate even though an arbitration panel in a foreign state already had rendered an award.” *Id.* at 284; *see First Options*, 514 U.S. at 944, 115 S.Ct. 1920 (“If ... the parties did not agree to submit ...
the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

Applying the facts before the Court, this reasoning is consistent with that in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), in which the Supreme Court “distinguished between ‘[t]he issue of the contract’s validity,’ which is not for the court to resolve, and ‘the issue of whether any agreement between the alleged obligor and obligee was ever concluded,’ which the courts might be allowed to consider.” Belize Soc. Dev. Ltd. v. Gov. of Belize, 5 F.Supp.3d 25, 39 n. 22 (D.D.C.2013) (analyzing China Minmetals and quoting Buckeye, 546 U.S. at 444, 126 S.Ct. 1204). Unlike the respondent in China Minmetals, the GOB does not argue that the arbitration clause of the Settlement Deed was independently invalid and also failed to raise its argument that the contract was void ab initio before the arbitral panel. See Mot. at 5 (admitting the GOB chose “not to participate in the arbitration”).

[26] The GOB’s insistence that it did not agree to arbitrate because the contract is invalid is also inconsistent with the language of the New York Convention. Article V(1)(a) provides that an arbitral award may be refused only if the party that is challenging enforcement furnishes to the competent authority proof that “[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it.” N.Y. Convention, art. V(1)(a). The agreement referred to in Article II of the Convention is “an agreement in writing under which the parties undertake to submit to arbitration all or any differences...” The term ‘agreement in writing’ shall include an arbitral clause in a contract.” Id. at art. II. Therefore, a challenge brought under Article V(1)(a) must be brought against the agreement to arbitrate, not against the contract as a whole. See Restatement (Third) of Int'l Comm. Arb. § 4–12 cmt. e. (Draft No. 3, 2011) (Under Article V(1)(a), “courts do not review the arbitral tribunal's rulings on challenges to the validity of the contract as a whole, such as a claim that a contract including an arbitration clause was fraudulently induced or is illegal.”); see also Nanosolutions, LLC v. Prajza, 793 F.Supp.2d 46, 54–55 (D.D.C.2011) (“[T]he FAA prohibits a district court from considering ... challenges [to the contract as a whole.”).

[27] [28] [29] The LCIA arbitral panel examined the question of the legality of the contract in assessing its jurisdiction and concluded that “the widely accepted doctrine of the separability of the arbitration clause contained in a contract would preserve the validity of the arbitration clause in the Settlement Deed as Amended and the jurisdiction of this Tribunal in this *249 case.” Award at ¶ 62. 6 Contrary to the GOB’s assertion that the arbitration clause cannot be severed from the contract in this manner (see Mot. at 28), it is settled law that “an arbitration provision is severable from the remainder of the contract.” Buckeye, 546 U.S. at 445, 126 S.Ct. 1204 (holding that an arbitrator should consider claims that a contract containing an arbitration provision is void for illegality). 7 Again, the GOB has not provided any proof to the Court that the provision in which the parties agreed to arbitrate is invalid under Belizean law, so the GOB’s challenge under Article V(1)(a) fails.

2. Article V(2)(a)—Appropriateness of Arbitration

[30] The GOB also claims that this Court should deny confirmation of the revenue rule which precludes U.S. courts from adjudicating foreign tax liabilities. See Resp. to Pet. at 16. Article V(2)(a) of the New York Convention allows courts to refuse to enforce an award when “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.” N.Y. Convention, art. V(2)(a). “The revenue rule is a longstanding common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign.” Rep. of Honduras v. Philip Morris Co., Inc., 341 F.3d 1253, 1256 (11th Cir.2003). In cases in which the revenue rule has been applied, “[t]he main object of the action ... was the collection of money that would pay foreign tax claims.” Pasquantino v. U.S., 544 U.S. 349, 364, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). In Pasquantino, the Supreme Court articulated the link between the revenue rule and the rule against foreign penal enforcement, analyzing the “analogy between foreign revenue laws and penal laws.” See id. at 361, 125 S.Ct. 1766.

[31] No such link is present in the instant case. Petitioners did not bring their claim to the arbitral tribunal in an attempt to enforce Belize’s tax laws. Indeed, the LCIA determined that the revenue rule did not apply because
this is a contract case, not an action to enforce Belizean tax laws. See Award ¶ 180. The crux of the dispute was contract enforcement rather than the enforcement of a foreign revenue law. See Opp. to Resp. to Pet. at 27 (explaining the dispute arose out of an alleged breach of warranties contained in the Settlement Deed). Thus, the subject matter arbitrated was contemplated by the parties and capable of settlement by arbitration.

3. Article V(2)(b)—Public Policy


[34] The GOB relies on a broad policy statement, arguing that “[j]ustice and U.S. public policy against corruption will not be served by allowing this corrupt agreement and tainted Award to burden the people of Belize.” Resp. to Pet. at 18. In so doing, the GOB does not identify an explicit or well-defined U.S. public policy that, if violated, would offend the most basic notions of morality and justice. Although this Court recognizes that “the United States has a strong public policy against corruption abroad,” this policy does not reach the threshold required to outweigh the policy in favor of enforcement. Belize Soc. Dev. Ltd., 5 F.Supp.3d at 43 (“U.S. courts have enforced arbitral awards in the face of public policy interests at least as weighty as the policy against corruption abroad.”). Indeed, the GOB cannot point to any cases in which a court declined to enforce an arbitral award because it violated the United States' public policy against government corruption. Additionally, the general public policy the GOB relies upon implicates the politics of a foreign nation. Article V(2)(b) “was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’ ” Parsons, 508 F.2d at 974. Refusal to enforce the Award on the public-policy grounds suggested by the GOB would undoubtedly implicate politics abroad. The Court declines to do so. The GOB has not met the substantial burden of proving its public-policy defense.

F. The Award

[35] Conversion of foreign currency into dollars at judgment “is the norm, rather than the exception.” Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nigeria, 932 F.Supp.2d 153, 158 (D.D.C.2013), aff’d, *251 603 Fed.Appx. 1, 2015 WL 233385 (D.C.Cir. Jan. 16, 2015). The monetary relief in the Award shall be converted into U.S. dollars as of August 18, 2009, the date of the Award, and the judgment will be entered in U.S. dollars. The Court also has discretion to award prejudgment interest and will exercise that discretion because doing so is “consistent with the underlying arbitration award.” Cont’l Transfert, 932 F.Supp.2d at 164 (internal quotation marks omitted). See also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran, 665 F.3d at 1103 (“[F]ederal law allows a district court to award postaward, prejudgment interest in actions under the New York Convention.”); Waterside Ocean Nav. Co., Inc. v.
Int'l Nav. Ltd., 737 F.2d 150, 153–54 (2d Cir.1984); Indus. Risk Insurers, 141 F.3d at 1445. The arbitral tribunal awarded petitioners pre- and post-judgment interest at an annual rate of 3.38% compounded annually. Award ¶ 149. The Court accepts this determination and awards petitioners interest consistent with the Award calculated from the date the Award, August 18, 2009, to this date. The parties are ordered to submit to the Court proposed judgment amounts calculated with the conversions and interest consistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, the Court shall GRANT the Petition to Confirm Foreign Arbitration Award; convert the monetary relief in the Award into U.S. dollars; and award prejudgment interest. The complaint in the alternative is dismissed as moot. Likewise, the motion to dismiss is DENIED as moot. An appropriate Order accompanies this Memorandum Opinion.

All Citations

110 F.Supp.3d 233

Footnotes

1 In their petition, petitioners note that the Award was issued on August 20, 2009. See Pet. ¶ 27. However, in a later filing, petitioners state that the Award was issued on August 18, 2009. See Opp. to Resp. to Pet. at 42. The first page of the Award lists both dates, but the Court interprets this document to indicate that the issuance date is August 18, 2009, and the later date is the certification date by the LCIA Registrar.

2 On April 29, 2015, petitioners filed a Motion for leave to file a sur-reply (Docket No. [38] ) to respondent's motion to dismiss which the Court GRANTS.

3 Specifically, in Clauses 4.1 and 4.2 of the Settlement Deed, the GOB warranted that BBL could offset overpayment of business taxes against future business tax payments and that petitioners would be indemnified against all costs, expenses, losses and damages incurred by them arising out of any breach of warranties provided by the Settlement Deed. See Pet. ¶ 21.

4 BCB Holdings and BBL are both Belize registered companies. BCB Holdings is the parent company of BBL. See Pet. ¶¶ 7–8.

5 The Award and the Settlement Deed are available in exhibit 2 to the petition. See Pet. Ex. 2, First Kimmelman Decl.

6 The CCJ judgment also found that the arbitration agreement was enforceable. See BCB Holdings Ltd, et al., v. Attorney General of Belize, CCJ Appeal No. CV 7 of 2012, ¶ 55 (“The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed.”).

7 The GOB argues that the severability rule is inapplicable because it pertains to the FAA and not to the FSIA. See Mot. at 26–28. As explained above, the Court is not required to conduct a de novo review of the arbitrability of the dispute to satisfy the jurisdictional requirements of the FSIA. See infra at Section III(A)(2). Indeed, the Court's analysis of the arbitrability of the dispute is confined to the GOB's Article V defense. Thus, principles available under the FAA, which incorporates the New York Convention, are available to the Court. See, e.g., General Elec. Co. v. Deutz AG, 270 F.3d 144, 155 (3d Cir.2001) (“We recognize that First Options is a domestic arbitration case, but the international nature of the present litigation does not affect the application of First Options' principles.”).
IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Application No. BZCV2017/001
BZ Civil Appeal No. 4 of 2015

BETWEEN

THE BELIZE BANK LIMITED

APPLICANT

AND

THE ATTORNEY GENERAL OF BELIZE

RESPONDENT

Before The Right Honourable Sir Dennis Byron, President
and The Honourables
Mr. Justice Saunders
Mr. Justice Wit
Mr. Justice Hayton
Mr. Justice Anderson

Appearances
Mr. Eamon H. Courtenay, SC and Ms. Angeline Welsh for the Applicant
Mr. Anthony Astaphan, SC, Mr. Nigel Hawke and Ms. Agassi Finnegan for the Respondent

JUDGMENT

of The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton and Anderson

Delivered by The Honourable Mr. Justice Winston Anderson on the 22nd day of November 2017
On 4 April 2017, the Applicant, The Belize Bank Limited (“the Bank”), filed an application in this Court for special leave to appeal the judgment of the Court of Appeal delivered on 24 March 2017. The Respondent, the Attorney General of Belize, did not oppose the application for special leave, but did oppose the appeal. The application was heard on 17 October 2017 and was treated as the hearing of the substantive appeal.

The judgment of the Court of Appeal concerned the application by the Bank for recognition and enforcement of an arbitral award made on 15 January 2013 by a London-seated arbitral tribunal under the Rules of the London Court of International Arbitration (the “LCIA Award”). The LCIA Award required the Government of Belize (“the Government”) to pay to the Bank damages amounting to BZ$36,895,509.46 together with interest at 17% and arbitration costs of £536,817.71. In making the LCIA Award, the arbitral tribunal expressly relied upon the prior judgment of the Judicial Committee of the Privy Council in The Belize Bank Limited v The Association of Concerned Belizeans & Others¹ (the “ACB Proceedings”), which had decided that a loan note dated 23 March 2007 made out to the Bank by the Government (the “Loan Note”) gave rise to a valid obligation on the part of the Government to make payment to the Bank in accordance with its terms.

The Bank contended that the LCIA Award was a ‘Convention award’ within the meaning of section 25 (1) of the Arbitration Act² and that, having itself complied with the relevant formalities outlined in section 29, it was entitled to have the award recognized and enforced in accordance with the Arbitration Act. However, the trial Judge, and the Court of Appeal by a majority decision, agreed with the Respondent that it would be contrary to public policy to recognize and enforce the LCIA Award because the transactions underlying the Loan Note were tainted with illegality having been concluded without the authorization of Parliament and contrary to section 114 of the Constitution.

As a brief indication of the underlying transactions it may be said that the Loan Note was part of a formal arrangement between the Government and the Bank to settle the

¹ [2011] UKPC 35.
² CAP 125.
Government’s liabilities and obligations in respect of its guarantee of certain liabilities of a private company, Universal Health Services Co. Ltd., (“UHS”) to the Bank. Advances had been made by the Bank to UHS to fund its expansion, including the construction of a hospital. This borrowing was at first guaranteed by the Development Finance Corporation (“DFC”), a statutory body tasked with promoting and facilitating financial development. The DFC ran into financial difficulty and the borrowing was then guaranteed by the Government itself under a 9 December 2004 agreement (“the 2004 Guarantee”). The Government supported the UHS project because it was Government policy to reform the health care system in Belize by promoting the expansion of health care facilities, the costs of which would be met by a national health insurance programme.

On 23 March 2007, the Government and the Bank entered into a Settlement Deed in respect of the UHS debt which then totaled BZ$33,545,820. This Deed sought to release the Government from the UHS liabilities and obligations in consideration of the payment of BZ$1 and execution of the Loan Note in favour of the Bank in the sum of BZ$33,545,820 at 13% compound interest per annum. The Government failed to pay interest in accordance with the terms of the Loan Note and the Bank demanded payment in full on 9 May 2007. Prior to this demand, however, the ACB Proceedings were instituted and the Government, who was involved in these proceedings, undertook to refrain from satisfying the Settlement Deed until that claim was determined. The Bank instituted arbitration proceedings pursuant to the Settlement Deed’s arbitration clause which resulted in the LCIA Award being made in favour of the Bank.

The courts below considered several grounds on which the LCIA Award ought not to be enforced. Before us the areas of dispute have narrowed considerably. The only issue that remains for decision is whether enforcement of the LCIA Award would be contrary to the public policy of Belize.

**NON-ENFORCEMENT ON GROUNDS OF PUBLIC POLICY**
Part IV of the Arbitration Act (“the Act”) provides for the enforcement of a ‘Convention award’ that is, a foreign arbitral award covered by the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”), set out in the Fourth Schedule. The scheme of the New York Convention, which is reflected in the Act, favours enforcement of Convention awards. Section 30 (1) provides that enforcement of a Convention award shall not be refused except in the cases mentioned in that section and section 30 (3) provides that enforcement may be refused if it would be contrary to public policy to enforce the award.

In deciding whether enforcement may be denied on grounds of public policy the court conducts a balancing exercise weighing the interest of guaranteeing the finality of the award against the competing interest of ensuring respect for fundamental principles of its legal system such as the rule of law. To tilt the balance in favor of non-enforcement there must be strong and compelling evidence that there has been an unacceptable violation of these principles. Given what is customarily referred to as the “pro-enforcement bias” of the conventional scheme embodied in the Act, the court will be astute to ensure that enforcement proceedings are not used as a colourable device to reopen and relitigate matters that were decided in the arbitration. Whether the language of “bias” is ever appropriate to describe a desired judicial attitude is a matter of conjecture. What is important and undeniable is that the judicial attitude towards enforcement of arbitral awards is properly informed by the international obligation incurred by acceptance of the New York Convention to act in good faith in the discharge of the pro-enforcement provisions of the Convention. Such treaty-compliant action has attendant advantages of predictability, certainty and reliability of the global network of arbitration arrangements, an important constituent for foreign investment and economic development.

The requisite balance to be struck in the application of public policy was extensively expounded by this Court in BCB Holdings Limited and The Belize Bank Limited v
The Attorney General\(^3\) (the “BCB Holdings case”). At paragraphs 24-26, we said the following:

“[24] Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalised and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

[25] The Court must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators. Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties’ agreement to pursue arbitration.

[26] An expansive construction of the public policy defence would vitiate the Convention’s attempt to remove pre-existing obstacles to enforcement and to accommodate considerations of reciprocity. For all these and other reasons the Convention has a definite pro-enforcement bias, and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances...”\(^4\)

[10] This Court considered that the facts in BCB Holdings qualified as exceptional circumstances warranting non-enforcement of the foreign arbitral award. The London Court of International Arbitration had determined that the State of Belize should pay damages for dishonouring certain promises made by its Minister of Finance to two commercial companies which were incorporated in Belize. These promises were contained in a Settlement Deed which provided that the companies should enjoy a tax regime specially crafted for them and at variance with the tax laws of Belize. This regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change in administration following a

\(^3\) [2013] CCJ 5 (AJ).
\(^4\) References omitted.
general election. There was no controversy as to the conduct of the parties in the making of the Deed and all the relevant facts were uncontested matters of public record accepted by both sides. These facts revealed clear and credible evidence of illegality of the promises contained in the Settlement Deed. Under the Constitution, only Parliament, or a body specifically delegated by Parliament, could lawfully grant exceptions to the obligation to obey the country’s revenue laws.

In these circumstances, we considered it permissible to examine the underlying agreement reflected in the Settlement Deed and to re-examine the legality of that document even after the arbitral tribunal had itself specifically addressed the issue and found it to be valid. In exchange for settling prior arbitral proceedings, the Settlement Deed purported to create and guarantee to the Belizean companies a unique tax regime that was unalterable by Parliament and notwithstanding provisions contained in the existing legislation to the contrary. Not even Parliament could have bound itself to legislation that was “irrevocable”. It was evident that the Minister had no authority to make such an agreement. We held that enforcement of the foreign award based on that agreement would violate existing legislation as well as the separation of powers and constitutional order of Belize. The balance was therefore clearly in favour of denying enforcement on grounds of public policy, which we did.

The Respondent urged that the decision in the BCB Holdings case should be applied to deny the present application because the Executive had not received the approval of the National Assembly to conclude the Loan Note. The Bank contended that the present proceedings were distinguished from that of the BCB Holdings case in two vital respects, namely; the existence of the decision of the Privy Council in the ACB Proceedings which decided that the Loan Note was validly contracted, and the failure of the Respondent to produce any clear or credible evidence that enforcement of the LCIA Award would be illegal.

PRIVY COUNCIL DECISION IN THE ACB PROCEEDINGS

At the time of its decision in the ACB Proceedings, the Judicial Committee of Her Majesty’s Privy Council was the final Court of Appeal for Belize. That decision therefore finally settled the matters in dispute between the parties and precluded
those matters from being re-opened based on the doctrine of issue estoppel. Unlike the case of a foreign arbitral tribunal, there can be no question of re-examining the legality of an agreement that had been specifically addressed by Belize’s final Court of Appeal (as the Judicial Committee then was) and found to be valid. The only viable issue remaining to the Respondent was to question the scope of the Judicial Committee’s decision.

[14] The judgment of the Board of the Judicial Committee, delivered by Lord Clarke, framed the issue as whether the Loan Note “… is invalid as being contrary to section 7 (2) of the Finance and Audit (Reform) Act No. 12 of 2005 … on the ground that the Bank… made a loan to the Government of Belize which could only lawfully be made pursuant to a resolution of the National Assembly authorizing the loan.”

[15] Section 7 (2) of the Finance and Audit Reform Act (“FARA”) provides that:

Loans to Government “(2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars shall only be validly entered into pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money,

Provided that the Government shall not use any money borrowed under this section to meet its “recurrent expenditure” (as defined in the financial regulations made under section 23(4) of this Act, except,

(a) to refinance existing public debt; and

(b) to amortize and service principal payments to existing public debt,

Provided further that, subject to the foregoing the Government may raise loans, borrow monies and secure financing to meet its capital requirements in amounts of less than ten million dollars at any one time without the authority of a resolution as aforementioned on the condition that the total aggregate amount so raised or borrowed in any one fiscal year does not exceed ten million dollars.”
[16] The Board noted that both the Supreme Court and the Court of Appeal of Belize had held that the Bank did effect such a borrowing or loan, and that the Loan Note was accordingly invalid under section 7 (2). The Board examined in significant detail the terms of, and the background to, the Settlement Deed and Loan Note before turning its attention to the reasoning and conclusions of Hafiz J, the trial judge. She had focused on the reference at the beginning of the Loan Note to “FOR VALUE RECEIVED” which implied that a loan had been made. She was of the view that the fact that there was no evidence of a draw-down or a facility letter was not conclusive evidence to rebut the implication that a loan had been made. The Board considered this reasoning and conclusion to be defective, primarily because the judge had failed to analyze the language of the Settlement Deed and Loan Note.

[17] Morrison JA, who gave the judgment of the Court of Appeal, had conducted an analysis of the Settlement Deed and Loan Note and had concluded that the trial judge was entitled to take the view that there was no need for the court to, “speculate as to the method of advance or the accounting method used in this transaction, or whether there was any recording at all of this transaction.” The trial judge opted to have regard to the fact that the 2004 Guarantee was discharged under the Settlement Deed and that the Government had executed the Loan Note and to conclude in the light of both those facts that the sum of BD$33,545,820 was advanced to the Government by the Bank. Morrison JA also took into account statements made by the Bank’s solicitors to the effect that the Bank “acting under a mistake as to law had paid out over BZ$33 million” as well as their claim that the Bank was entitled to rescind the Settlement Deed and the Loan Note on the ground of the Government’s negligent or fraudulent misrepresentation as to its authority to enter into the transaction, the effect of which “would be to revest in the Bank the principal amount advanced to the Government and give rise to a claim in damages …” The learned Justice of Appeal concluded that for these reasons, together with those given by the trial judge, he would hold that the Loan Note effected a borrowing by the Government from the Bank.

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5 Belize Bank Ltd v Association of Concerned Belizians et al (Court of Appeal of Belize, 19 March 2010), BZ 2010 CA 2 (CARILAW) at [71g].
6 Ibid at [74].
The Board disagreed. In its judgment, the true construction of the Settlement Deed and the Loan Note in their historical context and surrounding circumstances made clear that the purpose of both was,

“to settle the position as between the Bank and the Government under the 2004 Guarantee, not under any later arrangement between the parties. The amount due under the Guarantee was agreed to be BZ$33,545,820 and the purpose of the Settlement Deed was to discharge that liability and to release the Government from all future liabilities under it. In short the liability under the 2004 Guarantee was replaced by a new obligation, namely to pay that amount as the Principal Sum due under the Loan Note, together with interest calculated as stated in the Loan Note. There is no support for the suggestion that that amount, or any other sum, was lent to the Government. Indeed, such a loan would make no sense, since there was already a liability under the 2004 Guarantee.”

At paragraphs 29 and 30 of its judgment, the Board continued as follows:

“29. Moreover, quite apart from the fact that the Settlement Deed was effected by deed, there was ample consideration for the agreement, including that contained in the Loan Note. That consideration is expressed in clause 3.1…. It lay both in the mutual promises made by the parties and by the Government’s promise to pay the Bank BZ$1.00 and to execute the Loan Note. The judge mentioned the reference to “FOR VALUE RECEIVED” but observed that neither the Loan Note nor the Settlement Deed said what was the value received. The Board is unable to accept that that is so for two reasons. The first is that…clause 3.1(a) expressly provided that the Government “shall execute and deliver to the Bank … the Loan Note under the terms of which the Government for value received shall pay to the Bank BZ$33,545,820 … in accordance with the terms and conditions contained in the Loan Note”. The second reason is that, as just stated, the consideration, that is the value received by the Government, was the promise by the Bank to treat the Guarantee as discharged and to release it from all future liabilities under it.

30. Both the judge and, in particular, the Court of Appeal placed considerable reliance upon their conclusion that the effect of the Settlement Deed and the Loan Note was to replace the Government’s secondary liability under the 2004 Guarantee with its primary liability under the Loan Note. The Board is unable to accept this reasoning, for two alternative reasons. The first is that … the obligation of the Government under the 2004 Agreement and the 2004 Guarantee was expressly stated to be as primary obligor and not merely as surety. The second is that, however that may be, the effect of the Settlement Agreement and Loan Note was to replace the Government’s liability under the 2004 Guarantee by its liability under the Loan Note, which simply

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7 The Belize Bank Ltd v The Association of Concerned Belizeans and Others [2011] UKPC 35 at [28].
contained an obligation to pay the Principal Sum and interest in accordance with its terms. Whether that was to replace a primary or secondary obligation is legally irrelevant. In either case the obligation was due and in either case there was no commercial or other reason to introduce a further loan as between the Bank and the Government. Unsurprisingly, there is nothing in the language of the Settlement Deed or the Loan Note which has that effect.⁸

[20] Having found no evidence from the surrounding circumstances which could have been said to evidence a collateral agreement between the Bank and the Government, the Board said at paragraph 39:

“39. There was no commercial need for a loan to form part of the transaction documented in the Settlement Deed and the Loan Note. The government was unable to satisfy its guarantee of the UHS debt. The settlement which it reached with the Bank was that it would promise to pay the sum owing within six months, while also taking control of UHS from its former shareholders. There was no need for the Government to be loaned money by its creditor, the Bank, for this settlement to be put into effect.”

[21] The Board rejected the suggestion that the purpose of the loan was to enable the Government to on-lend the money borrowed to UHS, so enabling UHS in turn to repay its indebtedness or, simply, to replace UHS’s indebtedness and the Government’s guarantee of that indebtedness by a new loan under which the Government would be the sole debtor. It found that there was “no evidence” of such an agreement and therefore concluded that on its true construction, the Loan Note was a Promissory Note. As there was no evidence of any loan to or borrowing by the Government, “the Loan Note was not invalid by reason of section 7 of the Act.”⁹ The approval of the National Assembly was not required for the Government to enter into the Loan Note.

[22] In the present case, the majority in the Court of Appeal, at paragraph 8 of their judgment, indicated that they were offering no opinion as to whether the Privy Council’s decision that the Loan Note was “not invalid” left open the question of the validity of the Loan Note. Nevertheless, the majority also agreed with and endorsed the approach of Griffith J in the Supreme Court who, at paragraph 79 of her judgment, stated that although bound by the decision that the Loan Note was not

⁹ Ibid at [47].
contrary to Section 7 (2) of FARA, the court was still “at liberty to consider the transaction that gave rise to the promissory note against the applicable law, as part of its deliberation on whether the enforcement of the Final Award would be contrary to public policy.” More expansive, at paragraph 93, the learned trial judge said that the Privy Council could be regarded “as having either left open a question of the validity of the promissory note or, declined to consider any other issue besides what the Loan Note was not and the fact that it did not violate section 7(2) of the Finance Audit (Reform) Act.” The Judge continued: “This Court therefore considers itself at liberty, to address the promissory note within the context of the illegality that it is advocated, would occur as a result of its enforcement. Also, in this regard the Tribunal in coming to its conclusion, considered the 2007 Settlement Deed from a purely contractual standing and not with any reference to the Constitution’s section 114(2) that has been put before this Court.”

[23] We do not consider this to be a reasonable characterization of the scope of the decision by the Privy Council. In coming to its judgment, the Board considered in significant detail the background and history of the Loan Note. There was no mention of any illegality infecting the transactions which underlay the Loan Note. To the contrary, the Board accepted the 2004 Settlement Deed and Guarantee, which discharged and released the Government from the BZ$33,545,820 liability under it, as providing value and consideration for the Loan Note.

[24] The Board’s decision was framed in terms of the validity of the Loan Note as measured against the requirements of section 7 (2) of the FARA because that was the way in which the case had been argued. The Respondent did not seek to argue any other ground on which the Loan Note may have been illegal. In making this point, it is necessary to mention that the proceedings were originally brought by the Association of Concerned Belizeans against the then Prime Minister and Attorney General of Belize. There was a change of Government in Belize in February 2008 and the new Prime Minister and Attorney General ceased to defend the claim. In the Court of Appeal, Ms. Magali Perdomo was announced as appearing for the Prime Minister and the Attorney General but did not otherwise participate in the
Proceedings. The Respondent Attorney General therefore had the opportunity to raise
the issue of the legality of the transactions underlying the Loan Note, if such a course
was considered factual and viable, but chose not to do so. To now allow the
Respondent Attorney General to raise that issue would expose the judicial process to
the intolerable evil of litigation in increments and undermine a decision of the highest
appellate court of Belize.

[25] Furthermore, the decision of the Board in the ACB Proceedings was the basis of and
entirely consistent with the concession made in the Court of Appeal by Mr Denys
Barrow SC for the Government. At the start of the appeal, learned senior counsel
handed up a document dated 14 June 2016 styled Respondent’s Statement of
Issues. That document stated at paragraph one that, “the question whether the
promissory note created a debt has been overtaken by the agreement of the parties
that the Executive could properly have entered into the promissory note without prior
legislative approval.” In his minority decision, Blackman JA interpreted this
concession as recognizing that prior legislative approval was not a pre-requisite to
enter into the promissory note.

[26] In these proceedings, Mr Anthony Astaphan SC for the Government confirmed that
the concession was rightly made in light of the decision in the ACB proceedings but
then argued that the concession did not extend to or include the underlying
agreements or whether the promissory note was enforceable or not. Learned senior
counsel argued that the issue before this Court was not whether Parliamentary
approval was required to enter into the promissory note but rather whether leave to
enforce the award ought to be refused because enforcement would be contrary to
public policy. For the reasons given at [23] – [24], we consider that this is to read the
judgment of the Board much too narrowly. The Board’s examination of the
transactions underlying the Loan Note and its determination that those transactions
provided value and consideration for the Loan Note preclude re-examination of the
legality of these transactions on which the Loan Note was based. That determination
settled the dispute litigated between the parties as to the legality of the Loan Note.

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10 Record of Appeal, Submissions on Behalf of the Respondent/Attorney General, pp 935 – 972, 941 at [5.1].
and the doctrine of issue estoppel precludes further litigation between them on that matter.

[27] It follows that we disagree with the decision of the Supreme Court and Court of Appeal that the judgment of this Court in *BCB Holdings* permitted them to examine the transaction underlying the Loan Note for illegality. The fundamental difference between the two cases is that in *BCB Holdings* the Minister acted in clear and direct contravention of legislation and the Constitution. He had no authority to make, far less implement, the Settlement Deed as he purported to do. In the present case, the court of final appeal held that the Minister did not act in breach of any laws in concluding the Loan Note and that he had the authority to make that agreement. The Government can hardly be heard to argue that it would be contrary to public policy to enforce an agreement against it which agreement it had itself validly contracted.

**SECTION 114 OF THE CONSTITUTION**

[28] It is now necessary to examine whether section 114 of the Constitution has any bearing on the application to recognize and enforce the LCIA Award. That section provides as follows:

“(1) All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by a law enacted by the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund except in the manner prescribed by law.”

[29] The Respondent relied heavily on the stipulation in section 114 (2) that no monies can be paid out of the Consolidated Revenue Fund (“CRF”) except as charged by the
Constitution or any other law enacted by Parliament. As there was no law in the instant case which authorized the payment on the Loan Note, it would be illegal to make those payments and thus it would be contrary to public policy to recognize and enforce the Final Award. The Bank countered that it accepted that prior legislative approval was required for monies to be withdrawn from the CRF but offered that the grant of leave to enforce the arbitral award would enable recourse to section 25 of the Crown Proceedings Act,\textsuperscript{11} relating to the mode of satisfaction of judgments against the Crown.

[30] Justice Griffith examined in fulsome detail the legislative and constitutional regimes of oversight and controls of public expenditure. The learned judge did not consider that the base illegality found in relation to the Settlement Deed in \textit{BCB Holdings case} was to be attributed to the execution of the Loan Note. Nonetheless, she could not ignore the fact that the promissory note gives rise to a debt significantly in excess of obligations generally created by financial transactions which ordinarily require authorization by law and that these transactions are subject to substantial controls prescribed by the Constitution and other written law. She concluded at paragraph 107 that:

“… whilst not to the same extent of offensiveness found in relation to the Settlement Deed in \textit{BCB Holdings}, the absence of any legislative oversight or intervention in the issue of the promissory note herein, relative to the degree of oversight prescribed by law in relation to incurrence of debt by means generally effected, compels the enforcement of this Arbitral Award as against public policy as it is harmful to the interests of Belize. In the circumstances the Court declines to order enforcement.”

[31] The majority in the Court of Appeal considered that the trial judge correctly analyzed the issue of public policy and was right to refuse leave to enforce the award as this would breach the regimes governing payment from the public purse. Delivering his minority opinion, Blackman JA considered that the fundamental error made by the judge and supported by the majority, was to “conflate” the issue of registration, the subject of the application to recognize and enforce the award, with the enforcement

\textsuperscript{11} Cap. 167.
of the award, which was not before the court and consequently should not have been considered.

[32] We disagree with the majority in the Court of Appeal for two separate but related reasons. First, the Loan Note did not expressly or by necessary implication bind or purport to bind the Government to expenditure from the CRF without Parliamentary approval. The making of a Government contract is quite distinct from its enforecability against the State as was held by the Eastern Caribbean Court of Appeal in the Saint Lucian case of The Attorney General v Francois.12 That case concerned a guarantee entered into by the Saint Lucia Minister of Finance. No Parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument and a citizen challenged its legality. The court held that nothing prevented the Minister from giving the guarantee, but the State only became bound to pay out the relevant sums from the Consolidated Fund after Parliament had approved the monies necessary to discharge it. As Parliament had done so before the guarantee was honoured, there was no basis for complaint by the citizen. There are several other cases recognizing the distinction between the government’s making of a legal agreement and the implementation of that agreement which may require Parliamentary approval: Kidman v The Commonwealth,13 State of New South Wales v Bardolph,14 Australian Railways Union v Victorian Railways Commissioners.15

[33] Second, there is an important distinction between an order to enforce an award and an order that requires the issuance of a certificate that compels payment. To make an order allowing enforcement is not equivalent to making an order compelling payment. This distinction is similar to the difference between the “registration” and the “enforcement” of arbitral awards as explained in Micula, S.C. European Food SA and others v Romania and European Commission16 when the court said:

“… just as there is a distinction between the giving of a judgment and the enforcement of it, so there is a distinction between registering an award, and

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12 (Court of Appeal, 29 March 2004), LC 2004 CA 4 (CARILAW).
14 [1934] HCA 74, 52 CLR 455.
15 [1930] HCA 52, 44 CLR 319.
16 [2017] EWHC 31 (Comm).
enforcing it. Registration is not necessarily a precursor to execution, though it may lead to it. In commercial terms, there may be good reason to register an award aside from imminent enforcement, for example for reasons of priority as against other creditors, or as a precaution. So, in this case, the claimants who have a binding award in their favour could be prejudiced by setting aside the registration whilst the State aid issue is resolved in the European courts. In the court's view, care should be taken not to derogate from the entitlement to have an award registered as a judgment outside the confines of the 1966 Act…“17

[34] The Arbitration Act of Belize does not refer to “registration” but rather “enforcement” of awards. Nevertheless, an order to enforce a foreign award has essentially similar effects to its registration within the domestic sphere in that such an order permits the foreign award to be treated in the same manner as a judgment or order of the domestic court. Where such an award clothed with the status of a judgment is not satisfied, the award holder must take further steps for the execution of the judgment. In this way, the order to enforce the award is a necessary precursor to execution. But it is not an inevitable precursor, since an enforcement order could have other effects in commercial terms and therefore has value apart from the issue of execution. According to section 28 (2) of the Arbitration Act:

“(2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it is made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Belize and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.”

[35] In this application, the Bank seeks, pursuant to section 28 read together with section 13 of the Arbitration Act, an order granting leave to enforce the award in the same manner as a judgment or order to the same effect. The majority in the Court of Appeal considered that there would be an “anticipated illegality” in granting such an order, presumably because it would breach the rule that the Executive can incur no enforceable obligation or debt unless and until the National Assembly approved payment from the Consolidated Revenue Fund.18 We disagree.

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17 Ibid at [125].
18 Record of Appeal, Submissions on behalf of the Respondent / Attorney General, pp 935 – 972, 952 at [36].
It is presumed that judicial orders will always be obeyed by those affected, including the Government, but the order for enforcement of a foreign arbitral award does not itself compel payment from the CRF. It is common ground that s 114 of the Constitution requires legislative approval for expenditure which the Government promised to pay by validly entering into the Loan Note. If the Government procures the passage of the relevant legislation there is obviously no illegality in making payment. Furthermore, there is much force in the Bank’s contention that current constitutional and legislative provisions provide a procedure for enforcement. The marginal note to s 25 of the Crown Proceedings Act is entitled “Satisfaction of orders against the Crown” and the section provides as follows:

“25.- (1) Where in any civil proceedings by or against the Crown or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person, at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs, if any, ordered to be paid to the applicant

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the head of the authorized Government department or the officer concerned, or the Attorney General, as the case may be.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his attorney-at-law the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued, may order any such directions to be inserted therein.
(4) Except as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.”

[37] Section 115 (3) of the Constitution provides a means of appropriation whereby legislative approval may be obtained to pay the judgment. The subsection provides:

“If in respect of any financial year it is found… that a need has arisen for expenditure for a purpose for which no amount has been appropriated … a supplementary estimate showing the sums required or spent shall be laid before the House of Representatives and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.”

[38] For the foregoing reasons, we have concluded that an order allowing enforcement of the LCIA Award would not involve any illegality and would not be contrary to the public policy of Belize.

[39] The Bank has requested extraordinary relief “in light of the long history of the Government’s delay in payment notwithstanding decisions from the Judicial Committee and the LCIA arbitral tribunal confirming the validity of the Loan Note.” It requests that we make orders pursuant to section 25 of the Crown Proceedings Act directing the Minister of Finance to pay to the Bank the amount ordered by this Court.

[40] We consider that such a request is premature in that it anticipates that the Government will not honour its commitment without such an order. Such anticipation is unwarranted and it directly contradicts the presumption of regularity to which this court adheres: [36]. The request is also inconsistent with the procedure outlined in section 25 which requires the party, in whose favour the order to enforce the award is given, to make the appropriate application to the proper officer of the court after the expiration of twenty-one days from the date of the order made below. There are other specific steps that are prescribed by section 25 as prerequisites to securing satisfaction of the order against the Crown. Accordingly, we do not accede to this request.
ORDERS

1. The application for special leave to appeal is granted.
2. The appeal is allowed.
3. The Applicant is at liberty to enforce the London Court of International Arbitration Award dated the 15th day of January, 2013 in the amount of BZ$36,895,509.46 (as at the 7th day of September, 2012) plus interest at 17% compounded on a monthly basis from the 8th day of September, 2012 until the date of payment and costs of £536,817.71 in the same manner as a judgment or order of the Supreme Court of Belize to the same effect.
4. The Respondent to pay the Applicant/Appellant’s costs, both in this Court and the Courts below, to be taxed if not earlier agreed.
5. In respect of the preceding Order, the Registrar of the Caribbean Court of Justice shall issue a separate Certificate of Costs to the Applicant/Appellant pursuant to section 25 (1) of the Crown Proceedings Act Cap. 167.

/s/ CMD Byron
The Rt Hon Sir Dennis Byron, President

/s/ A Saunders
The Hon Mr Justice A Saunders

/s/ J Wit
The Hon Mr Justice J Wit

/s/ D Hayton
The Hon Mr Justice D Hayton

/s/ W Anderson
The Hon Mr Justice W Anderson
IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 7 of 2012
BZ Civil Appeal No 4 of 2011

BETWEEN

BCB HOLDINGS LIMITED
THE BELIZE BANK LIMITED

AND

THE ATTORNEY GENERAL OF BELIZE

APPELLANTS

RESPONDENT

Appearances

Mr Edward Fitzgerald QC, Mr Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin for the Appellants

Mr Michael Young QC, Ms Magalie Perdomo and Ms Iliana Swift for the Respondent

JUDGMENT

of

The President and Justices Saunders, Bernard, Wit and Anderson
Delivered by
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice Winston Anderson
on the 26th day of July 2013
JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS

[1] The London Court of International Arbitration ("the Tribunal") determined that the State of Belize should pay damages for dishonouring certain promises it had made to two commercial companies, namely, BCB Holdings Limited and The Belize Bank Limited ("the Companies"). The promises were contained in a Settlement Deed as Amended ("the Deed") executed in March 2005. The Deed provided that the Companies should enjoy, from the 1st day of April, 2005, a tax regime specially crafted for them and at variance with the tax laws of Belize.

[2] This unique regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change of administration in Belize following a General Election. The Companies then commenced arbitration. The Tribunal found the State of Belize in breach and awarded damages against Belize in addition to arbitration costs and legal, professional and other fees ("the Award"). The Award totalled approximately $44 million and it carried interest at the rate of 3.38% compounded annually. The damages were calculated on the hypothesis that the Companies would have continued to benefit from the special tax regime at least until 2020; the year when, in keeping with the laws of Belize, BCB Holdings Limited’s status as a public investment company was due to expire.

[3] The Companies are applying now to enforce the award. The State resists enforcement. The critical question is whether it is or is not contrary to public policy for the Court to enforce the same. For the reasons that follow it is our judgment that it would be contrary to public policy to recognise the Award and accordingly we decline to enforce it.

A brief background

[4] The Deed arose, at least in part, out of the stated intention of the Minister of Finance and the Companies to settle a pre-existing dispute between them. The prior dispute had to do with a share purchase deed and an option deed the parties had previously negotiated. That initial dispute had itself been submitted to the Tribunal for resolution by arbitration.
because of certain claims made by the Companies against the State. The Deed recorded the Companies’ agreement not to pursue further these existing claims. In return, the Minister agreed to grant the Companies the special tax regime to which reference was earlier made. The Deed expressed that its provisions were to be governed by English law and it contained an arbitration clause stipulating that either party could refer to the Tribunal for resolution of disputes that were not amicably settled.

[5] The Deed was executed by the Prime Minister (the then Minister of Finance) and also by the Attorney General of Belize. The document was expressed to be “confidential”. The parties agreed not to make any announcement concerning its contents or any ancillary matter. That did not, however, prevent any announcement being made or any confidential information being disclosed by a party -

“a) with the written approval of the other parties, which in the case of any announcement shall not be unreasonably withheld or delayed; or
b) to the extent required by law or any competent body or stock exchange.”

[6] For well over a year after its execution, the Commissioner of Income Tax was unaware of the Deed’s existence or its implications. On 10th July, 2006 the Commissioner wrote to the Companies seeking their compliance with the published tax laws of the land. The Companies responded by instructing the Commissioner to liaise directly with the Minister of Finance. Three months later the Commissioner wrote back to the Companies accepting the Companies’ position and retracting what initially was his. For a period of two years, the Companies enjoyed the tax regime set out in the Deed.

[7] In February, 2008, following a general election, a new administration was sworn into office in Belize. A few months later the Commissioner of Income Tax assessed the Companies for tax on the basis of Belize law in respect of the period the Companies had enjoyed the benefits under the Deed. The Commissioner rejected the tax returns filed by the Companies for the two previous years and required the Companies to comply with the law. The Commissioner informed the Companies that the Deed did not supersede the country’s revenue laws. This turn-around by the Government constituted a repudiation of
the promises made in the Deed and motivated the Companies once again to resort to arbitration.

**The Arbitral Award**

[8] The Tribunal was duly constituted but the State did not participate in the arbitration. It did not appear. It did not make any submissions to the Tribunal. It did not enter a defence to, nor did it comment upon, the Companies’ submissions. The Tribunal nonetheless rightly felt that it still had an obligation to take into account such matters as it considered might represent Belize’s position on the issues in dispute. There was some material that enabled it so to do. Satellite proceedings had been tried in the Belize courts in which the State had participated and been legally represented. The Tribunal concluded that the submissions made in those proceedings and the judgments of the courts provided an indication of what arguments the State of Belize would have likely pursued before the Tribunal in relation to the matters in dispute.

[9] The Tribunal considered that it had jurisdiction to entertain the dispute. It dismissed any notion that the dispute was not arbitrable whether because tax-related matters were involved or because of the alleged incompatibility of the promises made to the Companies with Belize law. In making these findings the Tribunal emphasised that it was pronouncing not upon the taxation regime of Belize but instead upon the contractual warranties the Government, in the exercise of its sovereign power, had made to the Companies. The Tribunal noted that the Crown at common law had a wide prerogative power to enter into contracts and this power was unfettered by restrictions as to subject matter or persons. The Tribunal asserted that the only constraint on this wide prerogative power is that any such contract: (i) should be entered into in the ordinary or necessary course of Government administration; (ii) must be authorised by the responsible Minister, and that (iii) any payments by the Government to honour any such contract must be covered by, or referable to, an appropriate Parliamentary grant.
The Tribunal decided that the first of these three conditions was demonstrably established as the Deed gave the Government considerable financial benefits, including the Companies’ agreement not to re-open the previous disputes between the parties. The Tribunal reasoned that it was not unusual for governments to enter into settlement arrangements which involved concessions or reductions. As to the second condition, according to the Tribunal, the Prime Minister clearly had actual and ostensible authority both to make the contractual warranties that were made and to assure the Companies that they would indeed enjoy the promised benefits. The Tribunal stated that the third condition did not apply in this case. No specific reason was given for this finding but one can infer that it was because the Deed did not require the Government to make unappropriated payments to anyone.

The Tribunal did not justify their decision only on the wide prerogative power of the Government. The Tribunal also held that section 95 of the *Income and Business Tax Act*\(^1\) expressly authorised the Government, through the Minister of Finance, to make and guarantee the promises contained in the Deed. As section 95 is a short section we take the liberty of setting it out in full:

“(i) The Minister may remit the whole or any part of the income tax payable by any person if he is satisfied that it would be just and equitable to do so.

(ii) Notices of such remission shall be published in the Gazette”.

In support of its findings that the Agreement was not illegal and the dispute was arbitrable the Tribunal cited several authorities.\(^2\)

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\(^1\) *Income and Business Tax Act*, Cap 55 [Belize]

\(^2\) These included but were not limited to *The Attorney General of New South Wales v Bardolph* [1934] 52 CLR. 455; *The Attorney General of Saint Lucia v Martinus Francois*, Civil Appeal No 37 of 2003; *In re D.H. Curtis (Builders) Ltd* [1978] 2 WLR 28; *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2004] 2 Lloyd’s Rep. 198; *Attorney-General v.Silver* [1953] AC 461, Arbitral awards made in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, Engineering Company (Italy) v. Engineering Company (Greece) and Producer (Greece), TCSB Inc. v Iran and Paushok and Others v. the Government of Mongolia* and an Article by Emmanuel Gaillard on *Tax Disputes Between States and Foreign Investors “Tax Disputes Between States and Foreign Investors”* [1997] NYLJ 217
The decisions of the Courts below

[12] The Tribunal’s award cannot be enforced in Belize without an application first being made to the court to enforce it. The legislative basis for enforcement is the Arbitration (Amendment) Ordinance No 21 of 19803 (“the Act”). The application to enforce was made to a trial judge in Belize. On this occasion the State appeared and made several submissions strenuously resisting the application.

[13] In essence, the State submitted to the judge that (a) the relevant provisions of the Act were in fact not part of the law of Belize; (b) the subject matter of the arbitration was non-arbitrable and (c) it would be contrary to public policy to enforce the Award. The judge rejected each of these arguments. The judge noted that section 28 of the Act enshrines the principle that an arbitral award, made pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the Convention”)4 is, for all purposes, binding on those who are parties to the Convention. The judge held that this Award is a Convention Award. The judge therefore weighed this principle against the provisions of section 30 of the Act which enjoins the court not to refuse enforcement of a Convention award except upon very limited grounds which are specifically prescribed. Citing the case of P T Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA5, the judge explained that the courts in Belize ought to lean toward enforcement of Convention awards unless to allow enforcement would “shock the conscience” or “is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public”. The judge concluded that the Deed was a lawful and legally binding commercial agreement and that to refuse enforcement would transgress established applicable legal principles and practices. He therefore ordered that the Companies be at liberty to enforce the Award in the same manner and to the same effect as a local judgment. The State appealed the judge’s decision to the Court of Appeal.

3 Arbitration Act, Cap 125 [Belize]
4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 3 (New York Convention)
5 [2007] 1 SLR (Reissue) 597
It is a matter of great regret that the Court of Appeal determined the appeal on a consideration only of the State’s submission (discussed more fully in the judgment delivered by Justice Anderson), that the Act was invalid and that for this reason enforcement of the Award should be refused. Two of the three judges upheld that submission. The third, Mendes JA, dissented. In his opinion the Act was valid and therefore the other submissions regarding enforceability were not at all moot.

No other issues were discussed in the judgment of the Court of Appeal. Mendes JA expressed his willingness to pronounce on the other issues in the case which, given his opinion that the Act was valid, would have arisen. Since his views on those other issues would have been otiose, given that the opinions of his colleagues had already determined the appeal, he considered ultimately that it was superfluous to express them in his judgment.

The issues

Three central issues arise from the appeal of the Companies to this Court:

1. Is the Act valid? Was its passage an improper encroachment by the Belize colonial legislature upon the preserve of the Crown? Should the claim for enforcement be dismissed on this ground?

2. If the first point is decided in favour of the Companies and the Act is valid and applicable, should this Court remit the case to the Court of Appeal so that it can first pronounce on the questions whether the Award should not be enforced because it is non-Arbitrable and/or because it is contrary to public policy?

3. If the Act is not invalid and the case is not remitted, should the application to enforce the Award be refused either because it would be contrary to public policy to do so (the public policy point) or because it is in respect of a matter which was not capable of settlement by arbitration (the non-Arbitrability point)?

For the reasons set out by Justice Anderson, we are of the view that the Act is not invalid and the case should not be remitted. As our opinion on the public policy point is
dispositive of the appeal we consider it unnecessary to consider the non-Arbitrability point.

**The Public Policy Point**

*The submissions of the parties*

[18] On this point, the State submits that it was never bound by the agreement that gave rise to the Deed because implementation of the same without parliamentary approval violates the country’s fundamental law. While the Minister, in making agreements, could ordinarily be taken to have implicitly promised that he would secure any necessary legislative approval, the Award on its face discloses that no such approval was ever sought or obtained and there never was any intention to seek or obtain such approval. In these circumstances, counsel submits, the Court should not enforce the Award as it is repugnant to the Belize legal order.

[19] The Companies, on the other hand, argue that the State benefited from the Agreement because the Deed amicably settled prior and pending claims of the Companies against the Government. The Tribunal has definitively ruled that the Agreement was not illegal and the Court should not now re-open the merits of what has already been determined. The State could and should have raised, before the Tribunal or before the English supervisory courts, any arguments it now wishes to raise on the legality of the Deed. The Award is final and, in keeping with the pro-enforcement bias courts should have towards Convention Awards, this Court should enforce it. The Companies support their submissions with reference to several authorities.

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**The broad approach to the public policy exception**

[20] Competing policies are invariably at play when a court is called upon to decide whether to enforce an arbitral Award. The court must balance divergent policies and interests and apply to them principles of proportionality.
Almost two hundred years ago, Burrough J. in *Richardson v. Mellish* famously noted that “public policy” is a very unruly horse. Once you get astride it, he warned, you never know where it will carry you. This admonition is especially prescient because the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditioned by time and place. Religion and morality, as well as the fundamental economic, social, political, legal or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked.

Since the Award here in question is a foreign Award governed by English law, the question that naturally arises is, whose public policy is being interrogated? Is there some international public policy which must be used as a yardstick against which to measure those matters which it is said are contrary to public policy?

Public policy in this case must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize. It is in Belize that the Companies seek to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. Article V. 2(b) of the Convention provides that enforcement of an award may be refused, if enforcement would be contrary to “the public policy of that country”; that is, in this case, the State of Belize. But this does not mean that, although there is no universal standard of “public policy”8, it would be appropriate for courts to adopt a parochial approach. As Cardozo J. reminds us in *Loucks v Standard Oil Co. of New York*9, the courts are not free to refuse to enforce a foreign judgment at the pleasure of the judges or to suit the individual notion of expediency or fairness.

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7 (1824) 2 Bing 229, 252
9 224 N.Y. 99
Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalised and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

The Court must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators. Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties’ agreement to pursue arbitration.

An expansive construction of the public policy defence would vitiate the Convention’s attempt to remove pre-existing obstacles to enforcement and to accommodate considerations of reciprocity. For all these and other reasons the Convention has a definite pro-enforcement bias and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances. In particular, this restrictive approach is adopted in relation to Convention Awards therefore, only where enforcement would violate the forum state's most basic notions of morality and justice would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is “at variance to an unacceptable degree with the legal order of the State in which

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10 See: A v. R (Arbitration: Enforcement) [2009] 3 HKLRD 389 at page 395
11 A v. R [2009] 3 HKLRD 389 at page 395
12 Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L’Industrie Du Papier (Rakta) and Bank of America 508 F.2d 969 (2d Cir. 1974)
13 Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L’Industrie Du Papier (Rakta) and Bank of America 508 F.2d 969 (2d Cir. 1974)
enforcement is sought inasmuch as it infringes a fundamental principle”. In such a case the infringement must constitute “a manifest breach of a rule of law regarded as essential in the legal order”. In this vein, the Indian Supreme Court has stated that it will decline to enforce an Award only if enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

[27] The International Law Association (the “ILA”) has recommended the use of the phrase “international public policy” as an appropriate description of the restrictive scope of public policy that should be applied to Convention Awards. The phrase is used in contra-distinction to “domestic public policy”. Its content includes such matters as (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; and (ii) rules designed to serve the essential political, social or economic interests of the State.

[28] We agree that to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must represent an unacceptable violation of those principles. The threshold that must be attained by the State to establish the public policy exception is therefore a very high one.

Public Policy and the underlying Agreement

[29] The rival submissions of the parties raise two important preliminary questions. Is it permissible for the Court now to examine the underlying Agreement reflected in the Deed? Should the Court re-examine the legality of the Deed even after the Tribunal has specifically addressed that issue and found the Deed to be valid?

[30] In our view, the circumstances of this case lend themselves to a positive answer to both questions. There is no controversy as to the conduct of the parties in the making of the

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14 Krombach v. Bamberski [2001] 3 WLR 488 at [37]
15 Krombach v. Bamberski [2001] 3 WLR 488 at [37]
Agreement. No one has any quarrel with the manner in which the Award sets out the basic terms of the Minister’s Agreement with the Companies. The warranties and promises made to the Companies, the consideration given in exchange, these are all agreed. There is no dispute that in 2008, when a new Minister of Finance assumed office, further implementation of the Agreement was halted. The reasons put forward to justify premature termination of the Agreement are also undisputed. In short, this is a case where all the relevant facts are uncontested matters of public record accepted by both sides. It is necessary only to decide whether, on the basis of these uncontroverted matters, enforcement of the Award will violate “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”.  

It may be possible here to make that decision by confining oneself to the dispositive aspect of the Award, but given the circumstance that the factual background is agreed and since the court is performing, essentially, a balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal are factors we must take into account. If there is illegality we must also consider the extent to which it impacts on the society at large and is offensive to primary principles of justice.

We respectfully disagree with the opinion of the trial judge that, because the Tribunal had considered and rejected the idea that the Deed was illegal, we are necessarily precluded from considering afresh that issue. We agree with Colman J who held in Westacre that any such estoppel must yield to the public policy against giving effect to transactions obviously offensive to the court. In the context of the credible allegations of illegality put forward by the Government, in order to assess whether this transaction is truly offensive the court must examine the Agreement and the promises the Minister made to the Companies against the backdrop of fundamental principles and rules.

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18 See Cardozo J in Loucks v Standard Oil Co. of New York 224 N.Y. 99 at 111
19 Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd [1999] 3 All ER 864 at 885 H
The promises made by the Minister

[33] The promises made by the Minister were designed to affect, indeed to alter, the Companies’ tax obligations under existing law. The Deed looked to past as well as future obligations. As to those of the past, whatever may have been the factual position in relation to the Companies’ liabilities as at the date of its execution, the Deed determined that, for “all periods up to and including 31st March 2005”, the Companies had “satisfied in full all and any such liabilities, assessments or claims”. The Deed further assured the Companies that all their filings, in relation to any form of taxation required to be made on their behalf, were complete and up to date.

[34] As to the future, the Deed recites at Clause 4.1(c) that

“to the extent that [the Companies] are liable to pay any Business Tax and/or Income Tax in respect of any period beginning on or after 1st April 2005, the calculation of the raising of any assessments or claims in respect of such Business Tax and/or Income Tax shall be calculated solely and exclusively on the basis that …”

The Deed at this point goes on at some length to construct in careful detail a special tax regime reserved for the Companies; a regime that all parties readily acknowledge is at variance with the extant revenue laws of Belize and one which conferred significant benefits on the Companies. To cite just one example of this variation, section 21(3) of the Income and Business Tax Act states:

“The excess of any business tax paid by any person other than an employed person during the basis year over the income tax due on the chargeable income of such person shall be carried forward as an expense to the next basis year.”

On the other hand Clause 4.1(c)(iii) of the Deed states

“Business tax is a withholding tax and an advance payment of final Income Tax and any amount paid in Business Tax which is in excess of the amount due in Income Tax will constitute an overpayment of Income Tax and shall be offset on a quarterly basis against Business Tax and payable in subsequent financial years.”
The Award discloses that the Deed was buttressed by other assurances made to the Companies. The Deed was accompanied by a letter dated 21st June 2006 addressed to the Chairman of the Companies in which the Minister of Finance “irrevocably confirmed” that all business and income tax obligations of the Companies would be governed by the terms of the Deed. The Minister also confirmed that the Deed had “irrevocably fixed” the rate of income tax payable by the Companies for as long as BCB Holdings remained a Public Investment Company notwithstanding anything contained in the Income and Business Tax Act to the contrary” (the italics are all those of the Tribunal in its published Award).

In sum, in exchange for settling the prior arbitral proceedings, the Deed purported to create and guarantee to the Companies a unique tax regime that was unalterable by Parliament. So, for the sake of argument, if BCB remained a Public Investment Company for the next 15 years, the State of Belize would be in breach of contract if its National Assembly, at any time during that period, without the Companies’ concurrence, enacted any revenue measure applicable to the Companies that diverged from the Deed. The promises made by the Minister were thus intended to supplant and supersede all current and any future statutes enacted by the National Assembly.

The Tribunal addressed the issue of the legality of the Deed by asking itself whether the Minister had actual and/or ostensible authority to make these promises to the Companies. The Tribunal held that the Minister did have such authority. The Tribunal rested this conclusion on two premises, firstly, the extensive prerogative powers of the Executive to make agreements and secondly, section 95 of the Income and Business Tax Act. The Tribunal noted that it is commonplace in international investment contracts for a host country to promise a foreign investor or contractor tax incentives as an inducement to make the investment or carry out an activity which is the subject of such agreements. The judge at first instance affirmed these conclusions of the Tribunal.

21 See [11] above where the section is set out
We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The Attorney-General v. Francois*²², an authority cited by the Tribunal. The judge’s focus, however, ought logically to have extended beyond the issue of whether it was lawful to make the promises. The making of a Government contract may be a matter quite distinct from its enforceability against the State as the *Francois* case also demonstrates.

It was necessary for the judge to consider whether the Award was contrary to public policy given the implementation of the underlying agreement without parliamentary approval and without any intention on the part of the contracting parties to seek such approval. This was an issue that was not at all considered by the Tribunal and the judge failed to advert to it. *Francois* concerned a guarantee entered into by the Saint Lucia Minister of Finance. No parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument. A citizen challenged its legality. The court held that nothing prevented the Minister from giving the guarantee, but the State only became bound by the same after Parliament had approved the funds necessary to discharge it. As Parliament had done so before the guarantee was honoured there was no basis for the citizen’s complaint.

EXECUTIVE PREROGATIVE AND THE SEPARATION OF POWERS

If it turns out that the Minister had no power to make or implement the promises he made, his lack of authority would be a potent factor in any assessment of the legality of the Agreement and the question whether enforcement of the Award is contrary to public policy. The Companies accept that the Minister’s authority to make the Agreement could only have been premised either on prerogative power or on section 95 of the Income and Business Tax Act²³. As to the former, the Companies submit that the Deed was “a detailed commercial agreement” between two parties dealing with matters of “a

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²² Civil Appeal No 23 of 2003, Judgment of the Court of Appeal delivered 29th March 2004
²³ See [11] above where the section is set out in full
significant financial value”; that both sides must have sought legal advice with its drafting; and that it was entered into in order to settle prior arbitral proceedings in which claims amounting to “considerable sums of money” were being made against the State. None of these points is disputed although it must be emphasised that this Court has no material before it to indicate the reasonableness or strength of the claims the Companies allegedly had against the Government. The Court also has no evidence before it of an approximate figure that might reasonably represent the “considerable sums” mentioned by the Companies for which the State may have been liable if the prior dispute had been settled or arbitrated upon terms favourable to the Companies. These are, however, not matters of great significance. The crucial question is whether any of the points made above to justify the exercise of prerogative power, or all of them taken together, serves to render enforceable an agreement made by the Executive branch of government, without parliamentary approval, to except a taxpayer from obligations contained in current and future revenue statutes.

[41] To negotiate an agreement with a company that can properly be described as a “detailed commercial” or “business” agreement or “settlement deed” does nothing to enhance the capacity of the Executive unilaterally to provide exceptions from the country’s revenue laws on the strength of Executive prerogative. The Government either has or lacks such capacity. It is trite that whatever legal advice the Minister procured does not bind a court and, interestingly, the State today actually has radically different advice from that which apparently informed the making of the Deed. The idea that the Minister who signed the Deed (or his Government) was attempting, in good faith, to settle a prior dispute is also quite beside the point. Neither a noble motive, as may have been the case, nor an executed Deed excuses or repairs an obvious excess of jurisdiction or serious breach of the fundamental principle of Separation of Powers.

[42] The latter principle goes back to the writings of Montesquieu. So far as it relates to a strict division between the Executive and the Legislature, with the growing complexity of the machinery of government, the principle may have lost some of its lustre. In particular, in relatively small Parliaments like Belize’s, and where the Executive is largely drawn
from the legislature, the separation between these two bodies often appears blurred. But it is erroneous to assume that there is not an important division between the functions performed by each branch. The struggle to maintain this important distinction is as old as the epic battles waged between Chief Justice Coke and King James I who sought to use Royal proclamations to make law without Parliament’s approval. The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the unique functions that each is authorised to exercise. The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive to assume unto itself essential law-making functions in the absence of constitutional or legislative authority so to do. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance. Caribbean courts, as part of their general function of judicial review, have a constitutional obligation to strike down administrative or executive action that exceeds jurisdiction or undermines the authority of the legislature.

Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country’s revenue laws. Counsel for the Companies submitted that the Deed merely resolved “uncertainties and ambiguities” in the law, but the Executive Branch, whether for the purpose of “settling” claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the

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24 See Case of Proclamations (1611) 12 Co. Rep. 74 which established the principle that the Executive has no general inherent power to alter the law of the land


promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.

[44] There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.

[45] There is a more fundamental reason why the Minister’s authority to make and implement the promises given in the Deed cannot be justified on the basis of prerogative power. This is because, as was noted by Lord Bridge in Williams Construction v Blackman, it is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded. While the statute remains in force, the function can only be exercised in accordance with its provisions. Since it is being put forward also that the Minister’s authority sprang from his powers under section 95 of the Income and Business Tax Act, prerogative power is ousted and it is to the statute that one must turn to discover whether (a) section 95 authorised the Minister to do what he did and (b), assuming such authorisation, the Minister acted within the scope of the authority given.

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27 (1994) 45 WIR 94 at 99
28 See [11] above where the section is set out in full
Section 95 of the Income and Business Tax Act

[46] The constitutionality of section 95 was challenged by counsel for the State. It is unnecessary now to rule on that challenge. Suffice it to say that, assuming its constitutional validity, the section must be interpreted in light of the Constitution. The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a “Money Bill”\(^29\). Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.

[47] Section 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly “remit” tax payable in respect of business activity to be conducted over an indefinite time in the future. The Tribunal expressed a different view on this issue. The Tribunal also likened remission of tax to the cancellation or extinguishment of all or part of a financial obligation whether past or future. In our opinion there is a substantial difference between the remitting tax payable and extinguishing an obligation to pay tax. If the Minister was authorised by section 95 to do the former he certainly had no power whatsoever to promise the latter.

[48] Since the Minister is not the only official upon whom is conferred a power of remission, it is instructive to reason by analogy. Section 52(1)(d) of the Constitution confers on the Governor-General the power to “remit the whole or any part of any punishment imposed

\(^{29}\text{See s 80(1) of the Belize Constitution}\)
on any person for any offence…” If the Tribunal’s views on remission are correct, then the Governor-General would be acting within the scope of the power if he/she remitted all the future sentences likely to be imposed upon a known recidivist. This would be an absurd interpretation of the Governor-General’s power.

[49] In the exercise of the statutory power to remit, section 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted both measures. Firstly, the Minister’s power under the section is constrained to the extent that the Minister needs to satisfy himself, on objective criteria, that it is just and equitable to remit tax payable. Fore-knowledge of the actual tax payable (which may be remitted in whole or part) constitutes a crucial, if not indispensable, factor informing the Minister’s exercise of discretion. Just as it would be perverse for the Governor-General (whose discretion is not ostensibly limited by what is “just and equitable”) to remit punishment when no crime has as yet been committed, far less a sentence imposed, so too the Minister cannot properly satisfy himself of the justice or equity in remitting tax payable by a company where the business activity upon which the tax may or may not accrue has not yet commenced and there is no knowing whether the company would even be in business for the period the tax is supposedly “remitted”. Apart from its absurdity, to construe the power to remit tax as capable of being exercised in respect of tax that may or may not become payable throughout the lifetime or existence of the taxpayer, evades section 95’s first safeguard and easily opens the door to the arbitrary and unlawful exercise of the power delegated.

[50] Section 95 also required Notices of any remission to be published in the Gazette. Given the cloak of confidentiality that surrounded the making and implementation of the Deed, it is reasonable to conclude that there was never an intention on the part of the Minister to publish the required Notice. At any rate, the Minister had two years to fulfil this statutory obligation and no attempt was made to comply with it during that time. The trial judge accepted the Tribunal’s view that the requirement of publication is merely “an administrative formality” and that publication may lawfully be done at any time. In light
of the importance the Constitution attaches to the remission of tax, we disagree. Parliament in its wisdom has decreed publication in the gazette so that the Minister’s decisions on remission are open to public scrutiny. This might be a mild, after-the-fact legislative safeguard. But to strip it of all its content, to render it devoid of any force only emphasises the grave danger to public policy that flows from interpreting the first limb of section 95 in the manner in which the Companies suggest.

[51] Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation.\textsuperscript{30} Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of “remitting tax payable” includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament’s revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new tax policy for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.

[52] It is not the Court’s function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent with the imperatives of the Constitution could be enacted to give force to it.

\textsuperscript{30} See s 80(1) of the Constitution
Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer. In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.

Should the Award be enforced?

As stated before, competing policies contend with each other when one must decide whether the public policy exception may successfully be invoked to render a foreign Award not enforceable. Even if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court must decline to enforce the Award. Reference has already been made to the pro-enforcement bias that informs the court’s approach and to the restrictive manner in which the public policy exception should be applied in the case of foreign awards.

There is also the fact here that the State treated with indifference the arbitral process to which it had agreed. This was far from exemplary conduct and it is a factor to which one should have regard. For this purpose no useful distinction can be made between the Administration in Belize which occupied the seat of government prior to 2008 and the one which held the reins immediately after the General Elections of that year. The latter was contractually bound by the warranties of the former, provided that the implementation of those warranties was not by law, impliedly or expressly, subject to parliamentary or judicial approval. The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed and it is unfortunate that the Government approached its obligations under that agreement in the way it did.

31 See in this regard Antigua Power Company Ltd v The Attorney General of Antigua and Barbuda & Ors (Antigua and Barbuda) (Rev I) [2013] UKPC 23 at [51] – [60]
We do not consider, however, that in each and every case, a failure to participate in the arbitral process should preclude a party from successfully arguing the public policy exception at the enforcement stage. The case law on this issue is far from coherent and it would not be right to lay down hard and fast rules. It seems to us that here also, a tension exists between various public interests. In resolving that tension the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed and placed alongside the court’s desire to promote finality and certainty with respect to arbitral awards.

There is actually nothing in the Act that suggests that a pre-condition for invoking the public policy exception is prior participation in the arbitral process. The Convention envisages that a court may *on its own motion* decline to enforce an Award on public policy grounds. This is hardly surprising. While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought *not* to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an Award on public policy grounds, the court is not concerned with favouring or prejudicing *a party* to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the Award is to be enforced.

This is a case where, as we have noted, it is clear that the Minister had no power to guarantee fulfilment of the promises he gave. It is equally clear that the signatories to the Deed, including the Companies’ representatives, had no intention to seek the requisite parliamentary approval. There was nothing in the Deed to suggest any such intention. Implementation of the promises made, far from being suspended pending possible legislative approval, took effect immediately upon execution of the Deed. But even if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was “irrevocable”.

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[58]
The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value\textsuperscript{32}. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted\textsuperscript{33}. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception.\textsuperscript{34} The Committee on International Commercial Arbitration has endorsed “tax laws” as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award.\textsuperscript{35} In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.

We have considered whether, notwithstanding all of the above, we should still enforce the Award because if we did not, the State of Belize may be unjustly enriched. There are powerful factors that weigh against this view. As mentioned above at [47], we have no evidence of the strength of the Companies’ claims relating to the prior dispute between the parties. There is therefore only a tenuous basis for presuming any unjust enrichment. Even assuming there could conceivably be some unjust enrichment, there is no way of assessing its likely quantum. It is also significant that the Companies are not foreign entities. They are Belizean companies cognizant of and constrained by the public policy of special tax rates, exemptions and concessions being granted by Parliament. The Companies themselves are currently the beneficiaries of tax concessions which were obtained, not from the Minister but through the National Assembly.

The public policy contravened in this case falls well within the definition of “international public policy” recommended by the ILA that might justify the non-

\begin{footnotes}
\item[32] See Methodist Church v Symonette [2000] 5 LRC 196 at 208; (2000) 59 WIR 1 at 13
\item[33] See Moses Hinds v. The A.G. of Jamaica [1976] 1 All ER 353 at 359
\end{footnotes}
enforcement of a Convention Award. If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this. Responsible bodies, including the Attorney General, have a right and duty to draw attention to and appropriately challenge attempts to undermine the Constitution.

**JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON**

[62] An interesting question of general public importance raised by this case is the following: Did the enactment by the Parliament of Belize of the 1980 Arbitration Ordinance to give effect to the New York Convention before that treaty had been accepted by the Executive constitute a breach of the separation of powers doctrine thereby making the legislation unconstitutional?

**Constitutionality of the 1980 Arbitration Ordinance**

[63] In order to properly examine the constitutionality of the 1980 Arbitration Ordinance it is necessary to engage in a brief review of the historical background to the constitutional and legislative order in Belize. British Honduras was acquired by Great Britain by settlement becoming part of Her Majesty’s dominions by 1817, at the latest. The British Honduras Constitution of 1870 vested power to make laws “for the peace, order and good governance of the … Colony” in the Governor “with the advice and consent of the … Legislative Council…” On 1st January 1964, the Colony achieved self-government through the British Honduras Letters Patent (“Letters Patent”) and the enactment of the British Honduras Constitution Ordinance (“Constitution Ordinance”). These instruments, together with the common law relating to the Crown prerogative and executive power, delineated and delimited the boundaries of the three arms of governmental power in British Honduras: executive power was vested in the Monarch headed by Queen Elizabeth II; legislative authority vested in the colonial legislature; and judicial authority vested in the colonial judiciary.
British Honduras became Belize on 1st June 1973. For ease of reference the Court will henceforth refer to “Belize” regardless of the date of the relevant event. Belize became independent on 21st September 1981. By letter dated 29th September 1982, the Prime Minister informed the Secretary General of the United Nations that Belize would continue to apply provisionally and on the basis of reciprocity, the treaties extended to it by the United Kingdom.

On 10th October 1980, during the era of self-government, but before attaining independence, the Belize Legislature enacted the Arbitration (Amendment) Ordinance36 (“the 1980 Ordinance”) which came into effect on the same day. By the 1980 Ordinance the Legislature added Part III, sections 25 – 30 and a Fourth Schedule titled “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” to the Arbitration Ordinance of 1932. The 1980 Ordinance was expressed to be: “An Ordinance to amend the Arbitration Ordinance Chapter 13 of the Laws to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” It provided for the staying of court proceedings in the absence of proof that the arbitration agreement was null and void and the enforcement in Belize of an arbitration award made in the territory of a country (other than Belize) which is a party to the New York Convention (“Convention Award”). The New York Convention had been ratified by the United Kingdom on 24th September 1975 and made applicable to Belize by Notice of Territorial Application (in the form of a Declaration by the United Kingdom) which was received by the Secretary General of the United Nations on 26th November 1980, some six weeks after the enactment of the 1980 Ordinance.

The Appellants contend that the LCIA Final Award of 29th August 2009 was made in the United Kingdom, a party to the New York Convention and is therefore a Convention Award that ought to be enforced in Belize in accordance with the provisions of the 1980 Arbitration Ordinance inserted into the Arbitration Act. This is opposed by the Respondent who argues that the Ordinance was ultra vires the powers of the Legislature

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36 No. 21 of 1980
and therefore unconstitutional at the time of its enactment. In response the Appellants say that even if the 1980 Arbitration Ordinance was defective at its passage, which they strenuously deny, it could nevertheless be characterized as “having effect” immediately before Independence Day and was therefore “saved” as existing law by Section 134 (1) of the Constitution. Finally, the Appellants argue that Belize is estopped from contending that the New York Convention is not applicable given the 29th September 1982 letter of the Prime Minister to the Secretary General of the United Nations.

(a) *Is ultra vires legislation saved as existing law?*

[67] If the Appellants are correct that any defect in the passage of the 1980 Arbitration was cured by its being “saved” under the Independence Constitution then the issue would be resolved in their favour and this resolution would foreclose on the need to discuss whether the Ordinance was *ultra vires* the powers of the colonial legislature. For this reason it is convenient to consider this point first.

[68] Section 134 of the Independence Constitution of 1981 made provision for the saving of “existing laws” and where necessary, for the Governor General and the courts to bring those laws into conformity with the 1981 Constitution. “Existing laws” meant any Act, Ordinance, rule, regulation, order or other instrument “having effect as part of the law of Belize immediately before Independence Day.” The Appellants argue that even if the 1980 Ordinance was *ultra vires*, it was still capable of being saved on the basis that section 136 (6) does not require that an Ordinance be “valid” to qualify as an existing law but only that it be an Ordinance “having effect” immediately before Independence Day. Having been saved by section 134 the only basis on which the Ordinance could be declared unconstitutional was for want of compatibility with the 1981 Constitution, since the section gave the same effect to saved laws “as if they had been made in pursuance of this Constitution.”

[68] There is no merit in this argument. In order for a law to be saved as “existing” law that law must first exist. The purported enactment of a law by a colonial legislature that has
no power to enact that law does not result in the creation of law. Such a “law” does not 
exist and never did; it is void ab initio: see Murphy v R.\textsuperscript{37} There is therefore nothing to be 
saved. If the 1980 Ordinance was outside the legislative competence of the colonial 
Legislature then the Court agrees entirely with Pollard JA that the Ordinance could “not 
constitute ‘existing law’ within the meaning of Section 134 (1) of the Belize Constitution 
and amenable to being saved at the time of independence of Belize”.\textsuperscript{38} The real question, 
therefore, is whether the enactment of the 1980 Ordinance was in fact outside of the 
legislative powers of the Legislature.

(b) Was the 1980 Ordinance ultra vires the powers of the legislature?

[69] The Respondent argues that by enacting the 1980 Ordinance the colonial legislature acted 
outside its legislative competence and encroached on the authority of the Executive 
thereby breaching the Separation of Powers doctrine and thus rendering the legislation 
unconstitutional. The competence of the colonial legislature derived from the Letters 
Patent and from the Constitutional Ordinance, section 16 of which provided: “Subject to 
the provisions of this Ordinance, the Legislature may make laws for the peace order and 
good government of the Territory.” Under the Royal Prerogative executive power was 
vested in the Crown and exercised by the Governor of Belize. For centuries it has been 
accepted that executive powers in the Royal Prerogative included the power to make 
international treaties, although the legislative implementation of the treaty was a matter 
for the legislature: Roberts v Minister of Foreign Affairs;\textsuperscript{39} and Attorney General v 
Joseph and Boyce.\textsuperscript{40} Section 16 of the Letters Patent and Section 2 (4) of the 
Constitutional Ordinance confirmed that the Governor acting in his discretion was 
responsible for “external affairs”.

[70] The difficulty in this case arises from the fact that the 1980 Ordinance was expressly 
enacted “to give effect to the New York Convention on the Recognition and Enforcement

\textsuperscript{37} 1982 Ir. 241  
\textsuperscript{38} At paragraph 46 of the Judgment in the court below  
\textsuperscript{39} [2007] UKPC 56  
\textsuperscript{40} [2006] CCJ 3 (AJ)
of Foreign Arbitral Awards” at a time when the Executive had not yet accepted the Convention. Pollard JA, who delivered the majority judgment in the court below, held as follows:

“Section 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance “to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” the colonial legislature was clearly encroaching on the royal prerogative in respect of the matter relating to foreign affairs. The ‘enactment’ of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively the domain of the Crown.

…

On the evidence before this Court, the colonial legislative assembly of Belize presumed to apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize…”

[71] The Appellants argue that the 1980 Ordinance dealt with the internal affairs of Belize, that is, the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. It does not purport to regulate or govern external affairs or the external relationships between the State and other States. This line of reasoning found favour with Mendes JA who put the matter this way:

“The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace and good government of the people of [Belize] was the responsibility of the [Belize] Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the [Belize] Legislature was expressed was inspired or was intended to replicate or indeed was intended to give effect to an existing treaty by which [Belize] was not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of [Belize].”
[72] This Court finds the views expressed by Mendes JA utterly convincing and prefers them to those articulated by Pollard JA. The 1980 Ordinance in no way interfered with the exercise of the executive authority in foreign affairs. In legislating the 1980 Ordinance, the legislature was not engaged in the negotiation, signature or ratification of the New York Convention; matters which belonged to the prerogative powers of the Crown. Nothing in the 1980 Ordinance purported to make Belize a party to the New York Convention. The annexure of the Convention to the Ordinance appeared to have been for purposes of identifying the categories of foreign awards that would be recognized and enforced in Belize, not to undertake international law obligations on behalf of the State. By giving force to the obligations in a treaty at the domestic level the legislature does not usurp the executive’s functions. Belize could not, by virtue of the 1980 Ordinance, assert an international law right to compel other parties to the Convention to enforce awards made in favour of Belizean nationals; equally, an amendment to or repeal of the 1980 Arbitration Ordinance could not engage the international responsibility of Belize. There is a normative separation between international rights and obligations under the New York Convention and domestic legislative enactment of that Convention.

[73] Further, the 1980 Ordinance was within the broad powers of the Belize legislature, “to make laws for the peace, order and good government of the Territory”. These words are apt to connote the widest plenary law-making powers appropriate to a sovereign (Ibralebbe v The Queen\(^41\) and Regina (Bancoulт) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)\(^42\)). It is, indeed, unanimously agreed that this law-making power includes the power to legislate for the incorporation of international treaties. What the Respondent argues, and Pollard JA accepted, was that there was state practice in so-called “dualist” jurisdictions that established a requirement for the prior executive act of acceptance of the treaty by the Executive.

\(^41\) [1964] AC 900 at 923 (PC)
\(^42\) [2009] 1 AC 453 at 486
There is no such requirement. At best, state practice could amount to a customary rule of international law recognized as part of the common law but such a common law rule could scarcely override the clear vesting by the Constitution of the widest plenary law-making powers in the Legislature. Furthermore, the emergence of customary law requires uniformity of state practice and state practice is by no means uniform on whether treaty acceptance must precede legislative incorporation. There are undoubtedly many instances in which the executive act of treaty acceptance has preceded legislative enactment of the treaty, although the authorities cited for the proposition that the timing of the 1980 Ordinance made it ultra vires, i.e., being enacted six weeks before executive acceptance of the New York Convention, do not establish that principle. Attorney-General for Canada v Attorney General for Ontario\(^{43}\) held that the legislative enactment by the Dominion Parliament of the Versailles Treaty was ultra vires not because of a sequencing issue but, rather, because the domestic implementation of the relevant treaty obligations was within the exclusive competence of the legislatures of the provinces. The Dominion Parliament had therefore sought to usurp the jurisdiction of the Provincial Legislatures.

It is also the case that there are many occasions where legislative incorporation of a treaty has preceded executive acceptance of that treaty.\(^{44}\) The Arbitration Act 1975 of England was enacted to give effect to the New York Convention before the United Kingdom had acceded to the Convention, although in Channel Group v Balfour Beatty Ltd\(^{45}\) it was said that “strictly speaking” the legislation should have followed Executive acceptance of the Convention. The UK Act to implement the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air was passed before the Convention was ratified by the Executive.\(^{46}\) In some instances the New York Convention has been given effect in domestic law even though the State is not a party to the Convention, as in

\(^{43}\) [1937] AC 326 (PC)  
\(^{45}\) [1993] AC 334 at 354 (HL)  
\(^{46}\) Judgment in the court below, Pollard JA at paragraph 52
the British Virgin Islands, an important Caribbean jurisdiction for the settlement of transnational commercial disputes. Pre-acceptance enactment has also been recommended by colonial legal advisors as well as modern academic writers. The rationale appears to be that if domestic legislation is required to enable the State to give effect to its treaty obligation then the legislation should be in place before the treaty comes into force so as to avoid a breach of the international obligation at the point when the treaty enters into force. In an ideal world both the treaty and the incorporating legislation would enter into operation at the same time. But the sequencing of these events has never, prior to the decision below, been held to displace the constitutional competence in the legislature to enact incorporating legislation. We do not think that any such fettering of the legislative competence was intended by the Constitution.

We also do not think that the majority in the court below gave sufficient weight to the Governor’s assent to the 1980 Ordinance. The colonial Constitution vested executive authority in the Crown and provided for its exercise by the Governor; the Governor acting in his discretion had responsibility for “external affairs”. The Governor could interrupt the legislative passage (section 27 (1)) or refuse his assent or reserve the Bill for the signification of Her Majesty’s pleasure (section 28 (3)) if he felt the Bill infringed upon the prerogative powers or his special responsibilities. While not conclusive, it is reasonable to assume that by assenting to the Bill providing for the giving of effect to the New York Convention, the Governor must have considered that the legislation did not usurp the treaty making prerogative of Her Majesty or his special responsibilities. More crucially, the Bill was only fully enacted upon Assent of the Crown in the exercise of the Royal Prerogative. It is therefore difficult to see how a law which can only become so on the exercise of the Royal Prerogative could be inconsistent with the Royal Prerogative. It

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47 The UK colony of the British Virgin Islands enacted its Arbitration Ordinance dated 6 September 1976 to give effect to the New York Convention in domestic law although the Convention has never been extended to the BVI by the British Government.

is not without significance that the Crown exercised its executive power to extend the Convention to Belize a mere six weeks after the enactment.

[77] For these reasons the Court concludes that the enactment of the 1980 Ordinance was *intra vires* the powers of the legislature and did not encroach into the domain of the Royal Prerogative in treaty-making. We therefore find the 1980 Ordinance to be constitutional and saved as “existing law” under the 1981 Independence Constitution.

(c) *Is Belize estopped from arguing that the New York Convention is not applicable?*

[78] The Appellants argue that the declaration made by the Prime Minister of Belize in the *Note Verbale* of 29th September 1982 was legally binding and estopped Belize from denying the applicability of the New York Convention. In the *Note Verbale*, the Prime Minister informed the Secretary General of the United Nations that the Government of Belize, “…. had decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize.” The Prime Minister requested that his letter be circulated to all Member States of the United Nations. The Appellants contend that this declaration fulfilled the conditions for estoppel to arise in International Law, namely, (a) the meaning of the statement is clear and unambiguous; (b) the statement or representation is voluntary, unconditional, and authorised; and (c) there is reliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation). 49

[79] This issue of the binding nature of the declaration made by the Government of Belize raises very complex issues and not only those relating to estoppel in International Law.

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49 These conditions are discussed by Professor Bowett, “Estoppel before International Tribunals and its Relation to Acquiescence”, *British Yearbook of International Law* (1957) Vol. 33 at pp. 188-194.
Diverse theories underpinning the law of treaties, state responsibility, state succession, and of unilateral declarations also come into play. Since this Court has already held that the 1980 Ordinance giving effect to the New York Convention was constitutional and saved as existing law at the time of independence, we consider it unnecessary and unwise in the circumstances to decide on the issue of estoppel.

**Why the case was not remitted to the Court of Appeal**

[80] There was no common ground between the parties as to the consequential disposal of the appeal in the event that this Court found the Arbitration Act to be constitutional, as we have. The Appellants submit that we should decide the issue of enforcement of the award without further ado while the Respondent seeks a remittal to the Court of Appeal. The remittal would enable the court below to decide the two other objections raised by the Respondent to enforcement, that is, that the subject matter of the dispute was not capable of settlement by arbitration, and enforcement would be contrary to public policy.

[81] The issues of constitutionality, arbitrability, and public policy were the subject of comprehensive written submissions and were fully argued over a three-day period in October 2011, before the Court of Appeal. At the request of the Court of Appeal made on 26th January 2012, the parties made further written submissions on the question of the constitutionality of the 1980 Ordinance. The judgment of the Court of Appeal was handed down on 8th August 2012, and dealt exclusively with the question of constitutionality. The judgment did not at all address the issues of arbitrability or public policy. This approach was lamented by Mendes JA who observed that “…. if there is an appeal and the decision of the majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy.”

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50 At paragraph [30] of the judgment in the court below
We deeply regret that the Court of Appeal declined to make their views on these matters available to us. This Court places considerable weight on the opinions expressed in the Court of Appeal; opinions which are pre-eminent in providing vital juridical material to inform and shape the views of this final Court especially on such innate questions as arbitrability and public policy: *Boyce v Attorney General and Minister of Public Utilities.*\(^{51}\) The scheme of adjudication in the Constitution contemplates review by this Court of decisions of the Court of Appeal. But this Court does have explicitly in relation to any appeal, all the jurisdiction and powers possessed in relation to that case by the Court of Appeal.\(^ {52}\) The Court’s overriding objective is “to deal with cases fairly and expeditiously so as to ensure a just result”.\(^ {53}\) In every case the most important objective is for the Court to ensure a fair and just result. Subject to that requirement, the question which arises is whether the natural reluctance to decide the issues without the benefit of the views of the Court of Appeal should prevail over the judicial impulse to settle litigation with expedition and finality.

This question cannot be answered in the abstract but only by reference to the particular circumstances of the case at hand. In this case the arbitral award was made on 20\(^{th}\) August 2009 and finalized on 29\(^{th}\) August 2009, almost four years ago. Each subsequent cycle of litigation before the courts of Belize occasions additional substantial costs and expense. Under the terms of the award interest continues to accrue. The arguments on arbitrability and public policy were fully ventilated before the Supreme Court and in the judgment of the trial judge. That the Court of Appeal was aware of its responsibility to address the outstanding issues but chose not to do so argues against remitting the case: *Re James McDonald.*\(^ {54}\) Remitting the matter to the Court of Appeal could require a full rehearing before a new panel as Pollard JA is no longer a Judge of the Court of Appeal.

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\(^{51}\) [2012] CCJ 1 (AJ) (R)  
\(^{52}\) Section 11 (6), Caribbean Court of Jurisdiction Act 2010  
\(^{53}\) Rule 1.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules  
\(^{54}\) (1975) 13 JLR 12 especially at p 27 per Graham-Perkins, JA
It is also significant that there are no relevant disputes of fact and that the issues to be decided do not derive from peculiar constitutional or legislative provisions in Belize. Whether an agreement that includes matters relating to the imposition and collection of taxes is properly submitted to international arbitration and whether enforcement of an award resulting from such arbitration would be contrary to public policy are quintessentially matters of judicial policy. Access to the views of the judges below remains important but the matters for decision are of broad significant public importance to the Caribbean polity as a whole. In these circumstances this Court must pay some attention to its regional role to make determinative ruling for further development of Caribbean jurisprudence through the judicial process. \(^{55}\)

For these reasons the Court decided that the balance was tilted in favour of deciding the outstanding issues in dispute rather than remitting them to the Court of Appeal.

**Conclusion**

For the reasons so eloquently articulated in the judgment of our brother Saunders JCCJ the Court orders that enforcement of the arbitral award should be declined under section 30 (3) of the Arbitration Act.

**Costs**

The award of costs in this case is complicated by a number of factors. The Respondent has prevailed on the central issue that enforcement of the Convention Award would be contrary to the public policy of Belize. However, the Respondent had sought to have this Court defer decision on the public policy issue and instead to remit the matter to the Court of Appeal. The Appellants succeeded on the primary ground of appeal arising from the decision of the Court of Appeal, namely, that the Arbitration Act of 1980 was constitutional and saved as existing law under the Independence Constitution. A further

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\(^{55}\) Cf. *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 832
factor that complicates the issue was the non-participation by the Respondent in arbitration proceedings despite numerous invitations and opportunities to do so. It is not beyond the realm of possibility that had the Respondent mounted vigorous and comprehensive arguments before the arbitral tribunal as it did before us the tribunal might have been persuaded to decline to adjudicate upon the matter thereby saving considerable expense. In this regard it is important to place on record that this Court has, and must encourage the greatest respect for international commercial arbitration under the Arbitration Ordinance and by extension as well the New York Convention. In the circumstances we consider that the most appropriate award would be for each party to bear its own costs.

Disposition

[88] The appeal is dismissed. There is no order as to costs.

The Right Hon Mr Justice Dennis Byron, President

The Hon Mr Justice A Saunders
The Hon Mme Justice D Bernard

The Hon Mr Justice J Wit
The Hon Mr Justice W Anderson
CARIBBEAN PUBLIC POLICY AS A DEFENCE TO ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

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A. Introduction

1. Parties choose arbitration as a means of dispute settlement for many reasons. But once that choice is made, it inevitably provokes the possibility of an age-old clash: Finality v Illegality.

2. This Paper explores one of the defences to finality: the Public Policy Defence to the enforcement of an arbitral award. The law discussed centers almost exclusively on Convention awards and the Public Policy Defence to enforcement of such awards.

B. The Statutory Context

3. Belize has neither signed nor ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), however it forms a part of the law of Belize. The Convention appears in the Schedule to the Arbitration Act (“the Act”) and in the celebrated case of BCB Holdings Limited & The Belize Bank Limited v The Attorney General of Belize the Caribbean Court of Justice (“the CCJ”) definitively held that “... the enactment of the 1980 Ordinance was intra vires the powers of the legislature and did not encroach into the domain of the Royal Prerogative in treaty-making. We therefore find the 1980 Ordinance to be constitutional and saved as “existing law” under the

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1 This Paper uses Belize as the main jurisdiction to explore the issue of the public policy defence. However, the law is relatively similar to most jurisdictions that have incorporated the New York Convention.

2 Adopted 10 June 1958, entered into force on 7 June 1959 UNTS 3

3 CAP 125 of the Laws of Belize (revised edition 2011)
1981 Independence Constitution." As such, Convention Awards are enforceable in Belize in accordance with the law and practice applicable to the New York Convention.

4. Article 5 of the New York Convention states that “Recognition and enforcement of [awards] may be refused, ... only if [a] party furnished to the competent authority where the recognition and enforcement is sought, proof” on any of five separate and independent grounds. The Convention also provides at Article 5.2(b) that “Recognition and enforcement of [awards] may be refused if competent authority in the country where recognition and enforcement is sought finds that:

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.”

Article 5.2(b) is given force in Belize by section 30(3) of the Act which is in similar terms. It is universally accepted that the effect of these provisions means that:

“... the Convention has a definite pro-enforcement bias and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances. In particular, this restrictive approach is adopted in relation to Convention Awards therefore, only where enforcement would violate the forum state’s most basic notions of morality and justice would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle”. In such a case the infringement must constitute “a manifest breach of a rule of law regarded as essential in the legal order”.

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4 [2013] CCJ 5 (A) [77]
5 sec 25(1) of the Act
6 BCB Holdings [26]
5. The CCJ emphasized the point by explaining the very high threshold that applies to the Public Policy Defence:

“*We agree that to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must represent an unacceptable violation of those principles. The threshold that must be attained by the State to establish the public policy exception is therefore a very high one.*”7

6. However, it must be recalled that it is “*the public policy of that country*” – in this case Belize, which must be considered by the enforcement court.

7. Put shortly, on an application for enforcement of an award, when confronted with the Public Policy Defence, a court must conduct a balancing exercise “*between the competing public policies of finality and illegality*”.8

C. Finality versus Illegality - The perennial tension

8. The beneficiary of an arbitral award will always contend that the dispute which it settled, has been *finally* settled. That is why parties use arbitration – to settle disputes *finally*. This is contractual. Without submission to the Courts of a jurisdiction, the winning party has no means to enforce the award against a recalcitrant party.

9. Losing parties are entitled to raise any defence provided in the Act including the Public Policy Defence - the ‘unruly horse’. In their judgments, courts often recite that they should remain vigilant to ensure that the Public Policy Defence is not abused.9 There is the danger of an interventionist court, as Lord Denning put it:

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7 *BCB Holdings* [28]
8 *BCB Holdings* [31]
9 *BCB Holdings* [25]
“with a good man in the saddle, the unruly horse can be kept in control, it can jump over obstacles”.10 So how far can a court go?

10. Where a party, in defence against an application for enforcement of an arbitral award, contends that enforcement would be contrary to public policy is the enforcement court entitled to revisit the question of illegality if it has already been considered and rejected by the arbitral tribunal? What if evidence of illegality is raised, not before the tribunal, but by way of defence to enforcement, can the court act on such evidence and if believed decline enforcement? Is the award really final?

Soleimany v Soleimany11

11. The Claimant, the son of the Defendant, exported carpets from Iran, which involved contravention of the Iranian revenue laws, for sale by his father outside of Iran. They fell out and their dispute was referred by agreement to the Beth Din for settlement. The Claimant asserted that, although they were not partners, the Defendant sold the carpets and failed to account to him for his share of the profits. The Defendant contended that the carpets were bought with his money derived by the Claimant from the sale of his business in Iran, and in any event the sales of the carpets were at a loss. The defendant did not plead illegality during the arbitration. However there was some mention of seizure of the carpets by the authorities in Iran, and that the Plaintiff had used “diplomatic immunity” of diplomats to get the carpets out of Iran.

12. In the Award, there was reference to illegal activities in Iran. After ex parte permission was given to enforce, the Defendant resisted enforcement asserting through his witness that “the illegality which was at the root of the enterprise on which [the plaintiff’s] claim was founded, and which the Beth Din clearly

10 Enderby Town Football Club Ltd. v Football Association Ltd. [1971] Ch 591
11 [1999] Q. B. 785
recognized was there, it was the obligation of the Beth Din ... to consider whether or not the illegality rendered the plaintiff’s claim void or unenforceable. This the Beth Din failed to do. In any event, it is [Sion’s] case that the illegality rendered [Abner’s] claim void or unenforceable in an English court, and that it would be contrary to public policy for an award founded on an illegal agreement or transaction to be enforced as a judgment of the High Court pursuant to section 26 of the Arbitration Act 1950".¹²

13. In its Judgment, the English Court of Appeal posed the following question: “Is it apparent from the award itself what type of contract the arbitrator was dealing with? We pose the question in this way because it seems to us important to emphasise that we are dealing with a case where it is apparent from the face of the award that (i) the arbitrator rejected Abner’s case that he had exported carpets purchased by himself which had then been sold by his father on his behalf; and (ii) the arbitrator was dealing with what he termed an illicit enterprise under which it was the joint intention that carpets would be smuggled out of Iran illegally.”¹³ Interestingly, the Dayan swore an affidavit for the purposes of the enforcement proceedings and stated that he “considered the illegality to be of no relevance “since he was applying Jewish law, under which, any purported illegality would have no effect on the rights of the parties.””¹⁴

14. The Court concluded that the original arbitration agreement was valid and therefore the Dayan had jurisdiction to consider the issue of illegality. The Court noted that he found that the contract was not illegal. So this was a case in which an arbitrator had considered and made a determination on the question of the illegality of the matrix contract.

¹² p. 791
¹³ p.794
¹⁴ Ibid
15. The English Court of Appeal laid out the approach to be adopted by a judge on an enforcement application where the Public Policy Defence is raised. In such a case three questions arise according to Lord Justice Waller, in his judgment:

“In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator’s award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.” 15

16. The Court of Appeal thereby set out a somewhat tentative and ill-defined process to be followed when a court is considering the Public Policy Defence. The first question is whether “there is prima facie evidence the award is based on an illegal contract”? The party resisting enforcement must put forward evidence to show that the award is based on an illegal contract, of course it can appear on the face of the award. Secondly, looking at the award itself, does it show that the arbitrator considered the question of illegality and concluded “that the underlying contract was not illegal?” Third, is there anything to suggest “incompetence” of the arbitrator; or is there evidence of “collusion or bad faith” in procuring the award? If the arbitrator was competent and there is no evidence that undermines the integrity of the arbitral process, and the arbitrator considered the illegality of the matrix contract and concluded that it was legal,

15 p. 800
then this would incline the enforcement court distinctly towards finality and “give full faith and credit” to the award. However, But in deciding whether or not, as a preliminary issue, to “give full faith and credit” to the award, the enforcement judge “should [not] conduct a full-scale trial of those matters in the first instance”.16

17. It is only if the answers to the three questions causes the enforcement judge not to “give full faith and credit” to the award, that he “embark on a more elaborate inquiry into the issue of illegality”. The Court ultimately found that the award sought to enforce an illegal contract and therefore was not enforceable in England and Wales.

