

## Explaining Arbitration Law

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### I. A Framework for Avoiding Courts

#### A. Regretted Decisions

Most fields of law provide guidance on how courts decide cases. In contrast, arbitration law tells judges when *not* to decide disputes, in deference to private decision-makers selected by the litigants. Agreements to avoid courts implicate an intricate interaction of treaties, statutes and cases which layer themselves like a Russian nested doll, with one carved figure opening to more diminutive figurines. Unlike a *matryoshka*, however, arbitration law often reveals exceptions as capacious as the rule from which they derogate.<sup>1</sup>

People can change their minds, or differ in understanding what was agreed. If one side regrets a decision to arbitrate, or the parties diverge about what the arbitration clause covers,

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<sup>1</sup> In a similar metaphor from the epic novel *Moby Dick*, the narrator explains his mental detours: “Out of the trunk, the branches grow; out of them, the twigs. So in productive subjects grow the chapters.” HERMAN MELVILLE, *MOBY DICK* (1851), Ch. 63 “The Crotch” examining organization of whaling boats.

courts may be asked to assist in implementing the arbitration agreement or resulting award.

At such moments, arbitration law normally includes two limbs: first, to hold parties to their bargains to arbitrate; second, to monitor the basic integrity of the arbitral process, so the case will be heard by a fair tribunal that listens before deciding, stays within its mission, and respects the limits of relevant public policy. As we shall see, in applying these principles, the devil lurks in the details of each award, ruling or contract.<sup>2</sup>

Arbitration can exist without law, of course. Arbitration involves a dispute resolution process intended as binding by the parties themselves. Nothing stops merchants from making a deal to arbitrate even absent a legal mechanism to enforce the bargain. How courts address the arbitral process remains a question separate from the nature of the process itself, although the matters have understandably been joined, mingled and blended, even by the best of minds.<sup>3</sup>

For relatively homogenous communities, the sanction for breach of an arbitration agreement might lie in social pressures such as shunning or refusal to do business.<sup>4</sup> In a heterogeneous world, however, shame may not work. Moreover, even close-knit groups often seek judicial

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<sup>2</sup> Identifying matters decided by arbitrators rather than courts remains distinct from articulating how arbitrators differ from judges in applying law in contract construction. The questions intersect in that legislators may be less inclined to enact arbitration-friendly legal regimes if they perceive arbitrators as prone to disregard law. Notwithstanding the oft-evoked image of “split the baby” arbitrators, arbitrators in international matters may care more than judges about strict legal analysis. Particularly in the commercial realm, as creatures of contract arbitrators show special concern for party expectations evidenced by choice-of-law clauses, and will be less likely than judges to see their roles as advancing social or national policies. See William W. Park, *The Predictability Paradox: Arbitrators and Applicable Law*, in 11 ICC DOSSIERS (Institute World Business Law 2014).

<sup>3</sup> See Wesley Sturges, *Arbitration-- What is it*, 35 N.Y.U. L. REV. 1031, 1041-45 (1960), characterizing arbitration as a “litigation substitute” so as to trigger Sunday hearing limitations.

<sup>4</sup> See Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010); Lisa Bernstein, *Opting Out of The Legal System*, 21 J. LEG. STUD. 115 (1992); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983). See also JAN PAULSSON, *THE IDEA OF ARBITRATION 1* (2013), speaking of “binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.” For accounts of arbitration before any comprehensive legal framework on the matter see BRUCE MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987) and William W. Park, *The Cohasset Marshlands Arbitration*, ICCA Newsletter, Autumn 2014.

assistance in resolving property disputes.<sup>5</sup> Courts intervene in faith-based arbitration for Jewish,<sup>6</sup> Muslim,<sup>7</sup> and Christian<sup>8</sup> communities.

When one side ignores an asserted duty to arbitrate, judicial action may be sought to compel arbitration, to stay litigation, or to enforce awards against a loser's assets. In such instances, questions arise about what the parties agreed and whether proceedings went according to their expectations.<sup>9</sup>

Although contract principles provide a starting point for analysis, any suggestion that arbitration remains "just" a matter of contract would seem excessive. Arbitration agreements pave the way for something unpredictable. Third parties called arbitrators, strangers to the agreement, make an award which replaces judicial decision-making. States giving effect to the process will want to monitor its legitimacy, to ensure that losers received due process and the arbitrator respected jurisdictional limits conferred by the litigants.. Moreover, recognition of

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<sup>5</sup> In *Baker v. Fales*, 16 Mass. 488 (1820), the court set a framework for resolution of property disputes between Unitarian and Trinitarian elements in Massachusetts churches. For a more modern illustration, see *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (U.S. 1976).

<sup>6</sup> See *Soleimany v. Soleimany*, [1998] EWCA Civ 285 (1998). In a dispute between father and son arising from their carpet smuggling business, the English judiciary refused to enforce an award made by a Jewish court, or Beth Din which violated public policy by reason of export control violations. See also *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983), where a pre-nuptial agreement (Ketubah) contained provisions interpreted as analogous to an arbitration agreement, allowing the court to compel arbitration when the husband refused to grant a certificate (get) allowing his wife to remarry in the Jewish faith.

<sup>7</sup> In *Jivraj v. Hashwani*, [2011] UKSC 40, two Muslim businessmen agreed that disputes arising from their hotel venture would be decided by Muslim arbitrators who were "respected members of the Ismaili community." When one appointed a non-Muslim arbitrator, the other sought to invalidate the appointment. Faced with an argument that the religious requirement violated anti-discrimination law, the British Supreme Court upheld the clause on the basis that arbitrators are not the parties' employees.

<sup>8</sup> *Spivey v. Teen Challenge of Florida*, 122 So. 3d 986 (Fla. Dist. Ct. App. 2013), involving a wrongful death action on behalf of a son who overdosed after treatment at a Christian rehabilitation program. The son had signed an agreement for arbitration and mediation providing prayer at beginning of the hearings. The court enforced the clause, rejecting arguments that it violated a right to free exercise of religion.

<sup>9</sup> See Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent"*, 24 Arb. Int'l 199 (2008).

foreign awards can raise delicate questions of deference toward courts of other jurisdictions that may have vacated or confirmed the arbitrator's decision.

Arbitration statutes fill several functions. First, they send signals to curb judicial hostility toward perceived "ouster" of judicial jurisdiction.<sup>10</sup> Second, they enhance predictability in the pre-requisites for valid arbitration agreements and awards,<sup>11</sup> without which practitioners would face a procedural morass much like the legal hodge-podge governing court selection and foreign judgments.<sup>12</sup> Finally, an arbitration act provides intellectual hooks on which to hang doctrines useful in addressing recurring problems. For example, the principle of "separability" reduces prospects of arbitration being sabotaged by fraud allegations unrelated to the arbitration clause itself.<sup>13</sup>

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<sup>10</sup> In an early case involving an attempt at contractual circumvention of supervisory jurisdiction by English courts, Justice Scrutton declared: "There must be no Alsatia in England where the King's writ does not run." *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478, at 488. Alsatia referred to a part of London near Fleet Street that had once been a sanctuary for criminals.

<sup>11</sup> For a most thoughtful excursion into how the text of a statute affects decisions on arbitration, see the concurrence by Justice Thomas in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (U.S. 2011), addressing the interaction of sections 2 and 4 in the Federal Arbitration Act.

<sup>12</sup> Although the 1958 New York Arbitration Convention now gives international currency to arbitration awards in 149 countries, the 2005 Hague Choice of Court Convention has yet come into effect to give similar effect to decisions of national courts. See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article III, New York, 10 June 1958, 21 U.S.T. 2517. See also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-12 (U.S. 1972), noting that court selection clauses "have historically not been favored by American courts [and were often declined enforcement] on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."

<sup>13</sup> Separability permits arbitrators to do their job notwithstanding invalidity of the larger contractual framework, with arbitration clause remaining autonomous from the principal agreement. See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 231-295 (2d ed. 2012); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 *Am. Rev. Int'l Arb.* 1 (2003); *Prima Paint. Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Some defects in the contractual framework do affect the arbitration clause, of course, as with forgery or duress. However, if a buyer alleges that a company did not have the assets represented by the seller, that dispute would raise exactly the type of question expected to be resolved under the acquisition agreement's arbitration clause, notwithstanding allegations of misrepresentations which might ultimately lead to invalidation of the transaction.