*Westacre Investments Inc v Jugoimport-Sdrp Holding Company Limited*17

18. This case arose from an attempt to enforce an award issued by an International Chamber of Commerce arbitral tribunal seated in Geneva, Switzerland, which had awarded Westacre more that US$500 million in a dispute with the defendants. On enforcement the defendants produced evidence of bribery in the award of the contract which was in dispute. This evidence had not been placed before the arbitrators. However at the beginning of the hearing before the arbitrators counsel for the defendants submitted that the matrix contract was void because it violated “ordre public international” or “bonos mores” because of alleged bribery of officials in Kuwait. The arbitrators rejected the plea on the basis that the point was not pleaded and no evidence was produced to support it.

19. In due course the defendants applied to set aside an *ex parte* enforcement order made by the English High Court. On this application they produced an affidavit to support the allegation of bribery. According to the Court, “The key issue

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16 Ibid
17 [1999] 1 All ER (Comm) 865
accordingly is whether the appellants should, in these enforcement proceedings, be entitled to prove the facts as set out in the affidavit of M.M.."18

20. Waller LJ, who had given the judgment in Soleimany adopted the “full faith and credit” test which he had set out in Soleimany. On whether the fraud issue could be re-opened, he found that “... there will be circumstances in which, despite the prima facie position of an award preventing a party re-opening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused. It is for those reasons that the nature of the illegality is a factor, the strength of case that there was illegality also is a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor.”19

21. Waller LJ considered the evidence and concluded that the Award should not be enforced.

22. In a short judgment, Mantell LJ, with whom Sir David Hirst agreed, concluded that it was not open to the Court to consider the issue of illegality. He said: "From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected ... in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.”20 Having expressed reservations about the “full faith and credit” test, he applied it and concluded that the issue of illegality should not be re-opened.

18 p. 873
19 p. 885
20 p.887
23. **Soleimany** and **Westacre** recognize the jurisdiction of the enforcement court to perform a very limited review of the issue illegality where that issue had been considered and rejected by the arbitrators. The question remains – what is the depth of the review to be performed when the arbitrators have expressly considered the issue of illegality and concluded that the underlying contract is not vitiated by illegality, but there is fresh evidence of illegality? Mantell LJ had expressly stated in **Westacre** that re-opening would not be allowed in that case “without fresh evidence”.

D. **A tour of the Caribbean Sea**

24. The case law reveals a distinct pro-enforcement bias by courts in the Caribbean. The Public Policy Defence is routinely dismissed.

**Sonera Holding BV v Cukurova Holding AS**

25. Sonera initiated arbitration under the ICC Rules in Geneva, Switzerland against Cukurova on the basis of a Letter Agreement. The Tribunal issued two partial awards and a final award. By its 2nd partial award, the Tribunal ordered specific performance of the Final SPA and valuing the Turkcell shares at US$1.809 million. Sonera subsequently waived its claim based on specific performance and sought relief based on damages for non-delivery of the shares under the Final SPA. The Tribunal awarded US$932 million to Sonera based on Cukurova’s failure to transfer the shares.

26. Sonera applied to the BVI High Court for permission to enforce the final award in the same manner as a judgment and to enter judgment in same terms as the

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*21* Whilst there appears not to be many cases of the public policy defence being raised in the Caribbean, there is no pretence that the cases here considered represent the totality of cases in the Commonwealth Caribbean.

*22* BVIHC (Com) 119/2011
terms of the final award. The Application was granted and Cukurova was ordered to pay Sonera US$1.033 billion with costs.

27. Cukurova applied to set a side the Order on several grounds including that “enforcement of the final award in the Virgin Islands would be contrary to public policy as violating principles of natural justice and the fundamental principle of res judicata”. One of its main contentions was that the Tribunal had found that closing under the SPA was to be on the 30 July 2005. However, when it came to assessing damages, the Tribunal assessed on the basis of the failure to deliver the shares by 30 June 2007. The trial judge held:

a. On the question of the date of assessment – this “... seems to me to amount to no more than a complaint that the Tribunal was in error [in] assessing damages for non-delivery as at 30 June 2007. ... It is notorious that the enforcing court may not concern itself with the correctness or otherwise of a tribunal’s award and that is sufficient to dispose of this issue.”

b. On the public policy defence – “The damages awarded may or may not have been correctly calculated, but that does not mean that the parties’ bargain is not being enforced – it means merely that it may be open to argument on the merits that the quantum of the award is wrong. That is something which the enforcing court may not inquire into – not least because it is part of the public policy of the Virgin Islands, enshrined in section 36 of the Ordinance, that it should not.”

Cukurova appealed to the OECS Court of Appeal.

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23 [52]
24 [58]
25 Cukurova Holding AS v Sonera Holding BV BVIHCVAP2012/0029 (9 May 2013)
28. In dismissing the appeal, the Court of Appeal noted: "The public policy ground is commonly considered to be a ground of last resort."26

29. On natural justice the Court said: "It was clearly not for the enforcing judge to carry out his own independent assessment in deciding whose expert evidence the Tribunal ought to have accorded more weight."27

30. On pacta sunt servanda, the Court said: "having agreed that the tribunal had jurisdiction, the challenge as to the basis on which damages were assessed is not a matter for inquiry by the enforcing court... I accordingly agree ... that the grounds regarding pacta sunt servanda and res judicata are merely complaints by Cukurova that the Tribunal erred in assessing the damages awarded to Sonera and affords no basis for saying that this was contrary to the public policy of the Virgin Islands."28

Cukurova appealed to the Privy Council.29

31. “The appeal to the Board raises three questions defined in the statement of facts and issues: (1) whether the Tribunal had jurisdiction to grant the relief in the Final Award; (2) whether the Court of Appeal was correct to conclude that Cukurova had not been unable to present its case before the Tribunal within the meaning of section 36(2)(c) of the BVI Arbitration Ordinance 1976 ("the Arbitration Ordinance"); and (3) whether the Court of Appeal was correct to conclude that enforcement of the Final Award would not be contrary to the public policy of the BVI within the meaning of section 36(3) of the Arbitration Ordinance.30

26 [44]
27 [45]
28 [49]
29 Cukurova Holding AS v Sonera Holding BV (British Virgin Islands) [2014] UKPC 15
30 [3]
32. The Board noted: *It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, known as the New York Convention. The Final Award is such an award. In particular the court cannot refuse to enforce an award on the ground of error of law or fact.*

33. In reaching its decision, the Board stated that: “Cukurova’s case is that enforcement ought to have been refused because the Tribunal violated the rules of natural justice. It says that it was not able to present its case within the meaning of section 36(2)(c) and/or that it would be contrary to public policy to enforce the award under section 36(3) of the Arbitration Ordinance. It takes two points. First, the Tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukurova and that Cukurova never had an opportunity to address. Secondly, the Tribunal ignored (and failed to give any reasons for rejecting) Cukurova’s evidence and submissions on a key point in relation to the quantification of Sonera’s alleged loss. This resulted in a massive increase in the damages awarded against Cukurova”.

34. “There may be grounds for saying that the Tribunal was wrong to accept the evidence of Professor Lind and to reject that of Mr Osborne with regard to the appropriate figure to take in respect of the illiquidity discount. However those grounds would involve saying that the Tribunal erred on the facts, or perhaps in law. As explained at the outset, the enforcing court is not concerned with such issues. The Board concludes that there is no basis upon which the decision of the judge or the Court of Appeal can or should be reversed, so far as the Tribunal’s treatment of the evidence of Mr Osborne is concerned. Cukurova cannot succeed under section 36(2)(c). Nor can it succeed on the basis that enforcement would be contrary to public policy or on the basis of any infringement of the rules of natural justice.”

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31 [4]

32 [30]
justice. Finally, the Tribunal gave reasons for its decision. Whether those reasons were convincing or not is not a matter for the enforcing court”.33

35. This is a strong authority from the Judicial Committee that if it is necessary to conclude that “the Tribunal erred on the facts, or perhaps in law” in order to refuse enforcement, it will not avail the defendant as the “enforcing court is not concerned with such issues”.

Premier Cruise Lines Ltd. v Treasure Cay Ltd.34

36. By a claim in the High Court of the Commonwealth of the Bahamas, the Claimant sought enforcement, at common law, of an Award made in the State of Florida against the Defendant. “The Defendant has raised the defences of public policy and breach of natural justice by the alleged treatment of Nierenburg as a witness during the arbitration proceedings. The Defendant alleges, in the affidavit of Ludwig Meister, that during the arbitration proceedings, the witness was threatened by the Plaintiff with civil action as a result of a confidentiality agreement between the witness and the Plaintiff. The Defendant further alleges that as a result of the intimidation, it was deprived of his evidence which would have showed that the Plaintiff was in fact losing money on their trips to Abaco and suffered no loss as alleged by the Plaintiff. It alleges that these breaches amount to a substantial injustice to the Defendant.35

37. The Court was clear - “As regards the question of public policy, in my view no issue is raised thereon. A review of the authorities suggest that it is the foreign judgment or award itself or the contract on which the cause of action is based which must be

33 [64]
34 [1998] Bah Law Rep
35 [63]
contrary to public policy. I find no basis whatsoever on which such a defence may be raised in this case.”

38. “The Defendant also alleges that the Award cannot be enforced in that it would be unconstitutional to allow its civil rights to be affected by an unfair trial and by a body not appointed by the Judicial and Legal Service Commission. In this regard, Articles 15, 20(8), 28, 116 and 117 were commended for this Court’s consideration as was an excerpt from Lloyd G. Barnett’s Constitutional Law of Jamaica.”

39. In answer the Court said: “I fail to appreciate how any of those provisions have any application to the matter at hand. In all the circumstances, I do not find any issue raised by the Defendant as to the infringement or likely infringement of any of the Articles mentioned.”

**LV Finance Group Limited v IPOC International Growth Fund Limited**

40. Essentially, this claim before the High Court in Bermuda was for an anti-suit injunction restraining IPOC from pursuing proceedings in the Arbitration Court in St Petersburg, Russia in breach of two arbitral awards. In so far as was relevant, the tribunal in its Second Partial Award upheld LV’s plea that the claim brought by IPOC “under the April Option Agreement are against public policy and arise ex turpi causa”. The First and Second Partial Awards were Convention Awards, and on the 14 June 2006 the High Court in Bermuda recognized the Awards and gave permission to LV to enforce them. The Enforcement Order was in terms declaratory.

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36 [64]
37 [78]
38 [79]
40 The case has an interesting discussion on the enforcement of a declaratory award [47] – [90] which is beyond the scope of this Paper.
41. On the public policy issue, IPOC contended that it would be contrary to public policy to permit LV to enforce the Award on the ground that it was based on an underlying contract found by the arbitrators to be illegal and therefore enforcement should be refused. This was an ingenious argument; IPOC was essentially falling on its own sword by arguing that because the arbitrators had found the underlying agreement to be illegal, LV should be prevented from enforcing that finding, and from obtaining an anti-suit injunction. The Chief Justice stated:

“The award does not refer on its face to an illegal transaction which neither party is able to enforce. The award merely declares that IPOC may not enforce the April Option Agreement. LVFG is seeking to enforce an award which declares that the underlying contract is not enforceable by IPOC by reason of illegality. It is not seeking to recover money or other contractual rights under a contract which arbitrators have held it cannot enforce. Rather, it is seeking to uphold the finality of the arbitrator’s decision that the April Option Agreement is not enforceable by IPOC, in circumstances where it is not contended that the arbitration agreement itself was vitiated by the illegality in question.”

42. The Court rejected the argument and concluded:

“In my view no question of any public policy impediment to enforcement arises because in the present case the award is untainted by the underlying illegality. It cannot be contrary to Bermudian public policy for an award which has found that an illegal contract cannot be enforced by the Defendant to be upheld at the instance of the Plaintiff. The position would be different if the Plaintiff was asserting a claim based on the illegality found by the arbitrators, or positively seeking to derive a benefit under the illegal contract. All that the Plaintiff seeks to do in enforcing the award is to enjoy the benefits of the agreement to arbitrate, which it is not contended is itself unenforceable.”

43. The Chief Justice then turned to the ‘Soleimany Point’: “To what extent should this Court investigate the issue of whether the award is tainted by illegality?” The
answer was found by the Court’s reliance on the dicta of Waller LJ in *Soleimany*
which was repeated in *Westacre*.42 The Chief Justice concluded that “... this
passage illustrates that in the present case this Court has no grounds for going
behind the findings set out in the SPA as to illegality.”43

44. For completeness, it is well to quote the Chief Justice:

“In carrying out what Sir Charles Mantell in *Westacre* referred to as a
“balancing exercise between the competing public policy considerations of
finality and illegality”, it seems to me that this is very clearly a case where
finality prevails. The contrary conclusion would discourage parties from raising
allegations of illegality in arbitration proceedings altogether, or create a
situation where all findings of illegality in the arbitration context had to be re-
litigated in a court to achieve finality. Taken to its logical conclusion, the
Defendant’s arguments on this issue would potentially deprive the courts of the
ability to decide that a contract was illegal, because the party raising the
illegality defence (and implicated in the illegality) was seeking to benefit from
the illegal transaction. It does not follow that any finding of illegality in
relation to a contract automatically disqualifies the parties to the impugned
transaction from seeking any form of legal relief relating to the illegal
contract.”

45. IPOC was irrepressible. In answer to enforcement proceedings in the British
Virgin Islands in the autumn of 2006, it ran the same public policy argument, and
the non-enforceability of declarations of the tribunal argument. The arguments
found no traction before the High Court so IPOC appealed. The Court of Appeal
reached the same conclusion as Kawaley CJ:

“It seems clear that while the Tribunal declared that the April Option
Agreement was tainted with illegal conduct by both parties, the Second Partial
Award was not tainted by that illegality. It may be that had LV Finance relied
on the agreement to enforce contractual rights or benefits under it the

42 Ibid [40] – [45]
43 Ibid [41]
principles in Soleimany v Soleimany would have precluded enforcement on the ground of public policy. By the enforcement application, LV Finance sought to enforce the conclusion in the Second Partial Award that the April Option Agreement is unenforceable. This cannot be contrary to public policy under section 36(3) of the Arbitration Act. To paraphrase the words of Kawaley CJ in **LV Finance v IPOC**, LV Finance was merely seeking to uphold the finality of the Tribunal’s decision that the April Option Agreement is not enforceable by IPOC, in circumstances where it is not contended that the arbitration agreement was itself vitiated by the illegality in question. LV Finance sought to enforce the benefits of the agreement to arbitrate.

**Sampoerna Strategic Holdings Ltd. v. Huawei Tech Investments et al**

46. The Claimant obtained an award based on a ground not pleaded, all its pleaded grounds having been considered and rejected. "In short, the Arbitral Tribunal awarded the sums claimed by the claimants, not on the grounds advanced in the Statements of Claim, which were rejected, but under the provisions of Article 1316 of the Civil Code, which was not expressly pleaded." However, “As the Chief Justice observed, the suggestion that the arbitration respondent suffered prejudice "must have rung somewhat hollow" (Judgment para. 12). The fact is that Article 1316 was introduced into the case and was extensively dealt with by the arbitration respondent's own expert witness.”

47. In the course of its Judgment, the Bermuda Court of Appeal underscored the standard of proof required to succeed on the Public Policy Defence saying that: “... English as well as Singaporean authority spoke in terms of cases where upholding an award would "shock the conscience" or be "clearly injurious to the public good" or "violate the forum's most basic notion of morality and justice". It is scarcely necessary to say that, in my judgment, the appellant (arbitration respondent) does not come within measurable distance of establishing that the

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44 BM 2014 CA 20
45 [13]
46 [50]
present Award satisfies that test. And the requirements of public policy demand no less.”

**Maritime General Insurance Company Limited v. International Oil Pollution Compensation Fund**

48. *Maritime General* was a case regarding the enforcement of a judgment not an award. But the issue decided is worth studying. The Judgment arose from a claim tried in Guadeloupe, French West Indies and arose from a ship that sank and caused an oil spill near Nevis. Judgment was obtained based on the relevant provisions of the International Convention on Civil Liability for Oil Pollution and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution. Enforcement was sought in Trinidad & Tobago against the insurer of the vessel. The Claimant succeeded on the enforcement, and the insurer appealed.

49. “Section 195(2) of the Insurance Act is as follows:

“Every policy issued in Trinidad and Tobago through a person or an office in Trinidad and Tobago shall, notwithstanding any agreement to the contrary, be governed by the laws of Trinidad and Tobago and shall be subject to the jurisdiction of the Courts of Trinidad and Tobago.”

50. The Court of Appeal held:

“This section enacts a rule of the conflict of laws (see Irish Shipping Limited v. Commercial Union Assurance Co. PLC and Another [1991] 2 Q.B. 206). It provides that in the case of any policy issued in Trinidad and Tobago through a person or an office in Trinidad and Tobago, it shall, notwithstanding any agreement to the contrary be governed by the laws of Trinidad and Tobago and

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47 [56]
48 TT 2012 CA 13
49 [47]
shall be subject to the jurisdiction of the Courts of Trinidad and Tobago. This is an example of an overriding statute. It lays down a mandatory rule as to the applicable law of the policy or contract of insurance and the relevant jurisdiction. The parties cannot contract out of that provision.”

“Section 195(2) of the Insurance Act crystallizes a rule of public policy that the policy or contract of insurance issued in this jurisdiction should be governed by the law of Trinidad and Tobago and be subject to the jurisdiction of the Courts of Trinidad and Tobago. To enforce a judgment pursuant to French law in which the French Courts have assumed jurisdiction and applied French law, it seems to me, would be contrary to that policy.”

“As I mentioned, it has been held that it would be contrary to public policy to recognize a judgment obtained in breach of an anti-suit injunction (see WSG Nimbus Pte Ltd. v. Board of Control for Cricket in Sri Lanka, supra, and Phillip Alexander Securities and Futures Ltd. v. Bamberger, supra). This appeal seems to me to be an a fortiori case, as the judgments have been obtained by the application of a law contrary to an act of Parliament setting out a rule of public policy.”

51. A judgment, or award, that was based on the application of a law that had the effect of violating a mandatory provision of the law of Trinidad & Tobago was held to be contrary to public policy. The Trinidad Insurance Act had elaborated the public policy of Trinidad and the Court declined to enforce a judgment that would have effectively ignored that public policy.

E. The Belize Experience

52. The Public Policy Defence has been successfully raised in two cases in Belize. The first case is the seminal case of BCB Holdings Limited & The Belize Bank Limited v The Attorney General of Belize decided by the CCJ. A summary of
the case appears in the annex to this Paper. As a summary of the main issues is as follows:

“Addressing the public policy issue, the Court found that it was the public policy of Belize that was in issue as that was the country where enforcement would take place. The Court stated, however, that enforcement of a foreign arbitral award should be refused only in the rarest of circumstances because courts must always act with great respect for the judgments of foreign tribunals. In order for the court to decline enforcement, the claimed intrusion upon public policy must be violate core principles of justice and the rule of law.

“In order to assess whether this high threshold was met in this matter, the Court addressed several issues. The Court noted that the Deed created a unique tax regime that claimed to be unalterable by parliament. Even if the Minister may have had the authority to make such an agreement, its implementation without legislative approval, which was neither sought nor granted, was not lawful. The Deed purported to alter and regulate taxation and under the Belize Constitution and statutes this could only validly be done by parliament. To allow the Executive to assume essential law-making functions beyond its constitutional or legislative authority would put democracy at peril. Neither the Crown's Executive prerogative nor any statute authorized the Minister to make the promises made to the Companies. Accordingly, the deed was illegal, void and Caribbean courts have an obligation to strike down executive action that undermines the authority of the legislature. For these reasons, the Court found that the enforcement of the Award should be refused and it was therefore unnecessary to consider the arbitrability point.”

53. It is critical to note that the CCJ disagreed with the trial Judge's conclusion that because the Tribunal had considered and rejected the illegality of the underlying contract, the Court was precluded from re-visiting that issue. According to the CCJ:

“We respectfully disagree with the opinion of the trial judge that, because the Tribunal had considered and rejected the idea that the Deed was illegal, we are necessarily precluded from considering afresh that issue. We agree with Colman J who held in Westacre that any such estoppel must yield to the public policy against giving effect to transactions obviously offensive to the court. In the context of the credible allegations of illegality put forward by the
Government, in order to assess whether this transaction is truly offensive the court must examine the Agreement and the promises the Minister made to the Companies against the backdrop of fundamental principles and rules.”54

54. The CCJ embarked on a full-scale review of the evidence produced by the Government in defence to the claim for enforcement, much of which had been before and was considered by the Tribunal. The CCJ concluded:

“It seems to us that here also, a tension exists between various public interests. In resolving that tension the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed and placed alongside the court’s desire to promote finality and certainty with respect to arbitral awards.”55

55. In deciding to uphold the Public Policy Defence, the CCJ held that “the “grounds for not enforcing this Award are compelling.”56 Its denouement was:

“The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception. ... This is a case where the Court actually has a duty to invoke the public policy exception.”57

56. The second Belizean case in which the Public Policy Defence was successfully deployed is The Belize Bank Limited v The Attorney General of Belize.58 A summary of this case appears in the Annex to this Paper. In a fully reasoned judgment, the Court reviewed the legislative architecture governing public finances in Belize. It concluded that an essential feature of this architecture was

54 [32]
55 [56]
56 [59]
57 Ibid
58 Claim No. 418 of 2013. This case has been appealed and a judgment from the Court of Appeal is pending.
the necessity for legislative approval before the Government incurred debt above a certain threshold. In the particular case, although legislative approval was not needed for the validity of the Loan Note (as found by the Privy Council) being the instrument by which Government’s liability was established, the Court reasoned:

“The Court finds that the promissory note whilst validly executed pursuant to executive authority, that when considered against the extent of legislative financial controls of public expenditure listed in paragraphs 94-96 above, it is inconceivable that the Executive possessed the authority to bind the government to the expenditure without Parliamentary approval. As a result, the Court finds that the promissory note cannot be enforced without the sanction of the Legislature.”

57. In the end in declining to enforce the Award, the Court concluded:

“The competing public policy of guaranteeing public confidence in the arbitral process and respecting the institutional fabric of the country where the award is to be enforced, as articulated in BCB Holdings is considered to be just outweighed when considering the interests of a developing state, in maintaining transparency and accountability in the Executive’s handling of the country's public revenue.”

F. Conclusion

58. These two cases from Belize reveal a willingness of the Court to revisit and reconsider findings of arbitral tribunals, and to reach different conclusions on the law than those reached by the arbitrators. This appears to be a much more interventionist approach than adopted in the other cases from the Caribbean, and at variance with the stance adopted by the Judicial Committee in Cukurova when it concluded “the court cannot refuse to enforce an award on the ground of error of law or fact.” Can this difference in approach be rationalized?

59 [100]
60 [106]
59. One answer may be that except for the two Belizean cases the Government was not a party in any of the other cases reviewed. Do different public policy issues arise when the Government is a defendant? It is difficult on an objective analysis to justify an affirmative answer to that query. But it cannot be gainsaid that the defences raised, rather than the fact that the Government was a party, in the two Belizean cases raised constitutional law issues. The CCJ and the Belize Supreme Court decided that high constitutional principles were violated by the implementation of the underlying contracts on which the respective awards were based.

60. It is now clear that Caribbean Public Policy recognizes that agreements to which a government is a party and which, when implemented, contravene constitutional provisions may lead to enforceability problems if awards are based on such agreements. In such circumstances it appears that court’s in the Caribbean may be more alive to these issues and more interventionist. Having identified the Supremacy of Parliament and Separation of Powers as “core constitutional value[s]” in BCB Holdings, the CCJ said:

“To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception. ... “This is a case where the Court actually has a duty to invoke the public policy exception.”61

61. It is important to emphasise that all the cases reviewed confirmed the pro-enforcement regime is applicable when enforcing Convention awards. Also, the all underscored the “very high” threshold that must be reached to succeed on the Public Policy Defence. That said, violating “core constitutional value[s]” will impose a duty on courts in the Caribbean to invoke the public policy exception.
ANNEX

IN THE CARIBBEAN COURT OF JUSTICE Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 7 of 2012

BZ Civil Appeal No 4 of 2011

BETWEEN

BCB HOLDINGS LIMITED THE BELIZE BANK LIMITED

APPELLANTS

THE ATTORNEY GENERAL OF BELIZE

RESPONDENT

JUDGMENT SUMMARY

[1] The London Court of International Arbitration (“the Tribunal”) gave an arbitral Award against the State of Belize in favour of BCB Holdings Limited and The Belize Bank Limited (“the Companies”). The arbitration arose from a Settlement Deed made between the Companies and the Government of Belize which afforded the Companies a unique tax regime independent of Belizean tax laws. The Deed was executed in March 2005 and executed by the Companies’ representatives and the Prime Minister (then Minister of Finance) of Belize and the Attorney General. Its purpose was to settle a pre-existing dispute between the parties and to specify tax rates and liabilities of the Companies. Under its terms the Companies refrained from pursuing claims they had against the Government in relation to this dispute and the Government agreed that the Companies would be entitled to special tax privileges effective from April 1, 2005.

[2] The Deed was to be governed by English law and it contained a clause that provided for arbitration should disputes arise. The Deed was not legislated by the parliament of Belize. The tax regime created by the Deed was enjoyed by the Companies for two years before it was repudiated by the Government in 2008
following a general election in Belize and a change in administration. Following this repudiation the Companies commenced arbitration proceedings in accordance with the arbitration clause of the Deed.

[3] The Tribunal found Belize to be in breach of the Deed and awarded damages and costs to the Companies totaling approximately US $44M with interest at 3.38% compounded annually ("the Award"). These damages were calculated based on the postulation that the Companies would have enjoyed the benefit of their special tax arrangement until at least 2020, at which point BCB’s public investment company status would expire.

[4] The Companies applied to the High Court of Belize to have the Award enforced. The Attorney General resisted the application on the grounds that (i) the Act pursuant to which enforcement of the award was sought was unconstitutional in that it was enacted by Belize colonial legislature specifically for the purpose of giving effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") at a time when Her Majesty had not yet accepted the Convention on behalf of Belize; (ii) the dispute was not arbitrable as it related to the tax rates and liabilities of the Companies which was a matter for the Parliament of Belize; and (iii) enforcement of the award would be contrary to public policy since the Deed was repugnant to the legal order of Belize. The judge granted the application of the Companies to enforce the Award and the Attorney General appealed to the Court of Appeal. In upholding the appeal, the Court of Appeal declined to address the arbitrability and public policy points but agreed with the Attorney General’s submissions that the Act was invalid. The Companies appealed to the Caribbean Court of Justice ("the Court").

[5] The Court considered three key issues: (i) the validity of the 1980 Arbitration Ordinance (the “Act”); (ii) whether, if the Act was considered to be valid, the Court should remit the case to the Court of Appeal so that the latter could address the arbitrability and public policy points; and (iii) if the Act is valid and the case not remitted to the Court of Appeal whether the application should be refused on grounds either that the dispute was not arbitrable or that enforcing the Award would be contrary to public policy.

[6] Regarding the validity of the Act, the Court held that passage of the Act by the Parliament of Belize prior to the Convention being accepted by the Executive neither constituted a breach of the separation of powers nor an interference with executive authority. By passing the Act, parliament was legislating the way in which foreign awards would be recognized and enforced in Belize. The Act did not make Belize a party to the Convention and Parliament’s passage of the Act was in accordance with its broad power “to make laws for the peace, order and good government of the Territory.” The Court held that the Act was therefore intra vires the authority of the legislature.
[7] Having found the Act to be valid, the Court declined to remit the case to enable the Court of Appeal to pronounce on the arbitrability or public policy points. The Court held that this would occasion additional expense especially as it was possible that the arguments would have had to be re-heard before a differently constituted Court of Appeal.

[8] Addressing the public policy issue, the Court found that it was the public policy of Belize that was in issue as that was the country where enforcement would take place. The Court stated, however, that enforcement of a foreign arbitral award should be refused only in the rarest of circumstances because courts must always act with great respect for the judgments of foreign tribunals. In order for the court to decline enforcement, the claimed intrusion upon public policy must be violate core principles of justice and the rule of law.

[9] In order to assess whether this high threshold was met in this matter, the Court addressed several issues. The Court noted that the Deed created a unique tax regime that claimed to be unalterable by parliament. Even if the Minister may have had the authority to make such an agreement, its implementation without legislative approval, which was neither sought nor granted, was not lawful. The Deed purported to alter and regulate taxation and under the Belize Constitution and statutes this could only validly be done by parliament. To allow the Executive to assume essential law-making functions beyond its constitutional or legislative authority would put democracy at peril. Neither the Crown’s Executive prerogative nor any statute authorized the Minister to make the promises made to the Companies. Accordingly, the deed was illegal, void and contrary to public policy and Caribbean courts have an obligation to strike down executive action that undermines the authority of the legislature. For these reasons, the Court found that the enforcement of the Award should be refused and it was therefore unnecessary to consider the arbitrability point.

[10] In deciding the issue of costs, the Court found that given the Government’s refusal to participate in the arbitration proceedings, as well as the Companies’ success on the arguments raised on the constitutionality of the Arbitration Ordinance, in addition to the Court’s respect for the arbitral process enshrined in the Act, each party should bear its own costs.
CLAIM NO: 418 OF 2013

BETWEEN:

THE BELIZE BANK LIMITED

Claimant

– AND –

THE ATTORNEY GENERAL OF BELIZE

Defendant

1. On 23 March 2007, the Bank and the Government of Belize entered into a Settlement Deed, and the Government issued a Loan Note. At that time, Universal Health Services Company Limited ("UHS"), a provider of healthcare in Belize, owed the Bank the sum of BZ$33,545,820 in principal and interest under a loan facility agreement dated 9 December 2004 ("the 2004 Loan"), which was the last of a series of loan agreements by which UHS had steadily increased its borrowing from the Bank.

2. Universal Health Services Company Limited ("UHS") borrowed money from The Belize Bank to fund expansion, including the construction of a hospital. These loans were first guaranteed by the Development Finance Corporation ("the DFC") the lending arm of the Government. However, in 2004 the financial condition of the DFC deteriorated and, in November 2004, the Government announced its intention to liquidate the DFC.

3. To secure further funding from the Bank, the Government stepped into the shoes of the DFC and gave a guarantee itself ("the 2004 Guarantee"). The existing loan facility between the Bank and UHS of BZ$19,000,000 was amended on 9 December 2004 and increased to BZ$29,000,000. By early 2007, it was clear that UHS would not be able to repay the loans and that the Government was not willing to discharge the debt it had guaranteed in December 2004. The Bank therefore commenced arbitration proceedings against the Government under the 2004 Loan and the 2004 Guarantee.
4. By a 2007 Settlement Deed the Bank agreed to settle its claims against the Government arising out of the 2004 Guarantee in return for execution and delivery of the Loan Note, and payment to the Bank of BZ$1. Thus, the 2007 Settlement Deed and Loan Note crystallised the Government’s liabilities, which amounted to BZ$33,545,820. When UHS defaulted, the Bank made demand on the Government which demand was not honoured. The Bank initiated arbitration before the London Court of International Arbitration.

5. The arbitration, which had a tortured history, was suspended because a public spirited NGO challenged the 2007 Settlement Deed and Loan Note asserting that they were unlawful and void, pursuant to section 7 of the Finance and Audit (Reform) Act ("the Finance and Audit Act 2005"). The central allegation was that approval of the National Assembly should have been obtained before any of these documents were entered into. The Bank was joined as an "Interested Party" and provided the only effective opposition to the claim.

6. These proceedings were eventually resolved by the judgment of the Privy Council in The Belize Bank Limited v The Association of Concerned Belizens and Others [2011] UKPC 35) which held that the Settlement Deed and Loan Note did not effect a borrowing and therefore no approval from the National Assembly was required.

7. The arbitration resumed and the Final Award was issued by the LCIA Court on 15 January 2013 in favour of the Claimant. The Tribunal held, inter alia, that

“(c) the March 2007 Loan Note is valid and binding;

(d) the Respondent is in breach and in default of the March 2007 Loan Note;

(e) the Respondent is ordered to pay to the Claimant under the March 2007 Loan Note the sum of BZ$36,895,509.46 (as at 7 September 2012) plus interest at 17% compounded on a monthly basis from 8 September 2012 until the date of payment;”

8. The enforcement claim was refused as the Supreme Court held that enforcement would be contrary to public policy. The burden of the Court’s conclusion was that the Government of Belize became bound by the Loan Note to pay the UHS debt. The Legislature did not approve the incurring of the debt: “... the incurrence of debt above certain prescribed amounts, is by the Constitution and other written law, restricted without the involvement of the Legislature”. [105]
Hardy Exploration & Production (India), Inc. v. Government..., 314 F.Supp.3d 95 (2018)

KeyCite Blue Flag – Appeal Notification
Appeal Filed by HARDY EXPLORATION & PRODUCTIO v. GOVERNMENT OF INDIA, MINISTRY, D.C.Cir., July 6, 2018
314 F.Supp.3d 95
United States District Court, District of Columbia.

HARDY EXPLORATION & PRODUCTION (INDIA), INC., Petitioner,
v.
GOVERNMENT OF INDIA, MINISTRY OF PETROLEUM & NATURAL GAS, Respondent.

Civil Action No.: 16–140 (RC)
Signed 06/07/2018

Synopsis

Background: Entity that acquired interest in contract for development and production of hydrocarbons petitioned to confirm arbitration award against Government of India, acting through its Ministry of Petroleum and Natural Gas.

Holdings: The District Court, Rudolph Contreras, J., held that:

stay of proceeding was not warranted;

forced interference with India’s complete control over its territory would have violated public policy to extent necessary to overcome United States’ policy preference for speedy confirmation of arbitral awards;

district court had clear jurisdiction over proceeding; and

district court could not confirm contested monetary portion of arbitration award.

Petition denied.

Attorneys and Law Firms


DENYING PETITION TO CONFIRM ARBITRATION AWARD; DENYING AS MOOT PETITIONER'S MOTION FOR LEAVE TO FILE SUR–REPLY; DENYING AS MOOT RESPONDENT'S CROSS–MOTION FOR LEAVE TO FILE RESPONSE

RUDOLPH CONTRERAS, United States District Judge

I. INTRODUCTION

In 1997, Hardy Exploration and Production (India), Inc. (“HEPI”) entered into a contract with the Government of India that would allow HEPI to search for and potentially extract hydrocarbons from an area off of India’s southeastern coast. The contract provided that if HEPI found crude oil, it would have two years to ascertain if that oil was commercially viable, but that if it found natural gas, that assessment period would last for five years. HEPI discovered a reserve of hydrocarbons in 2006 and claimed that it was natural gas, entitling it to a five-year appraisal period. India disagreed, and after two years, it informed HEPI that its rights to the Block had been relinquished. When the Indian Government refused to change its position on the type of hydrocarbons that had been discovered, HEPI initiated arbitration proceedings pursuant to the contract. The Tribunal ultimately found in HEPI’s favor and ordered India to allow HEPI back onto the Block for another three years to continue its assessment of whether the natural gas it had discovered was commercially viable. The Tribunal also awarded HEPI interest on its original investment in the Block, as well as certain costs. India immediately appealed the award to the Delhi High Court, and HEPI filed a separate suit in the Delhi High Court to enforce the award. As far as the Court is aware, those cases remain pending.

Three years after it had won the arbitral award, HEPI had still not been allowed back onto the Block, and therefore filed a petition for confirmation of its arbitral award in this court under the Federal Arbitration Act. India opposed the confirmation, claiming that the enforcement of the award’s specific performance order would violate U.S. public policy, as would confirmation of the interest portion of the award, which India claimed is punitive and coercive, rather than compensatory. For the reasons set forth below, the Court finds that confirmation and enforcement of the specific performance portion of the award would violate U.S. public policy, and therefore declines to confirm that portion of the award. Additionally, the Court finds that granting the award of interest, which is predicated on India complying with an order that this Court cannot issued, would also violate U.S. public policy, and therefore declines to confirm that portion of the award as well.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from HEPI’s participation in a Production Sharing Contract *100 (“PSC”) with the Government of India for the extraction, development, and production of hydrocarbons in a geographic block found off the southeastern coast of India called CY–OS/2 (the “Block”). See Decl. of Ian MacKenzie (“MacKenzie Decl.”) ¶ 3, ECF No. 1–2; see generally MacKenzie Decl. Ex. 2 (“PSC”), ECF No. 1–4. The PSC was originally entered into in November 1996 by three private companies; India’s state-owned oil company, the Oil and Natural Gas Corporation Limited (“ONGC”); and “[t]he President of India, acting through the Joint Secretary, Ministry of Petroleum and Natural Gas.” PSC at 1. The PSC permitted the three private companies to
explore the Block and, if they found commercially viable hydrocarbon reserves, to extract those resources under a production sharing arrangement. See Pet’r’s Mem. Law Supp. Pet. to Confirm Arbitration Award (“Pet’r’s Mem.”) at 2–3, ECF No. 1–1; PSC arts. 14–15. While HEPI was not an original participant in the PSC, it acquired a 25% participation share from one of the original participants in 1997, and by August 2001, HEPI had acquired a 100% participation share in the PSC. See Pet’r’s Mem. at 3; see also MacKenzie Decl. Ex. 1 (“Award”) at 3, ECF No. 1–3; MacKenzie Decl. Ex. 4 at 1–2, ECF No. 1–6. HEPI then transferred 25% of its interest in the PSC to GAIL (India) Ltd, a state-owned retail gas processing and distribution company in India. MacKenzie Decl. Ex. 5 at 2, ECF No. 1–7. HEPI maintained a 75% interest in the PSC at all times relevant to this dispute. See Pet’r’s Mem. at 4.

Each participant in the PSC entered the agreement at their own risk. If a participant discovered a reserve of hydrocarbons that was capable of being extracted and produced commercially, then it would be entitled to extract and produce the hydrocarbons, and would be entitled to keep a percentage of the hydrocarbons for itself, with the rest going to the Government of India. See PSC arts. 14–15. If participants’ work on the Block yielded no commercially viable discovery, the participants would be entitled to no compensation for the investment they had put into the Block. See PSC art. 7.4 (providing that the contractor shall “conduct all Petroleum Operations at its sole risk, cost and expense and provide all funds necessary for the conduct of Petroleum Operations ...” unless otherwise provided in the PSC); see also Award at 41 (observing that “[t]here is no dispute” that a contractor “is not entitled to any compensation if it is unable to get commercial discovery of the product within the period specified in the contract”).

The PSC outlined the procedures the parties would follow in the event of a hydrocarbon discovery. See PSC art. 9. Under the PSC, after the discovery of hydrocarbons, the participants would enter into an appraisal period to determine whether the production of the hydrocarbons in the newly discovered reserve would be commercially feasible. See Pet’r’s Mem. at 4, PSC arts. 9.5, 21.4.4. The PSC provided for appraisal periods of different lengths depending on the type of hydrocarbons discovered. If the discovery was crude oil, the appraisal period would be two years, see PSC art. 9.5; if it was natural gas, the appraisal period would be five years, see PSC art. 21.4.4.

In late 2006, HEPI and GAIL discovered a reserve of hydrocarbons and promptly informed the Ministry of Petroleum and Natural Gas of their discovery. Pet’r’s Mem. at 4; Award at 7–8. HEPI believed that the hydrocarbons it had discovered was natural gas, and more particularly, Non–Associated Natural Gas (“NANG”), and therefore that its declaration of commerciality would not be due until January 7, 2012. Id. at 6–7, 9–11. However, the Ministry insisted that the discovery was in *101 fact crude oil, and accordingly that HEPI’s declaration of commerciality was due on January 7, 2009. Id. at 9–11. Therefore, the Ministry informed HEPI via letters dated February 20 and March 23, 2009, that HEPI’s rights to the Block were relinquished due to its failure to submit its declaration of commerciality on time. Id. Despite HEPI’s efforts to convince the Ministry over the next year that its discovery was natural gas and therefore that it had not missed its deadline to file a declaration of commerciality, India would not yield. Id. at 5. Therefore, HEPI initiated arbitration proceedings pursuant to Article 33 of the PSC to resolve the question of which assessment period applied to the discovery of relevant hydrocarbons in the Block. Id. at 4. A tribunal of three former Chief Justices of the Supreme Court of India was empaneled to preside over these proceedings. Id. at 5.

Article 33 of the PSC provides that “any unresolved dispute, difference or claim which cannot be settled amicably within a reasonable time may ... be submitted to an arbitral tribunal for final decision,” PSC art. 33.3; sets forth the procedures for any arbitration; and selects Kuala Lumpur, Malaysia as the venue for the proceedings, PSC art. 33.12. Article 33 further provided that “[t]he decision of the arbitral tribunal, and, in the case of difference among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.” PSC art. 33.8.

The Tribunal first turned to preliminary issues, and issued an order on May 28, 2011 finding that the dispute between the parties was subject to arbitration and within the Tribunal’s jurisdiction. See MacKenzie Decl. Ex. 7, ECF No. 1–9; see also Award at 5. The Tribunal heard argument on the merits of the dispute on August 20–22, 2012, in Kuala Lampur, Malaysia. Award at 5. During the course of these proceedings, HEPI presented the testimony of two expert witnesses to support its contention that the discovery was of natural gas, and India produced no expert testimony to the contrary. Id. at 26–29. On February 2, 2013, the Tribunal, still sitting in Kuala Lampur, issued a unanimous 43–page Award to HEPI, finding that “the nature of the
discovery in the Block ... would unequivocally qualify under the term of the [PSC] as Non Associated Natural Gas.” *Id.* at 29. Because the discovery was natural gas, not crude oil, the Tribunal decided that HEPI was “denied the time provided for in the contract for appraisal and to come to [a] conclusion about the commerciality of the discovery.” *Id.* at 36. The Tribunal concluded that severing HEPI’s interest in the Block was “illegal, being on the erroneous impression that the discovery was Oil.” *Id.* at 43.

To remedy what it found to be a breach of the PSC, the Tribunal ruled that India’s “order of relinquishment is declared to be null and void.” *Id.* Because India had ordered the relinquishment of the Block before HEPI was able to determine the commercial viability of the hydrocarbons it had discovered, the full extent of the monetary damage to HEPI due to India’s breach of the PCS remained unclear. *Id.* at 41. Therefore, the Tribunal ordered that “the parties shall be immediately relegated to the position in which they stood prior to the order of the relinquishment and the block shall be restored to [HEPI].” *Id.* at 43. Additionally, it ordered India to pay interest on HEPI’s Rs. 500 crores investment in the Block, at a rate of 9% per year up to the date of the award, and 18% per year thereafter until the fulfillment of the award. *Id.* The Tribunal also awarded certain costs to HEPI. *Id.*

To date, the Government of India has only complied with the latter portion of the Award, the payment of Rs. 51 lakhs for *102 India’s share of the arbitration costs. See 4th MacKenzie Decl. ¶ 8, ECF No. 29–1. However, in order to challenge the other two portions of the award, India filed a petition with the Delhi High Court to invalidate the award in July 2013. *Id.* ¶ 9. In November 2013, HEPI filed a petition to enforce the award with the same court. *Id.* ¶ 10. After two years of delays, “counsel for GOI ultimately withdrew the [invalidation] petition on the grounds that it was not properly under the jurisdiction of the Delhi High Court,” but rather that of the Madras High Court in Chennai, the high court geographically closest to the Block. *Id.* ¶ 14. However, less than a month later India filed a review petition seeking to reverse the order dismissing its action to invalidate the award. *Id.* ¶ 15. After the Delhi High Court dismissed this review petition in January 2016, India filed an appeal of the dismissal of the review petition. *Id.* ¶ 19–21. Following several adjournments at the request of India’s counsel, the matter was heard in May 2016 and dismissed by the Delhi High Court, again on jurisdictional grounds, in July 2016. *Id.* ¶ 22. This time, however, the jurisdictional basis of the dismissal was not the fact that the high court in Chennai was the proper court to hear the case. Rather, it was because the Delhi High Court had found that the seat of arbitration had been Malaysia, rather than India, and therefore, that Indian courts did not have the power to set aside the arbitral award pursuant to Section 34 of the Arbitration and Conciliation Act, 1996, India’s statute governing arbitration. See 4th MacKenzie Decl. Ex. 5 (“Judgment”) at 17–22, ECF No. 29–6.

In October 2016, India filed for leave to appeal the dismissal with the Supreme Court of India. 4th MacKenzie Decl. ¶ 23. It also moved for the Supreme Court to stay the arbitration award, which the court denied. *Id.* Arguments on the appeal were delayed for almost a year due to the unavailability of India’s counsel and the Supreme Court, and the docket in this case does not indicate whether the appeal has yet been fully heard, nor does it indicate whether the Supreme Court has ruled on the appeal. *Id.* ¶ 27. In the meantime, HEPI’s petition for execution of the Award before the Delhi High Court has been repeatedly adjourned pending the disposition of India’s appeal. *Id.* ¶ 28.

Due to this delay, HEPI decided to avail itself of the enforcement powers of this Court as well, and in January 2016 filed the instant petition for enforcement of the arbitral award. See Pet’r’s Pet. to Confirm Arbitration Award (“Pet’r’s Pet.”), ECF No. 1. Following briefing and an order from this Court regarding proper service of India, India filed its response to HEPI’s petition, arguing that the Court should decline to enforce the arbitral award because confirming both the specific performance and interest aspects of the Award would violate U.S. public policy. See Resp’t’s Resp. Pet’r’s Pet. (“Resp.”), ECF No. 28. It further moved for the Court to stay these proceedings while its petition to set aside the arbitral award remains pending in India. *Id.* HEPI’s petition, and India’s request that the Court stay these proceedings, are now ripe for decision.
III. LEGAL STANDARD


IV. ANALYSIS

India has presented two major arguments for why HEPI should not be granted the confirmation it seeks. First, it argues that confirmation of the two remaining portions of the arbitral award—specific performance and interest—would violate U.S. public policy. See Resp. at 6–7. Second, it argues that if the Court finds that the award does not violate U.S. public policy, and therefore that it should be confirmed, the Court should stay the enforcement of the award while India’s appeal of the award and HEPI’s parallel litigation to enforce the award proceed through the Indian court system. Id. at 40. The Court first addresses India’s arguments regarding a stay of these proceedings, and, finding that a stay is not warranted, then addresses India’s arguments regarding whether confirmation of the award would violate U.S. public policy.

A. Request for Stay

India has moved for a stay of these proceedings pending the resolution of its appeal of the arbitral award in India pursuant to Article VI of the New York Convention, which provides that “[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.” New York Convention, art. VI. A “competent authority” referred to in Article V(1)(e) is one “of the country in which, or under the law of which, that award was made.” New York Convention, art. V(1)(e). India further argues that this Court should stay the proceedings pursuant to the doctrines of forum non conveniens and international comity. See Resp. at 40. HEPI counters that because India brought a set-aside suit in India, rather than Malaysia, the requirements of an Article VI stay have not been met. See Pet’r’s Mem. P. & A. Resp. Resp’t’s Opp’n (“Pet’r’s Resp.”) at 34–35, ECF No. 29. It further argues that forum non conveniens and international
comity *104 are not available as defenses to enforcement actions in this Circuit. See id. at 23, 31–32. For the reasons set forth below, the Court finds a stay of these proceedings unwarranted, and therefore denies India’s request.

The D.C. Circuit has explained that “the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards: the Convention is ‘clear’ that a court ‘may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention,’ ” and a court “may adjourn enforcement proceedings only on the grounds explicitly set forth in Article V(1)(e) of the Convention.” Belize Soc. Dev. Ltd. v. Gov’t of Belize, 668 F.3d 724, 727 (D.C. Cir. 2012) (quoting TermoRio S.A. E.S.P., 487 F.3d at 935). While other circuits have found that “a district court nevertheless retains the inherent authority to issue a stay for the purposes of managing its own docket” in FAA cases, the D.C. Circuit has eschewed such flexibility. Cf. Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A., 377 F.3d 1164, 1172 n.7 (11th Cir. 2004); see also Hewlett-Packard Co. v. Berg, 61 F.3d 101, 106 (1st Cir. 1995) (concluding that a district court may consider staying a case in broader circumstances than those found in Article VI of the Convention, but cautioning that the power to stay should be used judiciously). As such, the Court is limited to granting stays only when “an application for setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e)—that is, “a competent authority of the country in which, or under the law of which, that award was made.” New York Convention, arts. V, VI.

India filed suit with the Delhi High Court to set aside the arbitration award in 2013, and HEPI filed suit with the Delhi High Court to enforce the arbitration award, also in 2013. Pet’r’s Pet. at 5; Resp. at 13. The court dismissed India’s set-aside action in July 2015, finding that it did not have jurisdiction and that the action should have been brought in Chennai, which is the locality closest to the Block. Resp’t’s Resp. at 13. India’s request for reconsideration was denied in January 2016, on the ground that Indian courts do not have the authority to set aside this award. Id. India then appealed to the Indian Supreme Court, but the docket in this case does not indicate that the Indian Supreme Court has ruled on the appeal in the set-aside case. Id. The docket likewise does not indicate that the Delhi High Court has ruled on HEPI’s petition to enforce the arbitration award.

HEPI and India contest whether Indian courts have power under the New York Convention to set aside the award, and therefore, whether a petition in India to set aside the arbitral award counts as an application with “a competent authority of the country in which, or under the law of which, that award was made.” New York Convention, arts. V, VI; see Pet’r’s Mem. at 12–13; Resp. at 14–18. India argues that Indian courts are one such competent authority because India was the country under whose law the arbitration award was made. Resp. at 14–18. HEPI argues that “India has failed to initiate any action before the courts of a competent authority, and therefore has no basis to apply for a stay” because Malaysian courts, rather than Indian courts, are the only courts of competent authority to set aside the award. Pet’r’s Resp. at 32.1

*105 If the Court were to find that Indian courts have the authority to set aside the award under the New York Convention, the Court would next turn to deciding whether a stay under these circumstances is proper. “A stay of confirmation should not be lightly granted,” because “the adjournment of enforcement proceedings impedes the goals of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation.” Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998). Therefore, the Second Circuit in Europcar listed several factors for courts to consider when determining whether to stay arbitral enforcement proceedings, which courts in this district have chosen to apply on several occasions.

*Europcar instructs courts to look at:

(1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;

(2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;

(3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;

(4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which
would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;

(5) A balance of the possible hardships to the parties ...; and

(6) Any other circumstance that could tend to shift the balance in favor of or against adjournment ....

*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F.Supp.3d 112, 134–35 (D.D.C. 2015) (quoting *Europcar*, 156 F.3d at 317–18). Additionally, the court in *Europcar* specified that “[b]ecause the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards, the first and second factors on the list should weigh more heavily in the district court’s determination.” *Europcar*, 156 F.3d at 318. “A stay of confirmation should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration.” *Id.* at 317 (citing *Hewlett-Packard Co.*, 61 F.3d at 106).

Courts in this District have often utilized the *Europcar* factors in determining whether to grant a stay of arbitral enforcement proceedings. See, e.g., *Hulley Enterprises Ltd. v. Russian Fed’n*, 211 F.Supp.3d 269 (D.D.C. 2016); *Stati v. Republic of Kazakhstan*, 199 F.Supp.3d 179 (D.D.C. 2016); *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57 (D.D.C. 2013). While the D.C. Circuit has yet to *explicitly* adopt the *Europcar* factors, the Court will follow the lead of other courts in this District and analyze the prudence of a stay of these proceedings according to the *Europcar* factors.

The Court begins by considering the first and second *Europcar* factors, which “should weigh more heavily in the district court’s determination.” “[b]ecause the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards.” *Europcar*, 156 F.3d at 318. India claims that staying these proceedings would satisfy the first *Europcar* factor because a stay would further “the general objectives of arbitration—expeditious resolution of disputes and the avoidance of protracted and expensive litigations.” Resp. at 42 (quoting *Europcar*, 156 F.3d at 317). India supports this claim by arguing that “[h]ere, the pending court proceedings in India could effectively and expeditiously resolve the issues of both confirmation and enforcement of the Award.” Resp. at 42. India also claims that the second *Europcar* factor, “the status of the foreign proceedings and the estimated time for those proceedings to be resolved,” *Europcar*, 156 F.3d at 317, also counsels in favor of a stay of these proceedings. Resp. at 42–43. HEPI argues that these factors in fact counsel against a stay, because “[f]ar from offering speedy resolution, the Indian proceedings have been characterized by inordinate delay.” Pet’r’s Resp. at 36.

The Court agrees with HEPI’s assessment of the timeliness of the Indian proceedings and the likelihood of their resolution in the near future. India filed its suit to set aside the arbitral award nearly five years ago, in July 2013. 4th MacKenzie Decl. ¶ 9. After several years of delay by both the Government of India and the courts, India’s set-aside action was dismissed for lack of jurisdiction in July 2016. *Id.* ¶ 22. India appealed to the Supreme Court of India in October 2016. *Id.* ¶ 23. There is no indication on the docket that the Supreme Court has ruled on this appeal, which has been delayed over and over again due to the actions of the Government of India and the Supreme Court. *Id.* ¶¶ 23–27. Additionally, the parties have given no indication of how long they expect it will take the Indian court system to reach a final resolution in this case once the Supreme Court of India has determined whether the Delhi High Court has jurisdiction to hear the set-aside action on its merits, or whether only the courts in Malaysia do, forcing India to refile its suit there. Similarly, the parties have given no indication of how long they expect it will take for the Delhi High Court to reach the merits of HEPI’s enforcement action, given that the courts have been inclined to postpone deciding that case until India’s set-aside action has been resolved. *Id.* ¶ 28.

As HEPI has pointed out, courts in this district have readily found stays inappropriate when foreign set-aside proceedings have remained pending for half a decade. Pet’r’s Resp. at 35–38. In *Chevron*, the court took into account the fact that the underlying arbitration had occurred over six years prior and the protractedness of set-aside litigation pending in The Hague when it decided not to stay its confirmation of *Chevron’s* arbitral award. 949 F.Supp.2d at 72. Likewise, in *G.E. Transp. S.p.A. v. Republic of Albania*, the court took into consideration the fact that the arbitration process had commenced four years prior and the fact that appeal proceedings in Italy would likely not be completed for another four when it decided to confirm the arbitral award. 693 F.Supp.2d 132, 138–139 (D.D.C. 2010). Here, the fact that the underlying arbitral award was rendered five years ago and the
Next the Court considers the third Europcar factor, which is “whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review.” 156 F.3d at 317. India claims, without citation, that the award will be subject to more exacting scrutiny when an Indian High Court rules on HEPI’s Indian enforcement action, because “Indian law permits courts to refuse confirmation and enforcement on public policy grounds that are broader than those permitted in the United States.” Resp. at 43. It continues that “in order for an arbitral award to be confirmed and enforced in India and not be considered a violation of Indian public policy, it must meet four criteria: (1) compliance with Indian statutes and judicial precedents; (2) adherence to a ‘judicial approach’; (3) compliance with ‘Natural Justice’; and (4) reasonableness.” Id. Conversely, this Court is only empowered to decline enforcement of this award if “[t]he recognition or enforcement of the award would be contrary to the public policy of th[is] country,” because no other grounds for declining enforcement are applicable in this case. See New York Convention, art. V(2)(b). HEPI argues that India’s standard for arbitral enforcement is irrelevant here, “since India is not a competent authority to set aside the Award.” Pet’r’s Resp. at 37. However, this argument misses India’s point regarding how Indian courts will review the award in enforcement proceedings, rather than set-aside proceedings. While it would have been preferable for India to direct the Court toward sources indicating that Indian courts have broader discretion when deciding whether to enforce arbitral awards, the Court will take India’s word that Indian courts evaluate whether arbitral awards comport with Indian law when considering whether to enforce that award, a power that American courts do not have, until the award has actually been set aside by a competent authority. See Four Seasons Hotels, 613 F. Supp. 2d at 1369 (“A holding in an arbitration award that is contrary to the substantive law governing the arbitration is not a defense under the Convention, and therefore a district court generally may not review an arbitration award on the merits.”) (citing China Nat’l Metal Prods. Import/Export Co. v. Apex Digital, Inc., 379 F.3d 796, 799 (9th Cir. 2004)) . Therefore, the third Europcar factor counsels in favor of a stay.

The fourth factor instructs the court to examine the characteristics of the foreign proceedings in several respects, including the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award (counseling in favor of a stay). Both suits were filed prior to the filing of this case, counseling in favor of a stay. The fourth subfactor asks the Court to consider the motivations underlying the foreign proceedings, and consider whether they were commenced in good faith. India has provided no explanation for why, throughout its appeal, hearings repeatedly needed to be continued because India’s attorney was not prepared for the hearings. See 4th MacKenzie Decl. ¶¶ 9–27. While the Court acknowledges the right of the Indian government to challenge an arbitral award that it believes was unlawful, India’s contributions to the protractedness of the litigation in the Indian courts cannot be denied. As such, the Court finds that overall, the fourth Europcar factor counsels against a stay.

The fifth factor likewise counsels against a stay. India’s initial breach of its contract with HEPI occurred nine years ago, and the arbitral award in question was handed down five years ago. While the interest that HEPI was awarded through arbitration would continue to accrue in the event of a stay, there is no doubt that, given the length of time HEPI has waited to receive the award, and the amount of money at issue, HEPI would be burdened should the Court delay confirmation of the award. See Chevron Corp., 949 F.Supp.2d at 72. Last, pursuant to the sixth Europcar factor (“any other circumstance that could tend to shift the balance in favor of or against adjournment”), 156 F.3d at 317, the Court notes in particular the fact that the Supreme Court of India has already declined to stay the arbitration award pending India’s appeal regarding the Delhi High Court’s jurisdiction over the set-aside suit. See 4th MacKenzie Decl. ¶ 23; see also G.E. Transp. S.p.A., 693 F.Supp.2d at 139 (“Furthermore, the court notes that the Court of Appeals in Rome declined to set aside the Arbitral Award on an interim basis.”).
This Court is disinclined to question that assessment.

Overall, examination of the six Europcar factors demonstrates that a stay is not warranted in this case. Because the Court determines that the application of the six Europcar factors counsels against staying this enforcement action, the Court need not determine whether Indian courts, under Indian law, have the power to set aside the arbitral award. Because the Court need not determine the “seat” of the arbitration for the purposes of considering whether it will grant a stay in this case, the Court need not consider the arguments raised in HEPI’s proposed sur-reply and India’s proposed sur-sur-reply. Because this is not a situation in which the “proposed surrepl[ies] would be helpful to the resolution of the pending motion,” Glass v. Lahood, 786 F.Supp.2d 189, 231 (D.D.C. 2011), the Court denies HEPI’s motion for leave to file its sur-reply (ECF No. 36), and India’s cross-motion for leave to file a response to the sur-reply (ECF No. 37).

B. The Arbitration Award

Having ruled against India’s request to stay these proceedings, the Court now turns to HEPI’s petition for enforcement of the Award. Because it has already received the costs portion of the arbitral award, see 4th MacKenzie Decl. ¶ 8, HEPI urges this Court to affirm and enforce the two remaining portions of the award: return of the Block to HEPI for a period of three years and interest on its original investment in the Block. India responds that the Court should decline to enforce these two components of the award on public policy grounds, as permitted by the New York Convention. See New York Convention, art. V(2)(b). First, it argues that because confirmation of the award “would not lead to the usual result this Court is used to seeing—a monetary judgment that the petitioner can then enforce against the sovereign nation’s commercial assets located within the U.S.,” but rather “would divest [India] of possession and control of its own territorial waters and natural resources,” the confirmation “would be contrary to the public policy of [the United States].” Resp. at 19. It further argues *109 against confirmation of the monetary portion of the award because “[t]he United States has clear public policy prohibiting punitive measures against foreign nations,” and therefore it cautions against confirmation of an arbitral award meant to “punish[ ] India for its ‘illegal acts’ and any future disobedience of its injunctive decree by ordering India to pay interest on a base amount unless and until it restores the Block to Hardy.” Id. at 37–38.

As both parties acknowledge, the burden of demonstrating that the confirmation of an arbitral award would violate U.S. public policy is a heavy one. Analysis of a proposed public-policy defense “begins with the strong public policy favoring confirmation of foreign arbitration awards,” Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1098 (9th Cir. 2011), because “[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” Scherk v. Alberto–Culver Co., 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Due to the “ ‘emphatic federal policy in favor of arbitral dispute resolution’ ... the FAA affords [a] district court little discretion in refusing or deferring enforcement of foreign arbitral awards.” Belize Soc. Dev. Ltd., 668 F.3d at 727 (quoting Mitsubishi Motors Corp., 473 U.S. at 631, 105 S.Ct. 3346). Courts in this circuit have repeatedly held that “courts should rely on the public policy exception only ‘in clear-cut cases’ where ‘enforcement would violate the forum state’s most basic notions of morality and justice.’ ” Newco Ltd. v. Gov’t of Belize, 650 Fed.Appx. 14, 16 (D.C. Cir. 2016) (emphasis added) (citing TermoRio S.A. E.S.P., 487 F.3d at 938; see also Chevron Corp., 949 F.Supp.2d at 69 (D.D.C. 2013) (citing Parsons v. Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) ). The public policy defense under Article V(2)(b) of the New York Convention is to be construed narrowly and is available only where an arbitration award “tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.” Enron Nigeria Power Holding, Ltd. v. Fed. Republic of Nigeria, 844 F.3d 281, 289 (D.C. Cir. 2016). Such a public policy must be “explicit” and “well defined and dominant, and is to be ascertained by reference to the laws and legal precedents.”
Inc., 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The “provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy,’ ” and it does not provide that awards that might contravene U.S. interests may be resisted on such grounds. Parsons, 508 F.2d at 974. The public policy exception cannot be used to simply question the merits of the underlying award. See Chevron Corp., 949 F.Supp.2d at 69.

Therefore, the Court must determine whether the confirmation of the specific performance and interest portions of the arbitral award violate the United States’ most basic notions of morality and justice, defined by its laws and legal precedents.

1. Specific Performance

This case presents the Court with a unique opportunity to balance two important U.S. public policy values: respect for the sovereignty of other nations and respect for foreign arbitral agreements. India urges the Court to decline confirmation of the portion of the award ordering it to allow HEPI back onto the Block to continue its determination of whether the reserve of natural gas it discovered in 2006 is commercially viable, claiming that such a confirmation would be in violation of U.S public policy for several reasons. First, it claims that enforcement of the award would violate the U.S.’s clear public policy preference of respecting the sovereignty of foreign nations, including their right to control their own lands and national resources. Resp. at 19. Second, it claims that the specific performance portion of the award was granted in contravention of Indian law, which prohibits the granting of specific performance other than in limited circumstances. Id. at 31. Third, it claims that an order confirming the arbitral award would be too difficult to enforce and supervise. Id. at 35. Fourth, it argues that enforcement of the award would violate the doctrines of comity and act of state. Id. at 26.

In response, HEPI argues that India overstates the affront confirmation of the award would be to India's sovereignty, and also overstates the hesitancy of U.S. courts to hold foreign governments accountable when they harm private parties. See Pet’r’s Resp. at 15–23. It also contends that India’s emphasis on its belief that the award violates Indian statute is an attempt to reargue the merits of the arbitration award, something this Court is not allowed to consider. Id. at 25. It further argues that compliance with the award would not be too difficult to supervise, and that the doctrines of comity and act of state are inapplicable in arbitration award confirmation cases. Id. at 23–24.

Despite HEPI’s examples to the contrary, the Court finds that India does not overstate the United States’ public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories. The Court therefore finds that India has met its burden of demonstrating that confirmation of the specific performance portion of the award would be contrary to U.S. public policy, and therefore the Court declines to confirm this portion of the award. Because the Court declines confirmation of the award on this ground, it does not reach India’s other arguments as to why the Court should decline to confirm this portion of the award.

There is no doubt that “[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States” and other nations. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). That is why “[o]ur courts have understood, as international law itself understands, foreign nation states to be ‘independent sovereign’ entities. To grant those sovereign entities an immunity from suit in our courts both recognizes the ‘absolute independence of every sovereign authority’ and helps to ‘induc[e]’ each nation state, as a matter of ‘international comity,’ to ‘respect the independence and dignity of every other,’ including our own.” Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co., —— U.S. ———, 137 S.Ct. 1312, 1319, 197 L.Ed.2d 663 (2017). This respect for the independence and dignity of other nations includes respect for their territorial integrity.

The United States’ recognition and respect of other nations’ sovereignty is expressed through the Foreign Sovereign Immunities Act, which provides that “foreign state[s] shall be immune from the jurisdiction of the courts of the United States and of the
States except as provided in” three subsequent subsections of the *111 Act. 28 U.S.C. § 1604. One such exception enumerated in the Act is when a party seeks to enforce a foreign arbitration agreement or have a foreign arbitral award confirmed, as HEPI has done here. See 28 U.S.C. § 1605(a)(6). Neither this exception nor any of the others listed in the FSIA specifies whether U.S. courts’ jurisdiction extends to awards of specific performance to be completed outside the territorial jurisdiction of the United States, or indeed, even within the territorial jurisdiction of the United States. Therefore, the crucial question for this Court to consider is whether the enforcement of an arbitral award granting specific performance against a foreign sovereign, and extraterritorial specific performance at that, would undercut American public policy, as expressed through the FSIA and other treaties regarding the liability of foreign nations to which the United States is a party.

To counter India’s contention regarding U.S. public policy, HEPI first points out that courts have in the past enforced arbitral awards for specific performance in other countries, and that therefore, confirmation of arbitral awards that grant extraterritorial specific performance do not violate U.S. public policy. See Pet’r’s Resp. at 20–21 (citing NTT DoCoMo v. Ultra d.o.o., No. 10-cv-3823, 2010 WL 4159459, at *3 (S.D.N.Y. Oct. 12, 2010) (enforcing award requiring foreign party to stock purchase agreement to perform its purchase obligations); Four Seasons Hotels, 613 F.Supp.2d at 1369 (confirming award providing injunctive relief and specific performance of management agreement relating to a hotel in Venezuela) ). However, as India indicates, both of these confirmations of awards ordering extraterritorial specific performance were against private corporations, rather than foreign nations. As such, these district court cases do not convince the Court that confirmation of this award would not violate U.S. public policy’s respect for national sovereignty.

HEPI also highlights two instances in which American courts granted specific performance against defendant sovereign nations outside of the international arbitration context. In Chabad v. Russian Federation, a court in this district ordered Russia to “surrender to the United States Embassy in Moscow or to the duly appointed representatives of ... Chabad ... the complete collection” of certain expropriated religious texts and artifacts in Russia’s possession. 915 F.Supp.2d 148, 150–52 (D.D.C. 2013). HEPI argues that this case demonstrates that “U.S. courts have not hesitated to order extraterritorial specific performance or injunctive relief against foreign states.” Pet’r’s Resp. at 21. However, after Russia had refused to comply with the order, and after the plaintiff had moved for the imposition of civil contempt sanctions against Russia, the United States filed a Statement of Interest, explaining that while the government was actively working through diplomatic channels to recover the artifacts in question, it believed that the FSIA “does not permit a court to compel compliance with a specific performance order regarding property held by a foreign sovereign within the sovereign’s own territory,” and also that “the provision of such relief would be contrary to the foreign policy interests of the United States.” Statement of Interest of the United States, Chabad v. Russian Fed’n, No. 05–1548, Aug. 29, 2012, ECF No. 111 at 2. The United States Government highlighted that “FSIA’s exceptions from execution immunity apply only to a foreign state’s ‘property in the United States,’ and even that property is subject to execution only in carefully circumscribed and extremely limited circumstances.” Id. at 6 (quoting 28 U.S.C. § 1610(a) ). It further highlighted that many circuit courts have found the language *112 of 28 U.S.C. § 1610(a) referring only to the execution against property “in the United States” to be significant. Id. at 5 (citing, for example, Autotech Tech. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 750 (7th Cir. 2007) (“The FSIA did not purport to authorize execution against a foreign sovereign’s property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.”) ). The United States therefore concluded that, without this limitation, judicial seizure of the property of a foreign state may well “be regarded as an affront to its dignity and may affect [the U.S.’s] relations with it.” Id. at 6–7 (quoting Republic of Philippines v. Pimentel, 553 U.S. 851, 866, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008) (internal quotation and ellipses omitted) ).

While the injunction in Chabad stemmed from a suit seeking the return of expropriated property, the limited language of 28 U.S.C. § 1610(a) also applies when “the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.” 28 U.S.C. § 1610(a)(6). As such, the Court finds that the policy interests expressed by the United States in Chabad are also relevant in this case, which concerns an order that would deprive a foreign nation of the ability to decide who will be able to extract and utilize its natural resources.

The second case HEPI cites is also relevant, but ultimately does not convince the Court that HEPI must prevail. See Pet’r’s Resp. at 22. In NML Capital v. Argentina, the Second Circuit affirmed a district court’s orders permanently enjoining Argentina
from making payments on bonds issued pursuant to its debt restructurings without making comparable payments on defaulted bonds. 699 F.3d 246, 261–65 (2d Cir. 2012). In that case, the court awarded specific performance because it had found that money damages would be an insufficient remedy for the plaintiffs. In justifying this remedy, the court further reasoned that even though the court was prohibiting Argentina from transferring money to some bondholders before it had paid others, the injunctions were permissible because they could “be complied with without the court ever exercising dominion over sovereign property.” Id. at 262–65. Additionally, “[t]he injunctions d[id] not require Argentina to pay any bondholder any amount of money; nor d[id] they limit the other uses to which Argentina may put its fiscal reserves.” Id. at 263. Nevertheless, the injunctions against Argentina were extraordinary to the extent that they prevented a sovereign nation from spending its money in the way that it saw fit, and indeed demonstrated that in some particular instances, U.S. courts have chosen to exercise their authority in a manner that contravenes usual notions of nations’ rights to control what occurs within their borders.

India argues that a confirmation of the award would go even farther than the injunction in NML Capital, because it would require “India to give possession of its territorial waters to Hardy and permit Hardy to commercially develop India’s natural resources.” Resp. at 19. While the Court questions this assertion—after all, the PSC specifies that “India’s natural resources remain vested in India ... and subject to its control ..., while HEPI bears the status of a ‘Contractor’ with limited rights and obligations enumerated in the PSC,” Pet’r’s Resp. at 20—the Court nevertheless finds that this infringement on India’s national sovereignty would contravene the United States’ public policy interest in respecting the territorial integrity of other nations for several reasons.

First, the Court agrees with India that confirmation of the award would lead to a U.S. court attempting to enforce an even more invasive order than the one in NML Capital. While the Court does not agree with India’s contention that enforcement of the arbitral award would be too complicated for the Court to oversee, nor does the Court agree that allowing HEPI back onto the Block to continue its commerciality assessment would give HEPI full “possession” of the Block, it does find that forced interference with India’s complete control over its territory violates public policy to the extent necessary to overcome the United States’ policy preference for the speedy confirmation of arbitral awards. After all, the issuance of “extraterritorial injunctions often raise serious concerns for sovereignity and enforceability which compel denial.” Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.), 373 F.Supp.2d 7, 45 (E.D.N.Y. 2005). The power to grant extraterritorial injunctions “should be exercised with great reluctance when it [would] be difficult to secure compliance ... or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.” Id. (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir.1956) ).

Second, the Court is persuaded that the FSIA’s contemplation of jurisdiction over foreign countries in suits seeking compensatory (but not punitive) damages, and allowing for specific, domestic methods of ensuring that plaintiffs receive those damages, demonstrates the United States’ public policy commitment to respecting the sovereignty of foreign nations by only holding them liable for certain forms of relief. See, e.g., 28 U.S.C. § 1606 (providing that a “foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state ... shall not be liable for punitive damages”); 28 U.S.C. § 1610(a)(6) (providing that “[t]he property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States ..., if ... the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitration agreement”) (emphasis added). While the FSIA grants federal courts jurisdiction over arbitral award confirmation proceedings, 28 U.S.C. § 1605(a)(6), and therefore the Court has clear jurisdiction over this case, the spirit of the United States’ policy preference against specific performance is clear from the exclusion from the statutory text of any mention of specific performance or extraterritorial enforcement, apart from the terrorism and expropriation exceptions. See Resp. at 21–22 n.9 (citing to 28 U.S.C. § 1605(a)(3) and 28 U.S.C. § 1605A).

Third, while the doctrine of international comity does not generally counsel against the confirmation of arbitral awards, see Newco Ltd., 650 Fed. Appx. at 16 (citing Belize Soc. Dev., 668 F.3d at 727), as India has indicated, confirmation of this award would “raise the specter of the opposite situation coming to pass; namely, a foreign court confirming (or the court going further and granting injunctive relief directly) against the United States for acts it has taken within its own borders or respecting its own territory.” Resp. at 27. Given that the United States has not waived its sovereign immunity in its own courts against specific

performance in contract cases, it would defy comprehension that it would be in compliance with U.S. public policy to create a situation in which a foreign court could order the U.S. to specifically perform its portion of a contract. See e.g., *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep’t Homeland Security*, 490 F.3d 940, 943 (Fed. Cir. 2007) (“In order for a [contract] claim to be brought under either the Tucker Act or the Little Tucker Act, the claim must be for monetary relief; it cannot be for equitable relief, except in very limited circumstances...”); *Robbins v. U.S. Bureau of Land Mgt.*, 438 F.3d 1074, 1082 (10th Cir. 2006) (“We now join our fellow circuits in holding that the Tucker and Little Tucker Acts ‘implies forbid’ federal courts from ordering declaratory or injunctive relief, at least in the form of specific performance, for contract claims against the government”); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 971 (D.C. Cir. 1982) (acknowledging the “generally recognized rule that a plaintiff cannot maintain a contract action in either the district court or the Court of Claims seeking specific performance of a contract” with the federal government); cf. *Suburban Mortg. Assocs., Inc. v. U.S. Dep’t of Housing & Urban Dev.*, 480 F.3d 1116, 1128 (Fed. Cir. 2007) (“Since the Tucker Act grants consent for suits based on contract, this has been interpreted by these other courts to preclude under the APA contract claims of any kind, either for damages or specific performance. This court has acknowledged the issue but not squarely addressed it.”)

For all of these reasons, the Court finds that enforcement of the specific performance portion of the arbitral award would violate United States public policy, and therefore, that this case presents one of the limited circumstances under which a district court can decline to confirm and enforce a foreign arbitral award. Given that other recourse is still available to HEPI, through its litigation in the Indian courts, the Court declines to confirm this portion of the award.

### 2. Interest

India urges the Court to decline confirmation of the monetary portion of the arbitral award—interest on HEPI’s Rs. 500 crores ($113 million) investment in the Block, at a rate of 9% per year up to the date of the award, and 18% per year thereafter. As the fulfillment of the award—claiming that it is both coercive and punitive and therefore that its enforcement “would be contrary to the public policy of [the U.S.].” See Resp. at 37 (quoting New York Convention, art. V(2)(b)); Rejoinder at 9–10. HEPI disagrees with India’s characterization of the awarding of interest as punitive, explaining that the interest was meant “to compensate HEPI for the deprivation of the marooned capital it had already sunk into the Block.” Pet’r’s Resp. at 27. HEPI does not directly address India’s argument that the post-judgment interest portion of the award is coercive. The Court finds that even if the interest awarded by the Tribunal was meant to be compensatory rather than punitive, because this Court cannot enforce the primary component of the award (return of the Block to HEPI), and because the two components of the award are inextricably intertwined, the Court also cannot award interest predicated on compliance with that component of the award. To order otherwise would be to impermissibly coerce India into complying with an order that this Court has determined it cannot issue. The Court cannot coerce through an interest award an action that it cannot order directly.

As explained above, the New York Convention allows U.S. courts to decline enforcing a foreign arbitral award if the award “would be contrary to the public policy of [the U.S.].” New York Convention, art. V(2)(b). The Court has already established that confirmation of the specific performance portion of the award would violate public policy. Now the Court must also determine whether confirming the contested monetary portion of the award, the magnitude of which depends on whether India complies with the specific performance portion of the award, also violates public policy. In answering this question, the Court is persuaded by the United States’ prior contention that the substance of a proposed order awarding money damages, rather than its form, should control how a court considers that order. See Statement of Interest of the United States, *Chabad v. Russian Fed’n*, No. 05–1548, Aug. 29, 2012, ECF No. 111 at 7. In *Chabad*, the United States argued that even though the proposed contempt sanctions the court was considering had not been labeled as proposed orders for the attachment or execution on property, for all intents and purposes, the sanctions would have had the same effect as such orders, and therefore would violate the FSIA. *Id.* (citing *S & S Machinery Co. v. Masinexsportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (explaining that “courts ‘may not grant, by injunction, relief which they may not provide by attachment,’ for the obvious reason that ‘[t]he FSIA would
become meaningless’ if the denomination of an order controlled over its substance”). While the district court ultimately rejected the United States’ argument, finding that, under FG Hemisphere Assoc’s, LLC v. Democratic Republic of Congo, 637 F.3d 373 (D.C. Cir. 2011), it did have the authority to issue contempt sanctions, Chabad, 915 F.Supp.2d at 148, the Court will still heed the United States’ urging in Chabad to look at the functional effect of the proposed order before it, rather than just its form.

In this case, the practical effect of confirming the Tribunal’s award of interest would be to coerce a foreign state into complying with a non-existent order from this Court, a non-existent order which, as explained above, would be a severe affront to India’s sovereignty and would violate U.S. public policy. Even if the Tribunal did not intend its award of interest to be punitive, confirmation of this award would leave India in a Catch–22 of either halting the accrual of interest by allowing HEPI back onto the Block—and thereby, effectively, complying with the arbitration award at the behest of this Court—or allowing the sum of money it owes to continue to grow. Indeed, due to the way the *116 arbitration award was composed, there is no way for India to halt the accrual of interest against it, or indeed to even satisfy the award definitively, until it allows HEPI back onto the Block.

This portion of the award is so inseparable from the specific performance portion of the award, the confirmation of which would violate U.S. public policy, that the confirmation of the interest portion of the award must also be found, necessarily, the violate U.S. public policy. India may ultimately need to pay HEPI the millions of dollars in interest it now owes—but if it does, it will be because a court with the authority to enforce the entire arbitration award, including the specific performance portion, has ordered it to do so. Because this Court does not have such authority, it cannot order this payment.4

V. CONCLUSION

For the foregoing reasons, the Court DENIES HEPI’s Petition to Confirm Arbitration Award (ECF No. 1); DENIES AS MOOT HEPI’s Motion for Leave to File Sur–Reply (ECF No. 36); and DENIES AS MOOT India’s Cross–Motion for Leave to File a Response to HEPI’s Proposed Sur–Reply (ECF No. 37). An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

All Citations

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Footnotes

1 Both parties have requested leave to submit additional briefing, along with expert affidavits, concerning the question of whether India is the competent authority to set aside the arbitration agreement, and therefore, whether the Court has the power to grant a stay of these proceedings. See Pet’r’s Mot. for Leave to File Sur-reply, ECF No. 36; Resp’t’s Cross–Mot. for Leave to File Resp., ECF No. 37. As explained below, the Court ultimately finds that it can resolve the question of whether a stay should be granted without determining whether Indian courts have the authority to set aside the arbitral award, and therefore denies both parties’ motions as moot.

2 The district court ultimately granted Chabad its sanctions, despite the United States’ objection, see Chabad v. Russian Fed’n, 915 F.Supp.2d 148 (D.D.C. 2013), and because Russia was in default, it never appealed.

3 India emphasizes the complexity of the PSC and the involvement of entities not party to this suit to demonstrate “that any attempt to require specific performance of the PSC or to supervise specific performance of the PSC would be a fools-errand.” Resp. at 34. However, this contention misconstrues the extent of the arbitral award, and therefore, what this Court would actually be enforcing if
it confirmed the award. Confirmation of this award would not require the Court to supervise the remainder of the process provided by the PSC. It would only require that the Court ensure that HEPI is allowed back onto the Block to pick up where it had left off in 2009. If India violates any other portion of the PSC, that violation would not be covered by the initial arbitration award, and therefore would not be subject to this Court’s jurisdiction. The fact that ONGC and GAIL have expressed their disapproval of HEPI’s attempt to confirm the arbitral award in the United States does, however, indicate that the Government of India alone may not be able to grant HEPI the full relief contemplated in the arbitral award. See Bravin Decl., Exs. 5 & 6, ECF No. 28–1.

4 As explained above, the Court has found that the award’s grant of post-judgment interest is impermissibly coercive because the amount of interest owed is predicated on how long it takes India to return access to the Block to HEPI, an action the Court cannot order India to take. While the Court does not make a finding on the coerciveness of the Tribunal’s pre-judgment interest award, even if the Court were to find that such interest is not coercive, the Court still would not confirm that portion of the award. In its award decision, the Tribunal left open the question of how to calculate the 9% pre-judgment interest it was awarding. See Award at 41–43. India claims that the interest is compound, Resp. at 5 n.3, while HEPI contends that it is not, Pet’r’s Resp. at 5 n.20, 27 n.49. Because the exact amount of money the Tribunal awarded remains undetermined, the Court would not confirm this portion of the award either.
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Part I

Legal Principles Applicable to the Award of Damages
Introduction

Damages in investment arbitration are generally intended to make a party whole by giving full reparation. The goal of full reparation is not to provide a windfall or a penalty to either party, but rather to wipe out all the consequences of the illegal act. While the seminal case on point, *Factory at Chorzów*, dates back to the 1920s, recent developments continue to affect the calculation of damages.

In achieving full reparation, international law distinguishes between damages at large and compensation for lawful expropriation. Compensation standards are typically codified in investment treaties, whereas damages awards derive from customary international law as defined by international courts and tribunals.

The distinction between compensation and damages is important. The party whose assets have been the subject of wrongful conduct may be entitled to remedies such as restitution in kind and enhanced damages, which may not be available in permitted expropriation. Moreover, without such distinction, states would face the same consequences regardless of the illegality of their conduct. Such a result would provide no incentive for states to act in accordance with the law.

This chapter is structured in four sections that follow this introduction. The first section sets out the basic principles of customary international law derived from *Chorzów*. The second section discusses treaty-based compensation as a remedy for lawful expropriation. The third section analyses issues that can have a significant impact on valuation, such as the

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2 *Factory at Chorzów (Germany v. Poland)*, Merits, 1928 PCIJ (Ser. A) No. 17 (13 September).
choice of valuation methodology or valuation date, and the inclusion of country risk as an element of the discount rate. The final section offers concluding remarks.

International law principles

Full reparation: the Chorzów standard

International law requires states to provide ‘full reparation’ to investors for harm caused by internationally wrongful acts. In Chorzów, the Permanent Court of International Justice (PCIJ) articulated the full reparation standard as follows:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.

Some tribunals have found that the customary international law standard articulated in Chorzów applies not only to expropriations, but also to other breaches of investment treaties (unless otherwise provided under the applicable treaty). For example, in BG Group v. Argentina, the tribunal applied Chorzów where the breach at issue was of the fair and equitable treatment provision. Numerous other tribunals have applied the full reparation standard where the state engaged in unlawful conduct other than expropriation.

Restitution of assets as paradigmatic approach to full reparation

The Chorzów case itself illustrates how restitution in kind is the preferred means for full reparation.

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3 Id. at para. 125; Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice 47 (2011) (finding that the principle of full reparation is the ‘authoritative principle governing determination of reparation due for committing wrongful acts in international law’). See also Pierre Bienvenu & Martin J. Valasek, ‘Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law’, in 50 Years of the New York Convention 231, at 234 (Albert Jan van den Berg, eds., 2009) (identifying this as the ‘most often cited passage’ of the Chorzów opinion) (Bienvenu & Valasek).

4 BG Group Plc v. Republic of Argentina, UNCITRAL, Final Award, paras. 421–429 (24 December 2007) (finding that, although Chorzów’s focus was expropriation, its holding subsequently crystallised into a rule of customary international law, later codified in the Articles on State Responsibility and, therefore, it was appropriate to ‘be guided by’ Chorzów’s principles even in the event of a breach of the fair and equitable treatment provision).

5 See, e.g., Murphy Exploration & Production Co. International v. Republic of Ecuador, UNCITRAL, PCA Case No. AA434, Award (6 May 2016) (breaching the requirement of fair and equitable treatment); Swisshion DOO Skopje v. Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award (6 July 2012) (same); Railroad Development Corp v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award (29 June 2012) (same); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 March 2011) (same); Schneider v. Kingdom of Thailand, UNCITRAL, Award (1 July 2009) (same). See also White Industries Australia Ltd v. Republic of India, UNCITRAL, Final Award (30 November 2011) (arising under the most favoured nation clause).
Chorzów involved the unlawful seizure of a nitrate factory, which had been built in 1915 in a swathe of German territory that was transferred to Poland when the latter regained independence after World War I.6 Despite the transfer of the territory – called Upper Silesia – the factory remained under German ownership.

As part of the transition of power, Germany and Poland concluded the Convention Concerning Upper Silesia (the Geneva Convention) in 1922, which constrained Poland’s sovereign power to expropriate German assets in Upper Silesia.7 Despite this prohibition, Poland later transferred possession and management of the factory to a Polish national.8

The nature of Poland’s deprivation entitled the investor (whose claims were espoused by Germany) to restitution in kind. The PCIJ differentiated between prohibited takings and otherwise lawful expropriations (where only payment of compensation is lacking):

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation – to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation.9

In other words, where a state is not permitted to expropriate alien property, the party whose assets have been expropriated is entitled to restitution in kind. By contrast, otherwise lawful expropriation arguably limits recovery to the value of those assets at the time of the taking. As the PCIJ points out, providing any less would fail to ‘wipe out all the consequences of the illegal act and re-establish the situation which would . . . have existed’.10

Monetary damages equivalent to restitution

Restitution is not appropriate in every case. As the PCIJ recognised, investment tribunals may award damages equivalent to restitution where restitution has become impossible from the standpoint of the injured party:

The dispossession of an industrial undertaking – the expropriation of which is prohibited by the Geneva Convention – then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.11

As this passage illustrates, the PCIJ explicitly linked the amount of the ‘indemnification’ and the concept of restitution. Thus, where restitution has become ‘impossible’, the principle of full reparation requires the payment of damages equivalent to restitution in kind. In light of

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6 Factory at Chorzów (Germany v. Poland), Jurisdiction, 1927 PCIJ (Ser. A) No. 9, para. 42 (26 July).
7 Id. Thus, unlike in modern investment treaties, the expropriation by Poland could not be rendered lawful simply by virtue of Poland observing certain procedural requirements and providing compensation.
8 Factory at Chorzów, supra note 2, at paras. 48–49.
9 Id. at para. 123.
10 Id. at para. 125.
11 Id. at para. 126.
the practical realities surrounding cases of prohibited takings, awarding monetary damages is ‘the most usual form of reparation’. ¹²

The PCIJ also stated that monetary damages are ‘not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment’. ¹³ In light of Poland’s obligation not to expropriate, limiting damages in such a fashion would ‘be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned’. ¹⁴

**Supplemental damages**

To the extent restitution or its monetary equivalent alone do not make the injured party whole, the full reparation standard requires that the investor also receive damages for consequential losses stemming from the unlawful conduct. ¹⁵ Consequential damages may entail recovery for such diverse harms as loss of goodwill, reputational harm, or administrative costs. ¹⁶ While recognising that only consequential damages, in conjunction with restitution or its financial equivalent, ‘will guarantee just compensation’, some tribunals have dismissed this type of damages on the basis that it would result in double recovery. ¹⁷

Another head of damages sometimes pleaded in investment disputes is moral damages. Moral damages are appropriate for ‘individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life’. ¹⁸ Although some tribunals have recognised moral damages as a theoretically valid basis for recovery under international law, tribunals are typically wary of moral damages claims – both construing the grounds for granting them strictly and capping the amount awarded for moral damages (often at US$1 million). ¹⁹

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¹² Id. at para. 68.
¹³ Id. at para. 124.
¹⁴ Id.
¹⁵ Bienvenu & Valasek, supra note 3, at 235 (‘The injured party is also entitled to additional monetary damages for the consequential losses suffered as a result of the unlawful taking.’). But see Total SA v Argentine Republic, ICSID Case No. ARB/04/1, Award, para. 216 No. 258 (27 November 2013) (‘[T]he [t]ribunal considers that the losses incurred by [claimant] in respect of sales to others than the distributors . . . might be labelled as indirect or consequential. As such they would not be covered by the international obligation of compensation.’).
¹⁶ See, e.g., Tidewater Inc v Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Award, para. 145 (13 March 2015) (noting that ‘goodwill and know-how’ constitute part of the investment and thus are protected by the treaty); Siemens AG v Argentine Republic, ICSID Case No. ARB/02/8, Award, para. 386 (6 February 2007) (awarding damages for costs of administration associated with skeleton operation post-expropriation); Azurix Corp v Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 432 (14 July 2006) (finding that negotiation costs could in principle be included in recovery as consequential damages).
¹⁹ See, e.g., OI European Group BV v Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, paras. 910–917 (10 March 2015) (noting respondent’s behaviour was not ‘worthy of an additional compensation for moral damages’ because it did not ‘amount . . . to physical threats, illegal detention or ill-treatment’); Lenin v Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 333 (14 January 2010)
Codification of the Chorzów standard

By and large, the customary international law standard articulated in Chorzów has been codified in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility).20

Article 31, for example, requires states to ‘make full reparation for the injury caused by the internationally wrongful act’.21 The accompanying commentaries elaborate that Article 31 envisions ‘full reparation in the Factory at Chorzów sense’, meaning the state must ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.22

Article 36, in turn, requires states responsible for an internationally wrongful act ‘to compensate for the damage caused thereby, insofar as such damage is not made good by restitution’.23 Indeed, restitution ‘comes first among the forms of reparation’ because it ‘most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act’.24 Restitution only gives way to compensation where it is ‘unavailable or inadequate’, including when ‘the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the status quo ante for some reason’.25

The party whose assets have been the subject of a wrongful state act nonetheless retains the right ‘to elect as between the available forms of reparation’.26 Claimants often seek damages rather than restitution in light of the fact that the relationship with the host state has likely deteriorated to such an extent that it would impede operation of the assets in the future. Yet where claimants have sought non-pecuniary relief, tribunals have been willing to entertain such claims.27 Even in Arif v. Moldova,28 which presented the unusual scenario of a state advocating for restitution over monetary damages, the tribunal allowed the claimant to recover monetary damages.29

21 Id.
22 Commentaries, supra note 18, Commentary 3 to Article 31 (quotations omitted).
23 Articles on State Responsibility, supra note 20, Articles 34–36.
24 Commentaries, supra note 18, Commentary 3 to Article 35.
25 Id. at Commentary 4 to Article 35.
26 Id. at Commentary 6 to Article 43.
27 See, e.g., von Pezold v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, paras. 743–744 (28 July 2015) (finding restitution is available); Micula v. Romania, ICSID Case No. ARB/05/20, Award, paras. 1309–1311 (11 December 2013) (same); Goetz v. Republic of Burundi, Award, ICSID Case No. ARB/95/3, Award, paras. 134–137 (10 February 1999) (accepting that the tribunal has power to order Burundi to create new ‘free zone’ conferring tax and customs exemptions, consistent with parties’ settlement).
29 Specifically, the tribunal noted that restitution was ‘preferable’ and provided for the parties to negotiate the terms of a restitutionary remedy, but ordered that damages would be awarded if restitution had not been arranged after 90 days, and in any event gave the claimant the ability to opt for financial recovery if negotiations over restitution did not proceed satisfactorily. See id., at paras. 567–571.
Treaty-based compensation

Treaty-based reparation standards

Nearly all bilateral and multilateral investment treaties provide for compensation in cases of lawful expropriation. The four traditional elements of legal expropriation are that the expropriation must be undertaken (1) for a public purpose, (2) in accordance with due process, (3) in a non-discriminatory fashion, and (4) upon payment of compensation. The US Model Bilateral Investment Treaty (BIT), for instance, limits states’ prerogative to expropriate as follows:

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (‘expropriation’), except:

(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation; and
(d) in accordance with due process of law.

Although the formulation may vary, investment treaties typically articulate the compensation requirement as an obligation to pay ‘just compensation’ or ‘prompt, adequate, and effective compensation’, and many specifically require ‘fair market value’ as the measure of that compensation. For example, the US–Argentina BIT provides:

[Prompt, adequate, and effective] compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

As the text above illustrates, investment treaties answer some of the potential questions related to quantum. However, beyond the general principle that compensation is ‘equated

31 Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 99–100 (2012) (‘It is today generally accepted that the legality of a measure of expropriation is conditioned on [these] requirements.’).
34 Treaty between the United States of America and the Argentina Republic Concerning the Reciprocal Encouragement and Protection of Investment, US–Argentina, Article IV(1) (1994). See also Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, Article 5(1) (1985) (‘Such compensation shall amount to the fair value which the investment expropriated had immediately before the expropriation became known, shall include interest until the date of payment, shall be made without delay, be effectively realisable and be freely transferrable.’).
with the fair market value of the business’, 35 treaties often provide limited guidance. 36 Thus, the key issue – discussed below in Section IV – is often the choice of the valuation methodology to arrive at the ‘fair market value’, rather than the language of the compensation provision. 37

Lawful v. unlawful expropriations

Determining whether an expropriation is lawful or unlawful can have a significant impact on recovery. While an investor with lawfully expropriated assets is typically entitled to recover only the value of the assets at the time of the taking, an investor whose assets are unlawfully expropriated may receive remedies such as restitution and supplemental damages, as well as valuation based on the date of the award. 38

Investment tribunals have adopted somewhat divergent positions over the criteria for identifying an unlawful expropriation. Although there is general acceptance that violations of the ‘procedural requirements’ for lawful expropriations (public purpose, due process and non-discrimination) render an expropriation unlawful, there is disagreement over whether an expropriation that violates only the compensation requirement is unlawful.

Some tribunals have found that expropriations conducted in compliance with all treaty requirements but lacking only compensation remain lawful. For example, the tribunal in Tidewater v. Venezuela found that ‘an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation.’ 39 Rather, it deemed expropriations that fell into this category ‘provisionally lawful’, by which it meant that any potential unlawfulness would be cured upon the (presumably forthcoming) payment of adequate compensation. 40 Venezuela Holdings v. Venezuela reached the same result, noting that ‘the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful.’ 41

In both cases, the tribunal clearly stated that, as a result, recovery was limited to fair market value of the asset at the moment of dispossession. 42 Arguably, the Factory at Chorzów case is consistent with this result when it stated, albeit in dicta, that such limitation ‘would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what

38 See supra Section II.
40 Id. at para. 141.
42 Tidewater, supra note 16, at para. 142 (‘[C]ompensation for a lawful expropriation is fair compensation represented by the value of the undertaking at the moment of dispossession.’); Venezuela Holdings, supra note 41, at para. 306 (holding that ‘compensation must be calculated in conformity with the . . . BIT’ which provided for fair market value at the time of the taking).
was expropriated’.\textsuperscript{43} As \textit{Tidewater} noted, scholars – drawing on this dicta – ‘have insisted on the necessity to distinguish expropriation illegal \textit{per se} and expropriation only wanting compensation to be considered legal’.\textsuperscript{44}

Other tribunals have taken the opposite view, finding that payment of compensation was a condition for the lawfulness of the expropriation. In \textit{von Pezold v. Zimbabwe}, for example, the tribunal found that ‘no compensation ha[d] been paid for the properties and therefore . . . the expropriation did not fulfil the “lawful” criteria.’\textsuperscript{45} Given that no compensation had been paid, there was no need for the tribunal ‘to decide whether the acquisition was for a public purpose, whether there was access to due process or . . . whether the acquisition was non-discriminatory’.\textsuperscript{46} Likewise, the tribunal in \textit{Unglaube v. Costa Rica} found that the state’s mere failure to compensate rendered the expropriation unlawful.\textsuperscript{47}

The gap between these two approaches may be more apparent than real. In both \textit{Tidewater} and \textit{Venezuela Holdings}, the state was willing to pay compensation, or at least to negotiate towards that end. \textit{Tidewater} explicitly linked its decision to reject illegality to the fact that there was no ‘refusal on the part of the state to pay compensation’.\textsuperscript{48} Instead, the dispute arose because ‘the [p]arties were unable to agree on the basis or the process by which such compensation would be calculated and paid.’\textsuperscript{49} \textit{Venezuela Holdings} went even further, specifically noting that claimants bore the burden of showing that Venezuela’s participation in compensation negotiations, and subsequent offers, were ‘incompatible with the requirement of “just” compensation . . . of the BIT’.\textsuperscript{50}

A good faith requirement, therefore, may help reconcile these apparently contradictory positions. If the state wilfully and wantonly disregards the compensation requirement, the tribunal may be inclined to find the expropriation to be unlawful. By contrast, where the state makes a good faith effort to comply with the compensation requirement, eventual failure to pay compensation alone does not render the expropriation unlawful. Both \textit{von Pezold} and \textit{Unglaube} are consistent with this result in the sense that Zimbabwe and Costa Rica failed to take any real action to begin arranging for compensation, suggesting outright disregard of the treaty standards – arguably a distinguishing feature from \textit{Tidewater} and \textit{Venezuela Holdings}.\textsuperscript{51}

\begin{footnotes}
\footnotetext[43]{\textit{Factory at Chorzów}, supra note 2, at para. 124.}
\footnotetext[44]{\textit{Tidewater}, supra note 16, at para. 136.}
\footnotetext[45]{See, e.g., \textit{von Pezold}, supra note 27, at para. 497.}
\footnotetext[46]{Id. at para. 498.}
\footnotetext[47]{\textit{Unglaube v. Republic of Costa Rica}, ICSID Case No. ARB/08/1, Award, para. 305 (16 May 2012) (‘[A]dequate compensation . . . was not, in fact, paid to [claimant] within a reasonable period of time after the State declared its intention to expropriate. In these circumstances, the [t]ribunal cannot accept . . . that the provisions of Article 4(2) alone must govern.’).}
\footnotetext[48]{\textit{Tidewater}, supra note 16, at para. 145.}
\footnotetext[49]{Id.}
\footnotetext[50]{\textit{Venezuela Holdings}, supra note 41, at para. 305.}
\end{footnotes}
Issues with potential significant impact on valuation

Valuation methodology

Neither customary international law nor treaty-based standards require the application of a particular valuation methodology, leaving that choice to the tribunal. In light of the significant impact that the choice of valuation methodology can have on recovery, the subject warrants serious consideration but will only be treated briefly in this chapter given that Part III of this volume broadly covers valuation (including basic methods).

Income-based approaches

Income-based approaches can refer to any of the following three methods: discounted cash flow (DCF), adjusted present value and capitalised cash flow.\(^\text{52}\) The DCF analysis, which is the most common valuation method,\(^\text{53}\) aims to calculate the present value of future expected cash flows.\(^\text{54}\) As discussed in ‘Country risk as an element of discount rate’ below, the determination of the appropriate rate at which to discount future cash flows to current value in investment arbitration raises the additional issue of whether to add country risks concerning potentially illegal state conduct.

Tribunals’ willingness to apply the DCF analysis typically depends on whether there is a sufficient basis to estimate future cash flows, and numerous tribunals have rejected application of the DCF analysis where projections are deemed too speculative.\(^\text{55}\) Where an investment is a start-up with no track record, history of performance or other solid basis on which to make projections of profits, a tribunal may decide not to apply the DCF analysis.\(^\text{56}\)

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52 For a comprehensive overview, see Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence (2008).

53 World Bank, Guidelines on the Treatment of Foreign Direct Investment IV.(i) (2002) (embracing DCF as the basis for valuing ‘a going concern with a proven record of profitability’) [hereinafter World Bank Guidelines]. See also Quiborax SA v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, para. 344 (16 September 2015) (‘[T]he DCF method is widely accepted as the appropriate method to assess the [fair market value] of going concerns.’).


55 See, e.g., Awdi v. Romania, ICSID Case No. ARB/10/13, Award, para. 514 (2 March 2015) (‘The application of the DCF method relied upon by [c]laimants … is not justified in the circumstances … There are … uncertainties regarding future income and costs of an investment in this industry in the Romanian market.’); Compañía de Aguas del Aconcagua SA v. Argentine Republic, ICSID Case No. ARB/97/3, Award, para. 8.3.3 (20 August 2007) (‘[C]ompensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty.’); LG&E Energy Corp v. Argentine Republic, ICSID Case No. ARB/02/1, Award, para. 51 (25 July 2007) (rejecting DCF and holding that ‘lost future profits … have only been awarded when an anticipated income stream has attained sufficient attributes to be considered legally protected interests of sufficient certainty to be compensable’ and noting ‘[t]he question is one of certainty’) (internal quotations omitted); World Bank Guidelines, supra note 53, at IV.6(i).

56 See, e.g., Gold Reserve Inc v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, para. 830 (22 September 2014) (‘[A] DCF method can be reliably used in the instant case because of the commodity nature of [gold] and detailed mining cashflow analysis previously performed.’); Compañía de Aguas del Aconcagua SA, supra note 55, para. 8.3.3 (‘[T]he net present value provided by a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative.’). Cf. Amoco, supra.
Market-based approaches

The market-based approach entails a comparison to ‘similar businesses, business ownership interests, securities or intangible assets that have been sold’. 57 Specifically, the comparative analysis draws on either ‘comparable items’ or ‘comparable transactions’. 58 In Yukos v. Russia, for example, the tribunal found it had ‘a measure of confidence’ on the basis of existing stock market indexes, whereas it rejected the DCF analysis as less reliable on the facts of the case. 59 Some tribunals have considered other transactions involving the very same assets at issue in the arbitration to be particularly compelling evidence of the fair market value of these assets. 60

Asset-based approaches

The third dominant valuation approach is the asset-based approach, which uses either the ‘book value’ or the ‘replacement value’ of the expropriated assets. The book value looks to the difference between total assets and total liabilities, as indicated by the company’s books. The replacement value takes a similar approach without deducting depreciation. Although these approaches were featured prominently in the jurisprudence of the Iran–US Claims Tribunal, 61 they have fallen out of favour with contemporary investment tribunals, 62 reflecting the reality that investments are often worth more than the salvage value of assets.

57 Kantor, supra note 52, at 4.
59 Hulley Enterprises Ltd (Cyprus) v. Russian Federation, PCA Case No. AA 226, Final Award, paras. 1785–1787 (18 July 2014); Vétena Petroleum Ltd (Cyprus) v. Russian Federation, PCA Case No. AA 228, Final Award, paras. 1785–1787 (18 July 2014); Yukos Universal Ltd (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Final Award, paras. 1785–1787 (18 July 2014). See also Stati v. Republic of Kazakhstan, SCC Case No. 116/2010, Award, paras. 1617–1625 (19 December 2013) (finding the DCF analysis presented by claimants was not ‘convincing’ and consequently looking to comparable transactions); CME Czech Republic BV v. Czech Republic, UNCITRAL, Final Award, para. 533 (14 March 2003) (referring to prior purchase offers to arrive at valuation for CME). But see Tenaris SA and Talta – Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award, paras. 528–32 (29 January 2016) (noting ‘the difficulty of identifying genuinely similar companies for comparison and rejecting a market-based multiples approach in light of its failure to provide reliable guidance to the Tribunal in the ‘unique market circumstances’ of the case decided).
Other approaches

In some cases, investment tribunals simply apply the amount of recovery based on prior court decisions or arbitration awards. For example, in Saipem v. Bangladesh, the tribunal determined the amount of damages due based on a prior arbitration award. In other cases, tribunals calculated the amount of loss sustained by the injured party based on a wrongfully charged tax, or some other discrete financial imposition placed on the investor by the state. At least one tribunal has used a ‘weighted combination’ of multiple valuation methods to establish the fair market value of the investment.

Valuation date

The choice of the valuation date can also have a significant impact on the amount of compensation awarded to a party whose assets have been the subject of wrongful state conduct. Whether the tribunal can rely only on information available at the time of the taking or use hindsight as of a later date can have enormous consequences. In Yukos v. Russia, the valuation date was a US$44 billion issue.

Ex ante and ex post approaches to valuation

In theory, expropriation and adequate compensation should occur simultaneously. In that case, no issues related to valuation date would arise. In practice, however, legal and practical obstacles often delay compensation. When that occurs, tribunals face the question of whether to use hindsight or to rely solely on information available as at the date of the taking. These two approaches reflect, respectively, ex ante and ex post approaches to valuation.

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63 Saipem SpA v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, para. 202 (30 June 2009) (‘[T]he tribunal considers that in the present case the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the Chorzów Factory principle.’). See also Chevron Corp (USA) v Republic of Ecuador, PCA Case No. 34877, Partial Award, para. 546 (30 March 2010) (‘When conceiving of the wrong as the failure of the Ecuadorian courts to adjudge TexPet’s claims as presented to them, the starting point for the tribunal’s analysis must be TexPet’s damages claims as they were presented before these courts.’).

64 See, e.g., British Caribbean Bank Ltd v. Government of Belize, PCA Case No. 2010-18, Award (19 December 2014) (valuing damages using the face value of loans not repaid); Occidental Exploration and Production Co v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, paras. 205–207 (1 July 2004) (valuing compensation on the basis of tax refunds not paid to claimant).

65 Rusoro Mining Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, para. 789 (22 August 2016) (ruling out certain valuation methods as inappropriate in the circumstances and going on to find ‘that the best approach is a weighted combination of the [remaining] three Valuations [Maximum Market Valuation, Book Valuation, and Adjusted Investment Valuation], taking into consideration that each Valuation has its own strengths and shortcomings’).


67 Hulley, supra note 59, at para. 1826 (‘The total amount of [c]laimants’ damages based on a valuation date of [the expropriation] is USD 21.988 billion, whereas the total amount of their damages based on a valuation date of [the award] is USD 66.694 billion. Since the tribunal has concluded earlier that [c]laimants are entitled to the higher of these two amounts, the total amount of damages to be awarded before taking into account any deductions necessary . . . is USD 66.694 billion.’); Veteran Petroleum, supra note 59, at para. 1826 (same); Yukos, supra note 59, at para. 1826 (same).
Under the *ex ante* approach, the injured party will receive the value of the investment at the time of the taking, adjusted at the time of the award by an appropriate pre-judgment interest rate (with post-judgment interest typically to accrue thereafter until payment). By contrast, under the *ex post* approach, the claimant will receive the value of the investment at a later date, which generally coincides with the date of the award (as well as post-judgment interest). By then, the value of the investment will have increased or decreased compared to its value at the time of the taking.

**Evolution of the law**

**Historical practice and first signs of change**

Scholars have long recognised that *Chorzów*’s articulation of ‘full reparation’ could logically imply that the valuation date should coincide with the date of the award. However, tribunals historically valued the investment at or about the date of the expropriation. That is, even in cases of unlawful conduct, tribunals applied an *ex ante* approach to valuation. While a variety of potential reasons may explain this result, suffice it to say that the use of the award date in connection with unlawful expropriations remained largely dormant for much of the twentieth century.

The first signs of change emerged from the jurisprudence of the Iran–US Claims Tribunal. Recalling *Chorzów*’s statement that full reparation means damages are not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment, Judge Brower’s concurring opinion in *Amoco v. Iran* explained that unlawful takings entitle the injured party to:

\[
[D]amages
eq \text{the greater of (i) the value of the undertaking at the date of loss (. . . including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages.}
\]

The approach outlined by Judge Brower in *Amoco* was later vindicated implicitly by *Starrett Housing Corporation v. Iran* and explicitly by *Phillips Petroleum v. Iran*. The latter announced a principle that closely resembles the current state of the law: that the distinction between lawful and unlawful expropriations set forth in *Chorzów* could be ‘relevant only to two

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68 See, e.g., Max Sorenson, *Manual of Public International Law* 567, para. 9.18 (1968) (‘Since monetary compensation [under the *Chorzów* standard] must, as far as possible, resemble restitution, the value at the date when the indemnity is paid must be the criterion.’); Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*: I 660 (1957) (‘[T]he value of the property at the time of the indemnification, rather than that of the seizure, may constitute a more appropriate substitute for restitution.’).


70 See Lavaud & Recena Costa, *supra* note 65, at 50–52 (identifying sources of uncertainty and more pressing issues dominating the jurisprudence in the mid-twentieth century).

71 *Amoco*, *supra* note 17, at para. 18 (Brower, J., concurring in part and dissenting in part).

possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation’.73 In retrospect, these cases laid the groundwork for the evolution that took hold years later in *ADC v. Hungary*.

The turning point: *ADC v. Hungary*

The full implications of the *Chorzów* damages framework were not embraced by investment tribunals until the *ADC v. Hungary* award.74 Since then, the *Chorzów* standard – specifically, the distinction it established between lawful and unlawful state conduct and the choice of valuation date – has enjoyed a ‘renaissance’.75 Now, several international tribunals largely have used the award valuation date where appropriate.76

In *ADC v. Hungary*, the claimants argued that Hungary expropriated their investment by issuing a decree that took over claimants’ airport enterprise.77 Not only did Hungary fail to pay compensation, but the tribunal also found the expropriation violated the BIT for failing to comply with due process or serve the public interest.78 The tribunal agreed with the claimants that the BIT did not apply where a state expropriates unlawfully;79 instead, the illegality of the expropriation triggered the customary international law standard reflected in *Chorzów*.80 In language evocative of the PCIJ’s, the tribunal stated:

> The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and [such a standard] cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation.81

In light of the fact that the investment had risen in value since the date of the expropriation (which the tribunal held to be 1 January 2002), the claimants sought to obtain the value of

74 See Lavaud & Recena Costa, supra note 65, at 54–64 (analysing the practice of tribunals after ADC). See also Bienvenu & Valasek, supra note 3, at 231 (‘[U]ntil recently, the implication of Chorzów Factory for establishing a different standard of compensation for unlawful as opposed to lawful expropriation seems not to have been fully appreciated by arbitral tribunals in investment cases’).
75 Bienvenu & Valasek, supra note 3, at 255.
76 But see Lavaud & Recena Costa, supra note 65, at 56–58 (reviewing factual or evidentiary factors that lead tribunals to nonetheless apply the date of the taking, as well as outlier awards that do not follow the now-standard approach).
77 *ADC Affiliate Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, paras. 218–219 (2 October 2006).
78 Id. at para. 476(d) (‘[T]he expropriation . . . was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process.’).
79 As in *Chorzów*, ‘unlawfully’ here meant for more than mere failure to pay compensation.
80 *ADC*, supra note 77, at paras. 480–481 (‘The principal issue is whether the BIT standard is to be applied or the standard of customary international law . . . [T]he BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation.’).
81 Id. at para. 481.
their expropriated investment as at the award date.\textsuperscript{82} Despite the fact that such an approach was ‘almost unique’, the tribunal found that the ‘application of the Chorzów Factory standard requires that the date of valuation should be the date of the [a]ward and not the date of expropriation’.\textsuperscript{83}

In other words, the ADC tribunal found first that violation of BIT provisions (other than the compensation requirement) triggered the application of customary international law, and second that customary international law required valuation based on the award date where the value of the investment had increased. Following ADC, other tribunals used the award date as the valuation date,\textsuperscript{84} or at least embraced the reasoning in ADC even where the claimant could not make a factual case for higher damages based on the award date.\textsuperscript{85}

Country risk as an element of discount rate

A critical element of the DCF analysis is the application of a discount rate, which is necessary to obtain the present value of future cash flows.\textsuperscript{86} In investment disputes, one of the key issues pertaining to discount rate is whether to incorporate ‘country risk’ reflecting potential illegal state conduct. This determination can have a significant impact on the calculation of damages.

Conceptual tension contributes to lack of consensus on this issue. On the one hand, the purpose of investment treaties is to reduce the risk of investing abroad. Of course, country

\begin{itemize}
\item \textsuperscript{82} Id. at para. 242.
\item \textsuperscript{83} Id. at para. 497.
\item \textsuperscript{84} See, e.g., von Pezold, supra note 27, at para. 813 (‘The sum of compensation that the [t]ribunal arrives at should reflect the value of the [e]state that would have been received if restitution had been successful; that is, the value at the date of the [a]ward.’); Yukos, supra note 59, at para. 1826 (‘The total amount of [c]laimants’ damages based on a valuation date of [the expropriation] is USD 21.988 billion, whereas the total amount of their damages based on a valuation date of [the award] is USD 66.694 billion. Since the [t]ribunal has concluded earlier that [c]laimants are entitled to the higher of these two amounts, the total amount of damages to be awarded before taking into account any deductions necessary . . . is USD 66.694 billion.’); Quiborax, supra note 53, at para. 370 (‘The [t]ribunal has already held that the standard of compensation in this case is not the one set forth in Article VI(2) of the BIT, but the full reparation principle under customary international law . . . because it is faced with an expropriation that is unlawful not merely because compensation is lacking . . . [T]he majority of the [t]ribunal considers that this requires an ex post valuation.’); El Paso Energy International Co v. Argentine Republic, ICSID Case No. ARB/03/15, Award, paras. 704–705 (31 October 2011) (finding that because the expropriation was unlawful, ‘the property . . . is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid,’ i.e., the date of the award).
\item \textsuperscript{85} See, e.g., Siemens AG, supra note 16, paras. 352–353 (‘The key difference between compensation under the Draft Articles and the Factory at Chorzów case formula, and Article 4(2) of the Treaty is that under the former, compensation must . . . “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty . . . It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this [a]ward be compensated in full.’); Compañía de Aguas del Aconcagua SA, supra note 55, at para. 8.2.3–8.2.5 (20 August 2007) (‘[T]he Treaty thus mandates that compensation for lawful expropriation be based on the actual value of the investment . . . However, it does not purport to establish a lex specialis governing the standards of compensation for wrongful expropriations . . . There can be no doubt about the vitality of Chorzów Factory’s statement of the damages standard under customary international law . . . It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for lawful expropriations.’) (emphases in original).
\item \textsuperscript{86} Kantor, supra note 53, at 44.
\end{itemize}
risks related to domestic business conditions, currency fluctuations and structural economic factors must be borne by the investor as they are part of the typical risks associated with investment activities. However, when it comes to risks associated with wrongful state conduct, discounting the value of the investment in light of the prospect of such conduct seems in tension with the raison d’être of the investment treaty itself. Thus, at least one tribunal has excluded the effect of unlawful state conduct from the calculation of the discount rate with the goal to avoid a potential windfall to the state.87

On the other hand, a hypothetical willing buyer may have factored in the risk of illegal state conduct. On this view, excluding any aspect of country risk would constitute a windfall to the investor. A string of recent cases involving Venezuela have adopted this approach, incorporating different amounts of ‘confiscation risk’ into their country risk figures.88

In part as a result of these competing considerations, investment tribunals have applied widely varying country risk premiums, ranging from 6 per cent (OI Group) to 14.75 per cent (Tidewater) for the same country and for effectively the same period.89

Conclusion

As the range of cases and economic stakes in investment arbitration has grown, so too has the significance of compensation and damages issues. While some of the basic principles were established decades ago, detailed rules and precedents on how to apply those principles in individual cases are not always available. International tribunals will therefore continue to define and refine remedies in investment arbitration.

87 Gold Reserve, supra note 56, at para. 841 (‘The [tribunal agrees . . . that it is not appropriate to increase the country risk premium to reflect the market’s perception that a State might have a propensity to expropriate investments in breach of BIT obligations.’). See also Florin A. Dorobantu et al., ‘Country Risk and Damages in Investment Arbitration’, 2015 ICSID Rev. 1, 13 (arguing that tribunals should distinguish ‘actionable country risk’ from which the investor is protected by the BIT and which should not impact the discount rate, from other ‘non-actionable country risks’, which the investor should bear).

88 See, e.g., Venezuela Holdings, supra note 41, at para. 365 (‘It is precisely at the time before an expropriation (or the public knowledge of an impending expropriation) that the risk of a potential expropriation would exist, and this hypothetical buyer would take it into account when determining the amount he would be willing to pay in that moment. The [tribunal considers that the confiscation risk remains part of the country risk and must be taken into account in the determination of the discount rate.]; Flughafen Zürich AG v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award, para. 907 (18 November 2014) (finding claimants were aware of political and legal uncertainties in Venezuela when they made the investment); OI European Group BV, supra note 19, at para. 708 (finding the country risk captures the ‘disadvantage’ emerging market countries face in light of investors’ preference to invest in a developed country); Tidewater, supra note 16, at paras. 184, 186 (holding that the country risk premium quantifies the ‘general risks, including political risks, of doing business in a particular country’ and that the bilateral investment treaty was not insurance against such risks); Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, para. 719 (30 December 2016) (the majority holding that the notion of fair market value ‘does not require, and in fact does not allow for, a correction of the economic willing-buyer perspective on the basis of normative considerations,’ such that the risk of expropriation or other potential violations of the treaty may not be excluded from the applicable discount rate).

Appendix 1

About the Authors

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Mark W Friedman, a partner in Debevoise & Plimpton’s international dispute resolution group and a litigation partner in the New York and London offices, has broad experience in civil and criminal matters, with a concentration on international arbitration and litigation. Mr Friedman has represented clients in disputes in a wide variety of industries, including energy, mining, construction and telecommunications, and has acted as counsel or arbitrator in disputes under the rules of the AAA, ICDR, CPR, LCIA, ICC, UNCITRAL and ICSID.

Mr Friedman was named 2016 International Arbitration Attorney of the Year by Benchmark Litigation and has been ranked as a leading individual by Chambers Global, Chambers UK, Chambers USA, Who’s Who Legal: Commercial Arbitration, Who’s Who Legal: Commercial Litigation, PLC Which Lawyer? Yearbook and Legal Experts, and as one of the inaugural ‘45 stars under 45’ by Global Arbitration Review. Among other positions, he is a vice president of the ICC Court of Arbitration, a member of the editorial board of Dispute Resolution International, and was previously co-chair of the International Bar Association’s Arbitration Committee, a member of the Court of the London Court of International Arbitration, vice chair of the International Dispute Resolution Committee of the International Section of the American Bar Association, and co-rapporteur of the International Law Association’s Commercial Arbitration Committee. Mr Friedman regularly speaks and publishes on international arbitration and compliance topics.

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Ms Lavaud represents clients in arbitrations conducted under the auspices of the main arbitration institutions and in related court proceedings. She has advised clients in a variety of jurisdictions on issues of civil and common law, public international law, treaty and contract interpretation, and maritime boundary. Her expertise also includes the assessment of damages and the enforcement of arbitration awards, especially under the Foreign Sovereign Immunities Act and other similar legislation.

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Dealing with Uncertainty: Discounted Cash Flow (DCF) Versus Adjusted Present Value (APV)

By Thierry Senechal*

Summary

Both DCF (under the weighted average cost of capital or WACC basis), and APV methodologies are now commonly used in litigation for estimating the pecuniary value of damage in investment disputes. However, the APV and the traditional DCF methods differ in how the relevant cash flows are calculated, and the applicable discount rates. While APV has a great advantage by taking into account all sources of value creation and destruction related to the investment, DCF/WACC leads to more reliable results over time. More importantly, under a DCF scenario uncertainties in estimates of future revenues and costs can be easily accommodated. Such feature is a major advantage to deal with the increasing number of disputes prevailing in unstable economic and political conditions of the rapidly developing economies.

As a result, the DCF/WACC approach remains a standard valuation technique regularly used in litigation. Indeed, the approach should be privileged over the APV method which can be complex to implement and very costly or time consuming. At the general level, DCF has proven to be simple and consistent, rather than subtle and arbitrary. When well designed, it allows easy processing, consistency and accuracy of the valuation work. One should not forget that historical cost methods are also available and should be used whenever possible in international valuation practice.

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Dealing with Uncertainty: Discounted Cash Flow (DCF) Versus Adjusted Present Value (APV)

Valuation: Art or Science?

It is often claimed that valuation is an art, not a science. When it comes to valuing an asset or a company (or to put it differently, a cash flow or income stream), many would argue that there is no one “right answer.” There is no single “magic number” that instantly and permanently confirms what the company or the asset is worth. The issue is further complicated by the wide range of methodologies available to the expert valuator: Historical cost valuation (Book Value, Replacement Value, Liquidation Value), Earnings Multiples (Price/Earnings, Cash Flow or Revenue Multiples), Discounted Cash Flows (Net Present Value under the CAPM, Free Cash Flow Discounted at the Weighted Average Cost of Capital, Adjusted Present Value, Economic Value Added), Residual Income Model, or Industry Comparables. As illustrated in the following graph, it is true that the relation between the different methods and variables can be a challenge for the non expert.

Further adding to the complexity of each individual valuation technique mentioned above, the parties of a recent arbitration case presented two different approaches for estimating the pecuniary value of the alleged damages: the Discounted Cash Flow (DCF) under the WACC basis and the Adjusted Present Value (APV). The scope of work for the Neutral Expert involved the estimation of the aggregate value of damages suffered by the Claimant as a result of the termination of an Investment Agreement by the Respondent. It shall be noted that the business was created a few years before the cancellation of the agreement with only purpose to manage the contract signed between the Claimant and the Respondent in the area of operating hotels and other tourist facilities. Under the agreement, the claimant was receiving fees from the Respondent. It shall also be noted that the whole business, as a going concern, was lost as a result of the cancellation of the agreement by the Respondent.

The case of an investment dispute in Eastern Europe

The Tribunal asked whether the damages could be assessed on the basis of the fees the Claimant would have received under the contract (hypothetical expenses being subtracted). In conducting the evaluation, consideration was given to the issue of whether reliable methods are available for estimating possibly loss of fees (revenues) through 2018.
In particular, the Arbitration Tribunal’s request included to be informed on whether the expert’s knowledge and experience would allow him to make a recommendation on the choice of most acceptable methodology between the DCF/WACC and the APV approaches: What valuation methodology should be used to estimate of investment loss of profits in an Eastern European country under many political and economic uncertainties? The Tribunal asked whether lost profits could be assessed on the basis of the fees the Claimant would have received under an investment contract over a period of 15 years. In conducting the valuation, the expert had to recommend whether or not it would be within the range of generally accepted methods to estimate possibly lost profits for such a long period of time.

**Review of the methodologies**

Let us briefly review these two valuation approaches. The DCF/WACC analysis is a widely used method for evaluating the likely profitability of business investments that will generate future flows of revenues and costs. It is a method that is quite often used in arbitration of investment disputes. The idea is to forecast future cash flows of an investment and discount them at the proper discount rate to arrive at a present value. Instead of trying to project the cash flows to infinity, a terminal value approach is taken in the valuation. This is done because as time moves on, it becomes harder to come to a realistic estimate of the cash flows. In our case, it was admitted by the Tribunal that it is usual to end the cash flow used in a DCF with a terminal value as the final year cash flow under the agreement (2018).

The expert’s biggest challenge was then to comment on the choice of the discount rate (or cost of capital) for the lost business. Usually, the discount rate is found by deriving the average cost of equity and debt of the company, weighted according to their relative contributions. The widely adopted approach that consists of weighting both debt and equity is called the “Weighted Average Cost of Capital” (WACC). One difficulty is related to the derivation of the cost of equity. The Capital Asset Pricing Model (or CAPM) for estimating the cost of equity is based on one major assumption, that financial markets are dominated by rational, risk-averse investors, who seek to maximize satisfaction from return on their investment. Other important assumptions include that the market is efficient, frictionless, and without imperfections like transaction costs, taxes and restrictions on borrowing and short selling. In addition, it assumes that investors base their judgment on a common time horizon, because the model in itself is a one-period expectation model. Another difficulty is related to derivation of the cost of capital for non traded companies when benchmarks are not easy to obtain.

APV, on the other hand, takes into account all sources of value creation and destruction related to the investment. This is particularly relevant since investments are not without risk, especially in some countries where political instability is a key variable that may lead to major swings in profitability from year to year. As a result, the APV method is used more and more often these days. The adjusted present value is equal to the sum of the value of the unleveraged company and the value of tax shield less the present value of financial distress costs. Each of these components is discounted at different rates representing the different risks. APV is obtained in three steps. First, we begin by estimating the value of the firm with no leverage. We then consider the present value of the interest tax savings generated by borrowing a given amount of money. Finally, we evaluate the effect of borrowing the amount on the probability that the firm will go bankrupt. The APV is found by the following formula:

\[
\text{APV} = \text{Base case NPV of the unlevered value} + \text{Effects of debt (floatation costs, Tax shield, interest subsidy effects)}
\]
Pros and Cons for each method

The party that proposed to use the APV approach objected to the fact that forecasting cash flows over a long period of time is difficult under the DCF method. It was argued that the APV approach was more appropriate because it seeks to separate asset value from other sources of value. For instance, the APV approach allows the addition of effects such as debt financing (flotation costs, tax shields from debt, effects of subsidized financing, etc.). It was also objected that a traditional DCF valuation under WACC assumes constant debt to equity ratio, making the approach quite speculative over long periods of time.

It is true that DCF is subject to many assumptions that may prove subjective in nature. So are other valuation techniques, including the most traditional ones based on historical cost accounting. For instance, in a book valuation basis, the effect of depreciation, provisioning, stock evaluation or lease recording can be very subjective, depending on the overall results to be achieved, and one can come to hugely differing classifications and valuations. Obviously, DCF can be said to be speculative when it comes to variables taken into account (risk-free rate; estimation of betas; choice of risk premium; marginal tax rate evaluation; debt ratio definition…).

Still, today the DCF approach remains an international standard in the valuation field. It is a methodology which has been extensively tested and researched by leading institutions. When properly used, the DCF approach is simple to implement. The fact that the approach is based on the major assumption that financial markets are dominated by rational, risk-averse investors should not be an obstacle.

But the DCF approach can be accommodated to take into account the many uncertainties in estimating future revenues and costs, to a substantial degree, through the choice of discount rate used in the analysis. For instance, when estimating a loss of profits for a long period of time (10-15 years) in a context of political and economic instability, it is possible to assign to the future cash flows different projected growth factors and/or adjustments. Considering the prevailing economic conditions in rapidly developing economies, a DCF calculation can be designed to deal with uncertainties in the estimation of inflation and revenue/expense fluctuations. The investment cash flows can be assigned different discount rate commensurate with the level of risk (i.e., uncertainty) of future cash flows at different points in time.

The major drawback of the APV method is the level of complexity of the technique. Valuation with APV requires estimates for the following items: (1) expected future free cash flows (so does the DCF approach); (2) the unleveraged cost of equity; (3) the expected future capital structure; (4) the discount rate to be applied to the tax shield; and (5) the steady-state long-term growth rate of free cash flows and debt. Three problems immediately presented themselves in the case in front of us. First, the unleveraged cost of equity is rarely observable, and so it usually has to be derived from the leveraged cost of equity for the firm in question or from the leveraged cost of equity for similar firms. Second, the appropriate discount rate for the tax shield is not observable either. Third, the future capital structure of the firm is likely quite speculative.

All together, the predictive value of any model can become easily questionable. One way to tackle this problem of having a wide range of values from different methods is to compare the valuations from several models and present a range under a confidence interval for each model. Combination is also a possibility. In many empirical valuation studies, it has been found that a combination or average of two or more valuation methods would be more accurate than either of the individual method that makes up the combination. Combining estimates has two major advantages: First, in most cases, it produces a more comprehensive estimation (because a wider range of data and variables is included). Second, it removes the need to find the one best model, since often the combination of different models produces the best results. By using only one model, we may ignore some processes or patterns. Furthermore, some valuation approaches use data other ones do not use and thus increase predictability.
Making a choice about the methodology?

When making a choice over which valuation method to favor, the following key strengths and weaknesses of the DCF/WACC and APV should be taken into consideration:

- If a firm’s leverage ratio (debt to total assets) is constant, then the DCF/WACC method is easier as only one discount rate needs to be calculated.
- If a firm’s leverage ratio is not constant, then it is easier to use the more versatile APV method.
- If a firm’s leverage ratio changes over time, then the WACC discount rate would have to be continually recalculated, which can be extremely cumbersome.
- To calculate the tax shields under the APV method, one needs to know the firm’s marginal tax rate.

Needless to say that the traditional valuation models based on historical cost and book value still has a long shelf life in international valuation practice.
The Economics of Contracts in International Disputes

Introduction

This paper is about the role of economic analysis in the context of International Disputes. Based on first-hand experience, and as one would expect, law practitioners are prone to base their cases for breach of contract or harmful acts on legal grounds while limiting economic arguments to the damages part of a case. This approach may not be the most fruitful. In my view, commercial and investment-state disputes are like a 3-legged stool based on facts, law and economics. Focusing only on the first two increases the chances that the stool/case may topple since it will be unbalanced. Many, if not most, disputes revolve around a contract. Analyzing contracts with an economic eye is the foundation of a well-balanced claim or defense. In addition, and again based on first-hand experience, the use of economics complements and, in some cases, expands the usual legal analysis of liability and helps to inform the tribunal. Finally, I believe some lawyers are of the view that the relevant economic principles differ in commercial or investment state disputes. However, in my experience this is wrong. The economic principles are the same even though the heads of claim and the legal rules may be different.

In addition to this introduction, this paper contains 3 more sections. The following section addresses the economics of contracts in the context of international disputes. Next, I present a group of case studies based on actual arbitrations and demonstrate how economic principles have been applied to enhance legal analysis. Finally, the last section presents some concluding remarks.

The Economics of Contracts

Contracts are the heart of any commercial relationship. They define the terms and conditions for the provision of goods and services as well as the responsibilities of the parties to the contract. Contracts – whether between commercial businesses or states and international investors - are legal documents but more fundamentally they are a codification of a commercial relationship between parties. Contracts memorialize in (hopefully) proper legal form the economic and financial arrangements that the parties involved have agreed upon to undertake a business venture. But, as I
discuss next, economic principles underpin the commercial relationships and so, contracts are economic documents.

For market economies to work and do so efficiently they need to able to contract reliably. That means that contracts need to be enforceable and be stable, i.e., they are subject to the rule of law. Economic agents (States and enterprises) must be able to rely on these principles otherwise the basic framework for successful market economies will not develop effectively. Since States and investors compete for limited financial resources and the success of their enterprises depend upon their ability to attract capital and attract it in a financially feasible manner, the reliability of contracts become a paramount building block of any commercial relationship.

Contract-based economies display three key factors. First, contracts need to be sacrosanct in the legal and commercial systems in order for these systems to be economically efficient. This means that absent clearly defined conditions parties will abide by the terms and conditions as agreed in the contract. Under this principle, changes or modifications to the contract should only take place according to the terms of the contract or under the exceptional conditions, e.g., contract infeasibility. By the same token, if one party wishes to alter the economics of a deal then the agreement must be modified to maintain the economic balance originally agreed to in the contract. The basic idea is that “a deal is a deal” for both parties and that “deal” is captured in the respective rights and obligations spelled out in the original contract.

In the context of international arbitrations, as I will attempt to show in the next section, it is my opinion that the decision of a tribunal that effectively interprets a contract in a way that differs from that of one or both parties risk changing the commercial balance of the underlying agreement. Such a decision needs to balance the economic benefits of the sanctity of contracts that may be lost due to the tribunals changing the contract absent the conditions for contract reform. The decision also needs to be sensitive to the risk of changing the economic balance between the parties. Such decision could undermine that balance to the detriment of one party.

Second, as just described, contracts are an economically efficient way to allocate a given set of risks, rewards and obligations between the parties. This is because each party presumptively
accepts the risks that it is best suited to bear typically reflected in a set of mutual obligations. Similarly, each party agrees on the expected rewards under the contract that compensates for the risks and obligations accepted. This is an efficient outcome from an economic perspective. If that balance is upset, either because one of the parties sees an opportunity to maximize its gain or there is an event that disrupts the anticipated gain for one or both parties, then economic efficiency is at risk.

Third, one needs to understand that reliable contracts are crucial instruments that facilitate large and long-lived projects. While relevant in all economic segments, this is particular important in the infrastructure sector where once an investment is committed, the investor accepts the risk of a substantial, long term and immobile investment and the other party for the reliability of the investors and the contracted service. Without reliable contracts, hydro plants, pipelines or roads could not be developed in market economies because there would not be an enforceable contractual relationship to rely upon demanded by investors to funds such projects.

Therefore, since economic principles underlie the contracting structure in either a basic agreement or any further modifications to a contract, economics principles must be used to interpret and understand contracts. Such economic analysis must reflect the commercial and economic objectives and expectations of the parties when the contract was signed.

In the context of international disputes, this requires an analysis to see if an attempt to alter the economics of a contract by one party (because of alleged contract breach or infeasibility for instance) is inconsistent with the initial commercial and economic principles explicitly or effectively agreed to by the parties. In addition, it requires analyzing whether the balance of risks and rewards inherent in the contract has been maintained or has been altered, and the economic repercussions of any possible modification by the arbitrators.

So, analyzing investment or commercial contracts from an economic perspective is a fundamental input in international arbitration settings not only for damages determination purposes but also to understand and assess the principles surrounding a commercial relationship. By using economics as a tool, practitioners can formulate a well-structured case from the beginning; not
limiting themselves to the breach of legal clauses but more importantly assessing the state of a commercial relationship and how it has been affected by an event or how it might be altered by a proposed award.

The following section presents some case studies that illustrate how an economic reading of contracts in the context of international arbitrations complements and supports the legal analysis and informs tribunals vii.

Case Studies

Contract Modification Request

The first case study refers to a request for contract modification by an investor. Investor’s integrated gas/electricity project consisted of the monetization of natural gas reserves (and associated sub-products) by generating and transmitting the commodity to the country’s electricity market. Investor argued that due to changes in market conditions of its commodity, the level of royalties agreed to by contract should be reduced. It also claimed that it was not treated fairly in comparison to other investors and that one of its integrated activates had been harmed due to paying high royalties.

The economic and commercial analysis of the case was based on the analysis of the claim as well as of the concession agreement between the investor and the granting authority. The analysis was divided in two parts: the qualitative and the quantitative part.

On the quantitative part, the economic analysis focused on the assessment of the royalty’s adjustment clauses, the analysis of the gas and electricity market arguments, and on arguments raised on infeasibility. Regarding the assessment of the royalty’s adjustment clauses, the economic analysis showed that the investor had failed to link contract modification requests with the plain language terms agreed to in the contract. While the contract established adjustments to changes to the prices in a basket of predefined fuels, investor was asking for changes in prices of its own products. In addition, the analysis showed that the request for contract modification was focused on the wrong market. The investor developed arguments regarding the decoupling of the relationship
between oil and natural gas and the development of local markets for natural gas as triggering factors for contract reform. In reality, a plain language reading of the contract terms showed that it only allowed for changes in the reference markets defined in the contract. Finally, the economic analysis also demonstrated that had the proposed changed been granted, it would have likely upended the balance of benefits and obligations initially agreed by the parties. Decreases in royalties were not accompanied by any benefits for the counterparty.

The investor also put forward arguments regarding the nature of natural gas and electricity market in the region. Economic analysis showed that arguments on the isolated nature of investor’s reserves and the asserted competitiveness with other regional markets were unfounded because of the integrated nature of the project and the lack of available infrastructure that would link investor’s projects with other markets. Furthermore, the investor put forward an “indirect competition” argument by noting that its generation business was not competitive because of the high royalties being paid. This argument failed as well because it ignored again the integrated nature of the project, the transfer price for the commodity set administratively by the project, and the fact that other segments of the business were producing profits. Finally, the investor raised infeasibility arguments. Again, economic analysis showed the weakness of this argument because the investor did not prove that it had been financially at risk. As Judge Posner and Prof. Joskow have put it: “hardship is not enough” viii .... performance [must be] extremely burdensome.” ix

From a quantitative perspective, the analysis revealed the fallacy of the investor’ arguments that its lack of competitiveness in the electricity market was a result of the high royalty payments. By reviewing bidding costs in the electricity market, economic analysis showed that investor’ commercial strategy was to bid with high margins in the local electricity spot market x. Also, the fact that dividend payments were able to be made to the holding company by the other segments of the integrated project (generation and transmission) suggested that the investor was not placed in a disadvantageous position financially.

Essentially, the economic analysis showed that the claim had no valid basis and that any contract modification should only be based on the terms of the contract as agreed by both parties since there was no economic support for contract infeasibility. Granting the claimant’s requested
remedy would reform the contract even though there was no proof of contract infeasibility and contrary to the specific trigger mechanisms in the contract. This would ignore contract sanctity.

**Power and Desalinization Plan**

The second case study is an international commercial arbitration that involved the purchase of a power and desalinization plant. The claim basically focused on a breach of warranties when the plant became nonoperational after the asset was acquired.

The economic and commercial analysis of the claim was based on the reading of the contracts signed by the parties, the assessment of the financial information of the project, and the analysis of the contracts signed with third parties and electricity off-takers. The analysis showed basically two things: first, the need to compensate Claimant due to the breach of warranties by respondent, and second, the indirect effects of revenue lost due to the prolonged plant shutdowns.

Regarding compensation, an economic assessment of Claimants’ historical and projected future financials was used to quantify the magnitude of the harm. With this purpose, two different methodologies to assess damages were applied: lost profits and direct costs. For the assessment of lost profits, the use of economic and financial principles and the commercial reading of the facts of the case allowed the development of real world and but-for-word scenarios to assess the financial implications of the plant’s shutdown. Different alternative-scenarios were analyzed to value the damages caused by the nonoperational asset. For the direct cost analysis, a detailed review of expenditures was undertaken in order to determine the investments by Claimant up to the moment the claim was filed. Lost profits and direct costs were presented to the tribunal as a measure of harm.

Concerning the indirect effects of the plant shutdowns, the economic and financial analysis showed that the lack of operation of the plant had prevented Claimant’s from complying with its commercial and financial obligations. Expected revenues for the sale of electric power and desalinized water were not realized compromising the financial health of the project as well as the anticipated project upgrades and normal maintenance operations. In addition, the inability to operate the asset impacted negatively the commercial relationship with 3rd parties and off-takers.
Lack of revenues inhibited the project for making payment to vendors. Obligations to deliver power and desalinized water under power purchase and water supply agreements could not be fulfilled. Claimant was not only suffering a reputational damage but also financial harm because of its inability to comply with obligations acquired under the assumption that the plant would be operational.

Essentially by using economic principles the tribunal was made aware of the economic and commercial implications that the breach of warranties had brought upon to the investors and the need for compensation for the harm caused.

**Distribution Concessionaire**

The third case study refers to a presumed breach of contract in a South Asian electricity market. A State government gave a concession for the exploitation of an electricity distribution company to an international private investor. This was part of the power sector reform that the State implemented with the purpose of improving service provision, introducing efficiency to the sector, and bringing needed private investment to upgrade the physical and human capital of the money-losing enterprises, among others.

The heart of the complaint centered on the belief of the granting authority (the State) that a “financial comfort letter” committed the international investor to fund power costs owed to an energy supplier. The economic and commercial analysis of the case was based on the assessment of the claim, the concession agreement between the State and the private investor, and the application of economic utility regulation and market reform principles. The analysis showed three main issues: the weakness in the implementation of the power sector reform, the default of Claimant’s obligations to the sector, and the unwarranted claim for financial damages.

Regarding the weakness in the implementation of the power sector reform, the economic analysis noted the misunderstanding and misapplication by government authorities of the fundamentals of the sector reform. As mentioned above, the power sector was in the process of being restructured with the goal of introducing economic efficiency to a sector characterized by dependency on public funding, huge electricity loses, low quality service, non-compensatory tariffs,
outdated equipment and *de minimums* capital investment, amongst others. However, the state failed to realize that this model “necessarily relies on private investment, first to purchase the state-owned firms and then to upgrade the physical and human capital of the money-losing enterprises.”\(^\text{xii}\) And to attract the private investment utilities needed to meet their service obligations. This necessarily means the implementation of compensatory tariffs which allow the opportunity to earn adequate return on investment. This leads inexorably to “tariffs [that] must be capable of providing revenues that cover operation and maintenance costs including fuel, and that provide a return of and an adequate return on [the] investment.”\(^\text{xii}\) The State failed to do this and by doing so it jeopardized the “voluntary” participation of private investment which is key in any privatization-based market reform.

Concerning the default of Claimant’s responsibility to the power sector, the economic analysis also showed that the government and the regulatory agency failed to meet their institutional obligations. The former not only failed to provide compensatory tariffs but also to pay its own bills. In addition, the government was unsuccessful in using the state’s police powers against electricity theft and intimidation against the concessionaire’s employees which were common practices in this south Asian country. With regard to the regulator, another key piece of any restructuring effort, it also failed by denying collection enforcement and helping to structure power theft reduction programs. The lack of inaction by these two entities made almost impossible the implementation of a sustainable restructuring effort.

Finally, a commercial analysis of the concession and the corporate structure of the concessionaire demonstrated the frailty of the claim that investor’s “financial comfort letter” compelled it to cover power costs expenses with equity contributions. Therefore, no damages had been incurred.

In any commercial firm, operating costs are near-term expenses and are distinguishable from long-term investment expenses. Financial principles dictate that these costs be met with revenues of comparable tenors. Clearly, the latter are funded by investors in the form of debt and equity. And in a viable commercial venture, operating revenues must cover operating costs. So, asking an investor to fund operating costs from its own resources (i.e., equity contributions) because tariffs, which
must cover operating and maintenance expense including fuel, were not at the appropriate level is financially nonsensical and also violates basic principles of utility regulation\textsuperscript{iii}. In addition, it was commercial nonsense to believe that an investor had agreed to fund operating losses through equity contributions since it defeated the rationale for investor’s corporate structure since the holding company had been structured to shield itself from such claims. In financial terms, the claim essentially would pierce the corporate veil.

Effectively, by using economic principles of corporate finance, utility regulation and market restructuring, it was demonstrated to the tribunal that the claim was baseless and that failure to comply with economic fundamentals and basic utility regulation principles had financially encumbered the investor.

Conclusion

In my view, commercial and investment-state disputes are like a 3-legged stool based on facts, law and economics. Focusing only on the first two increases the chances that the stool/case may topple since it will be unbalanced. In general, disputes revolve around an economic construct, the contract. So, analyzing contracts from an economic perspective is the foundation of a well-balanced claim or defense.

As the case studies illustrate, in free-market economies, contracts are the heart of any commercial relationship between economic agents. Economic principles underpin the commercial relationships and so, contracts are economic documents. Reliability of contracts is essential for any market economy to work and is a paramount building block of any commercial relationship. This reliability is reflected by three fundamental characteristics -- sanctity of contracts, efficient allocation of risks and rewards, and facilitation of large, immobile long-lived projects. If they are not present most probably relevant investment for development may not take place or are prone to be disputed.

Based in my experience, economic analysis is a very important and valuable tool in the context of international disputes settings. Economic analysis can be used not only to assess damages but also as a tool to understand the underlying principles of a commercial relationship and
assessing whether the allocation of responsibilities and rewards that originally was agreed by the parties has been upset. It also helps to determine alternatives to rebalance a contract if such a balance has been altered.

Contrary to some views, the economic principles in the context of either commercial or investment-state arbitrations are not different as one can infer from the case studies above. The principles are the same. The difference basically just reflects the applicable legal framework and the specific heads of claim. The economic expert and counsel need to work together to develop robust arguments within the applicable law to make stronger cases.

Finally, as the case stories show, economic analysis is a tool that not only informs tribunals but most importantly allows them to become aware of the tradeoffs between the economic benefits of providing relief via contract modification with the economic harm from disturbing the allocation of rights and obligations agreed by the parties in a contract.

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i This paper is an expanded and more detailed version of “The use of Economics in International Arbitrations” at http://arbitrationblog.kluwerarbitration.com/2017/06/05/use-economics-international-arbitrations/, June 4, 2017 and has been published by the Young Arbitration Review, Edition 29, April 2018.

ii This is what is known in the literature as the “economic legality.” See “Legality and Market Reform in Soviet-Type Economies” John M. Litwack, Journal of Economic Perspective, vol 5, Number 4 – Fall 1991 – pages 77-89.


iv Posner addressed this point by noting that if that allocation was not the most efficient, parties would re-allocate those risks and rewards until a balance is reached. See Posner, p. 98.

v Professor Joskow is an important scholar on the economics of contracts amongst other topics. He analyzes the concept of commercial impossibility as well in great detail and how courts have dealt with this issue from an economic perspective. See “Commercial Impossibility, the Uranium Market and the Westinghouse Case”, Paul L. Joskow, Vol. 6, Journal of Legal Studies, p 119-176, 1977 (Joskow).

vi If the balance of rights and obligations is altered by one party in its favor and the other is not adequately compensated, the economic efficiency of the contract is lost. If the former is awarded a favorable change but without an offsetting benefit to the latter, then it is a windfall.

vii The author was a consulting expert in each of the case studies presented here.


ix See Joskow p. 160.
Though it is a valid commercial strategy, it is not a sound basis to claim financial harm. Marginal costs are determined by O&M costs plus fuel costs. Data showed investor’s marginal costs were higher suggesting it had signed bilateral contracts to deliver electricity at higher prices than those it could have obtained in the spot market and was using its market power to permit it to accept higher transfer prices for its commodity from its supply arm.


As many commentators have point out, “regulated utilities are expected to provide ‘safe and adequate service at just and reasonable rates,’ and to achieve that goal, investors in the utility must be allowed the opportunity to earn a return that is sufficient ...and adequate ... to maintain and support its credit and enable it to raise money necessary for the proper discharge of its public duties.” See EJ, p. 18, and Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U.S. 679, at 692–695.
The calculation of compensation and damages always presents a particular challenge in legal proceedings. This is all the more true in international proceedings, where different legal systems, languages and traditions come together. International jurisprudence appears especially unpredictable in valuation matters. It is difficult to discern general principles or methodologies that are accepted on a wider scale. This is exacerbated by the fact that the judgments and awards often lack sufficient reasoning or consistency.

On the other hand, there is a considerable need for more clarity and predictability in international practice with regard to valuation. Also due to increasing international economic relations—public and private—the potential of conflicts increases. In such a situation, it is of particular interest for the parties to know how their rights and properties in all probability will be valued. There must be a possibility of estimating at least roughly the outcome of international proceedings in order to calculate the risks of such a costly undertaking.

A number of reasons can be identified for the existing lack of consistency and predictability. First, there is the use of terms. The obligation to pay an amount of money can be referred to, for example, as the duty to pay “compensation”, “reparation”, “indemnification” or “damages”. These terms are used quite interchangeably and are normally not linked to a specific legal subject matter. Therefore, considerations that have been developed for one particular case are sometimes applied without sufficient
reflection to another case, where they might not fit. The different legal concepts behind the terms are mixed up and lead to confusion.³

Second, international practice often does not appropriately take into account that “value” is not an objective quality of things. As Immanuel Kant pointed out, value may only be understood as appreciation by persons.⁴ Without the needs and affections of persons, things would not have any value. “Value”, therefore, is a relative concept.

This is also reflected in business valuation practice. The U.S. Appraisal Foundation defines “value” in its Uniform Standards of Professional Appraisal Practices (USPAP) in the following way:

“... the monetary relationship between properties and those who buy, sell, or use properties... Value expresses an economic concept. As such, it is never a fact but always an opinion of the worth of a property at a given time with a specific definition of value.”⁵

For the transformation of a specific legal claim into numbers—which is the process of valuation in legal proceedings—it is therefore necessary to identify the definition of value on the basis of the applicable legal rules. This, unfortunately, is rarely done.

Third, the principles and concepts of valuation as they have been developed in economic science and practice are not very familiar to many lawyers involved in international claims. Even if the precise numbers will normally be presented by economic experts, the understanding of the underlying concepts by counsel, judges and arbitrators is essential in order to evaluate the purported numbers and assumptions.

The present article tries to identify the most important principles which should be observed in the process of calculation of compensation and damages in international legal proceedings. It concentrates on claims of individuals against foreign States before international courts or international arbitral tribunals, be it directly or by the home State in the exercise of diplomatic protection. The main causes of valuation in such proceedings are expropriations, violations of international obligations (State responsibility) and breaches of contract.

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³ The same is true in French, where the terms “indemnité”, “indemnisation”, “compensation”, “dommages” or “dommages-intérêts” are not carefully distinguished. This becomes particularly evident in the bilingual publications of the judgments of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). For example, in The Mavrommatis Jerusalem Concessions, the PCIJ held: “Le Gouvernement hellénique s’est principalement placé au point de vue que, déjà, il y a eu expropriation sans que l’indemnité due à cet effet sei été payée à M. Mavrommatis; c’est cette indemnité que, en premier lieu, il réclame.” A few pages later, it reads: “[C]ette clause n’a, en fait, ni entraîné une expropriation ou une annulation des concessions de M. Mavrommatis, ni causé à celui-ci un préjudice quelconque qui puisse donner lieu à son profit à des dommages-intérêts dans le présent procès.” In English, in both cases, the term “compensation” is used. See The Mavrommatis Jerusalem Concessions, PCIJ 1925, Series A, No. 5, at 40 and 45 (emphasis added). By contrast, in German, the term “Entschädigung” is generally not used interchangeably with “Schadenersatz”, the former having a broader meaning and being not necessarily linked with a legal obligation to pay. See, for example, D. Majer, Die Fragen der Entschädigung für ehemalige NS-Zwangsarbeiter in völkerrechtlicher Sicht, 29 Archiv des Völkerrechts (1991) 1.

⁴ I. Kant, Kritik der praktischen Vernunft. Grundlegung zur Metaphysik der Sitten, Vol. 7 (Frankfurt am Main 1968) 60.

II. THE DISTINCTION BETWEEN “COMPENSATION” AND “DAMAGES”

The obligation to pay a certain amount of money to someone may be based on various legal grounds. Even if there is no clear distinction between “compensation” and “damages” in general, in certain cases the use of one term might be more appropriate than the other. This is, for example, true with regard to expropriation.

A State that expropriates private property in the exercise of its sovereign powers is normally not required to pay “damages”. What might be due to the former owner is “compensation”. Under international law, the payment of compensation has traditionally been one of the conditions for a lawful expropriation of foreign private property. In addition, the expropriation must serve a public purpose and be conducted in a non-discriminatory manner and in accordance with due process of law.6

If a State does not comply with the legal requirements of a lawful expropriation, it commits an illegal act for which it must pay “damages”.7 As Amerasinghe has pointed out:

“It is important in all cases to distinguish between unlawful takings of property and lawful takings. In the former what is due is damages. In the latter the alien must be compensated. There is clearly a distinction between the two cases, damages being naturally usually heavier than compensation”.8

Bowett has similarly explained that “it may be best to refer to compensation as the remedy for a lawful taking or termination of contract and damages as the remedy for an unlawful taking or termination” (emphasis in original).9

Also, some arbitral tribunals have emphasized the distinction between “compensation” and “damages”. For example, the ICSID Tribunal in AGIP v. Congo10 held:

“The Tribunal notes that it is seized not only of a claim for compensation for the consequences to AGIP of the nationalization of the Company but also of a claim for damages for the losses resulting from all the violations of the contractual obligations of which the Government is impugned.”11

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6 See, for example, R. Dolzer and M. Stevens, Bilateral Investment Treaties (The Hague 1995), 104 et seq.
7 A dispute about the adequacy of the compensation does not render the compensation per se unlawful. This is particularly true if the State accepts an international tribunal to decide upon the amount of compensation. See, for example, Sedco, Inc. v. NiOC, Second Interlocutory Award, Separate Opinion Brower, 10 Iran–U.S. Claims Tribunal Reports (1986) 189, 204. International tribunals considered expropriations as lawful even if compensation had not been paid but had been accepted as an obligation by the expropriating State. Compare, for example, American International Group v. Iran, 4 Iran–U.S. Claims Tribunal Reports (1983) 96, 105; ISA Corporation v. Iran, 8 Iran–U.S. Claims Tribunal Reports (1985) 373, 378; Southern Pacific Properties (Middle East) and Southern Pacific Properties Ltd v. Egypt, Award of 20 May 1992, 3 ICSID Reports (1995) 189, at para. 158; Compañía del Desarrollo de Santa Elena v. Costa Rica, Award of 17 February 2000, 15 ICSID Review—F.I.L.J. (2000) 169, at para. 68.
11 Ibid., at para. 95.
Another ICSID Tribunal declared in *Southern Pacific Properties (Middle East) v. Egypt:*12 "Thus, the claimants are seeking 'compensation' for a lawful expropriation, and not 'reparation' for an injury caused by an illegal act such as a breach of contract ... [T]he Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract."13

In case of a lawful expropriation, the duty to pay compensation is the consequence of the legal exercise of a recognized sovereign right of a State. The duty to pay damages arises out of the violation of a legal obligation of that State. The violated legal obligation might be international or contractual in nature. If the rule is an obligation of international law, the State commits an international wrong and the State's international responsibility becomes engaged. If the violated obligation is a contractual obligation, the State becomes liable for contract damages. Therefore, it is advisable to distinguish clearly between "compensation" as the consequence of a legal act and "damages" as the consequence of a breach of an obligation, be it international or contractual.

The fact that the International Law Commission (ILC) in its Articles on State Responsibility chose to use the term "compensation" for the consequence of an illegal act of a State14 perhaps has contributed to the persisting lack of clarity with regard to valuation in international jurisprudence. In the context of State responsibility, however, the central obligation after a breach of an international obligation is "reparation". This represents the more comprehensive obligation of which "compensation" is only a part. According to Article 31 of the ILC Articles on State Responsibility, the responsible State is obliged "to make full reparation for the injury caused by the internationally wrongful act".15 This is clearly different from the concept of compensation after expropriation, because expropriation is not regarded as an illegal act under international law.16 The equivocal use of terms, thus, might be remedied by a closer look at the legal concepts and rules behind them.

III. THE DIFFERENCE BETWEEN LAWFUL AND UNLAWFUL EXPROPRIATION

The distinction between compensation as an element of lawful behaviour and damages as the consequence of unlawful behaviour is only important if it has practical effects. With regard to the general preventive function of law, it would not be desirable if legal and illegal behaviour led to the same financial consequences. In this sense, the

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12 *Southern Pacific Properties (Middle East) v. Egypt*, supra, footnote 7.
13 Ibid., at para. 183.
14 In French, the term is "indemnisation"; in Spanish, it is "indemnización". The German translation uses the term "Schadenersatz" and not "Entschädigung"; see: <http://www.un.org/Depts/german/>. An explanation may be that the ILC largely relied on international jurisprudence, in particular on the judgments of the PCJ and the ICJ which—as already mentioned supra, footnote 3—did not carefully distinguish between the two terms. See J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge 2002) 218 et seq.
16 See further infra, footnote 36 and accompanying text.
Permanent Court of International Justice (PCIJ) held in its Judgment in *Chorzów Factory*:\(^{17}\)

"Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property ... since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned."\(^{18}\)

Judge Brower, at the Iran–United States Claims Tribunal, also spoke in favour of a distinction in his Separate Opinion in *Sedco, Inc. v. Nioc*,\(^{19}\) because otherwise “the injured party would receive nothing additional for the enhanced wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct”.\(^{20}\)

Similarly, Bowett has emphasized that “it offends against all common sense to suggest that it makes no difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases”.\(^{21}\)

The view has gained certain ground that the difference lies in the compensability of lost profits (*lucrum cessans*).\(^{22}\) According to that view, lost profits must only be compensated in case of unlawful expropriations, while in case of lawful expropriations the State must only pay what the owner has lost (*damnum emergens*). This allegedly resembles what the PCIJ held in its Judgment in *Chorzów Factory*.

However, as has already been pointed out by a number of scholars and in international jurisprudence,\(^{23}\) this is not the case. What the PCIJ said in its *obiter dictum* regarding lawful expropriations is that the “value of the undertaking at the moment of dispossession”\(^{24}\) has to be compensated. This is not the amount the former owner has invested or the value of its tangible assets. The “value of the undertaking”, according to the PCIJ, not only comprises the value of its lands, buildings, equipment and stocks but also its supply and delivery contracts, its goodwill and its future prospects.\(^{25}\) The value

\(^{17}\) *Case Concerning the Factory at Chorzów (Germany v. Polish Republic), Claim for Indemnity (Merits)*, Judgment of 13 September 1928, PCIJ 1928, Series A, No. 17.

\(^{18}\) Ibid., at 47.


\(^{20}\) Separate Opinion Brower, *supra*, footnote 7, at footnote 40. He was of the opinion that punitive or exemplary damages should be allowed.


\(^{24}\) *Case Concerning the Factory at Chorzów*, *supra*, footnote 17, at 47.

\(^{25}\) See the formulation of the two detailed questions to the valuation experts in ibid., at 51 *et seq.*
of the undertaking, therefore, cannot be determined without valuing the future prospects of the undertaking. The mere reimbursement of invested capital or the compensation based only on asset values will not provide compensation for the value of the expropriated property.

The development of a distinction between “future prospects” and “lost profits” with regard to the valuation of an undertaking attempted by the Iran–United States Claims Tribunal in Amoco International Finance Corporation v. Iran has correctly been identified as artificial and not practical.

Instead, the dichotomy of “damnum emergens” and “lucrum cessans” should be given up altogether in this connection. It is a concept that stems from the law of damages which simply does not fit to compensation for expropriation.

Two distinctions may, however, be drawn from the considerations of the PCJ in Chorzów Factory which were relied upon, for example, by the Iran–United States Claims Tribunal in Phillips Petroleum v. Iran. First, in case of an unlawful expropriation, the immediate obligation of the State would be restitution of the property, not compensation. Second, an increase in the value of the expropriated property between the date of the taking and the date of the judicial or arbitral decision must be taken into account only in case of an unlawful expropriation.

Claimants in their written and oral submissions sometimes rely on the standard of compensation for a lawful expropriation, even if they are of the opinion that the expropriation was unlawful. This can be explained by the fact that restitution is often not regarded as the best or the most desirable remedy. Claimants and tribunals thus frequently turn immediately to the secondary remedy, the “compensation”. Furthermore, the choice of this standard perhaps is considered to be helpful for the acceptability of their claim by the court or tribunal and by the respondent State because it does not “punish” the State for having acted illegally.

These considerations, however, should not blur the distinction between lawful and unlawful expropriations. The consequences for the process of valuation will be analysed in the following.

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21 See also M. Reisman and R. Sloane, Indirect Expropriations and its Valuation in the BIT Generation, 74 B.Y.I.L. (2003) 115, 137, who are critical of the distinction between damnum emergens and lucrum cessans in the context of expropriation as "economically anachronistic".

22 In other words, according to the Court, 'future prospects' does not equal lost profit (lucrum cessans),” Amoco International Finance Corporation v. Iran, 15 Iran–U.S. Claims Tribunal Reports (1987) 189, para. 203.


24 Case Concerning the Factory at Chorzów, supra, footnote 17, at 47.


26 With regard to the primacy of restitution in the law of State responsibility in general, see Crawford, supra, footnote 14, at 213 et seq.

27 This was the case, for example, in Sokol, Inc. v. Nier; Second Interlocutory Award, supra, footnote 19, at 182 et seq.
IV. FAIR MARKET VALUE VERSUS THE CHORZÓW STANDARD

In general, the process of valuation has to deal with the fundamental problem that “value” is not an objective quality of things. In economic valuation theory, it is regularly pointed out that different individuals have different opinions about the value of an object. There are:

- differences in estimates of future earning power;
- differences in perception of the degree of risk;
- differences in tax status; and
- synergies with other operations owned or controlled.

Value, therefore, can only be determined within a particular given framework. It is thus critical to identify the particular framework of valuation in the present context. As has been pointed out above, the contexts for valuation in international proceedings between an individual and a foreign State are primarily expropriations, violations of public international law and breaches of contract.

A. COMPENSATION UPON EXPROPRIATION—THE FAIR MARKET VALUE STANDARD

The right to expropriate private property for public purposes is recognized in international law as a legitimate exercise of a State’s sovereign power. As to the amount of compensation to be paid to the affected individuals, States enjoy a large margin of appreciation with regard to their own nationals. If, however, nationals of other States are affected, international law becomes relevant. It has been accepted as a rule of customary international law that compensation must at least be “appropriate.”

As is very well known, there has been considerable controversy about the question of what constitutes “appropriate” compensation in this context. While the industrialized countries interpreted this generally as a standard of “full compensation”, the developing countries emphasized that it must mean “less than full”.

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33 See already supra, footnote 4, and accompanying text.
37 This is true even in the context of the European Convention on Human Rights, where the right to property is regarded as a human right. Compare, e.g., James et al. v. United Kingdom, 21 February 1986, E.C.H.R. Series A, No. 98, para. 54; and Litigow et al. v. United Kingdom, 8 July 1986, E.C.H.R. Series A, No. 102, para. 116.
39 See the sophisticated separate and dissenting opinions by Lagergren, Holtzmann and Ameli with regard to the Iran–United States Claims Tribunal’s Decision in INA Corporation v. Iran, supra, footnote 7, at 373. See also the discussion in the American Journal of International Law with contributions by Schachter, Robinson and (footnote continued on next page)
Today, the debate on the customary international law standard has lost its explosiveness due to the growing number of treaties that deal with the question of compensation upon expropriation. The currently more than 2,000 existing bilateral investment treaties (BITs) and several multilateral treaties on investment protection all contain one or another compensation standard in case of expropriation. The following considerations, therefore, will concentrate on those treaty standards.

It may seem surprising that it is hardly possible to find a treaty that would contain the standard of “full compensation”, even among BITs between two industrialized States. Instead, the standard of “adequate, prompt and effective” is broadly accepted and can be found in a vast number of BITs,0 model treaties and in Article 13 of the Energy Charter Treaty. The famous words of U.S. Secretary of State Cordell Hull of 1938,42 therefore, seem to be a widely accepted solution up to today.

Many treaties explain the standard further and refer explicitly to the “fair market value” as the measure of compensation. This is, for example, the case in Article 1110 of the North American Free Trade Agreement (NAFTA) or in the recent Model BITs of the United States (Article 6), Canada (Article 13) and Germany (Article 4).

International tribunals have frequently relied on the fair market value as the appropriate standard in case of lawful expropriations.43 In particular, the Iran–United States Claims Tribunal held that both the Treaty of Amity between the United States and Iran and customary international law require payment of just compensation representing the “full equivalent” of the property taken, which entitles the claimant to be granted compensation equal to that property’s fair market value.44

This concurs with the World Bank Guidelines for the Treatment of Foreign Investments, which were formulated on the basis of a broad and diligent study on the topic:

“Compensation will be deemed ‘adequate’ if it is based on the fair market value of the taken

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40 This is particularly true for the BITs of the United States, but also of the United Kingdom, for example with Argentina of 1990 (Article 5) and with Croatia of 1997 (Article 5). It is also contained in treaties between Latin American countries, developing countries and former Communist countries. Compare, for example, the bilateral investment treaties between Argentina and El Salvador of 1996 (Article 7), Ethiopia and Sudan of 2000 (Article 4), Indonesia and Jordan of 1999 (Article 4) and Russia and Turkey of 1997 (Article 4); available at: www.unctadchi.org/templates/DocSearch_779.aspx.

41 See, for example, Article 6, United States Model Btt (2004); Article 13, Canadian Model Btt (2004); Article 4, German Model Btt (2004).

42 "... it has been stated with equal emphasis that the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation.” Whiteman, Digest of International Law, Vol. 8 (1967) 1029 (emphasis added).

43 See, for example, Southern Pacific Properties (Middle East) v. Egypt, supra, footnote 7, at para. 197. Compañía del Desarrollo de Santa Elena v. Costa Rica, supra, footnote 7, at para. 70.

asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.” (emphasis added).45

This means that the standard of “prompt, adequate and effective” compensation is referring to the fair market value of the expropriated property. Fair market value may be defined as:

“... the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under an obligation to buy or sell and when both have reasonable knowledge of the relevant facts.”46

This does not mean full compensation. The expropriated individual will not necessarily receive all the financial loss he or she has suffered as a consequence of the expropriation. Rather, the calculation shall be based on the opinion of a hypothetical third person on the value of the affected property.

This approach can be regarded as “objective” or “abstract”, as opposed to a “subjective” or “concrete” approach, which would concentrate on the actually incurred losses from the perspective of the affected individual. The “objective” or “abstract” approach of international treaty law is in conformity with the solution of a number of national laws on expropriation. It corresponds, for example, to the Fifth Amendment of the U.S. Constitution, which refers to the standard of “just compensation” in case of expropriation. Although it does not contain a definite standard of fairness by which the measure of just compensation is to be determined, fair market value has normally been accepted as a just standard.47 Also Germany has opted for the “objective” or “abstract” approach.48

Some States, like the United Kingdom,49 Austria50 or Switzerland,51 have chosen a different solution, concentrating on the actually incurred loss of the affected individual. They therefore take into consideration also subjective criteria when calculating compensation upon expropriation. This shows that there are, indeed, different solutions concerning the measure of compensation upon expropriation in different legal systems.52


46 See: http://www.bvappraisers.org/glossary/. Approved June 2005, Copyright 2005, American Society of Appraisers. See also Gabelhart and Brinkley, supra, footnote 34, 23; Pratt, supra, footnote 35, 24; INA Corporation v. Iran, supra, footnote 7, 380; Starrett Housing Corp. v. Iran, Final Award, 16 Iran-U.S. Claims Tribunal Reports (1987) 112, para. 277; Phillips Petroleum v. Iran, supra, footnote 23, para. 111.


48 Article 14 Grundgesetz; BVerfGE 24, 367; B.G.H.Z. 59, 150. See H. Bergmann, Die völkerrechtliche Entschädigung im Falle der Enteignung vertragrechtlicher Positionen (Baden-Baden 1997) 114.


50 Article 5 StGG, § 365 A.B.G.B.; see P. Rummel and J. Schlager Enteignungsentschädigung (Wien 1981) 89 et seq.

51 Article 26 Bundesverfassung; Article 19 Enteignungsgesetz (1930); see R. Merker, Der Grundsatz der “vollen Entschädigung” im Enteignungsrecht (Zürich 1975); Bergmann, supra, footnote 48, 164 et seq.

52 See also R. Dolzer, Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht (Berlin 1985) 292.
In principle, there would even be a third possibility of valuation, namely the "enrichment" standard. It has been argued that the measure of compensation upon expropriation should not concentrate on what the affected person has lost but on what the State has gained from the appropriation.\textsuperscript{53} This "enrichment" standard, however, has not been widely accepted in international law. It would represent a subjective standard, in this case from the perspective of the expropriating State.

Under international law, the approach—at least the one chosen in treaties—is an objective and abstract one. Compensation upon expropriation should be equivalent to the fair market value of the expropriated property and thus represent the price a hypothetical willing and able buyer would pay to a hypothetical willing and able seller in a free transaction at arm's length, both being under no obligation or constraint to buy or sell. This should be taken into consideration when it comes to the valuation process and the actual calculation of the amount due.

B. DAMAGES—THE CHORZÓW STANDARD

The obligation to pay damages is one of the consequences of a violation of a legal obligation, be it international or contractual in nature. In both cases, the act is considered as illegal.

1. INTERNATIONALLY WRONGFUL ACTS

Concerning the violation of an international obligation, international jurisprudence very early pointed out that the transgressor must repair, as far as possible by financial means, the damage caused by the illegal act. As the well-known dictum of the PCIJ in Chorzów Factory\textsuperscript{54} says:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."\textsuperscript{55}

Similarly, according to Article 31(1) of the ILC Articles on State Responsibility, the responsible State is obliged "to make full reparation for the injury caused by the internationally wrongful act".\textsuperscript{56} Article 36 specifies further:

"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

\textsuperscript{54} Case Concerning the Factory at Chorzów, supra, footnote 17.
\textsuperscript{55} Ibid., at 47.
\textsuperscript{56} ILC Articles on the Responsibility of States for Internationally Wrongful Acts, supra, footnote 15.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

It can therefore be concluded that the paramount obligation arising from a violation of international law is to provide "full reparation". The standard for calculation is the damage actually incurred that was caused by the illegal act.

How does this help with the valuation of the damage incurred and how should the calculation be conducted in practice? It is again the PCIJ in its Judgment in Chorzów Factory that provides the answer. What has to be done is a comparison of the actual financial situation of the injured person with the financial situation that would have existed if the illegal act had not been committed. The adjudicating body must therefore make an assumption regarding the situation that "would, in all probability, have existed" if the illegal act had not occurred and compare it to the actual situation after the breach. The difference is the damage that was caused by the illegal act.

This differential method (Differenzmethode) was developed by Mommsen already in the middle of the 19th century. The damage is measured from the perspective of the affected individual and not from the perspective of a third person, such as the "hypothetical willing buyer". Of course, the allegations about values and losses put forward by the injured person must be assessed by the adjudicating body. The court or the tribunal will have to decide in the exercise of its discretion whether the numbers put forward are plausible. But this is a matter of evidence. It must not be confused with the determination of a "fair market value".

The differential method follows the subjective approach and takes the specific significance of an asset for the financial situation and the specific rights, plans or competences of the owner into consideration. In addition, it includes consequential damages, such as loss connected to the location of the property, moving expenses or attorneys' fees.

Also, the financial situation of the owner as a whole must be taken into account. For example, the value of the remaining piece of land may be negatively affected by an unlawfully granted right of passage and exploitation of wood. Sometimes, the subjective perspective increases the value of an affected asset because the particular owner has certain personal rights which are not necessarily marketable.

At the same time, full reparation is also a limitation. The amount of damages must not exceed the damage actually incurred. This is necessary to avoid over-compensation.

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Footnotes:

57 Case Concerning the Factory at Chorzów, supra, footnote 17, at 47.
58 F. Mommsen, Zur Lehre von dem Interesse (Braunschweig 1855).
60 De Sába (United States v. Panama), Mixed Claims Commission, Award of 29 June 1933, 6 R.I.A.A., 358, 368.
61 For example, in Walter Fletcher Smith, the former owner had the right to an unobstructed view of the waterfront; Walter Fletcher Smith v. Compañía Urbanizadora del Parque y Playa de Marios, Award of 2 May 1929, 2 R.I.A.A., 915, 918.
In addition, if the injured party has gained or saved certain amounts of money as a result of the illegal act or the breach, these have to be deducted from the claim for damages. The eventual benefits have to be taken into account when comparing the actual situation with the financial situation of the injured person had the illegal act not been committed.

The subjective standard also allows for considerations of contributory negligence. This was clearly spelled out by an ICSID Tribunal in *MTD v. Chile*. The Claimant had undertaken its investments relying upon expected changes of zoning regulations which, according to the Tribunal, was not a prudent behaviour of a wise businessman. It therefore reduced the amount of damages by 50 per cent.

2. Breaches of Contract

With regard to contractual relationships, the obligations arising from a breach vary, of course, from case to case and depend on the applicable law. The practice of international tribunals, however, shows a tendency towards the general principle of "full reparation". The dictum of the sole arbitrator in *Sapphire International v. Nioc* has received particular attention in this respect and is frequently quoted in recent arbitral decisions as a reference for an existing general principle of law with regard to the calculation of damages for breaches of contract:

"According to the generally held view the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been if the contract had been performed in the manner provided for by the parties at the time of conclusion."!

This tendency can also be observed in international codifications of contract law, such as the United Nations Convention on the International Sale of Goods (CISG), and other international codification attempts, such as the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law (PECL). They all state that the party that is in breach has to put the aggrieved party as closely as possible into the position in which he or she would have been if the contract had been duly performed.

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63 Ibid., at para. 242.
64 Ibid., at para. 243.
71 See Article 74 CISG, Article 9.502 PECL, and Article 7.4.2 UNIDROIT Principles of International Commercial Contracts.
It may therefore be concluded that—without prejudice to the particularities of the applicable law and the specific terms of the contract—also in cases of breach of contract the general principle of "full reparation" should guide the valuation, thereby following the subjective approach. This means that the party that is in breach must pay an amount of money that puts the other party as far as possible in the same financial position as he or she would have been if the violation had not been committed.

V. CONSEQUENCES FOR THE SELECTION OF A VALUATION METHOD

It is important to emphasize that there are a number of valuation methods for different kinds of purposes. As the renowned U.S. valuation expert Shannon Pratt points out:

"No single valuation method is universally applicable to all appraisal purposes. The context in which the appraisal is to be used is a critical factor. Different statutory, regulatory, and case precedent standards govern valuation of businesses and business interests under various jurisdictions for diverse purposes." (emphasis in original)

It should therefore be attempted to identify the most suitable methods for calculating the amount of compensation or damages in the present context.

A. METHODS FOR DETERMINING FAIR MARKET VALUE

Since "fair market value" is mentioned as the standard of compensation upon expropriation in numerous treaties, it has gained particular attention in international jurisprudence. It needs, however, to be analysed in more detail than is usually done. The reference to a "hypothetical buyer" makes it clear that the value of the property is not to be determined from a subjective perspective, be it that of the former owner or that of the expropriating State, but from the perspective of a third person who is not directly involved in the transaction. Put differently, an "objective" or "abstract" approach is applied. Although the term "objective" does not exactly fit in the context of valuation as a matter of principle, it is recognized that fair market value is a value that is "impersonal and detached".

"Fair market value" can be contrasted with "investment value", which is defined as the "value to a particular investor based on individual investment requirements" and depends on the individual knowledge, perceptions and attitudes of one particular owner.

The advantages of an "impersonal and detached" value are evident. The marketplace balances the various subjective perspectives of value by a large number of buyers and sellers. Market values can thus be regarded as the result of a number of different subjective valuations.

72 Pratt, supra, footnote 35, 22.
73 See supra, footnote 4 and accompanying text.
74 Pratt, supra, footnote 35, at 25.
75 See: http://www.bvappraisers.org/glossary/1. Approved June 2005. Copyright 2005, American Society of Appraisers. See also Pratt, supra, footnote 35, at 25; Gabehart and Brinkley, supra, footnote 34, 25 et seq.
Actually paid market prices represent the average of the perceptions of many different owners, even if they are not equal to the value of an asset for one particular owner.\(^7\)

In the United States, where the regulatory forces of the marketplace are particularly favoured, the reference to market values is highly appreciated. The Financial Accounting Standards Board has put it in the following words:

"While the expectations of an entity's management are often useful and informative, the marketplace is the final arbiter of asset and liability values. Moreover, the entity must pay the market's price when it acquires an asset or settles a liability in a current transaction, regardless of its intentions or expectations."

These considerations sometimes lead to the conclusion that market value is an "objective" value or even represents "the" value of an asset. Although this is not entirely true, reference to the marketplace in valuation processes certainly contains a number of advantages.

First, it is relatively easy to determine, because it leaves aside the various subjective estimations and asks how "the market" would value the asset. Second, the assessment of evidence is rendered easier. The perceptions of the participants in the marketplace can provide a basis for the evaluation of the numbers put forward by claimants. These two advantages lead to the third advantage, namely to a better predictability of the valuation results, at least in principle. If the standard of valuation is the fair market value, the outcome of a legal proceeding should not come as a surprise.

On the other hand, reference to the marketplace also has certain disadvantages. It does not generally represent the value of the property for a particular owner. It does not reflect the specific competences, skills, know-how, mobility, plans, estimations, perceptions or risk-acceptances of the affected individual. Furthermore, it does not take into account whether the property in question forms a component part of a greater entity or if there are personal rights attached to it.

Compensation that equals the fair market value of an expropriated asset therefore often does not provide full reparation to the former owner. This is implicitly accepted by the legal norms on expropriation that refer to the fair market value as the standard of compensation.

1. **The Discounted Cash Flow Method**

The valuation method most commonly used for determining fair market value is the Discounted Cash Flow Method (DCF method). This is particularly true for the valuation of entire business entities, but it is, in principle, suitable for valuing very different kinds of assets.\(^8\)

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The DCF method follows the "income approach". According to this approach, the value of an object does not depend on historical cost but is equivalent to its ability to create financial benefits for the owner in the future. A hypothetical willing buyer of an object will not normally be interested in what the former owner has spent on an object but in what can be gained from it in the future. The fair market value is therefore not based on historical data but on future expectations.

This is why, for example, book value is generally not accepted as a method for determining fair market value. Book value means the difference between the enterprise's assets and liabilities as recorded on its financial statements or the amount at which the tangible assets appear on the balance sheet, representing their cost after deducting accumulated depreciation in accordance with generally accepted accounting principles. To establish book value, accounting conventions and legal rules have to be observed which are designed for other purposes (reporting, taxation, etc.) than valuation. Book value, therefore, is an unfortunate colloquialism from a valuation perspective. Being actually an accounting concept, it is of little help for valuation purposes.

The DCF method values assets on the basis of their future cash flows and not, for example, of their future earnings or profits. The focus on cash flows has the advantage of not depending on accounting conventions that vary from country to country and that leave a margin of appreciation to the owner. Cash flows are therefore better comparable.

The analysis takes place in two steps. First, a forecast must be made in order to estimate the cash flows that can be expected. Second, the accumulated future cash flows have to be discounted in order to calculate the present value of the expected future cash flows. The discount factor should reflect the time value of money and the risk. The appropriate discount rate is generally calculated on the basis of the Capital Asset Pricing Model, which helps to identify the (opportunity) cost of capital of the valuation

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79 For the income approach in general, as opposed, for example, to an asset-based approach or a market approach, see Pratt, supra, footnotes 35, 147 et seq.


81 World Bank Guidelines, supra, footnote 45, 1383.

82 Pratt, supra, footnote 35, 256.

83 Nevertheless, it has been pointed out by Stauffer that actually paid sales prices in transactions of oil companies have been shown to come close to their adjusted book values. The main items for adjustment would be inflation, depreciation and the costs for research and development. Depreciation should be adjusted in order to come as closely as possible to real depreciation. Research and development should be treated as "investment" rather than as "costs" and thereby contributes to the value of the asset. It remains to be seen whether this approach will find wider support in valuation theory and in the practice of international tribunals. T. Stauffer, Valuation of Assets in International Takings, 17 Energy Law Journal (1996) 459, 485 et seq.

84 This takes into account the basic financial principle that "one dollar today is worth more than a dollar tomorrow" because the dollar of today may be invested in other profitable enterprises. R. Brealey and S. Myers, Principles of Corporate Finance (Boston 2006) 16.

85 This reflects the principle that "a safe dollar is worth more than a risky one"; ibid., 17.
object.86 Inflation is usually not taken into account because, in general, nominal instead of real cash flows and discount rates are used.87

It is characteristic of the DCF method that during the entire valuation process all data and assumptions used in the capitalization are market oriented.88 This is important for the forecasting as well as for the discounting.

As regards the forecasting, the decisive task is to identify the so-called “value drivers”89 that are important for the generation of cash flows. How this is done depends on the particular valuation object. Generally, past data are helpful but should not simply be taken as representing future prospects.90 In international practice, the factors have been identified with regard to large housing projects,91 petroleum enterprises92 or TV stations.93

The forecasting is done from the perspective of a “hypothetical willing buyer” or “a reasonable businessman”,94 and not from the individual viewpoint of one specific buyer. It is, thus, important to assess the different value drivers put forward by the parties’ experts from the perspective of the market participants. For this, verifications by independent financial analysts or market analysing agencies, for example, can be helpful.95

With regard to the process of discounting, reference to the perceptions of the market are even more important. This is true for the determination of the relevant opportunity costs of capital, i.e. the time value of money and for the risk.

The assessment of risk associated with future cash flow clearly represents a particular challenge in the valuation process. This is primarily due to the fact that the perceptions

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86 Ibid., 16 et seq.; Pratt, supra, footnote 35, 165.
88 Damodaran, supra, footnote 78, 12; Pratt, supra, footnote 35, 171.
89 A. Rappaport, Creating Shareholder Value (New York 1986) 50; Copeland et al., supra, footnote 87, 137.
91 In Starrett Housing, the calculation was based on the revenues from sales and resales of apartments, parking spaces and heavy-duty construction equipment; Starrett Housing Corp. v. Iran, supra, footnote 46, para. 305.
92 In Phillips Petroleum, although the enterprise had not started operation, the expert made his forecast on the basis of what he identified as the main value drivers: the existing reservoir of oil within the area of the concession; and the world market prices of oil. Phillips Petroleum v. Iran, supra, footnote 23, paras. 112 et seq.
93 In CME v. Czech Republic, the most important factors were the share and the size of the advertising market. As for the forecast of costs and expenses, the programme and production costs were identified as being the most relevant with regard to the expected cash flow. CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, Final Award on Damages, 14 March 2003, 9 ICSID Reports (2006) 264, para. 571.
94 In Starrett Housing, the Tribunal based the value of the expropriated asset on the expectations of a “reasonable businessman” who would have wanted to purchase the asset on the valuation date. Starrett Housing Corp. v. Iran, supra, footnote 46, para. 305.
95 Independent media analysts were, for example, referred to in CME v. Czech Republic, supra, footnote 93, para. 585.
of risk and the readiness to accept risk differ greatly from one individual to another. The DCF method, however, allows to disregard these subjective estimations. It measures the risk on the basis of the mechanisms of the financial market.

Capital market theory divides risk into two components: systematic risk; and unsystematic risk. The first is the risk that investors undertake by investing money in enterprises and not in safe securities, such as government bonds. This general risk includes macroeconomic developments, business fluctuations, political crises or environmental disasters. The other is the risk that is associated with the particular enterprise in question. This specific risk includes market share, goodwill, relationships to customers and suppliers as well as other competitors.

According to the DCF method, the specific risk is not reflected in the discount factor. This is explained by the assumption that the investors do not invest in one single enterprise but hold a diversified portfolio. In this way, the specific risks of a number of different enterprises are balanced. The specific risk is therefore regarded as "diversifiable" risk. If there are specific uncertainties about the future cash flows, they should be measured in the forecast, that is, in the numerator of the DCF formula.

The general risk, by contrast, is not diversifiable. It is regarded as the market risk premium which the investors expect from the market for not investing in safe securities but in enterprises. The fact that not all investments are equally risky is taken into account by the so-called "beta" factor. The beta shows whether an investment in a particular enterprise is riskier than the average market return. Betas are usually analysed and published for different types of enterprises and industries. A beta of 1 is equal to the market risk premium; a beta of 0 means risk free. Therefore, a beta less than 1 indicates that the enterprise is less risky than the average market risk; a beta of more than 1 indicates that the enterprise is riskier.

The Tribunal in *Phillips Petroleum* followed this method of valuation—put forward by the Claimant's expert—very clearly and transparently. The applied discount rate of 4.5 per cent was explained by the reference to average real rates of return to investors in U.S. non-financial corporations, which at the time of expropriation were 6 per cent. As it was generally held that investments in oil enterprises were less risky

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96 Pratt, *supra*, footnote 35, 166.
97 Id.
100 Brealey and Myers, *supra*, footnote 84, 162; Pratt, *supra*, footnote 35, 166.
102 Rappaport, *supra*, footnote 89, 57 et seq.
103 Ibid., 58; Brealey and Myers, *supra*, footnote 84, 167.
104 Pratt, *supra*, footnote 35, 175 et seq.
106 Ibid., at para. 136.
than average investments in the market, the discount rate was reduced.\textsuperscript{107} The particular risk of expropriation was not taken into account because the effects of the expropriation or the threat of expropriation should not be taken into account when valuing the property's fair market value at the time of an expropriation.\textsuperscript{108}

One of the important advantages of the DCF method is that the discount factor is normally not much disputed. As the market risk premium and betas are known to all valuation experts, there is not much about which to disagree.

This was clearly shown in \textit{CME v. Czech Republic}\textsuperscript{109} While the valuations of the two opposing parties differed in the amount of US$ 200 million, this was not because of the discount rate. Both experts agreed on the discount rate of 10.83 per cent.\textsuperscript{110} The difference lay in the future prospects of the enterprise, i.e. the forecast. Here, the Tribunal was in the position to assess the purported assumptions and numbers and adjusted them according to estimations and studies undertaken by independent third parties and experts.

One can conclude that the DCF analysis is not only a widespread method of valuation in economic practice but can also be applied very well in international decision making for determining the fair market value of an expropriated asset. Since the adjudicating body will hardly have to worry about the discount rate, it can concentrate on assessing the forecast of future cash flows put forward by the parties, preferably comparing them to opinions of independent analysts.

It has to be emphasized, however, that the result is the fair market value of the asset, which does not necessarily come close to the price an actual buyer has paid or is ready to pay for the asset. This was clearly shown in \textit{CME v. Czech Republic}. While the fair market value of the media enterprise CNTS, running the successful TV channel TV Nova, was identified as representing US$ 290 million, an actual buyer, a Scandinavian broadcasting enterprise, actually offered US$ 400 million for it only five months before the expropriation.\textsuperscript{111} A year and a half later, the Claimant bought TV Nova back for the amount of US$ 642 million.\textsuperscript{112} This does not prove that the calculation of the fair market value was wrong, but it shows that the subjective value of an object to one particular buyer in real life may well differ from the price a "hypothetical willing buyer" is expected to pay.

2. \textbf{The comparative method}

Another method for determining the fair market value of an object is to look at actually paid prices for comparable items on the market. However, due to the above-

\textsuperscript{107} ID. The specific risk was reflected in the forecast—in particular concerning the projection of future oil prices—and not in the discount rate. This was heavily criticized by the Iranian arbitrator; \textit{Phillips Petroleum v. Iran}, Statement by Judge Khalilian, 21 Iran–U.S. Claims Tribunal Reports (1989) 194, 229.

\textsuperscript{108} See, for example, the World Bank Guidelines, supra, footnote 45, 1382.

\textsuperscript{109} \textit{CME v. Czech Republic}, supra, footnote 93.

\textsuperscript{110} Ibid., at para. 564.

\textsuperscript{111} Ibid., at para. 553.

\textsuperscript{112} The Financial Times, 14 December 2004.
COMPENSATION AND DAMAGES

mentioned difference between market price actually paid and the fair market value, it is necessary that a sufficient number of comparative transactions have actually taken place and information about them be available. Only under these conditions it is possible to balance the different subjective perceptions of the value of the object.

In international practice, the comparative method has been applied for determining the value of pieces of land.\textsuperscript{113} For the valuation of entire businesses, this method is difficult to apply. Generally, each company differs from the other by a number of factors, which makes it almost impossible to find a sufficient number of "comparable companies".\textsuperscript{114}

For an international court or tribunal, the application of the comparative method is, therefore, advisable only for assets which are not highly individualised and not very complex.\textsuperscript{115} As a matter of principle, it is necessary that there be enough comparable transactions on which information is available. Only under this condition can actually paid prices be regarded as representative for the fair market value.

3. MULTIPLES

The use of multiples for valuation purposes combines the approaches of the two above-mentioned methods into a method that is relatively easy to apply. First, it is income-oriented, as it is—like the DCF method—based on the assumption that the value of an object is not related to its historical cost but to its future performance. Second, it is a comparative method, because the "multiples" are determined on the basis of actually paid market prices.\textsuperscript{116}

To arrive at the value of an asset by using multiples, one has to take a particular variable of the company's performance, such as cash flow, earnings, EBIT\textsuperscript{117} or EBITDA,\textsuperscript{118} and multiply it by a certain factor.\textsuperscript{119} This factor is primarily derived from sales prices of comparable enterprises. Multiples are regularly published for specific types of enterprises and industries.

As valuations by multiples are necessarily rather inexact, they are also called "rules of thumb".\textsuperscript{120} They are generally recommended only for smaller businesses but are in practice also applied with regard to bigger enterprises.

\begin{footnotes}
\item[114] The Comparative Company Method has, however, gained a certain acceptance in the United States, where the data are collected and accessible on a broader basis. Gabehart and Brinkley, \textit{supra,} footnote 34, 39 \textit{et seq.;} Pratt, \textit{supra,} footnote 35, 203 \textit{et seq.}
\item[115] For example, with regard to machinery and equipment. A. Balalan, \textit{Machinery and Equipment Valuation Approaches and Methods,} in T. West and J. Jones (eds.), \textit{The Handbook of Business Valuation} (New York 1999) 143, 146.
\item[116] See Damodaran, \textit{supra,} footnote 78, 453 \textit{et seq.;} who calls this approach "relative valuation". He deals in detail with the advantages and disadvantages of multiples, emphasizing (at 456) that "[m]ultiples are easy to use and easy to misuse."
\item[117] Earnings Before Interest and Taxes.
\item[118] Earnings Before Interest, Taxes, Depreciation and Amortisation.
\item[119] Damodaran, \textit{supra,} footnote 78, 453 \textit{et seq.;} Pratt, \textit{supra,} footnote 35, 203 \textit{et seq.}
\end{footnotes}
International tribunals have in a number of cases been confronted with valuations by the parties on the basis of multiples. In *Thomas Earl Payne v. Iran*, the Claimant valued his two enterprises in the film and electric industries by “a multiple of 10 times net average earnings for the three years preceding the taking”. The Iran–United States Claims Tribunal, however, doubted that the average earnings of the past three years of the company could possibly be a reliable indicator for its future prospects. It was of the opinion that the changed circumstances in the Iranian society after the Islamic Revolution would have affected the Claimant’s business, which included the selling and renting of American movies, so seriously that past performance could not form a basis for determining the fair market value.

In *Phelps Dodge v. Iran*, a company in the wire and cable production industry was valued by the Claimant on the basis of an earnings multiplier derived from comparative earnings multipliers of U.S. enterprises in the same industry. The Iran–United States Claims Tribunal, however, rejected the valuation by multiples in this case because it did not find that U.S. enterprises were sufficiently comparable to a start-up enterprise in the same business in Iran.

In *CME v. Czech Republic*, it turned out that the Scandinavian broadcasting enterprise SBS had not based its US$ 400 million offer for the Czech television station TV Nova on a DCF analysis but on multiples. The Tribunal itself did not refer to this selection but took the actually agreed price for granted and compared it to the fair market value by assessing the DCF valuations put forward by the parties’ experts. It did not enter into details regarding the appropriateness of applying multiples in this case or of the multiples themselves.

The use of multiples in international practice as a means of valuing the fair market value should be used with caution. As a “rule of thumb”, it is not the ideal means of applying the law. On the other hand, it is true that valuations are necessarily approximative. If the adjudicating body therefore comes to the conclusion that the main parameters of the method are appropriate and acceptable, i.e. the income approach in general and the choice of the multiple in particular, it may also apply this method in order to determine fair market value. This is even more so since, due to its simplicity and practicability, this method, despite its deficiencies, is still so widespread in practice that a court or tribunal may well find that the “hypothetical willing buyer” would apply it.

4. LIQUIDATION VALUE

If it is unlikely that the object of valuation will generate income for the owner, it is appropriate to determine its fair market value on the basis of the price for which it

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122 Ibid., para. 31.
124 Ibid., at para. 29.
125 *CME v. Czech Republic*, supra, footnote 93, paras. 514 et seq.
could be sold under liquidation conditions. The World Bank Guidelines refer to the liquidation value as:

"... the amounts at which individual assets comprising the enterprise or the entire assets of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet ..."

The liquidation value is the lowest possible value. With regard to business enterprises, the American Appraisal Foundation has emphasized that "an appraiser must investigate the possibility that the business enterprise may have a higher value by liquidation of all parts of the enterprise than by continued operation."

A number of international awards have based their calculation on the liquidation value, in particular when this was explicitly claimed by the parties. It must be emphasized, however, that the liquidation value is based on achievable sales prices and not on other figures, like historical purchase prices, adjusted book values or insurance values. As with all the other valuation approaches, it is important to apply the chosen standard and method of valuation consistently.

B. Valuation according to the Chorzów Standard

The damage that an individual has suffered from an illegal act of a State or from a breach of contract should be valued according to the actual and concrete loss. The principle of full reparation—or the "Chorzów standard"—implies, as was explained above, a subjective valuation approach.

The decisive factors and parameters for the valuation depend on the nature of the obligation violated and on the circumstances of the case. It is the task of the court or tribunal to identify them on the basis of the available evidence. There is no simple rule to be applied in all cases.

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126 Gabehart and Brinkley, supra, footnote 34, 23 et seq.; Pratt, supra, footnote 35, 29.
127 World Bank Guidelines, supra, footnote 45, 1383.
128 It is therefore hardly understandable why the ICSID Tribunal in ME Cement v. Egypt reduced the scrap value of a ship—which must be regarded as its lowest possible liquidation value—even further. Middle East Cement Shipping and Handling Co. S.A. v. Arab Republc of Egypt, Award of 12 April 2002, 18 ICSID Review–F.I.L.J. (2003) 602, at para. 150.
132 Harold Birnbaum v. Iran, supra, footnote 130, para. 63.
133 This was the case regarding the assets of the U.S.–Iranian petroleum enterprise SISA. Sedco, Inc. v. NIIOC (Final Award), 15 Iran–U.S. Claims Tribunal Reports (1987) 23, para. 297.
134 This was the case regarding the assets of the U.S.–Iranian petroleum enterprise SEDIRAN; ibid., paras. 76 et seq.
1. **RESTITUTION OR REPLACEMENT**

After a violation of an obligation of international law, restitution would be the primary remedy. As the PCIJ held in *Chorzów Factory*:

"Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

Articles 35 and 36 of the ILC Articles on State Responsibility refer to the primacy of restitution, too. This does not only mean physical restitution of tangible assets but, of course, also restitution of sums of money.

Restitution of money renders the calculation of damages relatively easy, as was shown, for example, in *Maffezini v. Spain*, where the amount of the unlawfully transferred funds was not disputed. In *Feldman v. Mexico* and *Occidental v. Ecuador*, reparation consisted in the repayment of taxes and duties because the enterprises had been unlawfully deprived of their preferential status in this respect.

Instead of physical restitution, the replacement value of a damaged asset or the costs for repairing it may be appropriate. This was, for example, the method chosen by the International Court of Justice (ICJ) in *Corfu Channel*. The replacement value, however, was eventually reduced by the value of some usable equipment and by the scrap value of the destroyed ship. The ICJ thereby clearly followed the subjective valuation approach, comparing the concrete financial situation of the owners with and without the breach, assuming that they could still use the remaining equipment and sell the scrap on the market.

However, the replacement value is the appropriate means to achieve full reparation only under the condition that the asset in question is replaceable and that no other damage actually occurred or can be proven. Additionally, the assets must be marketable also in a used condition. Otherwise, the claimant will not be in a position to purchase comparable assets by spending the amount of damages awarded. This has also been

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135 *Case Concerning the Factory at Chorzów*, *supra*, footnote 17, at 47.
136 As to the relationship of restitution and compensation as different forms of reparation, see Crawford, *supra*, footnote 14, at 213 et seq. and 261 et seq.
138 Ibid., at para. 95. The Tribunal had, however, to decide on an appropriate award on interest; ibid., at para. 96.
141 In this case, the loss incurred was the complete destruction of one ship, the destroyer "Saumarez", and severe physical damage to another. The destroyed ship was valued at its replacement cost, the damage to the other ship was valued by the necessary cost of repair. *The Corfu Channel Case (United Kingdom v. Albania) (Assessment of the Amount of Compensation)*, Judgment of 15 December 1949, ICJ Reports 1949, 243, 249.
142 This is problematic with regard to assets with specific individual qualities or unique business opportunities.
affirmed in international jurisprudence with regard to industrial equipment, in particular in the oil industry.\textsuperscript{113}

2. Costs and expenses

The valuation of damages on the basis of past costs and expenses comes very close to restitution. This seems to be a “solid” valuation approach that has been applied in numerous cases where other items of damages were considered to be too speculative or were not supported by sufficient evidence.\textsuperscript{114}

In many expropriation cases, the amounts of the original investment and other costs were the most important basis for the valuation. This was, for example, the case in Phelps Dodge Corporation v. Iran,\textsuperscript{115} Biloune v. Ghana,\textsuperscript{116} Metalclad v. Mexico,\textsuperscript{117} or Wena Hotels v. Egypt.\textsuperscript{118} The tribunals referred to this as representing the “fair market value” of the investments.\textsuperscript{119} This would only be correct, if under the given circumstances it could be assumed that the amounts actually spent by the investors were equivalent to the price a hypothetical willing buyer would be ready to pay. This cannot generally be taken for granted. The fair market value might be less or more, depending on the reasonableness of the invested amounts and the economic prospects of the investment project at the expropriation date from the perspective of the market participants.