Not all arbitration law makes arbitration easier than would be the case under general contract principles. Although oral contracts will often be enforced, arbitration law generally requires a “writing” of some sort, sometimes augmented by signature.<sup>14</sup> The requirement makes sense. It is no small matter to forego the proverbial day in court. A legal system that enforces waiver of recourse to judges will want to be sure that both sides really mean it. Of course, once a valid agreement to arbitrate has been found to exist, an arbitration-friendly framework reduces wiggle room for escape.<sup>15</sup>

## **B. Hard Law and Soft Law**

Any attempt to explain the specific legal framework for arbitration requires at least a nod toward the question “what is law” which by its vastness evokes the “Abandon all hope” warning at the door to Dante’s Inferno. The task implicates understanding not the law of gravity, the law of averages, or the law of God, but rather the authoritative dispute resolution process elaborated through state-sponsored instruments that inform both substantive conduct and the way cases get decided.<sup>16</sup>

In arbitration, such authority will often be supplemented by the “soft law” in guidelines of professional associations and the lore of practice, representing expectations of the commercial community. Particularly in cross-border disputes, such norms fill gaps in national standards on evidence and ethics, addressing matters such as document production, witness testimony and conflicts-of-interest.<sup>17</sup>

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<sup>14</sup> See e.g. Article II, New York Arbitration Convention. Compare *Kahn Lucas Lancaster. v. Lark Int’l Ltd.*, 186 F.3d 210 (2d Cir. 1999) (signature needed for contract with arbitration clause) and *Sphere Drake Ins v. Marine Towing*, 16 F.3d 666, 669 (5th Cir. 1994) (no signature needed).

<sup>15</sup> The notion of “arbitration friendly” seems more apt than the oft-used term “pro-arbitration” policy. The latter may be a misnomer, in that arbitration law relates to recognition of the parties’ agreement, whatever that might be, rather than creating an obligation to arbitrate where none existed.

<sup>16</sup> Francophone jurists often distinguish between “*loi*” and “*droit*”. A tyrant’s statute (“*loi*”) might be law in the sense of an enactment, even if contrary to authoritative norms bearing deeper legitimacy (“*droit*”), not unlike American colonists once distinguished among laws and taxes imposed by Great Britain.

<sup>17</sup> For an example of soft law adopted in national court decisions, see *Applied Industrial Materials Corp. (AIMCOR) v. Ovalar Makine Ticaret Ve Sanayi*, 492 F.3d 132 (2d Cir. 2007).

Not all scholars feel comfortable with a porous membrane between government and non-government authorities. To count as law, some would argue, a decision-making system should clearly bear essential features such as public accessibility, normative coherence, and steadiness over time.<sup>18</sup> In reply to this concern, one might suggest that most human artifacts, including notions of law, vary depending on context. Tennis, squash, baseball, football and basketball all involve robust physical activity applied to balls. All are called games. Chess involves less physical force and no balls, yet still qualifies as a game. Likewise, the contours of arbitration's legal framework, particularly for international transactions, may be different from the silhouettes of fiscal or banking regulations.<sup>19</sup>

General principles of arbitration law sometimes find simple application. Courts enforce arbitration agreements between sophisticated merchants covering the quality of grain, but decline to recognize awards procured by bribery or fraud. Although such clear-cut paradigms remain useful for analysis, they limp when applied to complex scenarios, where obvious answers remain elusive. In seeking equilibrium between enforcing bargains and monitoring fairness, arguments

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Vacating an award for the arbitrator failure to investigate business contacts with one party's affiliate, the district court made reference to the International Bar Association Guidelines on Conflicts of Interest as well as the American Arbitration Association Code of Arbitrator Ethics. See generally, William W. Park *The Procedural Soft Law of International Arbitration*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 141 (L. Mistelis & J. Lew, eds. 2006). Sources of "soft law" include not only in IBA and AAA pronouncements on ethics, but also guidelines from those bodies on evidence and information exchange, as well as UNDRIT contract principles, and the LCIA Rules Annex on professional conduct.