3. Lost profits

In order to achieve full reparation, it is sometimes necessary to take into consideration that the injured person has suffered loss of income opportunities as a consequence of the illegal act. This loss might either appear as an additional item of damages—the dichotomy of 	extit{damnum emergens} and 	extit{lucrum cessans} suggests that this is the “normal case”—or as the primary or sole item of damages.

\textsuperscript{113} Aminoil v. Kuwait, supra, footnote 38, para. 178(3); Oil Fields of Texas, Inc. v. Iran, 12 Iran–U.S. Claims Tribunal Reports (1986) 308, para. 44; Phillips Petroleum Corporation v. Iran, supra, footnote 23, para. 160; Petrolane, Inc. v. Iran, 27 Iran–U.S. Claims Tribunal Reports (1991) 64, para. 108.

\textsuperscript{114} For example, in Pope & Talbot, the “heads of damages” were enumerated as “investor’s out of pocket, legal fees and disbursements, accountant’s fees and disbursements, Lobbyist”. The costs for internal personnel that dealt with the preparation and pursuance of the claim were, however, not accepted because they were considered to be “fixed costs”. Pope & Talbot Inc. v. Canada, Award in Respect of Damages of 31 May 2002, 41 I.L.M. (2001) 1347, paras. 82 et seq. In Autopista v. Venezuela, the Tribunal was of the opinion that, even in the absence of the breach, future profits would have been very unlikely. It awarded only out of pocket expenses. Autopista Concessionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, Award of 23 September 2003, paras. 236 et seq., 362; available at : www.worldbank.org/icsid/cases/Award_Total.pdf. Similarly, in MTD v. Chile, the valuation of damages was based only on the original investment, additional expenses incurred for the project and financial costs. MTD v. Chile, supra, footnote 62, paras. 240 et seq.

\textsuperscript{115} Phelps Dodge v. Iran, supra, footnote 123, para. 31.

\textsuperscript{116} Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre & Gov’t of Ghana, Award on Damages and Costs of 30 June 1990, 95 I.L.R. (1994) 211, 229.

\textsuperscript{117} Metalclad, supra, footnote 90, para. 122.

\textsuperscript{118} Wena Hotels, supra, footnote 90, para. 125.

\textsuperscript{119} The reimbursement of the original investment and additional expenses is sometimes labelled as the “book value” method because the amounts appear on the balance sheet and on the income statement. They might, however, also be presented in a different way, by invoices or other evidence.
Lost profits are particularly important for the calculation of damages after contract breaches. As contracts are normally concluded for the main purpose of gaining profit, it is normally required to include such profit in the calculation of damages in case of a breach. If the breaching party was obliged to repay only the amount of wasted costs, the other contracting party would be transformed into a lender. Furthermore, States would be induced to breach contracts that turn out to be beneficial to their partners. Therefore, the “benefit of the bargain” has to be reflected in the calculation of damages.

It must, however, not be forgotten that, as a rule, certain expenses and costs are the necessary prerequisites for the achievement of income or profits. In combining both items of damages, one must avoid over-compensation by double counting. To award both expenses and profits would, in some cases, mean “to have the cake and eat it too”. One must, therefore, carefully distinguish the facts and circumstances of the different cases.

(a). Lost Profits as an Additional Item of Damages

Double counting does not occur if wasted costs and expenses are not directly related to the expected profits. Costs for repair, delay or deviation might therefore be awarded in addition to lost profits without any problem.

This was shown exemplarily in Wimbledon, where the PCIJ held that the denial of passage did not only cause costs for the deviation, such as costs of gas, equipment and personnel, but in addition the loss of freight during the period in question. Similarly, in Robert May and Shufelt, the main item of damages was the loss of profits from the concession agreement. Additionally, the claimants suffered damages from travel costs and other expenses not related to their obligations in the concessions but to inconveniences and problems in connection with the threat of the nationalization and other unlawful behaviour by the State.

More recently, the ICSID Tribunal in Amico v. Indonesia awarded an amount for the “loss entailed by disturbances and burdens”, which resulted from the action of police and armed forces who had supported the takeover of the hotel, in addition to the main claim for lost profits from the revocation of a hotel licence. The damage caused by the police and armed forces had nothing to do with the necessary investments for the operation of the hotel.

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150 See Himipunna, supra, footnote 67, para. 291.
151 Id.
152 Ibid., at para. 242.
153 Case of the S.S. “Wimbledon” (Great Britain, France, Italy, Japan v. Germany, Poland intervening), PCIJ 1923, Series A, No. 1, 15.
154 Ibid., at 31.
155 Robert H. May (United States v. Guatemala), Award of 16 November 1900, in Whiteman, Damages in International Law, Vol. III (1943) 1704, 1709.
156 Shufeldt Claim (United States v. Guatemala), Award of 2 November 1929, 2 R.I.A.A., 1079, 1099 et seq.
157 Amico v. supra, footnote 67.
158 Ibid., at para. 166.
Sometimes it is necessary to add lost profits to the replacement value of an asset. This was the case in Sedco, Inc. v. NIoC. The Tribunal held that the replacement value of the oil rigs alone would not be sufficient because the Claimant was additionally deprived of income from renting them during at least nine months, the necessary period of time to buy and install comparable oil rigs. Although referring to the “fair market value”, the Tribunal was actually trying to re-establish the financial situation that would have existed absent the illegal act and based its calculation on the amount of profits obtained in Iran previously.

Double counting is not always appropriately avoided in international arbitral practice. For example, the ICSID Tribunal in LETCO v. Liberia dealt with the breach and withdrawal of a forestry concession on the basis of Liberian contract law and explained that the damages were composed of “the estimated value of the net worth of LETCO and LLIC at the date operations were terminated in Liberia”, on one hand, and on “future profits that would normally be expected from the forestry exploitations by LETCO and from the sawmill of LLIC during the period of the concession”, on the other. A separate item of damages representing the “joint net patrimonial worth of LETCO and LLIC”, in addition to future profits, is, however, not entirely comprehensible. This is even more so as the installations utilized during the concession were to become the property of Liberia at the end of the concession.

In Himpurna California, the international Tribunal explicitly referred to the danger of double counting. The U.S. investor had by a long-term contract agreed to undertake the exploitation of Indonesian geothermal resources, to plan and build electric power plants, and to produce and deliver electric power. The Indonesian partner had accepted a number of contractual obligations, including the purchase of the electric power. Already at a very early stage it turned out that the Indonesian partner was not in a position to fulfill its contractual obligations. The Tribunal based the calculation of damages on the concept of damnum emergens and lucrum cessans followed by “countless international arbitrations” and in accordance with Article 1246 of the Indonesian Civil Code. It emphasized that claimants are on solid ground when they ask to be reimbursed monies they have actually spent in reliance on the contract. The investor undertook these costs in good faith and in reliance on the performance of the other party without reference to how judicious or providential those expenditures were.

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59 It started the calculation of lost profits from 60 days after the expropriation because, according to the Tribunal, this would have been the necessary time to demobilize the oil rigs and place them somewhere else. Sedco, Inc. v. NIoC (Final Award), supra, footnote 133, para. 86.


61 Ibid., at 371.

62 Ibid., at 374.

63 Ibid., at 376.

64 Id.

65 Himpurna, supra, footnote 67.

66 Ibid., para. 242. See already, supra, footnote 152 and accompanying text.

67 Ibid., para. 235.

68 Ibid., para. 241.
turned out to be.\textsuperscript{169} It should therefore not be the task of the Tribunal to question their usefulness and reasonableness.\textsuperscript{170} The Tribunal must only examine if the expenditures were directly related to the contract, thus establish the causal relationship between the breach and the loss, and adjust the claims accordingly.\textsuperscript{171}

With regard to the calculation of lost profits as an additional item of damages, the Tribunal made two important points. First, it emphasized that the calculation of lost profits must be distinguished from the DCF method.\textsuperscript{172} To avoid double counting, lost profits as an additional item of damages must result in a lower amount because future net cash flow generally includes all the amortisation of investment there will ever be.\textsuperscript{173} The calculation of lost profits, therefore, must reduce future net cash flows by allowing a proper measure of amortisation.\textsuperscript{174}

Second, the Tribunal pointed out that the calculation of lost profits must take into account the risk of default, not by intentional breach but by default due to larger forces—political, social, and, in any event, macroeconomic—which \textit{de facto} paralyses contractual performance.\textsuperscript{175} It thereby addressed the issue of country risk.\textsuperscript{176} It emphasized that, even with government bonds, it makes a difference if the issuer is “Switzerland or Swaziland”.\textsuperscript{177} In calculating lost profits, one must take into account that even absolute obligations to pay may—at least in part—sometimes turn out to be “paper entitlements”.\textsuperscript{178} These considerations are important when estimating the financial situation the injured person in all probability would be in if the breach had not occurred.

To conclude, the risk of double counting with regard to long-term contracts can be avoided by clarifying from the beginning how the necessary expenditures will be reflected in the calculation: they can either be taken into account in the process of calculating profits or be deducted from the total of the expected income. The first method, which was the one preferred by the Hinpuma Tribunal, is more in accordance with the \textit{damnum emergens} and \textit{lucrum cessans} concept. It is, however, difficult to apply because it is not supported by common economic valuation principles.

\textsuperscript{169} Id.
\textsuperscript{170} Ibid., para. 258.
\textsuperscript{171} Ibid., para. 261 and paras. 270 \textit{et seq}.
\textsuperscript{172} Ibid., para. 240.
\textsuperscript{173} Ibid., para 242.
\textsuperscript{174} Id. With regard to unpaid invoices, the Tribunal suggested: “[W]hat should be measured is the lost benefit of the claimant, and this means, broadly, invoices minus both operating or variable costs and amortisation of past investment. To pursue the simplified assumptions just made, if one is satisfied that 50\% of the $ 30 profit slices would suffice to amortise capital investment over the life of the contract, the proper recovery on account of expectancy damages in a termination scenario should include only $ 15 of each invoice.” Ibid., paras. 249 \textit{et seq}.
\textsuperscript{175} Ibid., para. 364.
\textsuperscript{176} Id.
\textsuperscript{177} Ibid., para. 358.
\textsuperscript{178} Ibid., para. 364. The Tribunal did not award lost profits on investments not yet made, although the investor had the contractual rights to build more facilities in order to increase the production of electric power. In the eyes of the Tribunal, to ask for those profits on investment not yet made would amount to an “abuse of rights”. Ibid, para. 318. This was, however, criticized by one arbitrator in his separate statement and by commentators. See J. Gotanda, \textit{Recovering Lost Profits in International Disputes}, 36 Georgetown Journal of International Law (2004) 61, 106.
The second alternative, by contrast, is not exactly compatible with the dichotomy of *damnnum emergens* and *lucrum cessans*. The claimant will not receive back his/her “expenditures incurred” and “profits lost”, but he/she will be put as far as possible in the financial situation he/she would in all probability be in without the breach. It seems the preferable approach, because it is more in accordance with common economic valuation principles and therefore leads to a more transparent procedure and comprehensible result. It is similar to the DCF method as described above, but the factors put into the present value formula are not based on the expectations of the market and the mechanisms of the capital market but on the actual contract terms, the financial situation of the investor and the particular risk connected to the investment. The risk has to be assessed by the tribunal and cannot be regarded as diversifiable through an investor's diversified portfolio. The calculation of lost profits is, therefore, similar to the assessment of investment value.

(b). *Lost Profits as the Primary or Sole Item of Damages*

In some cases, it appears that the damage actually incurred does not consist in the sunken costs or physical damage but primarily or even exclusively in the loss of expected profits. The valuation, therefore, must concentrate on the measurement of these foregone opportunities of economic benefit.

Already very early cases concentrated on the loss of profits and excluded other forms of damage from valuation. In *The Wanderer*, *The Kate* or *The Favourite*, the damage consisted exclusively in the loss of profits from the sale of freight. The Tribunal in *The Kate* held that the costs incurred by the detention of the ship and its crew were fully taken account of by the award of lost profits:

“Inasmuch as the profits for the estimated catch of the Kate during the period of detention have been allowed, there was no pecuniary damages [sic] suffered on the account of the detention of the officers and the crew.”

The Iran–United States Claims Tribunal dealt with damages that consisted mainly in the loss of income or profit in several cases. For example, in *Seismograph Service Corp. v. Iran*, the damage caused to the foreign investor by an export ban, which was not considered as an expropriation but as “other measures affecting property rights”, was
measured exclusively by the profits which it was deprived of. The Tribunal calculated the damage on the basis of the foregone profits that could have been earned by renting the seismic equipment in other places:

"[T]he Tribunal finds that the actual damage suffered by the Claimant as a result of the deprivation of its right to export and, therefore, of the use of the Property outside Iran is limited to the loss of the profit that it would have earned with this Property during the working life of the Property."\(^{186}\)

The calculation in *Amco v. Indonesia*\(^ {187}\) also concentrated on lost profits. The relationship between the parties was based on a "Lease and Management Agreement" which provided for the operation of a hotel and an office building complex. The Claimant did not own the hotel but had the contractual right to operate it and to gain profits from this operation. After various disagreements about the terms of the contract and the fulfilment of the mutual obligations, the Indonesian partner, by physical force and with the help of Indonesian police and armed forces, took over control of the management of the hotel and the buildings. Shortly afterwards, the Indonesian authorities withdrew the investment and management licences of the Claimant.

According to the second and final decision in this case, the damage was to be assessed exclusively on the basis of the lost profits from the operation of the hotel.\(^ {188}\) The Tribunal based its valuation on the "base period" of 15 months during which the hotel was operating under the management of the Claimant on the assumption that these profits would roughly stay the same for the remaining term.\(^ {189}\) The present value of these profits was calculated until the contractual end of the concession. This was actually not an application of the DCF method,\(^ {190}\) but it nevertheless represented an appropriate way of calculating lost profits in this case. The choice of parameters put into the present value calculation (i.e. "base period" instead of forecast, discount factor based on inflation and risk and not on opportunity cost of capital\(^ {191}\) ) was accurately reasoned and adapted to the specific circumstances of the case. As it was not the task of the Tribunal to determine the fair market value of the investment but the loss actually incurred by the investor, it succeeded in finding a well-founded solution within its margin of discretion.

Also, the Tribunal in the NAFTA case *S.D. Myers v. Canada*\(^ {192}\) calculated the damage actually incurred on the basis of lost profits.\(^ {193}\) According to the Tribunal, a temporary Canadian export ban on a hazardous waste substance amounted to a violation

\(^{186}\) Ibid., at para. 305.
\(^{187}\) *Amco II*, supra, footnote 67.
\(^{188}\) *Amco II*, ibid., at paras. 196 et seq.
\(^{189}\) Ibid., at para. 203.
\(^{190}\) Although the Tribunal’s references to the expert opinions might give this impression; ibid., para. 198.
\(^{191}\) Ibid., at para. 182.
\(^{193}\) Ibid., at paras. 173 et seq.
of the rights to "national treatment" (NAFTA Article 1102)\textsuperscript{194} and "fair and equitable treatment" (NAFTA Article 1105).\textsuperscript{195} In its Award on Damages, the Tribunal held:

"As stated above, the Tribunal has determined that the appropriate compensation is the value of SDMI's lost net income stream."\textsuperscript{196}

The particular difficulty in this case was the fact that the company had not even started the operation of processing the hazardous waste in Canada before the export ban. It had only undertaken investigations of the market with regard to available material and potential customers. The Tribunal, however, referred, \textit{inter alia}, to the success and proven know-how of the company in the U.S. market, to its extensive marketing activities and efforts in contacting potential customers, to the draft inventory of existing material, and to the actual amount of material available in the Canadian market. It emphasized that the advantages of the "first mover" and the comparably low prices which it was able to offer must also be taken into account.\textsuperscript{197} As a consequence, the Tribunal took for granted a high probability of success in the Canadian market by the claimant.\textsuperscript{198}

This case confirms the principle that damages are preferably and most appropriately valued according to the subjective approach and that the specific competences, skills and plans of the claimant have to be taken into account. This is particularly important with regard to the calculation of damages on the basis of lost profits.

4. \textbf{Valuation date}

As the value of an object changes with the passage of time, in any valuation process it is necessary to define the particular valuation date. In the context of expropriations, this should be the moment "immediately before the time at which the taking occurred or the decision to take the asset became publicly known".\textsuperscript{199} With regard to the calculation of damages, the valuation date is less clear. In order to re-establish as far as possible the financial situation of the injured person, the valuation perspective of a "hypothetical buyer" or of a "reasonable businessman" at the time of the internationally wrongful act or the breach of contract should not be decisive. Subsequent events may affect the extent of the damage caused by the illegal act and hence must be reflected in the calculation. This does not only comprise consequential damages but also a possible increase in value of the valuation object and other factors. The PCI\textsuperscript{J} clearly explained in \textit{Chorzów Factory}:

"It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate ..."\textsuperscript{200}

\textsuperscript{194} S.D. Myers, Inc. \textit{v.} Canada, Final Award on the Merits of 13 November 2000, 8 ICSID Reports (2005) 18, paras. 256.

\textsuperscript{195} Ibid., para. 268.

\textsuperscript{196} S.D. Myers, Inc. \textit{v.} Canada (Damages), supra, footnote 192, para. 174.

\textsuperscript{197} Ibid., paras. 182 et seq.

\textsuperscript{198} Ibid., para. 214.

\textsuperscript{199} World Bank Guidelines, supra, footnote 45, 1362.

\textsuperscript{200} Case Concerning the Factory at Chorzów, supra, footnote 17, 47.
It underlined the importance of the different valuation dates by drafting two sets of questions for the valuation experts who were to find out whether the value of the undertaking was higher at the time of the illegal act or at the time of the Judgment.\textsuperscript{201} This comparison was necessary to ensure that the Claimant was not awarded less than the "value of the undertaking" at the time of dispossession, which must be compensated even in case of a lawful expropriation. The amount of compensation after a legal expropriation should represent the lower limit of the Award.\textsuperscript{202} An increase in value between the time of dispossession and the date of the Award should, however, be taken into account.\textsuperscript{203}

In international practice, the valuation date is often not very much reflected upon. This can be explained by the fact that an increase in value after unlawful acts seems unlikely. On the contrary, the circumstances of the cases, in particular in investment disputes, normally have the effect of diminishing the value of the affected property.

By contrast, the European Court of Human Rights has already quite frequently dealt with increasing values. Despite the fact that according to Article 41 of the European Convention on Human Rights the Court may limit itself to awarding "equitable satisfaction" after a breach of the Convention, it often refers to the principles of the PCIJ in \textit{Chorzów Factory}.\textsuperscript{204} In doing so, it has repeatedly awarded amounts that took into account the increase in value of unlawfully expropriated property between the time of dispossession and the date of the judgment.\textsuperscript{205}

Also, with regard to the calculation of lost profits, the perspective of a reasonable businessman in the past does not seem appropriate. The ICSID Tribunal in \textit{Amco v. Indonesia} emphasized that, according to the principles developed by the PCIJ in \textit{Chorzów Factory}, information that became known after the date of the wrongful act had to be taken into account:

"If the purpose of compensation is to put Amco in the position it would have been in had it received the benefits of the Profit-Sharing Agreement, then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980."\textsuperscript{206}

The Tribunal carefully distinguished between the fair market value in case of a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{201} Ibid., at 51 \textit{et seq.}
\item \textsuperscript{202} See already the observations by Judge Rabel in \textit{Chorzów Factory}, PCIJ 1928, Series A, No. 17, 66, 67: "A government which has expropriated an object—with no right to do so—is obliged to pay the value of the object at the moment of dispossession plus interest on this value, and it is also responsible for damages caused in so far as such damage exceeds the amount mentioned above."
\item \textsuperscript{203} Phillips Petroleum Co. Iran v. Iran, supra, footnote 23, at para. 110.
\item \textsuperscript{206} \textit{Amco ii}, supra, footnote 67, at para. 186.
\end{itemize}
\end{footnotesize}
lawful taking and the principle of full reparation after breaches of international or contractual obligations:

"It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique ..." 207

The Tribunal emphasized that the developments up until the time of the Award had to be taken into account:

"Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitutio in integrum. The only subsequent factors relevant to value which are not to be relied on are those attributable to the illegality itself." 208

The assessment of lost profits therefore was divided into two periods: the first period ran from the date of the illegal act up to the date of the Award; the second from the date of the Award up to the end of the concession. 209 As for the first period, the Tribunal relied on known data regarding tax rates, exchange rates and inflation rates. 210 A discount factor including a risk factor was not needed for the first period. 211 For the second period, the Tribunal made a present value calculation of lost future profits. 212

It follows, thus, from the principle of full reparation as formulated by the PClJ in Chorzów Factory, that the valuation is not normally limited to the perspective of the date of the illegal act or some other date in the past. An increase in value of the valuation object, consequential damage, subsequent events and information, at least up until the date of the judgment or award, must be taken into account in the evaluation of damages.

This is not a contradiction to the general principle of foreseeability. The criterion of foreseeability is a limitation of damages and must not be confused with a guarantee that foreseeable damage must be compensated even if it did not occur. This is important for the calculation of lost profits which are not included in an award of damages if, even though they were foreseeable in the past, it turns out they would not in fact have been obtained, even if the illegal act had not been committed. 213

5. INTEREST

In order to achieve full reparation in international proceedings, it is necessary to make an appropriate finding on interest. One must take into account that between the

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207 Id.
208 Id.
209 Ibid., at para. 196. See, however, M. Ball, Assessing Damages in Claims by Investors against States, 16 ICSID Review–F.I.L.J. (2001) 408, 417, who criticized this approach as "arbitrary".
210 Amco II, ibid., at paras. 247 et seq.
211 Ibid., at paras. 255 et seq.
212 See already supra, at footnote 190 and accompanying text.
213 See, for example, Autopista v. Venezuela, supra, footnote 144, para. 365.
date of the illegal act (or the date on which the damage occurred) and the actual payment of the amount of damages, the injured person cannot use or invest the respective amounts of money.

According to the subjective valuation approach, the determination of the rate of interest, its duration and the question of compounding should be based on the concrete financial situation of the injured person. If, for example, a loan was taken in order to bridge the period without the money, it is evident that the interest actually paid becomes the measure of damages. If the taking of a loan was not necessary because the injured person had enough money at his or her disposal, one has to consider that he or she could have used or invested the money otherwise. It is therefore decisive to identify the available investment alternatives of the injured investor in order to achieve full reparation.

The Iran–United States Claims Tribunal convincing developed this concept in *Sylvana Technical Systems,* holding that interest should be calculated on the basis of the investment alternatives of the Claimant. Preferably, this should be commercial investment alternatives in common use in the country of the investor. A number of subsequent decisions of the Iran–United States Claims Tribunal followed this approach.

Often, these considerations are not appropriately taken into account. The ICJ in *Cosfu Channel,* for example, did not award interest at all. In many cases, interest was awarded without any particular reasoning at an "appropriate", "fair", or "reasonable" rate of 6 or 10 per cent.

ICSID and NAFTA tribunals often relied on the legal interest rate of the host State or referred to investment alternatives in the host State. This is, however, generally not

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217 Another proposal was made by Gotanda, who suggested using a rate corresponding to that of a commonly used savings vehicle in the country of the currency in which payment is to be made; J. Gotanda, *Awarding Interest in International Arbitration,* 90 A.J.L.L. (1996) 40, 56.
219 *Cosfu Channel,* supra, footnote 141, 250.
220 *Wimbledon,* supra, footnote 153, 32; *Metalclad,* supra, footnote 90, para. 128; *ME Cement v. Egypt,* supra, footnote 128, para. 175; *Tezmod,* supra, footnote 90, para. 196.
223 See, for example, *Pope & Talbot,* supra, footnote 144, para. 88; *Amico i,* supra, footnote 67, para. 281; *Southern Pacific Properties (Middle East)* v. *Egypt,* supra, footnote 7, 189, para. 222.
224 See, for example, *Feldman v. Mexico,* supra, footnote 139, para. 205; *Wena Hotels,* supra, footnote 90, para. 128.
a convincing choice. The legal interest rate of the host State is only relevant if the applicable law is exclusively the host State's law. This is often not the case. In cases of State responsibility, the applicable law is international law. As international law provides for full reparation after a violation of an international obligation, any calculation of interest that falls short of this standard is not in accordance with international law.\textsuperscript{225} Interest on investment alternatives in the host State in the context of the calculation of damages should be relevant only if it can be assumed that the investor would have invested in that State. This is not evident in most cases.

With regard to contract damages, an explicit agreement on the question of interest or choice of law clauses have to be considered first. In the absence of an exclusive choice of law, ICSID tribunals must apply the law of the host State and such rules of international law as may be applicable.\textsuperscript{226} In this case and in case of the application of general principles of law or any other legal basis for the principle of full reparation, the same approach is advisable for the calculation of interest.

Recently, inter-bank rates of interest have increasingly been referred to in international arbitration. The most favoured one is the LIBOR, the London Interbank Offered Rate.\textsuperscript{227} Normally, a certain percentage is added on top of that in order to arrive at a commercially appropriate rate of interest for international investors. This can be regarded as an attempt to make the determination of the interest rate more "objective". It is therefore an appropriate solution if the standard to be followed is an "impersonal" standard such as the fair market value. For the reasons mentioned above, it is not the ideal solution with regard to the "subjective" standard of full reparation. However, in the absence of other evidence, it is still an acceptable solution and definitely comes closer to full reparation than no interest at all.

VI. THE LIMITS OF FAIR MARKET VALUE

The dominant role that the fair market value plays in international practice, in particular in international investment disputes, may be explained by the fact that it is seemingly the only "standard of compensation" that is explicitly mentioned in numerous treaties and accepted in a number of legal systems as the appropriate measure of compensation for expropriation.\textsuperscript{228} This causes serious misunderstandings which are compounded by the fact that the term "compensation" is used in two quite different contexts: as a prerequisite for a lawful expropriation; and for the damages due as a consequence of an internationally wrongful act or a breach of contract.

\textsuperscript{225} Therefore, tribunals can disregard prohibitions or limitations of interest as they are foreseen in many Islamic countries due to the influences of the Islamic Shari'a. See, for example, \textit{Wena Hotels Ltd. v. Arab Republic of Egypt}, Decision of the Ad hoc Committee of 28 January 2002, 41 I.L.M. (2002) 933, at paras. 50 et seq.


\textsuperscript{228} Commentators also suggest applying the fair market value standard in other cases than expropriations. See, for example, \textit{Ball}, \textit{supra}, footnote 209, 409.
The ICSID Tribunal in *Amco v. Indonesia (Amco II)*\(^{229}\) was one of the first that made a clear distinction between calculation of fair market value and the *Chorzów* standard.\(^{230}\) Another remarkable Decision in this respect was the Arbitral Award in *S.D. Myers v. Canada*.\(^{231}\) Confronted with the calculation of the damages caused by a temporary export ban, which was not regarded as an expropriation but as a violation of the obligation of fair and equitable treatment, the Tribunal held:

"The drafters of the NAFTA did not state that the 'fair market value of the asset' formula applies to all breaches of Chapter 11. They expressly attached it to expropriations ... expropriations that are conducted for a public purpose, on a non-discriminatory basis and in accordance with due process of law— are 'lawful' under Chapter 11 provided that compensation is paid in accordance with the ... fair market value of the asset ... formula.

Under other provisions of Chapter 11, the liability of the host Party arises out of the fact that the government has done something that is contrary to the NAFTA and is 'unlawful' as between the disputing parties. The standard of compensation that an arbitral tribunal should apply may in some cases be influenced by the distinction between compensating for a lawful, as opposed to an unlawful, act. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor." (emphasis in original)\(^{232}\)

The Tribunal decided that in this case "the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded".\(^{233}\) Instead, it emphasized:

"[W]hatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."\(^{234}\)

Some years later, the ICSID Tribunal in *MTD v. Chile* equally stressed the difference between compensation upon expropriation and the consequences of breaches of legal obligations. On the basis of the submission of the Claimant, the Tribunal came to the following conclusion:

"The Tribunal first notes that the BIT provides for the standard of compensation applicable to expropriation, 'prompt, adequate and effective' (Art. 4(c)). It does not provide what this standard should be in the case of compensation for breaches of the BIT on other grounds. The Claimants have proposed the classic standard enunciated by the Permanent Court of Justice in the *Factory at Chorzów*: compensation should 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that [act] had not been committed.' The Respondent has not objected to the application of this standard and no differentiation has been made about the standard of compensation in relation to the grounds on which it is justified. Therefore, the Tribunal will apply the standard of compensation proposed by the Claimants to the extent of the damages awarded."\(^{235}\)

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\(^{229}\) *Amco II*, supra, footnote 67.

\(^{230}\) See *supra*, footnote 207 and accompanying text.

\(^{231}\) *S.D. Myers v. Canada (Merits)*, supra, footnote 194.

\(^{232}\) *S.D. Myers v. Canada (Merits)*, ibid., para. 308.

\(^{233}\) Ibid., at para. 309.


\(^{235}\) *MTD v. Chile*, *supra*, footnote 62, at para. 238.
With regard to contract damages, reference to the fair market value is even more displaced. As the Tribunal in *Bridas v. Turkmenistan*236 correctly held:

"Contract damages reflect the contractual context of parties. This may, or may not, mirror the market value when a bargain—the contractual asset—is lost, because the terms of the contract may give to a party more or less than the market will pay. In addition, a party may decide for its own reasons to persist in a contract which directly does not maximize the available return on its investment, a crucial component of fair market value."237

This confirms the conclusion of the Tribunal in *Himpurna California* that the application of valuation methods that are designed for determining fair market value, including the DCF method with its anchorage in capital market theory, are often not appropriate for calculating contract damages.238

This does not mean that the application of present value calculations in general is not appropriate for the calculation of damages. However, the respective parameters—that is, the denominator and the numerator of the present value formula—should not be based on market expectations, like in the DCF method, but on the comparison of the concrete financial situation of the affected person with and without the illegal act.239

In light of these prominent cases which show a tendency towards a broader acceptance of the subjective valuation approach with regard to the calculation of damages, it is somewhat surprising that the Decision by an ICSID Tribunal in *CMS v. Argentina*240 relied on the objective valuation approach stemming from the principles of expropriation even though it had stated explicitly that it was not dealing with expropriation but with a breach of a concession agreement and violations of international obligations enshrined in the applicable investment protection treaty.241 It argued that the standard of fair market value was widely accepted in respect of expropriation and might also be appropriate for other breaches if their effect resulted in important long-term losses.242 When it proceeded to the concrete calculation, however, it actually determined the damages by a comparison of the "pesification scenario" with the "non-pesification scenario",243 which hardly can be regarded as a determination of the fair market value but rather as a model example for the application of the differential method.

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237 Ibid., at 1271.

238 See already supra, footnote 172 and accompanying text.

239 Accordingly, the Tribunal in *Bridas v. Turkmenistan* based its calculation of lost profits on a present value calculation whose parameters were determined by the terms of the contracts, the legitimate expectations of the Claimant and the circumstances of the case to be the following: "[D]amages for the Respondent’s improper repudiation of the JV Agreement would be calculated as a loss of bargain and based inter alia on the following: 25 year term; net-back price $10.50; total barrels 218,560,935; discount rate 10.446%." *Bridas v. Turkmenistan*, supra, footnote 236, 1271 et seq.


241 The wrongful conduct consisted in the "pesification" of a contract with the foreign investor that dealt with the transportation of gas on the basis of mutual rights and obligations. The foreign investor was entitled to ask for tariffs which were calculated in US dollars and regularly adjusted according to a U.S. consumer price index. Due to the Argentine economic crises in the year 2000, the dollar clauses in Argentine contracts with foreign investors were repudiated. Ibid., paras. 59 et seq.

242 The Tribunal held that the "cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value"; ibid., at para. 410.

243 Ibid., paras. 436 et seq.
This short overview of international practice shows that reference to fair market value in many cases is not the appropriate measure of damages to achieve full reparation. It can only be relied upon if the circumstances of the breach are comparable to a purchase and sale situation and the loss or damage is, indeed, best valued by the perspective of a hypothetical buyer. This, however, cannot easily be taken for granted. Furthermore, the fair market value standard may serve as a tool if the evidence is poor and alternative ways of valuation are not at hand or not better than reliance on the “objective” value.

Concerning regulatory takings, it has been suggested that the fair market value of the expropriated property rights might be valued, for example, by a comparison of the fair market value before the regulation and the fair market value after the regulation. This would follow the “objective” or “abstract” valuation approach correctly in cases where the State exercised its regulatory power in a lawful manner. However, if the State does not comply with its international or contractual obligations when changing its law, full reparation for the damage inflicted must be granted.

VII. CONCLUSION

The present article has tried to draw attention to the importance of the distinction between compensation upon expropriation and damages after a breach of an international or contractual obligation. Based on the respective legal rules, it was shown that they serve different purposes from which differences in the valuation process must follow.

The standard of compensation with regard to the lawful exercise of the State’s right to expropriate under international law, at least under treaty law, is the fair market value. As it refers to the price a hypothetical willing buyer would pay to a hypothetical willing seller, it can be regarded as an “objective” or “impersonal” standard.

By contrast, damages after a violation of an international obligation or a breach of contract should provide “full reparation” and thus try to re-establish the financial situation that would have existed if the illegal act or breach had not been committed. According to the famous dictum of the PCIJ in Chorzów Factory, it is necessary to compare the financial situation that in all probability would have existed, absent the breach, with the actual financial situation after the breach. This differential method emphasizes the importance of subjective criteria in the valuation process. Otherwise there would be no “full reparation”.

At first sight, the calculation of damages according to the Chorzów standard should lead to higher amounts than compensation based on the fair market value. In cases of expropriation, this is correct, because damages for an unlawful expropriation cannot be less than compensation for a lawful expropriation. According to the Chorzów standard,

244 See the proposals elaborated by Merrill, supra, footnote 59, 120 et seq.
an increase in value of the affected property after the expropriation must be included in the valuation if the expropriation was unlawful. Fair market value at the time of expropriation, in this case, represents the lower limit of the amount of damages.

However, with regard to other violations of international law, there is no such lower limit. The right to fair and equitable treatment and other treatment standards in treaties is not connected to the fair market value of the investment involved. Thus, the damage actually incurred has no relationship to the fair market value of the affected property. The amount of damages after a violation of those rights consequently can be less or more.

The principle of full reparation of the Chorzów standard is also a limitation. It bars over-compensation. The fair market value, if inappropriately applied, might disregard this limitation and result in an award that is higher than the loss actually incurred. This is the case if the valuation object turns out to be economically less successful than estimated by a reasonable businessman in the past. The value of an object valued at some time in the past can be higher than at the time of the judgment or award. The principle of full reparation demands that events occurring after the illegal act must be taken into account in the calculation of damages because a subsequent increase in value or consequential damage must be included. However, one must also consider factors that decrease the value in comparison to some valuation date in the past. Only those factors affecting value which are a consequence of the illegality itself must be disregarded.

This does not contradict the principle of foreseeability. The criterion of foreseeability is a limitation of damages and must not be confused with a guarantee that foreseeable damage must be compensated even if it did not occur. Lost profits are therefore not compensable if they were foreseeable in the past but, with the benefit of hindsight, in all probability would not have been obtained even if the illegal act had not been committed.

Furthermore, the differential method also induces a balance of benefits. If the injured party has gained or saved certain amounts of money as a result of the illegal act, these benefits must be taken into account and thus reduce the amount of damages.

The subjective approach, furthermore, allows for consideration of contributory negligence, which may diminish the amount of damages, as international arbitral practice has already shown. As a consequence, the calculation of damages according to the Chorzów standard does not always lead to higher amounts than compensation on the basis of fair market value.

It follows that in international law there is indeed a difference between the financial consequences of a lawful exercise of a State's sovereign rights and a violation of its obligations. It is therefore the task of the adjudicating bodies to determine whether an unlawful act has occurred, to identify the correct standard of valuation and to apply the appropriate valuation method in a consistent manner.
AWARDS OF INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION:
NEW YORK LAW AND PRACTICE

COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES

June 21, 2017
Interest on damages awarded by an arbitral tribunal can be a significant component of a prevailing party’s total recovery in international commercial arbitration. Uncertainty exists, however, with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. One question that arises in domestic and international arbitrations governed by New York substantive law and seated in New York is whether the prejudgment interest provisions contained in Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules (“N.Y.C.P.L.R.” or “C.P.L.R.”) apply to the determination of pre-award or post-award interest. The answer to the question whether arbitrators are obligated to (or should) apply New York’s nine percent statutory prejudgment interest rate can have a substantial economic impact on the parties in an arbitration.

Part I of this report sets forth an executive summary.

Part II provides a discussion of the standards applicable to interest determinations in international commercial arbitrations, with a focus on arbitrations that are both governed by New York substantive law and seated in New York. 1

Appendix A sets forth summaries of pre-award and post-award interest determinations of arbitral tribunals in approximately 45 international commercial arbitrations governed by New York substantive law.


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1 This report proposes a step-by-step approach that international arbitrators may apply to the determination of interest in international commercial arbitrations generally, and not merely in international commercial arbitrations governed by New York substantive law and seated in New York. This report does not address, however, the choice of law issues that may arise when the arbitral law of the seat of arbitration may conflict on the question of interest with the substantive law governing the dispute because no such conflict exists between New York arbitral law and New York substantive law. The report addresses the law of the seat of arbitration principally as a factor that arbitrators may wish to consider as one indication of party intent.

I. Executive Summary

International arbitrators have discretion to apply or not to apply New York’s statutory prejudgment interest provisions to the determination of pre-award and post-award interest in an international commercial arbitration governed by New York substantive law and seated in New York, in the Committee’s view, for several reasons. First, the text of C.P.L.R. Sections 5001 and 5002 contains numerous terms (including references to “the court’s discretion,” “the cause of action,” “the jury,” and “the clerk of the court”) indicating that these sections are intended to apply only to court proceedings, not arbitration. Second, the legislative history of C.P.L.R. Section 5004, which sets the prejudgment interest rate applicable under Sections 5001 and 5002, indicates that the New York State Legislature (the “NY Legislature”) adopted a fixed rate of nine percent in part in consideration of factors that are not directly related to the compensatory purpose of an award of interest and that arbitrators may or may not deem relevant to the award of interest in international arbitration. In particular, the NY Legislature’s adoption of a fixed rate in 1972 reflected its desire to simplify the calculation of interest by the courts; in 1981, after market rates of interest had risen into the high teens, the NY Legislature increased the fixed rate from six to nine percent in part to discourage defendants from using delay tactics in court proceedings. Third, although New York’s highest court has not had occasion to address squarely the applicability, or not, of New York’s prejudgment interest provisions to international or domestic arbitration, the State’s Appellate Divisions have held that these provisions do not necessarily
apply to arbitrations and that an arbitral tribunal’s decision on this question is not subject to review by the courts.²

New York courts acknowledge that, in the absence of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations. It may be appropriate for an arbitral tribunal to determine pre-award and post-award interest in accordance with New York’s prejudgment interest provisions if, by way of example only: evidence exists that the parties intended for the statutory prejudgment interest rate to apply, or no case is made in favor of applying a different rate, or the choice of interest rate would not have a significant economic impact one way or another. Arbitrators also have discretion to take into consideration that, as already noted, the NY Legislature adopted a fixed rate in part for the administrative convenience of the courts. Moreover, arbitrators may choose to consider to what extent New York’s nine percent rate differs from market rates prevailing during the pre-award period and/or economic factors specific to the parties such as their cost of funds. However arbitrators may choose to exercise their discretion to determine interest, in order to facilitate international enforcement the Committee recommends that the tribunal set forth clearly in its award the basis for its interest determination.

In the Committee’s view, thoughtful consideration of two guiding principles common to New York law and to international arbitration – the freedom of contracting parties to agree on the terms of their relationship, and the compensatory purpose of interest – should guide arbitrators in prioritizing the many factors that they may consider in awarding interest in a particular case. Generally, the more clearly a factor reflects the intent of the parties, the higher the priority an arbitral tribunal should give to that factor. A focus on party intent generally leads

to an examination of key factors in the following order: (a) contractual stipulations on interest rates to be applied to one or more aspects of the contract; (b) guidance that may be found in the arbitration rules chosen by the parties regarding the award of interest; (c) the substantive law governing the merits of the case; and (d) the arbitration law of the seat of the arbitration. An arbitral tribunal should consider these indicators of party intent in light of the underlying compensatory purpose of interest awards subject to narrow exceptions based on public policy.

An arbitral tribunal engaged in the reasonable exercise of its discretion may seek guidance in appellate court decisions that set forth guidelines for trial courts to follow in exercising their discretion to award prejudgment interest in federal question and admiralty cases. For example, the guidelines set forth by the federal Court of Appeals for the Seventh Circuit call upon the district courts to award prejudgment interest at the market rate, which may be either (a) the actual rate that the losing party must pay to borrow money or (b) the U.S. prime rate, which is a market-based estimate. Counsel may wish to alert arbitrators to this case law and/or to the various approaches that economists employ in calculating the amount of prejudgment (or pre-award) interest necessary to compensate the prevailing party for the loss of use of its money.

Summaries of arbitral awards set forth in Appendix A to this report suggest that uncertainty exists with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. International arbitrators generally give effect to contractual stipulations on interest; however, arbitral practice varies with respect to the determination of interest in the absence of such stipulations. Arbitrators in a significant minority of the surveyed awards expressly determined that New York’s nine percent prejudgment interest

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3 *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992).
provisions do not apply to the determination of interest in international arbitration. A majority of the awards surveyed awarded interest, typically with little or no analysis, in accordance with New York’s prejudgment interest provisions. The Committee hopes that this report will serve to enhance consistency and predictability in the analysis underpinning the award of interest in international arbitrations governed by New York substantive law.

II. Standards Governing the Award of Interest by International Arbitrators

Generally, interest on amounts awarded in arbitration may accrue during three periods: (a) the period from the date the prevailing party’s claim arose to the date of the award (pre-award interest); (b) the period from the date of the award to the date of entry of judgment enforcing the award (post-award, prejudgment interest); and (c) the period from the date of entry of judgment to the date of payment (post-judgment interest).

The confidentiality of the arbitral process presents an obstacle to the collection of reliable statistics. The summaries of awards set forth in Appendix A indicate, however, that commercial arbitrators grant pre-award interest to the prevailing party as a matter of course and sometimes grant post-award, prejudgment interest.

A. Pre-Award Interest

Recent commentaries on the award of interest in international arbitration illustrate the complexity of the subject and prompt this Committee to propose that, in international commercial arbitration governed by New York substantive law, arbitrators apply a step-by-step approach to their determination of pre-award interest.

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4 See Appendix A, rows 1 to 8.
5 See id., rows 17 to 42.
6 See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3105 (2014) (“The interplay between differing national laws dealing with interest, as well as national characterizations of interest rules and national choice-of-law rules, can be metaphysical in their theoretical complexity.”); Thierry J. Senechal & John Y. Gotanda, Interest as Damages, 47 COLUMBIA J. TRANSNAT’L L. 491 (2009); Andrea Giardina, Issues of Applicable
The standards that govern the pre-award interest determination in any given arbitration will depend on factors including (a) the terms of the parties’ contract, (b) the applicable arbitration rules, (c) the law governing the merits, and/or (d) the applicable arbitration law. The Committee proposes that arbitrators prioritize these factors according to how clearly and directly each factor reflects the intent of the parties as to the principles that should govern in the event of an arbitrated dispute between them. The recommended order of priority acknowledges and gives effect to (a) the contracting parties’ broad autonomy, under the law of international commercial arbitration applicable in New York, to agree on the law and procedures that apply to their dispute, and (b) the emphasis in the New York law of contract interpretation on construing agreements in accordance with the parties’ intent as expressed in the language of their agreement. 7

Each step in the Committee’s suggested methodology is explained *seriatim* below. The last subsection (subsection II.A.5) provides general guidelines that arbitrators may decide to follow in exercising the discretion that they will often possess with respect to the determination of pre-award interest in arbitrations governed by New York substantive law.

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7 See, e.g., BORN, supra note 6 at 102 (noting the New York Convention’s “emphatic recognition of the predominant role of party autonomy in the arbitral process”); Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004) (Federal Arbitration Act “requires arbitration proceed in the manner provided for in the parties’ agreement”) (internal quotation marks, alteration and citation omitted; emphasis in original); Greenfield v. Phillies Records, Inc., 98 N.Y.2d 562, 569 (2002) (“The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent.”) (citation omitted); Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985) (“In adjudicating the rights of parties to a contract, courts . . . are required to discern the intent of the parties[].”).
1. **Contractual Stipulations on Interest**

The first step in the Committee’s suggested methodology is for arbitrators to determine whether the parties’ contract establishes how interest is to be assessed in the arbitration. Subject to limited exceptions discussed below, contractual stipulations governing the assessment of interest on the damages awarded by a court or tribunal are valid and enforceable under the laws of most jurisdictions (including New York).  

Contracts occasionally include a clause that specifically sets the rate of interest on damages or on a particular category of damages. If the contract contains such a clause, and if the clause applies to the damages awarded, it is appropriate for arbitrators to determine pre-award interest in accordance with it, subject to the considerations discussed below. More often, the parties’ contract will contain a “late payment” clause or other similar type of clause stipulating how interest is to be assessed on amounts past due under the contract. Such a clause typically addresses such matters as when interest begins to accrue on an amount due, the rate at which it accrues, whether the interest is simple or compound, and, if it is compound, the compounding period.

In the Committee’s view, generally it is appropriate for arbitrators to apply a late payment or other similar clause if the losing party’s breach consists of a failure to make or delay

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8. See, e.g., *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011) (*NML I*) (“When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract.”); 10 *Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, New York Civil Practice ¶ 5004.01a, at 50-79 (2016)* (“The parties may establish, by contract, the rate of interest to be paid until entry of judgment[,]”); English Arbitration Act 1996, § 49(1) (“The parties are free to agree on the powers of the tribunal as regards the award of interest.”).

9. Following is an example of a clause addressing the assessment of interest on a particular category of damages: “[Any amount of unpaid Seller Damages] that is ultimately determined to have been due on any Damages Due Date shall bear interest at the Default Rate . . . from such Damages Due Date until the date of payment.”

10. Following is an example of a late payment clause: “Unless otherwise specified, all sums due under the Contract shall be paid within forty five (45) days from the date on which the obligation to pay was incurred. All sums due by one Party to the other under the Contract shall, for each day such sums are overdue, bear interest compounded daily at the applicable LIBOR plus two (2) percentage points.”
in making a required payment under the contract. Arbitrators should exercise caution, however, in deciding whether to grant pre-award interest in accordance with a late payment clause on damages awarded for breaches of contract not involving non-payment or late payment. If an arbitral tribunal decides that an interest rate in a late payment clause is not relevant to the determination of pre-award interest on damages awarded for other kinds of breaches, the arbitrators should proceed to the next step in the methodology suggested herein.

In certain limited circumstances, arbitrators may decline to award interest in accordance with a contractual stipulation. For example, if a contractual stipulation on interest is invalid under the usury law of the jurisdiction whose law governs the parties’ contract, arbitrators should decline to enforce the stipulation and consider other methods of calculating interest. Usury laws may be subject, however, to exceptions rendering them inapplicable to pre-award and post-award interest. For example, New York’s civil usury law, which prohibits charging more than sixteen percent interest per year, does not preclude applying a contractually stipulated rate to pre-award and post-award interest in a commercial dispute because the usury law does not apply to interest on defaulted obligations.

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11 See, e.g., Allenby, LLC v. Credit Suisse AG, 25 N.Y.S.3d 1, 6 (1st Dep’t 2015) (contractual stipulation on interest applied only to delayed settlement, not damages awarded by court for breach of contract); Ross v. Ross Metals Corp., 976 N.Y.S.2d 485, 487-88 (2d Dep’t 2013) (contractual stipulation on interest was basis for calculating monthly payments due under contract, but did not apply to damages awarded by court for defendant’s breach of its obligation to make such payments); NML I, 17 N.Y.3d at 261-62 (clause in bond documents providing that interest would accrue at specified rate “until the principal is paid” applied to damages awarded by court for Argentina’s breach of its obligation to make bi-annual interest payments to bondholders). In drafting a late payment or other similar clause, contract drafters may wish to make clear whether the clause is intended to apply to the determination of interest on the damages awarded for a contractual breach not consisting of a failure to make a required payment or of a delay in making a required payment.

12 The validity of a contractual stipulation on interest is generally determined by the law governing the parties’ contract. See Restatement (Second) Conflict of Laws § 207 cmt. e (1971) (“[The law governing the parties’ contract] determines the validity of an express contractual provision for the payment of a stipulated rate of interest.”); Dicey, Morris & Collins on the Conflict of Laws (15th ed.) § 7-089 (“[W]hether an express undertaking to pay interest is lawful or whether it is made invalid wholly or partly by legislation referring to usury or money-lending depends on whether that legislation forms part of the law applicable to the contract.”).

13 See, e.g., Bloom v. Trepmal Constr. Corp., 289 N.Y.S.2d 447, 448 (2d Dep’t 1968), aff’d, 23 N.Y.2d 730 (1968) (provision in note fixing interest due after default at rate in excess of statutory maximum was valid and
In addition, the public policy of some countries may prohibit the charging of any interest or the charging of interest at a high rate. If an arbitration is seated in such a country, or if enforcement is likely to be sought in such a country, the tribunal may decline to give effect to an otherwise valid contractual stipulation on interest in order to minimize the risk that its award will be vacated (annulled) by a court of the seat or denied enforcement in other courts on public policy grounds. Alternatively, arbitrators may issue a partial award granting the principal amount of damages and a separate partial award granting interest as a possible device to insulate the former award from vacatur at the seat or a refusal to enforce on public policy grounds.

2. Arbitration Rules

The second step in the Committee’s suggested methodology, to be followed if the parties’ contract does not contain a provision governing the assessment of interest on damages awarded,

enforceable); Manfra, Tordella & Brookes, Inc. v. Bunge, 794 F.2d 61, 63 n.3 (2d Cir. 1986) (“the [New York] usury laws do not apply to defaulted obligations”). New York’s civil usury law also does not apply if the principal amount involved is greater than $250,000, and it cannot be interposed as a defense by corporations or other business entities. See N.Y. Gen. Oblig. Law §§ 5-501(1), (2), (6)(a), 5-521 (McKinney 2016); N.Y. Banking Law § 14a-1 (McKinney 2016). New York’s criminal usury law (which prohibits charging more than 25% interest per year) does not apply to defaulted obligations or if the principal amount involved is greater than $2.5 million. See N.Y. Penal Law §§ 190.40, 190.42; N.Y. Gen. Oblig. Law § 5-501(6)(b); Bristol Inv. Fund, Inc. v. Carnegie Int’l Corp., 310 F. Supp. 2d 556, 563-64 (S.D.N.Y. 2003).

For example, the public policy of some countries prohibits the charging of any interest on the ground that it violates Islamic law. See ABDUL HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 632 (2011) (“contracts relating to interest . . . are considered to be against [Saudi Arabian] public policy”). New York’s public policy against usury is coterminous with its usury laws. Accordingly, the charging of interest at a high rate does not violate New York public policy unless it runs afoul of New York’s usury laws. See NML Capital v. Republic of Argentina, 621 F.3d 230, 238-39 (2d Cir. 2010) (NML II) (enforcement of 101% annual interest rate on notes issued by Argentina in principal amount of $102 million did not violate New York public policy because New York’s civil and criminal usury laws do not apply where the principal amount involved exceeds $250,000 and $2.5 million, respectively).

Article 50(2) of Saudi Arabia’s Arbitration Law (promulgated on April 16, 2012) provides that “[t]he competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic law and the laws of the Kingdom.” See also, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(b)(ii) (court at seat of arbitration may set aside award if it finds that “the award is in conflict with the public policy of [the seat]”); New York Convention, Art. V(1)(e) (court in country where recognition and enforcement is sought may refuse recognition and enforcement if award “has been set aside . . . by a competent authority of the country in which . . . that award was made”).

Article V(2)(b) of the New York Convention provides that a court may refuse to recognize or enforce a foreign award if “recognition or enforcement of the award would be contrary to the public policy of [the] country [where recognition and enforcement is sought].”
is for arbitrators to look to the arbitration rules chosen by the parties for any provisions regarding the award of interest. The rules of several leading international arbitral institutions grant arbitrators discretion to award such interest as they consider appropriate.¹⁷ For example, Article 31(4) of the International Arbitration Rules (the “Rules”) of the American Arbitration Association’s International Centre for Dispute Resolution (the “ICDR”) (“ICDR Article 31(4)”) provides as follows: “[T]he tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).” By contrast, the UNCITRAL Arbitration Rules and the rules of several other leading institutions, including the ICC, Hong Kong International Arbitration Centre (the “HKIAC”) and Swiss Chambers, are silent with respect to the award of interest.

In view of the frequent use of the ICDR Rules in international commercial arbitrations governed by New York substantive law, the requirement under ICDR Article 31(4) that the tribunal “tak[e] into consideration the contract and applicable law(s)” in exercising its discretion to award interest raises three noteworthy issues.¹⁸ First, arbitrators might well ponder the meaning of “taking into consideration the [parties’] contract.” In the Committee’s view, if the contract contains a clause that specifically addresses the assessment of interest on the amounts

¹⁷ See ICDR International Arbitration Rules, Art. 31(4) (quoted in text); LCIA Arbitration Rules, Art. 26.4 (“Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with.”); SIAC Arbitration Rules, Rule 32.9 (“The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed or, in the absence of such agreement, as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate.”); WIPO Arbitration Rules, Art. 62(b) (“The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.”); JAMS International Arbitration Rules, Art. 35.7 (same as Article 31(4) of ICDR Rules); DIFC-LCIA Arbitration Rules, Art. 26.4 (same as Article 26.4 of LCIA Rules).

¹⁸ This language is repeated in the September 2016 revisions to the JAMS International Arbitration Rules. See JAMS International Arbitration Rules, Art. 35.7.
awarded, respect for party autonomy typically would suggest that arbitrators determine interest in accordance with that clause rather than exercise their discretion under ICDR Article 31(4), at least in part because “specific terms [of a contract] . . . are given greater weight than general language.” The reference to “taking into consideration” the parties’ contract in ICDR Article 31(4) appears to acknowledge that an arbitral tribunal has discretion to consider whether to determine interest in accordance with a contractual stipulation on interest, such as a late payment clause, that does not strictly apply, by its terms, to damages awarded for reasons other than late payment.

Second, arbitrators may wish to consider what laws are included within the term “applicable law(s)” in ICDR Article 31(4). In the Committee’s view, the term includes the substantive law(s) governing the parties’ contract. The Committee considers that the term “applicable laws(s)” may be understood also to include the arbitration law of the arbitral seat when it addresses an arbitral tribunal’s remedial powers. In addition, arbitrators exercising discretion under ICDR Article 31(4) may take into consideration the public policies of the arbitral seat and of any jurisdiction where the award is likely to be enforced, even though such

19 RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981). See generally County of Suffolk v. Long Island Lighting Co., 266 F.3d 131, 139 (2d Cir. 2001) (“It is axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language.”) (internal quotation marks, ellipsis and citations omitted).

20 See, e.g., ICC Award No. 7622, ICC International Court of Arbitration Bulletin 15(1) (2004), at 79 (applying contract rate even though it did not apply to damages awarded); ICC Award No. 6219, ICC International Court of Arbitration Bulletin 3(1) (1992), at 22 (same). See also Secomb, supra note 6, at 432.

21 Paragraph (1) of Article 31 provides in pertinent part that “[t]he arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute.” Prior to the 2014 revisions to the ICDR Rules, the predecessor article to ICDR Article 31(4) required that the tribunal take into consideration the contract and “applicable law” (singular). See ICDR International Arbitration Rules (as amended and effective June 1, 2009), Art. 28(4). No commentary on the 2014 revisions to the Rules addresses the change from the singular to the optional plural in the interest provision.

22 See subsection II.A.4 below.
public policies might not be viewed as falling within the ordinary meaning of “applicable law(s).”

Third, when “taking into consideration the . . . applicable law(s)” in accordance with ICDR Article 31(4), arbitrators may wish to consider what effect they should give to the law governing the parties’ contract. As discussed in subsection II.A.3 below, many jurisdictions have enacted statutory provisions specifying how interest shall be assessed on the damages component of court judgments. Arbitrators exercising their discretion under ICDR Article 31(4) may deliberate on the meaning of “taking into consideration” such statutory provisions. The question takes on practical significance when the statutory provisions call for the application to court judgments of a rate of interest that materially overcompensates or undercompensates the prevailing party in light of prevailing market rates of interest or the prevailing party’s actual cost of funds.

In the Committee’s view, ICDR Article 31(4) allows an arbitral tribunal, in the exercise of its discretion, to determine pre-award and post-award interest wholly or partially in accordance with the statutory prejudgment interest provisions applicable to court judgments

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23 The same question could be asked with respect to the arbitration law of the seat. As discussed in subsection II.A.4 below, however, all of the arbitration laws surveyed that address the awarding of interest either (a) grant the tribunal discretion to award such interest as it considers appropriate or (b) provide that the tribunal may award interest, without addressing the standard that the tribunal should apply in making such an award. Accordingly, no conflict generally will arise between the standard for awarding interest under Article 31(4) of the ICDR Rules and the standard for awarding interest under the arbitration law of the seat.

24 New York’s statutory prejudgment interest rate of nine percent, enacted by the NY Legislature when market rates were even higher, exceeds market rates of interest generally prevailing in the United States at the time of this report. By contrast, the statutory interest rates of some other jurisdictions may be set below commercially available rates. For example, the French Civil Code allows for the award of simple interest at the “legal rate,” which is fixed by the French Minister of Economy every six months based on the European Central Bank’s benchmark rate and commercial lending rates in France. See CODE CIVIL [C. CIV.] art. 1231-7 (Fr.); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code). As of June 2017, the French legal rate was only 0.90% per year. Some jurisdictions have adopted a statutory prejudgment interest rate that continuously floats by reference to a benchmark rate. For example, the Delaware Code provides for a “legal rate” of five percent over the Federal Reserve discount rate. See DEL. CODE ANN. tit. 6, § 2301(a). The Delaware courts generally award prejudgment interest at the legal rate defined by Section 2301(a). See, e.g., Montgomery Cellular Holding Co. v. Dobler, 880 A.2d 206, 226 (Del. 2005) (“the legal rate [defined by Section 2301(a)] has historically been considered as the ‘benchmark’ for prejudgment interest”).
under the law governing the parties’ contract. For example, if interest only begins to accrue under that law from the date of a formal demand for payment, arbitrators would have discretion to award interest from that date; at the same time, they could determine the interest rate based on commercial considerations and without regard for any statutory prejudgment interest rate under the applicable law.

An arbitral tribunal would also have discretion, in the Committee’s view, to award interest under ICDR Article 31(4) based exclusively on commercial considerations and without any regard for statutory interest provisions applicable to court judgments under the law governing the parties’ contract.25 In the Committee’s view, an award of interest based exclusively on commercial considerations would be in accord with party expectations that reasonably arise (subject to specific evidence to the contrary) from ICDR Article 31(4)’s grant of discretion to the tribunal to award such interest “as it considers appropriate.”

3. **Law Governing the Merits**

Courts have held that the purpose of pre-award interest is to compensate the prevailing party for the loss of use of money that the prevailing party was entitled to receive from the date its claim arose until the date of the award.26 Because pre-award interest is an element of

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25 Subsection II.A.5 below sets forth general guidelines that a tribunal may choose to follow in determining an appropriate interest rate, whether interest is simple or compound, and, if compound, the compounding period.

26 See, e.g., *NML I*, 17 N.Y.3d at 266 (“[T]he function of prejudgment interest is to compensate the creditor for the loss of use of money the creditor was owed during a particular period of time.”) (internal citations omitted); *Kassis v. Teachers’ Ins. & Annuity Ass’n*, 786 N.Y.S.2d 473, 474 (1st Dep’t 2004) (“The purpose of prejudgment interest is to compensate parties for the loss of the use of money they were entitled to receive, taking into account the time value of money.”) (internal quotation marks and citation omitted).
complete compensation for the claim, the Committee’s view is that it should generally be determined in accordance with the same law that governs liability and damages.

This choice-of-law approach accords with New York’s choice-of-law rules. It also accords with Comment (e) to Section 207 of the Restatement (Second) of Conflict of Laws, which provides that the law governing the parties’ contract “determines whether plaintiff can

27 See, e.g., West Virginia v. United States, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation."). In the international context, see 2010 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ("UNIDROIT PRINCIPLES") Art. 7.4.2(1) ("The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance.").

28 Most international arbitration rules grant arbitrators discretion to apply the law or rules of law they determine to be appropriate, in the absence of party agreement as to the applicable law. See, e.g., ICDR Arbitration Rules, Art. 31(1) ("Failing such an agreement by the parties [on the substantive law(s) or rules of law applicable to the dispute], the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."); ICC Arbitration Rules, Art. 21(1) ("In the absence of any such agreement [on the rules of law applicable to the merits of the dispute], the arbitral tribunal shall apply the rules of law which it determines to be appropriate."). International arbitrators reasonably may conclude that a generic choice-of-law clause specifying the law governing the parties’ contract does not encompass an agreement that that law shall govern the determination of pre-award interest, given that interest is generally considered as incidental to the damages awarded on the main claim. Cf. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58-64 (1995) (interpreting generic choice-of-law clause referring to “the laws of the State of New York” as encompassing New York’s substantive rights and obligations, but not its prohibition on the award of punitive damages by arbitrators). Nonetheless, as explained in this subsection, it would generally be appropriate for international arbitrators to determine pre-award interest in accordance with the law governing the parties’ contract, because interest is an element of complete compensation for the main claim.

Gary Born distinguishes, for choice-of-law purposes, between an arbitral tribunal’s authority to award interest and the standards governing the exercise of that authority. Born, supra note 6 at 3103-06. According to Professor Born, “the better view appears to be that, absent contrary agreement, questions concerning the arbitrators’ authority to award interest are better regarded as subject to the law of the arbitral seat” because “[i]t is that law which is generally regarded as having the closest connection to questions concerning the tribunal’s powers.” Id. at 3104. As discussed in subsection II.A.4.a below, both federal and New York arbitral law grant arbitrators broad remedial powers that include the power to award interest, absent party agreement to the contrary. Professor Born further suggests that international arbitrators should “apply the law of the currency in which any award is made to determine the substantive standards, including the applicable interest rates, for any award of interest,” although he recognizes that “arbitrators have in practice generally looked to the substantive law governing the parties’ underlying claims for standards regarding interest.” Id. at 3105-06.

29 See, e.g., Schwimmer v. Allstate Ins. Co., 176 F.3d 648, 650 (2d Cir. 1999) (“Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest.”); Davenport v. Webb, 11 N.Y.2d 392, 394-95 (1962) (prejudgment interest is substantive issue controlled by law governing merits); Sirie v. Godfrey, 196 A.D. 529, 539 (1st Dep’t 1921) (entitlement to prejudgment interest was governed by French law, which was law governing parties’ contract). The choice-of-law rules of some other jurisdictions may treat prejudgment interest as a procedural matter governed by the law of the forum. See Born, supra note 6, at 3105.
recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.”

a. **New York Substantive Law Relating to the Award of Interest by International Arbitrators**

If New York substantive law governs the merits of the parties’ dispute, international arbitrators should consider what standards, if any, that law imposes on the award of interest in international arbitration. One question that frequently arises in practice is whether New York’s prejudgment interest provisions contained in C.P.L.R. Sections 5001, 5002 and 5004 apply to the determination of interest in arbitration. For the reasons set forth in this subsection, it is the Committee’s view that international arbitrators (a) are not bound to apply these provisions and (b) have discretion under New York’s substantive common law to award such interest as they consider appropriate.

i. **Inapplicability of New York’s Prejudgment Interest Provisions to International Arbitration**

C.P.L.R. Sections 5001, 5002 and 5004 provide for mandatory prejudgment interest, at an annual rate of nine percent and on a simple-interest basis, upon any sum awarded by a New York State court for breach of contract. Although these provisions are found in the Civil Practice Law and Rules, state and federal courts have found them to be substantive for choice-of-law and *Erie* purposes. Whether these statutory prejudgment interest provisions apply in arbitration

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30. RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971). See also id. § 171 cmt. c (law governing tort liability and damages “determines whether the plaintiff can recover interest and, if so, at what rate for a period prior to the rendition of judgment as part of the damages for a tort”).


32. See, e.g., Davenport, 11 N.Y.2d at 394-95 (prejudgment interest is substantive issue controlled by law governing merits); Paine Webber Jackson & Curtis, Inc. v. Winters, 579 A.2d 545, 551-53 (Conn. App. Ct. 1990) (N.Y.C.P.L.R. § 5001 is rule of substantive law to be applied by Connecticut courts if New York law governs merits); Schwimmer, 176 F.3d at 650 (prejudgment interest is substantive issue for *Erie* purposes). See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971); id. § 171 cmt. c. Under the *Erie* doctrine, a U.S. federal court hearing a claim brought under state law must apply state rules that the court considers “substantive”
does not turn, however, on whether they are characterized as substantive or procedural for purposes of determining their applicability in state or federal court. Rather, the Committee considers the key question to be whether the provisions are directed to the determination of interest not only by a court, but also by arbitrators. As shown by the summaries of awards in Appendix A of this report, arbitrators have not always considered this question or answered it in a consistent manner.

In the Committee’s view, based upon the statutory language and New York case law, New York’s statutory prejudgment interest provisions are binding only in court proceedings and not in arbitration. Several sections of the C.P.L.R. support this conclusion. First, C.P.L.R. Section 101 provides that the Civil Practice Law and Rules “shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges.” The inclusion of New York’s prejudgment interest provisions in a statute that governs civil proceedings in the courts of the state and before “all judges” indicates that the NY Legislature intended for the interest provisions to be applicable in court proceedings, not in arbitration. The C.P.L.R. does address certain limited aspects of arbitration in its Article 75, generally considered to be the first under federal law, while applying federal rules that it considers “procedural” under federal law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). It is beyond the scope of this report to address whether courts outside the United States apply New York’s prejudgment interest provisions if New York substantive law governs the merits of the parties’ dispute.

33 One reason courts have characterized statutory prejudgment interest provisions as substantive for choice-of-law and Erie purposes is to discourage forum shopping by plaintiffs, who otherwise might choose to sue in a particular court to take advantage of that forum’s statutory prejudgment interest rate. See, e.g., Jarvis v. Johnson, 668 F.2d 740, 745 (3d Cir. 1982) (“[I]f [Pennsylvania’s prejudgment interest statute] is not applied in the federal courts, an incentive for forum shopping in diversity actions may well result. We can readily foresee that many plaintiffs would sue in Pennsylvania state court to take advantage of [Pennsylvania’s prejudgment interest statute] and thus to recover considerable additional damages.”). This anti-forum-shopping rationale does not support the application of statutory prejudgment interest provisions in arbitration, however, because the parties to an arbitration agreement cannot shop for a forum after the agreement to arbitrate has been signed. And unlike the rules that govern court jurisdiction, the parties’ choice of a seat of arbitration in international arbitration frequently reflects a determination that the seat has no connection with the parties or the dispute. There is, therefore, little reason for an arbitral tribunal to reach the same result that a court at the seat would reach.

34 N.Y.C.P.L.R. Section 105(d) defines “civil judicial proceeding” as “a prosecution, other than a criminal action, of an independent application to a court for relief.”
arbitration statute in the United States and a model used in the drafting of the Federal Arbitration Act.\(^{35}\) Article 75 makes no reference, by cross-reference or otherwise, to the issue of interest awards in arbitration.

Second, New York’s prejudgment interest provisions are part of C.P.L.R. Article 50, entitled “Judgments Generally.” N.Y.C.P.L.R. Section 5011 defines “judgment” as “the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final.” Arbitration does not qualify as an “action” or as a “special proceeding” under the N.Y.C.P.L.R.\(^{36}\) The inclusion of the prejudgment interest provisions in an article relating to “judgments” is a further indication that the NY Legislature intended for the interest provisions to apply only to civil proceedings in New York State’s courts.

Third, N.Y.C.P.L.R. Sections 5001 and 5002 contain numerous terms indicating that they are intended to apply only in court proceedings. Subdivision (a) of Section 5001 provides, in full, as follows:

**Actions in which recoverable.** Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court’s discretion.

Subdivision (a) thus refers to “action[s]” both in its title and in its text. As already noted, arbitration does not qualify as an “action” under the C.P.L.R. The reference to the “court’s discretion” to award interest in equitable actions further suggests that the NY Legislature, in its enactment of Section 5001, considered only court proceedings. So, too, do the references in subdivisions (b) and (c) of Section 5001 and in Section 5002 to “the cause of action,” “the jury,” “the court,” “motion,” “the clerk of the court” and “any action.”

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\(^{36}\) See, e.g., N.Y.C.P.L.R. §§ 103(b), 105(b), 304, 7502(a).
The legislative history of C.P.L.R. Section 5004, which fixes the prejudgment interest rate applicable under Sections 5001 and 5002 at nine percent, further supports the conclusion that these sections are intended to apply only in court proceedings, not in arbitration. The NY Legislature adopted the fixed nine percent rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

The highest court of the State of New York, the New York Court of Appeals ("NY Court of Appeals") explained as follows:

Prior to 1972, CPLR 5004 provided that “[i]nterest shall be at the legal rate, except where otherwise prescribed by statute.” The “legal rate” was then based upon the variable rate of interest on the loan or forbearance of money as set by the Banking Board, or, if no rate had been prescribed by the Banking Board, the rate of 6% per annum (see, 1972 Report of NY Law Rev Commn, 1972 NY Legis Doc No. 65 [C], reprinted in 1972 McKinney’s Session Laws of NY, at 3226). However, in its review of the provision, the Law Revision Commission recommended that the rate be fixed at 6% based upon the following reasons: (1) 6% was the historical rate from 1879; (2) the interest rate for a loan or forbearance was not logically or necessarily related to the rate for judgments; (3) a fixed rate would facilitate the administrative act of entering judgments with interest “without possible controversy over different rates for different periods;” and (4) the power of the Banking Board to set such rates was due to expire later that year. Accordingly, in 1972, CPLR 5004 was amended to set a fixed interest rate on judgments at “six per centum per annum” (L 1972, ch 358).

However, in the years that followed, interest rates soared in an inflationary market. The 1981 Report of the Advisory Committee on Civil Practice noted reports where defendants had exploited the system by investing and accruing interest on funds which would otherwise have been used to pay judgment creditors (1981 McKinney’s Session Laws of NY, at 2658). Increased returns were facilitated through such delaying tactics as “the prosecution of unmeritorious appeals and eschewing reasonable settlements” (Mem of Assemblyman Goldstein, 1981 NY Legis Ann, at 148). Although arguments had been made “to reinstate the market rate under CPLR 5004” (1981 McKinney’s Session Laws of NY, at 2658; see also, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 5004), the Advisory Committee then recommended increasing the fixed rate payable on judgments from 6 to 9%. The recommendation was enacted in 1981 (see, L 1981, ch 258) and the rate has remained unchanged since.
Rodriguez v. New York City Housing Authority, 91 N.Y.2d 76, 78-79 (1997). The NY Legislature thus appears to have adopted a fixed rate of six percent in 1972 based upon a complex set of public policy goals not all of which were directly related to determining an appropriate level of compensation in a particular case.\(^\text{37}\) In 1981, after market rates had risen into the high teens, the NY Legislature increased the fixed rate from six percent to nine percent, in part, to discourage defendants from using delay tactics in court proceedings.\(^\text{38}\)

The NY Court of Appeals has not had occasion to address squarely the applicability, or not, of New York State’s prejudgment interest provisions to international or domestic arbitration. It can reasonably be surmised that this is due, at least in part, to the very limited grounds available to challenge an arbitral award or to resist its enforcement. New York’s courts have consistently rejected, however, applications to modify an award or to grant pre-award interest in circumstances where the award allegedly did not comply with New York’s prejudgment interest provisions.

The leading case in this area is Penco Fabrics, Inc. v. Bogopulsky, Inc., 146 N.Y.S.2d 514 (1st Dep’t 1955), in which the Appellate Division, First Department, held that “[t]he right to interest involves questions of fact and law that are within the purview of the arbitrators.” Id. at 515. The arbitral tribunal had awarded damages for breach of contract, but it had not granted any pre-award interest, even though Section 480 of the then Civil Practice Act, the predecessor to C.P.L.R. Section 5001, provided for mandatory prejudgment interest in breach of contract.

\(^{37}\) The six percent rate adopted in 1972 was close to the market rates in effect at the time. During 1972, the U.S. prime rate ranged from 4.50% to 6.00%. See [http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm](http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm).

\(^{38}\) During 1981, the U.S. prime rate ranged from 15.75% to 21.50%. See id.
actions. The Appellate Division denied the award-creditor’s request for pre-award interest, reasoning as follows:

The mere fact that the award was silent on the question did not mean that the arbitrators did not consider the question and did not operate to enable the court to allow such interest. Provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their controversies to arbitration forego those provisions and leave all questions of law and fact to the arbitrators.

*Id.* The Appellate Division characterized the grant of pre-award interest as a mixed question of law and fact for the tribunal to decide and held that a tribunal’s decision on that question is not subject to review by the courts.

Three Appellate Division cases holding that a domestic arbitral tribunal’s power to grant pre-award interest stems from its broad remedial powers under New York arbitral law (without any mention of C.P.L.R. Section 5001) support the conclusion that New York State’s prejudgment interest provisions do not apply in arbitration. *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep’t 2010), is typical of these three cases. The award-creditor in *Levin & Glasser* requested that the court grant pre-award interest on the damages

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39 Section 480 of the then Civil Practice Act provided as follows:

In every action wherein any sum of money shall be awarded by verdict, report, or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum, whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded. N.Y. Civil Practice Act § 480 (as amended in 1927).

40 In subsequent cases, the Appellate Division has reaffirmed that “in a contract dispute brought before an arbitrator[,] the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine.” *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311, 312 (1st Dep’t 2010) (internal quotation marks, alteration and citation omitted). See also, e.g., *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep’t 2015) (“[B]ecause the arbitration award did not include a provision awarding the defendant [pre-award] interest, the court was without power to award [such] interest.”); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep’t 2001) (“the question as to whether pre-award interest is to be allowed is for the arbitrator to determine”); *Gruberg v. Cortell Group, Inc.*, 531 N.Y.S.2d 557, 558 (1st Dep’t 1988).

awarded by the tribunal, contending that the tribunal had lacked the authority to award interest under the arbitration rules of New York’s Fee Dispute Resolution Program, which are silent on this issue. *Id.* at 312-13. The Appellate Division rejected this contention on the ground, *inter alia*, that a tribunal’s “broad authority to resolve disputes” under New York arbitral law includes the power to award interest. *Id.* The fact that the court rested its decision on a tribunal’s broad remedial powers under New York arbitral law rather than on C.P.L.R. Section 5001 suggests that the court did not consider Section 5001 in the context of arbitration.42

Three New York federal district courts appear to have assumed, notwithstanding several reported Appellate Division decisions, that New York State’s prejudgment interest provisions apply in domestic arbitration.43 In each case, the award-creditor claimed that the tribunal had “manifestly disregarded” the law by failing to grant pre-award interest in accordance with C.P.L.R. Section 5001. The district courts rejected this argument in each of the three cases on grounds other than the non-applicability of C.P.L.R. Section 5001 in arbitration (a point that does not appear to have been argued).44 In view of (a) the principle that, in order to establish manifest

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42 See also *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by awarding interest; court did not refer to C.P.L.R. § 5001 but instead cited *Silverman v. Bennor Coats, Inc.*., 61 N.Y.2d 299, 308 (1984), which held that arbitrator “may do justice as he sees it”); *Rosenblum*, 439 N.Y.S.2d at 483 (arbitrators had power to rule on pre-award interest based on their broad power to fashion awards to achieve just results).


44 In *Sayigh*, the district court held that the tribunal had not manifestly disregarded the law because (1) the petitioner’s claim arose under a human rights statute and (2) C.P.L.R. Section 5001(a) requires the award of interest only on sums awarded for breach of contract or interference with property. *Sayigh*, 2015 U.S. Dist. LEXIS 27139, at *35. In *Shamah*, the district court concluded that both arbitral tribunals and federal district courts exercising diversity jurisdiction have discretion to award interest at a rate lower than the applicable state statutory prejudgment interest rate, although it erroneously based that conclusion on a Second Circuit decision which held only that in the narrow circumstances of that particular case, the district court had not abused its discretion by using a rate lower than the applicable Vermont statutory prejudgment interest rate. *See Shamah*, 21 F. Supp. 2d at 217 (citing *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994)). In *Nicoletti*, the district court reasoned that “[a]lthough petitioner’s claim sounded in contract, the arbitrators may have concluded that [his] entitlement was equitable rather than contractual, and that therefore interest was discretionary [under C.P.L.R. Section 5001(a)].” *Nicoletti*, 761 F. Supp. at 315.
disregard of the law, “[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable”;45 (b) the text of the C.P.L.R.; and (c) the Appellate Division’s observation in Penco Fabrics that New York’s prejudgment interest provisions “do not necessarily apply to arbitrations,” 146 N.Y.S.2d at 515, counsel for the award-debtor in each of the three cases had available, in opposition to the manifest disregard challenge, a further argument that C.P.L.R. Section 5001 is not “clearly applicable.”46

ii. Pre-Award Interest Under New York’s Substantive Common Law

In the Committee’s view, New York’s substantive common law allows an arbitral tribunal to award interest as an element of damages on the main claim(s).47 After the enactment of New York’s first prejudgment interest statute in 1920, New York courts have held that they may award prejudgment interest only on the basis of specific statutory authority.48 Prior to the

45 Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986).

46 In Moran v. Arcano, No. 89 Civ 6717, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. July 27, 1990), Judge Haight of the District Court for the Southern District of New York stated in dictum and without referring to C.P.L.R. Section 5001 that “[w]hether interest is taxed on a claim prior to the entry of an arbitration award is within the discretion of the arbitrators.” Id. at *6. Judge Haight thus appears to have concluded, sub silentio, that C.P.L.R. Section 5001 does not apply in arbitration. However, neither of the two cases that he cited in support of this statement so held. See Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986) (holding that district court should have granted post-award, prejudgment interest because, while arbitrators had included pre-award interest in their award, they “lacked authority to decide the entirely separate question of prejudgment interest on the amount confirmed by the district court judgment”); Brandeis Intsel Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160, 170 (S.D.N.Y. 1987) (confirming award that included pre-award interest granted by arbitrators under English law; arbitration seated in London and parties’ contract governed by English law).

A Massachusetts appellate court has held squarely that, under Massachusetts law, “[a]n arbitrator’s award of interest, when made as a component of an award, is an integral part of the total remedy that he fashions and, as such, is not subject to the statutory provisions which apply to court-awarded interest on contract claims.” Blue Hills Reg’l Dist. Sch. Comm. v. Flight, 409 N.E.2d 226, 235 (Mass. App. Ct. 1980). The Massachusetts statutory prejudgment interest provisions are worded similarly to the New York provisions. See MASS. GEN. LAWS ch. 231, § 6C (2016) (“In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve percent per annum from the date of the breach or demand.”).

47 Some commentators argue that, as a general matter, “[c]laimants would be more accurately compensated for the loss of use of their money if they received interest as damages, as opposed to interest on damages.” Senechal & Gotanda, supra note 6 at 514. See also Secomb, supra note 6, at 443-44.

48 See, e.g., In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 851 (2d Cir. 1992) (“The right to interest [under New York law] is purely statutory and in derogation of the common law and it cannot be extended beyond
enactment of that statute, New York common law allowed courts to award prejudgment interest in breach of contract actions with interest running from the date on which the defendant could have ascertained the damages with reasonable certainty.\(^{49}\) The Committee believes that, because New York’s prejudgment interest provisions do not apply in arbitration, the proscription on non-statutory interest under New York law also does not apply in arbitration. Moreover, the availability of pre-award interest under New York’s substantive common law accords both with (a) the historical allowance of prejudgment interest under the common law and (b) the compensatory purpose of such interest.\(^{50}\)

In addition, as discussed in subsection II.A.4.a below, federal and New York arbitral law both grant arbitrators broad remedial powers that include the discretionary power to award interest on damages. In the Committee’s view, an arbitral tribunal may consider the law regarding its remedial powers, including its discretionary power to award interest, to be substantive law for purposes of choice-of-law analysis, particularly if the tribunal is seated in a jurisdiction that treats arbitrators’ remedial powers as a question of substantive law.\(^{51}\)

\(^{49}\) See, e.g., *Faber v. City of New York*, 222 N.Y. 255, 262 (1918) (“[i]f a claim for damages [on account of breach of contract] represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day.”).

\(^{50}\) In 1927, the New York State Legislature amended the State’s prejudgment interest statute to allow the courts to award prejudgment interest on the principal amount of damages “whether theretofore liquidated or unliquidated.” Shortly thereafter, the NY Court of Appeals held that retrospective application of the amendment to contracts entered into before its enactment did not violate the non-impairment clause of the U.S. Constitution because the amendment “prevents an escape . . . from the real obligation to make full compensation for breach of contract” and “vindicates a preexisting right to compensation for breach of contract.” *J.B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 145 (1933).

\(^{51}\) See BORN, supra note 6, at 3068 (“[i]n many jurisdictions, the arbitrators’ remedial powers are treated as an aspect of the substantive dispute between the parties.”).
One question that may arise is whether an international arbitral tribunal, in exercising discretion to award interest under New York law, should apply New York’s prejudgment interest provisions even though they are not directed to the determination of interest by arbitrators. Given that C.P.L.R. Section 5001 has been characterized as substantive for choice-of-law and 

_Erie_ purposes, one might argue that an award of interest under this section ordinarily would accord with the parties’ reasonable expectations if they have chosen New York law as the law governing their relationship. Moreover, the Appellate Division recently stated that New York’s “statutory nine percent rate [is] presumptively fair and reasonable, irrespective of the lower interest rate in the current market,” although it made this statement in an equitable action in which it upheld the trial court’s awarding of six percent interest.\(^5^2\)

Arbitrators have discretion to determine interest based primarily on commercial considerations and to consider New York’s statutory prejudgment interest provisions in the light of commercial realities, for three main reasons.

First, as discussed above, the NY Legislature adopted a fixed nine percent prejudgment interest rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

Second, the award of nine percent simple interest in accordance with New York’s statutory prejudgment interest provisions may materially overcompensate or undercompensate the prevailing party for the loss of use of its funds.\(^5^3\)

\(^{52}\) _Gourary v. Gourary_, 943 N.Y.S.2d 80, 82 (1st Dep’t 2012).

\(^{53}\) In some cases, even in the current low rate environment, the award of nine percent interest in accordance with New York’s statutory prejudgment interest provisions may _undercompensate_ the prevailing party for the loss of use of its funds. As noted above, a court may award only simple interest under C.P.L.R. Sections 5001 and 5004. In the commercial world, however, interest on a debt is almost always compounded; for this reason, an arbitral tribunal exercising its discretionary power to award interest under New York’s substantive common law may choose to award interest on a compound basis. Depending on various factors such as the compounding interval and the length of the pre-award period, compound interest calculated at today’s low market rates may exceed simple interest
Third, given the broad remedial powers of arbitrators under both federal and New York arbitral law and the many uncertainties at the time of contract regarding possible future disputes, commercial parties and their counsel may reasonably expect an arbitral tribunal to exercise discretion to award such interest as it considers appropriate. Of course, if for any reason the parties express a different expectation, for example by fixing the pre-award interest rate in advance, they are free to do so in their contract or in a stipulation entered during arbitration.  

During a period when New York’s statutory prejudgment interest rate is substantially higher or lower than market rates, factors that may weigh in favor of application of the statutory rate in a specific case may include, in the judgment of the tribunal, a showing of party intent that the statutory prejudgment interest rate be applied; the absence of any case made in favor of applying a different rate; or a lack of significant economic impact on the interest calculation in a particular case. Moreover, if both parties argue that New York’s statutory prejudgment interest provisions govern their respective claims for pre-award interest, a tribunal could reasonably infer agreement between the parties that the statutory prejudgment interest rate applies in their arbitration.

On the other hand, arbitrators have discretion to consider factors that may weigh against application of New York’s statutory prejudgment interest rate in a time of low market interest rates, including the NY Legislature’s desire to set the prejudgment interest rate at a level close to or below the market rates at the time the statutory rate was chosen; the NY Legislature’s concern calculated at New York’s nine percent statutory prejudgment rate. In the Committee’s view, this possibility confirms that it may be appropriate for arbitrators to award interest based on commercial considerations.

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54 See subsection II.A.1 supra.

55 Arbitrators may also exercise their discretion to apply New York’s statutory prejudgment interest provisions if they take the view that it would be desirable, as a general matter, that the relief granted coincide precisely with the relief that a court hearing the same claim would grant. In the Committee’s view, a tribunal may consider how a court would decide the same question but retains discretion, under well-settled federal and New York State arbitral law, to consider other factors in shaping the tribunal’s remedy. See subsection II.A.4.a below.
for easing administrative burdens on the courts; and the extent to which current market rates of interest may adequately discourage the use of delay tactics in arbitration.56

iii. Inapplicability of Section 5-501(1) of New York’s General Obligations Law to Pre-Award Interest

An arbitral tribunal may also wish to consider whether it would be appropriate to award interest at New York’s statutory default rate of interest for loan obligations, as established by Section 5-501(1) of the State’s General Obligations Law (“G.O.L.”). G.O.L. Section 5-501(1) provides that “[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action . . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law.”

In Sedlis v. Gertler, 554 N.Y.S.2d 614 (1st Dep’t 1990), the Appellate Division held that an arbitrator should have granted pre-award interest at the six percent rate set by G.O.L. Section 5-501(1) because the parties’ contract provided that late payments would bear interest at New York’s “legal rate.” Id. at 616. Relying on C.P.L.R. Section 7511(c)(1), which provides that the court shall modify an award if “there was a miscalculation of figures . . . in the award,” the Appellate Division modified the arbitrator’s award (which granted twelve percent pre-award interest) to provide for interest at the six percent rate. Id. The Appellate Division’s modification

56 New York’s maintenance of the nine percent statutory prejudgment interest rate in the current low rate environment may also be intended to encourage defendants to settle claims brought against them. See Oden v. Schwartz, 71 A.3d 438, 457 (R.I. 2013) (upholding constitutionality of Rhode Island’s statutory prejudgment interest rate of twelve percent in medical malpractice actions on ground that this rate is “rationally related to a legitimate state interest of promoting settlement as well as compensating an injured plaintiff for the loss of the use of money to which he or she is legally entitled”). However, any possible state interest in promoting settlement of claims appears to be related to the efficient administration of justice by the courts and does not reflect a substantive policy favoring plaintiffs over defendants. See Paine Webber, 579 A.2d at 551 (court held that Connecticut’s “offer of judgment” rule, which “provides an economic incentive for parties to settle disputes before trial,” was “procedural rule, punitive in nature, and enacted to promote fair and reasonable pretrial compromises of litigation,” and that it therefore applied to action in Connecticut state court even though New York law governed substantive issues in dispute). In view of the many and varied social policies underlying statutory prejudgment interest rates, arbitrators reasonably may conclude that a statutory prejudgment interest rate binding on courts may or may not be appropriate in a particular case but should not dictate the determination of interest in arbitration.
of the award appears anomalous in the sense that it involved the reversal of a substantive ruling, not the correction of a mere computational error.\textsuperscript{57} The court’s interpretation of G.O.L. Section 5-501(1) as establishing a legal rate of interest of six percent under New York law would appear to support the application of this rate to pre-award interest in arbitration irrespective of whether or not the parties specifically so agreed in their contract.

Three factors militate against the application of the six percent rate established by G.O.L. Section 5-501(1) to pre-award interest in arbitration, absent party agreement that this rate will apply. First, G.O.L. Section 5-501(1) provides that the rate set by that section applies to a “loan or forbearance,” a phrase that does not encompass damages owed by a breaching party.\textsuperscript{58} Accordingly, the text of the statute provides no basis for arbitrators to award interest at the six percent rate, absent party agreement to the contrary.

Second, the majority of courts to have addressed the issue have concluded that the six percent rate set forth in G.O.L. Section 5-501(1) is “superseded” by New York’s maximum interest rate of sixteen percent set by Section 14-a of the Banking Law.\textsuperscript{59} The latter is a usury rate and does not reflect the NY Legislature’s calculation of what rate would make an injured party whole. Accordingly, it would not be appropriate, in the Committee’s view, for arbitrators to award interest at the sixteen percent rate set by Section 14-a, absent clear evidence of party intent that it apply in the circumstances.

Third, to the extent that the six percent rate mentioned in G.O.L. Section 5-501(1) retains any validity, the Committee is not aware of any precedent or other authority supporting the

\textsuperscript{57} See, e.g., Madison Realty Capital, L.P. v. Scarborough-St. James Corp., 25 N.Y.S.3d 83, 85 (1st Dep’t 2016) (“CPLR 7511(c)(1) only authorizes modification of computational errors . . ., not reversal of substantive rulings”).

\textsuperscript{58} See, e.g., Manfra, Tordella & Brookes, 794 F.2d at 63.

award of interest in accordance with G.O.L. Section 5-501(1) in arbitration, absent party agreement that New York’s “legal rate” is applicable. Arbitrators therefore should not presume, solely on the basis of the parties’ choice of New York law as the law governing their contract, that parties intended for the six percent rate to apply to the award of interest.

b. International Arbitrators Should Align the Rate of Interest With the Currency of the Award

As already noted, many jurisdictions (including New York, in the case of a court judgment) have enacted statutory provisions specifying how interest shall be assessed on damages, including the rate at which it shall accrue.\(^60\) For reasons set forth above, the Committee takes the view that neither the New York prejudgment interest provisions (C.P.L.R. §§ 5001, 5002 and 5004) nor G.O.L. Section 5-501(1) are binding in international arbitration. For purposes of this discussion, the Committee assumes that, under some circumstances, the statutory interest provisions of other jurisdictions may be deemed applicable, as a question of local law or public policy, in a particular international arbitration.

In accordance with the choice-of-law analysis discussed above, the law governing the parties’ contract generally should determine whether the prevailing party may recover interest on damages and, if so, how much.\(^61\) An award of interest in accordance with these provisions may not be appropriate, however, if (a) the governing law specifies a legal rate of interest and (b) the arbitral tribunal assesses damages and issues its award in the currency of another jurisdiction. For example, a contract may provide for arbitration in New York, French governing law, and payment in U.S. dollars. If, as would be expected, the arbitral tribunal assesses damages and

\(^{60}\) See, e.g., C. CIV. art. 1231-7 (Fr.) (interest on damages accrues at “legal rate”); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code) (legal rate fixed by French Minister of Economy every six months).

\(^{61}\) See supra notes 26-30 and accompanying text.
issues its award in U.S. dollars, the grant of pre-award interest at the French legal rate may not make commercial sense because that rate reflects, *inter alia*, material changes in the value of the Euro over time. In fairly foreseeable circumstances, therefore, application of the French legal rate to an arbitral award in U.S. dollars could significantly undercompensate or overcompensate the prevailing party for the loss of use of its money.

Arbitral tribunals may wish to consider at least two factors as they seek to avoid anomalies in the interest rate used to calculate pre-award interest. First, arbitrators may consider whether, as a matter of statutory construction, the legal rate under the governing law does not apply to damages assessed in a foreign currency. As explained by Professor Pierre Mayer:

> The arbitrator’s sense of equity can suggest to him that the rule expressed in the applicable law only deals with domestic situations, which allows him to formulate himself the rule that is supposed to apply to international situations. This last device has been used to set aside provisions, which can be found in many national laws, which fix the rate of interest at a certain percentage, regardless of the place of payment and of the currency in which the debt was expressed; indeed, such provisions lead to absurd results when applied to international contracts.

In the event an arbitral tribunal should determine that the legal rate of interest under the governing law does not apply, the arbitrators may consider assessing interest at a rate appropriate to the currency of the award through the exercise of any discretion that they possess in determining damages under the governing substantive law or the arbitral law of the seat.

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62 In the international context, particularly in the absence of an express provision in the parties’ contract, an arbitral tribunal may have discretion in determining the currency in which the award is rendered. See UNIDROIT PRINCIPLES Art. 7.4.12 (“Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.”).

63 The 2012 U.S. Model Bilateral Investment Treaty recognizes the importance of matching the interest rate to the currency of the award. Article 6(3) of the Model Treaty provides that if the fair market value of an expropriated investment is denominated in a freely usable currency, the arbitral tribunal shall grant pre-award and post-award interest “at a commercially reasonable rate for that currency[.]” See also 2012 U.S. Model Bilateral Investment Treaty, Art. 6(4) (specifying compensation payable if fair market value of expropriated investment is denominated in currency that is not freely usable).

64 Pierre Mayer, *Reflections on the International Arbitrator’s Duty to Apply the Law*, 17(3) ARB. INT’L 235, 244 (2001). See also Secomb, supra note 6, at 440.
Alternatively, international arbitrators reasonably may conclude that the choice-of-law approach, holding that interest should be determined in accordance with the same law that governs liability and damages, is subject to an exception in an international case if the value of the currency of the governing law changes at a materially different rate from the value of the currency of the award.\(^{65}\) In such circumstances, the Committee believes that it would be appropriate for a tribunal to determine the entitlement to interest and the period during which interest accrues in accordance with the law governing the contract, while determining the interest rate, whether the interest is simple or compound, and (if it is compound) the compounding period in accordance with general principles of law.\(^{66}\) Such general principles include the prevailing party’s right to full compensation for the loss of use of money it was entitled to receive from the date when interest begins to accrue under the governing law until the date of the award.\(^{67}\) An international arbitration tribunal possesses discretion under general principles of law to assess

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\(^{65}\) Section 10 of the Restatement (Second) Conflict of Laws expressly recognizes that “[t]here may . . . be factors in a particular international case which call for a result different from that which would be reached in an interstate case.” The Reporters Notes to Section 10 of the Restatement observe that “[s]ome questions can arise only in international conflicts, [such] as questions involving . . . the conversion of one currency into another.”

\(^{66}\) This recommended choice-of-law rule is similar to the approach followed by the English courts, which determine liability to pay prejudgment interest in accordance with the law governing the merits, while determining the rate of interest in accordance with English law. See DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7R-082, Rule 20(2). English law authorizes the High Court to award prejudgment interest on a simple-interest basis “at such rate as the court thinks fit[.]” Senior Courts Act, 1981, § 35A(1). In the exercise of its discretion under English law, the High Court “will, *prima facie*, award the rate applicable to the currency in which the debt is expressed.” DICEY, MORRIS & COLLINS, supra, § 7R-082, Rule 20(3) (footnotes omitted). See also, e.g., Miliangos v. George Frank (Textiles) Ltd., [1977] Q.B. 489, 497 (“while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the *lex fori* to decide how much”; court awarded damages in Swiss francs and held that claimant was entitled to prejudgment interest on a simple-interest basis “at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest”).

\(^{67}\) See UNIDROIT PRINCIPLES Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).
pre-award interest at a market rate appropriate to the currency of the award and on a compound basis. 68

Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States addresses the awarding of prejudgment interest by U.S. state and federal courts in international cases as follows:

The date for commencement of interest on an obligation or a judgment is determined by the law of the forum, including its rules on choice of law. When a statutory rate of interest is applicable in the forum, that rate must be applied, even if the judgment is given in foreign currency. If no statutory rate of interest is applicable, the court may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable. 69

In accordance with the first sentence of this comment, read together with Comment (e) to Section 207 of the Restatement (Second) of Conflicts of Law, the law governing the merits of the parties’ dispute should determine the date for commencement of prejudgment interest. The second sentence appears to provide that a U.S. court must apply the forum’s statutory prejudgment interest rate, if any, in assessing prejudgment interest in an international case, “even if the judgment is given in foreign currency.” This approach to the applicable interest rate can

68 See, e.g., UNIDROIT PRINCIPLES Art. 7.4.9(2) (providing that interest on late payments shall be payable at “the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment”); ICC Award No. 8769, ICC International Court of Arbitration Bulletin 10(2) (1999), at 75 (awarding interest at “commercially reasonable interest rate” in accordance with Article 7.4.9(2) of UNIDROIT Principles). International investment tribunals, applying international law, often assess pre-award interest at a market rate appropriate to the currency of the award and on a compound basis. A recent survey of pre-award interest determinations in 63 investment awards rendered between January 2000 and March 2016 found that 18 of the 63 awards surveyed (approximately 30%) assessed pre-award interest at a rate based on LIBOR, most often with an uplift of two percentage points. See Tiago Duarte-Silva & Jorge Mattamouros, Prejudgment interest – a mere afterthought?, 11(5) GLOBAL ARB. REV. 30, 31 (2016). LIBOR is a benchmark rate that the leading banks in London charge each other for short-term loans. Sixteen of the awards surveyed (25%) assessed interest at a rate not linked to any benchmark, most often from four to six percent, while nine of the awards (14%) assessed interest at a rate based on U.S. Treasury yields. Id. at 31-32. In the majority of recent awards, international investment tribunals have assessed interest on a compound basis. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 298 (2012).

give rise to anomalies for at least two reasons.\textsuperscript{70} First, if a statutory prejudgment interest rate is to be applied, the presumptively applicable interest rate in an international case generally is not the forum’s statutory rate, but the statutory rate under the governing substantive law.\textsuperscript{71} Second, a court or arbitral tribunal should consider the impact, if any, of the currency in which damages are to be awarded. If the value of the currency of the governing substantive law changes at a materially different rate than the value of the currency of the award, it may be inappropriate, as a general matter, for a court or arbitral tribunal to grant one of the parties a windfall by applying a statutory prejudgment interest rate that has no relevance to the loss incurred as a result of delay in recovery of compensation.\textsuperscript{72}

4. \textbf{Law of the Arbitral Seat}

The next step in the Committee’s suggested approach is for arbitrators to look to the law of the arbitral seat governing the arbitral process.\textsuperscript{73}

\textsuperscript{70} To the Committee’s knowledge, no U.S. court has ever cited or applied the second sentence of Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States. \textit{See, e.g., Amoco Cadiz}, 954 F.2d at 1333 (“Rules for prejudgment interest . . . usually come from the law defining the elements of damages. . . . One would think, therefore, that prejudgment interest on the French plaintiffs’ claims depends on French law[].”).

\textsuperscript{71} \textit{See} \textsc{Restatement (Second) of the Conflict of Laws} § 207 cmt. e (1971).

\textsuperscript{72} In an article published in 1985, Professor Ronald Brand proposed that Section 823 of the draft Restatement (Third) of the Foreign Relations Law of the United States then under consideration be revised to include the following provision:

In giving judgment on a foreign currency obligation, a court may award both pre-judgment and post-judgment interest at such rate or rates as may be appropriate, taking into consideration the statutory rate of interest, if any, otherwise applicable and the rate of interest generally available in the market on investments made in terms of the currency in which judgment is made.

Ronald A. Brand, \textit{Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience}, 11(1) \textsc{Yale J. Int’l L.} 139, 184 (1985). As Professor Brand explained, this provision was “directed at the problem of matching the interest rate to the currency of judgment. Without such a rule, it is possible that a court would render judgment in one currency and apply the interest rate relevant to another currency[].” \textit{Id.} at 189. Professor Brand’s proposal was not adopted.

\textsuperscript{73} The choice of a seat almost invariably leads to the application of its arbitration law, and so parties should expect that their selection of a seat will affect numerous aspects of the arbitral process, potentially including the standards applicable to the awarding of interest. \textit{See, e.g., BORN, supra} note 6, at 2052 (“[T]he law of the arbitral seat can directly govern a number of distinct legal issues affecting any international arbitration, many of which can be highly important.”). An arbitral tribunal, in considering an award of interest, may decide, in the face of evidence
As discussed in subsection (a) below, the law of the arbitral seat, when the seat is New York, accords with New York substantive law relating to the award of interest by international arbitrators. If, in a particular case, the law of the arbitral seat conflicts with the applicable substantive law relating to the award of interest by international arbitrators, the tribunal will need to determine how to reconcile the conflict. No such conflict exists when New York is the arbitral seat and New York substantive law governs the dispute. This Committee does not express a view as to how such conflicts might be addressed in arbitrations seated in other jurisdictions.

a. International Arbitrators’ Broad Remedial Powers Under Federal Arbitral Law

The Federal Arbitration Act and C.P.L.R. Article 75, New York’s arbitration statute, are silent with respect to the award of interest. It is well-settled, however, as a matter of federal and New York arbitral law that, “[w]here an arbitration clause is broad . . . arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself.”

In the Committee’s view, the broad remedial powers of international arbitrators under federal arbitral law include at least the same discretionary power to award interest that the New

in a specific case that the contracting parties carefully considered the arbitration law of the seat, that the arbitration law of the seat be given greater weight in that case than the law governing the merits. However, contracting parties frequently select the seat of arbitration primarily or exclusively for reasons of logistical convenience and without regard to its arbitration law. Under the latter, more typical scenario in commercial cases, principles of party autonomy and respect for the intent of the parties arguably weigh in favor of giving the arbitration law of the seat lower priority than the law governing the merits of the parties’ dispute. Following the same logic, when parties neglect to designate the seat and, as a consequence, the seat is designated for the parties, arbitrators reasonably may decide not to give weight to the law of the seat as reflective in any way of party intent as to interest awards.

Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003) (federal law). See also, e.g., Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 902 (2d Cir. 2015) (“Like federal law, New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties and under New York law, arbitrators have power to fashion relief that a court might not properly grant.”) (internal quotation marks, ellipsis and citation omitted); Bd. of Educ. of Norwood-Norfolk Cent. Sch. Dist. v. Hess, 49 N.Y.2d 145, 152 (1979) (“[T]o achieve what the arbitration tribunal believes to be a just result, it may shape its remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.”); Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308 (1984) (arbitrator “may do justice as he sees it”); Benedict P. Morelli & Assocs., P.C. v. Shainwald, 854 N.Y.S2d 133, 134 (1st Dep’t 2008) (“Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result.”).
York courts possess in equitable actions. In equitable actions, the New York courts enjoy discretion under C.P.L.R. Section 5001(a) to determine whether to award any interest and, if so, how much.\(^{75}\) As explained by the Appellate Division in *Rosenblum v. Aetna Casualty & Surety Co.*, 439 N.Y.S.2d 482 (3d Dep’t 1981),

> [I]t is . . . well settled that the inclusion of interest in recoveries in actions of an equitable nature is left to the sound discretion of the court (see CPLR 5001, subd [a]) and that arbitrators are empowered to fashion awards to achieve just results and may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.

*Ibid.* at 483 (internal quotation marks, ellipsis and citation omitted). Although the underlying claim in *Rosenblum* was equitable, the Appellate Division’s conclusion that a tribunal’s broad remedial powers under New York law include the discretionary power to award interest applies equally regardless of whether the claim in the arbitration is characterized as legal or equitable.\(^{76}\) An international arbitral tribunal seated in New York has discretion, therefore, to award such interest as it considers appropriate.

b. International Arbitrators’ Power to Award Interest Under Other National Arbitration Laws

The arbitration statutes of England and several predominantly British Commonwealth jurisdictions expressly grant to arbitral tribunals discretion to award such interest as they

\(^{75}\) N.Y.C.P.L.R. § 5001(a) (“. . . in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court’s discretion”). By contrast, in actions of a legal nature, courts generally have no discretion under New York law with regard to prejudgment interest determinations. *See, e.g.*, *United Bank*, 542 F.2d at 878 (“This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.”).

\(^{76}\) *See Levin & Glasser*, 896 N.Y.S.2d at 312 (tribunal’s “broad authority to resolve disputes” includes power to award interest; nature of underlying claim in arbitration not specified); *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by granting pre-award interest; nature of underlying claim in arbitration not specified); *Grobman v. Chernoff*, No. 024250/98, 2008 N.Y. Misc. LEXIS 10792, at *3 (Sup. Ct. Nassau County 2008) (“an arbitrator’s power includes pre-award interest as part of a decision”; sole issue in arbitration was amount of damages owed for personal injuries).
consider appropriate. For example, Section 49(3) of the English Arbitration Act 1996 provides that “[t]he tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . . on the whole or part of any amount awarded by the tribunal[].”

The House of Lords’ well-known decision in Lesotho Highlands Development Authority v. Impregilo SpA, [2005] UKHL 43, establishes that a tribunal seated in England has discretion to award interest under Section 49(3) of the English Arbitration Act even if the law governing the merits specifies how interest shall be calculated on damages. The dispute in that case arose under a contract governed by the law of Lesotho and providing for arbitration in London. The law of Lesotho included statutory interest provisions, but the tribunal disregarded those provisions in exercising its discretion to award interest under Section 49(3) of the Arbitration Act. The Court of Appeal held that the tribunal had exceeded its powers, reasoning that “there is no room for any discretionary procedural power” under Section 49(3) where the law governing the merits confers a substantive right to interest. The House of Lords reversed on the ground, inter alia, that Section 49 of the Arbitration Act allows an arbitral tribunal to award interest either by exercising its discretionary power under Section 49(3) or by applying the law governing the merits pursuant to Section 49(6).

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77 See, e.g., ENGLISH ARBITRATION ACT 1996 § 49; SINGAPORE INTERNATIONAL ARBITRATION ACT 2012 §§ 12(5)(b), 20; HONG KONG ARBITRATION ORDINANCE, Art. 34D; BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993 § 31; BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT § 31(7); AUSTRALIAN INTERNATIONAL ARBITRATION ACT 1974 §§ 25-26; INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(a); IRISH ARBITRATION ACT 2010 § 18. Several U.S. states that enacted arbitration statutes based on the UNCITRAL Model Law on International Commercial Arbitration added a section providing that unless otherwise agreed by the parties, the arbitral tribunal “may award interest.” See CALIFORNIA CIV. PROC. CODE § 1297.317 (2017); 710 ILLINOIS COMP. STAT. 30-25-20(g) (2017); OREGON REV. STAT. § 36.514(6) (2017); TEXAS CIV. PRAC. & REM. CODE § 172.144 (2017). These U.S. state statutes do not address the standard that the tribunal should apply in awarding interest.

78 Lesotho Highlands Development Authority v SPA, [2003] EWCA Civ 1159, at [48]-[49].

5. **General Guidelines for the Exercise of Discretion in Awarding Interest**

Federal case law with respect to the awarding of prejudgment interest by the federal district courts in federal question and admiralty cases may provide useful guidance for international arbitrators in the exercise of any discretion they possess with respect to the awarding of pre-award interest in arbitration, whether by virtue of the applicable arbitration rules, the applicable substantive law (or rules of law), or the applicable arbitration law. The federal district courts have broad discretion as to the awarding of prejudgment interest in such cases.  

Each Circuit has developed somewhat different guidelines for the exercise of this discretion. The Seventh Circuit Court of Appeals has set forth perhaps the clearest and most comprehensive set of guidelines. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992). In a *per curiam* opinion, Chief Judge Bauer and Judges Easterbrook and Fairchild set forth the following guidelines:

- A district court should award prejudgment interest at the market rate, because interest at this rate “puts both parties in the position they would have occupied had compensation been paid promptly.” *Id.* at 1331.

- The market rate is “the minimum appropriate rate for prejudgment interest, because the involuntary creditor [i.e., the prevailing party] might have charged more to make a loan.” *Id.*

- “Any market rate reflects three things: the social return on investment (that is, the amount necessary to bid money away from other productive uses), the expected change in the value of money during the term of the loan (i.e., anticipated inflation), and the risk of nonpayment. The best estimate of these three variables is the amount the defendant must pay for money, which reflects variables specific to that entity.” *Id.* at 1332.

- A district court need not try to determine the actual rate that the defendant must pay to borrow money. *Id.* If the court chooses not to engage in such “refined rate-setting,” it should award prejudgment interest at the U.S. prime rate, which is “the rate banks charge for short-term unsecured loans to credit-worthy

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customers.” *Id.* The prime rate “may miss the mark for any particular party, . . . it is a market-based estimate.” *Id.*

- The relevant market rate is the rate in effect during the prejudgment period, “not the going rate at the end of the case.” *Id.* If the market rate fluctuated during the prejudgment period, the district court should calculate interest at the different rates in effect during this period. *Id.* at 1333. Alternatively, it may use an average rate during the period. *Id.* at 1335.

- The “norm” in federal litigation is to award prejudgment interest on a compound basis because (1) the defendant would have had to pay interest on unpaid interest if it had borrowed the amount of the damages and (2) the plaintiff could have earned interest on interest if it had invested or loaned that amount. *Id.* at 1331-32.

The Seventh Circuit’s guidelines are broadly similar to those developed by the other federal courts of appeals. For example, the Second Circuit held, in *Mentor Insurance Company (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506 (2d Cir. 1993), that the district court may award prejudgment interest at a rate that “reflects the cost of borrowing money, if measured for example by the average prime rate or adjusted prime rate[.]” *Id.* at 520. Judge Jacobs, writing for the panel, concluded that “[t]he award of compound interest . . . was within the district court’s broad discretion.” *Id.* Unlike the Seventh Circuit in *Amoco Cadiz*, the Second Circuit in *Mentor Insurance* held that (a) the district court may award interest at a short-term, risk-free rate, rather than the market rate, and (b) “a prevailing party is not entitled to a calculation of prejudgment interest at the interest rates at which it actually borrowed money during the period in question since consideration of the precise credit circumstances of the victim would inject a needless variable into these cases.” *Id.* (internal quotation marks and citation omitted).

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81 As of the date of this report (June 2017), the U.S. prime rate is 4.25%. If the tribunal assesses damages and issues its award in a currency other than the U.S. dollar, the Committee considers that it would generally be appropriate for it to use a market rate appropriate to the currency of the award. See subsection II.A.3.b supra.

82 See also, e.g., *Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nigeria*, 603 Fed. Appx. 1, 5 (D.C. Cir. 2015) (“This court has repeatedly concluded that the use of the prime rate in the award of prejudgment interest reflects an appropriate exercise of the district court’s discretion.”).
An arbitral tribunal may find guidance in judicial opinions that set forth guidelines intended to ensure that the prevailing party is fully compensated for its loss. Arbitral tribunals generally differ from most trial courts in being able to bring to bear whatever resources the parties consider appropriate in order to take into account the particular circumstances of the parties including, in appropriate cases, engaging in a “refined rate-setting” exercise. See Amoco Cadiz, 954 F.2d at 1332. In other cases they may choose to award interest at an appropriate market rate or at a risk-free rate. See Mentor Ins., 996 F.2d at 520.

Economists differ as to how pre-award (or prejudgment) interest should be calculated in order to compensate the prevailing party for the loss of use of money it was entitled to receive from the date its claim arose until the date of the award. For example, some economists espouse the “coerced loan” theory, which holds that pre-award interest should be calculated at the rate that the losing party would have paid a voluntary creditor because the losing party, by not immediately compensating the prevailing party for its harm, in effect forced the prevailing party to make a loan to the losing party equal in value to the prevailing party’s harm. Other economists argue that pre-award interest should be calculated at a rate equal to the prevailing party’s opportunity cost of capital. Several other approaches for determining the pre-award

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84 See, e.g., Michael S. Knoll & Jeffrey M. Colon, The Calculation of Prejudgment Interest (2005), in PENN LAW: LEGAL SCHOLARSHIP REPOSITORY.

85 See, e.g., Manuel A. Abdala et al., Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration, 5(1) WORLD ARB. & MEDIATION REV. 1 (2011). In a number of industries and economic sectors, commercial enterprises have an opportunity cost of capital equal to or in excess of nine percent per annum. In those circumstances, at least, adoption of an “opportunity cost of capital” approach to calculating pre-award interest would tend to support the award of interest at New York’s nine percent statutory prejudgment interest rate as an appropriate estimate of the prevailing party’s opportunity cost of capital. On the other hand, a number of economists criticize the opportunity cost of capital approach to calculating pre-award interest on the ground, inter alia, that the prevailing party does not actually put any investment at risk; rather, the only risk that the prevailing party assumes is the risk that the losing party will not satisfy the award, and this risk may be compensated by requiring the losing party to pay interest at the rate that it would have paid a voluntary creditor. See, e.g., Dolgoff & Duarte-Silva, supra note 83 at 101 ("[T]here is an inconsistency introduced by applying ex ante cost of capital rates
interest rate also exist.\textsuperscript{86} It will generally be up to the parties in the arbitration to argue to the arbitral tribunal what rate is appropriate in the particular circumstances of their dispute.

The Seventh Circuit awarded the plaintiffs in the \textit{Amoco Cadiz} case prejudgment interest at the average U.S. prime rate compounded annually, although it did not address the appropriate compounding period in its decision.\textsuperscript{87} It would not be inappropriate for arbitrators, in exercising their discretion, to award compound interest and to base the compounding period on factors specific to the parties and their industry.

Finally, the Committee believes that it is generally appropriate for pre-award interest to begin to accrue from the date of the non-performing party’s breach, except that interest upon damages incurred thereafter should generally begin to accrue from the date the damages were incurred. Subject to any countervailing equitable considerations, the awarding of interest until the date of the award generally appears to be necessary to provide full compensation to the prevailing party for the loss of use of its money.\textsuperscript{88}

\textsuperscript{86} See Dolgoff & Duarte-Silva, \textit{supra} note 83.


\textsuperscript{88} This pre-award period coincides with the periods specified in C.P.L.R. Section 5001(b) and UNIDROIT Principles Article 7.4.10. \textit{See} N.Y.C.P.L.R. § 5001(b) (“Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.”); UNIDROIT \textit{PRINCIPLES} Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).
B. Post-Award, Prejudgment Interest

Parties sometimes request not only that arbitrators include pre-award interest as part of the total compensation due under the award, but also that the arbitral tribunal order the losing party to pay interest on the total amount of the award from the date the award is issued until the date it is paid. The Committee is also aware that there have been instances in which the ICC International Court of Arbitration, following its review of a tribunal’s draft award under Article 33 of the ICC Rules, has asked the tribunal to modify its award to address the granting of post-award interest, even if the prevailing party did not request such interest in its pleadings.

Increasingly, the practice is for arbitral tribunals to order the award-debtor to pay post-award interest if it does not satisfy the award within a specified time period. In U.S. courts, post-award interest ordered by an arbitral tribunal generally accrues from the date of the award (or the date on which payment is due under the award) until the date of a U.S. federal or state court judgment enforcing the award, even if the award provides that such interest shall accrue until the date the award is paid. Under the so-called merger doctrine, when an award is enforced through a U.S. federal or state court judgment, the debt created by the award merges with the judgment, such that the award debt is extinguished and, in the jurisdiction that rendered the judgment, only the judgment debt survives. Accordingly, “post-award” interest ordered by an arbitral tribunal comprises only post-award, prejudgment interest; post-judgment interest is separately determined in accordance with the law of the enforcement forum. In cases potentially involving enforcement proceedings in a forum that has not adopted a merger doctrine analogous to the

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doctrine prevailing in the United States, there may be good practical reasons for the arbitral tribunal to award interest until the date the award is paid.

In the Committee’s view, it is generally appropriate for an arbitral tribunal to follow the same step-by-step methodology to identify the standards governing the award of post-award, prejudgment interest that an arbitral tribunal follows to determine the standards for pre-award interest. The fundamental guiding principles remain the same: respect for the intent of the parties and the compensatory purpose of interest. Not surprisingly, all of the arbitration rules that address the awarding of interest grant the arbitral tribunal discretion to award such pre-award and post-award interest as it considers appropriate.90

Accordingly, an arbitral tribunal, in exercising discretion with respect to post-award, prejudgment interest, may follow the guidelines set forth in subsection II.A.5 above for pre-award interest. Notwithstanding the arguably secondary purpose to encourage an award-debtor to satisfy an award promptly, the awarding of post-award, prejudgment interest at a rate higher than the rate of pre-award interest may be deemed an unenforceable penalty in some jurisdictions.91

C. Post-Judgment Interest

As noted above, “post-award” interest ordered by an arbitral tribunal only accrues until the date of a U.S. federal or state court judgment enforcing the award, because the debt created

90 See, e.g., ICDR International Arbitration Rules, Art. 31(4); LCIA Arbitration Rules, Art. 26.4; SIAC Arbitration Rules, Rule 32.9. One circumstance in which the governing standards for pre-award interest and post-award, prejudgment interest would differ is where the parties’ contract contains a clause specifically addressing the assessment of interest on any damages “until the date of award,” rather than “until the date of payment.”

91 See Laminioirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980) (declining to enforce that portion of award assessing post-award interest at rates higher than rate of pre-award interest on ground that post-award rates were penal rather than compensatory). The Indian Arbitration and Conciliation Act (as amended in 2015) provides that, unless otherwise ordered by the arbitral tribunal, post-award interest shall accrue at a rate two percent higher than the Indian legal rate in effect on the date of the award. See INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(b).
by the award is deemed to merge into the judgment under the merger doctrine prevailing in the United States.\footnote{See, e.g., \textit{Marine Mgmt.}, 574 N.Y.S.2d at 208; \textit{Westinghouse}, 371 F.3d at 102; \textit{Tricon}, 718 F.3d at 457; \textit{Fid. Fed. Bank}, 387 F.3d at 1024.} Interest on the judgment, or “post-judgment interest,” is separately determined in accordance with the law of the enforcement forum. For U.S. federal court judgments, 28 U.S.C. Section 1961 specifies that interest shall be calculated from the date of entry of the judgment, “at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment,” and that it shall be compounded annually.\footnote{See 28 U.S.C. § 1961(a), (b). \textit{See also} N.Y.C.P.L.R. §§ 5003, 5004 (providing for 9% interest upon New York State court judgments).

\textit{Marine Mgmt.}, 574 N.Y.S.2d at 209; \textit{Westinghouse}, 371 F.3d at 102; \textit{Tricon}, 718 F.3d at 457; \textit{Fid. Fed. Bank}, 387 F.3d at 1024.

\textit{Marine Mgmt.}, 574 N.Y.S.2d at 208-09; \textit{Tricon}, 718 F.3d at 459.}

It may be possible, under some circumstances, for parties to override the general merger rule and to specify a post-judgment interest rate, if the parties use “clear, unambiguous, and unequivocal” language indicating their intent that interest will accrue at this rate after the entry of a judgment.\footnote{\textit{Marine Mgmt.}, 574 N.Y.S.2d at 209; \textit{Westinghouse}, 371 F.3d at 102; \textit{Tricon}, 718 F.3d at 457; \textit{Fid. Fed. Bank}, 387 F.3d at 1024.} Contractual language stating that interest will accrue at a particular rate “until the principal is paid,” or other similar language, has been held not to meet this high standard.\footnote{\textit{Tricon}, 718 F.3d at 457; \textit{Newmont}, 615 F.3d at 1276-77.}

Where the parties have agreed to a broad arbitration clause, the question whether they have sufficiently contracted for their own post-judgment rate is a determination reserved for the arbitral tribunal.\footnote{\textit{Tricon}, 718 F.3d at 459-60; \textit{Fid. Fed. Bank}, 387 F.3d at 1022, 1024.} Nevertheless, an award ordering that interest shall accrue at a particular rate “until the award is paid,” or other similar language, does not override the general rule on merger.\footnote{\textit{Tricon}, 718 F.3d at 457; \textit{Newmont}, 615 F.3d at 1276-77.} Rather, the arbitral tribunal must use words that make crystal clear its intent to award
post-judgment interest.\textsuperscript{98} The Committee is aware of only one case in which an arbitral tribunal’s award was interpreted as awarding post-judgment interest.\textsuperscript{99}

International Commercial Disputes Committee
Richard L. Mattiaccio, Chair

\textit{June 2017}

\textsuperscript{98} \textit{Tricon}, 718 F.3d at 459-60.

\textsuperscript{99} \textit{See Newmont}, 615 F.3d at 1273, 1276-77 (tribunal’s award “provided for pre- and post-judgment interest at rate of 1.5\% per month”).
APPENDIX A

Arbitrators’ Pre-Award and Post-Award Interest Determinations in
International Commercial Arbitrations Governed by New York Substantive Law

Key: Arbitral Institutions and Relevant Rules

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<thead>
<tr>
<th>Arbitral Institution</th>
<th>Relevant Rules on Interest</th>
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<tr>
<td><strong>ICC</strong>: (International Chamber of Commerce)</td>
<td>The ICC Arbitration Rules are silent with regard to interest.</td>
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<tr>
<td><strong>ICDR</strong>: International Centre for Dispute Resolution</td>
<td>The ICDR International Arbitration Rules provide, at Article 31(4), that a tribunal “may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).”</td>
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<td><strong>IUSCT</strong>: Iran-U.S. Claims Tribunal</td>
<td>The IUSCT Arbitration Rules, which are adapted from the 1976 UNCITRAL Arbitration Rules, are silent regarding interest.</td>
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<td><strong>LCIA</strong>: London Court of International Arbitration</td>
<td>The LCIA Rules provide, at Article 26.4, that “the arbitral tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the arbitral tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority).”</td>
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<th>No.</th>
<th>Case Details</th>
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| 1   | *Veolia Propreté v. Valores Ecologicos S.A.* de C.V., ¶¶ 259–60, 279(a)-(c) | - Institution: ICC <br>- Seat: New York | 5% <br>The tribunal considered that a grant of pre-award interest was appropriate, and acknowledged that the CPLR rate was 9%. Nonetheless, the tribunal granted simple pre-award interest at a
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<td>(available via Westlaw Arbitration Materials)</td>
<td>- <strong>Law:</strong> New York &lt;br&gt;- <strong>Year:</strong> 2007</td>
<td>rate of 5%, describing this rate as “market based.”&lt;br&gt;The tribunal undertook a comparatively lengthy analysis of the applicability of the CPLR to pre-award interest. It concluded that while there was no doubt that New York law governed the contract at issue, “[t]his agreement by the parties does not extend to their joint agreement as to the applicability of Section 5004 of the Civil Practice Law and Rules (CPLR) of the State of New York.”&lt;br&gt;The tribunal found that the CPLR was meant to govern “the civil procedure in the courts of New York” and <em>not</em> arbitration proceedings taking place in New York, other than as provided for under CPLR Article 75. Accordingly, the tribunal did not feel “compelled to apply the CPLR interest rate of 9%”.&lt;br&gt;The tribunal considered that since the 9% interest rate under the CPLR had been fixed by statute over 20 years prior, it is a rate that “inevitably bears no relation to existing market rates.”&lt;br&gt;For post-award interest, the tribunal granted interest at a 5% rate, or the applicable rate in the jurisdiction where enforcement of the award was sought.</td>
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<td><em>Grove Skanska v. Lockheed International A.G.</em>, ICC Case No. 3903 (excerpted in David J. Branson &amp; Richard E. Wallance, <em>Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach</em>, 28 Va. J. Int’l L. 919 (1987))</td>
<td>- <strong>Institution:</strong> ICC &lt;br&gt;- <strong>Seat:</strong> Geneva &lt;br&gt;- <strong>Law:</strong> New York &lt;br&gt;- <strong>Year:</strong> 1981</td>
<td>Unspecified “realistic rate”</td>
<td>The contract at issue in this case provided that a party’s failure to make payments on time would carry the penalty of interest, but did not specify any particular interest rate. The contract had an unusual governing law clause which explicitly provided that “the law of the State of New York, U.S.A. (procedural and substantive) shall govern the interpretation of the Agreement.”&lt;br&gt;The prevailing party contended that interest should be computed at market rates (LIBOR +1%). LIBOR had been as high as 20% during the pre-award period. The losing party argued that interest should be set at the New York statutory prejudgment rate, which at that time was 6%.&lt;br&gt;The tribunal first noted that, under New York case law, the question of interest is deemed substantive. However, the tribunal declined to apply the CPLR interest provisions on the ground that</td>
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they only pertained to court actions and not to international arbitrations. The tribunal noted the “truly international flavor” of the dispute and stated that “in international commercial arbitrations it is generally accepted that arbitrators are entitled and indeed expected to award a realistic rate of interest.”

The tribunal performed its own analysis of the CPLR, noting that the separate section dealing with arbitration (Article 75) does not cross-reference the CPLR prejudgment interest provisions, whereas it does explicitly refer to other portions of the CPLR such as the prescription rules found in Article 2. The tribunal stated that “[w]e approach §§ 5001 and 5004 on the footing that the rate of interest laid down may have the characteristic of a rule of practice to be applied in certain circumstances but not necessarily of universal application to all tribunals charged with the duty of deciding issues in accordance with the law of the State of New York.”

The arbitrators conceded that if there was some indication that New York law was intended to limit interest rates in all contexts, it would control. Absent some clear indicia of such an intent, however, the tribunal did not believe that New York law had such a broad application.

Ultimately, the tribunal granted interest at what it called a “realistic rate,” but did not give an indication of what it considered this to be. Instead, the tribunal expressed the hope and expectation that the parties would be able to agree on a mutually-acceptable, appropriate rate.

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| 3   | Daum Global Holdings Corp. v. Ybrant Digital Ltd., ¶¶ 56–61 (available via Westlaw Arbitration Materials) | - **Institution:** ICC  
- **Seat:** Singapore  
- **Law:** New York  
- **Year:** 2013 | Unspecified | In this case, the tribunal found that although New York law governed the merits of the parties’ dispute, interest was governed by Singapore law, as the *lex arbitri*. Section 20(1) of the Singapore Arbitration Act 2012 expressly grants to arbitral tribunals the authority to “award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate. . .” The tribunal further explained that CPLR Article 50 is “concerned |
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| 4   | NTT Docomo, Inc. v. Ultra D.O.O, ¶ 85 (available via Westlaw Arbitration Materials) | - Institution: ICC  
- Seat: New York  
- Law: New York  
- Year: 2010 | U.S. Prime (3.25% - 4.25%) | The tribunal first noted that Docomo was entitled to pre-award and post-award interest at the New York statutory prejudgment interest rate pursuant to CPLR § 5001. However, it chose not to grant interest at this rate.  
Rather, the tribunal applied the U.S. Prime rate for pre-award interest, to run as of three separate dates for separate breaches. Similarly, the tribunal granted simple post-award interest at the Prime rate, to run until the award was paid or reduced to judgment.  
The tribunal did not provide a detailed explanation as to why it chose to apply the Prime rate over the New York statutory prejudgment interest rate. However, one factor that was likely relevant is that Docomo only claimed interest at the Prime rate, and Ultra made no submission in response. |
| 5   | ICC Case No. 10888 (excerpt available via ICC Dispute Resolution Library) | - Institution: ICC  
- Seat: Paris  
- Law: New York  
- Year: 2002 | U.S. Risk-Free | The tribunal had previously granted pre-award interest at a risk-free interest rate computed by an expert. Said interest was to run from the date of breach to the date of the award.  
Claimant applied for correction of the award, asserting that the tribunal should have awarded interest at the 9% New York statutory prejudgment interest rate.  
The tribunal rejected the application, noting that an international arbitral tribunal acting under the ICC Rules and seated in Paris was not bound to apply a rule on interest that was intended for the courts of New York State.  
The tribunal expressed concern that employing the New York rate would hinder the enforceability of its award, and instead chose the New York court proceedings.”  
The tribunal noted that it had wide discretion as to the awarding of interest, but it held that it had insufficient information to make a suitable award of interest at the time. Instead, it reserved the question for a later award. |
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| 6   | *Al Maya Trading Establishment v. Global Export Marketing Co., Ltd.*, ¶ 88 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2016 | U.S. Prime (3.25%) | “U.S. risk-free prejudgment interest rate,” which it viewed as more reflective of the economic reality. |
|     |       |              |              | The tribunal acknowledged that New York law prescribes 9%. However, it found that “in an international arbitration such as this, where the parties have not specifically agreed to any particular interest rate and no evidence was presented as to actual borrowing costs, we believe that the better course is to apply a commercial rate in the relevant currency.” Notably, the tribunal cited to the *Grove Skanska* case in support of its proposition that “CPLR Article 50 . . . concerns court judgments.” The tribunal thus granted pre-award interest at the U.S. Prime Rate. |
| 7   | *Butzel Long v. Valtech, S.A.*, ¶¶ 7.1–7.7 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** London  
- **Lex Arbitri:** England  
- **Law:** France, New York  
- **Year:** 2010 | 5% | The sole arbitrator concluded that interest was governed by the English Arbitration Act as the *lex arbitri*. Under Section 49 of that Act, an arbitral tribunal has broad discretion to fix the rate of interest. The sole arbitrator granted pre-award interest at 5%, in accordance with English court practice. “This rate may be in excess of the interest rate at which Valtech could borrow from a bank,” it was “designed to encourage Valtech to resist the temptation to delay payment to Chesapeake of the sums due it, in effect using Chesapeake as its de facto banker.” For post-award interest, the Arbitrator similarly applied a rate of 5% both for damages and costs, with a three-week grace period for the latter. This interest was to be compounded quarterly. |
| 8   | *PepsiCo, Inc. v. Iran* (available at Yearbook of Commercial Arbitration, Vol. XII, Page 253 (1987)) | - **Institution:** IUSCT  
- **Seat:** The Hague  
- **Law:** New York  
- **Year:** 1986 | 10% | In this case, the tribunal applied LIBOR +3% for damages relating to most of the contractual breaches found. For one breach, the tribunal applied a 10% rate, deeming this “reasonable.” Notably, neither party argued for the application of the New York statutory prejudgment interest rate, even though New York law |
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<td></td>
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<td>8%</td>
<td>governed the underlying contract.</td>
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**Awards Granting Interest at the Contractual Rate**

Usually, contractual interest rates apply, by their terms, only to the late payment of money owed under the contract. However, tribunals have often applied such contractual rates to the award of damages.

### Case 9


(available via Westlaw Arbitration Materials)

- **Institution:** AAA
- **Seat:** New York
- **Law:** New York
- **Year:** 2016

The parties’ contract (an attorney-client fee agreement) provided that the client could elect to make certain payments due under the contract over a period of 10 calendar quarters at an annual interest rate of 8%. The tribunal held that this provision was not directly applicable to the amount due by the client and considered the contract ambiguous as to whether the parties intended the 8% contractual rate or the 9% statutory rate to apply to this amount. The tribunal rejected the law firm’s request for 9% pre-award interest, noting that “[u]nder New York law, where a contract provides that interest will be paid at a specific rate until the principal has been paid, the contract rate governs, not the statutory rate, and interest is due until payment of the principal is made or until the contract is merged into a judgment.” The tribunal further noted that “[a]mbiguous provisions in attorney-client fee agreements are to be construed in a manner most favorable to the client.”

### Case 10

*PDV Sweeny, Inc. v. ConocoPhillips Co.*, ICC Case No. 16982, Final Award of 18 August 2014, ¶¶ 31–32

(available via Westlaw Arbitration Materials)

- **Institution:** ICC
- **Seat:** New York
- **Law:** New York, Venezuela
- **Year:** 2014

The relevant contract in this case was unusual, in that it provided for an interest rate that was specifically to be applied to damages. It read, in relevant part: “[Seller Damages] shall bear interest at the Default Rate (4.875%) from such Damages Due Date until the date of payment.”

The tribunal had previously rendered a Partial Award in which it awarded respondent Seller Damages under the contract. The parties had agreed that pre-award interest should be granted at the Default Rate (4.875%), and that it should run from the date when Seller Damages became due until the date of the Partial Award. Respondents sought the 9% statutory prejudgment interest rate for...
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</table>
- **Seat**: New York  
- **Law**: New York  
- **Year**: 2014 | 10% | The contract in this case provided for a “pre-default” interest rate of 8% on the principal balance due, and a 10% “default” rate once the claimant had made a demand for payment. The contract further provided that any amount to be paid by respondent “shall bear interest at the Default Rate or the maximum rate permitted by applicable Requirements of Law, whichever is less . . . .” This contract was more in line with the norm, in that it provided that the contractual rates applied to late payments and not to damages. The tribunal construed the term “Requirements of Law” as addressing only those laws that set upper limits on interest, such as usury statutes. To hold otherwise, the tribunal reasoned, would be to needlessly abridge the parties’ freedom to contractually agree on an interest rate of their choice. The tribunal further concluded that the interest rates specified under the contract were not prohibited by New York’s anti-usury laws. As such, the tribunal granted simple pre-award interest at 8% up until the “default date,” and 10% interest thereafter. The tribunal also granted simple post-award interest at 10%. |
| 12  | *CIMC Raffles Offshore Ltd. v. Schahin Holdings, S.A.*, ¶ 81(1)(a)-(c) (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- **Seat**: New York  
- **Law**: New York (?)  
- **Year**: 2012 | LIBOR +2% | The contract included an interest rate of LIBOR +2%. The tribunal granted pre-award interest at the contractual rate. However, the tribunal granted post-award interest at the statutory 9% rate, which was to run beginning 30 days after the rendering of the award. The tribunal did not explain why it decided to apply different rates |
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<td>13</td>
<td>Thales Alenia Space France v. Globalstar, Inc., ¶¶ 124, 126. (available via Westlaw Arbitration Materials)</td>
<td>Institution: ICDR - Seat: New York - Law: New York - Year: 2012</td>
<td>EURIBOR + 400 basis points</td>
<td>The contract stipulated an interest rate of EURIBOR + 400 basis points for late payments. The tribunal granted pre-award interest at the contractual EURIBOR rate. For post-award interest, the tribunal awarded 5% simple interest to run on unpaid amounts beginning 30 days from the issuance of the award until payment in full. The tribunal noted that this 5% rate corresponded closely to the rate that the parties agreed to in the contract (EURIBOR +400 basis points).</td>
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<td>14</td>
<td>Amaprop Ltd. v. Indiabulls Financial Services Ltd., ¶ 155–56 (available via Westlaw Arbitration Materials)</td>
<td>Institution: ICDR - Seat: New York - Law: New York, India - Year: 2011</td>
<td>12%</td>
<td>The agreement between the parties provided that the respondent would pay 12% interest per annum on all amounts borrowed. The tribunal, invoking the contract as well as equitable considerations and arbitral practice, awarded pre-award and post-award interest at the 12% contractual rate.</td>
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<td>15</td>
<td>Agrera Investments, Ltd. v. Palant, ¶ 68 (available via Westlaw Arbitration Materials)</td>
<td>Institution: ICDR - Seat: New York - Law: New York - Year: 2011</td>
<td>12%</td>
<td>The contract provided for a 12% interest rate on payments for purchase of shares, pursuant to a contractual stock purchase option. The tribunal applied the contractual rate, in light of the fact that claimant sought damages for breach of the very contractual provision that provided for the 12% interest rate.</td>
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<td>16</td>
<td>Westminster Securities Corp. v. Petrocom Energy Ltd. (available via Westlaw Arbitration Materials)</td>
<td>Institution: ICDR - Seat: New York - Law: New York - Year: 2010</td>
<td>12%</td>
<td>The tribunal granted pre-award interest on damages as well as on the fees and costs awarded. The tribunal did not specify the interest rate it was applying, although claimant had requested interest at the contractual rate applicable to late payments (12%).</td>
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<td>17</td>
<td>KWV Int’l (Pty) Ltd. v. Peter Andrew LLC, pp. 12–13</td>
<td>Institution: ICDR</td>
<td>7%</td>
<td>One of the contracts at issue provided for an interest rate of 7% on overdue payments; the other was silent on interest.</td>
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</table>
Despite the fact that “[b]oth parties have requested pre and post award interest at the New York statutory rate of 9% per annum,” the sole arbitrator concluded that the contractual interest provision reflected what the parties had deemed an appropriate rate of interest for their business arrangement and accordingly awarded interest at the 7% contractual interest rate, to run from the date of breach until the date of payment.

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### Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Reasoned Decisions)

In arbitrations where the contract between the parties was silent on the issue of interest, arbitral tribunals have often granted pre-award and/or post-award interest at the 9% New York statutory prejudgment interest rate. Those tribunals that have issued (often perfunctory) reasoned decisions on this issue have generally relied on the parties’ choice of New York law as the law governing the contract.

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- Seat: New York  
- Law: New York  
- Year: 2017 | The sole arbitrator granted pre-award interest at the 9% statutory rate. In this case, the parties apparently agreed that CPLR §§ 5001 and 5004 governed the grant of interest. The dispute related solely to whether the grant of pre-award interest on an award of lost profits would constitute double recovery and a windfall for the award creditor. The sole arbitrator considered that New York law did not bar the grant of prejudgment interest on lost profits. |
| 19  | Digitelcom Ltd. v. Tele2 Sverige AB, ¶ 457 (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- Seat: New York  
- Law: New York  
- Year: 2011 | The tribunal granted post-award interest on costs, to run beginning 15 days from the rendering of the award. It applied the New York 9% statutory prejudgment interest rate, holding that it was appropriate given that New York law governed the contract and New York was the seat of arbitration. |
- Seat: New York | The tribunal, citing the CPLR, granted pre-award interest at the statutory 9% rate, stating that “[w]e find this rate appropriate” because New York law governed the contract. The tribunal further granted post-award interest at 9%, to run beginning 30 |
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| 21  | Logic, S.P.A. v. L-3 Communications Corp., ¶ 111 (available via Westlaw Arbitration Materials) | - **Law**: New York  
- **Year**: 2016 | This decision is notable in that the tribunal explicitly found that it was not bound to apply the New York statutory prejudgment interest rate. However, citing to CPLR §§ 5001 and 5004, it found the 9% rate “appropriate” because it was the rate applied to New York court judgments and therefore “may be used by arbitral tribunals for guidance.” The tribunal granted simple pre-award interest at 9%, running from the date of breach. It also granted 9% post-award interest until the date the award was paid. |
| 22  | Sexton v. Karam et al., ¶¶ 218–222 (available via Westlaw Arbitration Materials) | - **Institution**: ICDR  
- **Seat**: New York  
- **Law**: New York  
- **Year**: 2014 | The tribunal did not grant pre-award interest, as it had rejected the claimant’s claims and there were no counterclaims. However, it did grant post-award interest on its award of costs and fees. The tribunal noted that Article 28(4) of the ICDR Rules allowed it to “award such . . . post-award interest . . . as it considers appropriate, taking into consideration the contract and applicable law.” The tribunal further indicated that the “New York CPLR does not set forth a post-award interest rate for international arbitrations seated in New York and does not mandate the application of its post-judgment interest rate to such arbitrations. Further, it is generally accepted in international arbitration that neither the statutory post-judgment interest rate at the seat of arbitration nor the statutory post-judgment interest rate of the law governing the contract mandatorily applies. Instead, arbitrators generally have wide discretion to determine the applicable interest rate, and the ICDR Rules reflect this principle. In exercise of its discretion, the tribunal nonetheless chose to apply the 9% CPLR rate “that would apply to a judgment rendered by a New York state court as of the date of this Final Award.” |
- **Seat**: New York | This arbitration, while administered by the LCIA, was conducted pursuant to the 1976 UNCITRAL Arbitration Rules, which are silent as to the award of interest. The tribunal declined to grant any pre-award interest, noting that the claimant did not request such interest and that the claimant had not incurred additional replacement |
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<td>Law: New York</td>
<td>costs that would warrant the grant of pre-award interest.</td>
<td>With respect to post-award interest, the tribunal granted the New York statutory prejudgment interest rate because New York law was the “law applicable to the arbitration” and the contract. This post-award interest was applied both to damages and to the costs awarded by the tribunal.</td>
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<td></td>
<td>Seat: Miami</td>
<td>- Year: 2008</td>
<td>The sole arbitrator granted pre- and post-award interest at the 9% statutory prejudgment interest rate, reasoning that “no interest rate was stipulated” in the contract. The sole arbitrator determined that pre-award statutory interest would run from the date of breach as determined by the arbitrator. Post-award interest would begin accruing if payment of the amount awarded was not made within 30 days.</td>
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**Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Unreasoned Decisions)**

Many awards that have granted interest at the 9% statutory prejudgment interest rate have done so without any analysis.

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<td></td>
<td>Institution: AAA</td>
<td>The sole arbitrator granted 9% pre-award interest pursuant to CPLR §§ 5001 and 5004. The sole arbitrator did not provide any reason for this award other than that the claimant was “entitled” to statutory interest.</td>
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<td></td>
<td>Law: New York</td>
<td>The sole arbitrator granted 9% interest pursuant to CPLR § 5004 to each of seven sums due under seven separate invoices.</td>
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<td>Year: 2016</td>
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<tr>
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<td>The sole arbitrator granted 9% interest pursuant to CPLR § 5004 to each of seven sums due under seven separate invoices.</td>
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<td>For pre-award interest, the tribunal simply awarded a lump sum amount. For post-award interest, the tribunal granted interest at the New York statutory prejudgment interest rate to run on any amounts unpaid within 30 days of issuance of the arbitral award.</td>
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<td>Law: New York</td>
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| 28  | **Hard Way, LLC v. Roc Fashions, LLC**, p. 2 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2014 | The tribunal granted a fixed figure for pre-award interest ($68,219.18 interest through June 18, 2014 plus $4.28 per day through date of award). For post-award interest, the tribunal granted 9% statutory interest, to run beginning 30 days after the rendering of the award. |
| 29  | **Caldera Resources, Inc. v. Global Gold Mining, LLC**, ICDR Case No. 50 2010 00674, p. 40 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York (?)  
- **Year:** 2014 | The tribunal neither granted nor discussed pre-award interest. It granted post-award interest at New York’s statutory prejudgment interest rate of 9% on most categories of damages awarded, running from the date of award. |
| 30  | **Garcia v. Ridge C.C.**, ¶¶ 66, 82 (available via Westlaw Arbitration Materials) | - **Institution:** ICC  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2014 | The tribunal granted 9% simple pre-award and post-award interest. The pre-award interest was to run from the date of breach. The tribunal opted to grant simple interest despite a contractual provision that allowed it discretion to grant compound interest. |
| 31  | **Schulte, Roth & Zabel, LLP v. China North Docl East Petroleum Holdings Ltd.**, p. 8 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York (?)  
- **Year:** 2014 | The sole arbitrator granted pre-award interest at the 9% statutory prejudgment interest rate, to run from date of breach. There was no discussion of post-award interest. |
| 32  | **GlobeOp Financial Svcs. LLC v. Titan Capital Group**, p. 51 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2014 | The sole arbitrator referenced the contractual choice of New York law and noted that “under New York law, interest is normally allowed and awarded as a matter of course.” He granted pre-award interest at 9%. He also granted post-award interest at the statutory prejudgment interest rate. |
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| 33  | *CE Int’l Resources Hldgs, LLC v. S.A. Minerals Ltd. Partnership*, ¶ 75 (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- Seat: New York  
- Law: New York  
- Year: 2013 | The sole arbitrator granted 9% statutory interest, to run from the approximate date of breach. This interest was to run until award-debtor received payment in full. |
| 34  | *Toshiba Corp. v. Nat’l Film Laboratories, Inc.* (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- Seat: New York  
- Law: New York  
- Year: 2012 | The sole arbitrator granted post-award interest at the statutory prejudgment interest rate on attorney’s fees and costs, to begin running immediately after the rendering of the award. There was no mention of pre-award interest. |
| 35  | *Colt Int’l Ltd. v. Alppower, Inc.* (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- Seat: New York  
- Law: New York  
- Year: 2012 | The sole arbitrator granted pre-award interest at the statutory prejudgment interest rate, to run from a date fixed after the commencement of the arbitration. There was no mention of post-award interest. |
| 36  | *Oakley Fertilizer, Inc. v. Hargpota For Trading & Distribution, Ltd.*, ¶ 136 (available via Westlaw Arbitration Materials) | - Institution: ICC  
- Seat: New York  
- Law: New York  
- Year: 2011 | The tribunal granted simple 9% statutory interest, running from the date of breach. It made no express finding with respect to post-award interest. |
| 37  | *Amri Rensselaer, Inc. v. Borregaard Industries Ltd.*, ¶ 3 (available via Westlaw Arbitration Materials) | - Institution: ICDR  
- Seat: New York  
- Law: New York  
- Year: 2010 | The sole arbitrator cited to the CPLR, and granted pre-award interest at the statutory prejudgment interest rate. The interest was to run from the date on which claimant received notice of the termination of the contract at issue.  
The sole arbitrator also granted post-award statutory interest at 9%, to run until date of payment. |
<p>| 38  | <em>A.G.k. SARL v. A.M. Todd Co.</em>, ¶ 17 (available via Westlaw Arbitration) | - Institution: ICDR | The tribunal granted pre-award interest at the 9% statutory prejudgment interest rate. The interest was to run from the date the arbitration commenced, given the extreme |</p>
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| 39  | Lizton Trading, Ltd. v. ATM Lenders, LLC, ¶¶ 190–91, 194 (available via Westlaw Arbitration Materials) | - **Institution:** LCIA  
- **Seat:** London  
- **Law:** New York  
- **Year:** 2008 | With respect to pre-award interest, the tribunal stated that it would exercise “its discretion to apply the New York rate of interest of 9% to the principal sums awarded.” This was to be a simple interest rate, running from the date of breach. Similarly, for post-award interest, the tribunal granted simple interest at New York’s statutory prejudgment interest rate. This was uncontested. The tribunal awarded interest at a rate of LIBOR +2% on the costs of the arbitration if not paid within 14 days. |
| 40  | Navneet Publications India Ltd. v. American Scholar, Inc., ¶¶ 5.2-5.3 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** Unclear  
- **Year:** 2008 | The sole arbitrator granted the claimant 9% pre-award interest running from the date of breach, and 9% post-award interest on any unpaid amounts to begin running 30 days from the date the award was rendered. |
| 41  | Colonial Oil Industries, Inc. v. Masefield America, Inc., ¶ 5.3 (available via Westlaw Arbitration Materials) | - **Institution:** ICC  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2007 | The tribunal granted both pre-award and post-award interest at the 9% statutory prejudgment interest rate. |
| 42  | Lubiam Modo per l’Uomo SPA v. Chesa Int’l Ltd., ¶ 19 (available via Westlaw Arbitration Materials) | - **Institution:** ICDR  
- **Seat:** New York  
- **Law:** New York  
- **Year:** 2007 | The tribunal granted pre-award interest “at the legal rate of interest permitted under the law of New York.” The interest was to run until the date of payment. |
<p>| 43  | Esso Exploration and Prod. Chad Inc. v. | - <strong>Institution:</strong> ICC | In this case, the applicability of the 9% statutory prejudgment interest rate was uncontested. The sole arbitrator granted pre-award interest, to run from “an |</p>
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| Taylors Int’l Svcs. Ltd., ¶¶ 58, 60 (available via Westlaw Arbitration Materials) | - Seat: New York  
- Law: New York  
- Year: 2006 | appropriate midpoint of the various dates on which Esso Chad incurred the losses suffered by it.” Post-award interest at the 9% rate was granted on both damages and the costs and fees awarded by the tribunal. It was to run starting 1 month and 1 week after the rendering of the award. |
| Capital India Power Mauritius I v. Maharashtra Power Dev’t Corp. Ltd., ICC Award No. 12913/MS, pp. 34–36 (available via italaw.com) | - Institution: ICC  
- Seat: New York  
- Law: New York  
- Year: 2005 | The tribunal granted 9% simple pre-award interest, to run from the date of the destruction of claimant’s equity in an investment project in breach of a Shareholders Agreement. The tribunal invoked its discretion to decline to grant pre-award interest on arbitration costs. The tribunal also granted 9% simple post-award interest. |
| Chemical Overseas Hldgs, Inc. v. Uruguay, ¶¶ 64–65, 68(a) and 68(h) (available via Westlaw Arbitration Materials) | - Institution: ICC  
- Seat: New York  
- Law: New York  
- Year: 2004 | Invoking the CPLR, the tribunal held that claimants were entitled to simple 9% interest “from the earliest ascertainable date the cause of action existed.” The tribunal also granted simple post-award interest at the statutory 9% rate. |
| ICC Case No. 9839, ¶ 63 (excerpt available in 2004 Y.B. Com. Arb. 66) | - Institution: ICC  
- Seat: Unclear  
- Law: New York  
- Year: 1999 | The tribunal held that, under CPLR § 5001, the petitioner was owed 9% interest from the earliest possible date its cause of action existed. This 9% interest was to run until petitioner received full payment of the sum awarded. |
- Seat: The Hague  
- Law: Unclear  
- Year: 1982 | In this case, a check issued by the respondent to claimant remained unpaid due to a presidential order of 14 November 1979, freezing respondent’s U.S. assets. A consent judgment was filed in the New York County Clerk’s office on 28 February 1980. Before the Iran-U.S. Claims Tribunal, the claimant sought the principal amount of this judgment plus interest running from 14 November 1979. For its part, the respondent claimed that no interest should be payable on the principal amount because its funds in the U.S. were frozen. The tribunal noted evidence that respondent’s U.S. funds had yielded interest during the period in question, and therefore respondent could not be exempted from paying New York statutory interest. |
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<td>The tribunal applied §§ 5003 and 5004 of the CPLR in its analysis. The application of § 5003, which deals with post-judgment interest, was a product of the unusual circumstances of this case, <em>i.e.</em> that the tribunal was dealing with an award that followed a New York state court judgment. The tribunal granted pre-award interest at 6% up to and including 24 June 1981. After that date, pre-award interest was raised to 9% to match the increase in the CPLR rate. This interest was to run from the date of the consent judgment. No post-award interest was granted.</td>
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APPENDIX B
New York Federal and State Court Decisions Reviewing Arbitrators’ Awards of Interest

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<td>1</td>
<td>Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (2d Cir. 1984)</td>
<td>In this New York Convention case, the lower court had confirmed the tribunal’s award without granting post-award, prejudgment interest, stating that it did not have jurisdiction to “go beyond confirmation” of the award. On appeal, the Second Circuit held that whether to grant post-award, prejudgment interest in cases arising under federal law has, in absence of statutory directive, been placed in the “sound discretion” of the district courts. The court noted that there is a presumption in favor of the award of prejudgment interest, and that the facts did not indicate that award of prejudgment interest would be inappropriate in this case. The case was thus remanded to the district court for computation of post-award, prejudgment interest at an “appropriate rate.”</td>
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<td>2</td>
<td>Manios v. Zachariou, No. 14CV4331-LTS-DCF, 2015 U.S. Dist. LEXIS 42537 (S.D.N.Y. 2015)</td>
<td>In this proceeding to vacate an international arbitral award under Chapter 2 of the Federal Arbitration Act (“FAA”), the award-creditor argued that the arbitrators had manifestly disregarded the law by granting pre-award interest on a distribution of assets in an estate settlement case. The award-creditor contended that the terms of CPLR § 5001 only allow for interest upon “a sum awarded.” The court rejected the award-creditor’s “manifest disregard” claim, holding that where parties agree to submit a dispute to AAA arbitration (such as in the instant case), the AAA Commercial Rules are incorporated into the underlying agreement. Because the AAA Rules grant arbitrators the authority to award interest at such rate and from such date as they may deem appropriate, the tribunal did not manifestly exceed its authority by granting pre-award interest in this case. Accordingly, the award-debtor was not entitled to vacatur of the arbitral tribunal’s award under the FAA.</td>
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<td>Sayigh v. Pier 59 Studios, No. 11-CV-1453-RA, 2015 U.S. Dist. LEXIS 27139, at *37 (S.D.N.Y.</td>
<td>In this proceeding to modify or vacate an arbitral award, the award-creditor argued that the arbitrator manifestly disregarded New York law by not granting her pre-award interest.</td>
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<td>The court rejected this argument, first noting that CPLR § 5001 (providing that interest shall be recovered on a sum awarded for breach of contract) was inapplicable, as the underlying dispute concerned an alleged act of employment discrimination. The court further held that, “where an arbitrator could have awarded pre-award prejudgment interest but did not, the court may not do so when entering judgment on an arbitration award.” The court, applying CPLR § 5002, granted “post-award prejudgment interest at an annual rate of 9%” as well as post-judgment interest at the rate provided for in 28 U.S.C. § 1961(a).</td>
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<td>Local Union No. 1 of the United Assn. of Journeymen &amp; Apprentices of the Plumbing &amp; Pipe Fitting Indus. v. Bass Plumbing &amp; Heating Corp., 2014 U.S. Dist. LEXIS 183085 (E.D.N.Y. Oct. 28, 2014)</td>
<td>In this proceeding to confirm a domestic arbitral award, the arbitral tribunal had not granted post-award, prejudgment interest. Petitioner sought, along with confirmation of its award, to obtain interest from the date of the award. Magistrate judge Viktor Pohorelsky found that where an award is silent as to prejudgment interest, a court is not entitled to award such interest. He therefore recommended that Petitioner’s request for interest be denied. This recommendation was adopted, and a judgment was entered in Local Union No. 1 of the United Assn. of Journeymen &amp; Apprentices of the Plumbing &amp; Pipe Fitting Indus. v. Bass Plumbing &amp; Heating Corp., 2015 U.S. Dist. LEXIS 37932 (E.D.N.Y. Mar. 25, 2015). This judgment is at odds with the weight of New York federal case law, which provides that courts have discretion to grant post-award, prejudgment interest where the arbitral award is silent as to such interest. The outcome of this case appears to have resulted from the Magistrate Judge’s misreading of certain precedents (see Shamah v. Schweiger and Moran v. Arcano, below) which had referred to pre-award interest as “prejudgment” interest.</td>
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<td>PremiereTrade Forex, LLC v. FXDirectDealer, LLC, No. 12 CIV. 7006 PAC, 2013 WL 2111286 (S.D.N.Y. May 16, 2013)</td>
<td>In this proceeding to confirm a domestic arbitral award, the tribunal in the underlying arbitration had granted post-award interest at the New York statutory prejudgment interest rate of 9%, to begin running 30 days after the award. During the confirmation proceeding, the award-creditor sought a separate, additional award of prejudgment interest at 9% per annum, on top of the arbitrators’ award of post-award interest. The court denied the award-creditor’s request for duplicative post-award, prejudgment interest, noting that “confirmation of the award will include post-award interest at a rate of 9% specified in the arbitrators’ opinion”. The court further noted that, to the extent the award-creditor’s request for prejudgment interest referred to pre-award interest, “the Court will not grant interest that the arbitrators in this action explicitly denied.”</td>
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| 6   | *Ganfer & Shore, LLP v. Witham*, 2011 U.S. Dist. LEXIS 2622 (S.D.N.Y. 2011)   | In this proceeding to confirm a domestic arbitral award, the court held that where an arbitral tribunal does not grant pre-award interest, a court cannot award such interest on a motion to confirm the arbitration award.  
By contrast, the court held that it was required to grant post-award, prejudgment interest “absent circumstances warranting the contrary” and that post-judgment interest was similarly “mandatory.” |
| 7   | *Finger Lakes Bottling Co. v. Coors Brewing Co.*, 748 F.Supp.2d 286, 292-93 (S.D.N.Y. 2010) | In this proceeding to confirm a domestic arbitral award, the court first noted that, where arbitrators have authority to grant pre-award interest, courts cannot grant such interest in post-award proceedings.  
However, in this case the issue of interest was beyond the scope of the parties’ narrowly-worded and limited arbitration agreement.  
New York law governed the granting of pre-award interest, because this was a diversity case and New York law governed the arbitration agreement.  
The award-creditor was not entitled to interest at the 9% statutory prejudgment interest rate because it did not assert a claim for breach of contract.  
Rather, because the proceeding was one of an equitable nature, the court had discretion to grant pre-award interest under CPLR § 5001.  
The court ultimately granted interest at the treasury bill rate, reasoning that the New York statutory prejudgment interest rate was not in line with actual market conditions. |
| 8   | *Petrie v. Clark Moving & Storage, Inc.*, No. 09-CV-06495, 2010 U.S. Dist. LEXIS 48460 (W.D.N.Y. 2010) | In this proceeding to confirm a domestic arbitral award, the award-creditor requested that the court grant pre-award interest at the 9% rate specified in CPLR § 5004.  
The court rejected the award-creditor’s claim, noting that arbitrators may provide for pre-award interest as part of their award, but if the award is silent on pre-award interest courts may not grant it.  
Because the “court is not entitled to award an amount relating to such prejudgment interest . . . the parties must determine the applicable interest rate and calculate the amount due.” |
| 9   | *Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper*, 2007 U.S. Dist. LEXIS 58114 (S.D.N.Y. Aug. 10, 2007) | In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the award to add prejudgment interest.  
The award-creditor sought 9% prejudgment interest pursuant to the CPLR, from the date the contract balance was due.  
The arbitral tribunal had held that “[a]lthough prejudgment interest may be required by the CPLR, we find that we have discretion under the applicable rules of the American Arbitration Association not to award pre-award interest . . . Given the vast uncertainties concerning the amounts due and the reasons for those uncertainties . . . we think it is highly inappropriate to award interest and we decline to do so.”  
In denying the award-creditor’s motion to modify the award, the court noted that “the arbitrators did not
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<td>disregard law in exercising their discretion to deny [award-creditor] prejudgment interest.” The court noted that the parties had selected the American Arbitration Association Construction Industry Rules and New York law to govern their dispute. The former, at Rule 44(d), grant arbitrators discretion to award such interest as they may deem appropriate. The latter, at CPLR § 5001, provides that “interest may be required by law.” Ultimately, the court concluded that “[g]iven the tension between Rule 44(d) and Section 5001, it is appropriate to refrain from vacating an arbitral award and to defer to the arbitrators’ judgment. This case was partially reversed on unrelated grounds in E.E. Cruz v. Coastal Caisson Corp., 346 Fed. Appx. 717 (2d Cir. 2009).</td>
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<td><em>P.M.I. Trading Ltd. v. Farstad Oil, Inc.</em>, 2001 U.S. Dist. LEXIS 227 (S.D.N.Y. 2001)</td>
<td>In this New York Convention case, the court, citing Waterside Ocean Nav., held that, absent persuasive evidence to the contrary, post-award, prejudgment interest is available for judgments rendered under the New York Convention and is presumed to be appropriate. The court held that “[t]he mere fact that arbitrators chose not to award post-award, prejudgment interest does not control this analysis.” It granted post-award, prejudgment interest, as well as post-judgment interest, at the federal post-judgment rate specified by 28 U.S.C. § 1961(a).</td>
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<td><em>Shamah v. Schweiger</em>, 21 F.Supp.2d 208 (E.D.N.Y. 1998)</td>
<td>In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the amount of the award to include pre-award interest at the New York statutory prejudgment interest rate of 9%. It asserted that the tribunal’s grant of 6% interest was a “material miscalculation” that necessitated modification. The court denied the motion, noting that courts “have rejected motions to vacate or modify arbitration awards which have failed to provide prejudgment interest.” The court also cited <em>Moran v. Arcano</em> for the proposition that arbitrators may grant pre-award interest, but when their award is silent with regard to such interest, courts may not grant it in the arbitrators’ stead. The court considered that, in awarding 6% interest, the tribunal could have been using the federal post-judgment interest rate. Accordingly, there was no evidence that the pre-award interest component of the arbitral award was miscalculated. The court denied the award-creditor’s request for modification.</td>
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| 12  | *Nicoletti v. E.F. Hutton & Co.*, 761 F.Supp. 312 (S.D.N.Y. 1991) | The award-creditor moved to modify a domestic arbitral award on the ground that the tribunal had manifestly disregarded the law in failing to grant him pre-award interest under CPLR § 5001. The court denied the motion, noting that the award-creditor had cited to no case in which an arbitration
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<td><em>Jamaica Commodity Trading Co. v. Connell Rice &amp; Sugar Co.</em>, No. 87 CIV. 6369 (JMC), 1991 WL 123962 (S.D.N.Y. July 3, 1991)</td>
<td>In this New York Convention enforcement proceeding, the arbitral tribunal had granted post-award, prejudgment interest “in the amount of 10% per year from the date of the award until the award is fully paid or reduced to judgment.” In addition to confirming the principal amount of the award, the court expressly noted that it was confirming the arbitrators’ award of prejudgment interest pursuant to <em>Waterside Ocean Nav.</em></td>
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<td>14</td>
<td><em>Moran v. Arcano</em>, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. 1990)</td>
<td>In this proceeding to confirm a domestic arbitral award, the award-debtor claimed pre-award and post-award, prejudgment interest. The court held that whether interest is taxed on a claim prior to the entry of an arbitration award (i.e., pre-award interest) is within the discretion of the arbitrators (although neither of the two cases that it cited in support of this proposition so held). The court held that if the award is silent as to pre-award interest, a court is not entitled to grant it. By contrast, it held that “the award of post-award prejudgment interest is a matter left with the district court.”</td>
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<td><em>Brandeis Intsel, Ltd. v. Calabrian Chemicals Corp.</em>, 656 F.Supp. 160 (S.D.N.Y. 1987)</td>
<td>In this proceeding to confirm an international arbitral award under the New York Convention, the award-debtor cross-moved for vacatur, <em>inter alia</em> on the ground that the tribunal’s award of 11.5% pre-award interest was penal and therefore contrary to U.S public policy. The court denied the cross-motion, holding that the award-debtor had not shown that the arbitrators’ chosen rate of 11.25% per annum was penal as a matter of English law, which governed the parties’ contract. Moreover, the award-debtor had not pointed to any other expression of accepted public policy which would weigh against confirming the arbitrators’ award of interest. 28 U.S.C. § 1961(a), which refers to post-judgment interest, was inapposite.</td>
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| 16  | *UCO Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213 (S.D.N.Y. 1984)     | In this proceeding to confirm a domestic arbitral award, the award-debtor cross-moved to vacate the award, in part on the ground that the tribunal’s calculation of post-award interest was incorrect and unauthorized. The tribunal had granted post-award interest at a rate of 12%, to run beginning 30 days after the award was rendered. The court rejected the award-debtor’s argument that this grant of interest was unauthorized, noting that “[p]ost-award interest is an entirely rational arrangement established by the arbitrators to compensate [award creditor] for its loss . . . Absent some express limitation on such an award, the Court can discern
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<td>no disregard of applicable law or of the [underlying contract] here.”</td>
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<td>The court further rejected the award-debtor’s argument that the annual rate of 12% established in the arbitral award should be set aside, as there was no indication that the tribunal disregarded the law in granting such a rate of interest.</td>
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<td>In this confirmation proceeding, the award-debtor moved to vacate the arbitral tribunal’s grant of pre-award interest at 14%, as said interest was omitted from the arbitral award itself and was only later added as an “Appendix B.” The award-debtor argued that this amounted to an impermissible reconsideration of the tribunal’s ruling.</td>
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<td>The court rejected the award-debtor’s claim, holding that the tribunal had not considered the issue of interest in its initial award, and therefore retained discretion to subsequently add pre-award interest in the form of Appendix B.</td>
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<td>The grant of interest was thus confirmed. The court, applying federal maritime law, granted post-award, prejudgment interest, also at 14%.</td>
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<td>In this case, the award-debtor moved to vacate a prior judgment confirming an arbitral award. The prior judgment had granted pre-award interest to the award-creditor notwithstanding that (a) the tribunal had not granted pre-award interest, and (b) the issue of interest had not been placed before the arbitral tribunal.</td>
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<td>The court held that, under CPLR §§ 5001, 5002 and 5003, the award-creditor was entitled to interest as a matter of right. The court noted that while the issue of interest was not submitted to the tribunal in the demand for arbitration, the parties specifically agreed in their arbitration agreement to arbitrate their dispute “as to balance due, together with appropriate interest.” Further, the award-creditor had demanded interest in the complaint it submitted to the district court.</td>
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<td>Thus, even though the arbitral tribunal had not granted pre-award interest, the court rejected the award-debtor’s argument that the court’s grant of pre-award interest was improper and merited vacatur or modification of the prior judgment.</td>
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<td>N.B. This case appears at odds with the weight of subsequent case law, which unambiguously holds that courts may not grant pre-award interest if the arbitrators have not done so.</td>
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<td>New York State Court Decisions Reviewing Arbitrators’ Interest Awards</td>
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<td>New York state case law mirrors federal case law with regard to the review of arbitrators’ awards of interest.</td>
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<td><em>Dermigny v. Harper</em>, 6 N.Y.S.3d 561 (2d Dep’t 2015)</td>
<td>In this appeal, the award-creditor sought to reinstate a vacated lower court judgment that had confirmed an arbitral award and granted pre-award interest. The lower court had vacated its own judgment on the ground that the award-creditor had misrepresented to the clerk of the court that he was entitled to pre-award interest. The Appellate Division noted that, because the arbitration award did not include a provision granting pre-award interest to the award-creditor, the court was without power to grant such pre-award interest. Post-award, prejudgment interest and post-judgment interest were granted pursuant to CPLR 5002 and 5003, respectively.</td>
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<td><em>Esrey v. Ernst &amp; Young, LLP</em>, 133 A.D.3d 539 (1st Dep’t 2015)</td>
<td>In this case, the award-creditors appealed from a lower court ruling denying a motion to vacate an arbitral award on the ground that the tribunal had manifestly disregarded the law by granting prejudgment interest at a rate lower than the CPLR rate. The First Department affirmed the trial court’s ruling, noting that (a) the parties’ agreement limited the prevailing party’s damages to the actual damages suffered and (b) the tribunal had found that the award-creditors were “fully compensated” by reduced prejudgment interest.</td>
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<td><em>Peters v. Collazo Florentino &amp; Keil LLP</em>, 117 A.D.3d 432 (1st Dep’t 2014)</td>
<td>In this case involving a domestic arbitral award, the award-creditor appealed from a decision confirming an arbitral award which granted prejudgment interest at a rate of 2% per annum. The First Department, reviewing the award under CPLR Article 75, denied the appeal and held that (a) the award-creditor failed to timely move to modify the award to raise the prejudgment interest rate to 9%, and (b) in any event, the arbitrator properly set the prejudgment interest rate at 2%. It is not entirely clear why the court felt that the 2% rate was proper. The court cited to CPLR § 5001(a), suggesting that it may have viewed the dispute as one of an equitable nature rather than for breach of contract. CPLR § 5001(a) provides that “in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court’s discretion.”</td>
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<td><em>Kingdon Capital Mgt., LLC v. Kaufman</em>, 110 A.D.3d 648 (1st Dep’t 2013)</td>
<td>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s judgment granting the award-creditor the sum and prejudgment interest rate set by the award. The First Department unanimously affirmed the lower court judgment, noting that there was no basis for modifying the rate of prejudgment interest awarded.</td>
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<td>23</td>
<td><em>Levin &amp; Glasser, P.C. v. Kenmore Property, LLC</em>,</td>
<td>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s</td>
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|     | 896 N.Y.S.2d 311 (1st Dep’t 2010) | judgment granting the award-creditor pre-award interest pursuant to CPLR § 5001.  
The Appellate Division vacated the lower court’s judgment, holding that the lower court had erred in granting pre-award interest. It reasoned that, in contract disputes before an arbitral tribunal, the question of whether interest from the date of breach of contract should be allowed in the arbitral award is a mixed question of law and fact that is for the arbitrator to determine.  
Because the award-creditor could have sought pre-award interest from the arbitral tribunal, it was now barred from seeking such interest from the court. |
| 24  | Grobman v. Chernoff, 881 N.Y.S.2d 458 (2d Dep’t 2009) | The award-creditor appealed from a lower court order that disallowed pre-award interest. The circumstances of this case were unusual, in that the arbitration was focused solely on the issue of damages after the award-debtor’s liability had been determined in a prior jury trial.  
The Appellate Division observed that in a personal injury action in which the trial is bifurcated, interest on damages runs from the date liability is determined. Therefore, the court held that the award-creditor was entitled to “pre-award” interest, i.e. interest running from the date of the jury verdict that preceded the arbitration.  
Thus, the Appellate Division granted the award-creditor interest on her personal injury award from the date the award-debtor’s liability was determined, notwithstanding the tribunal’s silence with regard to pre-award interest. This decision was affirmed by the Court of Appeals in Grobman v Chernoff, 15 N.Y.3d 525 (2010). |
| 25  | West Side Lofts, Ltd. v. Sentry Contr., Inc., 300 A.D.2d 130 (1st Dep’t 2002) | In this case involving a domestic arbitral award, the award-debtor appealed from a lower court ruling confirming an arbitral award, including pre-award interest.  
The First Department affirmed the lower court’s judgment. It held that, [g]iven a broad arbitration clause and the absence of a contractual provision specifically prohibiting preaward interest, the award of preaward interest cannot be successfully challenged as beyond the arbitrator’s power simply because the parties’ contract contains no provision therefor and petitioner made no such demand in the arbitration.” |
| 26  | Rothermel v. Fidelity & Guarantee Ins. Underwriters Inc., 721 N.Y.S.2d 565 (3d Dep’t 2001) | In this case involving a domestic arbitral award, the award-creditor appealed from a lower court ruling denying his request for pre-award interest. The arbitral tribunal had also refused to grant pre-award interest.  
The Appellate Division affirmed the lower court’s ruling, holding that the question as to whether pre-award interest is to be awarded is for the arbitrator to determine and, if the arbitrator does not award any pre-award interest, the court is powerless to do so. |
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<td>The court added that even if the arbitrator had committed an error of fact or law in denying the award-creditor pre-award interest, the lower court would have lacked the authority to correct such an error.</td>
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<td>27</td>
<td><em>Excelsior 57th Corp. v. Kern</em>, 283 A.D.2d 209 (1st Dep’t 2001)</td>
<td>The award-creditor appealed from a lower court judgment vacating so much of an arbitration award as granted pre-award interest. The Appellate Division affirmed the lower court, holding that the arbitrators exceeded their authority in awarding pre-award interest on the back rent they found due, because (a) the parties’ narrow arbitration clause only covered specifically-mentioned issues of fact and (b) the parties did not agree to submit the issue of interest to the arbitrators. The court also declined to use “judicial discretion” to award interest under CPLR 5001, criticizing the award-debtor’s conduct in the underlying arbitration.</td>
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<td>28</td>
<td><em>State Farm Mut. Auto. Ins. Co. v. Cordes</em>, 662 N.Y.S.2d 140 (2d Dep’t 1997)</td>
<td>In this appeal, the Second Department reversed a lower court order that granted pre-award interest, in spite of the arbitral tribunal’s failure to do so. The Second Department noted simply that “[t]he court lacked the power to award pre-arbitration award interest.”</td>
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<td>29</td>
<td><em>Aetna Casualty and Surety Co. v. Rosen</em>, 650 N.Y.S.2d 29 (2d Dep’t 1996)</td>
<td>In this appeal from a lower court judgment confirming an arbitral award, the Appellate Division modified the lower court’s ruling so as to omit the court’s award of pre-award interest. The Appellate Division explained that the lower court was powerless to grant pre-award interest (as presumably the tribunal had not provided for such interest). Rather, upon confirmation of an arbitrator’s award, interest should be calculated from the date of the award.</td>
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<td>30</td>
<td><em>Sedlis v. Gertler</em>, 554 N.Y.S.2d 615 (1st Dep’t 1990)</td>
<td>In this appeal from a lower court judgment confirming a domestic arbitral award, the tribunal had granted pre-award interest and post-award interest at a rate of 12%. The award-creditor requested that the court vacate the award or modify the interest the interest portion of the award. The parties’ contract provided that late payments would bear interest at the rate specified or at the “legal rate” at the award-creditor’s place of business, which was New York. The First Department held that, as no interest rate was specified in the parties’ contract, prejudgment interest should be calculated at the rate of 6% per annum set by General Obligations Law § 5-501(1). In modifying the award, the First Department relied on CPLR § 7511(c)(1), which provides that the court shall modify an arbitral award if “there was a miscalculation of figures . . . in the award.” This appears to have been in error, given that CPLR § 7511(c)(1) only authorizes modification of computational errors and not reversal of substantive rulings. The arbitrators’ award of interest involved a decision on a substantive...</td>
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<td>31</td>
<td><em>Gruberg v. Cortrell Group, Inc.</em>, 143 A.D.2d 39 (1st Dep’t 1988)</td>
<td>In this case involving a domestic arbitral award, the award-creditor appealed from a lower court judgment that had denied pre-award interest. The Appellate Division upheld the lower court’s decision to deny pre-award interest, but modified the date from which post-award interest was to run to correct a computational error by the arbitrator. The Appellate Division noted that in a contract dispute brought before an arbitrator, the question of whether interest from the date of breach of contract should be allowed is a mixed question of law and fact for the arbitrator to determine. Further, in a motion under CPLR § 7510 to confirm an arbitral award, the arbitrator’s award is deemed conclusive as to all matters of law and fact, unless some ground for modification or vacatur exists under CPLR § 7511. In this case, since the tribunal’s award was silent as to pre-award interest, the lower court did not have the authority to grant such interest.</td>
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<td>32</td>
<td><em>Rosenblum v. Aetna Casualty &amp; Surety Co.</em>, 439 N.Y.S.2d 482 (3d Dep’t 1981)</td>
<td>The award-creditor appealed from a lower court judgment confirming an arbitral award that omitted pre-award interest. The award-creditor had moved under CPLR § 7511 to modify the award to include pre-award interest, but this motion was denied. The Appellate Division considered it “well settled” that arbitrators are empowered to fashion awards to achieve just results and “may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.” Accordingly, the award should not be disturbed.</td>
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<td>33</td>
<td><em>Penco Fabrics, Inc. v. Bogopulsky, Inc.</em>, 146 N.Y.S.2d 514 (1st Dep’t 1955)</td>
<td>In this proceeding involving a domestic arbitral award, the Appellate Division held that the question of whether interest is to be allowed from the date of breach was for the arbitrators to determine. The court was powerless to award interest from the date of breach. The mere fact that the award was silent on interest did not mean that the arbitrators did not consider this question. Additionally, the court noted that provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their disputes to arbitration forego these provisions and leave all questions of law and fact to the arbitrators. The right to interest involves questions of law and fact that were within the arbitrators’ purview.</td>
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| 34  | *Taborsky v. Bayes*, No. 09-9562, 2016 N.Y. Misc. LEXIS 592 (Sup. Ct. Suffolk Co. Feb. 23, 2016) | In this proceeding to confirm an arbitral award pursuant to CPLR Article 75, the award-creditor moved to modify the award to add pre-award interest, pursuant to CPLR § 5001. Citing *Dermigny* and *Rothermel*, the court noted that the arbitration award “did not include a provision
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<td>granting the [award-creditor] pre-arbitration award interest; consequently, the court is without power to award such interest.”</td>
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<td>In this proceeding to confirm a domestic arbitral award in a labor dispute, the award-creditors claimed that they were entitled to pre-award interest on their back pay award as a matter of law, despite the fact that the tribunal had not granted such interest. The court, applying the review standards contained within CPLR Article 75 and the Federal Arbitration Act, concluded that “judicial review of arbitration awards is extremely limited.” In particular, the court noted that arbitrators may provide for pre-award interest as part of their award, and that courts have rejected motions to vacate or modify arbitration awards which have failed to provide pre-award interest. It also noted that where an award is silent on pre-award interest, a court may not grant it. Thus, because pre-award interest was not mentioned in the arbitral award, the award-creditors’ request was denied.</td>
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<td>36</td>
<td>DeMartini v. Bertram Garden Apartments, 138 N.Y.S.2d 659 (Sup. Ct. Queens Co. 1955)</td>
<td>In this case involving a domestic arbitration, the arbitral tribunal had rendered an award, a judgment had been entered thereon, and the award-debtor had made payment in full. Nevertheless, the award-creditor contended that he was still entitled to continue a proceeding to enforce a mechanic’s lien for pre-award interest on the arbitral award. The arbitrator’s award had not provided for pre-award interest. The court noted that “interest was an incident of the award and arose out of the contract between the parties” because all matters arising out of that contract were within the scope of the parties’ arbitration agreement. It followed that the arbitral award and the judgment entered thereon stood as a bar to enforcement of the mechanic’s lien. The court thus granted summary judgment dismissing the award-creditor’s attempt to enforce the mechanic’s lien.</td>
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Committee on International
Commercial Disputes

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In this article, we posit that when arbitral tribunals decide international disputes, they typically fail to fully compensate claimants for the loss of the use of their money. This failure occurs because they do not acknowledge that businesses typically invest in opportunities that pose a significantly greater risk than the risk reflected in such commonly used standards as U.S. T-bills and LIBOR rates. Claimants also must share the blame when they do not set out a well-constructed claim for interest as damages. However, even when claimants do so, tribunals often award damages at a statutory rate or at rate reflecting a nearly risk-free investment because they are unfamiliar with modern economic and financial principles. We propose changing this practice. We set out a legal framework for allowing an award of interest as damages and then furnish a model for claimants and tribunals to use. Under this model, interest reflects market realities with the interest award to be compounded on a yearly basis. This model would bring awards in line with modern economic practice and more accurately compensate injured parties.
INTRODUCTION

Two principles are well settled in international law today. First, when a respondent engages in a wrongful act, it is liable for all damages that naturally result. Second, the respondent is liable for the loss of the use of money and must compensate by paying interest.1

Because claims in international disputes today often involve millions of dollars and because lengthy periods of time may elapse between the origin of the dispute and the final award, a tribunal’s award of interest may be as large as the principal claim itself.2

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Recent years have seen dramatic changes in the awarding of interest in the international arena. In the not too distant past, tribunals deciding international disputes would typically award interest by applying a national law on interest. They would apply a fixed statutory interest rate providing for the payment of only simple interest. The practice of awarding only simple interest was so ingrained that in her leading treatise, Marjorie Whiteman wrote “there are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable.” And for over half a century, many agreed. This practice, however, began to change with the new millennium. Today, tribunals deciding disputes under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) commonly award interest at market rates, such as the U.S. T-bill or LIBOR rates, and on a compound basis.

Although these changes were designed to more fairly compensate claimants for the loss of the use of money, in practice they
fail to do so. This failure occurs because they do not acknowledge that businesses typically invest in opportunities that pose a significantly greater risk than the risk reflected in such commonly used standards as U.S. T-bills and LIBOR rates. The fault, however, does not lie with tribunals alone. Claimants also must share the blame because they may not set out well-constructed claims for interest. Nevertheless, even when claimants do so, tribunals often award damages at statutory rates or at rates reflecting a nearly risk-free investment because they are unfamiliar with modern economic and financial principles.

We propose changing this practice. In this article, we argue that the goal of full compensation would be better served by allowing interest to be awarded as damages. This approach finds support in national laws, as well as in international treaties and conventions. In addition, the traditional limitations on damages, such as causation, foreseeability and certainty, pose no per se bar to their award. We also furnish a model (the opportunity cost approach) for claimants and tribunals to use. Under this model, interest accrues at a rate in line with specific market realities with the interest award to be compounded on a yearly basis. This model would bring awards in line with modern economic realities and more accurately compensate injured parties. Indeed, such a standard is required to ensure that a party is made whole after being deprived of the opportunity to earn a return on the use of its money.

I. OVERVIEW

Interest is a sum paid or payable as compensation for the temporary withholding of money.12 Today, interest is a well-accepted form of compensation for the loss of the use of money—so much so that it is often awarded without proof of actual loss. Courts and tribunals presume that the delayed payment of money deprives the injured party of the ability to invest the sum owed.13

There are three reasons for requiring a respondent to pay interest to a claimant that has succeeded on its damages claims. The first and main reason is to fully compensate the claimant by restoring it to the position it would have enjoyed if the wrongful act had not occurred.14 The payment of interest recognizes that there exists the loss of return opportunity between the time of injury and the time of award.15 Indeed, if there were no delay between the date of the injury and date of compensation, a claimant would be made whole by the tribunal’s award, and an award interest would not be needed. However, delay in the payment of compensation can be quite lengthy and lead to increased financial loss to the claimant, ultimately leading to a position of uncertainty especially in times of monetary depreciation. In awarding interest, a tribunal rightly recognizes that the injured party is justly compensated not only for the original injury or loss but also for the passage of time between the date of injury or loss.

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12. See McCollough & Co., Inc. v. Ministry of Post, Tel. & Tel., 11 Iran-U.S. Cl. Trib. Rep. 3, 29 (1986); S. G. HACKWORTH, DIGEST OF INT’L LAW 735 (1943) (citing Illinois Central Railroad Co. (U.S. v. Mex.), Opinions of the Commissioners 189 (1927)); 1 D. DOBBS, DOBBS LAW OF REMEDIES § 3.6(1) (2d ed. 1993). Interest is distinguished from usury, which is considered to be a form of unjust enrichment in that the creditor is receiving more than what the creditor had lent. SIDNEY HOMER & RICHARD E. SYLLA, A HISTORY OF INTEREST RATES 73 (3d ed. 1991).

13. See McCollough, 11 Iran-U.S. Cl. Trib. Rep. at 29; Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4 (Dec. 8, 2000), 41 I.L.M. 896, 896 (2002); see also DOBBS, supra note 12, § 3.6(3); WHITEMAN, supra note 5, at 1991-92.


and the date of full reinstatement.

The second reason for awarding interest is to prevent unjust enrichment of the respondent. Respondents that retain and use the money owed to the claimants during the resolution of the dispute enjoy an unfair benefit. They are receiving the earning capacity of the borrowed money without compensating the claimants for the loss of its use. Pursuant to this rationale, the respondents should be liable for at least "the reasonable cost the [respondent] would have incurred in borrowing the amount in question for the relevant period."16

The third reason for awarding interest is that it promotes efficiency. It encourages parties to avoid disputes and, when they do occur, to resolve them in a timely manner. Without interest, the losing respondent’s obligations are lessened. Because the resulting cost to the respondent for the breach is less, the respondent may not be sufficiently deterred from breaching the contract. It may even delay the resolution of the dispute, because the respondent profits from the use of the claimant’s money while the dispute is in the process of being resolved. As for the claimant, if the claimant knows that it will not receive interest, it may take excessive precautions to avoid future litigation.17

Claims for interest typically raise four issues. The first issue is whether the court or tribunal has the authority to award interest. If it decides that it has the authority to award interest, the second issue is how to determine the period over which interest accrues. The third issue is at what rate the interest should accrue. The final issue concerns whether interest should accrue on a simple or compound basis.

**Liability for Interest.** The laws of most countries hold a respondent liable for interest.18 Italian Civil Code Article 1224 illus-

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17. See Louis B. Sohn & R. R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens: Draft No. 12 with Explanatory Notes 242 (explanatory note to art. 38(1)); Knoll, supra note 15, at 296–97. An inadequate award of interest also could have the effect of pressuring the claimant to settle quickly, and to accept a lower amount of compensation early, rather than wait for an award of higher compensation.

18. For a comparative study of interest, see Gotanda, supra note 1, at 193–236.
INTEREST AS DAMAGES

It states: "[i]n obligations having as their object a sum of money, legal interest is due from the day of default . . . even if the creditor does not prove that he has suffered any damage." Thus, under Italian law, a tribunal has the obligation, not merely the discretion, to award interest.

In England, the payment of interest is authorized both by statutes and by judicial decisions. For example, the Supreme Court Act of 1981 and the County Courts Act of 1984, provide for those courts to award interest on debts and damages. In addition, English courts have held that a claimant may recover interest in several situations, including (1) when the agreement provides for interest in the case of delayed payment; (2) when the payment of interest could be inferred from the course of dealing between the parties or through trade usage; and (3) when the claimant had actually incurred interest charges because of the respondent’s actions and it “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”


20. C.c. art. 1224 (Ital.).

21. Some jurisdictions, like France, draw a distinction between moratory interest, which is interest related to a monetary debt, and compensatory interest, which is interest on damages for breach of contract generally or for property damage. See Gotanda, supra note 10. In these countries, the former may be awarded without proof of fault or, in some cases, without a formal demand for payment or notice of default. See id. It should also be noted that some jurisdictions, like Germany, treat interest as a procedural matter, while others, like England, consider it to be a substantive matter. See Gotanda, supra note 4.


Subject to various exceptions, courts in England typically award only simple interest.\(^{24}\) By contrast, the English Arbitration Act gives arbitrators the broad authority to “award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . . .”\(^{25}\)

In 2000, the European Parliament and the Council of the European Union issued a Directive that required Member States to introduce measures to protect commercial creditors against late payment by creating, among other things, a right to interest for late payments. By its terms, this Directive is “limited to payments made as remuneration for commercial transactions and does not regulate transactions involving consumers, interest in connection with other payments, e.g., payments under the laws on cheques and bills of exchange, payments made as compensation for damages including payments from insurance companies.”\(^{26}\)

In the United States, the payment of interest in private actions is typically governed by state law. States have enacted statutes providing for interest.\(^{27}\) For example, in New York, a statute provides a right to interest not only in actions where a debtor defaults on a money payment, but also in cases for damages for breach of contract generally or for property damage.\(^{28}\)

Countries in Asia, Latin American and Oceania also typically permit interest. For example, statutes in China and Japan allow for interest when a respondent defaults on a money payment.\(^{29}\) In Mex-

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25. Arbitration Act, 1996, c. 23, § 49 (Eng.); see also Adam Samuel, Pre-Award Interest: England and Scotland, 5 ARB. INT’L 310 (1989) (discussing an arbitrator’s power to award interest in England and Scotland).


29. See Zhonghua Renmin Gongheguo hetong fa [hereinafter Contract Law of the Peo-
Interest as Damages

And, in Australia and New Zealand, interest is awarded to compensate a party for the loss of the use of money and to discourage delay in resolving the dispute. International treaties, conventions and uniform laws also may provide the authority to award interest. The United Nations Convention on the International Sale of Goods (CISG) expressly provides that “[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it . . . .” In addition, the North American Free Trade Agreement (NAFTA) provides that a tribunal deciding a dispute pursuant to NAFTA may award “monetary damages and any applicable interest.” And uniform laws, such as the UNIDROIT Principles and the Principles of European Contract Law, also provide for the payment of compensatory interest.

Many of the statutes and laws noted above deal with interest on damages. Most countries also typically permit the recovery of interest as damages. This award commonly occurs when the breach of contract has caused the claimant to incur financing charges at a rate different from the statutory rate. The claimant then is awarded interest at the borrowing rate that it paid in order to fully compensate it for the loss of the use of money.
for the injury that the respondent's wrongful act caused.\textsuperscript{35}

However, a number of countries prohibit the payment of interest for religious reasons. Most of these countries have legal systems based on Islamic law or the \textit{Shari'a}, which expressly forbids the taking of interest.\textsuperscript{36} Today, many leading Islamic finance specialists accept that time must be priced. Although they still object to the fixed, pre-determined aspects of interest-based lending with its inherent risk of lender exploiting borrower, Islamic finance currently aims to replicate in Islamic forms the substantive functions of modern financial instruments, markets, and institutions.\textsuperscript{37}

There also are exceptions to the general rule concerning liability for interest. For example, parties may agree that no interest will be paid on sums in arrears. Claims for interest may be denied if the payment of interest would result in injustice, be otherwise unconscionable or violate public policy. In addition, interest may not be awarded if the respondent can show proof of laches, bad faith, duress, or fraud on the part of the claimant.\textsuperscript{38}

In short, liability for interest is so pervasive under national laws that absent an exception, it is generally accepted that international tribunals may award interest to an injured claimant. In fact, in the \textit{Compañía de Aguas del Aconquija, S.A. and Vivendi Universal}


\textsuperscript{36} G. Gregory Letterman, \textit{Letterman's Law of Private International Business} 43 (1990); Samir Saleh, \textit{The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East, in Contemporary Problems in International Arbitration} 348-49 (J.D.M. Lew ed., 1987) [hereinafter \textit{Contemporary Problems}]. The rationale for this prohibition on interest is threefold:

1. Interest or usury reinforces the tendency for wealth to accumulate in the hands of a few, and thereby diminishes man's concern for his fellow man.
2. Islam does not allow gain from financial activity unless the beneficiary is also subject to the risk of potential loss; the legal guarantee of at least nominal interest would be viewed as guaranteed gain.
3. Islam regards the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity.


\textsuperscript{38} Gotanda, \textit{supra} note 1, at 252-53.
S.A. v. Argentine Republic arbitration award issued in August 2007, the ICSID tribunal stated that "the liability to pay interest is now an accepted legal principle." 39

Accrual Period. Under the laws of most countries, interest starts to accrue from the date of default. 40 However, exactly what constitutes a default varies from jurisdiction to jurisdiction. If the parties agree that a breach of contract will occur if the respondent fails to fulfill its obligations by a certain time and then the respondent does not perform by that date, in many countries, interest begins to accrue automatically from the time of the breach. 41 If the parties' contract does not set forth a date for performance, in some jurisdictions, like New York, interest accrues "from the earliest ascertainable date the cause of action existed" or from the date upon which damages were incurred. 42 By contrast, in many other jurisdictions, interest does not begin to accrue until the claimant demands performance. 43 In France, this requirement has been held not to apply to claims for purely compensatory damages, as opposed to claims for moratory damages, that is, damages for delay in performing as opposed to compensatory damages which are recoverable for the failure

40. See generally Gotanda, supra note 1, at 193–233. It should be noted that there is a distinction between pre-judgment or pre-award interest and post-judgment or post-award interest. Pre-judgment interest is interest as part of an award, as opposed to post-judgment interest, which is interest on an award. In this context, we are referring to pre-judgment or pre-award interest.

41. See, e.g., C.c. art. 1219 (Ital.); Civil Act [hereinafter Kor. Civ. Act] art. 387 (S. Korea); MINPO (Civil Code) art. 412 (Japan).

42. N.Y. C.P.L.R. 5001(b) (2009).
43. See, e.g., Código Civil [C.C.] art. 1063 (Braz.); Código de Comercio [CÓD.COM.] art. 227 (Pan.).
to perform. 44

With respect to setting the accrual period, the 2000 European Union Directive requiring Member States to introduce measures to protect commercial creditors against late payment provides, among other things, that interest shall be "payable from the day following the date or the end of the period for payment fixed in the contract." 45 If the contract does not specify a date, the Directive provides four options, the most notable being the right to interest thirty days after the date of receipt by the debtor of the invoice or an equivalent request for payment. 46

Interest Rate. To determine the rate at which interest accrues, the laws of many countries provide for courts and tribunals to first look to the parties agreement and enforce any provisions on the payment of interest, unless they violate public policy or usury laws. 47 In the absence of such agreement, in most countries, interest on a sum in arrears will accrue at the applicable statutory rate. 48 The rate in such statutes can vary widely, even within the same country. 49

Some countries, such as France, periodically set the rate of interest, typically basing it on market conditions. 50 By contrast, most other countries have fixed statutory rates that often remain unchanged for years. 51 As a result, they do not accurately reflect com-

44. See Cour de cassation Chambre mixte [Cass. Ch. mixte] [highest court of ordinary jurisdiction], Decision No. 257 of July 6, 2007, report of Mr. Hederer.
46. The Directive states that "if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder: (1) 30-days after receipt by the debtor of the invoice or an equivalent request for payment;" (2) if the receipt of the invoice or the request for payment is uncertain, then 30-days after the receipt of goods or services; (3) if the request for payment precedes the receipt of goods or services, then 30 days after receipt of the goods or services; or (4) if the request for payment precedes the date for procedures to verify performance as determined by contract or statute, then 30 days after the procedural date. Id.
47. See Gotanda, supra note 4, at 50–51.
49. See Gotanda, supra note 1, at 193–236.
50. In France, the legal rate of interest is equal to the arithmetic average of the last twelve monthly averages of the actuarial rate of return of auctions of three-week fixed rate treasury bills. See Monetary and Financial Code, art. L. 313-2 (Dec. 14, 2000).
51. See, e.g., KOR. CiV. ACT art. 379; N.Y. C.P.L.R. 5004 (2009); MINPO art. 404 (Japan); Código de Comercio [Cód.Com.] art. 362 (Mex.).
pensation for the loss of the use of money. In the United States alone, statutes that fix interest at specific rates vary from 6% to 15%.52

In New York, the statutory interest rate on damages for a breach of contract is 9%.53 This rate has not changed for over twentyfive years.54 In 1983, when the New York statute was last amended, the U.S. T-bill rate was around 9%.55 However, by 1993, the T-bill rate had fallen to 3%. In 2003, it was a little above 1% and it is currently around 2%. Thus, there can be a significant difference between a fixed statutory rate and a rate based on market conditions.

Some countries, like China, do not have a fixed statutory rate. In general, Chinese courts and tribunals will award interest at the contractually agreed upon rate, and in the absence of an agreement between the parties, they have discretion to award interest and typically do so at a reasonable rate. That rate has ranged from 5% to 10%, with 6% to 8% being the most common.56

In England, in the absence of an applicable statute, courts have the discretion in fixing the rate at which interest accrues. Most courts apply the prevailing commercial rate. This rate is based on evidence submitted by the parties or, in some cases, on the rate that a claimant of like characteristics would have had to pay to borrow money during the period in question. A 2004 study by the Law Commission found that courts typically award pre-judgment interest at rate of 8%.57 The rate of interest also may be prescribed by statute. For example, the Late Payment of Commercial Debts (Interest) Act of 1998 applies to claims for interest by commercial creditors who are owed money by commercial organizations. It provides for interest to accrue at a rate that is 8% above the Bank of England base rate.58

52. Gotanda, supra note 1, at 210.
54. The statute was enacted in 1962 and was last amended in 1981, when the interest rate was increased from 6% per annum to 9% per annum. Id.
58. The Late Payment of Commercial Debts (Interest) Act, 1998 (U.K.) provides for
**Form of Interest.** There are two principal forms of interest: simple interest and compound interest. Simple interest is interest that is calculated only on the principal owed. The interest owed for a certain period does not merge with the principal and become part of the base upon which future interest is calculated. In other words, in the simple interest scenario, the interest that accrues each period is not added to the base that is used to calculate interest in future periods. An award of compound interest means that the interest payment for a certain period is added to the principal sum owed, and that sum is treated as a new principal for calculating the interest for the next period. This is why compound interest is sometimes referred to as the capitalization of interest or as “interest on interest.”

In most countries, simple interest is the norm. And some countries forbid interest to be paid upon interest, even if the contract provides for it. However, some jurisdictions have begun to award compound interest on the ground that it is more in line with modern financial practice. As an American state court explained:

> It is simply not credible in today’s financial markets that a person sophisticated enough to perfect his or her appraisal rights would be unsophisticated enough to make an investment at simple interest—in fact, even passbook savings accounts now compound their interest daily. This fundamental economic reality strongly indicates to me that, our litigants typically being at least as financially sophisticated as passbook savings

simple interest on debts owed “for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business.” This Act was originally designed to protect only small business against the late payment of commercial debts, but it has since been broadened to implement the European Union Directive on combating late payment in commercial transactions. The Directive provided that “Member States shall ensure that . . . the level of interest for late payment [of commercial transactions] which the debtor is obliged to pay, shall be the sum of the interest rate applied by the European Central . . ., plus at least seven percentage points, unless otherwise specified in the contract.”

59. See BREALEY & MYERS, supra note 8, at 36; EUGENE F. BRIGHAM & JOEL F. HOUSTON, FUNDAMENTALS OF FINANCIAL MANAGEMENT 207 (8th ed. 1998). Compound interest is calculated through the use of the following formula: $FV = PV (1+i)^n$, where $FV$ is the future value of the total award, including interest, $PV$ is the present value of the award (i.e., not including interest), $i$ is the interest rate per compounding period, and $n$ is the number of compounding periods.

60. Gotanda, supra note 7.

61. See, e.g., Schweizerisches Obligationenrecht [OR], Code civil suisse [Cc], Codice civile swizzero [Cc] [Civil Code] Mar. 30, 1911, RS 281, art. 105 (Switz.).
holders and seeking at least the same return, interest on appraisal cases should be compounded daily, not monthly. As for the defendant company in an appraisal action, it is even harder to imagine a corporation today that would seek simple interest on the funds it holds. One cannot imagine that a sophisticated businessman . . . would invest his company’s funds in instruments yielding simple rates of interest. Nor is it conceivable that [a businessman’s] lenders would provide his companies with capital at simple rates of interest.\(^\text{62}\)

Furthermore, in many countries, compound interest may be awarded when the parties have agreed to it in the contract or when it is payable as special damages.\(^\text{63}\)

From an industry point of view, it should be noted that compound interest is the international standard applied in most time value applications. Indeed, the adoption of compound interest reflects the majority of commercial realities in that a loss of value incurred by a company, active in normal trading operations, implies the loss of use of that value.\(^\text{64}\)

II. INTERNATIONAL CLAIMS PROGRAMS AND INTEREST

Today, there exists an emerging body of international law jurisprudence that supports the general proposition that compensation may include an interest component based on compounding. In this respect, we can make reference to a few mass claim mechanisms having used the concept of interest.

For instance, under CRT I, the first Claims Resolution Tribunal established in 1997 to process claims in respect of 5,570 dormant Swiss bank accounts dating from 1933–1945, specific rules have been crafted to readjust the 1930s and 1940s value of the accounts to present day values and they take into account the principal of com-


\(^{63}\) See Gotanda, supra note 7; see also Wadsworth, 1 W.L.R., at 598 (stating a plaintiff may recover as special damages compound interest when the plaintiff borrows money from a financial institution charging compound interest to make up for the loss of funds caused by the defendant’s breach and such action was foreseeable under the circumstances).

\(^{64}\) See Sénéchal, supra note 11.
pounding. In particular, the rules of the Claims Resolution Tribunal provide for applying the Current Value Adjustment Factor (CVAF), which "is an allowance for compounded investment return from the end of 1944 to the end of 1999."\(^\text{65}\)

The 2000 Knesset Inquiry Committee on the "Location and Restitution of Assets (in Israel) Belonging to Persons Who Perished in the Holocaust" found that many of the bank accounts belonging to Holocaust victims were handed from the British Custodian to Israel not at their real value at the time this transfer took place. The final report stated:

Advisory Committee recommended that the funds be reappraised on the basis of linkage to the consumer price index in Israel for the period to be determined, with an addition of an annual compound interest of 4%, which is similar to what was decided in the Volker Committee, that examined the bank liability to Holocaust victims in Switzerland. This calculation is based on the calculation that is customary when the State collects debts or taxes from the citizens, or pays them.\(^\text{66}\)

In both situations, it was recognized that an injured party should be compensated for the loss of the use of money and that compound interest may be necessary to achieve that goal.

III. INTERNATIONAL TRIBUNALS AND INTEREST

Arbitral tribunals deciding international disputes typically resolve claims for interest by using one of four approaches. First, if the parties' agreement contains a provision on the payment of interest or designates a national law to apply to claims for interest, tribunals


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usually enforce it unless the agreement violates public policy. This practice promotes the goals of party autonomy, respect for the intent of the parties and predictability and certainty concerning the legal rights of the contracting parties. Second, if the parties' agreement is silent or ambiguous on the payment of interest, many tribunals resolve the interest claim in accordance with applicable law selected through a choice of law analysis, which often results in applying a statutory interest rate and an award of only simple interest. Third, some tribunals have resolved claims for interest based on general principles of law, such as the UNIDROIT Principles. Fourth, others have resolved issues concerning interest, particularly the rate at which interest accrues, on the basis of fairness or reasonableness.

When tribunals decide transnational contract disputes, they most commonly resolve interest claims by applying national law.
By contrast, the trend in investment disputes has been for tribunals to award interest at market savings or lending rates, such as the U.S. T-bill rate or the LIBOR rate. Investment tribunals can choose this method because they often enjoy broad power under an international treaty or convention to award interest to achieve the principle of full reparation for the loss caused by the wrongful act.

In international investment arbitrations, the trend is also to-
ward using compounding of interest.\textsuperscript{74} For example, in Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt, the tribunal concluded "that, to make the compensation 'adequate and effective' pursuant to Art. 4. c) of the BIT, it is appropriate that the interest pursuant to the last sentence of Art. 4. c) of the BIT be awarded as compound interest."\textsuperscript{75} Similarly, in Metalclad Corp. v. United Mexican States, the tribunal stated that compound interest will best "restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place."\textsuperscript{76} In addition, as the tribunal in Siemens A.G. v. Argentine Republic noted, "tribunals have ruled that compound interest is a closer measure to the actual value lost by an investor."\textsuperscript{77} It explained:

Where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.\textsuperscript{78}

In reality, however, neither the approach of tribunals deciding transnational contract disputes nor the approach of the investment tribunals is likely to achieve the main goal of interest: to fully compensate a claimant for the loss of the use of money. The former approach generally fails to properly compensate a party for its loss because it awards interest pursuant to national laws containing statutory rates that remain unchanged for years. Moreover, these domestic statutes typically provide for only simple interest. Indeed, the failure to provide for compound interest alone could, in the case of a lengthy delay in payment, result in a significant economic loss to a claimant. In today's finance world, compound interest is the international standard applied in most time value applications. Not recognizing this

\textsuperscript{74} See Gotanda, supra note 10, at 169.
\textsuperscript{76} Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (2000) (Award ¶ 131), reprinted in 26 Y.B. COM. ARB. 99 (2001).
\textsuperscript{78} Id. ¶ 399.
reality would leave the claimant less than whole and result in a wind-
fall to the respondent.\textsuperscript{79}

The approach taken by investment tribunals is a step in the right direction. It more accurately compensates a party for the loss of the use of money through an award of interest at a market rate, such as the U.S. T-bill or LIBOR rate, and on a compound basis. Nevertheless, this approach has a serious drawback that prevents it from achieving its main goal. It ignores the reality that businesses typically invest in opportunities that have a significantly greater amount of risk than the U.S. T-bill or LIBOR rates.

Today, it is common for businesses to seek to secure different interest rates. A risk-averse businessperson will likely invest in government bonds and virtually risk-free investments; others will seek higher return through more risky investments. When investing or placing capital into a project today, the investor is expecting a return based on a specific risk preference. Indeed, an investor always has a certain risk profile in mind when making the investment decision. The level of political, economic, and business risks that an individual investor undertakes is a matter of preference. The investor will want to be compensated for the risks undertaken in making the investment. Therefore, the investor should not only be compensated for inflation risks but also for systematic and regulatory risks. Such risks include the possibility of default or inability to fulfill the originally agreed upon terms. Accordingly, a tribunal should account for the underlying risk profile of the assets in the dispute in order to achieve the goal of full compensation.\textsuperscript{80}

One should not be too quick to lay all the blame at the feet of tribunals for failing to award interest at a rate that accounts for risk. In a few instances, applicable law may prevent a tribunal from doing


\textsuperscript{80} Rational investors would usually not invest at a rate below the risk-free rate available in the market. At minimum, the rate of interest to be used for adjusting the award to present day value should thus be equal or above the risk-free rate. This rate represents the interest an investor would expect from an absolutely risk-free investment over a specified period of time. It usually includes inflation. Consequently, the risk-free rate is the minimum return an investor expects for any investment since he or she would not bear any risk unless the potential rate of return is greater than the risk-free rate.
so. 81 In other cases, the claimant may fail to provide sufficient information needed to award interest in a manner that would fully compensate a party for the loss of the use of money. For example, in the *Wena Hotels* arbitration, the claimant sought interest on an award of damages, but failed to specify the rate at which interest should accrue and whether it should be on a simple or compound basis. 82 Nevertheless, even where the claimants have asserted claims for interest based on lost opportunity cost, tribunals have sometimes rejected them as speculative or have awarded a lesser rate without explanation. 83

The tribunal’s decision in *PSEG Global Inc. v. Republic of Turkey* illustrates this practice. There, the tribunal ruled that Turkey breached its obligation to provide claimants fair and equitable treatment as provided for in the United States-Turkey Bilateral Investment Treaty in their efforts to build and operate a coal power plant in Turkey. It awarded claimants compensation for their actual expenses related to the investment, totaling approximately US$9 million. 84 With respect to the claim for interest, both sides “extensively dis-

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81. Cf. *Iowa Lakes Electric Cooperative v. Schmitt*, 2001 WL 355722 (Iowa Ct. App. Apr. 11, 2001) (ruling that Iowa Code § 668.13(1) does not allow interest on past damages and only allows for the payment of interest from the date of the commencement of the suit); see also N.C. GEN. STAT. § 24-5 (2009).
82. *Wena Hotels Ltd. v. Arab Rep. of Egypt*, ICSID Case No. ARB/98/4 (Dec. 8, 2000), 41 I.L.M. 896, 945 (2002). This also occurs in domestic courts. As one U.S. state court noted:

> In point of fact, very few, if any, appraisal trials provide a record on which the trial judge may base his compound versus simple interest decision. The parties usually fail (or refuse) to address this miniscule issue. That should not be surprising. After spending days, or even weeks, in a trial, wading through swarms of hired experts and hours of excruciating testimony, the trial judge, the parties, and counsel are determined to get it over as quickly as possible—which means no one wants to prolong the trial by even a minute in order to have yet more testimony on an issue like simple or compound interest. After two or three weeks of trial, it is inhumane to expect the trial judge to plead for yet another bucket of water to be added to the ocean.

*Onti, Inc. v. Integra Bank, Inc.*, 751 A.2d 904, 929 n.103 (Del. Ch. 1999).

84. *Id.* The tribunal declined to award claimants the market value of their investment on the ground that the BIT permits such damages only for cases of expropriation. It recognized that a number of tribunals had awarded the fair market value for non-expropriated breaches, but it distinguished those cases on the ground that the damaged investments were in those cases in the production stage.
cussed the question" and provided experts' views on the subject. 85 The claimants sought their alleged lost opportunity costs, which they asserted ranged from 10.6% to 12%, or alternatively the Turkish sovereign rate. 86 Turkey argued that the appropriate interest rate should be that of the U.S. T-bill. 87 In rejecting the claimants' claim for interest based on lost opportunity cost, the tribunal noted:

The Tribunal is not persuaded . . . that the cost of equity offers an appropriate basis [upon which to calculate interest] . . . . The cost of equity is based on subjective determinations by investors. For this reason it does not offer a useful basis for calculating interest that aims at the protection of the value of funds spent rather than the value of expropriated assets . . . . 88

The tribunal also declined to use the Turkish bond yield rate or the U.S. T-bill rate because there was no evidence that the claimants would have placed the money owed in either financial market. In the end, the tribunal determined that the interest rate that would "compensate adequately an international company such as PSEG Global" under the circumstances was the "6 month average LIBOR plus 2 percent per year for each year during which the amounts" were owed and that interest should be compounded semi-annually. 89

_Siemens A.G. v. Argentine Republic_ illustrates a situation in which the tribunal sought to set the interest rate in order to ensure "full reparation" but in reality fell short of its goal. In that case, the claimant was awarded a concession to create and operate Argentina's personal identification and electoral information system, which was

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85. id. ¶ 341.
86. The tribunal noted: The Claimant's expert . . . used the date of alleged expropriation, March 3, 2001, to calculate prejudgment interest relating to expenses made before and after this date. For the period prior to March 2001, the estimated interest rate is 12% based on the opportunity cost to the Project Company at that particular point in time and the length of time since the investment was made until the date of expropriation. This opportunity cost is in turn based on the "historic" cost of equity. Post award interest is calculated at 10.6%.

_id._

87. id. ¶ 344 (The respondents' expert argued that the U.S. T-bill rate was the appropriate reference because there was no risk involved in the case of compensation resulting from an award).
88. id. ¶ 343.
89. id. ¶ 341-48 (explaining that there was no further explanation of why the LIBOR rate plus 2% was the most appropriate rate).
based on the creation of national identity cards (DNIs).\footnote{Siemens A.G. v. Argentine Rep., ICSID Case No. ARB/02/8 (Feb. 6, 2007), 44 I.L.M. 138, available at http://www.worldbank.org/icsid/cases/awards.htm.} Argentina caused the claimant to suspend production of the DNIs and subsequently terminated the contract. The claimant filed for arbitration, alleging violations of the Mutual Protection and Promotion of Investments treaty between the Federal Republic of Germany and the Argentine Republic. The tribunal ruled, \textit{inter alia}, that Argentina's actions amounted to an expropriation and that it also breached its treaty obligation to provide fair and equitable treatment.\footnote{\textit{Id.} ¶ 396.} With respect to interest, the claimant sought an award of interest at a compound rate of 6\%, which it claimed was its average corporate borrowing rate. In contrast, Argentina argued that the Treaty provided for interest at the usual bank rate. The tribunal noted that, in determining the applicable interest rate, the “guiding principle is to ensure ‘full reparation for the injury suffered as a result of the internationally wrongful act.’”\footnote{\textit{Id.} ¶ 399-400. The tribunal also ruled that interest should be compounded annually because if the compensation had been paid following the expropriation, the claimant would have earned interest on interest on that amount. Compound interest, the tribunal noted, “is a closer measure of the actual value lost by an investor” and furthers the “objectives of prompt, adequate and effective compensation that reflects the market value of the investment immediately before the expropriation.” \textit{Id.}} It thus rejected the claim for interest at the corporate borrowing rate on the ground that the appropriate rate is not the rate associated with corporate borrowing but the rate that reflects the amount of compensation the claimant would have earned if it had been paid after the expropriation. The tribunal concluded that “[s]ince the awarded compensation is in dollars, . . . the average rate of interest applicable to the U.S. six-month certificates of deposit is an appropriate rate of interest,” which resulted in an interest rate of 2.66\%.\footnote{\textit{Id.} ¶ 403.}

In short, tribunals deciding international disputes have by and large failed to fully compensate injury claimants for the loss of the use of money through the awarding of interest because such awards do not reflect modern economic realities.
IV. INTEREST AS DAMAGES

Claimants would be more accurately compensated for the loss of the use of their money if they received interest as damages, as opposed to interest on damages. Furthermore, a model claim and award of interest as damages would use a risk-free interest rate plus a market risk premium, and such interest would be compounded on a yearly basis.

A. Procedural and Legal Framework

In order for a tribunal to award interest as damages, a claimant first would need to assert a claim for interest as damages. Thus, the claimant would have to show that there exists the authority to award interest as damages, that the loss was caused by the respondent, that it was foreseeable and that the claimant could prove the loss with sufficient degree of certainty.94

1. Authority to Award Interest as Damages

Many national laws recognize that interest may be awarded as damages. For example, while the German Civil Code provides for interest to accrue on a money debt during the period of default at the statutory rate, it allows an obligee to claim higher interest on a different legal basis and to "claim additional loss."95 In addition, in the United States, many jurisdictions allow for the recovery of interest as a component of damages.96 This commonly occurs when the defendant's breach of contract causes the claimant to borrow funds at a specified interest rate to make up for the loss of the use of the money owed.97

94. See generally Gotanda, supra note 1, at 96–171 (In many countries, a claimant is precluded from recovering loss that could have been avoided.).
95. BGB § 288 (Ger.).
96. See Gotanda, supra note 4, at 42, 44, 46 (outlining that European, Asian and North and South American countries allow for the recovery of interest as a component of damages).
This practice is consistent with international treaties and conventions. The CISG, for instance, mandates the recovery of interest "if a party fails to pay the price or any other sum that is in arrears." Nevertheless, it also permits the recovery of interest as damages under Article 74, which sets forth the general rules regarding the recovery for breach of contract, if the injured party can prove that greater loss has occurred. The purpose of awarding damages for breach of contract is similar to the main reason for awarding interest: damages for breach of contract are designed to place the aggrieved party in the same position it would have been in if the contract had been performed. The goal is to give the aggrieved party the "benefit of the bargain" by fully compensating it for direct, incidental and consequential losses.

In the investor-state arena, bilateral investment treaties (BITs) may provide broad authority to award monetary compensation, which could include interest as damages. For example, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, the BIT between the United Kingdom and Egypt required that compensation for expropriation must be "prompt, adequate, and effective" and "shall amount to the market value of the investment . . . ." The tribunal saw this requirement as including a determination of interest compatible with those principles.

The Permanent Court of International Justice in the *Chorzów Factory* case has set forth the customary international law standard for damages for unlawful actions by States, including unlawful ex-
propriations and treaty violations: full compensation. The Court explained:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

The principle that reparation “must... wipe out all consequences of the illegal act” is also articulated in the Articles on Responsibilities of States adopted by the International Law Commission. Article 31 provides that a State’s obligation is “to make full reparation for the injury caused by the internationally wrongful act.” Article 36 further provides that compensation for damage caused “shall cover any financially assessable damage...” Furthermore, Article 38 states: “Interest on any principal sum [payable]... shall be payable when necessary in order to ensure full reparation” and that “[t]he interest rate and the mode of calculation shall be set so as to achieve that result.”

In sum, there is a general principle calling for full compensation for damages resulting from a breach of contract or internationally wrongful act. This principle is certainly broad enough to support a claim for interest as damages as the purpose of awarding interest; the award would make the claimant whole from the loss, particularly the loss of the use of money. Thus, a claimant may argue that if a

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108. Id. art. 36.
109. Id. art. 38.
wrongful act had not occurred, it would have used its money earlier and would have invested it. According to the claimant, it would have invested the money in a manner that would earn a certain rate of return. The claim is actually a claim for damages for loss directly resulting from the respondent’s conduct. The claimant is arguing that an award of these damages is necessary to reestablish the situation that likely would have existed if the respondent had not acted improperly.\textsuperscript{10}

2. Causation/Foreseeability

In order to recover damages, a causal connection must exist between the aggrieved party’s loss and the respondent’s act.\textsuperscript{111} Thus, the issue becomes whether the respondent’s wrongful act was so connected with the aggrieved party’s loss or damage that as a matter of ordinary common sense and experience, it should be regarded as a cause of it. The requirement of causation typically does not generate much controversy. In fact, in many countries it is often subsumed within the discussion of foreseeability or remoteness.\textsuperscript{112}

Even if the aggrieved party can show that the respondent’s action caused the aggrieved party’s loss, the aggrieved party must still show that the damages are not too remote. In general, “[t]he non-performing party [in a contract action] is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.”\textsuperscript{113} In most cases, the failure to pay money when owed

\textsuperscript{10} Interest could be claimed as damages either to indemnify a capital withholding or to restore an injured party to the economic situation that it would have been in if the damages award for the other substantive claims had occurred immediately. In many ways, a claim for interest as damages is similar to a claim for lost profits.

\textsuperscript{111} See generally Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 241–53 (1953); Gotanda, supra note 1, at 92–186; see also International Law Commission, supra note 73, art. 37(3).

\textsuperscript{112} See Gotanda, supra note 1; Wälde & Sabahi, supra note 1.


1. A loss is recoverable if it can be said to flow naturally from certain breaches of the contract (i.e., that which any reasonable person should have foreseen).
would cause a loss, because the aggrieved party would not be able to use the funds at issue. The loss should also be foreseeable as a natural and contemplated result of the respondent’s wrongful act. Logically, parties know that the failure to pay a sum of money on time will result in the aggrieved party not being able to use those funds that could generate a return on their capital. They also should know that a breach of contract or an act such as an expropriation will result in a separate and distinct monetary loss while the valid claim remains unpaid.

This conclusion finds support in cases in which a debtor fails to timely pay a debt and the creditor requests and receives as damages any interest expense that it incurs from borrowing money to make up for the shortfall of funds resulting from the debtor’s wrongful act. In those instances, courts and tribunals have found interest to be a normal and foreseeable result of the wrongful act. In addition, courts have awarded interest as damages when a product that is to become part of the buyers’ goods is defective and the buyer borrows funds to repair the defect. Borrowing the funds needed to finance the repair and paying the resulting interest are considered inju-

2. If a loss does not flow naturally from the breach, it must be shown that when the defendant entered the contract, the defendant possessed such knowledge that would enable an ordinary person to foresee that extraordinary loss would result from breaching the contract (i.e., the knowledge that a reasonable person with particular knowledge should have foreseen). The second rule of *Hadley* has thus been described as actual foreseeability or contemplation—what a reasonable person with particular knowledge should have foreseen.

A number of countries limit damages through the concept of adequate causation. The test for whether adequate causation exists has been expressed as whether “the obligor’s default, as judged by ordinary human standards at the time of its occurrence, render, more likely, damages of the kind actually suffered.” *Arthur Taylor von Mehren & James Russell Gordley, The Civil Law System* 1115 (2d ed. 1977).

It should also be noted that even if one were to apply a tort causation analysis, the result would be the same. *See generally* 3 E. Allan Farnsworth, *Farnsworth on Contracts* 148 (3d ed. 2004) (noting the requirement of causation in contract is “similar to that imposed in tort cases”). In fact, the tort causation analysis is less stringent than in contract. *See id.* § 12.14.


ries that follow in the normal course of events from the breach and thus constitute foreseeable losses.

As these cases demonstrate, the delay in payment of money owed causes a foreseeable loss. In terms of foreseeability, it matters not whether the wrongful act necessitates that the claimant borrow money. As Allan Farnsworth pointed out,

what must be foreseeable is only that loss would result if the breach [or wrongful act] occurred. There is no requirement that the breach [or wrongful act] itself or the particular way in which the loss came about be foreseeable . . . . [Nor is there a requirement that] the magnitude of the loss [must] . . . have been foreseeable.116

Thus, parties today know that the failure to pay a sum when due in the ordinary course of events causes a loss because the use of money itself has economic value. Accordingly, interest in this context is in fact foreseeable and that doctrine is simply not a barrier to awarding interest as damages.

3. Certainty

Perhaps the greatest barrier to awarding interest as damages is the well known concept of certainty. In many jurisdictions, the aggrieved party must prove damages with a certain degree of certainty. The purpose of this requirement is to deny recovery of loss that has not occurred or which may never occur. While the certainty standard varies under national laws, most have adopted a reasonable certainty requirement, which is a standard that can be found in the UNIDROIT Principles as well as the Principles of European Contract Law.117

Courts and tribunals also differ over the scope of the certainty

116. FARNSWORTH, supra note 113, § 12.14. But cf. Djakhongir Saidov, The Law of Damages in International Sales: The CISG and Other International Instruments 113-19 (2008) (arguing that foreseeability should be interpreted as applying to both nature and extent of loss); see also Peter Huber & Alastair Mullis, The CISG 280 (2007) (noting that it makes little difference in practice whether foreseeability applies also to extent because a loss that is unusual or of extraordinary dimension would likely be considered a different type of loss than what was foreseeable).

117. UNIDROIT, supra note 113, art. 7.4.3 (2004); Lando & Beale, eds., supra note 19, art. 9:501(2).
requirement. In many jurisdictions, the reasonable certainty rule applies only to determining whether damages occurred, not what the amount of damages was. Thus, if the claimant provides sufficient evidence of loss or damage, the fact that the amount of damages is difficult to assess is generally no bar to recovery.\textsuperscript{118} In others, a claimant must show with reasonable certainty both that it has suffered damage as a result of the wrongful act and that damages amount to a certain sum.\textsuperscript{119} A number of investment tribunals also have ruled that recovery is allowed only for those economic losses that can be proved with reasonable certainty.\textsuperscript{120}

The scope of the certainty requirement can have a major impact on a claimant’s success. If the certainty requirement applies only to ascertaining fact of loss and not to extent of loss, then a claimant seeking interest as damages will need to show if the claimant had access to the principal amounts at issue that in the likely course of events it would have earned the interest above a risk-free rate. Even if the amount is difficult to calculate or the claimant is able only to approximate the amount lost, the claimant is still entitled to recovery. Here, the claimant would need to provide only a basis upon which a tribunal can reasonably estimate the extent of the claimant’s loss with respect to interest. If the certainty requirement applies both to fact and extent of loss, then the claimant also would need to provide evidence as to the amount of interest it lost.


\textsuperscript{119} See \textsc{Restatement (Second) of Contracts} § 352; \textit{Unidroit}, \textit{supra} note 113, art. 7.4.3(1).

The claimant need not prove its damage with mathematical precision or with proof beyond a reasonable doubt; it only need establish a *prima facie* case with regard to damages. A claimant should be able to prove the amount of its loss with reasonable certainty through the use of an "objective valuation method which can be founded on rational reasoning." The claimant's burden is tempered by the "clear principle that [a tribunal should insist only upon] as much certainty and particularity as is reasonably possible . . . , having regard to the circumstances and nature of the acts themselves causing the damage."

B. Model Approach

If a claimant is able to show that there exists the legal authority to award interest as damages and is able to prove the various prerequisites to recovery, it then becomes necessary to determine how such interest should be calculated. In theory, there are at least four ways to do so: (1) the inflation-based approach; (2) the risk-free rate approach; (3) the borrowing rate approach; and (4) the opportunity cost approach. We advocate using the opportunity cost approach, which provides for interest to accrue at a rate in line with specific market realities with the interest award to be compounded on a yearly basis.

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121. Asian Agricultural Products Ltd. v. Rep. of Sri Lanka, ICSID Case No. ARB/87/3 (June 27, 1990), 30 I.L.M. 577, 603 ¶ 56; see also Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 12–14, WT/DS33/AB/R (May 23, 1997). Indeed, the calculation of damages itself is not an exact science. As the tribunal deciding the Himpurna California Energy Ltd. v. P.T. (Persero) Perusahaan Listriuk Negara dispute explained:

There is no reason to apologise for the fact that [the approach used to calculate damages, in this case the DCF method,] involves approximations; they are inherent and inevitable. Nor can it be criticised as unrealistic or unbusinesslike; it is precisely how business executives must, and do, proceed when they evaluate a going concern. The fact that they use ranges and estimates does not imply abandonment of the discipline of economic analysis; nor, when adopted by arbitrators, does this method imply abandonment of the discipline of assessing the evidence before them.


122. Wilde & Sabahi, *supra* note 1, at 10, 49.

1. The Inflation-Based Approach

Inflation is a common feature in evaluating damages in domestic law and, as a result, may be considered in fixing the rate of interest. Indeed, court judgments in which inflation was utilized in the assessment of damages can be found in many jurisdictions, based on the premise that prices go up every year, so a claimant will probably seek to be compensated for that loss of purchasing power. This statement is obvious in the finance world. Without interest at least equal or above the inflation rate, lenders wouldn't be willing to lend, or to temporarily give up the ability to spend, and savers would be less willing to defer spending.

The following example illustrates how inflation rates are used. For determining the U.K. inflation rate, for instance, arbitrators and experts usually refer to the U.K. Consumer Price Index (or U.K. CPI) based on a composite consumer price index showing changes in purchasing power over time. The source of information is widely available and we can use, for instance, a composite price index (CPI) for analysis of consumer price inflation, or the purchasing power of the pound, over long periods of time. A CPI is a statistical measure of a weighted average of prices of a specified set of goods and services purchased by wage earners. It is an index which tracks retail prices of a specified set of consumer goods and services, providing a measure of inflation. The CPI is a fixed quantity price index and effectively represents a cost-of-living index. Indices are produced by different organizations, for instance, in the U.K., the Office for National Statistics, the Bank of England and the House of Commons Library.

The inflation-based approach has several major drawbacks. First, the inflation-based method is vulnerable to macroeconomic shocks and turbulence, i.e., devaluation and exchange rate exposures taking place over time and in some cases in an unexpected fashion.

124. See Cc. art. 1284 (Italy) (giving Ministry of treasury the authority to set interest rates based inter alia on average gross yields of government bonds and the inflation rate); Government of the State of Kuwait v. The American Independent Oil Company (Aminoil), 21 I.L.M. 976 (1982) (considering, among other things, the level of inflation in setting the interest rate).

125. See generally D. Dobbs, Law of Remedies § 3.7 (2d ed. 1993) (citing cases).

126. For a further discussion of inflation and its effect on interest, see T. Sénéchal, supra note 11; DOSSIER V, supra note 10, at 219, 225–26; see also Government of the State of Kuwait v. American Independent Oil Company (Aminoil), 21 I.L.M. 976 (1982) (consider-
Second, interest is rarely equivalent to the rate of inflation. An individual who invests money for repayment at a later point in time expects to be compensated for the time value of money, or not having the use of that money while it is invested. In short, we conclude that the inflation-based approach is flawed and should not be used to arrive at the interest rate. Properly understood, inflation in itself is only one element accounting for the time value of money.

2. The Risk-Free Rate Approach

Under the risk-free rate approach, we consider a rate of return of an investment with theoretically zero risk. In theory, the risk-free rate is the minimum return an investor expects for any investment because he or she will not accept additional risk unless the potential rate of return is greater than the risk-free rate. In practice, the absolutely risk-free rate does not exist, since even the safest investments always carry a very small amount of risk, including the U.K. Gilts and the U.S. T-bill.

One of the principal risk-free instruments is the Treasury Bills or T-Bill.\textsuperscript{127} U.S. T-Bills, for instance, are short-term debt obligations backed by the U.S. government with a maturity of less than one year. Like zero-coupon bonds, they do not usually pay interest prior to maturity; instead they are sold at a discount of the par value to create a positive yield to maturity. Regular weekly T-Bills are commonly issued with maturity dates of 28 days (or 4 weeks, about a month), 91 days (or 13 weeks, about 3 months), and 182 days (or 26 weeks, about 6 months). Today, many regard T-Bills as the least risky investment available to U.S. investors. Indeed, with government securities, the default risk is relatively low.

The London Inter-Bank Offer Rate or LIBOR, is also used in arbitration.\textsuperscript{128} LIBOR is the interest rate that the banks charge each

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\textsuperscript{128} See, e.g., MTD v. Chile, Award of 25 May 2004, para. 250; Maffezini v. Spain,
other for loans (usually in Eurodollars). This rate applies to inter-
bank market loans borrowed for anywhere from one day to five
years. This market allows banks with liquidity requirements to bor-
row quickly from other banks with surpluses, enabling banks to avoid
holding excessively large amounts of their asset base as liquid assets.
Both the LIBOR curve and the U.S. Treasury curve are widely used
proxies for the risk-free rate or the basis of a discount rate.129

Selecting a risk-free rate as a proxy for the interest rate may
be appropriate in some circumstances, such as disputes between sov-
ereign entities. However, for an investment dispute involving a pri-
ivate party, a claimant may rightly select interest at its opportunity
cost of capital. This is particularly true for any publicly-traded or
privately held businesses operating under an on-going concern. In
such case, the risk-free rate approach may not be appropriate because
the interest would not include a return that compensates the claimant
for the average risk it bears.130

3. The Borrowing Rate Approach

Others have argued that the respondent’s borrowing rate
should be used to derive the interest rate.131 However, a rate based

129. See David Yong Yan & Robert Brooks, London Inter-Bank Offer Rate (LIBOR)
Versus Treasury Rate: Evidence from the Parsimonious Term Structure Model, J. FIXED
INCOME, June 1999. For a further discussion of the structural differences among the various
risk-free rates, see MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION
130. For a further discussion of risk-free investment rates and systematic and unsystem-
atic risks, see F. REILLY & K. BROWN, INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT
(5th ed. 1997); S. REPININSKY & K. WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT
LAW (2008).
131. See, e.g., LG&E Energy Corp. et al. v. Argentine Rep., ICSID Case No. ARB/02/1
(July 25, 2007), available at http://www.investmentclaims.com/decisions/LG&E-Argentina-
Damages_Award.pdf; see also Michael S. Knoll & Jeffrey M. Colon, The Calculation of
approach furthers the goal of preventing unjust enrichment of the respondent, it may fail to
fully compensate the injured party for its loss and may frustrate that party’s expecta-
tion/performance interest. In addition, it ignores that businesses intend to be compensated
for risks (other than bankruptcy of the defendant). It also is premised on the assumption that
the respondent can borrow unlimited amounts. In some cases, the amount of money wrong-
fully withheld or the value of the asset destroyed may exceed the ability of the respondent to
borrow. See Franklin M. Fisher & R. Craig Romaine, Janis Joplin’s Yearbook and the The-
on the costs of borrowing may be difficult to derive and may rely heavily on a judgment call. It can be challenging to estimate the borrowing rate or cost of debt for a particular company. The "total debt" ratio of a firm is defined as the ratio of short-term and long-term debt, finance leases and preferred stock to the value of the firm (market capitalization plus book value of debt). The cost of debt is thus equivalent to the risk-free rate plus a margin that reflects the credit and market risk of the debt issued by a company. This market risk of debt is often difficult to estimate and depends on many assumptions and variables that could lead to arbitrary results.

Three methods can be used to derive the cost of borrowing:132

*Method 1.* The first method would take into account the observed interest margins payable over the risk-free rate over the years, averaging them, and adding them to the risk-free rates in each year that debt finance is raised. However this is not as straightforward as it might first appear. It is cumbersome to apply a series of different risk-free rates to individual borrowings according to the years in which they are made.

*Method 2.* The second method would find the cost of debt capital based on bond ratings for each of the selected firms. The cost of debt can be found by assuming an average debt profile for the company under review and determining an average rating. The average rating is difficult to estimate in some cases, for example, when the firm is not publicly traded. In those cases, it is necessary to estimate the borrowing spreads by comparing corporate issues of similar standing.

*Method 3.* An intuitive third method consists of obtaining the ratio of finance charges over the total (or net) debt for similar individual firms over a period of time and then calculating a weighted average. However, this method can give only a crude approximation of the borrowing rate: using book value for finance charge is a risky business, especially when firms are involved in "creative accounting." Furthermore, such a measure does not distinguish between short-term and long-term debts and does not take into account the different risk-free rates in each year that debt finance is raised. Inter-

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est charged on zero-coupon bonds also would also not appear on the balance sheet of the firms. 133

4. The Opportunity Cost Approach

We have argued that interest should be considered as an amount due or paid for the temporary withholding of money, bearing in mind that the investor always has a certain risk profile in mind when making the investment decision. The International Valuation Standards Committee (IVSC) also clearly establishes that valuation experts should consider such factors as the level of interest rates, rates of return expected by investors on similar investments, and the risk inherent in the anticipated benefit stream when estimating discount rate for a valuation. 134 This is why we advocated moving away from the notion of a "risk-free rate" to a rate of return commensurate to the risk undertaken.

Some experts have argued that depriving the claimant of an asset Y at time 0 allows the respondent to relieve the claimant of the risks associated with investment in that asset. 135 This is not necessarily true because claimants could easily point out that the specific investment project being the object of the dispute has generated positive cash flows and rate of return over the long run. It is true that most businesses are made up of high returns for successful ventures and negatives returns on unsuccessful ones. But above all, businesses do exist to generate shareholder value and positive net present values (NPVs) for investors. Therefore, it is not correct to assume that the claimant is not compensated for the returns generated in a consistent

133. Some may argue that, in the case of a dispute with a sovereign government, a successful claimant that is owed money has in effect made a loan to the sovereign. Since the sovereign will certainly repay, the loan is essentially risk-free; hence, the risk-free rate is appropriate. As noted, this approach does not place the injured party in the position it would have been in had the breach or wrongful act not occurred. Another problem with this approach is that all governments are not created equal in terms of risk. While the U.S. government may borrow at an essentially risk-free rate, other countries do not. This approach ignores this reality. Of course, if one takes into account this risk, it is not at all then clear why other risks that are present are excluded. Indeed, foreign investors typically take into account a variety of risks, including country specific risks when deciding whether to undertake a project.

134. See KANTOR, supra note 129, ch. 4; see generally INTERNATIONAL VALUATION STANDARDS COMMITTEE, INTERNATIONAL VALUATION STANDARDS (8th ed., 2007).

135. See Fisher & Romaine, supra note 131, at 145–57.
manner over the years. As such, interest should not be awarded at the risk-free interest rate. As a result, an investor is right in asking for a rate above the risk-free rate. Of course, the level of political, economic, and business risks to be undertaken by an investor is indeed a matter of preference and it is thus important to arrive at a correct opportunity cost for the investment under dispute.

The question now becomes how to define the interest under the opportunity cost approach?

It would probably be correct to state that there is not an easy answer or straight answer to this question. It depends on the investment type, the business governance structure of the claimant and respondent (whether the business is privately or publicly held), the proportion of debt (leverage), the tax environment, etc.

For a publicly-held firm, we may well argue that the appropriate interest rate for adjusting an award to present day value should be derived from the claimant’s cost of capital.136 The cost of capital is defined as the return that needs to be earned by a firm in order for the financial markets to be willing to invest in that firm’s security. It represents a measure used for discounting investment cash flows on specific projects and for pricing products. The cost of capital is a mix of the cost of equity and the cost of debt. A firm’s cost of equity capital is the expected return on a financial asset of riskiness comparable to that of the firm. Under the Capital Asset Pricing Model (or CAPM), which aims at estimating the cost of equity, the asset’s sensitivity to non-diversifiable risk (also known as systematic risk or market risk), often represented by the quantity beta (β) in the financial industry, is taken into consideration, as well as the expected return of the market and the expected return of a theoretical risk-free asset (Rf). Expressed in its simplest form, this model estimates the equity cost of capital as the sum of two components, the “riskless rate” and the “reward” for taking risk.137 The basic CAPM equation is:

---


137. SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW, 197 (2008); see also RICHARD A. BREALEY, STEWARD C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE (8th ed. 2006).
\[
\text{RE} = \text{RF} + \beta (\text{RM} - \text{RF})
\]

where \(\text{RF}\) = risk-free rate

\(\text{RM} - \text{RF}\) = long-term average market price of risk

\(\beta\) = the systematic risk of the firm

A firm's cost of debt capital is merely the rate that it has to pay to borrow in the market. The firm's total cost of capital is then the weighted average of the cost of equity capital and the cost of debt capital and, usually abbreviated as the "Weighted Average Cost of Capital" (WACC).

While it is theoretically accurate to award interest on this basis, it may be problematic from a practical standpoint. In practice, it may be very difficult for a claimant to demonstrate how it arrived at such an opportunity cost and to convince a tribunal that its loss is reasonably certain. The cost of capital may be difficult to derive, because it is based on many assumptions and it requires high expertise as well as reliable data. Usually, the discount rate is found by deriving the average cost of equity and debt of the company, weighted according to their relative contributions. One difficulty is related to the derivation of the cost of equity. The estimation of the cost of equity, i.e., through the CAPM, is based on one major assumption, that financial markets are dominated by rational, risk-averse investors, who seek to maximize satisfaction from return on their investment. Other important assumptions include that the market is efficient, frictionless, and without imperfections like transaction costs, taxes and restrictions on borrowing and short selling. In addition, it assumes that investors base their judgment on a common time horizon, because the model in itself is a one-period expectation model.\(^{138}\) Under the CAPM, the true beta can be difficult to estimate as it depends on the operation characteristic of the underlying asset. Using the CAPM also implies doing research on the firm's financial gearing ratio, operating leverage and market competitiveness, and so on.

For these reasons, we only propose to refer to the WACC model for estimating the cost of capital for publicly-traded assets. We do not propose to use the cost of capital approach to derive the interest rate for privately-held firms because publicly available information may not be available for deriving the cost of capital. Fur-

---

themselves, the information is often missing for many regions of the world and for non-traded companies when benchmarks are not easy to obtain.\textsuperscript{139} Indeed, such an approach under deficient information would require a significant level of inquiry into the individual circumstances of the company under scrutiny and would lead to an unnecessary "battle of the experts" arguing over the underlying assumptions of the model.

For privately-held corporations or any other corporations for which the cost of capital could not be calculated from traditional models, we advocate using a risk-free rate (for example, government bonds) plus a market-risk premium (as measured by an historical average of the excess of the market return over the risk-free rate). The rationale for using this approach, equivalent to using a market rate of return, is based on the assumption that businesses will generally tend to demand an extra payoff above the risk-free rate for investing in an asset with some level of risk.\textsuperscript{140}

As pointed out by Mark Kantor, arbitrators should be pleased to know that they need not draft their awards with quite the level of detail required by international banks. Still, reference to publicly available quotations may indeed be useful. That will be especially true if the arbitrators anticipate the parties may take the award into other forums for an extended period of time. An arbitrator can easily incorporate into the award a more technically correct interest rate provision by cross-referencing to definitions commonly accepted by the international financial community.\textsuperscript{141}

\textsuperscript{139} Many publications are available. For example, Ibbotson publishes a book called the "Cost of Capital Yearbook" that gives detailed calculations of cost of capital (debt, equity and WACC) for firms organized by SIC code. As a result, the data to perform a number of the calculations may be readily available from third party sources. However, information from these sources is often provided on a specific country basis and for developed economies, and not necessarily for all region of the world and for all business sectors. In particular cases, the data may not be appropriate or may not exist from third-party sources. At this time, tribunals are often reluctant to award interest based on internal financial records. See, e.g., PSEG Global Inc. v. Rep. of Turkey, ICSID Case No. ARB/02/5 (Jan. 17, 2007), available at http://www.investmentclaims.com/decisions/ARB0205%20PSEG%20v%20Turkey%20-%20Award%20and%20Annex.pdf.


\textsuperscript{141} See KANTOR, supra note 129, ch. 9 ("Checklist for Interest").
Indeed, the market rate of return approach is not only a method widely used in finance, but it is also quite straightforward to use. The approach is consistent with economic realities, the economic purpose of businesses being to seek higher returns based on their risk profile. Incorporated investors and businesses will not usually invest at the risk-free rate. In international arbitration, arbitrators and parties should recognize that the claimant will seek to maximize profits and earn incremental returns on their investments in proportion to the amount of additional risk those investments add to their portfolio.\textsuperscript{142}

This method raises one main issue: how does one derive the risk premium?

The expected market risk premium is the difference between the risk-free rate and the market-risk (\(R_m - R_f\)). The extreme volatility of the stock and bond markets makes a long measurement period essential. Therefore, this risk premium must be a historical average of the excess of the market return over the risk-free rate. Information on market risk is easily available. For instance, the London Business School has determined the risk premia in the U.S. for the period 1900–2001 was 5.6\% (geometric mean of risk premia relative to bills) and the prospective risk premia for U.S. to be 5.3\%\textsuperscript{143}

\begin{itemize}
\item A somewhat analogous situation arises in shareholder suits under Delaware law in the United States against corporations for a determination of the fair value of the shares in the event of a merger. In this situation, the shareholder has a statutory right to a "fair rate of interest . . . to be paid upon the amount determined to be the fair value" owed. Del. Code Ann. tit. 8, § 262 (2007). There are two reasons for awarding interest in this situation: (1) to compensate a plaintiff for the loss of the use of its money; and (2) to disgorge from respondent any benefit it received from the use of the plaintiff's funds. See Prescott Group Small Cap, LP v. Coleman Co., 2004 WL 2059515 (Del. Ch. Sept. 8, 2004). Delaware courts have ruled that these purposes are fulfilled equally by weighting the respondent's actual cost of borrowing and the prudent investor rate where no special circumstances exist. See Chang's Holdings, S.A. v. Universal Chems. & Coatings, 1994 WL 681091 (Del. Ch. Nov. 22, 2004). The court determines the latter by looking to the plaintiff's opportunity cost based on an objective standard. See Gonsalves v. Straight Arrow Publ'rs, Inc., 2002 WL 31057465 (Del. Ch. Sept. 10, 2002). In the event that the plaintiff fails to meet its burden of proof, the court awards interest at the default rate, which is the applicable legal rate of interest set forth in Delaware Code § 2301(a) (5% over the Federal Discount Rate). See In re United States Cellular Operating Co., 2005 WL 43994 (Del. Ch. Jan. 6, 2005).
\item See Elroy Dimson, Paul Marsh & Mike Staunton, Global Evidence on the Equity Risk Premium (LBS Institute of Finance and Accounting Working Paper No. IFA 385, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=431901. The study also found that over the 102-year period, the risk premium for the world index relative to Bills was 4.6\% and the prospective arithmetic risk premium for the world index to be 3.9\%. Id. Different institutions provide their statistics and analysis of risk premium, mostly for equity risk premium. See, e.g., IBBOTSON ASSOCIATES, STOCKS, BONDS, BILLS AND
\end{itemize}
Simply put, the approach advocated in this article (the risk-free rate plus the market-risk premium) is roughly equivalent to an approach based on the market rate of return. Market rates of return are often readily available from financial market public information on a regular basis. When working on adjusting an award to present day value over a certain period of time, it becomes easy to take an average of the annual returns. There is, however, a complication in deciding what is the market to which we should make reference to determine the interest rate. We thus advocate use of the broadest equity market index available in the country where the claimant is based.

The following example shows the dramatic difference between the model approach for a privately held company and the approach for calculating interest commonly used by investment tribunals. Assume that a tribunal awards US$100 million in damages, calculated from the date of the wrongful act, which is 1 January 1997, and the date of the award is 31 December 2006. The average T-bill rate for the ten-year period is 3.65%. Based on the 2008 Ibbotson Risk Premia Over Time Report, a leading source for historical market data, the equity risk premia for that period is 4.5%. As a result, our market rate should be 8.15% (or the sum of 3.65% and 4.5%).

If interest is calculated pursuant to the approach commonly used by investment tribunals (average T-bill rate of 3.5%, compounded annually), the interest award over US$100 million would total approximately US$43.1 million.

If interest is calculated based on the opportunity cost approach for privately held companies (risk-free rate plus market risk premium (8.15%), compounded annually), the interest award would total approximately US$118.9 million.

The difference between the interest award under the approach commonly used by investment tribunals and the award under the model approach is US$75.8 million. In other words, the model approach in this case results in an award that is nearly 3 times more than the interest award calculated by using the approach commonly employed by investment tribunals.

C. Compounding

1. Simple Interest Versus Compound Interest

We also advocate using compound interest and, in particular, yearly compounding. As noted, in the finance world, compound interest is the international standard applied in most time value applications. Indeed, the adoption of compound interest reflects the majority of commercial realities in that a loss of value incurred by a company, active in normal trading operations, implies the loss of use of that value. Not recognizing this reality would also lead to awarding a windfall to the respondent.

In the simple interest scenario, the interest that accrues each period is not added to the base that is used to calculate interest in future periods. Let’s take an example. We want to calculate the interest on 1,000,000 euros at 5% interest per year for a period of ten years. The formula we will use for this is the simple interest formula:

\[ I = Prt \]

Where:

a. \( P \) is the principal amount, 1,000,000 euros
b. \( r \) is the interest rate, 5% per year, or in decimal form, \( 5/100=0.05 \)
c. \( t \) is the time involved, 10 year time period

To find the simple interest, we multiply 1,000,000 euros \( \times 0.05 \times 10 \), which results in 500,000 euros in interest.

As noted earlier, compound interest differs from simple interest in that the principal balance grows by the amount of interest earned in past periods depending on the stated compounding period.

Now we provide an illustration on the impact of compounding by adjusting an award of 1,000,000 euros according to different time and interest rate scenarios on a yearly compounding basis.

<table>
<thead>
<tr>
<th>Rate / Time period</th>
<th>5%</th>
<th>8%</th>
<th>12%</th>
<th>15%</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 years</td>
<td>1,276,282</td>
<td>1,469,328</td>
<td>1,790,848</td>
<td>2,011,357</td>
</tr>
<tr>
<td>10 years</td>
<td>1,628,895</td>
<td>2,158,925</td>
<td>3,105,848</td>
<td>4,045,558</td>
</tr>
<tr>
<td>15 years</td>
<td>2,078,928</td>
<td>3,172,169</td>
<td>5,473,566</td>
<td>8,137,062</td>
</tr>
<tr>
<td>20 years</td>
<td>2,653,298</td>
<td>4,801,021</td>
<td>9,646,293</td>
<td>16,366,537</td>
</tr>
</tbody>
</table>

All other things being equal, compound interest has a larger effect as the time period increases and as the interest rate increases. For instance, over a 10 year time period, the difference between 5% interest and 15% interest is quite significant, from 1.6 million to 4 million. Consequently, the compounding will have greater impact for high interest rates and longer periods of time.

2. Choice of the Compounding Period

The choice of the compounding period can have a significant impact on the amount of the award. The shorter the compounding period, the faster the principal amount will grow. All other things being equal, compound interest has also a larger effect as the time period increases and as the interest rate increases.

There are no prescribed standards for choosing one particular compounding period over another (annually, quarterly, monthly or daily are the most common options). The compounding period usually depends on the financial products chosen by the client. For some financial products, interest is calculated on a quarterly basis, typically on the last day of the month (i.e., the 31st of March, 30th of

---

146. *See Sénéchal, supra* note 11.
June, 30th of September, 31st of December). Other compounding periods are widely used in the financial industry. For example, interests paid for term deposits in many countries are compounded on a daily basis. For forfeiting transactions or bank-to-bank loans, interest can be calculated on a semi-annual basis, and in the case of short term finance, even for the exact period, for example, ninety days.\textsuperscript{147}

We can easily conclude that, after looking at banking usage, a standard for the compounding period does not clearly emerge. However, continuous compounding is not widely used.\textsuperscript{148}

Different practices can also be applied in different countries. Some countries require financial institutions to compound most of their interests on an annual basis, with the banks then using several types of interest periods. For instance, for letters of credit and letters of guaranty, compounding could be done quarterly in advance after the first quarter. For loans, the compounding period could be "monthly past the month." It is also noted that interest rates for loans could be calculated on a daily balance, and applied monthly. This would obviously result in a compounding effect, based on the monthly cycle. On government bonds, long-term corporate bonds, bills and discount government papers, different practices can be found in the world.

We suggest using the yearly approach since that is a common default practice in the business community. Furthermore, the yearly compounding period is implicit in using average annual returns on the market. Still, depending on the nature of the claims, the invest-

\textsuperscript{147} Id.

\textsuperscript{148} Here are some practices related to compounding:

1. Bonds are often compounded on a yearly or semi-annual basis. Corporate bonds are most frequently payable on the semi annual basis. The amount of interest paid (each six months) is the disclosed interest rate divided by two (multiplied by the principal), the yearly compounded rate being higher than the disclosed rate.

2. Mortgage loans generally refer to semi-annual compounding (but sometime the monthly compounding basis is used, i.e., in the U.S. market).

3. Most financial institutions worldwide award interest on a daily (and sometimes bi-monthly) compounded basis for money on deposit.

4. Continuous compounding is not widely used. In financial engineering, the valuation of derivatives may use continuous compounding, which is the limit as the compounding period approaches zero. The shorter the compounding period, the faster the principal amount will grow. Different options are available (annually, quarterly, monthly or daily are the most common options).
ment vehicles serving as a benchmark, the place of breach and the time horizon under consideration, arbitrators may need to switch to a different compounding period, as most appropriate.\footnote{149}  

* * *

In sum, awarding interest pursuant to the opportunity cost approach would more accurately compensate claimants for the loss of the use of their money than the approaches that tribunals currently use. This method reflects the realistic assumption that if the claimants would have had the use of their money earlier, they would have invested it in a way that would have earned a higher rate of return than the risk-free interest rates typically awarded.\footnote{150}  

Additionally,

\footnotetext{149}{See Sénéchal, supra note 11.}

\footnotetext{150}{A common argument against the use of a rate in excess of the risk-free rate is that if the company could have earned more, it could simply have raised more capital and done so. On the one hand, this argument sounds like an attack on causation. If so, it is misplaced because causation looks at connection between the wrongful act and loss or damage. Clearly, absent unusual circumstances, the wrongful withholding of money causes a loss from the inability to use the funds (causation is typically not concerned with the extent). On the other hand, this argument could be based more on the doctrine of avoidability; that is, the claimant should not receive all of its damages because it could have avoided some or all of the loss. This argument is misplaced. First, and most importantly, even if we assume that the claimant could have secured the funds to make additional investments, it does not necessarily mean that the claimant could have avoided the loss by doing so. But for the breach or wrongful act, the claimant could very well have profitability entered into both transactions as the opportunity to invest in the market is generally available. In other words, if the claimant could have raised the additional money and taken advantage of the investment opportunities generally available during the relevant time period, any income earned on those additional moneys is not a consequence of (and therefore not a mitigation of) the breach. It is thus irrelevant whether the claimant could have raised more money and earned the same interest it is seeking as damages. See Farnsworth, supra note 113, § 12.12; see also Neri v. Retail Marine Corp., 30 N.Y.2d 393 (N.Y. 1972). In fact, in this circumstance, the wrongdoer also had the opportunity to use the claimants' funds in the same manner. Second, the argument assumes that the claimant has the ability to secure the amounts at issue. However, the ability to raise capital is not unlimited and the costs associated with the raising of such funds may go well beyond the simply paying interest to a third party lender. In any event, it would be for the respondent to show that the claimant could have, but did not, take reasonable steps to avoid further loss. See Farnsworth, supra note 113, § 12.12 (citing cases). It also should be noted that, in situations where a party does not take reasonable mitigation efforts, damages are typically assessed as if the claimant had done so. What that would mean here is that the claimant would be treated as if it took the steps to raise the capital and then would have invested it. Under this theory, the expenses associated with raising the capital would still be taken into account and would likely be equivalent to the claimant’s WACC. If, however, the claimant truly has suffered no damage from the respondent’s detention of the claimant’s money, then the claimant may be precluded from recovering interest as damages, even under a restitution theory. See generally Gareth Jones & Robert Goff, Goff & Jones: The Law of Restitution (G. Jones ed., 7th ed. 2007) (discussing the concept that the benefit must be gained as the claimant’s expense).}
this method is in accord with modern business practices and with sound economic and financial principles. Because it is based on objective, readily available data, it also avoids the major concern that claims for interest as damages are usually supported by subjective evidence and are therefore speculative.

CONCLUSION

Arbitral tribunals deciding international disputes have failed to fully compensate claimants for the loss of the use of their money, because their awards of interest do not take into account the reality that businesses typically invest in opportunities that pose a significantly greater risk than the risk reflected in such commonly used standards as U.S. T-bills and LIBOR rates. This problem can be remedied by allowing awards of interest as damages, which is a concept found in laws, treaties and conventions. An ideal award of interest as damages would call for interest to be calculated at the opportunity cost of capital. When such an approach cannot be used, we propose to use a market rate of return with the interest award to be compounded annually. This approach would more accurately compensate injured parties and bring awards of interest in line with modern economic realities.
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CHAPTER 7

The Role of Damages Calculations in the Legitimacy of International Investment Arbitration

Catherine Amirfar1

Introduction

Issues surrounding the calculation of damages in the investor-state arbitration context are among the most significant and underappreciated challenges facing the system of international investment arbitration. If the premise that “valuation is not what lawyers do”2 were true once—which I dispute—it cannot be true today. Billion-dollar claims, often of significant public policy importance, now routinely are brought in investment arbitration. The import of arbitrators applying the nuances of the law of treaty interpretation in a reasoned and transparent manner goes without saying. Less well-settled, but equally crucial for the legitimacy of the international dispute settlement system, is that practitioners understand the nuances of damages valuation disputes, and that arbitrators interpret and decide those nuances in a reasoned and transparent manner. To be clear, I am not suggesting that legal practitioners themselves should become full-fledged experts in financial economics, but I do believe that they must understand better the complexities of valuation.

From a practical standpoint, parties to international investment arbitrations routinely engage in years of drafting pleadings, hearings, collecting of evidence, retaining experts, and paying sizeable legal fees to prepare their cases on damages. To have a tribunal in its final award provide little or no reasoning for the adoption of one methodology or input variable over another, risks creating the perception that tribunals are effectively awarding damages based on ambiguous and amorphous conceptions of equity, with lip-service being paid.

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2 Markham Ball, “Assessing Damages in Claims By Investors Against States”, 32 ICSID Review—Foreign Investment Law Journal 408 (2001) (noting “valuation is not what lawyers do. The law establishes a standard. It is up to another discipline to assess the facts in light of that standard and produce a number.”).
to a valuation methodology to add a veneer of credibility. In egregious cases, damages awards with no supporting analysis are subject to attack. But even outside that admittedly rare circumstance, legal practitioners are often hard-pressed to explain to, for example, a senior government official, a general counsel of a Fortune 500 company, or even a student of Economics 101 an award citing to no reasoned basis to justify a quantum of damages that happens to fall just in between the parties' two competing valuations. If States, parties, and observers perceive that the international investment arbitration system lacks rigor and certainty, that perception materially affects the enterprise of international investment arbitration as a whole. In short, valuation needs to be something that lawyers "do."

A tribunal's decision on damages not only impacts the ultimate quantum of compensation, but it often raises legal equities of particular importance to investment arbitration. Yet the economic and legal consequences of such decisions are often little discussed in tribunal awards. Critical economic issues drive many awards. For example, how should the valuation for an alleged expropriation claim treat the prospect of future expropriations by the respondent state? Should a respondent state with a higher risk of expropriation pay lower compensation to a winning claimant than for an identical asset in a state with lower risk of illegal sovereign acts? What incentives does the ability to benefit from their illegal conduct create? For another example, when and how should compound or simple pre- and post-award interest be available and on what basis? Should pre-award interest hinge only upon whether damages should properly account for the time-value of money, or should tribunals also consider whether interest awards are proper tools to disincentivize possible future illegal conduct by losing respondent states? What incentives for both expropriation and payment are created when post-award interest provides financing to state at rates lower than its sovereign borrowing cost?

One critical area where transparent reasoning often is lacking is in the determination of the applicable discount rate ("DR") in the context of the commonly used discounted cash flow ("DCF") method. For these purposes, I focus

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on the calculation of the DR with respect to the specific factor of sovereign risk related to illegal conduct to (a) illustrate the importance of understanding the detail of valuation methodologies, and (b) illustrate the types of issues within the determination of the DR that implicate core legal equities and with which tribunals should grapple in a reasoned and transparent manner. I comment also on a second commonly used method, "market comparables."

**Damages & the Discounted Cash Flow Methodology**

When it comes to unlawful expropriation and other common breaches of International Investment Agreements ("IIAs") such as the fair and equitable treatment standard, the Chorzów Factory principle of reparation for violations of international law as set forth by the Permanent Court of International Justice tends to be the point of origin. That principle is as follows: "Reparation must, as far as possible, [1] wipe out all consequences of the illegal act and [2] reestablish the situation which would, in all probability, have existed if that act had not been committed."[5]

While the precise contours of the customary international law standard for reparation remain subject to debate, many States acknowledge the role that fair market value ("FMV") plays in the calculation damages for international investment claims. The Commentary of the International Law Commission Articles on Compensation Standards provides, "compensation reflecting capital value of property taken/destroyed as a result of an internationally wrongful act is generally assessed on the basis of FMV of the property lost. Method

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6  See, e.g., U.S.-Arg. BIT, art. IV(1) ("[P]rompt, adequate, and effective compensation...shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known[,]" U.K.-Pan. BIT, art. 5(1) ("Such compensation shall amount to the fair value which the investment expropriated had immediately before the expropriation became known, shall include interest until the date of payment, shall be—made without delay, be effectively realisable and be freely transferable."). See also Markham Ball, *supra* note 2, at 414 ("Despite the diversity of terms, however, I believe one can see a growing consensus, expressed in treaties and in arbitral awards under treaties or customary international law, on a standard of 'fair market value' or its equivalent.").
used to assess FMV depends on the asset concerned.\textsuperscript{7} The 1992 World Bank Guidelines likewise state, "[w]ithout implying the exclusive validity of a single standard for the fairness by which compensation is determined," that stated, "(i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value; (ii) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value; (iii) for other assets, on the basis of (a) the replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking...[\textdagger]"\textsuperscript{8}

FMV is a term of art referring to the price that a hypothetical willing buyer would pay a hypothetical willing seller.\textsuperscript{9} Estimating the FMV of expropriated assets indirectly is frequently necessary because the market price of the asset is not observable. Indeed, as I explain below, it may be inappropriate in investor-state arbitration to equate FMV with the traded value of the asset even where can be observed, because actual transactions may not reflect the legal assumptions for compensation.

Two of the most common valuation approaches are the DCF method and the market comparables method.\textsuperscript{10} The DCF method attempts to come to a reasonable forecast of the future cash flows from an asset or company, often with reference to the entity's historical performance. The comparables approach looks for prices paid in sales of like assets in like circumstances, or contemporaneous sales of stock in an enterprise holding such assets as guides to determining the expropriated asset's value. Experts often use both methods when each is imprecise, in the name of "triangulation."\textsuperscript{11} I should note that these methods may (and often do) result in different valuations, as each method reflects different


\textsuperscript{9} See, e.g., Restatement (Third) of Foreign Relations Law Section 712 (1989).

\textsuperscript{10} See generally Kantor, supra note 4 (discussing three approaches to valuation: income-based approach (including DCF), market-based approach (including comparables), and the asset-based approach). For shortcomings on the market based approach, where there may be no comparable businesses or opportunities, see Paul D. Friedland & Eleanor Wong, Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies, 6 ICSID REV. FOREIGN INVESTMENT L.J. 400, 405–06 (1999).

\textsuperscript{11} In the social sciences, ° triangulation " refers to using more than one source (ideally of a strategically different type) to check the validity of an interpretation. For a general
assumptions, data, or circumstances. Experts often enlist multiple methods to buttress the reliability of the bottom line number, and widely divergent results can suggest they have inconsistent assumptions and that one or more are not reliable. For this reason, an expert’s ability to reconcile for the tribunal the differing results is critical.

For these purposes, I focus on the DCF methodology. A DCF model forecasts the future expected cash flows from the investment and reduces these to a present value using a discount rate. Briefly stated, the DCF method comprises several steps: (i) estimating the future cash flows from the investment being valued during a specific projection period; (ii) calculating the present value of those future cash flows using a discount rate; (iii) where appropriate, estimating the terminal value of the asset after the end of the specific projection period; (iv) aggregating the present values of the projection period and terminal value cash flows; and (v) (where appropriate) deducting the FMV of the investment debt to determine the value available to equity investors.12 Inputs to a DCF include, among other elements, future revenue and expenses forecasts, incremental capital requirements, interest and inflation rates, currency fluctuations, and starting and ending dates for the DCF forecast period.

In theory, the method is well-suited to estimating full compensation to the claimant by determining the amount that reflects a company’s expected ability to generate positive returns in the future.13 There now is widespread acceptance of DCF in the world of corporate finance and increasingly by courts and some international investment tribunals, at least for expropriation claims involving “a going concern with a proven record of profitability.”14 Particularly

12 Id. at 132. Notably, DCF forecasts are highly sensitive to the terminal value projecting the residual value to the end of the investment’s life, especially if the period for the detailed projections is short.


14 World Bank Guidelines at 138; see also Ball, supra note 2 at 419 (“It is well settled in the world of finance that the accepted way of valuing prospective earnings is the discounted cash flow method.... The DCF method is a real-world method that businessmen and financiers apply every day in deciding how much to invest in a business. It has been accepted and applied in the awards of numerous international arbitral tribunals, as well as in cases in national courts.”); Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, U.N. Comp. Comm’n Governing Council, 4th Sess., 33d mtg. para. 18, U.N. Doc. S/AC.26/SER.A/1 (1992) (arguing that, where market value cannot be directly observed, DCF is proper); Pratt, The Lawyer’s Business

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in light of these developments, lawyers need to be conversant, and tribunals need to engage, in the detail of the methodology.

Issues in the Calculation of the DCF Discount Rate

The classic approach to determining the DFR is to estimate the Weighted Average Cost of Capital (WACC) of the asset. The WACC is directed at determining the proper balance between risks and benefits to investors in competitive capital markets. The WACC often is calculated by reference to the company holding the asset (or similar ones) and is comprised of the cost of debt and the cost of equity, proportionately weighted to determine the overall cost of capital to the company.¹⁵ Some practitioners add a factor for non-market (i.e., subjective or investment-specific) risks, though this is controversial among experts.

The numerical inputs to determining the DFR often are the subject of substantial disagreement by competing party experts and result in wide divergences in damages conclusions. Further, many of these inputs inevitably often have far-reaching legal and policy implications. But very often, tribunals often provide no discussion or decision with respect to the underlying inputs, or even when they do, awards reflect mechanical adoptations of a party’s position, with little to no acknowledgment of the legal or policy underpinnings.

Of specific import in the field of investment arbitration is the inclusion and magnitude of a country or sovereign risk discount in a DCF. This element seeks to account for risks associated with country-specific conditions of the host State.¹⁶ In the words of the EDI Tribunal, the “country risk premium represents the premium required by an investor to place money in a

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¹⁵ Valuation Handbook (American Bar Association 2000), at 105 ("Not only is discounted cash flow the most theoretically correct valuation method, it is also the most widely practiced valuation method in the world of corporate finance. Furthermore, the method is increasingly used by valuation experts and increasingly accepted by courts."). For two excellent discussions of the DCF method, see *CMS Transmission Company v. Republic of Argentina, ICSID Case No. ARB/03/08, Award ¶ 416 (May 12, 2005)* ("DCF techniques have been universally adopted...") and *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina, ICSID Case No. ARB/01/3, Award ¶ 385 (May 22, 2007)* ("[DCF] has also been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law.").

¹⁶ See Maniatis, supra note 3, at 3.
foreign investment.”¹⁷ As sovereign risk increases, the damages figure decreases. One common procedure for determining sovereign risk is based upon the premium of the country’s USD sovereign debt over the corresponding USD risk-free rate.¹⁸ Mathematically, but not without controversy, such a risk can be incorporated into the estimation of future cash flows feeding into a DCF analysis (usually based on contemporaneous business projections¹⁹) or in the DR itself, although it appears that the latter is more frequent.²⁰ One common issue with respect to country risk that requires vigilance by counsel and arbitrators is the possibility of double-counting: to the degree that country risk is already incorporated into estimated cash flows, it should not be incorporated into the DR as well. Indeed, incorporating such a risk directly into the DR can sometimes invite improper hindsight and results that are not intended, which can be at odds with the relevant Chorzów Factory legal exercise of determining the proper quantum of expected future profits based on the situation that would have existed but for the unlawful conduct. Thus where inclusion of a sovereign risk factor is deemed appropriate, and unless confronted with a unique set of facts, there is considerable appeal in an assessment limited to contemporaneous risk information that would have been fairly known by claimants (assuming a reasonable, informed investor) at the time of investment and not a post-hoc determination made in the context of a contentious legal proceeding.

The tribunal in Kardassopoloulos/Fuchs v. Georgia—one example of a particularly well-reasoned and detailed analysis of the DCF methodology—was faced with this very question. That tribunal was considering the proper sovereign risk to attribute to an oil pipeline investment in Georgia in 1995, which would take account of the specific macroeconomic and political conditions

¹⁷ EDIF v. Republic of Argentina, ICSID Case No. ARB/03/23, Award ¶ 1262 (June 11, 2012).
¹⁸ See generally Maniatis, supra note 3, at 13.
¹⁹ See, e.g., CMS Transmission Company v. Republic of Argentina, ICSID Case No. ARB/01/08, Award ¶ 422 (May 12, 2005) (“The use of a company’s internal forecast prepared in the normal course of business is quite acceptable as a starting point in the valuation of a company. The Tribunal sees no reason to reject it.”).
²⁰ See, e.g., EDIF v. Republic of Argentina, ICSID Case No. ARB/03/23, Award ¶¶ 1261–1265 (June 11, 2012) (accounting for country risk in the DR); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 274, 282 (March 28, 2011) (same); Sempra v. Argentina, ICSID Case No. Arb/02/16, Award, ¶ 433 (September 28, 2007) (same); Siemens v. Argentina, ICSID Case No. ARB/02/8, Award ¶ 382 (February 6, 2007) (same); CMS v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 454–55 (May 12, 2005) (same); ADC v. Hungary, ICSID Case No. ARB/03/16, Award ¶ 511 (October 2, 2006) (same).
surrounding the oil transportation industry at the time. The respondents' expert argued for a substantial upwards adjustment on the DR to 36% to reflect the addition of a country risk premium for Georgia of 23%. Notably, the expert justified that figure by comparing it to economic and political information subsequent to the time of investment: "The political risks have generally trended down, and before coming here, I went to get to my colleagues to say, what are the risk numbers looking now? What's the country risk percentage that you have calculated now? Nothing to do with this arbitration. ... But the country risk premium, you use country risk premiums now, if you say an average for 2008, 6 or 6.5 per cent, that's substantially lower than what it was back in 1995, and I think that reflects the fact that Georgia, subject to Russia, is a much more stable developed place than it was back in the days in 1995, because things were—the evidence around there was that things were really very, very uncertain." In short, the respondent's expert came to a 1995 estimate of 23% by casual inquiry about the country risk premium two decades later and, finding it was about 7%, adjusted that figure substantially higher in an ad hoc manner on the observation that things were much worse earlier when the investment was made. The claimants' expert opposed the addition of any country risk premium to the DR, arguing in response that as a conceptual matter, "these are just spreads between lending to governments and the risk is really embedded in how the government runs its fiscal affairs. One needs to take exceptional caution as to how that particular type of risk would affect commercial activity, and especially in the energy industry, people like to take into account risks such as this, country risk, political risk, into the cashflows." The claimant's expert argued that respondent's proposed discount was so high as to be unrealistic, since it would "deter any international oil companies from ever[ ] doing business in Georgia," a premise that was not borne out by the underlying facts showing investment in Georgia.

The Kardassopoloulos/Fuchs v. Georgia tribunal ultimately rejected the respondent expert's proposed addition of a 23% country risk premium to the DR, concluding that claimant "was not exposed to significant country risk so as to justify application," and that claimant expert's "methodology takes adequate account of the risks involved in each valuation scenario as of the

21 Kardassopoloulos/Fuchs v. Georgia, ICSID Case No. ARB/05/18 and ARB/07/15, Award ¶ 624 (March 3, 2010).
22 Id.
23 Id. at ¶ 629.
24 Id. at ¶ 630.
25 Id. at ¶ 626.
valuation date.\textsuperscript{26} While not made explicit in the decision, it stands to reason that the tribunal was unpersuaded by the attempt by respondent’s expert to justify a risk premium for 1995 by apparently working backwards from a post-1995 premium. More importantly, while the tribunal noted that “both experts appear to agree that risk may be accounted for either in the cash flows of a DCF analysis or in the discount rate,”\textsuperscript{27} it appeared to credit the assertion of claimants’ counsel that the country risk had been sufficiently accounted for in the underlying cashflows estimates, particularly where the nature of the pipeline investment appears to insulate it from the Georgian domestic political landscape.\textsuperscript{28} The tribunal’s decision in this regard gave appropriately fulsome attention to the question of sovereign risk in a way that is sensitive to the significant legal equities underlying it: what is the nature of the investment and how was that investment actually subject to the host State’s economic and political policies for the time period in question? In particular, was the investment of the type of business operation that would have been affected by the specific political turmoil in question? Was the investment dependent on the domestic or foreign market? Was the investment insulated from domestic currency fluctuations? What role does hindsight play in an expert’s assessment and is that appropriate?

While not an issue that to my knowledge has been subject of analysis in decisions, inclusion of a sovereign risk premium in the overall DR (rather than as a component of the underlying cash flow estimates) may lead to unintended assumptions. For example, normally a DCF valuation will apply a single DR to all future cash flows, even ones covering a prolonged period of time, rather than through different DRs applied to different time periods. So incorporation of the sovereign risk into the overall DR assumes that the risk compounds over time, that is, to “cause the country risk discount to be small in the first

\textsuperscript{26} Id. at ¶ 631.
\textsuperscript{27} Id. at ¶ 628.
\textsuperscript{28} Id. at 630 (“And so I think you have to think about how the quantity of what you’re applying and adding to the discount rate really affects the business’s operations and what you would expect. Would you expect oil that is really mostly travelling underground, not being sold to any Georgian citizens, not dependent upon the currency value in Georgia of the Lari, you know, literally being transited underground, being sold out into Western markets, how much does the political turmoil really affect that type of business operation? 36 per cent really just eviscerates value and pulls the project on a basis as if, you know, oil is hardly going to reliably flow through that pipeline, and I just don’t think that’s realistic. So in my view, you have to bring it down to a commercial context all the time before you just carte blanche apply that spread.”).
year and growing over time."\textsuperscript{29} Tribunal should offer a reasoned basis for their assumptions with respect to an investment’s exposure to sovereign risk, based on specific evidence of the nature of that risk over the course of the relevant time period.

Concluding Thoughts

In sum, a reasoned award with respect to damages requires actual reasons, akin to a reasoned award on liability. Awards that fail to detail the tribunal’s decision-making and evaluation of methodologies on damages can pose legitimacy risks to the investor state dispute settlement system. Users increasingly demand more sophistication with respect to financial modeling in international dispute settlement and express frustration when it is lacking.\textsuperscript{30}

In this respect, initiatives and writing aimed at increasing the rigor and transparency of damages awards are very welcome developments. In 2010, the International Institute for Conflict Prevention and Resolution (CPR) issued a Protocol on Determination of Damages in International Arbitration ("CPR Damages Protocol") that prescribes addressing damages early in the course of arbitration and recommends "various steps that arbitrators may take to make their and the parties’ task of dealing with damages less complex, time-consuming and expensive."\textsuperscript{31} These recommendations include asking arbitrators to address damages early in the life of the case (at the initial conference), set up an expert witness conference, consider appointing a tribunal damages expert,\textsuperscript{32} and provide “a careful analysis of how the quantum of damages

\textsuperscript{29} Mavignier, \textit{supra} note 5, at n. 31.

\textsuperscript{30} Cf. Rummel & Tellius \textit{v.} Kazakhstan, ICSID Case No. ARB [ ], Annulment Committee Decision (DATE), in which the Committee declined to annul award because it concluded that the tribunal "did undertake the task of producing a reasoned Award as to damages as Mandated by the ICSID Convention," but only after the committee itself obtained from the parties the complete record of evidence relating to quantum to be able to replicate the tribunal’s analysis. Notably, the Committee stated, "it is highly desirable that tribunals should minimize to the greatest extent possible the element of estimation in their quantification of damages and maximize the specifics of the rationale explaining how the ultimate figure was arrived at." See also Ball, \textit{supra} note 2, at 428 ("An arbitral award of damages without supporting analysis is not necessarily immune from attack.").

\textsuperscript{31} The protocol is available online at http://www.cpradr.org/RulesCasesServices/CPRRules/ProtocolsDeterminatioandofDamagesinArbitration.aspx.

\textsuperscript{32} See, e.g., see \textit{CMS Transmission Company} \textit{v.} Republic of Argentina, ICSID Case No. ARB/01/08, Award ¶ 418 (May 13, 2005).
awarded was determined" in the decision. The CPR Damages Protocol also sets out prescriptions for the presentation by experts of their damage calculations, in an effort to make them understandable and transparent in terms of the methodology used. Equally welcome is Mark Kantor's checklist in his excellent damages treatise, related to various issues such as calculation of interest, legal principles limiting compensation, selection of comparable companies for the valuation, and so on. One notable suggestion of both is for experts to take advantage of the sensitivity analysis that is common in the business world to play out what are known as "base case," "best case," and "worst case" scenarios.\footnote{33 See, e.g., CPR Damages Protocol 2(b); Kantor, supra note 4, at 134.} This would assist tribunals to appreciate which variables and embedded assumptions are driving the damages calculations.

These initiatives, while significant moves in the right direction, are only a start. The international arbitration community as a whole would benefit from the further development of guidelines and other criteria specific to valuation methods. Such measures should be designed to improve the consistency of expert presentation and arbitrator decision-making with respect to damages calculations in international investment arbitration.
This decision resolves a petition to confirm a foreign arbitration award. On November 18, 2016, petitioner Albtelecom SH.A ("Albtelecom") filed a petition to confirm an arbitration award (the "Award") pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 9 U.S.C. §201-08 (the "New York Convention"); see also 9 U.S.C. §203 (giving United States district courts original jurisdiction over actions or proceedings falling under the New York Convention). Dkt. 1 (the "Petition" or "Pet."). The 41-page Award, rendered September 2, 2015 by an arbitrator of the ICC International Court of Arbitration ("ICC") on consent of the parties, is against respondent UNIFI Communications, Inc. ("Unifi"). In addition to confirmation of the Award, Albtelecom seeks a damages award from Unifi based on Unifi's alleged breach of the Award. It argues that Unifi's failure, post-Award, to make all payments required by the Award triggers an enhanced damages remedy under the Award. Unifi resists confirmation of the Award, but principally resists Albtelecom's bid for a judgment of damages premised on a finding of breach. Unifi asks the Court to dismiss or stay Albtelecom's petition for confirmation and enforcement.
It notes, inter alia, that, after the filing of Albtelecom's petition, Unifi initiated a new ICC arbitration in Switzerland, aimed at examining whether the parties' post-Award communications excused Unifi's obligations under the Award.

For the reasons that follow, the Court confirms the arbitration Award and enters judgment in favor of Albtelecom consistent with the terms of that Award. However, the Court does not reach in this ruling whether Unifi has complied with or breached the Award; whether compliance with the Award was excused in whole or part based on the parties' post-Award dealings; or what, if any, damages may be merited for Albtelecom under the Award to the extent of any noncompliance by Unifi. The Court also does not reach the issue of whether, assuming Albtelecom were to continue to pursue a claim of breach, whether this Court is the proper forum to resolve such a claim, or whether such claims are more properly resolved elsewhere (e.g., the ICC arbitration that Unifi represents it has brought in Switzerland).

A. Factual Background

1. The Arbitral Award

This matter stems from the Contract between Albtelecom and Unifi, entered into on August 8, 2006, for the provision of international telecommunications services. A dispute later arose under the Contract, with Albtelecom claiming that Unifi had not paid Albtelecom fully for its services rendered. Award ¶4.

On June 29, 2012, Albtelecom initiated arbitral proceedings against Unifi. Bollen Decl. ¶4. It did so pursuant to paragraph 21 of the Contract, which provided that disputes between the parties were to be resolved by arbitration pursuant to the ICC's rules. Bollen Decl. ¶3 (citing Contract ¶21). On January 11, 2013, on consent of the parties, an arbitral tribunal, consisting of a sole arbitrator, Joachim Knoll, was constituted. Bollen Decl. ¶5; Award ¶¶16-17.

Arbitration proceedings proceeded before arbitrator Knoll throughout 2013 and into October 2014. Award ¶¶18-56. On October 5, 2014, counsel for Albtelecom and Unifi jointly advised the arbitrator that they were engaged in settlement discussion. Bollen Decl. ¶14; Award ¶¶57-58. The arbitrator therefore stayed further proceedings, but when these discussions broke down, arbitration proceedings resumed. Award ¶¶59-78.

On April 17, 2015, counsel jointly advised the arbitrator that a settlement agreement had been entered into. Bollen Decl. ¶14; Award ¶96 (reproducing parties' settlement agreement, including detailed payment schedule); id. ¶97. On April 18, 2015, upon the parties' joint request, the arbitrator stayed the arbitral proceedings and cancelled a scheduled evidentiary hearing. Id. ¶98. On April 21, 2015, the parties asked the arbitrator "to issue a Consent Award which shall in its general part (ground of the award) reproduce the settlement agreement and in its decision (ruling) reproduce clause 2 as well as the annex of the Settlement agreement." Bollen
Decl. ¶14; Award ¶100. The parties thereafter furnished the arbitrator with a copy of the settlement agreement. Award ¶102.

On June 16, 2015, the arbitrator provided a draft of his proposed Award to the parties, for their review and comment. Award ¶106. The parties commented on the draft award, suggesting minor changes which the arbitrator accepted. Id. The arbitrator agreed to issue an Award on consent. Id. ¶115 ("Against this background, and in the absence of any public policy-based concerns against the rendering of an award by consent, the Sole Arbitrator agrees to render an award by consent.") On July 29, 2015, the arbitrator closed the arbitral proceedings, pursuant to Article 27 of the ICC. Id. ¶106.

The Award was issued September 2, 2015. It awarded Albtelecom the amount of EUR 1,088,000, which Unifi was to pay by bank transfer in 39 monthly installments, which the Award specified by date and amount. Award ¶118. The Award further provided that, should Unifi fail to make payments consistent with the schedule it set and fail to cure under the terms provided by the settlement agreement, Albtelecom was entitled to claim EUR 2,100,000 from Unifi. Id. The Award further provided that payments overdue under the Award were to "bear interest at the rate of 2.5 percent per year, and fixed costs of $115,000, which were to be born by Albtelecom." Id. Each party was responsible for bearing its own legal and other costs in connection with the arbitral proceedings and the settlement agreement. Id. Neither party appealed the Award. Bollen Decl. ¶18.

2. Unifi’s Alleged Failure to Pay Under the Award

Albtelecom alleges that, after the Award issued, Unifi made the first three installment payments under it — due in September, October, and November 2015 — although the latter two were paid after the deadline set in the Award. Bollen Decl. ¶¶21-23. However, it alleges, Unifi did not make any further payments or cure its failure to timely pay. Id. ¶24. Albtelecom alleges

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that after it issued a notice of failure to pay, Unifi responded with the "spurious" claim that "any delay in payment occurred with Albtelecom's full knowledge and understanding." Id. ¶26. Albtelecom alleges that, as of November 16, 2017, Unifi had paid it only EUR 396,000, and that it is therefore entitled, under the Award to EUR 1,704,000 (the difference between the EUR 2,100,000 to which Albtelecom is due in the event of a failure by Unifi to pay or cure under the Award and the 396,000 it has paid). Id. ¶28.

3. This Action

On November 17, 2016, Albtelecom filed the Petition. The Petition sought confirmation of the Award. The Petition also sought entry of judgment in the amount of EUR 1,805,693.21 plus interest from December 15, 2015 on that sum, and costs and fees. Id. ¶15 & Prayer for Relief.

On March 3, 2017, Unifi responded, opposing the Petition and cross-moving to dismiss or stay the Petition, Dkt. 14-15, and submitting three supporting declarations, Dkt. 16-18. Unifi recounted much of the same history as Albtelecom. But, Unifi contended, after the Award had issued, the parties had entered into business agreements suspending Unifi’s monthly payment obligations. And, it stated, pursuant to that
understanding, Albtelecom had foregone sending default notices to Unifi during much of 2016, before it unexpectedly did so in October 2016. See Unifi Mem. at 2; see generally Shatku Decl. & Exs. A-C.

Unifi’s response made three arguments. First, it argued, the New York Convention does not apply to the Award, because it took the form of a consent award. Unifi Mem. at 12. Second, it argued, the Petition should be stayed, because according the terms of the Award, any disputes arising under the Award, except for disputes relating to Unifi’s payments, must be arbitrated in Switzerland. And, Unifi argued, Albtelecom’s petition implicates several such provisions of the Award beyond provisions relating to Unifi’s payments, including because, it argued, the parties’ post-Award agreements implicate Swiss law. Id. at 13. To address these issues, Unifi stated, on March 3, 2017, it had initiated a request for arbitration with the ICC. Id. at 11; see generally Hockstrasser Decl. & Ex. 2. Third, Unifi argued, if the Court confirmed the Petition, the Court should not award Albtelecom a lump-sum judgment (i.e., based on the EUR 2,100,000 provision applicable in cases of uncured default) because there are issues of disputed materials fact as to whether Unifi was excused from its payment obligation, including based on an ensuing oral agreement among the parties about the payment schedule. Id. at 15-19.

A. Applicable Legal Standards


Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §201-08, which codifies the New York Convention, governs arbitration agreements that arise from a "legal relationship, whether contractual or not, which is considered commercial," except when those relationships are "entirely between citizens of the United States" and are otherwise domestic in nature. 9 U.S.C. §202. Applying §202, the Second Circuit has held that where an agreement to arbitrate "involve[s] parties domiciled or having their principal place of business outside [the United States]," that agreement is governed by the Convention. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997) (quoting Bergesen v. Joseph Muller Corp.,


When a party seeks confirmation of an arbitral award under the New York Convention, "[t]he court shall
confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of
the award specified in the said Convention." 9 U.S.C. §207; see Encyclopaedia Universalis S.A. v.
Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005). "Article v. of the Convention specifies
seven exclusive grounds upon which courts may refuse to recognize an award." Encyclopaedia
Universalis, 403 F.3d at 90. "The party opposing enforcement of an arbitral award has the burden to prove
that one of the seven defenses under the New York Convention applies." See Telenor Mobile Comm'ns
AS v. Storm LLC, 584 F.3d 396, 405 (2d Cir. 2009) (quoting Encyclopaedia Universalis, 403 F.3d at 90).
"The burden is a heavy one, as the showing required to avoid summary confirmance is high." Id. (quoting
Encyclopaedia Universalis, 403 F.3d at 90).

"Given the strong public policy in favor of international arbitration, review of arbitral awards under the New
York Convention is 'very limited…in order to avoid undermining the twin goals of arbitration, namely, settling
disputes efficiently and avoiding long and expensive litigation.' Encyclopaedia Universalis, 403 F.3d at 90
(ellipses in original) (quoting Yusuf Ahmed Alghanim & Sons, 126 F.3d at 23 (additional internal citations
omitted)); accord Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12
(2d Cir.

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1997) ("The court's function in confirming or vacating an arbitration award is severely limited." (internal
citation and alteration omitted)). Indeed, "an arbitration award should be enforced, despite a court's
disagreement with it on the merits, if there is 'a barely colorable justification for the outcome reached.'
Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emps. Int'l Union, AFL-CIO, 954 F.2d 794, 797 (2d
1978)).

However, "[a] petition to confirm an arbitral award is 'treated as akin to a motion for summary judgment.'
STX Pan Ocean Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., No. 12 Civ. 5388 (RJS), 2013 U.S. Dist.
That is true even if the petition is unopposed. See D.H Blair, 462 F.3d at 110 ("[G]enerally a district court
should treat an unanswered…petition to confirm/vacate [an arbitral award] as an unopposed motion for
summary judgment").

To prevail on a motion for summary judgment, the movant must "show[] that there is no genuine dispute as
to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In
making this determination, the Court must view all facts "in the light most favorable" to the non-moving
party. Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (internal citations omitted). In determining whether
there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all
permissible factual inferences in favor of the party against whom summary judgment is sought." Johnson v.
Killian, 680 F.3d 234, 236 (2d Cir. 2012) (quoting Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003))
(internal quotation marks omitted).

However, "[e]ven when a motion for summary judgment is unopposed, the district court is not relieved of its
duty to decide whether the movant is entitled to judgment as a matter of
law." Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 242 (2d Cir. 2004); see also Amaker v. Foley, 274 F.3d 677, 681 (2d Cir. 2001) ("[E]ven when a nonmoving party chooses the perilous path of failing to submit a response to a summary judgment motion, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial."). "If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied even if no opposing evidentiary matter is presented." D.H. Blair, 462 F.3d at 110 (emphasis in original) (quoting Vt. Teddy Bear Co., 373 F.3d at 244). Where "[t]here is no indication that the arbitration decision was made arbitrarily, exceeded the arbitrator's jurisdiction, or otherwise was contrary to law[,]...a court must grant an order to confirm an arbitration award upon the timely application of a party." Herrenknecht Corp. v. Best Rd. Boring, No. 06 Civ. 5106 (JFK), 2007 WL 1149122, at *2 (S.D.N.Y. Apr. 16, 2007) (citing 9 U.S.C. §9; Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d cir. 1984)).

B. Analysis

Albtelecom first asks the Court to confirm the Award. Based on its review of the Award and the parties' submissions, and having undertaken the limited review appropriate here, the Court agrees that there is no material issue of fact for trial as to confirmation, and that the Award was properly entered. The face of the Award reflects full participation by both parties in the arbitration process, which had proceeded for more than three years as of the date on which the Award was entered. The Award reflects consent to the terms and the text of the Award, by both parties. It reflects due care by arbitrator Knoll. And the parties' consent to the Award — their stipulation to its terms — provides a sound basis for its entry.

Unifi's sole argument against confirmation is that the Award was entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes. Unifi claims that "the parties agreed to settle their dispute outside of arbitration." Unifi Mem. at 13. But that is wrong. The parties here certainly could have dismissed the arbitration in favor of a private settlement agreement. Instead, as the record reviewed above reflects, they affirmatively asked arbitrator Knoll to adopt as part of an ICC arbitral Award, in haec verba, the terms of their settlement agreement in the Award. The parties then proceeded, with the arbitrator's consent, to edit the draft Award, to assure that it reflected their agreement. Far from being resolved "outside of arbitration," the parties' dispute, therefore, was ultimately resolved in arbitration, based on the parties' stipulation to particular terms as embodied in the Award.

Unifi cites no law to the effect that an Award entered into by an ICC arbitrator, mid-arbitration, with the parties' consent and based on terms agreed to by the parties, is any less binding under the New York Convention than an ICC award entered into after more contentious litigation. There is no reason for such an exception. On the contrary, the opposite rule would discourage resolution of disputes in mid-arbitration. Parties who initiate arbitration under the ICC might be less willing to settle, were the implication of a settlement that the resulting Award would lose its enforceability under the New York Convention. There is indeed limited law on this point, presumably because Awards achieved following the parties' consent are less likely to result in later disputes. But the limited available precedents reflect recognition and

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The Court therefore will confirm the arbitral Award. The Court will order entry of judgment as provided in the Award, to wit, that Unifi was required, as of September 2, 2015, to make the 39 monthly installment payments totally EUR 1,088,000, in the amounts and on the dates indicated in the Award, and to comply with the other obligations reflected in the Award. See Award ¶118.

To the extent, however, that Abltelecom goes further and asks the Court to find a breach of the Award, or that the Award term triggered — upon breach by Unifi and a failure to cure — an obligation to make a larger lump-sum payment (of EUR 2,100,000) to Abltelecom, the Court cannot order that relief based on the present record. As Unifi observes, there are disputed factual issues that preclude entry of such relief. Unifi's declarations contain allegations that, if established, might excuse failure by Unifi to timely make certain installment payments. Unifi's declarations also raise questions, beyond the scope of this decision, about whether the proper forum to resolve its claims that the parties entered into a post-Award agreement supervening its terms is (1) a Swiss court or arbitration panel or (2) this Court, enforcing the judgment entered today that confirms and embodies the terms of the arbitral Award.

The Court's ruling today is therefore limited to confirming the arbitral Award. To the extent Albltelecom continues to pursue in this Court a claim of breach of the Award and of entitlement to the larger lump-sum payment, the Court would first require briefing by the parties. The Court would expect the parties to address (1) whether, in light of Unifi's claim of an ensuing agreement between the parties excusing compliance, a claim of breach is required to be brought elsewhere under the Award and/or the parties' Contract; and (2) if not, whether this Court, as

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opposed to another forum such as the arbitration recently initiated in Switzerland by Unifi under the auspices of the ICC, is the proper forum to resolve such a claim. Before any such briefing is initiated, however, the Court expects the parties to confer, with at least the goal of attempting to reach agreement as to the forum in which to resolve Albltelecom's claims of breach, if not more broadly to resolve their overall dispute. The Court directs counsel for Albltelecom to meet and confer with counsel for Unifi within three weeks of this decision. The Court further directs the parties to then submit, by Friday, June 23, 2017, a joint letter stating whether they have agreed on a forum. In the event that one or both of the parties seek to litigate these issues in this Court pursuant to Albltelecom's Petition, the parties' letter is to propose, jointly, an expeditious schedule for addressing the issues presented, and, if litigation is to occur in this Court, for discovery.
To the extent Albtelecom seeks an award of fees and costs, the Court declines to grant such an award at this time. The Court’s assessment is that the great majority of the legal work occasioned by the Petition was in turn occasioned by Albtelecom's bid for a judgment premised on a finding of a breach of the Award. Because the Court has not reached that claim and therefore has not rendered that relief, the Court, in its discretion, declines to order payment of fees. This ruling is, however, without prejudice to Albtelecom’s ability to bring a later fee application in the event that Albtelecom later prevails on such a claim. As to costs, the Court will order that Unifi recompense Albtelecom for its filing fee in this litigation, because Albtelecom would necessarily have incurred that fee had it initiated an action limited to confirmation of the arbitral Award, relief that the Court has awarded over Unifi’s objection.

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For the reasons stated herein, the Court grants Albtelecom’s petition for confirmation of the arbitral Award entered by the ICC as a judgment of the Court.

The Court, however, denies Albtelecom’s petition to the extent that it seeks, based on the present record, judgment and a damages award based on a finding of a breach by Unifi of the terms of that Award. This ruling is without prejudice to Albtelecom’s right to pursue such relief, either later in this action following appropriate briefing and fact discovery, or in another action, such as the ICC arbitration pending in Switzerland that Unifi has initiated. The Court also grants Albtelecom’s application for costs, limited to its filing fee for this litigation, but otherwise denies Albtelecom’s application for fees and costs, without prejudice to renewal. The Court denies Unifi’s cross-motion to dismiss Albtelecom’s petition.

Counsel for Albtelecom and Unify are directed to meet and confer about the proper forum in which to resolve Albtelecom’s claims of breach of the Award, and to submit a joint letter to the Court by Friday, June 23, 2017, consistent with the discussion herein.

The Clerk of Court is respectfully directed to terminate the motions pending at Dkts. 2 and 15.

SO ORDERED.

Dated: May 30, 2017

New York, New York

1. The following facts are derived from the Petition; the declaration of Christopher Bollen in support of the Petition, Dkt. 3 ("Bollen Decl."); and the documents attached to the declaration, including the parties’ underlying contract ("Bollen Decl. Ex. 1") ("Contract"), and the award of the arbitral panel (Bollen Decl. Ex. 2) ("Award"); Albtelecom's memorandum of law in support, Dkt. 22 ("Albtelecom Br."); the declaration of Ervin Shpori in support, Dkt. 23 ("Shpori Decl."); and the supplemental declaration of Christopher Bollen in support, Dkt. 24 ("Bollen Suppl. Decl."). The Court also considered the following materials submitted by Unifi in opposition to the Petition and in support of its cross-motion to dismiss or stay the Petition: its memorandum of law, Dkt. 20 ("Unifi Mem."), and its reply memorandum, Dkt. 31 ("Unifi Reply Mem."); the declaration of Joseph P. Goldberg, Dkt. 16 ("Goldberg Decl."); the declaration of Adrian Shatku, Dkt. 17 ("Shatku Decl."); the declaration of Daniel Hochstrasser, Dkt. 18 ("Hochstrasser Decl."); the supplemental declaration of Daniel Hochstrasser, Dkt. 21 ("Hochstrasser Suppl. Decl."); and the supplemental declaration of Adrian Shatku, Dkt. 32 ("Shatku Reply Decl.").
2. The Petition does not explain the origins of this figure. It appears to reflect the EUR 1,704,000 Albtelecom contends is due under the award, plus 2.5 percent interest, but the Petition does not clarify the basis on which that interest calculation was made.

The Time Has Come:
An International Regime for the Enforcement of Mediated Settlement Agreements
By Edna Sussman

In 2002 the United Nations recognized that the use of conciliation and mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States. The use of conciliation and mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, increasing court mandated mediation and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized. Many reasons are offered to explain this reality but it has repeatedly been stated that one of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting international conciliation of international commercial disputes, the United States proposed that UNCITRAL Working Group II develop a multilateral convention for enforcement.

“[N]otwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized…. [O]ne of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards.”

The U.S. recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through conciliation, that conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization just as under the New York Convention they have their own procedures governing arbitration. The U.S. requested that this initiative be given high priority. The U.S. explained that “solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution co-equal to arbitration and litigation.” Thus the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Prior Efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements has emerged. There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation to develop a uniform enforcement mechanism. However, notwithstanding the effort made, that goal was not achieved. Article 14 provides: “If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement].” The comments to Article 14 recognized that “many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.” The Commission supported “the general policy that easy and fast enforcement of settlement agreements should be promoted.” Notwithstanding, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision leaves the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The EU Mediation Directive recognizes the importance of enforcement and states in paragraph 19 that “mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties.” However, while the EU
Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be “made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state.”

The same result was reached by the drafters of the U.S. Uniform Mediation Act. A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

Recent Calls for Action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNCITRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. It is now 2015. The inability of the UNCITRAL delegates to arrive at a vehicle for cross-border enforcement is now years in the past and the need for the development of an international enforcement mechanism has become more compelling.

The European Parliament’s study assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study “suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector.”

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the United States that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and would be a significant factor in encouraging and increasing the use of mediation.

Enforcement Mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat has circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. While the final results have not yet been published, the Secretariat has reported that many replies were submitted and there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that “the diversity of approaches toward the objective of enforcing settlement agreement might militate in favor of considering whether harmonization of the field would be timely.”

In many jurisdictions, including the United States, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the United States, while there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, nonetheless the mediated settlement agreements remains a contract, and contract defenses are available to the parties.

Mediated settlement agreements can be entered as a judgment in some jurisdictions. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on the mediated settlement agreement. In yet other jurisdictions acts by a notary are required to make a mediated settlement agreement enforceable.

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross-border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 145 countries that are signatories to the New York Convention. Thus, even if a judgment or court decree can be obtained, the difficulties of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This leads to an anomalous result. As the U.S. stated, “[G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration (in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them).”
Entry of an Arbitration Award Based on Mediation Settlement Agreements

This difficulty could be obviated if the mediated settlement agreements could be entered as an arbitral award and be recognized under the established enforcement mechanisms of the New York Convention. The arbitration rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award. Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides with respect to international conciliations:

If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement, such an appointment after the dispute is settled may not be possible to effect in many jurisdictions because under local law there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an “arbitration agreement” means “an agreement to submit to arbitration present or future disputes.” Similarly, New York state law provides that an “agreement to submit any controversy thereafter arising or any existing controversy to arbitration” is enforceable. As there is no “present or future dispute” or “controversy thereafter arising or...existing” once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions. It could, of course, also be argued that the specific grant by statute, as in California, of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes overrides any objection based on the general definition of the arbitration agreement. California, like New York, also defines an arbitration agreement as one governing “an existing controversy or a controversy thereafter arising.”

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains. Consent awards are generally regarded as enforceable and institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration. But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties’ needs.

Commentators that have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable. Others have concluded that it is, while yet others conclude that the result is not clear.

The relevant New York Convention provides in Article 1 (1) that the Convention applies to the recognition and enforcement of awards “arising out of differences between persons.” The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that requires a “present or future” dispute or a “controversy thereafter arising or...existing.” The reference to a “difference” in Article 1 (1) of the New York Convention does not specify when that “difference” had to exist in time in relation to the time of the appointment of the arbitrator. Thus the Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the Convention. It would seem that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such a fundamental public policy of any country as would preclude enforcement of such an award under the public policy exception of Article 5 (2) of the Convention.

The differences of opinion as to the applicability of the Convention to mediated settlement agreements suggest that the Convention is at least ambiguous. It has been suggested that an interpretation of the New York Convention might suffice to resolve this issue. However, an interpretation would require the same thorough review in Working Group II as the proposed new convention and many would say that developing a regime tailored to the specific concerns raised in the mediation context would better serve users.
Issues for Consideration

There will be many issues for Working Group II delegates to grapple with. But keeping the great importance of the goal in mind should enable the identification of solutions to all obstacles. Issues to consider may include:

- Should the New York Convention the appropriate model on which to base a new convention, and set forth a broad obligation to recognize and enforce and provide a limited set of exceptions to that obligation thus permitting the development of a relatively short and simple document?
- Should the convention cover the agreement to mediate or only the settlement agreement? The U.S. proposal only applies to the mediated settlement agreement but surveys have shown a strong interest in having the convention cover both just as the New York Convention also applies to the agreement to arbitrate.
- What formalities need to be observed in the documentation of the settlement? In writing? What constitutes a writing? Is an e-mail exchange sufficient? A dictated transcript? Signed by the parties? Signed by the mediator? Other form requirements?
- How will one distinguish between settlement agreements achieved by the parties, and those achieved with the assistance of a third-party intermediary?
- Should there be an opt-in or opt-out feature allowing parties to choose if the convention would apply?
- What limited exceptions would be applicable to enforceability?
- Should certain claims be excluded from the application of the convention?
- Should the convention address settlement terms other than purely monetary payments just as the New York Convention requires enforcement of non-monetary terms? Should this be a decision for the states that can be dealt with by a reservation?
- How should enforcement of settlement agreements that are conditional on future events or conditions being met be addressed?
- Should there be an allowance for rectification if unforeseen circumstances arise in the course of performance?
- Should the convention apply if the mediator utilizes caucus sessions? If so, how are due process concerns to be addressed? Does an opt-in or opt-out option resolve this issue?
- Should all requirements as to the mediation itself, including the qualifications of the mediator and how the mediation is conducted, be left to the states just as the New York Convention leaves arbitration procedures to the law of the seat?
- When enforcement is sought, what law or process should the enforcing court look to, keeping in mind, as was the case with the New York Convention, of the desire to avoid a requirement for a double exequatur?
- Should the convention’s application be limited to conciliated settlements signed after the convention’s entry into force?
- Should the convention apply to agreements made by states?

These and other questions will require thoughtful analysis.

"Development of the convention would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business-oriented solutions, facilitate international transactions and produce savings in the administration of justice."

Conclusion

Given the many variations across the globe for the enforcement of mediated settlement agreements, some have expressed skepticism as to whether it will be possible to develop a convention that meets all concerns. They note that prior efforts to resolve the issues have failed. Development of the convention would foster the utilization of mediation and allow mediation to live up to its promise of preserving commercial relationships, enable creative business-oriented solutions, facilitate international transactions and produce savings in the administration of justice. These goals warrant a consistent and determined effort to find the path forward to the solutions. Sometimes finding solutions to difficult problems is not easy and considerable effort is required. As Victor Hugo said, "perseverance is the secret to all triumphs."
Endnotes

1. Conciliation and mediation are used interchangeably to refer to a process where a third person or persons assists the parties in achieving an amicable resolution.


3. United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL’s business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.


8. Id. para. 88.


10. Uniform Mediation Act, adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the UNCITRAL Model Law on International Commercial Conciliation into the UMA and provides that unless there is an agreement otherwise, the Model Law applies to any mediation that is “international commercial mediation.”


14. For a report of a survey on enforcement in the states of the EU see Rebooting the Mediation Directive, supra n. 11 (reporting a wide variety of enforcement processes).


16. UNCITRAL Comments by States, supra n. 5 at p. 7.

17. See, e.g., Article 18(3) of the Arbitration Rules of the Korean Commercial Arbitration Board; Article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce.


26. Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wishes to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. The Protocol is available at http://simc.com.sg/siac-simc-arb-med-ARB-protocol/. This should be a very useful process if the parties are amenable to arbitration as opposed to a court proceeding since arbitration rules generally authorize the arbitrators to enter a consent award and such awards are generally viewed as enforceable awards.


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The Singapore Convention
Promoting the Enforcement and Recognition of International Mediated Settlement Agreements

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Current enforcement mechanisms for mediated settlement agreements vary widely across jurisdictions providing little certainty in international disputes. In recent years, there have been numerous calls by scholars, practitioners and users for the development of a mechanism for the uniform enforcement and recognition of international mediated settlement agreements. Following three years of effort, the UNCITRAL Working Group II successfully completed the drafting of a multilateral convention for enforcement and recognition titled ‘The Convention on International Settlement Agreements Resulting from Mediation’ which will be commonly known as the ‘Singapore Convention’. The new convention was approved by consensus of UNCITRAL’s Member States on 25 June 2018, at its fifty-first session. Parallel amendments have been made to the 2002 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation to add provisions that mirror those of the Singapore Convention. These new instruments promise to provide parties with a clear, uniform framework for the enforcement and recognition of international mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Introduction

In 2002, the United Nations recognized that the use of mediation1 results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.2 The use of mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, the development of the IBA’s rules for mediation of investor-state disputes, and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of mediation, it is generally viewed to be under-utilized. Many reasons have been offered to explain this. A commonly cited impediment is that settlement agreements reached in international disputes through mediation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting mediation of international commercial disputes, the United States proposed that the United Nations Commission on International Trade Law (UNCITRAL) Working Group II develop a multilateral convention for enforcement3.

The US recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through mediation which conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization, just as under the

1 While the process was described in 2002 and in the early discussions of the new convention as ‘conciliation’, the more common and more useful term now is ‘mediation’ and, as discussed below, is the terminology that has now been adopted in the new convention and the amended model law.
3 United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL’s business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.
New York Convention, they have their own procedures governing arbitration. The US requested that this initiative be given high priority and explained:

Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.

Thus, the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

After extensive discussions over a period of three years, on 25 June 2018, at its fifty-first session, UNCITRAL approved by consensus of its Member States a ‘Convention on International Settlement Agreements Resulting from Mediation’. It will be commonly referred to as the ‘Singapore Convention’ upon adoption by the United Nations General Assembly and ratification by Member States starting as early as August 2019.

I - Prior efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements had previously emerged.

There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation (‘2002 Model Law on Conciliation’) to develop a uniform enforcement mechanism. However, notwithstanding the effort made, that goal was not achieved. Article 14 provides:

If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement].

The comments to Article 14 recognized that ‘many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award’. The Commission supported ‘the general policy that easy and fast enforcement of settlement agreements should be promoted’. Notwithstanding that, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision left the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The EU Mediation Directive recognizes the importance of enforcement and expressly stipulates at paragraph 19:

Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties.

However, while the EU Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be ‘made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member state’.

7 Supra note 2.
9 Id.
The same result was reached by the drafters of the US Uniform Mediation Act (‘UMA’). A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement, but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

II - Calls for action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNCITRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. Scholars, practitioners and users have called for the development of an enforcement mechanism.

The European Parliament’s study assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study ‘suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector’.

A survey conducted by the International Bar Association’s Mediation Committee in 2007 emphasized the importance of enforcement.

The results of the survey were summarized by the Committee:

(T)he enforceability of a settlement agreement is generally of the utmost importance...

[...]

[I]n international mediation … reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the US and confirm that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and it would be a significant factor in encouraging and increasing the use of mediation.

In order to assist the Working Group II delegates in their consideration of the US proposal, a survey was conducted in the fall of 2014 by S.I. Strong to ascertain the need for and level of interest in such a mechanism. The survey responses were compelling:

> An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the New York Convention would encourage mediation and conciliation, with 18% saying maybe.

> Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country.

> 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place.

11 The US Uniform Mediation Act was adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the 2002 Model Law on Conciliation into the UMA and provides that unless there is an agreement otherwise, the 2002 Model Law on Conciliation applies to any mediation that is ‘international commercial mediation’.


In October and November 2014, the International Mediation Institute (‘IMI’) conducted a short survey of internal counsel and business managers to assist the Working Group’s deliberations. The survey sought to assess the extent to which a mediation convention was desired.

> As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so (‘much more likely’ or ‘probably’).

> In response to whether the existence of a widely-ratified enforcement convention would make it easier for commercial parties to come to mediation in the first place, 87% said yes (‘definitely’ or ‘probably’).

> With respect to whether the absence of any kind of international enforcement mechanism for mediated settlements presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said yes (‘major impediment’ or ‘a deterring factor’).16

IMI also put a proposition to 150 delegates, comprised of users, educators, providers and advisors, at its conference in October 2014:

An international convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries.

73% of all delegates voted in favor. A sorting of the votes by delegate affiliations showed that not one user disagreed.17

A 2015 study by the Queen Mary University of London further supported such an effort with a majority (54%) agreeing that a convention on the enforcement of settlement agreements resulting from a mediation would encourage the use of mediation;18

The most recent relevant survey results were developed at the Global Pound Conference Series (GPC Series), which convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017.19 The delegates who attended the GPC Series, and the hundreds who participated online, voted on a series of 20 Core Questions. In response to the question ‘which of the following areas would most improve commercial dispute resolution’ 51% selected legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.20

Roland Schroeder, speaking on behalf of the Corporate Council International Arbitration Group21 at the UNCITRAL Working Group II session held on February 3, 2015, echoed the clear message delivered by users and strongly supported the US effort. He reported that it is often a challenge to convince counterparties to engage in a mediation process and many decline both because the process does not have a sufficiently international imprimatur and because the result is not easily enforceable cross-border. He was of the view that a convention like the New York Convention would be a catalyst that would drive an increased use of mediation. He noted that the benefits of mediation are generally recognised, but once one is already in a dispute, there is considerable concern about enforceability, suggesting a clear need for a cross-border enforcement mechanism. Mr Schroeder reported that he personally had experiences where he tried to enforce a settlement agreement but was ultimately required to re-litigate the merits of the underlying dispute.22

III - Existing enforcement mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement

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17 Id.
21 The Corporate Council International Arbitration Group (CCIAG) is an association of corporate counsel from approximately one hundred multinational companies which focuses on international arbitration and dispute resolution.
22 Confirmation on file with author.
agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. The Secretariat reported that there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that the diversity of approaches towards enforcing settlement agreements might militate in favor of considering whether harmonization of the field would be timely.23 The UNCITRAL report reviews a variety of methods for enforcement of mediated settlement agreements across jurisdictions.

In many jurisdictions, including the US, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the US, while there is a very strong policy favoring the settlement of disputes by agreement between the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, the mediated settlement agreements nonetheless remain a contract, such that all contract defenses are available to the parties.24

In other jurisdictions, mediated settlement agreements can be entered as a judgment. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on a mediated settlement agreement. Some jurisdictions have expedited enforcement mechanisms where settlement agreements can be enforced in a summary fashion provided the requirements are met. Other jurisdictions have opted for a mechanism of deposition or registration at the court as a way of making a settlement agreement enforceable. The practice of requesting a notary public to notarize the settlement agreement is also prevalent in several jurisdictions as a means of enforcement. In yet other jurisdictions, acts by a notary are required to make a mediated settlement agreement enforceable.25

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 155 countries that are signatories to the New York Convention. Thus, even if a judgment or court decree can be obtained, the difficulty of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This moreover leads to an anomalous result. As the US stated:

> [G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them.26

### IV - Entry of an arbitration award based on mediated settlement agreements

At the UNCITRAL Working Group II sessions, certain delegates suggested that the simple solution was to have the mediated settlement agreement entered as an arbitral award which would then be recognized under the established enforcement mechanisms of the New York Convention. The rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.27 Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides for such a process for international conciliations.28

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24 For a treatment of all contract defenses in the context of enforcing mediated settlement agreements, see Edna Sussman, ‘Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony’, IBA Mediation Committee Newsletter, Apr. 2006, at 32.
25 ‘Rebooting the Mediation Directive’, supra note 13 (reporting a wide variety of enforcement processes in the States of the EU).
26 Supra note 5, at 8.
27 See, e.g., Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement, the appointment of an arbitrator after the dispute is settled may not be possible in many jurisdictions because under local law, there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an ‘arbitration agreement’ means ‘an agreement to submit to arbitration present or future disputes’. Similarly, New York state law provides that an ‘agreement to submit any controversy thereafter arising or any existing controversy to arbitration’ is enforceable.\textsuperscript{30} As there is no present or future dispute or controversy thereafter arising or existing once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains.

Institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration.\textsuperscript{31} Some jurisdictions explicitly give consent awards the same status and effect as arbitral awards.\textsuperscript{32} Article 30(2) of the UNCITRAL Model Law on International Commercial Arbitration provides:

\begin{quote}
An award on agreed terms... shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.
\end{quote}

But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties’ needs. Commentators that have analysed this question have come to differing conclusions. Some have concluded that it is not enforceable.\textsuperscript{33} Others have concluded that it is.\textsuperscript{34} While yet others conclude that the result is not clear.\textsuperscript{35}

The relevant New York Convention section provides in Article 1(1) that the Convention applies to the recognition and enforcement of awards ‘arising out of differences between persons’. The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a ‘present or future’ dispute or a ‘controversy thereafter arising or ... existing’.

The reference to a ‘difference’ in Article 1(1) of the New York Convention does not specify when that ‘difference’ has to exist in time in relation to the time of the appointment of the arbitrator. Thus, the New York Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. But the differences of opinion as to the applicability of the New York Convention to consent awards issued by arbitrators appointed after a settlement agreement is reached suggests that the New York Convention is ambiguous on this point.\textsuperscript{36}

Moreover, while it is generally accepted that consent awards are enforceable, at least if the arbitrators are appointed before the settlement is achieved,


\textsuperscript{30} N.Y. C.P.L.R. 7501 (McKinney).

\textsuperscript{31} See, e.g., UNCITRAL Arbitration Rules 2013, Article 36 (Settlement or other grounds for termination); ICC Arbitration Rules 2017, Article 33 (Award by Consent); ICDR International Dispute Resolution Procedures 2014, Article 32 (Settlement or Other Reasons for Termination); LCIA Arbitration Rules 2014, Article 26.9 (Consent award); SIAC Arbitration Rules 2016, Article 32.10 (The Award); HKIAC Administered Arbitration Rules 2013 Article 36 (Settlement or Other Grounds for Termination).

\textsuperscript{32} See, e.g., Arbitration Act, 1996, c. 23 s 651 (Eng.) (‘An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.’).


\textsuperscript{36} Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wish to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. See Nadja Alexander, ‘SIAC-SIMC’s Arb- Med- Arb Protocol’, N. Y. Disp. Resol. L., Fall 2018 (forthcoming).
that matter too is not without some doubt. The UNCTRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states:

The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.

Two recent decisions in the United States confirmed the enforceability of consent awards issued by arbitrators appointed before settlement was achieved. However, decisions of the French courts raise some uncertainty.

Apart from concerns about enforceability, practical considerations make the enforcement of the mediated settlement agreement by means of a consent award unattractive for many reasons. Even if an arbitrator is already in place, the flexibility of the mediation process may lead to a resolution that is beyond the scope of the arbitrator’s authority. If an arbitrator is not already in place, the parties would be required to identify an arbitrator who is willing to rubberstamp a resolution, even though he or she has no knowledge of the parties or the issues in dispute. This would no doubt be a difficult and costly exercise.

The lack of a uniform and certain mechanism for the enforcement and recognition of international mediated settlement agreements and the repeated call for the development of such a mechanism begged for a solution. The US proposal offered the path forward to its development.

V - Working Group II deliberations: Issues raised and resolved

Launched by the US in 2014, over the course of the following years, the UNCTRAL Working Group II ("WGII") deliberations were conducted at eight UNCTRAL WGII sessions with 85 Member States and 35 non-governmental organizations participating. The delegates addressed and resolved numerous issues and looked for guidance both from the New York Convention and the 2002 Model Law on Conciliation.

For several issues that were difficult to resolve, the delegates continued to work on other aspects while leaving those for later resolution. In February 2017, a compromise proposal on those issues was achieved and served to break through the impasse and ultimately led to the successful completion of the convention.

First, a seminal question was the form of the instrument. Some were of the view that the current divergence and, in some cases, non-existence of practice with respect to mediated settlement agreements did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach, offered by model legislative provisions. The model law would not aim at harmonizing respective legislative frameworks on mediation but focus on enforcement aspects, thus, harmonizing the approach to enforcement of settlement agreements, both in legislation and practice. Others expressed a strong preference for a convention since the 2002 Model Law on Conciliation was not widely adopted and a convention could more efficiently contribute to the promotion and harmonization of mediation given the cross-border nature of the enforcement and the need for a binding instrument to bring certainty. The success of international arbitration under the purview of the New York Convention of 1958 was emphasized as a reference and it was argued that a convention had additional benefits since it could provide State Parties flexibility through declarations or reservations, improving its chances of ratification by more States. As a compromise between the divergent views, it was agreed that WGII would prepare parallel instruments, complementary in nature: a model legislative text amending the 2002 Model Law on Conciliation, and a convention on the enforcement and recognition of international commercial settlement agreements resulting from mediation. The provisions of the draft amended model law would and do mirror in all essential respects the provisions of the convention.

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Second, consideration was given to whether an opt-in should be required. It was suggested that since mediation was by its nature a consensual process, the regime envisaged by the instrument should apply only where the parties consented to its application. An opt-in provision would ensure that parties were aware of the international framework to which they would be subjected and could avoid situations which they might not find desirable. Opposing views were expressed that making application of the convention the default would be more consistent with party autonomy because it is what parties would want and would reinforce that agreements should be respected. An opt-out, which the parties can include in their settlement agreement under the convention, would provide party autonomy and would be more consistent with the purpose of the convention. Moreover, an opt-in as a practical matter limits the draft instrument’s application. Numerous studies have demonstrated that where a choice is required to opt-in, few elect it. It was noted that the New York Convention does not have an opt-in provision. It was further suggested that it was counterintuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Moreover, there was concern that allowing flexibility on this issue could result in an imbalance between parties in different jurisdictions as the settlement agreement might be enforceable in one jurisdiction, but not in another. It was agreed that the convention would apply by default but that State Parties could include a reservation that the convention would only apply to the extent that the parties to the settlement agreement had agreed. A parallel footnote is inserted in the draft model law as an optional provision.

Third, whether or not the convention would provide for recognition of a mediated settlement agreement when it is presented to a State’s competent authority by a party to prove that a claim brought against it had already been settled and resolved was a subject on which it was difficult to achieve consensus. Following further discussions, it was agreed that the convention would not only cover enforcement of mediated settlement agreements but also their recognition - and would do so without using the term ‘recognition’ - which was seen to imply different procedural consequences in different legal systems.

Fourth, in assessing the grounds for refusing to grant relief, there was concern that if there were too many bases upon which a party could resist enforcement, it would be an invitation to extensive and protracted litigation which would defeat the purpose of the convention. There was a particularly vigorous debate as to whether there should be any defenses based on the conduct of the mediator or a mediator’s failure to make disclosures related to independence and impartiality, since that would open the door to some of the gamesmanship that has become problematic in the context of enforcement under the New York Convention. Others felt that it was crucial that these grounds be included in order to ensure the fairness of the mediation process. As part of the package of compromises, it was agreed that grounds related to the conduct of mediators would be included as grounds for refusing to grant relief but that they would only apply in narrow circumstances.

Fifth, there had been ongoing discussions as to how to handle mediated settlement agreements which resulted in a consent award or a court judgment. While some delegates disagreed, many thought it was essential to exclude mediated settlement agreements in these contexts in order to avoid conflicts with other enforcement mechanisms available pursuant to the New York Convention, the Hague Convention on Choice of Courts and the Hague Convention on Foreign Judgments in Civil and Commercial Matters. It was agreed that these would be excluded.

Other material issues considered included whether the convention should include enforcement of agreements to mediate, just as the New York Convention provides for enforcement of agreements to arbitrate. Whether or not agreements to mediate are enforceable and whether they are considered conditions precedent that preclude the progression to employing other dispute resolution modalities varies across jurisdictions. Moreover, mediations are not always employed by parties pursuant to an agreement and it was considered too difficult to achieve consensus on including enforcement of agreements to mediate. Thus, the consensus view was that the convention should be limited to only mediated settlement agreements.

What to call the process that was being addressed was the subject of considerable discussion. While there was some desire to preserve the word ‘conciliation’ which was the term used in previous UNCITRAL instruments, there was recognition of the fact that the term ‘mediation’ was currently more commonly and more broadly used. Moreover, some view conciliation as a process in which the neutral facilitator suggests a solution whereas mediation is a broad term that

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42 See, e.g., SPARQ Social Psychological Answers to Real-World Questions, ‘Opt Out’ Policies Increase Organ Donation, Stanford, https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation (last visited Aug. 15, 2016) (demonstrating that in opt-out countries 90% of the population donates their organs while in such countries as the U.S. and Germany which are opt-in countries fewer than 15% donate their organs at death).
encompasses a variety of process design modalities. It was concluded that the word mediation would be used instead ‘in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. The change in terminology is not intended to have any substantive or conceptual implications.

Adopting what may be an emerging tradition in WGII, the new Convention on International Settlement Agreements Resulting from Mediation will be commonly referred to as the ‘Singapore Convention’, in honor of the home jurisdiction of the very able chair, Natalie Morris-Sharma of the Singapore Ministry of Law, who shepherded the deliberations in WGII. This designation follows the designation of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration as the Mauritius Convention on Transparency in honor of Salim Moollan from Mauritius, who chaired WGII in its deliberations on that convention.

VI - The Singapore Convention text

The final text of the Singapore Convention (the ‘Convention’) has not yet been released at the time of this writing. However, it is anticipated that no significant changes will be made. This review of the articles of the Convention is based on the draft of the Convention reviewed and approved at the United Nations Commission on International Trade Law at its 51st session held in June, 2018 subject to any further modifications provided by the Commission.

Preambles

The Parties to the Convention recognized the value for international trade of mediation as a method for settling commercial disputes, noted the increasing use of mediation as an alternative to commercial litigation, considered the significant benefit in facilitating the administration of international transactions and producing savings in the administration of justice, and are convinced that the establishment of a framework for international settlement agreements resulting from mediation would contribute to the development of harmonious international economic relations.

Scope of application (Article 1)

Article 1 defines the essential parameters of the Convention. It identifies the requirements necessary for a settlement agreement to fall within the scope of the Convention, and it specifies the exclusions.

The Convention requires that the settlement agreements resulting from mediation be:

1) In ‘writing’.
2) ‘International’ at the time of its conclusion based primarily on the place of business of the parties. The definition tracks the definition in the 2002 UNCITRAL Model Law on International Commercial Conciliation and resolved the debate as to when the international nature of the dispute should be determined in favor of ascertaining coverage at the time of the mediation’s conclusion;
3) Specifies that it be ‘commercial’ by excluding transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family inheritance or employment law. With these limitations, the Convention avoids conflicts with local mandatory laws that address disputes that arise in connection with such transactions and relationships.
4) Excludes categories of settlement agreements that have been approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment and settlement agreements that have been recorded and are enforceable as an arbitral award.

Definitions (Article 2)

Article 2 provides further specification as to the meaning of certain terms.

1) The Convention clarifies further Article 1’s ‘internationality’ requirement. It provides the solution to a situation where a party has more than one place of business. In such a case, the relevant place of business is the one that has closest relationship to the dispute resolved by the settlement agreement. Where the party does not have a place of business, the Convention prescribes that reference be made to the party’s habitual residence.
2) The Convention then expands on what it means by ‘writing,’ and reflects that the writing requirement may be satisfied by various forms of electronic communication.

44 Supra note 6.
3) The Convention defines ‘mediation’ as ‘a process, irrespective of the expression used or the basis upon which the process is carried out, where parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”), lacking the authority to impose a solution upon the parties to the dispute’.

The Convention deliberately avoided defining ‘mediation’ prescriptively so as to allow for the wide range of differences in the understanding of the term among different jurisdictions. How mediations are conducted and what process modalities are permitted in mediation vary across jurisdictions. The Convention’s broad definition resolves those differences by offering a definition that is simple and does not introduce any rigidity. It does not prescribe a specific technique of mediation; for example, the Convention does not specify whether the mediation must be evaluative, facilitative, or transformative, does not address whether or not caucus sessions can be used, and does not address whether or not the mediator can propose solutions. The Convention’s usage of broad phrases provides coverage for all mediations, however, the process is carried out in different jurisdictions and by different mediators.

General principles (Article 3)

Article 3 addresses the obligations of the Parties to the Convention and provides both for affirmative enforcement of mediated settlement agreements and for recognition of mediated settlement agreements as a defense if a party seeks to relitigate a dispute already resolved in mediation.

1) Under the Convention, the Parties to the Convention have the substantive obligation to enforce a settlement agreement (subject to the exceptions, of course) ‘in accordance with its rules of procedure.’ With this provision, the drafters deftly circumvented the fact that enforcement mechanisms for mediated settlement agreements vary across jurisdictions, a fact which had stymied the earlier efforts to achieve an enforcement mechanism for cross-border mediated settlement agreements. Like the New York Convention which leaves procedural issues to be governed by the law of the seat, this Convention leaves those procedural issues to be governed by the State of enforcement.

2) The General Principles also addresses the claim which a party considers to be an attempt to relitigate a dispute already resolved in mediation and provides for recognition of a mediated settlement agreement. By meeting all the conditions set in the Convention, a party seeking relief would be allowed to prove that the dispute had been settled. Here again, the rules of procedure are the prerogative of the Party to the Convention.

Requirements for reliance on settlement agreements (Article 4)

Article 4 addresses what a party seeking to rely on the settlement agreement must provide to satisfy the Convention’s requirements. The delegates vigorously debated whether or not confirmation in the state where the mediation took place should be required before enforcement could be sought elsewhere. It was concluded that there should be no such requirement. As a practical matter, it did not make sense. A mediation in a cross-border dispute might well take place in a jurisdiction with no connection to the parties or to the dispute. And more importantly, as was decided with respect to the New York Convention, requiring such a confirmation would require a double exequatur and contribute significantly to the complexity and cost of any enforcement process, precisely what the Convention is intended to remedy.

The draft Convention specifies what a party relying on a settlement agreement must supply to the competent authority of the Party to the Convention where relief is sought.

1) A settlement agreement signed by the parties.

2) Evidence that the settlement agreement resulted from mediation, which may be satisfied by the mediator’s signature on the agreement, attestation by the mediator that a mediation was carried out, or an attestation by the administering institution. In order to allow for situations where none of these are available and to preserve the flexibility of the process, the Convention permits evidence of the fact that the mediation took place by means of any other evidence acceptable to the competent authority. A signature or an attestation would be only to prove the mediator’s involvement in the process and is not to be construed as an endorsement of the settlement agreement nor as an indication that the mediator was a party to the settlement agreement. This requirement followed extensive deliberations by the delegates as to whether an unassisted negotiation which leads to a settlement agreement should also be covered by the
Convention. Delegates questioned whether there was a sound basis for distinguishing between those two contexts. Persuaded that mediation provides a qualitatively different process with many jurisdictions regulating the manner in which the mediation must be conducted and the conduct of mediations by many certified mediators, it was concluded that the Convention should be limited to mediated settlements. It is noted that the draft Model Law provides in footnote 5 that a State may consider the application of the Model Law to agreements settling the dispute irrespective of whether they resulted from mediation.

3) The draft Convention expands on how the requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication.

Grounds for refusing to grant relief (Article 5)

Article 5 is intended to encompass both the right of a party to seek enforcement as well as to invoke a settlement agreement. And both these reliefs may be refused by the competent authority if the objecting party furnishes the requisite proof with respect to any of the grounds provided under Article 5.

The development of these grounds for refusing to grant relief was extensively discussed by the delegates. It was concluded that the limited grounds of the New York Convention were insufficient in the context of a mediated settlement agreement where other potential defenses must be addressed. But it was important to limit the available grounds only to those that were necessary so as to prevent litigation over enforcement and defeat the purpose of the Convention. The grounds finally included in the Convention were the result of a compromise solution achieved by the delegates. The grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct. The Convention further adopts two of the principal grounds specified in the New York Convention.

Relief may be refused by the competent authority if the party opposing enforcement or recognition of a mediated settlement agreement furnishes proof with respect to any of the following grounds:

<table>
<thead>
<tr>
<th>Grounds relating to the terms of the settlement agreement</th>
<th>Grounds relating to the mediator's conduct and the process</th>
<th>Sua sponte/ sua sponte grounds invokable by the competent authority of the Party to the Convention where relief is sought or a requesting party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantive grounds</td>
<td>Serious breach by the mediator of standards applicable to the mediator or the mediation without which the party would not have entered into the settlement agreement, or</td>
<td>Granting relief would be contrary to the public policy of that Party, or</td>
</tr>
<tr>
<td>Incapacity of a party to the settlement agreement, or</td>
<td>Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence.</td>
<td>The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.</td>
</tr>
<tr>
<td>Settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it, or failing any indication, under the law applicable by the competent authority where relief is sought.</td>
<td>&gt; Granting relief would be contrary to the public policy of that Party, or</td>
<td>&gt; The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.</td>
</tr>
<tr>
<td>The settlement agreement is not binding, or is not final, according to its terms, or</td>
<td>&gt; Serious breach by the mediator of standards applicable to the mediator or the mediation without which the party would not have entered into the settlement agreement, or</td>
<td></td>
</tr>
<tr>
<td>The settlement agreement has been subsequently modified, or</td>
<td>Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence.</td>
<td></td>
</tr>
<tr>
<td>Obligations in the settlement agreement have been performed or are not clear or comprehensible, or</td>
<td>&gt; Serious breach by the mediator of standards applicable to the mediator or the mediation without which the party would not have entered into the settlement agreement, or</td>
<td></td>
</tr>
<tr>
<td>Granting relief would be contrary to the terms of the settlement agreement.</td>
<td>Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence.</td>
<td></td>
</tr>
</tbody>
</table>

Parallel applications or claims (Article 6)

Article 6 grants discretion to the competent authority to adjourn the decision and/or order security in situations where the decision of another court or arbitral tribunal may affect the relief being sought before it. The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense.

Other laws or treaties (Article 7)

Article 7 preserves a Party’s right to avail itself of a settlement agreement pursuant to other laws or treaties to which the Contracting State may be a party.
Reservations (Article 8)

Article 8 addresses two issues vigorously debated by the delegates: whether the Convention should apply to governments or governmental entities, and whether the parties should be required to opt-in for the Convention to apply. The compromise achieved by the delegates was to make these issues the subjects of permissible reservations.

1) The Convention provides State Parties with the option to make the following reservations:
   a. States and other public entities: This reservation permits a Party to the Convention to provide that the Convention will not apply to settlement agreements to which it or any government, governmental agency or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.
   b. Opt-in: This reservation permits a Party to the Convention to provide that the Convention will only be applicable if the parties opt-in, and have affirmatively agreed to the application of the Convention.

2) No other reservations are permitted.

Generally, the rest of the provisions on reservations deal with temporal determinations of the applicable reservation, their confirmation and deposition with the depositary, and withdrawals.

Effect on settlement agreements (Article 9)

Article 9 specifies that the Convention and any reservation or withdrawal applies only to settlement agreements concluded after the date on which the Convention, reservation or withdrawal enters into force for the Party to the convention concerned.

Depositary (Article 10)

Article 10 designates the Secretary General of the UN as the depositary of this Convention.

Signature, ratification, acceptance, approval, accession (Article 11)

Article 11 opens the Convention for signature. In the context of the place of signing of the Convention, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the Convention, once adopted. That proposal was welcomed and supported by the WGII delegates and it was agreed to make the corresponding recommendation to the Commission.

Participation by regional economic integration organizations (Article 12)

Article 12 facilitates a regional economic integration organization ("REIO") in becoming a Party to the Convention. REIOs that accede to the Convention shall have the rights and obligations of a Party to the Convention to the extent that the organization has competence over matters governed by the Convention. At the time of accession, the REIO shall make a declaration specifying the matters in respect of which competence has been transferred to that organization by its Member States. The Convention specifies the circumstances under which the Convention should not prevail over conflicting rules of an REIO.

Non-unified legal systems (Article 13)

Article 13 permits Parties to the Convention to declare that the Convention would extend to all its territorial limits or only to one or more of them. State Parties may make such declaration at the time of signature, ratification, acceptance, approval or accession. Moreover, Parties to the Convention shall be free to amend its declaration by submitting another declaration at any time.

Entry into force (Article 14)

Article 14 provides that it shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

Amendment (Article 15)

Article 15 provides that any State Party may propose an amendment by submitting it to the Secretary General of the UN, who shall communicate the proposed amendments to the rest of the State Parties. A conference shall be convened if at least one-third of the State Parties favor such a conference. The adoption of any amendment would require a two-thirds majority vote of the State Parties present and voting at the conference.

The Convention also provides that amendments should enter into force for Parties to the Convention only when they expressly consent to it.
Denunciations (Article 16)

Article 16 provides that a State Party may denounce the Convention by a formal notification in writing addressed to the depositary (the Secretary General of the UN). Such denunciation shall take effect twelve months after the notification is received by the depositary.

However, it must be noted that the Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

Conclusion

The Singapore Convention will deliver the uniform enforcement and recognition mechanism for international mediated settlement agreements which has long been called for by scholars, practitioners, and users. It has already gained recognition. For example, the proposed changes to the ICSID rules on conciliation specifically suggests that the parties sign a settlement agreement embodied in the report so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention.45 The invitation to accede to the Convention will shortly be before the State Parties. Their accession will ensure the success of the UNCITRAL effort, and pave the way for a clear, uniform framework for the enforcement and recognition of mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

In these words, Abraham Lincoln summed up one of the key benefits of mediation: saving time and money. Indeed, mediation does serve that purpose in the great majority of cases. But what if a party fails to comply with the mediated settlement agreement? Should the opposing party be forced to pursue a contract claim to enforce that agreement in a court proceeding, precisely the process the parties sought to avoid through the mediation? Or should a mediated settlement agreement be capable of entry as an arbitration award by an arbitrator appointed after agreement is reached and be enforceable under the New York Convention? As the use of mediation grows, these questions merit serious attention, particularly in international disputes.

The Need for an Enforcement Mechanism
Mediation has been increasing exponentially with multiple drivers at work to further its growth. The "Americanization" of international arbitration, with its increased discovery burden, costs, and delays, caused some in the field to call arbitration the "new litigation." Just as arbitration has developed in part to avoid expensive and protracted court proceedings, mediation is now viewed as a useful additional tool to counter the perceived increase in cost and delay in arbitration.

A question that requires further exploration if the growth of this powerful tool is to be fostered is whether and how an agreement reached in mediation can be enforced. A mediated resolution is typically achieved much more quickly and cheaply than one in arbitration or litigation, but mediation does require an effort by the parties, with preparation, attendance by counsel and principals at the mediation (which often in international cases requires a significant travel commitment), and sometimes continued discussions over a period of months. Thus, though typically there is an expenditure of significantly less time and money in a mediation than in a litigation or arbitration, mediation is not cost-free. If the settlement agreement reached is not complied with, a great deal of time and money can be lost.

There was a strong effort by those working on the UNCITRAL Model Law on International Commercial Conciliation to develop a uniform enforcement mechanism. Notwithstanding the effort made, that goal was not achieved. Instead, article 14 provides that a settlement agreement reached in mediation is enforceable but leaves the enforcement mechanism to the enacting states. The comments to article 14 recognized that "many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award."

The desirability of an enforcement mechanism for mediated settlement agreements was confirmed in a survey conducted recently by the International Bar Association’s Mediation Committee. The survey results on this issue were summarized by the committee: "(T)he enforceability of a settlement agreement is generally of the utmost importance and "in international mediation . . . reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement."

Avenues for Enforcement
The avenues for enforcement of mediation settlement agreements (MSAs) are not as robust as they should be if we are to maximize the utility of this dispute resolution tool. Parties can, of course, attempt to enforce the MSA under contract law principles subject to the usual contract defenses. But typically a contract is what the parties started out with, and litigating a contract again in another posture was not what the parties contemplated when they entered into the mediation.

MSAs can be entered as a judgment in some
The New York Convention

Through a Mediation Prism

By Edna Sussman

Convention. Thus, even if a judgment or court decree can
awards, which are recognized and enforced in the more
have not been accorded the deference shown to arbitral
jurisdictions, and historically court judgments and decrees
in an international matter often presents significant
obstacles to enforcement and renders the judgment of
diminished utility. This difficulty could be obviated if
the MSA could be entered as an arbitral award and be
recognized under the established enforcement mechanisms
of the New York Convention.

Entry of an Arbitration Award Based on Mediation Settlement Agreements

Some jurisdictions expressly provide for the entry of an
arbitration award to record an agreement reached in medica-
tion. For example, article 18(3) of the Arbitration Rules
of the Korean Commercial Arbitration Board provides:

If the conciliation succeeds in settling the dispute, and the
conciliator shall be regarded as the arbitrator appointed
under the agreement of the parties; and the result of the
conciliation shall be treated in the same manner as such
award as to be given and rendered upon settlement by
compromise under the provision of Article 53, and shall
have the same effect as an award.

Similarly, article 12 of the Rules of the Mediation
Institute of the Stockholm Chamber of Commerce
provides:

Upon reaching a settlement agreement the parties may,
subject to the approval of the Mediator, agree to appoint
the Mediator as an Arbitrator and request him to confirm
the settlement agreement in an arbitral award.

Some states in the United States have made similar
remedies available for international disputes. For example,
the California Code of Civil Procedure provides:

If the conciliation succeeds in settling the dispute, and the
result of the conciliation is reduced to writing and signed
by the conciliator or conciliators and the parties or their
representatives, the written agreement shall be treated
as an arbitral award rendered by an arbitral tribunal duly
constituted in and pursuant to the laws of this state, and
shall have the same force and effect as a final award in
arbitration.

Although the enactment of such provisions would
seem to be a useful avenue for MSA enforcement, such
an appointment after the dispute is settled may not be
possible to effect in many jurisdictions because under local
law there must be a dispute at the time the arbitrator is
appointed. For example, the English Arbitration Act of
1996 provides in its definition of an arbitration agreement
in section 6(1) that an “arbitration agreement” means
“an agreement to submit to arbitration present or future
disputes.” Similarly, New York state law provides that an
“agreement to submit any controversy thereafter arising or
any existing controversy to arbitration” is enforceable.

As there is no “present or future dispute” or “controversy
thereafter arising or . . . existing” once the dispute is settled
in mediation, such provisions may be construed to mean
that it is not possible to have an arbitrator appointed to
record the settlement in an award. Thus, it could be argued
that any arbitral award issued by an arbitrator appointed
after the settlement would be a nullity and incapable of
enforcement under the laws of those jurisdictions.

It would be easy to avoid this problem by appointing
the arbitrator before the mediation is commenced and having
the mediation conducted as an “arb-med-arb,” either by the

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appointed arbitrator with a carefully worded document executed by the parties consenting to such a process or by a separately appointed mediator. Although this may be satisfactory to some, there are many cases in which the party is willing to go to mediation but prefers a court solution to an arbitration if the mediation does not result in resolution.

It should be relatively easy to circumvent this problem by specifying in the MSA that it is governed by the law of a jurisdiction that permits the appointment of an arbitrator after the settlement is achieved. Such a provision should circumvent any attack on the award based on the appointment of the arbitrator after the settlement when there is no longer a controversy.

Thus it appears that, if the MSA is carefully drafted, parties can mediate and then (upon successful resolution) appoint the mediator as an arbitrator to record the settlement as an arbitral award. However, the question of whether such an award would be enforceable under the New York Convention remains. Can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitral award in an international dispute would be less than sufficient to meet the parties’ needs.

**Arbitral Awards Based on Party Agreement Under the New York Convention**

In analyzing the question of whether an arbitral award entered by an arbitrator appointed after the parties have resolved their differences based on the resolution achieved in mediation can be enforced under the New York Convention, one must first recognize that it is widely accepted that an arbitrator may enter an “agreed award.” If the parties reach an agreement during the arbitration, an agreed award is generally just a reflection of the agreement of the parties and does not reflect the arbitrator’s own analysis and conclusions as to the dispute. The UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985 expressly permits such awards and their recognition:

> If during the arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral tribunal, record the settlement in the form of an Arbitral Award on agreed terms.

Article 31 provides that “such an award has the same status and effect as any other award on the merits of the case.” Similar provisions giving full deference to “agreed awards” are found in the rules governing ICC and ICSID arbitration and the arbitration laws of many countries.

Many jurisdictions around the world expressly empower the arbitrator to try mediation first and empower the arbitrator to enter an award on the agreed terms. For example, article 30 of the Arbitration and Conciliation Act 1996 of India provides:

> It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

The provision further states that if settlement is achieved, the tribunal may record the settlement in the form of an arbitral award on agreed terms that shall have the same status and effect as any other arbitral award on the substance of the dispute.

Similarly, article 51 of the Arbitration Law of the People’s Republic of China authorizes the arbitrator to act as a conciliator and, if a settlement agreement is reached, the arbitrator shall prepare a conciliation statement, which is to have the same legal force as an award, or prepare an award based on the settlement. Some jurisdictions go even further and specifically require the arbitrator to attempt mediation or conciliation in the course of the arbitration proceeding. Articles 21(4) and 28 of the Brazilian Arbitration Law provide that the arbitrator “shall” at the beginning of the procedure try to conciliate the parties and, if a settlement is achieved, at the parties’ request may make an arbitral award.

Most would agree that such agreed awards rendered by an arbitrator appointed before the settlement of the dispute are governed by the New York Convention and enforceable. Whether the same result holds if the arbitrator is appointed after the settlement of the dispute as a result of mediation, such as can be achieved in Korea, California, and under the Stockholm rules, is less certain. Commentators who have analyzed this question have come to differing conclusions. Some have concluded that it is not enforceable. Others have concluded that it is. Yet others conclude that the result is not clear.

The relevant New York Convention provides in article 1(1) that the convention applies to the recognition and enforcement of awards “arising out of differences between persons.” The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a “present or future” dispute or a “controversy thereafter arising or . . . existing.” The reference to a “difference” in article 1(1) of the New York Convention does not specify when that “difference” had to exist in time in relation to the time of the appointment of the arbitrator. Thus, the convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. Nor would enforcement seem to otherwise be barred by other provisions of the convention. It would seem that even if the law of the country where enforcement is sought would not permit the entry of an award by an arbitrator appointed after resolution of the dispute, such a legal difference ought not to rise to the level of being contrary to such a fundamental public policy of any country as would preclude enforcement of such an award under the public policy.
exception of article 5(2) of the convention.\textsuperscript{16}

Increasing attention is being directed to the meaning of the New York Convention as it relates to the issuance of an arbitration award based on an MSA.\textsuperscript{17} The differences of opinion as to the applicability of the convention to MSAs suggest that the convention is at least ambiguous. It is time to review the issue and consider providing interpretative guidance to the courts. An analysis of the underlying policy issues would inform a conclusion as to the optimal interpretation of the convention. Questions such as whether there is a principled basis on which to distinguish between an agreed award, which is widely accepted as enforceable, and an award rendered by an arbitrator appointed following a mediated settlement must be explored. Whether there is a need to preserve contract defenses to ensure self-determination in agreements between parties of unequal bargaining power should be reviewed. The importance of providing an effective enforcement mechanism in the international context should be weighed.\textsuperscript{18}

UNCITRAL recommendations are one available mechanism for clarifying the meaning to be given to the New York Convention’s language.\textsuperscript{19} A UNCITRAL recommendation could clarify the applicability of the convention to international arbitration awards entered into with the consent of both parties as a result of a mediation by an arbitrator appointed after the conclusion of the mediation.

The New York Convention: Looking Forward

With the 50th anniversary of the New York Convention in 2008, many scholars and practitioners have discussed whether and how the convention should be amended to address issues that have arisen with respect to certain articles of the convention. The New York Convention has proven to be of tremendous value in achieving its purpose of fostering international trade. To capitalize on the enforcement mechanisms available under the New York Convention, those reviewing it should not only look backward for past problems but also forward in assessing how and whether the convention should be reshaped in the context of mediation settlement agreements.

The convention was drafted long before mediation’s current acceptability and usage. It can and should be reviewed with an eye toward keeping it current and enhancing its relevance to the realities of today’s dispute resolution world. Consideration should be given to recommending an interpretation clarifying the applicability of the New York Convention to an award issued by an arbitrator appointed after a mediated settlement agreement is reached that reflects such an agreement. ◆

Endnotes

3. Id. at 55.
12. For example, the U.S. Supreme Court decision in \textit{Volk Information Service v. Leland Stanford Junior University}, 489 U.S. 468 (1989) has been continued to mean that parties can agree to abide by state rules of arbitration. Accordingly, parties should be able to agree to the appointment of an arbitrator in a MSA that is to be governed by the laws of a jurisdiction that permits it. Thus, in California such a process should be possible. Although California, like New York, defines an arbitration agreement as one governing “an existing controversy or a controversy thereafter arising” (Arbitration and Conciliation of International Commercial Disputes, CAL. CODE OF CIVIL PROC. tit. 9.3., § 1281), the specific grant by statute in California of the right to have the mediator/conciliator enter an arbitration award based on a mediated settlement agreement in international disputes should be construed to override any objections based on the general definition of the arbitration agreement. See Balboa Watch Company v. United States, 365 U.S. 753, 758 (1961) (“a specific statute governs over a general one”).
16. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 629, 639 (1985) (“concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in the domestic context” (emphasis added)).
18. For a discussion of these issues, see Deason, supra n.15, 80 NOTRE DAME L. REV. at 580–92.
19. For example UNCITRAL adopted a recommendation in July 2006 that article II(2) be applied “recognizing that the circumstances described therein are not exhaustive” in recognition of the fact that the writing requirement in the New York Convention might be too limiting in light of the development of modern technology. Text available at www.unicitral.org/unictral/en/unictral_texts/arbitration/2006recommendation.html.
SIAC and SIMC’s Arb-Med-Arb Protocol
By Aziah Hussin, Claudia Kück and Nadja Alexander

1. Introduction to the AMA Protocol

In conjunction with its launch on 5 November 2014, the Singapore International Mediation Centre (SIMC), in collaboration with the Singapore International Arbitration Centre (SIAC), introduced the Arbitration-Mediation-Arbitration (Arb-Med-Arb) Protocol (the AMA Protocol), a process that aims at combining the benefits of these two prominent alternative dispute resolution tools.

As its name suggests, the AMA Protocol may be broadly divided into three different stages, beginning with the initiation of arbitration proceedings under the auspices of SIAC. Once the arbitral tribunal has been constituted, it will then stay the arbitration and SIAC will automatically refer the case to mediation at SIMC. The mediation is to be completed within eight weeks after the referral. The progression to the final stage depends on the outcome of the mediation: if the parties successfully settle their dispute at mediation, they may then request the arbitral tribunal to issue a consent award following the terms of their settlement. However, if the dispute is not settled in mediation, the stay of the arbitration proceedings may then be lifted and the arbitral tribunal will resume arbitral proceedings.

“Singapore…refers to a brand of dispute resolution.”

Parties can choose to adopt the Protocol at any time, meaning they may even do so after the dispute arises or after other dispute resolution processes are underway. Compared to the Med-Arb model, the Arb-Med-Arb model has its advantage in circumstances where mediation results in a settlement that the parties wish to record as a consent arbitral award as it removes ambiguities over whether a dispute is in existence when arbitration is commenced. Further, once parties agree to the AMA Protocol, commencement of mediation is an automatic step in the dispute whereas mediation typically requires the consent of both parties.

2. Context of the Protocol

(a) What Gap Does It Fill? How Does It Make a Difference?

In Singapore, the Protocol fits snugly within a pro-mediation ecosystem with robust cross-border enforcement. From an institutional perspective, the Protocol involves two service providers, the SIAC and the SIMC, in complementing existing domestic enforcement legislation and jurisprudence, such as the Choice of Court Agreements Act 2016 (CCAA) (implementing the Hague Convention on the Choice of Court Agreements) and the International Arbitration Act (IAA) (implementing the New York Convention). The SIMC Mediation Rules enforce writing requirements, which facilitates judicial enforcement. From a judicial perspective, the Protocol is supported by the Mediation Act 2017 (MA), under which a mediated settlement agreement (MSA) may be recorded as an order of court and enforced in other jurisdictions via, for example, the CCAA or IAA. The requirements to be met of an MSA (i.e., that the MSA was administered by a designated service provider or conducted by a certified mediator) introduces a direct link between private sector mediation and the courts. From the practitioners’ perspective, under the Rules of Court and the Supreme Court Practice Directions, lawyers are obliged to advise their clients on alternative dispute resolution (ADR) and adverse cost orders may be made if parties are found to have unreasonably refused to engage in ADR. International and specialist mediators and arbitrators are readily accessible in courts such as the Singapore International Commercial Court (SICC), in institutions such as SIAC and SIMC, and in law firms. Mediation infrastructure and services in Singapore, such as those provided by Maxwell Chambers, are highly regarded globally. Notably, parties are able to conduct a “Singaporean” mediation out of Singapore; for the purposes of the AMA Protocol, “Singapore” no longer refers to merely geography—it refers to a brand of dispute resolution.

3. Main advantages

(a) Enforceability

As mentioned earlier, the Protocol sits within a robust cross-border enforcement system in Singapore. An international MSA (iMSA) under the Protocol may be enforced as an order of court under the MA by courts such as the SICC, which has an international bench. Similarly, an arbitral award under the Protocol may be enforced as an order of court under the New York Convention, IAA and/or the CCAA. Moreover, there are expected to be new developments in the realm of cross-border enforcement. UNCITRAL Working Group II, chaired by Singapore, is currently working on the proposed UNCITRAL Convention on International Settlement Agreements. The Convention, which will be known as the Singapore Convention once in force, will provide contracting states the mechanism for the cross-border enforcement of iMSAs. Further, SICC and the Singapore Supreme Court are members of the Standing International Forum of Commercial Courts (SIFOCC), marked by a consensus for a multilateral memorandum of understanding to enforce judgments of commercial courts across a wide range...
of jurisdictions. As of July 2018, it has 32 participating courts across 23 jurisdictions.

(b) Additional Panels and Institutional Support

In addition to SIMC’s primary mediator panel, there are two other panels that have been established to support SIMC’s services. The panel of technical experts maintained by SIMC and SIAC, comprising independent consultants and key personnel of well-established companies from diverse sectors of industry, makes for another distinct advantage of the Protocol. SIMC’s and SIAC’s ability to offer this type of institutional support seems especially valuable given that cross-border commercial disputes in recent decades have become increasingly complex. With an expert panel at the parties’ disposal, technical questions that may arise during the course of the mediation requiring profound industry knowledge no longer have to stand in the way of parties concluding an MSA. In 2018 SIMC established a specialist mediator panel comprised of mediators with specific cultural, linguistic and other expertise.

“Singapore’s Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution.”

Furthermore, administrative and case management support services by the SIMC and SIAC on the whole ensure efficient, reliable and user-friendly organisation of the dispute resolution process. The support extends to the two institutions assisting the parties by appointing suitable high-quality arbitrators and mediators.

(c) Smooth Transitioning

What truly sets SIAC and SIMC apart from other dispute resolution service providers is their close collaboration. It reduces administrative burden for mediating in the midst of arbitration and thereby helps to avoid redundant costs: the Protocol is set into motion simply by one party filing a notice for arbitration with the Registrar of the SIAC. Later, the parties do not have to take any additional steps to ensure that the case is transferred to SIMC; SIAC takes care of all that. Also, SIAC is solely responsible for collecting all fees connected to the Protocol so that the parties do not have to make separate payments to both institutions.

Finally, process integrity in the form of a seamless transition between arbitration and mediation (and vice versa) is promoted by the fact that both Centres are located in the same building, Maxwell Chambers. The Protocol offers a robust and reliable framework whilst incorporating flexibility to allow parties to tailor the process according to the specific characteristics of the dispute.

4. Opportunities and Risks

(a) Expedited Timelines

The Protocol makes no provision for expedited enforcement or interim measures. Under the Protocol, either the SIAC Arbitration Rules (SIAC Rules) or the UNCITRAL Arbitration Rules apply to the arbitration, and the SIMC Mediation Rules (SIMC Rules) apply to the mediation. While the SIAC Rules make provision for both expedited enforcement and interim measures and the UNCITRAL Rules make provision for interim measures, the SIMC Rules are silent on both these fronts. This means that once the mediation has commenced, should parties require interim measures or expedited procedures the application will have to be made in the arbitration (which is stayed for the mediation). The Protocol is silent on whether, under such circumstances, the timelines under the Protocol may be adjusted or whether parties may return to the mediation process once such measures or procedures are triggered in the arbitration. In practice, this may not be an issue as most arbitrations under the Protocol are completed within 1 to 2 days (although eight weeks is set aside for the mediation phase), so parties are unlikely to make such applications within that narrow window, although they would not be hindered from seeking such measures, if necessary, in the arbitration. Furthermore, the Protocol’s silence on this issue gives parties the flexibility to adjust the Protocol (whether by agreement or application) to respond to the needs of the dispute.

(b) Arbitrator/Mediator Double-Hatting

The Protocol does not prohibit parties from appointing the arbitrator to double-hat as the mediator for the mediation stage of the process. Under the SIMC Rules, parties “may” nominate a mediator for confirmation by SIMC and “may [but need not] do so from SIMC’s Panel of Mediators” (Clause 4). However, SIMC generally encourages appointing different individuals. It considers it preferable to use different practitioners as mediator and arbitrator to maintain the integrity and confidentiality of both processes and comply with natural justice rules. Again, the Protocol, in leaving appointment open to parties, does not impose Singapore’s legal norms on other cultures, rather it encourages practices that meet international standards to ensure the integrity, recognition and enforceability of iMSAs in the form of consent arbitral awards in as many jurisdictions as possible throughout the world.

(c) Structuring a Flexible, Rules-Based Hybrid Model

In a typical ad hoc hybrid model, parties would have the flexibility to decide when it is best to commence either ADR process. Under the Protocol, parties proceed to the mediation stage once the Response to Arbitration is filed, which is either 14 or 30 days after the Notice of Arbitration is filed. Thus, the dispute is
structured with set timelines and gives parties certainty that the dispute will progress apace. This is significant because, in practice, the ad hoc model may be subject to abuse in the form of delays. Given the Protocol attempts to provide structure for what is essentially a flexible and fluid process which permits the parties, should they agree, to re-attempt mediation later in the dispute resolution process when the issues may have further crystallised.

(d) Outcomes: Potential Clash Between Arbitral Awards and iMSAs?

Hybrid dispute resolution also raises questions about the conversion of the mediated settlement into an arbitral award. For example, in mediation the parties are free to agree on their settlement terms, which may include arrangements for the future and are not limited by the types of remedies a court or tribunal might be able to provide. Conversely, in an arbitration the arbitral tribunal is required to issue awards consistent with the substantive law governing the dispute and the powers of the tribunal to grant remedy under the arbitration agreement, arbitration rules and/or applicable arbitration law. Arbitral awards typically grant monetary or injunctive relief, or specific performance orders, since any other result would likely lack legal basis. On the face of it, this suggests that an arbitral tribunal may conceivably not be able to record as an arbitral consent award a settlement agreement in its entirety.17

In Singapore the Protocol places the focus back on party autonomy. It is ultimately up to the parties to decide which aspects of their settlement they would like the tribunal to record as a consent arbitral award and which (if any) they wish to keep in contractual form. However, one should acknowledge that the Protocol is primarily directed toward parties involved in cross-border commercial disputes,18 the resolution of which, to date, has involved terms suitable to be recorded as a consent award. Thus, it seems that a “clash of outcomes” will rarely occur.

(e) How Has the Protocol Fared Thus Far?

SIMC was officially launched in November 2014. Since then, it has administered more than 50 cases, of which approximately one-fifth utilized the Protocol. Eighty percent of the parties who use SIMC’s services are from Asia. As of 2017, SIMC has a settlement rate of 85 percent.

5. Conclusion

The establishment of SIMC represents a significant development in the practice of international mediation, particularly in Asia. Singapore’s Arb-Med-Arb Protocol signals a new way of thinking about international dispute resolution and the role of mediation in it.

Endnotes
1. AMA Protocol, para. 2.
2. Id., para. 5.
3. Id., para. 9.
4. Id., para. 8.
5. Should parties wish to include the AMA Protocol into their contractual dispute resolution clause, SIMC provides a model dispute resolution clause, the Singapore Arb-Med-Arb Clause, on its website: http://simc.com.sg/model-clauses/the-singapore-arb-med-arb-clause.
8. George Lim & Eunice Chua, 4-8, Research Collection SMU School of Law 2015, 1 (3).
10. Id., para. 5.
13. This period of eight weeks may, however, be extended by the Registrar of SIAC in consultation with the SIMC; see AMA Protocol, para. 6.
16. The deadline is 14 days under the SIAC Rules, Rule 4.1 and 30 days under the UNCITRAL Arbitration Rules, Article 4(1).

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THE SINGAPORE CONVENTION ON MEDIATION:
A FRAMEWORK FOR THE CROSS-BORDER RECOGNITION AND ENFORCEMENT OF MEDIATED SETTLEMENTS

TIMOTHY SCHNABEL*

I. Introduction

The Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation) is a new multilateral treaty developed by the U.N. Commission on International Trade Law (UNCITRAL). The Convention provides a uniform, efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international, commercial disputes—akin to the framework that the 1958 New York Convention provides for arbitral awards.1 The text of the Convention was finalized by UNCITRAL on June 25, 2018, and after adoption by the U.N. General Assembly, it will open for signature in August 2019.2 Unlike the other primary international organizations that develop commercial law treaties,3 UNCITRAL does not commission official

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* J.D., Yale Law School. Although the author proposed and negotiated this Convention on behalf of the United States, this article expresses his personal views and should not be read as representing the views of the U.S. Department of State. The author would like to thank Natalie Morris-Sharma, Corinne Montineri, Itai Apter, Johan Tufte-Kristensen, Héctor Flores Sentíes, Khory McCormick, and Don Wallace for their comments on earlier drafts of this article. Any remaining errors are attributable solely to the author and most likely result from his failing to adequately respond to all of the helpful comments provided by the Chair, the Secretary of Working Group II, the distinguished delegates from Israel, Denmark, Mexico, and Australia, and the distinguished observer from the International Law Institute.


2 U.N. Comm. on Int'l Trade Law, Report of the U.N. Comm. on Int'l Trade Law, Fifty-first session, U.N. Doc. A/73/17 (2018) at para. 49 (finalization of the Convention) and Annex I (text of the U.N. Convention on International Settlement Agreements Resulting from Mediation (hereinafter the “Convention” or “Singapore Convention”)); Convention at Article 11(1) (designating Singapore as the location at which the Convention will open for signature). The treaty’s designation as the “Singapore” Convention was based on the location of the planned signing ceremony, which Singapore offered to host. However, both the title of the Convention and UNCITRAL’s acceptance of the offer to host the signing ceremony should be seen as an expression of delegates’ appreciation for the outstanding job done by the Singaporean chair of the negotiations, Natalie Morris-Sharma. See, e.g., intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp. Note that most of the citations in this article to the travaux of the Convention direct the reader to the publicly-available audio recordings of the negotiations rather than to the published reports of the Working Group or the Commission, as those reports provide much less useful detail regarding the discussions. In many cases, the interventions cited in this article were not the only statements that delegations made on particular issues; rather, the cited interventions are those deemed most relevant to the points being discussed.

3 Both UNIDROIT and the Hague Conference on Private International Law often assign responsibility for writing explanatory materials to one or two individuals. See, e.g., Sir Roy Goode, OFFICIAL COMMENTARY ON THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND THE PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT (3d. ed. 2013); Trevor Hartley and Masato Dogauchi, Explanatory Report, Convention of 30 June 2005 on Choice of Court Agreements (2005), available at
https://assets.hcch.net/upload/expl37final.pdf.
commentaries or explanatory reports for the treaties it produces. This article aims to fill this gap by providing an explanation of the key provisions of the Convention based on the records of the negotiations and the firsthand experiences of the author in proposing and participating in the negotiations.

Section II of this article provides a brief overview of the purposes and goals of the Convention, followed by a summary of the course of the negotiations in Section III. Section IV addresses some significant issues that were debated in UNCITRAL but that did not ultimately find their resolutions explicitly addressed in the text of the Convention. The remaining sections address the main legal rules of the Convention: the scope of the Convention (Section V), the Convention’s formality requirements and procedures (Section VI), the main obligations of Parties to the Convention (Section VII), the grounds on which a court (or other “competent authority” applying the Convention, such as a bailiff in a civil law system) can refuse to recognize or enforce a mediated settlement (Section VIII), declarations available under the Convention (Section IX), and issues related to supra- and sub-national legal systems (Section X).

II. Purposes of the Convention

The primary goal of the Convention is to promote the use of mediation for the resolution of cross-border commercial disputes, as mediation is seen as not only a faster, less expensive form of dispute resolution but also as more likely to preserve commercial relationships. The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation; a significant amount of time and energy might be needed in order to reach an agreement, and if the other party later fails to perform, the company seeking compliance would essentially have to start over in litigation or arbitration. Particularly for the many disputes arising out of alleged breaches of contract, mediation may be less attractive if even a successful mediation would simply result in another contract that would have to be enforced through normal contract litigation.

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6 U.N. Comm’n on Int’l Tr. L., Proposal by the Government of the United States of America: Future Work for Working Group II, U.N. Doc. A/CN.9/822 (June 2, 2014) (hereinafter U.S. Proposal) at 3. See also Guide to Enactment of the Model Law on International Commercial Conciliation (2002) (hereinafter Guide to Enactment), para. 87 (“Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award.”).
UNCITRAL was presented with evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation to resolve cross-border disputes.\(^7\) Many companies find it hard to convince their business partners in some jurisdictions to engage in mediation based on views that it lacks a stamp of international legitimacy like the New York Convention has given to arbitration since 1958.\(^8\) Thus, the proponents of developing the Convention expressed a hope that it will be able to give mediation the same type of boost that arbitration received from the New York Convention.\(^9\) The development of the Convention was said to be deemed critical by the international business community.\(^10\) In particular, a new framework was seen as necessary to combat the perception that if a company successfully mediates a contract law dispute, but the other party to the settlement fails to comply, the company is worse off than if it had not attempted mediation in the first place; having spent time and money on mediation, the company would still have to litigate a contract law dispute over the settlement agreement.\(^11\)

Notably, the Convention was not designed to provide enforceability for settlement agreements that otherwise would not have been enforceable at all,\(^12\) but rather to provide a framework for enforcement (and also for recognition, as discussed in Section VII infra) that would be more efficient than litigation under contract law. Some delegates cited many experiences where cross-border litigation resulted from a party’s failure to comply with a settlement.\(^13\) Yet although the Convention should provide significant benefits to parties who have to seek relief in court, its main goal is to provide an incentive to mediate in the many cases in which mediation might otherwise not be attempted.\(^14\) Ideally, the Convention will rarely need to be invoked in court, as in most cases, parties will abide by the mediated settlements they conclude.\(^15\)


\(^12\) See, e.g., Guide to Enactment, para. 89.


III. Course of the Debate in UNCITRAL

Work on a mediation convention was proposed by the United States at the 2014 Commission session,16 as UNCITRAL’s Working Group II was completing its efforts to address transparency in treaty-based investor-state arbitration. After brief consideration, UNCITRAL delegated consideration of the topic to Working Group II, assigning it to discuss the matter at its February 2015 session.17

The project did not get off to an auspicious start. Based on the first day of discussion in the Working Group, the chair18 assessed that the group did not have a great prospect of arriving at consensus on the desirability of work on this topic.19 Sobering views dominated the discussion, e.g., a prediction that development of a convention would take many years,20 and fears that even if UNCITRAL did spend years working on the project, that work would be no more successful than prior efforts to address the issue in the context of UNCITRAL’s development of the Model Law on International Commercial Conciliation21 (which did not include substantive provisions on enforcement procedures, despite efforts to address the topic).22 In the end, the Working Group did request a mandate from the Commission to work on the topic, but did not commit to developing any particular form of instrument.23 Instead, a broad mandate was granted that enabled the Working Group to determine for itself the proper outcome for its deliberations.

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23 See Working Group II Feb. 2015 report, supra n.18, at para. 59 (noting the possibility of preparing “a convention, model provisions or guidance texts”).
At the Commission that summer, the tone was far more positive, with most states viewing work in this area as being promising and worthwhile. The only strong opposition to authorizing work on the topic came from the European Union and some of its member states. The European Union stated that it saw no evident need for harmonization on the topic and opined that finding agreement on a harmonized approach—beyond the model law’s decision to leave the issue of enforcement to domestic law—was unrealistic.24 (This skepticism from the European Union continued into the negotiations.25) Nevertheless, the Commission authorized work to begin at the fall 2015 session of Working Group II.26

The Working Group focused on the mediation project for six sessions; most of the sessions were one week long, although the Working Group was given an extra week for its session in the fall of 2016.27 Natalie Morris-Sharma from Singapore chaired all six sessions.28 Although the United States and Israel proposed some initial draft provisions for a convention at the first session,29 the Working Group did not decide that its work would take the shape of a convention until its fourth session of work. That session, in February 2017, was the key turning point in the negotiations; after many hours of substantive discussions, the time was ripe for development of a compromise package that tied a number of divisive issues together. At the end of the morning session on February 7, the chair requested that delegations continue informal consultations over the lunch break.30 When the afternoon session resumed two hours later, Israel presented a proposal on behalf of interested delegations31 that had developed it during the break.

The compromise package addressed five issues, the resolutions of which were seen as interconnected, in what was described as a dramatic breakthrough.  

First, as described in Section VII _infra_, the Convention would not use the term “recognition,” but instead would functionally describe (in Article 3(2)) the aspect of recognition that needed to be included—i.e., the ability to use a mediated settlement as a complete defense in domestic legal proceedings. Second, as described in Section V(D)(2) _infra_, mediated settlement agreements that could be enforced as judgments or arbitral awards would be excluded from the scope of the Convention. Third, as explained in Section IX _infra_, the Convention would apply to mediated settlement agreements by default, but each state would be given the option of making a declaration to the effect that it would only apply the Convention to mediated settlement agreements to which the disputing parties affirmatively opted to have the Convention apply. Fourth, as described in Section VIII(H) _infra_, the Convention would include, as among its Article 5 grounds for refusal, two situations in which a court could refuse to grant relief based on misbehavior by the mediator. Finally, as discussed in Section IV _infra_, the Working Group would develop both a Convention and a model law simultaneously; this approach broke new ground for UNCITRAL, which previously had never developed two such instruments as a package. This set of compromises was quickly endorsed by a number of delegations; although its contents did not match what any delegation would have preferred, it provided a basis to move forward. The Working Group continued to discuss the compromise proposal throughout the rest of that week. Although the February 9 session was cancelled due to a blizzard, many delegations met anyway to continue working on refining some of the compromise language. At the end of the week, the compromise package was accepted by the Working Group, and was endorsed by the Commission in the summer of 2017.

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33 Accordingly, other articles of the convention, such as Articles 1 and 4, would not only avoid the term “recognition” but would also not refer to “enforcement.” The Article 3(2) formulation used to functionally describe “recognition” was too unwieldy to replicate in other articles, but referring to “enforcement” alone in other articles would risk the implication that recognition was not covered. Thus, other articles of the Convention simply refer to “relief” rather than “recognition and enforcement.”


After this breakthrough, the Working Group only needed two more sessions to complete its efforts. The Convention was finalized by the Commission on June 25, 2018, including a recommendation that it should open for signature in Singapore in August 2019.39

IV. Non-Textual Issues Resolved in the Negotiations

Before addressing the structure and contents of the Convention itself, it will be useful to explain several key issues that were not explicitly addressed in the text of the treaty but that were discussed in the negotiations. First, as noted above, the form of the instrument was in doubt until the five-element compromise was assembled. Some delegations consistently advocated for a Convention from the beginning of the project.40 The International Mediation Institute cited a survey of various mediation users, most of whom opined that a Convention would make it easier for commercial parties to come to mediation in the first place.41 Some delegations also suggested that a non-binding instrument such as a model law would not be as effective in promoting mediation or serving the needs of the users.42 However, other states were skeptical of a Convention,43 and argued that developing a binding instrument would be premature as mediation was still in its infancy in many states.44 This second argument was directly at odds with the primary motivation of the proponents who believed that an international framework was needed in order to encourage the further development of mediation in various jurisdictions. Eventually, some delegations suggested that both a Convention and a model law could be developed,45 as that would permit as many states as possible to use an UNCITRAL instrument on the subject, including those that deemed themselves not yet ready to join a Convention. This suggestion

opened the door to the undertaking (unprecedented in UNCITRAL) of developing two forms of instrument in parallel.

Second, the Convention can be seen as creating a new category of legal instrument on the international plane, elevating what would otherwise be a mere contract to a sui generis status. In general, the Convention provides for international, mediated settlements to be treated in a manner comparable to arbitral awards.\(^{46}\) That this effect would occur was recognized early in the UNCITRAL discussions, and was controversial.\(^{47}\) Some delegations argued that settlements are only contracts and should not be given a different status solely because they are mediated.\(^{48}\) The ability of disputing parties to convert a mediated settlement into an arbitral award (a “consent award” or “award on agreed terms”) was cited as an adequate workaround; some delegations suggested that such processes suffice to ensure enforceability and that the conversion of settlements into awards under existing processes provided a “useful fiction”\(^{49}\) that ameliorated the need for a new approach.

By contrast, others argued that disputing parties should not have to go through the elaborate exercise of converting a settlement into an award, and that they should not have to depend on finding (and hiring) an arbitrator willing to enter it as an award.\(^{50}\) One can also question how often parties who successfully mediate a dispute would want to suggest a risk of future noncompliance by seeking to have a settlement converted into an award while the disputing parties are still on good terms. Moreover, in many jurisdictions, whether the New York Convention would apply to all such consent awards is an open question.\(^{51}\) If an arbitration is only commenced once the parties have already reached a settlement, the requisite “differences” between the parties may no longer exist, thus suggesting that any resulting award would fall outside the scope of Article I(1) of that treaty.\(^{52}\) Beyond these concerns about a legal gap, from a


policy perspective, parties that prefer to use mediation should not be forced to engage in another form of alternative dispute resolution simply in order to receive equal legal protection of the outcome of the dispute resolution process.53

Thus, rather than forcing disputing parties to shoehorn their mediated settlements into the existing legal framework governing arbitration, the Convention accords a new status to mediated settlements in their own right. It converts what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally-binding international framework, and provides an entitlement to privileged treatment in other states, similar to a judgment.54 Thus, under the Convention, settlements are no longer merely subject to contract law,55 although some aspects of contract law may remain relevant in certain situations56 (and, of course, a party could still seek to rely on contract law, as mediated settlements do not lose their status as contracts). Such an approach makes sense, as a mediated settlement should receive more deference than a normal contract, given that parties have likely already given up contractual rights in settling their dispute, and have spent time and money on the mediation.57

More importantly, in arbitration, the disputing parties consent only to the process for resolving their dispute, but not to the ultimate outcome, yet the agreement to arbitrate and the arbitral award—which otherwise would only be private acts governed by contract law—are given privileged status under the New York Convention. In mediation, by contrast, the parties have agreed to not only the process for resolving their dispute but also to the ultimate outcome—thus suggesting a far stronger justification for according a privileged status to the mediated settlement agreement.

A third issue debated but not explicitly addressed in the text of the Convention is the question of whether the Convention should cover elements of mediated settlements that provide for more than just monetary relief. Initially, the European Union wanted to restrict the project to pecuniary settlements, but the Working Group rejected that idea.58 The Convention does not differentiate between the types of obligations that may be included within a mediated settlement. While a request to give effect to non-monetary obligations may present complicated issues to a

56 See Section VIII(B) infra on Article 5(1)(b)(i) (noting that many, but not all, aspects of the applicable contract law may be relevant to determining the validity of the mediated settlement agreement); infra at n.97 (noting that under Article 7, disputing parties can still rely on more generous treatment for mediated settlement that may be provided under domestic law).
58 See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp. Even the original proposal from the United States raised the question of whether the Convention should include limitations on the relief available in cases of long-term (or other non-monetary) obligations, although the United States did not pursue such limitations in the Working Group. See U.S. Proposal, supra n.6 at 5.
court applying the Convention, such risks are also present for arbitral awards, if not likely to be as common.\(^59\) Moreover, awards on agreed terms are not seen as causing problems in this respect.\(^60\) Admittedly, parties can resolve a dispute by entering into a new commercial relationship, which would generally not be provided for in an award.\(^61\) Despite this risk, the room for creativity and innovative solutions is a main reason why mediation can be a more useful form of dispute settlement\(^62\) and is worth promoting. Limiting the application of the Convention to monetary elements of settlements would dramatically undermine the benefits of mediation.\(^63\)

Non-monetary elements of mediated settlements were therefore described as critically important for the Convention to cover, and the Working Group was assured that companies understand that courts’ ability to enforce particular terms serves as a limit on what would generally be put into a settlement.\(^64\) In other words, disputing parties who include creative, far-reaching obligations in their settlements bear the risk that courts may find it difficult to fashion appropriate orders. Excluding non-monetary obligations would also have caused problems in terms of any attempt to cover the residual monetary aspects of settlements, as those monetary aspects might not be amenable to being enforced in isolation\(^65\) (as the obligations might be intertwined), and most settlements include both pecuniary and non-pecuniary elements.\(^66\) Thus, the Working Group decided not to distinguish between the two types of obligations that may be found in mediated settlements, to protect the flexibility of mediation and to preserve the settlement agreement in its entirety.\(^67\)

A fourth issue notable only for its omission from the text of the Convention is that of double exequatur. The Convention enables a mediated settlement to be directly presented for relief in any state that is a Party to the Convention. In the early discussions in UNCITRAL, some delegations suggested that approval by a national court or notary be required before a mediated settlement could circulate to additional states under the Convention, or that the scope be limited

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to settlements that are enforceable in a particular state of origin. These suggestions were not pursued. The Working Group wanted to avoid replicating the problems that arbitration faced prior to the New York Convention—i.e., the Geneva Convention approach that required double exequatur for arbitral awards—due to the fear of creating a system that would be so burdensome that parties would not want to use it. Additionally, as described further in Section V(B) infra, the Working Group determined that identifying a particular state of origin for a mediated settlement would be too difficult, particularly in an age when mediated settlements can be made through electronic means. Nor does the mediation process itself necessitate the identification of a seat. Thus, the Working Group designed the Convention to provide a process that would be easy and fast, and not overly burdensome.

Finally, the Convention diverges from the New York Convention by only addressing the results of a dispute settlement process (i.e., mediated settlements), rather than also applying to agreements to enter into a dispute settlement process (i.e., agreements to mediate). Although the Working Group briefly discussed whether the Convention should address agreements to mediate, that topic was seen as unnecessarily complicating the work. The Convention also does not require the disputing parties to have had an agreement to mediate; the Convention applies regardless of whether the parties had a prior agreement or not. (At most, an agreement to mediate can be relevant to show that mediation occurred. See Section VI infra.) One consequence of this decision is that the scope of any agreement to mediate is also irrelevant for the application of the Convention; the eventual settlement agreement may address issues outside the scope of an agreement to mediate (as the disputing parties can resolve whatever differences they want at the time of the settlement), unlike the New York Convention’s requirement that an arbitral award only address issues within the scope of an agreement to arbitrate.

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70 See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.


V. The Scope of the Convention

To fall within the scope of the Convention, a settlement agreement must meet several criteria. It must be mediated, international, and commercial, and must not be the subject of a specific exclusion.

A. Mediated

The Convention draws on the Model Law on International Commercial Conciliation as the starting point for its definition of “mediation”: a process “whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons … lacking the authority to impose a solution upon the parties to the dispute.”75 Importantly, the name of the process does not matter: metaphysical distinctions between “mediation,” “conciliation,” and other types of processes (as various terms may be used in different legal cultures) are not relevant. The Convention uses a broad definition as an umbrella that can cover many types of processes. (Note that the term “conciliation” was used by UNCITRAL for most of the negotiations, as the earlier UNCITRAL instruments used that term. However, the Working Group eventually decided to use “mediation” in the final text, as it was seen as the more widely-used term.)76

During the negotiations, some delegations argued that the Convention should only cover mediation insofar as it qualifies as a “structured” process. These delegations not only wanted to distinguish mediated settlements from non-mediated settlements but also to exclude settlements resulting from an “informal” process,77 such as a process that happens in a pub,78 as opposed to those conducted in an “organized” manner.79 An alternative explanation given regarding the proposed requirement of a “structured” process was that mediation would only be covered if it

took place within a domestic legal framework that regulates mediation, such as the Model Law, even though the Model Law, which reinforces the value of party autonomy, permits parties to alter its default rules.

Yet despite repeated, lengthy discussions, the Working Group never received a satisfactory answer to what a “structured” process would be, and the requirement was not included in the Convention. The Working Group chose not to disadvantage mediation that occurs outside of an institution, nor to devalue other approaches (even mediation in a pub) that take advantage of the benefits of mediation being a flexible process. One delegation even said that the number one rule of mediation is that there are no rules, and that mediators are supposed to do whatever may be needed in the situation rather than impose a particular structure. Other delegations explained that the results of the mediation—a written agreement, signed by the parties—should suffice to provide the requisite level of formality for a court to be confident in giving effect to the settlement, regardless of the “structure” of the process.

Additionally, the definition makes clear that the basis on which mediation begins is not relevant. As under the Model Law, the mediation can be based on agreement between the parties before or after the dispute, or a legal obligation, or a suggestion or direction of a court or arbitral tribunal, among other possibilities. Similarly, the parties could have entered mediation voluntarily, or they could have been mandated to mediate but voluntarily reached a settlement. The involvement of an administering institution is also irrelevant.

Thus, for a settlement to qualify as “mediated” for purposes of the Convention, the only requirement is that the disputing parties sought to reach an amicable settlement with assistance of a third party who lacked authority to impose a solution.\(^{89}\) The last element in the definition does not exclude mediation in which the mediator could be converted into an arbitrator, as long as the mediator did not have authority to issue an arbitral award at the time of the mediation.\(^{90}\) By contrast, the definition generally would not cover a situation in which a judge acted as a mediator if that judge was also seised with deciding the dispute in ongoing litigation; this restriction is necessary to avoid situations in which the judge could pressure parties into a settlement. However, if another person mediates a dispute during litigation, a resulting settlement is still covered (except to the extent the settlement is converted into a judgment, Section V(D)(2)(a) infra).

Per the definition, the settlement has to “result” from mediation, but this rule should be seen as applying a very broad standard. No clear line is provided regarding how much involvement from a mediator is sufficient. The mediator does not have to be involved throughout the entire process; for example, if the parties have come to a resolution on most issues, the mediator can leave them to work out any remaining issues on their own, even if the lingering issues take months longer to get resolved.\(^{91}\) Such a settlement would still be sufficiently “mediated” for purposes of the Convention. The definition could even cover situations in which a mediator simply helps the parties move forward on one contentious aspect and then the parties resolve the rest themselves. Such a broad approach is consistent with the policy motivating the Convention—i.e., the promotion of the use of mediation. Generally, for a party to resist a request for relief under the Convention on the basis that the settlement did not “result” from the mediation, the party would need to demonstrate that fraud or collusion occurred in the other parties’ attempt to portray a link between a dispute and an entirely unrelated mediation.\(^{92}\)

In any disputes regarding this issue or other elements of the Convention framework, the court where relief is sought would need to protect the confidentiality of the mediation process, in accordance with applicable law. Thus, the court generally would not need to get into details of whether and to what extent the mediation was successful in developing the terms of the settlement, as such inquiries would undermine confidentiality, but would just need to be satisfied that the parties used mediation and a settlement resulted. (More generally, the Convention does

\(^{89}\) Singapore Convention Article 2(3).


\(^{92}\) As the party seeking relief must provide “[e]vidence that the settlement resulted from mediation” in the forms listed in Article 4(1)(b), such evidence suffices to demonstrate that this requirement was met; the burden would be on the party resisting relief to demonstrate that the proffered evidence is not trustworthy.
not address confidentiality issues; the applicable domestic law would govern such evidentiary matters.)\(^ {93}\)

The Working Group repeatedly discussed whether the Convention should also cover non-mediated settlements.\(^ {94}\) Some states advocated for coverage of all settlements, mediated or otherwise, or at least sought to have such broad coverage be an option that a state could choose via a declaration mechanism (or that the Convention should let parties to non-mediated settlements opt in to the Convention’s framework).\(^ {95}\) However, the Working Group decided at its first session only to cover mediated settlements,\(^ {96}\) and this decision was never reversed. Most delegations wanted to require involvement of a third party in order to distinguish mediated settlements from ordinary contracts.\(^ {97}\) No good reason was ever provided for not permitting states to extend the Convention via a declaration, particularly given that Article 7 already permits them to provide non-mediated settlements with identical treatment under domestic law.\(^ {98}\)

The Working Group also discussed whether to include a requirement that the mediator be independent. However, this idea was not included in the Convention, as independence does not play the same role in mediation (where the settlement is agreed to by the parties) as it does in arbitration, and as including the requirement could risk generating unnecessary litigation.\(^ {99}\) (For more discussion of the role of the mediator’s behavior and independence, see Section VIII(H))

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\(^ {93}\) See, e.g., interventions of France, Israel, India, Australia, and Pakistan, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.


\(^ {96}\) See intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 10:00-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp


\(^ {98}\) See also interventions of the United States, Canada, and France, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp. The original United States proposal raised the question of whether the Convention needed rules designed to “avoid duplicative litigation caused by simultaneous attempts to enforce a settlement under the convention as well as under contract (or other) law,” but the United States did not pursue this issue in the Working Group. U.S. Proposal, supra n.6 at 5. Notably, the Model Law does explicitly note the possibility for states to extend the scope of the framework to non-mediated settlements—one of several subtle but important differences between the two instruments.

Similarly, the Working group briefly discussed requiring the mediator to meet certain qualifications, but that suggestion did not receive support.

**B. International**

In addition to being “mediated,” a settlement must be “international” to be covered by the Convention. Domestic and international settlements may not be analytically different in ways that would necessitate separate treatment at the stage of recognition and enforcement, but the Working Group nevertheless made a pragmatic decision to restrict the scope of the Convention to settlements that are in some sense international, in order to make it easier for countries to join the convention without requiring significant changes to their existing law addressing purely domestic settlements. However, in their domestic law, states could choose to apply the same standards to domestic settlements if they want.

The settlement must be international at the time it was concluded, regardless of whether the relevant criteria would have been met earlier during the mediation or at the time relief is requested. Thus, for example, a settlement can be international even if the mediation itself would not have been international for purposes of the existing Model Law (such as if one of the parties moved its place of business during the mediation, thus creating an international aspect at that stage). Whether a mediated settlement is international will depend on the identity of the disputing parties. In most cases, the requirement will be met by the parties having their places of business in different states. If both parties have their places of business in one state, the mediated settlement can still qualify as international if that state is different from either the state where the obligations of the mediated settlement are to be performed or the state with which the subject matter of the mediated settlement is most closely connected.

If a party has more than one place of business, the relevant state for purposes of the Convention is the state with the closest relationship to the dispute resolved by the settlement, having regard to circumstances known to or contemplated by the parties at the time of the conclusion of the settlement. This approach is based on a similar rule in the Vienna

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106 Singapore Convention Article 1(1).
107 Id. Article 2(1)(a).
Convention on Contracts for the International Sale of Goods (CISG).\textsuperscript{109} If a party has no place of business, the relevant state is the party’s habitual residence,\textsuperscript{110} although this rule is unlikely to be practically relevant given that the Convention is limited to commercial, non-consumer disputes. Like the definition of “mediation,” the definition of “international” is thus based on the Model Law, but it omits other elements. Although the Model Law enables parties to a mediation to opt into being covered even if the “international” criterion is not otherwise met, that approach was seen as too broad for the Convention (e.g., it risked abuse).\textsuperscript{111}

As noted above, a key feature of the Convention is that it does not attempt to incorporate the concept of a seat of the mediation.\textsuperscript{112} Because of that choice, the scope of the Convention could not be delineated by referring to whether relief is sought in a jurisdiction other than the mediated settlement’s state of origin, as no particular state of origin is designated. Many jurisdictions may be involved in one cross-border mediation.\textsuperscript{113} A particular dispute may involve parties that do business in two jurisdictions but are physically present in two other jurisdictions at the time of the mediation, with the mediator in a fifth jurisdiction, and with applicable law from a sixth state. Such a situation would provide no obvious answer to the question of which state the settlement is “from”; identifying a “seat” of the mediation, especially if the settlement is developed via email, would be unnecessarily difficult.\textsuperscript{114} Although the Working Group heard an early suggestion that the Convention should apply to “foreign” settlements, akin to the approach that the New York Convention takes for arbitral awards, that approach would have required identifying the state from which a settlement originates.\textsuperscript{115} Instead, the Working Group expressed a desire to avoid replicating the “artificial” concept of the place of the arbitration and its consequences in terms of applicable law.\textsuperscript{116}

This decision had significant implications for other issues. Notably, neither the mediation nor the settlement has to comply with the domestic legal requirements of any particular state of origin in order to be covered by the Convention (e.g., domestic law requirements that the parties must use a locally-licensed mediator, a particular institution, or specific mediation rules), and no state has the ability to set aside the settlement in a manner that would be binding on other jurisdictions.\textsuperscript{117} The mediator and the disputing parties would of course still be subject to any

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\textsuperscript{110} Singapore Convention Article 2(1)(b).


\textsuperscript{113} See, e.g., interventions of Bulgaria and Thailand, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{114} See, e.g., interventions of the United States, Finland, and Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{115} See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{116} See, e.g., intervention of Bulgaria, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{117} Although the original United States proposal posed the question of whether the Convention would need to give effect to “an originating jurisdiction’s determination that a settlement agreement is not enforceable (similar to the
applicable legal regimes in their various jurisdictions, and they could be subject to other legal sanctions if they violate those requirements. Yet such questions would not affect their ability to get the mediated settlement recognized and enforced under the Convention. Thus, a mediated settlement is essentially made a stateless instrument that is generally not subject to domestic law requirements except insofar as the Convention permits a state to apply some domestic concepts and procedures when relief is requested (i.e., its rules of procedure for administering the request for relief, and the grounds for refusal in Article 5(2)).

C. Commercial

An international, mediated settlement must also resolve a “commercial” dispute in order to fall within the scope of the Convention. The Working Group agreed at an early stage to restrict the scope of the Convention to commercial disputes; the only question was whether and how to define that concept (e.g., an illustrative list such as the Model Law uses), and what exclusions to provide.\(^{118}\) As in the New York Convention, the concept is not defined here, but should be read in an equally broad manner.\(^{119}\) The scope of the term could thus include at least some investor-state disputes,\(^{120}\) in areas such as construction or natural resource extraction. However, even if a dispute would otherwise qualify as commercial, a mediated settlement resolving the dispute will not fall within the scope of the Convention if one of the exclusions discussed in the next section applies.

D. Exclusions from Scope

1. Types of Disputes

Regardless of whether the other scope requirements are met, mediated settlements resolving consumer disputes are excluded from the Convention. The Working Group chose a formulation drawn from the CISG—i.e., disputes “arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes.”\(^{121}\) The parenthetical


\(^{119}\) See, e.g., intervention of Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.


\(^{121}\) Singapore Convention Article 1(2)(a). Cf. CISG, supra n.109, Article 2(a).
reference to the term “consumer” was added as a clarification, as some delegations did not find “personal” to be sufficiently clear.\textsuperscript{122} By excluding consumer disputes, delegations sought to avoid the problems that UNCITRAL encountered in previous discussions in Working Group III’s project on online dispute resolution, which floundered due to diverging views regarding the ability of consumers to enter into pre-dispute agreements to arbitrate\textsuperscript{123}; thus, Working Group II carved out consumer disputes at the beginning of its work, so as to avoid the need to take into account consumer protection issues.\textsuperscript{124}

Similarly, mediated settlements resolving disputes related to family law, employment law, or inheritance law are also excluded.\textsuperscript{125} Although these categories of disputes were seen as important, the Working Group viewed them as raising different issues\textsuperscript{126} than commercial disputes and as being sufficiently sensitive\textsuperscript{127} to merit exclusion. After an early agreement to exclude family law,\textsuperscript{128} inheritance law was later added as a separate category, as it may be considered a family law matter in some legal cultures but not others.\textsuperscript{129} These exclusions not only ensured that UNCITRAL would avoid treading on the turf of the Hague Conference on Private International Law (which has done work on voluntary agreements in the family law context),\textsuperscript{130} but would exclude the categories of disputes in which fears of the disputing parties’ unequal bargaining power might make some states reluctant to apply the Convention.

2. \textit{Mediated Settlements Enforceable as Judgments or Awards}

a. \textit{Judgments}

Mediated settlements that are enforceable as judgments are also excluded from the scope of the Convention.\textsuperscript{131} Although this issue will likely not arise frequently in practice, it was one of the central issues in the negotiations and thus a part of the five-issue compromise in February 2017. The exclusion of mediated settlements that are enforceable as judgments was extremely

\begin{itemize}
  \item \textsuperscript{122} See, e.g., interventions of Colombia, Argentina, Israel, and Germany, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.
  \item \textsuperscript{123} See, e.g., Ronald A. Brand, Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project, 10 Loy. U. Chi. Int'l L. Rev. 11 (2012).
  \item \textsuperscript{125} Singapore Convention Article 1(2)(b).
  \item \textsuperscript{126} See, e.g., intervention of Finland, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 7, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.
  \item \textsuperscript{127} Cf. intervention of Egypt, 1 February 2015
  \item \textsuperscript{128} See, e.g., intervention of the Chair, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp.
  \item \textsuperscript{129} See, e.g., interventions of the United States, Egypt, Israel, Singapore, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.
  \item \textsuperscript{131} Singapore Convention Article 1(3)(a).
\end{itemize}
important to the European Union,\textsuperscript{132} and thus was a key part of the Working Group’s ability to construct a package approach that resolved other issues in a manner the European Union had previously opposed (e.g., development of a Convention, inclusion of the concept of recognition (albeit without the word), and application of the Convention by default without requiring parties to opt in).

The exclusion of settlements enforceable as judgments was designed to avoid overlap with Hague Conference instruments—the 2005 Choice of Court Agreements Convention and the draft judgments convention\textsuperscript{133}—and to avoid parties having two bites at the apple (i.e., two routes to seek relief based on one settlement agreement). This exclusion was not necessary in terms of avoiding the creation of conflicting treaty obligations, as this Convention and the Hague Conference instruments all set floors rather than ceilings, such that states can provide more generous treatment to mediated settlements or judgments than is required by the various treaties. Thus overlap would not be a problem, as a state could provide relief under one treaty even if not required to do so under another. The instruments would generally not conflict directly.\textsuperscript{134} If overlap had been permitted, parties to a dispute could simply have used whichever framework is most useful in a given situation.\textsuperscript{135} Moreover, as not all states will be parties to both conventions,\textsuperscript{136} permitting overlap would have avoided the risk that some situations may not be covered in a given state. Yet the decision to include this exclusion in the Convention was clearly worthwhile, as it will be relevant only in marginal cases, and it enabled a compromise on much more significant issues.

To be affected by this exclusion, a mediated settlement would have to be approved by a court or concluded before the court during proceedings, in a manner that enables the settlement


\textsuperscript{135} See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

to be enforced as a judgment in the courts of that state.\textsuperscript{137} Mere involvement of a judge in the mediation does not suffice for the exclusion to apply.\textsuperscript{138} As noted above, the exclusion creates some risk of a gap, if the settlement agreement is enforceable as a judgment in the state of origin but not in the receiving state. Some states sought to eliminate such a gap,\textsuperscript{139} or at least give states flexibility in dealing with the issue,\textsuperscript{140} but the text included in the compromise package abandoned this effort to avoid any gap. The European Union wanted to ensure that, even if a gap were created, settlements would not be covered under this Convention if they were covered by the Hague instruments.\textsuperscript{141}

Importantly, exclusion of settlements that are “approved by a court” does not cover instances in which the mediated settlement is presented for recognition or enforcement under this Convention.\textsuperscript{142} If the exclusion did cover such situations, mediated settlements could only be presented in one jurisdiction before they could no longer circulate under the Convention, which would be inconsistent with the need for parties to be able to seek relief in as many jurisdictions as may be required to ensure that the obligations are fulfilled. Rather, the exclusion only covers instances in which the parties to the dispute get a court to bless the settlement at a time at which they both still accept the settlement and no relief is needed; granting a request for relief under the Convention does not qualify as “approval.” Additionally, mediated settlements are not excluded from the scope of the Convention merely because they can be recognized as a judgment, as long as they cannot also be enforced as a judgment. Thus, if a limitation period for enforcement has passed in a particular jurisdiction, thus rendering a court-approved mediated settlement no longer enforceable as a judgment in that jurisdiction, that mediated settlement may then come within the scope of the Convention (even if it can still be recognized as a judgment in the state in which it was issued).

b. Awards

Mediated settlements otherwise within the scope of the Convention are also excluded if they have been recorded, and are enforceable, as arbitral awards.\textsuperscript{143} This exclusion was an attempt to avoid creating an overlap with the New York Convention; as with the exclusion of mediated settlements enforceable as judgments, the exclusion is not legally necessary, as both treaties create floors rather than ceilings on states’ obligations to give effect to covered

\begin{footnotes}
\item[137] Singapore Convention Article 1(3)(a).
\item[143] Singapore Convention Article 1(3)(b).
\end{footnotes}
instruments. However, in contrast to the exclusion of mediated settlements enforceable as judgments, the exclusion of mediated settlements enforceable as arbitral awards must be analyzed from the perspective of the state where relief is being sought, rather than from the perspective of the seat of the arbitration (if different); this perspective is necessary as the Working Group desired to avoid not only overlap with the New York Convention but also a gap. As noted above, states may take differing approaches regarding whether a consent award is enforceable under the New York Convention when the settlement is reached before the arbitration is commenced. If a mediated settlement were analyzed from the perspective of the seat of an arbitration in which it was transformed into an arbitral award, it might be excluded from the scope of the Convention based on enforceability in that jurisdiction even if it would not be treated as an enforceable arbitral award in the state where relief under the Convention was sought. Of note, the exclusion applies only if a mediated settlement is both enforceable as arbitral award and also “recorded” as one. Thus, the exclusion would not apply to mediated settlements that are merely treated as being akin to arbitral awards under non-Convention law.

VI. Formality Requirements and Procedures

When a party to a mediated settlement that fits within the scope of the Convention presents the settlement to a court and requests relief, only certain limited formality requirements may be imposed. The Working Group expressed a desire for formality requirements to be brief and not overly prescriptive, but rather the minimum that would permit proper functioning of the Convention.

First, a mediated settlement must be in writing. This basic requirement was deemed to be important in order for courts to have proof regarding the contents of the settlement and in order to focus the attention of the parties on their conclusion of a covered settlement. To qualify as being in writing, the mediated settlement must be recorded, but it can be in any form, including electronic formats in which the information is accessible in a manner that makes it usable for subsequent reference. As such, an exchange of emails would be sufficient (although text in the draft Convention that would have explicitly mentioned email along with

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146 Cf. supra n. 46 (giving examples of jurisdictions that treat some mediated settlements as equivalent to arbitral awards).
148 Singapore Convention Article 1(1).
150 See Singapore Convention Article 2(2). This approach to the requirements for electronic communications draws on Article 9 of the U.N. Convention on the Use of Electronic Communications in International Contracts.
other, more outdated, formats was deleted when the Commission finalized the text of the Convention.)\textsuperscript{151}

Although a mediated settlement must be in writing for the Convention to apply, it does not have to be contained in one document. Such a requirement was proposed,\textsuperscript{152} a number of delegations claimed that if mediated settlements did not have to be contained in one document, competent authorities could have difficulty determining whether a pile of documents really constituted a settlement. In this view, a judge could not easily address a situation in which a party presents forty-five emails in a file and asks for enforcement.\textsuperscript{153} After extensive debate, this proposed restriction was rejected,\textsuperscript{154} as in practice, a mediated settlement may frequently not be contained in (or reduced to) one document; it may be contained in an exchange of emails or may rely on other cross-referenced documents (e.g., separate annexes).\textsuperscript{155} Regarding the burden on competent authorities, it was said that if a judge has to read a set of documents (e.g., the previously-noted forty-five emails) to understand the full context of whether a settlement was concluded, then reading those documents is the judge’s duty.\textsuperscript{156} Still, the burden is on the parties to draft a settlement in ways that will facilitate a judge’s ability to provide them with any necessary relief.\textsuperscript{157}

A mediated settlement must also be signed by the parties,\textsuperscript{158} a requirement that can be met in appropriate situations via signature by their counsel.\textsuperscript{159} For electronic documents, the signature requirement is satisfied if certain functional standards are met, drawing on past

\textsuperscript{156} See, e.g., intervention of IAM, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 20, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.
\textsuperscript{158} Singapore Convention Article 4(1)(a).
UNCITRAL electronic commerce instruments. (Under Article 4(2), a “method” must be used to identify the parties and to indicate their intentions with respect to the information contained in the electronic documents, such as the email coming from the party’s account. The method must be either as reliable as appropriate given the circumstances, or be proven to have actually demonstrated the party’s identity and intentions.) This issue was not seen as likely to be frequently litigated; these standards were included in the Convention to avoid any possible confusion over whether electronic settlements were covered, per UNCITRAL’s view of best practices in drafting instruments.

A party seeking to rely on a mediated settlement must also submit evidence that the settlement resulted from mediation. In this respect, the scope requirement that a settlement be mediated is different from the requirements that a settlement be international, commercial, and not fall within an exclusion, as the party seeking relief is not affirmatively required to provide evidence of those elements. The stated reason for imposing this requirement was to reduce the risk of fraud and to make it easier for competent authorities to ensure that the settlement was indeed mediated. (At the same time, it seems unlikely that this issue will be contested in many cases.) The party seeking relief has several options for the form in which to submit this evidence, an approach that developed as a compromise between states that wanted such evidence to be required only if the party resisting relief contested that the settlement was mediated and those states that wanted one specific form of evidence (i.e., the mediator’s signature on the settlement) to be required in all cases.

The first option for demonstrating that the settlement resulted from mediation is to have the mediator’s signature on the settlement agreement itself. While perhaps the simplest method of satisfying this requirement, it is not seen as appropriate in some legal cultures. In

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160 Singapore Convention Article 4(2).
161 Id. Article 4(1)(b).
166 Singapore Convention Article 4(1)(b)(i).
some jurisdictions, mediators are taught not to sign the settlement, both in order to ensure that
the settlement is seen as the parties’ settlement (not the mediator’s) and to avoid any risk of
being seen as a party to the settlement themselves.\(^{168}\) Moreover, in some jurisdictions, mediators
are not only taught to let the parties draft the agreement but may not even read it, both because
reaching the terms of the settlement is seen as a component of party autonomy and also because
drafting the agreement may be considered the practice of law (whereas some mediators may not
be lawyers, and even those who are lawyers would not want to have to treat the parties as clients,
in terms of the legal and ethical obligations that could then apply).\(^ {169}\) Finally, mediators
generally want to avoid being called as witnesses to testify about what the meaning of the
agreement was supposed to be.\(^ {170}\)

Thus, as an alternative to the mediator’s signature on the settlement, a party seeking relief
can provide a separate document signed by the mediator, indicating that the mediation was
carried out.\(^ {171}\) This separate document can be produced later in time, and does not have to
describe the extent of the dispute or the terms of the settlement, let alone vouch for the fairness
of the settlement or otherwise approve it. It only has to state that the mediation occurred.
Although a proposal was made to require this separate document to take a standardized form,
that idea was not supported.\(^ {172}\)

Alternatively, if the mediation was administered by an institution, the party seeking relief
can provide an attestation from the institution.\(^ {173}\) The inclusion of this option was an attempt to
address situations in which the mediator may no longer be available or willing to sign a separate
document (e.g., if the mediator has died), but its use is not limited to those situations.

Finally, if none of those three default options are available, the party seeking relief can
submit any other evidence acceptable to the competent authority. (Although alternative forms of
evidence are only acceptable if the first three forms are not available, that condition is not likely
to be litigated frequently, as the party resisting relief would have few incentives to demonstrate
that one of the listed forms of evidence would in fact be available.) Alternative forms of

\(^{168}\) See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015),
Sept. 8, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp; interventions of Canada and
CIETAC, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 3, 2016, 15:00-18:00,
http://www.uncitral.org/uncitral/audio/meetings.jsp; intervention of Canada, in Audio Recording: Working Group II,
65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30,

\(^{169}\) See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015),
Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 9:30-12:30,

\(^{170}\) See, e.g., intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015),

\(^{171}\) Singapore Convention Article 4(1)(b)(ii).

\(^{172}\) See, e.g., intervention of Russian Federation, in Audio Recording: Working Group II, 65th Session (United

\(^{173}\) Singapore Convention Article 4(1)(b)(iii).
evidence could include an agreement to mediate paired with documents demonstrating that the mediator was paid (suggesting that the mediation did indeed occur).  

Beyond these limited requirements of writing, signature, and evidence of mediation, no other formality requirements may be imposed by competent authorities: the Convention’s list of required formalities is exhaustive. During the negotiations, other suggestions were made regarding formalities that could be required (such as mandating that the main points of the dispute had to be mentioned in the settlement), but these proposals were not accepted by the Working Group. The Working Group limited the formality requirements for several reasons: reducing the barriers to obtaining relief, avoiding inconsistencies with existing mediation practice, and avoiding the creation of possibilities for unnecessary litigation. Overall, the Working Group strove to ensure that the formality requirements would not interfere with the Convention’s utility and would not undermine the use of mediation.

Thus, a state cannot impose other formality requirements such as mandating the signature of the mediator in all cases (which would contradict flexibility explicitly built into the Convention) or requiring different formalities such as notarization or a demonstration that the mediator was licensed by any particular state (e.g., the mediator’s home state or the state where the request for relief was made). These other types of formalities are not explicitly addressed in the Convention but are precluded, as such requirements would unduly restrict parties from obtaining relief based on settlement agreements within the scope of the Convention. A central purpose of the Convention’s uniform framework is to preempt more burdensome requirements and facilitate circulation of settlements. At the same time, it should be noted that this preemption does not prevent a state from applying unrelated form and process requirements for

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177 See, e.g., intervention of the United States, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.


179 Cf. intervention of the Belgian Center for Arbitration and Mediation (“CEPANI”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (noting that Belgian law requires accreditation of mediators); intervention of the Swiss Arbitration Association (“ASA”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 8, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp (noting that some systems would require village elders to be involved in a mediation). Moreover, a suggestion was made early in the negotiations that foreign mediators may have different training than might be required in domestic frameworks, such that enforcing settlements resulting from their mediations might not be lawful, but the Working Group did not embrace this line of reasoning. See, e.g., intervention of Belarus, in Audio Recording: Working Group II, 62nd Session (United Nations 2015), Feb. 2, 2015, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

real property transfers; a settlement purporting to transfer real property will suffice to require a party to transfer the property by undertaking any formal requirements related to deeds, but the mediated settlement itself does not replace a need to comply with title transfer requirements under domestic law. This limitation only applies in narrow circumstances such as real property transfer or registration of security interests, where the functioning of public registers cannot be undermined by parties trying to circumvent those registries’ requirements via a private settlement.\(^{181}\)

Under Article 4(4), a court can also require the submission of “any necessary document in order to verify that the requirements of the Convention have been complied with.”\(^{182}\) However, this authority cannot be used to circumvent the Convention’s limitation on formality requirements;\(^{183}\) for example, a court cannot require the submission of a copy of the settlement that was contemporaneously notarized or signed by the mediator. Rather, this clause merely applies to documents that may be needed for a court to be assured that the requirements contained elsewhere in the Convention have been met. In this respect, the “requirements of the Convention” cited in this clause are generally the same as the “conditions” referred to in Article 3(2)—i.e., the provisions related to the scope of the Convention, the definitions, the Article 5 grounds for refusal, and any relevant declarations that a state has made.

The “competent authority” before which these issues may arise can be a court or any other authority empowered by the relevant state to address these issues, including an arbitral tribunal seated in that state. The competent authority must act expeditiously on requests for relief.\(^{184}\) No specific timelines are required, but the competent authority is obliged to provide relief on a reasonable timeline. A state would be breaching its obligation under Article 4(5) if its courts act so slowly as to effectively be denying disputing parties the benefits of the Convention.

VII. The Obligations of Parties to the Convention

If a party to a mediated settlement agreement that resolves an international, commercial dispute presents that settlement—in writing, signed by the parties, and accompanied by evidence of mediation—to a court of a Party to the Convention, that court must recognize and enforce the settlement (subject to the Article 5 grounds for refusal, discussed in Section VIII \textit{infra}).

For much of the negotiations, the European Union opposed having the Convention cover “recognition” in addition to enforcement.\(^{185}\) Along with some of its member states, it argued that


\(^{184}\)Singapore Convention Article 4(5).

recognition is only appropriate for acts of a state, such as judgments\(^{186}\) (although this perspective ignored that agreements to arbitrate and arbitral awards can—and must, under the New York Convention—also be recognized),\(^{187}\) and that mediated settlements are mere contracts.\(^{188}\) Similarly, the European Union argued initially that res judicata effect should not apply to mediated settlements,\(^{189}\) and that mediated settlements should not be given preclusive effects.\(^{190}\)

However, other states saw covering recognition as being an important component of a new Convention;\(^{191}\) these states saw recognition of a settlement as being a prerequisite to enforcement,\(^{192}\) and emphasized the need for a Convention to provide for the use of a mediated settlement both as a sword and a shield.\(^{193}\) If a party could only rely on a mediated settlement when affirmatively seeking enforcement but could not rely on it equally as a defense, the party seeking to avoid compliance with a settlement could just initiate litigation itself (e.g., to seek declaratory relief) and thereby preclude application of the Convention and its streamlined framework. Moreover, in some instances, enforcement is not needed, only recognition.\(^{194}\) Finally, as a mediated settlement under the Convention is not identified as being tied to a particular state of origin, recognition would not entail recognizing the settlement as an act of a particular state, but merely recognizing it as an (international) mediated settlement as defined by the Convention.\(^{195}\)

Much of the debate on this topic related to the nature of recognition and what it would entail. Some civil law states also worried that providing for recognition in the Convention would


\(^{187}\) Cf. intervention of France, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (arguing that arbitral awards are an exception but can be recognized because they are closer to judgments than to contracts).


\(^{195}\) See, e.g., intervention of United States, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp; intervention of Iran, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp. (noting that a court would have to decide whether an agreement is a settlement agreement and could recognize it as such).
preclude courts from opening a case and thus prevent them from considering other evidence (beyond the mediated settlement itself) to analyze the availability of defenses available under the Convention.\textsuperscript{196} For example, using the “sword” and “shield” metaphor noted above, one delegation explained that its legal system provided two types of “shields”: one type that would consist of treating a document as evidence helping a court to decide a case, and another type that would prevent a court from admitting a lawsuit entirely.\textsuperscript{197} From that perspective, “recognition” was said to necessarily imply the second type of shield, whereas for purposes of the Convention, a third—intermediate\textsuperscript{198}—type of shield was said to be needed, i.e., a shield that would let a court open a case and consider defenses but that would not reduce a mediated settlement to merely one piece of evidence among others (as opposed to being conclusive proof of a dispute’s resolution, if none of the limited set of defenses apply).\textsuperscript{199}

One suggestion was that the Convention could give mediated settlements the same effect when raised in defense as they are given in enforcement, but only to the extent that national law provides such a defense.\textsuperscript{200} But this limitation was also not accepted, as it would have made the availability of recognition contingent on the choices made in each state’s domestic law.

However, the repeated discussions made clear that “recognition” means different things in different legal systems and entails different consequences.\textsuperscript{201} Thus, the Working Group made the decision to avoid using the term “recognition,”\textsuperscript{202} and instead take a functional approach,\textsuperscript{203} describing the aspects of recognition that are needed here.\textsuperscript{204} The result is that the Convention


\textsuperscript{198} Cf. intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 22, 2016, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (noting the possibility of a middle option between the two alternative procedural approaches described by Denmark)

\textsuperscript{199} See, e.g., intervention of the United States, in Audio Recording: U.N. Comm’n on Int’l Trade L., 50th Session (United Nations 2017), July 7, 2017, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.; interventions of Japan and the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (Japan asked whether the meaning of invoking the settlement agreement was to use it as evidence in litigation, and the United States clarified that the clause provides for more than just introducing the settlement into evidence, and that by meeting the conditions in the Convention, the party seeking relief is thereby able to prove that the dispute was resolved).


\textsuperscript{201} See, e.g., interventions of Germany and Denmark, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{202} Cf. intervention of Canada, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp (noting at the first Working Group session that even if “recognition” isn’t seen as the right word to use, the practical effect of recognition is needed)

\textsuperscript{203} Cf. intervention of Norway, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp (proposing at the first session that the intended effects be described, rather than using a word that has different associations in different legal traditions)

\textsuperscript{204} See, e.g., intervention of Israel, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 8, 2017, 10:00-13:00, http://www.uncitral.org/uncitral/audio/meetings.jsp; intervention of the United States, in
does require recognition, at least as that term is understood in many legal systems (particularly in the common law world).

In developing the functional approach to describing recognition, the Working Group experimented with various formulations. One idea that was discussed but discarded was the suggestion to require that settlements be “treated as binding.” Ultimately, those wanting the Convention to cover recognition were not assured that “binding” would have the same effect as recognition in their systems. Those delegations wanted to ensure that the Convention would provide mediated settlements with a greater effect than simply the binding nature that any other contract would have—i.e., they wanted to ensure that a mediated settlement would have the same effect when used as a defense that it would have when enforcement is sought. An approach using the “binding” terminology did not provide these delegations with sufficient assurance that a mediated settlement would not merely be treated as one piece of evidence that the dispute was resolved but rather definitive proof.

(Note that one downside of the decision not to refer directly to the term “recognition” is that the Working Group then lacked an easy way to refer to the concept elsewhere. The functional definition eventually developed for Article 3(2)—described infra—is too lengthy to be easily replicated elsewhere in the text. Thus, Article 1’s discussion of scope is broad, referring to mediated settlements rather than to the forms of relief covered by the Convention, to avoid suggesting that the scope only covers enforcement and not recognition. Elsewhere in the Convention, such as in Article 5, the word “relief” is used to encompass both enforcement and that-which-is-not-called-“recognition.”)

Ultimately, this issue was resolved as part of the five-issue compromise in February 2017. Article 3 of the Convention covers enforcement of mediated settlements as well as the core of recognition. In Article 3(1), the Convention requires states to enforce mediated settlements, in accordance with their rules of procedure and under the conditions laid down in the Convention (i.e., the procedural requirements in Article 4, the scope and definition requirements in Articles 1 and 2, and the grounds for refusal in Article 5, plus any relevant declarations). This paragraph thus covers the “sword”—the relief sought by a party who attempts to affirmatively compel compliance with a mediated settlement in the face of another party’s breach of its obligations.


under the settlement. The Convention imposes no particular rules on execution; the relevant state’s rules of procedure apply, as the Convention only addresses the phase before execution, namely the determination that the settlement is enforceable and that the party is entitled to legal relief. In this respect, the Convention follows the approach of the New York Convention.

Depending on their legal systems, some states may at present view “enforcement” as a process through which a document is taken directly to an administrative officer (such as a bailiff) who is not supposed to be required to undertake any complex analytical tasks but rather simply follows simple instructions, whereas in other systems, a judge performs a more thorough analysis (and can look at multiple, complex documents in doing so).

The Convention does not require either approach. States are not obligated to provide access to enforcement without providing the other party with an opportunity to present available defenses. This difference in legal systems may also shed further light on the reluctance of some delegations to address “recognition,” which is seen as being more clearly a judicial procedure rather than one merely undertaken by an administrative officer. Article 3(1) would also cover requests for declaratory relief, but states are not obligated to apply the Convention to other types of legal actions that might be available in some systems, such as if domestic law gives a party the ability to request that a court interpret a contract.

Article 3(2) then provides the functional description of “recognition” without using the word. This paragraph applies if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement. In other words, it applies if the parties have successfully mediated a dispute but then one party attempts to relitigate part of the underlying dispute that was resolved via mediation. The paragraph thus provides the “shield” to complement the “sword” in Article 3(1). If the described situation arises, the state shall allow the party to invoke the settlement agreement. This right is not merely an evidentiary rule permitting a party to cite a settlement and introduce it into evidence where it can be considered alongside other evidence. Rather, invoking a settlement means being able to rely on it as a complete defense.

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212 Note that Article 3(2) is one of the pieces of the Convention where “Party” and “party” are both used, although each refers to a different entity; the “Party to the Convention” shall allow “the party” to invoke the settlement agreement. The state or regional economic integration organization that has joined the Convention is the “Party,” and a “party” is one of the disputing parties bound by the settlement agreement itself. While other (potentially less confusing) approaches were considered, such as referring to “Parties” as “Contracting States” as is done in some other private law treaties, the Working Group ultimately chose this approach. See, e.g., intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 6, 2018, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp; intervention of Israel, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 7, 2018, 10:00-13:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

213 Note that prior to the development of the five-issue compromise, the European Union introduced a different version of this text that was less clear in its purpose and effect. That proposal referred to invoking the mere “existence” of the settlement agreement (rather than to invoking the settlement agreement itself). Moreover, it would have limited a state’s obligation to allowing invocation of the settlement agreement in accordance with the “law” of the state rather than only its rules of procedure. See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 6, 2017, 10:00-13:00,
The state can require the invocation to occur in accordance with its rules of procedure, such as if it has to be raised at a particular time in the litigation, via a particular motion, and subject to normal rules governing the conduct of litigation. However, the state’s rules of procedure cannot conflict with, nor result in the denial of, the substantive protections in the Convention. (In this sense, the approach taken is akin to that in Article III of the New York Convention, which also subjects the recognition and enforcement of awards to the state’s rules of procedure.) Article 3(2) also provides that the invocation of the mediated settlement must occur under the conditions laid down in the Convention; in other words, just as for enforcement requests under Article 3(1), the requirements of other articles must be met (i.e., the scope requirements in Article 1, the definitions in Article 2, the procedural requirements in Article 4, the non-applicability of the grounds for refusal in Article 5, and any declarations that may have been made by the relevant state).

The purpose and effect of invoking the mediated settlement is to prove that the matter has already been resolved. Article 3(2) thus provides a definitive result: if the conditions laid down in the Convention are met, in accordance with the state’s rules of procedure, then the “matter” (the underlying dispute that was successfully mediated) is thereby proven to be already resolved—a complete defense to the “dispute” (the ongoing litigation).²¹⁴ Ideally, the text of this paragraph would have been drafted more clearly. Notably, however, the Chair specifically asked the delegations that were involved in the informal consultations on the five-issue compromise to respond to a question about the meaning of “to prove that the dispute has been settled” (a phrasing that was later clarified to “resolved”).²¹⁵ The response (never contradicted, and repeated at the next session) was that, when a party is seeking to invoke a settlement as a defense, “by meeting all of the conditions laid down in the instrument, the party seeking relief is thereby able to prove that the dispute has been settled, which ... is the relief that the party is seeking” (with the “conditions” referring to the defenses, definitions, and formal requirements).²¹⁶

²¹⁴ Working Group II Oct. 2017 report, supra n.28, para. 44. Cf. intervention of Thailand, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 9, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp. Although the eventual text of Article 3(2) drew heavily on the drafting approach suggested by the European Union, the intended effect of the final text is much more robust, as noted below.


²¹⁶ See intervention of the United States, in Audio Recording: Working Group II, 66th Session (United Nations 2017), Feb. 7, 2017, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp; intervention of the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 3, 2017, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp. Similarly, at the UNCITRAL Commission, it was noted that this provision covered “the use of a mediated settlement as a defense to definitively demonstrate that a dispute was already resolved.” At a later stage, delegations debated whether the word “conclusively” should be included in Article 3(2), but it was deemed unnecessary, as the inclusion would not have changed the substantive meaning. See
VIII. Grounds for Refusal

Following the model of the New York Convention, Article 5 includes an exclusive list of grounds on which a court can refuse to recognize or enforce a mediated settlement. The Working Group aimed to keep the available defenses to a minimum, as a complex mechanism with many review grounds would be problematic for parties who want a fast and efficient process. The general sense of the Working Group was that the overall approach should be comparable to the regime applicable to arbitral awards under the New York Convention. Most of the grounds for refusal have to be raised and demonstrated by the party opposing relief. For the remaining grounds (in Article 5(2)), the court can raise concerns sua sponte. Of course, a party resisting relief can also demonstrate that other requirements of the Convention have not been met, such as the dispute not being commercial; no explicit grounds for refusal are needed for those issues, as including such grounds explicitly would merely have duplicated the rest of the Convention.

All of the Article 5 grounds for refusal are permissive rather than mandatory; a court can choose to provide relief even if a particular exception might apply, and if a state implements the Convention through legislation, it has no obligation to permit courts to use all grounds for refusal. At the same time, the listed grounds are exhaustive—a state cannot enable courts to deny relief on additional grounds not permitted in the Convention. The Working Group rejected suggestions for other grounds for refusal. Permitting a court to deny relief based on a lack of “due process” during the mediation was discussed but not included as a ground for refusal, because in mediation the final resolution is agreed to voluntarily, making the process by which it was developed less relevant (and in any event, what “process” would be due during a mediation was unclear).

The grounds for refusal related to mediator conduct during the process,


218 See, e.g., intervention of the Florence International Mediation Chamber (“FIMC”), in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp; see also intervention of Iran, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp. (noting that like a drowning person who will claw to any possible branch, a non-complying party will contest on any ground he can)


discussed in subsection H infra, come closest to addressing those “due process”-type concerns. Additionally, the Working Group considered including a ground for refusal that would have applied in cases where a mediated settlement was inconsistent with a judgment. This proposal gave rise to a fear of forum shopping—i.e., that parties might litigate in various jurisdictions in an attempt to obtain a judgment that could then be used to block relief under the Convention (particularly as, without a “seat” of the mediation, no one forum’s judgments would have a privileged ability to “annul” a mediated settlement).224 With respect to the issue of litigation in other fora, in lieu of a ground for refusal, only the Article VI authority to adjourn a decision based on pending litigation elsewhere was included in the Convention.225

A. Incapacity

Article 5(1)(a) permits a court to refuse a request for relief if a party to the settlement agreement was under some incapacity, such as if the party was a minor or intoxicated. This ground for refusal will not likely be applicable very often, as for most settlement agreements within the scope of the Convention, one or more lawyers would typically be involved for each of the parties.226 The Working Group discussed including language from the analogous provision (Article V(1)(a)) of the New York Convention to point to the law “applicable” to the relevant party, but deemed such a test not to be useful to include, as it did not provide an actual rule for determining the applicable law.227

B. Invalidity

Article 5(1)(b)(i) permits a court to deny relief if the mediated settlement is “null and void, inoperative or incapable of being performed.” This ground for refusal draws on language from Article II(3) of the New York Convention, in which context it applies to the validity of agreements to arbitrate.228 The ground for refusal encompasses various contract law concepts

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such as fraud and misrepresentation,\textsuperscript{229} and is broad enough to cover instances in which the mediated settlement may be considered voidable at the option of the party resisting relief.\textsuperscript{230}

However, this ground for refusal does not encompass arguments that a mediated settlement is not valid because of a failure to comply with domestic law requirements that are displaced by the Convention,\textsuperscript{231} such as any requirements that mediators be licensed in a particular jurisdiction or that mediations must be conducted under certain rules or by certain institutions, or that mediated settlements must be notarized or meet other (extra-Convention) formal requirements.\textsuperscript{232} As noted in Section VI \textit{supra}, this restriction on formalities does not prevent a state from enforcing its requirements regarding notarization of documents that transfer real property.\textsuperscript{233}

The analysis of a mediated settlement’s validity occurs “under the law to which the parties have validly subjected it, or failing any indication thereon, under the law deemed applicable by the competent authority.” Thus, if the disputing parties make a choice of law that is valid under the law of the state where relief is sought, that choice is effective; otherwise, that state’s private international law rules apply to determine the applicable law. This approach reflects the general principle of respecting party autonomy, which applies to choice of law issues even beyond this defense. It was noted early in the Working Group’s discussions that a mediated settlement may be governed by an applicable law chosen by the parties and that, where such a choice is relevant under the Convention, the court should not ignore the chosen law in order to apply the law of the state where relief is sought.\textsuperscript{234} The issue of applicable law is not otherwise addressed in the Convention; no harmonized rules for determining the applicable law were


\textsuperscript{231}See, \textit{e.g.}, Note by the Secretariat, A/CN.9/WG.II/WP.202 (2017), paragraph 43; interventions of the United States, Singapore, and the Chair, in Audio Recording: Working Group II, 64th Session (United Nations 2016), Feb. 4, 2016, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp; interventions of the United States, Finland, and the Chair, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 15, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp..

\textsuperscript{232}Comments by the Government of the United States of America, A/CN.9/WG.II/WP.203 (2017), paragraph 4. Note that the proposed language in paragraph 6 of this U.S. paper was not added to the text of the Convention, as what became Article 4(4) was clarified to state that the competent authority could only require additional documents to demonstrate that the requirements of the Convention have been met, and the Working Group’s prior discussion of the scope of the validity defense remained unchanged. See, \textit{e.g.}, intervention of the United States, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 9:30-12:30, http://www.uncitral.org/uncitral/audio/meetings.jsp.


developed.\footnote{See, e.g., interventions of Canada, Finland, and Israel, in Audio Recording: Working Group II, 63rd Session (United Nations 2015), Sept. 10, 2015, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.} On most issues, the Convention rules apply with an autonomous meaning, not drawn from an applicable law, so choice of law rules are generally not relevant to application of the Convention itself.

C. Not Binding, or Not Final, According to Its Terms

Article 5(1)(b)(ii) permits a refusal to provide relief if the mediated settlement is “not binding, or is not final, according to its terms.” This ground for refusal only applies if, in the mediated settlement itself, the parties explicitly stated that they did not intend for that document to be a binding or final agreement. Thus, this ground for refusal is redundant and could have been omitted, as Article 5(1)(d), discussed in subsection G \textit{infra}, would already permit a court to refuse relief in such situations. Some delegations nevertheless insisted that this ground for refusal be explicitly included as a separate subparagraph.

The “according to its terms” restriction means that a court may only look at what is explicitly stated within the four corners of the mediated settlement to determine whether it is final or binding, thus ruling out extrinsic evidence.\footnote{See, e.g., intervention of Australia, in Audio Recording: Working Group II, 68th Session (United Nations 2018), Feb. 5, 2018, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.} (The phrasing “on its face” was also considered, but was deemed not sufficiently clear for many legal cultures.) This provision would be far broader if the “according to its terms” phrase were not included, as questions might then arise regarding what makes a settlement final or binding if not compliance with the Convention (e.g., whether those standards have an autonomous Convention meaning or refer to an applicable law). As drafted, however, the parties may not use this provision to argue that the settlement should be considered not binding or final based on any reasons other than their explicit statements in the settlement itself.

Earlier in the negotiations, the Working Group considered whether a settlement should have to explicitly provide that it was intended to be binding, but this idea was rejected, as parties generally do not state explicitly that they intend to be bound, but rather indicate by their signatures that they intend to be bound.\footnote{See, e.g., interventions of Canada and Finland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 14, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.} The Convention thus assumes that parties intend to be bound by a signed agreement, but permits parties to rebut that presumption by explicitly stating that they do not intend it to be binding.

This exception also does not cover other types of claims that a mediated settlement is not legally binding, as the Convention itself provides the framework for determining whether a mediated settlement is binding; otherwise-applicable domestic law is displaced. A proposal was made to refer to whether a mediated settlement was final or binding under the law of the state where relief is sought.\footnote{See, e.g., intervention of the European Union, in Audio Recording: Working Group II, 67th Session (United Nations 2017), Oct. 4, 2017, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.} This approach was not followed. The Convention itself determines
whether the settlement is binding (i.e., as long as the scope and definitions requirements are met and no other grounds for refusal apply), and other provisions cover the different situations where finality would be at issue. Article 5(1)(b)(iii), discussed in subsection D infra, separately addresses mediated settlements that are not final because they were superseded, and the signature requirement of Article 4(1)(a) would exclude mediated settlements that are not final because they were never concluded. Similarly, parties cannot claim that a mediated settlement is not final because it only resolves part of a dispute; a mediated settlement that resolves some issues but not others is still covered.

D. Subsequently Modified

Article 5(1)(b)(iii) permits a court to refuse relief if the mediated settlement “sought to be relied upon … has been subsequently modified”—in other words, if a party to the settlement agreement seeks relief based on a version of the settlement that was later superseded. As with the ground for refusal in Article 5(1)(b)(ii), this subparagraph was not really needed, but was included at the insistence of several delegations. The subparagraph does not apply as long as the court is presented with the final settlement agreement including all modifications. The reference in the chapeau of Article 5(b) to the mediated settlement “sought to be relied upon” was included because of this subparagraph, in order to clarify that if a mediated settlement has been modified after it is concluded, the settlement that is submitted to the court must be the settlement as modified. Relief cannot be refused simply because the parties have later had to make modifications to a mediated settlement, as long as the modified settlement agreement is provided to the court, regardless of the extent of the modifications and the time elapsed after the mediation.

E. Obligations Have Been Performed

Article 5(1)(c)(i) provides another limited ground for refusal targeted at a very specific situation. This ground applies only if a party has already satisfied its obligations under the mediated settlement; if it has already complied, then further relief should not be ordered against

241 In an extreme situation, perhaps a party could argue that modifications to a settlement agreement take it outside the scope of the Convention, but only if the situation was so attenuated that it would be virtually tantamount to procedural fraud to claim that the settlement agreement was still the original mediated settlement—e.g., if, twenty years after a mediated settlement, the parties modify it to such an extent that the obligations are completely displaced, and the parties seem to have chosen to modify the settlement agreement rather than enter into a new agreement for tactical reasons such as ensuring, in bad faith, continued application of the Convention.
F.  Obligations are Not Clear or Comprehensible

Article 5(1)(c)(ii) similarly provides a narrow ground for refusal, and one that would only apply in a fairly unlikely situation. Under this provision, a court cannot refuse relief merely because the mediated settlement was poorly drafted or includes terms that are vague. Instead, the clause applies only if the mediated settlement is so confusing or ill-defined that the competent authority could not confidently provide the requested relief even if it found the party entitled to relief. When this concept was originally proposed by Germany,242 other delegations opposed it out of a fear that it would create too broad of an exception,243 but the Working Group agreed to include the concept when it was clarified that such concerns were based on a misunderstanding of the intent behind the German proposal.244 If the competent authority can determine whether the mediated settlement provides for an obligation, and can adequately frame its order providing relief, then this ground for refusal does not apply; the exception is meant only to protect competent authorities from being forced to act in situations in which they truly do not know what relief to provide.

G.  Contrary to the Terms of the Settlement

Article 5(1)(d) permits a court to refuse relief if granting relief would be contrary to the terms of the mediated settlement. This provision applies only to situations in which the requested relief would be directly inconsistent with the parties’ agreement in the mediated settlement. It therefore reflects the fundamental principle of party autonomy—i.e., as mediation is intended to enable parties to identify their own resolution to a dispute, it would be contrary to the purpose of mediation to apply a mediated settlement in a manner inconsistent with what the parties had agreed.245 Thus, for example, if the parties agree to limitations on their ability to seek relief, those limitations must be given effect.246 Choice of forum clauses under which the parties to the mediated settlement can only seek relief in a particular jurisdiction should be given effect, as should clauses in the mediated settlement providing that further disputes will be resolved by


Similarly, the parties might agree in the mediated settlement that they must return to the mediator before seeking relief in court, or that other conditions must be fulfilled before certain obligations even arise (e.g., that one party has to make a payment only if a certain event occurs). In any of these situations, the court can deny relief if granting relief would be inconsistent with the agreement struck by the parties in the mediated settlement. Importantly, the application of this rule provides parties with the ability to opt out of the Convention entirely; if the parties agree in the mediated settlement that they do not want the Convention to apply to the settlement, then it would violate that agreement for a competent authority to apply the Convention in response to a request for relief based on the settlement. In that respect, Article 5(1)(d) is similar to Article 6 of the CISG, which lets parties opt out of the application of that treaty.

H. Mediator Misconduct

In multiple ways, Articles 5(1)(e) and (f) are different from the grounds for refusal described above. Procedurally, these two defenses were included in the Convention as one of the five elements in the compromise package that resolved other significant issues; many delegations sought to exclude such exceptions entirely, and only agreed to narrow versions of the clauses in exchange for other concessions. Substantively, these two clauses relate less to the agreement reached by the disputing parties than to the conduct of the third party who helped them resolve the dispute, and the consequences of such conduct. Some delegations initially sought broader exceptions than are included in the final text, such as permitting a court to refuse relief if the mediator failed to treat the parties fairly, and as the compromise package was being discussed, argued for a need to include two separate exceptions to address two different situations. By contrast, other states had opposed including any exceptions specifically addressing the mediator’s behavior, as they saw such issues as being adequately covered by other grounds for refusal. These states contended that a mediator does not have to be impartial in the same way

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249 Cf. CISG, supra n.109, Article 6 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).
that an arbitrator does;\textsuperscript{253} the parties to a dispute can have good reasons to choose to use a partial mediator, such as someone who already has useful knowledge of the situation\textsuperscript{254} or who might be close to one or both of the parties and therefore able to persuade them.\textsuperscript{255} Similarly, a mediator may treat parties in a manner that might look unequal but might be justified; a mediator may need to spend only a few minutes with one party but an hour with the other, a disparity that would not be proper in arbitration.\textsuperscript{256} Moreover, a party can withdraw from mediation if it believes it is not being treated fairly.\textsuperscript{257} But despite these concerns, the Working Group ultimately agreed to include two narrowly-tailored grounds for refusal on this topic.

Article 5(1)(e) applies only if the party opposing relief can demonstrate a serious breach of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement. This exception only applies to the extent that there are in fact “applicable” standards that governed the mediator or the mediation. Such standards could have applied based on the mediator’s licensing regime or based on the location of the mediation (if the mediation did clearly occur in one place, given the facts at hand), or standards might have applied due to the parties’ agreement with the mediator (or pursuant to the rules of an administering institution). The Working Group cited several examples of potentially applicable standards, which could be imposed by domestic law (such as by enactment of the Model Law on International Commercial Conciliation) or by codes of conduct.\textsuperscript{258} Relevant standards could cover issues such as independence, impartiality, confidentiality, and fair treatment of the parties.\textsuperscript{259} However, to the extent that no such binding standards applied to the mediator or the mediation at the time of the mediation, the competent authority cannot apply standards on a post hoc basis (e.g., the competent authority cannot deny relief based on an argument that the mediator should have followed certain best practices or other jurisdictions’ requirements). Moreover, the alleged misconduct must be a serious breach of those applicable standards—not just questionable conduct or a minor breach.

Additionally, the party resisting relief must clearly demonstrate that if the breach had not occurred, that party would not have entered into the mediated settlement; the party must establish a causal link between the breach and the decision to settle, not just a correlation. Such an effect may not be presumed. This question is intended to be an objective test, not one that can be


\textsuperscript{255} See, e.g., intervention of Switzerland, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.

\textsuperscript{256} See, e.g., intervention of Mexico, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 21, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp.


\textsuperscript{259} Note by the Secretariat, A/CN.9/WG.II/WP.202 (2017), para. 47.
satisfied by a party claiming that subjectively it would not have entered into the settlement.\textsuperscript{260} The Working Group discussed whether to refer explicitly to whether a “reasonable” party would have entered into the mediated settlement given the serious breach of applicable standards.\textsuperscript{261} That term was not put in the text explicitly, as “reasonable” was said not to be a concept that could be easily applied in some legal systems, but the Working Group’s intent was that the test would be applied in the same manner.\textsuperscript{262} To be covered, the mediator’s misconduct must have vitiated the consent of the party seeking to oppose relief.\textsuperscript{263} Thus, this ground for refusal sets up such a high bar that it will only apply in extraordinary circumstances\textsuperscript{264} that would almost inevitably fall within other grounds for refusal (such as coercion by the mediator that would have made the settlement invalid under applicable law). These conditions will likely be difficult to demonstrate in practice, particularly given the relative paucity of evidence of mediator misbehavior that would likely be available compared to the greater level of documentation often available in arbitration.\textsuperscript{265} Establishing such a high bar makes sense, however, in light of the Working Group’s desire to avoid creating a test that would generate additional disputes.\textsuperscript{266}

Article 5(1)(f) addresses a slightly different circumstance in which the mediator’s conduct can provide a ground for refusal. This provision covers a “failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.” This provision was controversial, as in many jurisdictions, mediators generally do not make the types of disclosures that arbitrators make, as the mediator does not have the power to force the parties to reach a result.\textsuperscript{267}


Unlike Article 5(1)(e), this ground for refusal is not restricted to situations in which other sets of standards independently applied to the mediator’s conduct; rather, Article 5(1)(f) creates an autonomous standard that can be relied upon regardless of whether any “applicable” standards required disclosures. However, in other respects, Article 5(1)(f) is similarly narrow in its scope. For this exception to apply, a mediator must have failed to disclose circumstances that raise “justifiable doubts” as to his impartiality or independence (not merely an “appearance” of a conflict of interest). The circumstances must be significant, such as direct compensation from one of the parties that was not disclosed, and not merely information regarding past relationships or other attenuated links. “Justifiable doubts” is intended to establish an objective standard, not affected by whether the party in question subjectively doubts the mediator’s independence and impartiality.\(^{268}\)

If the relevant circumstances were actually known by the party resisting relief, then this ground for refusal does not apply.\(^{269}\) If the party already knew about those circumstances, the mediator’s failure to disclose them explicitly could not have affected that party’s willingness to enter into the settlement.\(^{270}\) Because a mediator does not have the power to impose a settlement on the parties (unlike an arbitrator), the parties can choose someone who has a relationship with one or both of them, as in some situations such a mediator might be best placed to help them come to a settlement (as long as the parties are both aware of the situation).

Additionally, the mediator’s failure to disclose must have had either a material impact or an undue influence on the party resisting relief. Finally, the party resisting relief must show that it would not have settled its dispute but for the misconduct; it must affirmatively demonstrate a causal relationship between the failure to disclose and the decision to settle. Such an effect may not be presumed. The party resisting relief cannot simply identify something that the mediator did not disclose and use that nondisclosure as a reason to get out of a settlement that it now regrets. Rather, as under Article 5(1)(e), this element is intended to establish an objective test, such that the failure to disclose would have led a reasonable person not to consent to the settlement agreement.

I. Public Policy and Subject Matters Not Capable of Settlement by Mediation

Article 5(2) includes two additional grounds for refusal that are contained in a separate subparagraph because the competent authority can raise either of these grounds sua sponte.


These provisions are drawn from analogous grounds for refusal in Article V(2) of the New York Convention and should generally be interpreted in a similar manner.\textsuperscript{271}

Under Article 5(2)(a), the court can refuse relief if granting relief would be contrary to the public policy of that state. As under the New York Convention, “the standard of proof required to establish a public policy exception … is a demanding one,” under which “courts uniformly hold” that its application is “‘exceptional’ and ‘extremely narrow,’ to be applied ‘sparingly’ and with ‘extreme caution,’ and to be interpreted ‘restrictively.’”\textsuperscript{272} In particular, this ground for refusal cannot be used as a means to circumvent other elements of the Convention to which a state has agreed; for example, a court cannot refuse to recognize or enforce a mediated settlement on the grounds that the a state has a public policy requiring mediation to be conducted by a licensed mediator. The Working Group noted that national security grounds could be among the types of public policy concerns that would justify invoking this exception.\textsuperscript{273}

Finally, Article 5(2)(b) permits a court to refuse relief if the “subject matter of the dispute is not capable of settlement by mediation” under the law of the state where relief is sought. For this provision, the relevant dispute is the underlying dispute that was mediated, not the dispute over the relief being requested. This provision would only apply in situations where a party would not have been legally able to agree to undertake certain obligations or give up certain rights via mediation, such as if some disputes are subject to mandatory adjudication processes. As under the New York Convention, this “exception is to be applied sparingly, only when statutory provisions clearly forbid” the mediation of “particular categories of disputes or claims.”\textsuperscript{274} Thus, its application would presumably be quite rare (in particular, less frequent than in the context of arbitration, as states are less likely to restrict the voluntary settlement of disputes than to prevent them from being resolved by arbitration), and in any event would only affect whether a mediated settlement can be relied upon in a certain jurisdiction.

### IX. Declarations

Article 8 permits a state to make two types of declarations affecting its obligation to apply the Convention in certain circumstances.

First, under Article 8(1)(a), a state may declare that it “shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.” By default, the convention does apply to mediated settlements to which states are parties, as long

\textsuperscript{271} Thus, as with the analogous grounds of refusal under the New York Convention, the ultimate burden of proof under Article 5(2) remains with the party resisting relief, notwithstanding that the court can raise this issues on its own. Cf. Gary Born, \textit{INTERNATIONAL COMMERCIAL ARBITRATION} (2d ed. 2014) § 26.05[C][9][c].

\textsuperscript{272} Id.


\textsuperscript{274} Born, \textit{INTERNATIONAL COMMERCIAL ARBITRATION}, at § 26.05[C][10][b].
as the settlement meets other requirements (e.g., it qualifies as commercial). However, the Working Group wanted to give states flexibility on this issue so as not to deter them from becoming Parties. In some situations, only certain agencies or individuals in a government may be authorized to enter into settlements, and a state may want to ensure that it avoids problematic situations in which, if a mediated settlement is signed by a person or agency not authorized under its domestic law, it could then be confronted by a request for relief under the Convention. Alternatively, a state may wish to restrict its obligation to apply the Convention to particular categories of mediated settlements involving state actors. Thus, states can make targeted declarations defining the scope within which they want the Convention to be applied in their courts. Such a declaration would only have a limited reciprocal effect: if a Party exempts a particular set of its own state actors from being subject to the Convention in its courts, other Parties would have no obligation to permit those actors to seek relief under the Convention in their courts. Moreover, this declaration is not meant to enable states to exempt state-owned enterprise from coverage under the Convention.

Second, Article 8(1)(b) permits a state to declare that it “shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.” Generally, the Convention applies as default law, except to the extent that parties to a mediated settlement affirmatively opt out from having the Convention apply, in which case Article 5(1)(d) would permit a court to refuse a request for relief. However, Article 8(1)(b) permits states to choose to apply the Convention on an “opt-in” basis, such that the Convention will only apply to a mediated settlement if the parties to the dispute affirmatively choose to have it apply. As noted above, this outcome—application of the Convention as the default approach, while giving states the option to apply the opposite rule by requiring disputing parties to opt in to the Convention’s application—was part of the five-issue compromise.

This issue was debated a number of times in the Working Group. At first, the majority of delegations supported an approach in which the disputing parties would have to opt in to the application of the Convention, although the debate later shifted to an even split in the room. Some delegations argued that the desire for a mediated settlement to be enforceable could not be

assumed across cultures. An opt-in approach was also supported by some of those who wanted greater formality requirements in the Convention, on the basis that the competent authority should be able to see from the face of the mediated settlement—based on an explicit opt-in—that the obligations were intended to be subject to the Convention. By contrast, others contended that when parties enter into a settlement agreement, the presumption is that they intend to comply with it, and that parties should not have to make further statements to clarify that they want the settlement to have legal effect. Thus, for situations in which the parties to a settlement do not explicitly address whether the Convention should apply, the assumption should not be that they did not want their obligations to be enforceable. Similarly, some delegations pointed out that the opt-out approach would result in a broader application of the Convention, which would serve to promote mediation, and that, as arbitration does not have an opt-in requirement for awards to be enforceable, imposing such a requirement in this Convention would make mediation less attractive by comparison.

Based on the five-issue compromise, the Convention will apply to all mediated settlements in which the parties do not opt out, but states that make the Article 8(1)(b) declaration only have to apply the Convention when the disputing parties agree to its application. In seeking relief in such a state, a party to a mediated settlement would not have to demonstrate that any specific formulation was used to opt in to the Convention. A court in such a state cannot require any particular “magic words” to have been used; although the parties to the mediated settlement could explicitly cite the Singapore Convention, they could also simply include a choice of law clause that points to the law of a jurisdiction where the Convention applies by default. Similarly, the disputing parties would not have to opt in via the mediated settlement itself; they could also opt in at an earlier stage of the process as well, such as in an agreement to mediate.

Hopefully, few states will make such a declaration, as doing so would significantly limit the application of the Convention, given that most parties likely will not be aware of the need to

opt in and thus will unintentionally fail to do so.\textsuperscript{288} Moreover, the opt-in approach is inconsistent with the principle that parties should comply with their agreements. Particularly given the exclusion of consumers and family and employment law, states should not need to limit access to the Convention’s more efficient framework. At the same time, if including this declaration option enables additional states to become Parties to the Convention, it may be a useful addition.

An Article 8(1)(b) declaration would not have reciprocal effects, nor would it in any way affect the treatment of mediated settlements in other jurisdictions. The declaration only affects the court where relief is sought; other courts presented with mediated settlements under the Convention would never encounter a need to evaluate whether those settlements are attributable to a state making such a declaration (as mediated settlements are not tied to any particular state, and factors such as the habitual residence of the party seeking relief are only relevant for satisfying the internationality requirement).\textsuperscript{289}

\section*{X. \textbf{REIOs and Territorial Units}}

Two other provisions of the Convention merit brief discussion. First, under Article 12(4), the Convention gives way to the internal rules applied by regional economic integration organizations (REIOs) such as the European Union, but only in limited situations. First, under Article 12(4)(a), any contrary REIO rules could prevail if relief is sought in a member state of a REIO and all states relevant under Article 1(1) are member states of the REIO (such that none of the factors qualifying the mediated settlement as “international” are tied to a state outside the REIO). If any non-REIO state is relevant in determining whether the mediated settlement is “international,” then Article 12(4)(a) does not apply. In other words, if the European Union and all of its member states join the Convention, and a mediated settlement between two E.U.-based companies is considered by an E.U. member state court, the Convention would still apply (notwithstanding any contrary rules in an E.U. regulation) if a substantial part of the obligations under the settlement were to be performed in a non-E.U. member state. Article 12(4)(b) then provides a separate test under which REIO rules can still prevail (even if the Article 12(4)(a) test is not met) if the application of the Convention would conflict with the REIO’s internal rules about recognition and enforcement of judgments between member states. In other words, if relief under the Convention is sought in one REIO member state, and that state issues a judgment (either granting or denying relief), other REIO member states might be obliged to recognize that


\textsuperscript{289} See, \textit{e.g.}, intervention of Israel, in Audio Recording: Working Group II, 65th Session (United Nations 2016), Sept. 16, 2016, 14:00-17:00, http://www.uncitral.org/uncitral/audio/meetings.jsp. In theory, a race to the bottom would be possible, with states making the declaration to protect those habitually resident in their territory (\textit{i.e.}, entities that would likely have assets in the jurisdiction and against whom relief would more likely be sought in the state’s courts). However, such a scenario seems implausible, as any state joining the Convention would be doing so to promote the use of mediation, not to provide a particular advantage to its nationals. (Given the lack of a reciprocity requirement or any state of origin for settlements, a state seeking an asymmetric advantage for its nationals would simply not join the Convention at all, as its nationals could still use the Convention in other jurisdictions. But such free riding would only be feasible once the Convention has many Parties.)
judgment, rather than applying the Convention de novo.\textsuperscript{290} A party seeking relief must therefore choose carefully as among REIO member states in which to seek relief, as that party may not be able to seek relief in another REIO member state if relief is denied in the first member state.\textsuperscript{291} However, the party could still seek relief under the Convention in other states outside the REIO without losing the protections of the Convention, even if the REIO member state judgment denies relief.

Finally, Article 13(1) permits a state that has two or more territorial units in which different systems of law apply to declare that the Convention is to extend to all of the territorial units or only to one or more of them.\textsuperscript{292} However, even if such a state chooses not to apply the Convention to all of its territorial units, a mediated settlement involving a party from an excluded territorial unit will still be covered by the Convention as long as the settlement qualifies as international. Exclusion of a territorial unit merely means that the courts in that territorial unit do not have to apply the Convention when relief is requested, not that the Convention does not apply to parties whose place of business is in that territorial unit.

XI. Conclusion

The development of such a groundbreaking treaty in such a short period of time seemed quite unlikely at the outset of UNCITRAL’s consideration of this topic. Yet in several years of work, UNCITRAL has produced a new Convention that, in the decades to come, could alter the landscape of international dispute resolution in a manner previously accomplished only by the New York Convention.\textsuperscript{293} The Singapore Convention has great potential to bolster the use of mediation as a method for resolving cross-border commercial disputes. Whether the Convention will live up to this promise will depend on whether a critical mass of states choose to join the Convention, which in turn will depend on whether lawyers (particularly in-house counsel),


\textsuperscript{292} Note that Article 13(3)(b) is a clause without any actual effect. That provision states that, for Parties with two or more territorial units in which different systems of law apply, references to a place of business in state shall be construed as referring to the place of business in the relevant territorial unit. Although this formulation is fairly standard for this type of treaty, it accomplishes nothing in this Convention, as a party’s place of business is only relevant for determining whether a mediated settlement is international. Whether the party’s place of business is deemed to be in a particular territorial unit rather than in the state itself makes no difference for this analysis.

\textsuperscript{293} UNCITRAL’s success in this regard can be attributed not only to the wise leadership of the Chair and to the dedication of the Secretariat (in particular, Corinne Montineri and Jae Sung Lee), but to the hard work and collegiality of the delegates at the center of the discussions. Not only did many of them work through a blizzard to preserve the momentum of the negotiations, supra notes 35-36, but much of the progress was made during informal discussions outside of the conference room. See, e.g., intervention of IAM, 6 February 2017 (reporting a group outing to a hockey game). The finalization of the text was even celebrated via song, ably led by the new Secretary of UNCITRAL, Anna Joubin-Bret. See intervention of the Secretariat, in Audio Recording: U.N. Comm’n on Int’l Trade L., 51st Session (United Nations 2018), June 25, 2018, 15:00-18:00, http://www.uncitral.org/uncitral/audio/meetings.jsp (leading the Commission in singing—to the tune of “Home on the Range”—a song celebrating that “the Singapore Convention is live”).

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mediators, and other stakeholders make clear that the potential benefits of the Convention make the pursuit of ratification worthwhile.
Annex I

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that:

   (a) At least two parties to the settlement agreement have their places of business in different States; or

   (b) The State in which the parties to the settlement agreement have their places of business is different from either:

   (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

   (ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

   (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

   (b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

   (a) Settlement agreements:

   (i) That have been approved by a court or concluded in the course of proceedings before a court; and

   (ii) That are enforceable as a judgment in the State of that court;

   (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.
Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

   (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

   (b) If a party does not have a place of business, reference is to be made to the party’s habitual residence.

2. A settlement agreement is “in writing” if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. “Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

   (a) The settlement agreement signed by the parties;

   (b) Evidence that the settlement agreement resulted from mediation, such as:

      (i) The mediator’s signature on the settlement agreement;

      (ii) A document signed by the mediator indicating that the mediation was carried out;

      (iii) An attestation by the institution that administered the mediation; or

      (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

   (a) A method is used to identify the parties or the mediator and to indicate the parties’ or mediator’s intention in respect of the information contained in the electronic communication; and

   (b) The method used is either:

      (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

      (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.
3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

**Article 5. Grounds for refusing to grant relief**

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

   (a) A party to the settlement agreement was under some incapacity;

   (b) The settlement agreement sought to be relied upon:

      (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

      (ii) Is not binding, or is not final, according to its terms; or

      (iii) Has been subsequently modified;

   (c) The obligations in the settlement agreement:

      (i) Have been performed; or

      (ii) Are not clear or comprehensible;

   (d) Granting relief would be contrary to the terms of the settlement agreement;

   (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

   (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator’s impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

   (a) Granting relief would be contrary to the public policy of that Party; or

   (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

**Article 6. Parallel applications or claims**

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

**Article 7. Other laws or treaties**

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by
the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

**Article 8. Reservations**

1. A Party to the Convention may declare that:
   
   (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
   
   (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

**Article 9. Effect on settlement agreements**

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

**Article 10. Depositary**

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

**Article 11. Signature, ratification, acceptance, approval, accession**

1. This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

**Article 12. Participation by regional economic integration organizations**

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over
matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

   (a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

   (b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

   (c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.
Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE at ---- this [X] day of [X] -----, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.
ORDER

I. Background

The petitioners, Transocean Offshore Gulf of Guinea VII Limited and Indigo Drilling Limited, moved to enforce arbitral awards and for entry of final judgment under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Docket Entry No. 24). The respondent, Erin Energy Corporation, objected and moved to dismiss for lack of subject-matter jurisdiction. (Docket Entry No. 29). The question is whether an arbitral award entered by the parties' consent is subject to the Convention.

Based on careful review of the petition, the motion to confirm the arbitral awards and to enter final judgment, the motion to dismiss, the briefs, the record, and the applicable law, the court grants the petitioners' motion, (Docket Entry No. 24), and dismisses the respondent's motion to dismiss, (Docket Entry No. 29). The reasons for these rulings are explained below.

II. Facts

The parties participated in the arbitration proceeding in Transocean Offshore Gulf of Guinea VII Limited v. Erin Energy Corporation (f/k/a CAMAC Energy Inc.), Arbitration No. 163241, before the London Court of International Arbitration. (Docket Entry No. 24 at 1). The arbitration arose from a dispute over a contract for drilling equipment, personnel, and services in the waters off the coast of Nigeria. (Docket Entry No. 25-1 at 5). Before the arbitration hearing and findings, the parties consented to the entry of an arbitral award by the tribunal. (Docket Entry No. 24 at 4); (Docket Entry No. 25-1 at 6-7); (Docket Entry No. 28 at 1).

The tribunal issued two awards: a first partial final award by consent, (Docket Entry No. 24 at 4); (Docket Entry No. 25-1 at 6-7); (Docket Entry No. 28 at 1).

The partial final award on legal costs is not challenged. (Docket Entry No. 29).
underlying dispute and the parties' subsequent agreement, the consent award stated: "WE DECLARE AS FOLLOWS," followed by six declarations about the amounts the respondent owed the petitioners. (Docket Entry No. 25-1 at 7). The consent award then stated: "WE ORDER [*3] AND DIRECT AS FOLLOWS," followed by the associated terms and conditions. *Id.* at 7-9. The award is attached to this Memorandum and Opinion as Attachment 1.

III. The Parties' Contentions

The petitioners, Transocean and Indigo, argue that the respondent, Erin Energy, has not paid the amounts it owes under the consent award and the legal-costs award. (Docket Entry No. 24 at 7). They petition for confirmation of the awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified in the [*Federal Arbitration Act, 9 U.S.C. §§ 201-08.* Id.* Transocean and Indigo argue that their action is timely, that the award is sufficiently definite, and that there are no grounds for vacatur. *Id.* at 7, 10-14.

They argue that the court has subject-matter jurisdiction over this action because the consent award is subject to the Convention, *id.* at 8, and that "[t]he argument that an award is not enforceable under the New York Convention simply because the award is consensual ignores the fact that the entire arbitration process is founded on the consent of the parties . . . ." *Id.* at 9; [*First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)* ("[A]rbitration . . . is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."). Lastly, [*4*] Transocean and Indigo argue that the tribunal made the consent award under its authority to resolve the parties' dispute. (Docket Entry No. 24 at 10).

Erin Energy argues in response that subject-matter jurisdiction is lacking because the consent award is not subject to the Convention. (Docket Entry No. 28 at 2-5). Erin Energy cites the 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention, which states: "The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue." *Id.* at 2. According to Erin Energy, the Convention's silence meant that it was not intended to apply to consent awards. *Id.* at 2-3.

Erin Energy argues that a consent award is fundamentally different from other arbitral awards because an arbitral award represents the tribunal's conclusions, not the parties' agreement. *Id.* at 3. Erin Energy points to the London Court of International Arbitration's rules as evidence that consent awards are treated differently from other arbitral [*5*] awards. *Id.* Rule 26.2 states: "The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based." Rule 26.9 states:

In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing . . . , provided always that such Consent Award shall contain an express statement on its face that it is an award made at the parties' joint request and with their consent. A Consent Award need not contain reasons. If the parties do not jointly request a Consent Award, on written confirmation by the parties to the LCIA Court that a final settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceeding concluded by the LCIA Court . . . .

*Id.* Erin Energy argues that Rule 26.2 requires every "award" to include written reasons, and that consent awards are not "awards" because Rule 26.9 exempts them from the written-reason requirement. *Id.* at 3-4.
IV. The Legal Standards

A. The Convention Requirements for Arbitral Award Confirmation

In 1970, Congress enacted enabling legislation for the New York Convention on the [*6] Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974) (citation omitted). The Convention grants district courts subject-matter jurisdiction over actions to confirm arbitral awards to which the Convention applies. See 9 U.S.C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States . . . shall have original jurisdiction over such an action or proceeding . . ."). 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration."); see also Vaden v. Discover Bank, 556 U.S. 49, 129 S. Ct. 1262, 1272 n. 9, 173 L. Ed. 2d 206 (2009) ("[T]he Convention Act] does expressly grant federal courts jurisdiction to hear actions seeking [*7] to enforce an agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards."); Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 283 F.3d 208, 212 (4th Cir. 2002) ("[T]he Convention and its implementing legislation . . . give federal district courts original jurisdiction over actions to compel or confirm foreign arbitration awards."); Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc., 13 F.3d 196, 198 (7th Cir. 1993) (stating that "§ 203 of the Convention's enabling statute . . . along with § 207, vests district courts with the authority to confirm foreign arbitral awards"). The Convention applies to arbitral awards "arising out of a legal relationship, whether contractual or not, which is considered as commercial." 9 U.S.C. § 202.

Under the Convention, if a party applies for a court order confirming an arbitral award, the court—assuming jurisdiction—must confirm the award unless there are grounds for vacating, modifying, or correcting it. 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds [*8] for refusal or deferral of recognition or enforcement of the award specified in the said Convention."). The confirmation of an arbitral award is a summary proceeding that converts a final award into a court judgment. Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 89 n.2 (2d Cir. 2005); Yusef Ahmed Algahanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997); Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 582 (8th Cir. 1998); Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851, 854 (11th Cir. 1989); Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986).

Judicial review of an arbitral award is "extraordinarily narrow" and "exceedingly deferential." Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 393 (5th Cir. 2003); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 248 (5th Cir.1993); Psarianos v. Standard Marine, Ltd., 790 F.Supp. 134, 135 (E.D.Tex.1992), aff'd, 12 F.3d 461 (5th Cir.), cert. denied, 511 U.S. 1142, 114 S. Ct. 2164, 128 L. Ed. 2d 887 (1994). The grounds for vacatur or modification are limited to: incapacity or legal
invalidity, improper notice or inability to present case, improper scope, improper arbitral authority composition or failure to follow arbitral procedure, award set aside or suspended or not yet binding, incapable of settlement by arbitration, and recognition or enforcement would be contrary to public policy. The party opposing enforcement or moving to vacate has the burden of proof. *Encyclopaedia Universalis*, 403 F.3d at 90; *Lummus Glob. Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F. Supp. 2d 594, 604 (S.D. Tex. 2002) (citing *Spector v. Torenberg*, 852 F.Supp. 201, 206 (S.D.N.Y.1994)).

### B. The Standards for a Motion to Dismiss for Lack of Subject-Matter Jurisdiction

*Federal Rule of Civil Procedure 12(b)(1)* governs challenges to a court's subject-matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Bloom v. Mem'l Hermann Hosp. Sys.*, 653 F. App'x 804, 805 (5th Cir. 2016). "Lack of subject-matter jurisdiction [*9] may be found in the complaint alone, the complaint supplemented by the undisputed facts as evidenced in the record, or the complaint supplemented by the undisputed facts plus the court's resolution of the disputed facts." *Gonzalez v. United States*, 851 F.3d 538, 543 (5th Cir. 2017).

The burden of proof for a *Rule 12(b)(1)* motion to dismiss is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Id.* When examining a factual challenge to subject-matter jurisdiction under *Rule 12(b)(1)*, which does not implicate the merits of plaintiff's cause of action, the district court has substantial authority "to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 223 (5th Cir. 2012). The court has wide discretion to allow affidavits or other documents and to hold a limited evidentiary hearing to resolve disputed jurisdictional facts. See *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015). The court may consider matters outside the pleadings to resolve factual challenges to subject-matter jurisdiction without converting the motion to dismiss to one for summary judgment. See *Battaglia v. United States*, 495 F. App'x 440, 441 (5th Cir. 2012).

### V. Analysis

#### A. The Motion to Dismiss

Erin Energy's only argument against confirming the arbitral award is that it is a "consent award" and therefore not subject [*10] to the Convention. Erin Energy concludes that the petition must be dismissed because the court lacks subject-matter jurisdiction. (Docket Entry No. 28). In lieu of citing case law, Erin Energy cites the 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention, which states that neither the Convention nor reported case law specifically address consent awards. *Id.* at 2. That is no longer the case.

In 2017, in a case with analogous facts and legal issues, the Southern District of New York held that an award "entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes," covered by and subject to the Convention. *Albtelecom SH.A v. UNIFI Commc'n, Inc.*, 2017 U.S. Dist. LEXIS 82154, 2017 WL 2364365, at *5 (S.D.N.Y. May 30, 2017). The petitioner in *Albtelecom* sought confirmation of an arbitral award decided by an arbitrator of the International Chamber of Commerce's International Court of Arbitration. The award was based on the parties' consent. 2017 U.S. Dist. LEXIS 82154, [WL] at *1. The respondent's "sole argument" against confirmation was that the award was made by the parties' consent, which the respondent asserted showed that the parties had

First, though the parties could have dismissed the arbitration to pursue a private settlement agreement, they instead "affirmatively asked [the arbitrator] to adopt as part of an . . . arbitral Award, in haec verba, the terms of their settlement agreement in the Award." Id. Second, the respondent cited no case law to support treating a consent award as outside the Convention, or entitled to less preclusiveness or enforceability, than an award entered through an adjudicative proceeding by the tribunal, even if the parties do not agree with the outcome. Id. As the court explained:

There is no reason for such an exception. On the contrary, the opposite rule would discourage resolution of disputes in mid-arbitration. Parties who initiate arbitration under the [arbitral court] might be less willing to settle, were the implication of a settlement that the resulting Award would lose its enforceability under the New York Convention. There is indeed limited law on this point, presumably because Awards achieved following the parties' consent are less likely to result in later disputes. But the limited available precedents reflect recognition and enforcement of Awards entered into based on stipulations [*12] by the parties.

Id.

The analysis in Albtelecom is thorough and persuasive. This court reaches a similar result. The parties in this case did not dismiss the arbitration. Rather, they opted to continue the arbitration proceedings even after they came to their own agreement. While the tribunal did not make findings or reach legal conclusions, it made an award that bound the parties, within its power. (Docket Entry No. 25-1 at 7-9). No binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention. As the Albtelecom court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide.

Erin Energy cites the London Court of International Arbitration rules, but they hurt, not help, its argument. Rule 26.2 states that "any award" made by the tribunal must be in writing "and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based." (Docket Entry No. 28 at 3 (emphasis added)). Rule 26.9 states that a consent award "need not contain [*13] reasons." Id. Erin Energy argues that an "award" cannot be a consent award because Rule 26.2 requires any award to contain reasons and Rule 26.9 permits consent awards without reasons. But Erin Energy ignores the punctuation in Rule 26.2 and the text of Rule 26.9. "[U]nless all parties agree in writing otherwise" in Rule 26.2 refers to consent awards, confirmed by the procedure in Rule 29.2. "In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing . . . ." Id. (emphasis added). Rule 26.2, in other words, states that all awards, except for consent awards, must state the reasons the award is based on. The rules make no distinction between consent awards and other arbitral awards.

Because the consent award made by the London Court of International Arbitration is subject to the Convention, this court has subject-matter jurisdiction under 9 U.S.C. § 203 to confirm the arbitral awards in this case.

B. Confirmation of the Arbitral Awards

Because the petitioners brought this action within three years after the arbitral awards were made, the first partial final award by consent and the partial final award on legal costs must be confirmed unless [*14] there are grounds to refuse or defer
recognition or enforcement. 9 U.S.C. § 207; (Docket Entry No. 25-1 at 10 (consent award made on July 19, 2017); (Docket Entry No. 26-1 at 7 (legal costs award made on October 24, 2017)). The Convention lists seven grounds for refusing to enforce an arbitral award. Convention, art. V; Tricon Energy, Ltd. v. Vinmar Int'l, Ltd., No. 4:10-CV-05260, 2011 U.S. Dist. LEXIS 108491, 2011 WL 4424802, at *12 (S.D. Tex. Sept. 21, 2011), aff'd, 718 F.3d 448 (5th Cir. 2013) (citing Admart AG v. Stephen and Mary Birch Found., Inc., 457 F.3d 302, 307-08 (3d Cir. 2006) (listing the seven grounds)). "The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies." Encyclopaedia Universalis, 403 F.3d at 90; Convention, art. V ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that [one of the defenses applies]."); Lummus, 256 F. Supp. 2d at 604 (S.D. Tex. 2002).

Erin Energy does not argue that the awards should not be confirmed on any ground but lack of subject-matter jurisdiction. Based on a "narrow" and "deferential" review of the arbitral awards, the court finds that the awards must be confirmed. Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 393 (5th Cir. 2003); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 248 (5th Cir.1993); Psarianos v. Standard Marine, Ltd., 790 F.Supp. 134, 135 (E.D.Tex.1992), aff'd, 12 F.3d 461 (5th Cir.), cert. denied, 511 U.S. 1142, 114 S. Ct. 2164, 128 L. Ed. 2d 887 (1994). There is no basis to vacate or modify either of the awards. The awards reflect [*15] that both parties fully participated in the arbitration proceedings.

**VI. Conclusion**

Transocean's and Indigo's motion to enforce the arbitral awards and for entry of final judgment under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (Docket Entry No. 24), is granted. Erin Energy's motion to dismiss for lack of subject-matter jurisdiction, (Docket Entry No. 29), is denied. The first partial final award by consent, (Docket Entry No. 25-1), and the partial final award on legal costs, (Docket Entry No. 26-1), are confirmed as this court's judgment.

SIGNED on March 12, 2018, at Houston, Texas.

/s/ Lee H. Rosenthal

Lee H. Rosenthal
Chief United States District Judge

**FIRST PARTIAL FINAL AWARD BY CONSENT (THE "CONSENT AWARD")**

**WHEREAS**

(A) On 27 November 2014 the Claimants and Second Respondent entered into Drilling Contract No: CPL/WELLS/14/099/1 (the "Contract").

(B) By a parent company guarantee dated 25 November 2014 (the "Parent Company Guarantee"), all of the Second Respondent's obligations to the Claimants were unconditionally and irrevocably guaranteed by the First Respondent, which is the Second Respondent's parent company.

(C) The Contract provided for [*16] the Claimants to furnish the drilling unit, the Sedco Express, associated equipment and personnel and to provide drilling services in waters offshore Nigeria (the "Contract Services").

(D) The parties extended the contract term by way of a number of amendments. The sixth and final amendment extended the term to 19 June 2015.

(E) The Contract was completed on this date to the satisfaction of the Second Respondent.

(F) Between December 2014 and June 2015,
the Claimants issued invoices (the "Invoices") under the Contract totalling US$55,342,523.72 and NGN106,133,523.80. The net sums due to the Claimants under the Invoices were US$49,671,000.04 and NGN105,712,000.39.

(G) Between December 2014 and August 2015, the Second Respondent paid the Claimants US$35,640,027.22 against the Invoices.

(H) Pursuant to Clause 7.3 of the Contract, the Second Respondent, as required by Nigerian law, withheld taxes and levies totalling US$4,127,339.15 (the "Taxes") from the payments made to the Claimants referred to at Recital G above.

(I) The Taxes comprised withholding tax of US$1,876,063.25, VAT of US$1,876,063.25 and NCD Levy of US$375,212.65.

(J) Clause 7.1 (b) of the Contract required the Second Respondent to pay all taxes [*17] for which it is liable by reason of the performance of the Contract Services by the Claimants:

(K) The Second Respondent is required by Nigerian law to pay withholding tax and VAT to the Federal Inland Revenue Service ("FIRS") and NCD Levy to the National Content Development Monitoring Board ("NCDMB"). These authorities are hereinafter referred to as the "Authorities".

(L) The Second Respondent has not paid the Taxes to the Authorities.

(M) Clause 18.2 of the Contract provided for arbitration under the LCIA Rules.

(N) The Claimants' Request for Arbitration was submitted to the LCIA on 22 January 2016.

(O) By a letter dated 9 March 2016 the parties were notified by the LCIA that, pursuant to Article 5 of the LCIA Rules, the LCIA Court had appointed Sir David Steel, Derrick Dale QC and Sir Richard Aikens to be the Tribunal in the said Arbitration, with Sir Richard Aikens presiding.

(P) The parties served their pleadings on 6 April 2016, 4 October 2016, 1 November 2016 and 5 December 2016.


(R) Witness statements were exchanged on 26 April 2017. The Claimants served reply witness statements [*18] on 10 May 2017.

(S) The parties exchanged skeleton arguments on 1 June 2017.

(T) In their skeleton argument, the Respondents confirmed that liability under the Contract was not in issue, and the matters for resolution were limited to quantum and interest.

(U) The Respondents also agreed that the sums of US$14,028,560.67 and NGN11,799,762.94 were due under the Invoices.

(V) The Respondents also accepted the validity of the Parent Company Guarantee.

BY CONSENT OF THE PARTIES

NOW, WE, Sir DAVID STEEL, DERRICK DALE QC and SIR RICHARD AIKENs, "THE TRIBUNAL", HEREBY SETS OUT ITS FIRST PARTIAL DISPOSITIVE AWARD:

WE DECLARE AS FOLLOWS:

1. The Respondents are liable to pay the Claimants further US$14,028,560.67 and NGN11,799,762.94 under the Invoices.

2. The Claimants have withdrawn their claim for any further sums claimed under the Invoices, save for an indemnity in respect of the Taxes and the sums at paragraph 3 as more fully set out below.

3. Withholding tax of US$701,902.41 and NGN23,399.63; VAT of US$701,902.41 and NGN23,399.63, and NCD Levy of US$140,380.48 and NGN4,679,931 are all payable to the Authorities on the sums referred to at paragraph 1 above.

4. The total amount of withholding tax
payable [*19] by the Second Respondent to the FIRS (taking account of the sums set out in Recital I and those set out in paragraph 3 above) is therefore US$2,577,965.66 and NGN23,399.63.

5. The total amount of VAT payable by the Second Respondent to the FIRS (taking into account the sums set out in Recital I and paragraph 3 above) is therefore US$2,577,965.66 and NGN23,399.63.

6. The total amount of NCD Levy payable by the Second Respondent to the NCDMB (taking into account the sums set out in Recital I and paragraph 3 above) is therefore US$515,593.13 and NGN4,679.93.

WE ORDER AND DIRECT AS FOLLOWS:

7. The Respondents shall pay the Claimants US$14,028,560.67 and NGN11,799,762.94 forthwith.

8. Upon the issuance of this Consent Award, the Respondents shall within 7 days send the Claimants the letters set out at Appendixes 1 and 2 hereto.

9. The Respondents shall pay the sums referred to at paragraphs 4, 5 and 6 above when due to the Authorities (or in accordance with any payment terms agreed between the Second Respondent and the Authorities) and provide the Claimants with the proof set out in Clause 7.3 of the Contract that they have done so.

10. If the Respondents do not pay any of the sums referred to [*20] at paragraphs 4, 5 and 6 above to the Authorities when due and the Authorities issue any request, demand or notice ("Demand") requiring the Claimants to pay such sums, including any interest, fines or penalties thereon, then within 30 days of the Claimants, at their election, sending (i) an email to the then current Managing Director of the Second Respondent and/or the then current Chief Financial Officer of the First Respondent or (ii) a letter by recorded delivery to the Registered Office of the First Respondent notifying them of such Demand the Respondents shall either:

   (i) pay any sums referred to at paragraphs 4, 5 and 6 above which remain unpaid and any interest, fines or penalties thereon to the Authorities and provide the Claimants with the proof set out in Clause 7.3 of the Contract that they have done so; or
   (ii) pay any outstanding sums referred to at paragraphs 4, 5 and 6 above which remain unpaid and any interest, fines or penalties thereon to the Claimants, who shall immediately pay the sums received from the Respondents to the Authorities.

11. In the event that the Respondents fail, within 30 days of any notification by the Claimants in accordance with paragraph 10, to [*21] pay any of the sums referred to at paragraphs 4, 5 and 6 above pursuant to paragraphs 10(I) or (ii) above:

   a. the Respondents shall be liable to indemnify the Claimants in respect of any such sums contained in any Demand and payable by the Claimants to the Authorities including, if necessary, any sums payable by way of past and continuing interest contained in such Demand;
   b. the Claimants shall be entitled, immediately and within a period of 6 (six) months thereafter, to request that the Tribunal shall immediately and without further submissions make a further award or awards in favour of to the Claimants in which the Claimants shall be awarded such further sums as are necessary to provide such indemnity; and such further award or awards shall stipulate that the sum (or sums) awarded shall be payable forthwith by the Respondents to the Claimants;
   c. the right to such further award or awards shall be established by the Claimants presenting to the Tribunal an original or certified copy of the Demand or Demands from the Authorities. The quantum of such further award or awards shall be the sum contained in the Demand or Demands; and
d. upon the Tribunal issuing such further award or awards [*22] and upon receipt of the same money from the Respondents of all such sums as are awarded, the Claimants shall pay it the sums contained in the Demand to the Authorities.

12. The Respondents shall pay simple interest at a rate of 5% per annum on the sums awarded under paragraph 1 above from 21 August 2015 until payment. The accrued interest as of 6 June 2017 is U.S. $1,260,648.74 and NGN1,060,362.26.

13. The Respondents are to bear the Claimants' legal costs ("Legal Costs") of this arbitration. The parties shall endeavour to agree the quantum of the Legal Costs within 7 days of the date of this Consent Award. If no agreement is reached, the quantum of the Legal Costs shall be determined by the Tribunal without an oral hearing in a further award having received written submissions from the parties as follows:

a. The Claimants to serve their written submissions within 21 days of the Consent Award.
b. The Respondents to serve their written submissions in response within 35 days of the Consent Award.
c. The Claimants to serve their written submissions in reply within 49 days of the Consent Award.

14. The total costs of the arbitration (other than the legal or other costs incurred by the parties [*23] themselves "Legal Costs") to the date of this Award, which are to be borne by the Respondents, have been determined by the LCIA Court, pursuant to Article 28.1, to be as follows:

15. The liability of the Respondents in respect of the sums referred to at paragraph 1 above shall be joint and several and payment to one or other of the Claimants shall discharge liability to that extent to both of them.

16. This Consent Award being a Partial Award, the Tribunal reserves in full its jurisdiction and powers to address and decide any issue or matter not here finally decided by one or more further orders or awards including without prejudice to the generality of the foregoing:

a. the assessment of Legal Costs if not agreed; and
b. any further sums due from the Respondents to the Claimants in order to indemnify the Claimants as set out in paragraph 11 above.

17. In the event that any member of the Tribunal resigns, falls ill or for any other reason is unable to continue as arbitrator, the parties agree that the LCIA Court shall immediately appoint a replacement.

The seat of [*24] the arbitration is London, United Kingdom

Signed by THE TRIBUNAL:

/s/ David Steel
Sir David Steel

/s/ Derrick Dale
Derrick Dale QC

/s/ Richard Aikens
Sir Richard Aikens

Dated: 17 July 2017
### APPENDIX 1

**[INTERNATIONAL NIGERIA LIMITE D](#)**

**[ADDRESSED TO TRANSOCEAN OFFSHORE GULF OF GUINEA VI LIMITED AND INDOO DRILLING LIMITED]**

**VIA LATTICE**

**Dear Sirs,**

Drilling Contract No: CPU/WIL/S3/1(R\#9/3)

1. We, Eni Petroleum Nigeria Limited, entered into the above contract with Transocean Offshore Gulf of Guinea VI Limited ("Transocean") and Indigo Drilling Limited ("Indigo").

2. Pursuant to invoices issued by Transocean and Indigo under the contract, we paid a total of US$81,086,263.92, allocated as follows:

   (i) Transocean - US$37,017,150.44
   (ii) Indigo - US$44,069,113.48

3. The table below provides a breakdown of the net sums paid to Transocean and Indigo, and the WRT, VAT and NCD levy that were deducted and withheld:

<table>
<thead>
<tr>
<th>Description</th>
<th>Gross Amount</th>
<th>Net Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transocean</td>
<td>US$81,086,263.92</td>
<td>US$72,068,866.32</td>
</tr>
<tr>
<td>Indigo</td>
<td>US$44,069,113.48</td>
<td>US$38,875,443.58</td>
</tr>
</tbody>
</table>

4. We have deducted total WRT of US$13,589,044.29, VAT of US$3,876,042.21 and NCD Levy of US$1,751,312.03 in accordance with the relevant laws and we confirm that we have not paid any of these sums to you. We acknowledge that we, as Transocean or Indigo, are legally responsible for paying them to the Federal Inland Revenue Service and the National Content Development Monitoring Board.

5. In accordance with the provisions of the Companies Income Tax ActDecree Of Tax Deducted At Source (Withholding Tax) Regulation 1997, we set out in Annex 1 a schedule showing details of the invoices covered by the above amounts.

**Yours faithfully,**

Eni Petroleum Nigeria Limited

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### APPENDIX 2

**[INTERNATIONAL NIGERIA LIMITED]**

**[ADDRESSED TO TRANSOCEAN OFFSHORE GULF OF GUINEA VI LIMITED AND INDOO DRILLING LIMITED]**

**VIA LATTICE**

**Dear Sirs,**

Drilling Contract No: CPU/WIL/S3/1(R\#9/3)

1. We, Eni Petroleum Nigeria Limited, entered into the above contract (the "Contract") with Transocean Offshore Gulf of Guinea VI Limited ("Transocean") and Indigo Drilling Limited ("Indigo").

2. We explained in our first letter of today's date that pursuant to invoices issued by Transocean and Indigo under the Contract (the "Invoices"), we paid a total of US$43,845,075.82, allocated as follows:

   (i) Transocean - US$37,017,150.44
   (ii) Indigo - US$6,827,925.38

3. We explained that we have deducted total WRT of US$13,589,044.29, VAT of US$3,876,042.21 and NCD Levy of US$1,751,312.03 from the payments to Transocean and Indigo in accordance with the relevant laws. We also confirmed that we have not paid any of these sums to Transocean or Indigo.

4. On 22 January 2016, Transocean and Indigo commenced arbitration against us and our parent company, Eni Energy Corporation (together, the "Respondents") under London Court of International Arbitration Rules taking claim of further sums under the Invoices.

5. By agreement of the parties, the Tribunal has made the award on 7th November 2016.

6. In the award, the Respondents have been entitled to pay Transocean and Indigo US$11,426,307.17 and US$26,790,759.04 under the Invoices. These sums are net of statutory deductions.

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**SUMMARY OF INVOICE AMOUNTS DEDUCTED FROM PAYMENTS TO TRANSOCEAN AND INDOO DRILLING LIMITED**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount Deducted</th>
</tr>
</thead>
<tbody>
<tr>
<td>WRT</td>
<td>US$13,589,044.29</td>
</tr>
<tr>
<td>VAT</td>
<td>US$3,876,042.21</td>
</tr>
<tr>
<td>NCD Levy</td>
<td>US$1,751,312.03</td>
</tr>
</tbody>
</table>

**TOTAL** | **US$19,216,400.73**
### Table 1 (Return to related document text)

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration Fee</td>
<td>£1750</td>
</tr>
<tr>
<td>LCIA's administrative charges</td>
<td>£8,696.69</td>
</tr>
<tr>
<td>Tribunal's fees</td>
<td>£39,865.00</td>
</tr>
<tr>
<td>Total Costs of Arbitration</td>
<td>£50,311.69</td>
</tr>
</tbody>
</table>

End of Document
Lawyers’ Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients “reasonably informed” about the status of a matter and to explain matters “to the extent reasonably necessary to permit a client to make an informed decision regarding the representation.” Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers. In one highly publicized incident, hackers infiltrated the computer networks at some of the country’s most well-known law firms, likely looking for confidential information to exploit through insider trading schemes. Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.

In Formal Opinion 477R, this Committee explained a lawyer’s ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet. This

1 This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.
2 See, e.g., Dan Steiner, Hackers Are Aggressively Targeting Law Firms’ Data (Aug. 3, 2017), https://www.cio.com (explaining that “[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence.”) See also Criminal-Seeking-Hacker’ Requests Network Breach for Insider Trading, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).
opinion picks up where Opinion 477R left off, and discusses an attorney’s ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney’s ethical obligations after a data breach, and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules per se represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney’s roles, level of authority, and responsibility in the law firm’s operations.

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6 The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a “firm.” A “firm” is defined in Rule 1.0(c) as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer’s position in the firm. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF’L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF’L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

7 In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 477R (2017) (“Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.”) See also, e.g., Cybersecurity Resources, ABA Task Force on Cybersecurity, https://www.americanbar.org/groups/cybersecurity/resources.html (last visited Oct. 5, 2018).
I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

In recommending the change to Rule 1.1’s Comment, the ABA Commission on Ethics 20/20 explained:

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to ‘keep abreast of changes in the law and its practice.’ The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.

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10 ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer’s substantive duty of competence: “Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase ‘including the benefits and risks associated with relevant technology,’ would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.”
In the context of a lawyer’s post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission’s thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer’s competency in this regard may be satisfied either through the lawyer’s own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.\textsuperscript{11}

1. Obligation to Monitor for a Data Breach

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer’s ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers’ offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer’s systems, destroying the lawyer’s infrastructure on which confidential information resides and incapacitating the attorney’s ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that “such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Applying this reasoning, and based on lawyers’ obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data. Without such a requirement, a lawyer’s recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred, whether further action is warranted, whether employees are adhering to the law firm’s cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties, and how and when the lawyer must take further action under other regulatory and legal provisions. Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

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14 See also MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF’L CONDUCT R. 1.15 (2018).
15 The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, https://www.us-cert.gov/ais (last visited Oct. 5, 2018); See also National Cyber Security Centre “Ten Steps to Cyber Security” [Step 8: Monitoring] (Aug. 9, 2016), https://www.ncsc.gov.uk/guidance/10-steps-cyber-security.
intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach.\(^\text{18}\) The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. “One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents.”\(^\text{19}\) While every lawyer’s response plan should be tailored to the lawyer’s or the law firm’s specific practice, as a general matter incident response plans share common features:

The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm’s network.

Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and

\(^{18}\text{See ABA CYBERSECURITY HANDBOOK, supra note 11, at 202 (explaining the utility of large law firms adopting “an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.”).}\)

define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.\(^{20}\)

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer’s clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”\(^{21}\) These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer’s office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breath investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breath investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer’s duty of communication and honesty under


\(^{21}\) We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer’s computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.
Model Rules 1.4 and 8.4(c).\textsuperscript{22} Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

B. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer’s efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that “A lawyer shall not reveal information relating to the representation of a client” unless certain circumstances arise.\textsuperscript{23} The 2012 modification added a duty in paragraph (c) that: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”\textsuperscript{24}

Amended Comment [18] explains:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a “reasonable efforts” determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and

\textsuperscript{22} The rules against dishonesty and deceit may apply, for example, where the lawyer’s failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. [1] (2018) (“Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).

\textsuperscript{23} MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2018).

\textsuperscript{24} \textit{Id.} at (c).
• the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).  

As this Committee recognized in ABA Formal Opinion 477R:

At the intersection of a lawyer’s competence obligation to keep “abreast of knowledge of the benefits and risks associated with relevant technology,” and confidentiality obligation to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney’s competence in preserving a client’s confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable. Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access. As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

Although security is relative, a legal standard for “reasonable” security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a “process” to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.

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25 MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [18] (2018). “The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available.” ABA COMMISSION REPORT 105A, supra note 9, at 5.

26 ABA CYBERSECURITY HANDBOOK, supra note 11, at 122.

27 MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. [18] (2018) (“The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.”)

28 ABA CYBERSECURITY HANDBOOK, supra note 11, at 73.
Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely. In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer’s Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client. We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must “keep the client reasonably informed about the status of the matter.” Rule 1.4(b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.

30 This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.
31 Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass’n Op. 842 (2010) (Question 10: “If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,
Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a “serious breach.” The Committee advised:

Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b). A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer’s ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client’s interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a “client reasonably informed about the status of the matter” and the lawyer should provide information as would be “reasonably necessary to permit the client to make informed decisions regarding the representation” within the meaning of Model Rule 1.4.

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4’s requirement to keep clients “reasonably informed about the status” of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.

notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated.” (citations omitted).

33 Id.
34 MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2018).
Model Rule 1.15(a) provides that a lawyer shall hold “property” of clients “in connection with a representation separate from the lawyer’s own property.” Funds must be kept in a separate account, and “[o]ther property shall be identified as such and appropriately safeguarded.” Model Rule 1.15(a) also provides that, “Complete records of such account funds and other property shall be kept by the lawyer . . . .” Comment [1] to Model Rule 1.15 states:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer’s business and personal property.

An open question exists whether Model Rule 1.15’s reference to “property” includes information stored in electronic form. Comment [1] uses as examples “securities” and “property” that should be kept separate from the lawyer’s “business and personal property.” That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15’s safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, “Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information.”

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.
2. Former Client

Model Rule 1.9(c) requires that “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”\(^{35}\) When electronic “information relating to the representation” of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer’s obligation to notify the former client. Rule 1.9(c) provides that a lawyer “shall not . . . reveal” the former client’s information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.\(^{36}\)

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.\(^{37}\) We also note that Rule 1.16(d) directs that lawyers should return “papers and property” to clients at the conclusion of the representation, which has commonly been understood to include the client’s file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.\(^{38}\) Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client’s electronic information that is in the lawyer’s possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

\(^{35}\) **MODEL RULES OF PROF’L CONDUCT R. 1.9(c)(2) (2018).**

\(^{36}\) See Discipline of Feland, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent’s argument that the court should engrat an additional element of proof in a disciplinary charge because “such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.”).

\(^{37}\) See **MODEL RULES OF PROF’L CONDUCT R. 1.9, cmt. [9] (2018).**

the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.\textsuperscript{39}

3. Breach Notification Requirements

The nature and extent of the lawyer’s communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the “safe harbor” provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer’s office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer’s plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients’

\textsuperscript{39} Cf. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).
information. Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data breach, the lawyer should evaluate the lawyer’s obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws. Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information. Most breach notification laws specify who must comply with the law, define “personal information,” define what constitutes a breach, and provide requirements for notice. Many federal and state agencies also have confidentiality and breach notification requirements. These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual’s relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer’s possession that was accessed by an unauthorized user.

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make “reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

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42 Id.
43 Id.
44 ABA CYBERSECURITY HANDBOOK, supra note 11, at 65.
45 Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so. Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.
breach under Model Rule 1.4 in sufficient detail to keep clients “reasonably informed” and with an explanation “to the extent necessary to permit the client to make informed decisions regarding the representation.”
Cyber Attacks: Issues Raised in Arbitration

By Edna Sussman

“T here is a new mantra in cybersecurity today, “It’s when not if.””

Introduction

Cyber intrusion and hacking are in the news almost daily, with damaging invasions of law firms, corporations, governmental agencies, and political entities. “Security breaches are becoming so prevalent that there is a new mantra in cybersecurity today: ‘It’s when not if,’ a law firm or other entity will suffer a breach.” Those who monitor IT systems report dozens of attempted attacks on a daily basis. Arbitration participants have not been immune.

This article seeks to flag for further analysis: (a) arbitrators’ duties with respect to cybersecurity risks, (b) admissibility of illegally obtained documents, (c) authentication of documents, (d) sanctions, (e) the psychological impact on decision-making of inadmissible evidence, and (f) the arbitrator’s duty to report.

The Arbitrators’ Duties

At the ICCA Conference in 2018, a consultation draft of the Cybersecurity Protocol for International Arbitration was circulated for comment. The Protocol is “intended to encourage participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchange and the arbitral process.”

It is hoped that adherence to the Protocols coupled with adherence to practical guidance on how to protect against cyber intrusion will diminish the number of incidents in international arbitration.

Guidance on how arbitrators should manage their practice in light of today’s cyber risk have been emerging and arbitrators would be well advised to consult those sources and consider whether they should undertake some cyber security measures in their practice. Users of arbitration are entitled to expect that arbitrators will take at least basic security measures and it is anticipated that user expectations in this regard will increase in the coming years. Steps taken now can avoid problems in the future. Many measures can be taken that are neither expensive nor difficult. This is a subject that no arbitrator can safely ignore.

Admissibility

Arbitrators have broad discretion in dealing with evidence under applicable laws and institutional rules. Given this wide discretion and the binding nature of arbitral awards, tribunals generally admit evidence to avoid risking vacatur for failure to provide a full and fair opportunity to present the case, and then consider its credibility, weight and value. However, on a proper showing evidence may be excluded by the arbitral tribunal.

Where it is demonstrated that evidence has been obtained illegally the arbitral tribunal is faced with a difficult choice. With the prevalence of cyber intrusions in today’s world, it is inevitable that tribunals will be increasingly required to address the question of whether they should admit illegally obtained evidence. However, no clear line of authority has developed to guide tribunals as to how they should treat illegally obtained evidence. Tribunals have arrived at different conclusions on the question.

Illegally obtained evidence is not new, but it is likely to be more prevalent in this age of technology and big data. The classic case dealing with illegally obtained evidence is the 2005 decision in Methanex v. United States (Methanex), long before WikiLeaks, in which the tribunal declined to admit the evidence. Methanex attempted to rely on documents obtained by going through wastepaper and rubbish in support of its position. The tribunal stressed the general duty of good faith and the fundamental principles of justice and fairness and declined to admit the evidence, although it also considered the question of materiality of the evidence and concluded that it was only of “marginal evidential significance.”

In the well-known Yukos award, which granted $50 billion in damages, the tribunal relied extensively on confidential diplomatic cables from the United States Department of State that had been illegally obtained and published on WikiLeaks. The tribunal provided no analysis of whether evidence illegally obtained should be admitted. Other published awards in investor state cases have specifically addressed the admissibility of evidence illegally obtained through cyber intrusion. See, e.g., Libananco v. Turkey (counsel communications intercepted—not admitted); Caratube v. Kazakhstan (hackers uploaded government documents—11 introduced, those not privileged admitted), Conoco Phillips v. Venezuela (after an interim decision material documents were made public on WikiLeakscourt declined to reconsider its decision and did not consider the evidence; strong dissent).
The decisions appear to emphasize who committed the wrongful act, whether the documents are privileged, and whether the information revealed was material to the decision on the merits. Balancing the search for truth and other values is not new. It is just being presented in a new context in our digital world. As William Park said, “Nothing new resides in balancing truth-seeking against values that further public goals rather than adjudicatory precision.”

Authentication

Litigation positions taken by parties with the ascendance of cyber intrusion may be presented in a variety of ways. A party may contend that the documents were “stolen” by hacking into his or her IT system; thus, illegally obtained. That contention raises questions of admissibility discussed above. A party may contend that it no longer has the documents available for production because it was hacked. That contention raises questions of proof as with any assertion that documents no longer exist. Or illegally hacked emails might be posted publicly on WikiLeaks or some other platform on the web that is publicly available. Again, that raises a question of admissibility discussed above. Parties may contend that the emails were fabricated by a hacker and that they did not write them. That contention raises questions of authenticity.

Authentication is not an issue frequently encountered in international arbitration. However, it is likely that with the prevalence of cyber intrusions and the ease with which it seems to be possible to intrude, arbitrators will likely be required to review an increasing number of objections to admissibility based on lack of authenticity.

Sanctions

The question of what sanctions a tribunal has authority to impose, and when and how sanctions should be imposed, has been the subject of extensive discussion in recent years in the wake of the issuance of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration (IBA Guidelines). Various proposals have been made as to who should be responsible for sanctioning counsel. Cyber intrusion brings that issue to the fore.

Tribunals are appropriately concerned about guerrilla tactics, and consideration of remedies beyond the exclusion of evidence may be appropriate in cases of cyber intrusion. As the tribunal stated in Libananco: “The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.”

The IBA Guidelines empower the tribunal to address “misconduct” by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined by the IBA Guidelines to include “breach of the present guidelines, or any other conduct that the arbitral tribunal determines to be contrary to the duties of a party representative.” The nature of the “misconduct” intended to be covered has not been established but, certainly, cyber intrusion would fall into that category. In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knows about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings, and the enforceability of the award. These considerations clearly outline the matters to be considered in deciding whether to impose a sanction on a party for cyber intrusions, if it is concluded that the tribunal has authority to do so.

The Impact on Decision-Making of Inadmissible Evidence

Study after study has established that fact finders cannot ignore inadmissible information and are influenced in their decision-making by that information, even if it has been excluded. As Doron Teichman and Eyal Zamir sum up the literature: “[n]umerous studies have documented the effects of inadmissible evidence in ... legal domains, such as hearsay evidence, pretrial media reports, and illegally obtained evidence. These studies show that inadmissible evidence affects judicial decision-making in civil as well as criminal settings, irrespective of whether that evidence favors the prosecution or the defense. A recent meta-analysis concluded that ‘inadmissible evidence produced a significant impact.’”

As the courts have found it can be “difficult to ‘unring the bell.’” Arbitrators should be sensitive to this unconscious influence and carefully assess the evidence upon which they rely to ensure that it supports their conclusions without reference to excluded evidence. Advocates should be sensitive to the fact that highlighting evidence to urge its exclusion may cause it to make an even deeper impression on the fact finder.

Duty to Report

Cyber intrusion is a crime in jurisdictions around the world. Violations of privacy laws are also implicated. What, if any, is the arbitrator’s duty to report a cyber crime? And to whom? Local authorities? Counsel’s bar association? The administering institution? While arbitrators must first consider whether they are under any legal or ethical obligation that requires them to take action, the resolution of the question presents the tension between reporting wrongdoing and the confidentiality of the arbitration proceeding.
Elliott Geisinger and Pierre Ducret distinguish between doctored documents and witnesses lying on the stand, which they consider sufficiently dealt with by the tribunal’s disregard of such evidence on the one hand and what they referred to as a “Balrog” on the other hand. A Balrog is a violation of fundamental national or supranational rules close to transnational public policy. They cite as examples money laundering, corrupt practices, gross violation of competition law, fraudulent conveyances, financing of terrorism, violation of embargoes, traffic of cultural property, and gross violations of environmental regulations. If a party hacks into another party’s computer system, or worse yet, posts it publicly or provides it to others to post publicly, one might well conclude that the matter involves no ordinary doctored document, but rather rises to the level of a Balrog.

However, Geisinger and Ducret conclude that finding a reporting duty is in complete contradiction with the confidential nature of international commercial arbitration and suggest that most legal systems would not impose any such duty even with respect to Balrogs. They allow for possible exceptions for extremely serious violations of fundamental legal principles, such as human trafficking where the confidentiality of the arbitration becomes a “minor consideration.”

The question of when an arbitrator has a duty report is likely to be a continuing discussion not only in the context of cyber intrusions but also in connection with other unlawful acts.

Conclusion

The ease with which it appears cyber intrusion can be accomplished and the almost daily reports of hacks suggest that arbitrators are likely to increasingly be presented with issues related to breaches of cyber security. The issues are not new. They are merely presented in a new guise. It is hoped that this article will lead to further analysis of the issues raised in this context.

Endnotes

2. Id.
7. Id. at ¶ 56.
8. Huyle Enters. Ltd. (Cyprus) v. Russian Fed’n, PCA Case No. AA 226, Final Award, 1185–86 (Jul. 18, 2014) (hereinafter Huyle). The District Court of The Hague quashed the final award from Huyle on other grounds on April 20, 2016. As of this writing the appeal is pending.
10. Libananco Holdings Co. Ltd. v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues at ¶ 80 (Jun. 23, 2008).
13. The Balrog reference draws upon Tolkien’s Lord of the Rings tale of miner dwarves who dug too deeply and unleashed “a terrible daemon from ancient times,” the Balrog.

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