<sup>18</sup> In particular, see THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION* 18–19 (2014) and Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders*, 2 J. INT'L DISPUTE RESOLUTION 59 (2011), taking aim at the "Ecole de Dijon" which during the last century introduced into arbitration notions such as "transnational law" and *lex mercatoria*.

<sup>19</sup> For a survey of law from a wider perspective, see Robert P. George, *What is Law? A Century of Arguments*, FIRST THINGS 23 (April 2001), taking as a springboard the "bad man theory" of Oliver Wendell Holmes presented in a lecture at Boston University, arguing that the best characterization of law would be prediction of what brings the sanction feared by a bad man. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). For an exploration of divisions between domestic and international law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. LAW REV. 1792 (2009).

may be finely balanced concerning sensitive policies, ill-defined arbitral missions, nuanced facts, or parties with unequal bargaining power.

## **II. From General to Specific**

### **A. A New Zealand Vignette**

A recent decision of the New Zealand Supreme Court illustrates how challenges to arbitration agreements can trigger rival goals, each of which might be extended but for the existence of others.<sup>20</sup> After cancellation of an agreement for sale of farming and hotel assets, the disappointed party blamed its lawyers for mishandling the transaction. When the malpractice claims were arbitrated, both sides participated without complaint. The lawyers prevailed because of the client's inability to prove that attorney negligence caused the deal to fail. The losing side then moved to appeal, or alternatively to have the award set aside.

The arbitration agreement provided that the award might be challenged on "questions of law and fact," a provision the court considered an impermissible expansion of relevant law. The Arbitration Act permits appeal only for error of law, not mistake of fact.<sup>21</sup> The valid and invalid provisions were deemed incapable of being severed, and the award was set aside. All bets were off, since the parties did not get what they expected, which for the loser included a chance to re-argue the facts of the case.<sup>22</sup>

This New Zealand case raised questions similar to those in a leading American decision, but with different results. The U.S. Supreme Court held that federal law precludes appeal on the

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<sup>20</sup> Carr & Brookside Farm Trust Ltd. v Gallaway Cook Allan [2014] NZSC 75 (Sup. Ct New Zealand 2014). See note by John Walton, *The Supreme Court in Carr v. Gallaway Cook Allan*, [2014] N.Z. L. J. 244, calling the case "a disappointing outcome, but an object lesson all the same."

<sup>21</sup> For domestic arbitration, appeal is allowed absent an agreement otherwise, while for international arbitration the parties must opt into an appellate regime. In either case appeal is allowed for "incorrect interpretation of the applicable law" but not on whether the arbitrators drew correct inferences from relevant facts. Arbitration Act 1996, Fifth Schedule, clauses 5 and 10.

<sup>22</sup> The New Zealand Supreme Court found that the parties' agreed scope of appeal went "to the heart of their agreement" to submit the dispute to arbitration. Carr & Brookside Farm Trust Ltd. v Gallaway Cook Allan [2014] NZSC 75 at para 70, McGrath J for the Court.

merits of an arbitrator's determination, no matter what the parties agreed.<sup>23</sup> In this respect, the American and New Zealand approaches converge. In the American case, however, the arbitrator's award was left standing, whereas the New Zealand award was annulled because valid and invalid elements of the agreement intertwined to thwart the parties' expectations.

The irony of the New Zealand decision will not escape thoughtful observers. Legislators sought to enhance arbitral finality by precluding appeal on questions of fact. In the end, however, the statute led to an award without consequences.

### **B. The “Procedural Fairness” Model of Arbitration**

The New Zealand decision serves as a springboard from which to consider several themes in modern arbitration law. Most major business centers have abandoned hostility to arbitration, and have restricted appeal on the legal and factual merits of a case. Any rights of appeal can usually be waived by the parties. On the assumption that an arbitral award should be the end rather than beginning of litigation, the emerging trend grants deference to arbitrators' decisions,<sup>24</sup> while retaining mandatory judicial review only for defects related to jurisdiction, due process and public policy.<sup>25</sup> This “procedural fairness” model resonates with arbitration's treaty architecture, which gives awards an international currency subject to safeguards related to public policy and respect for the limits of arbitral authority.<sup>26</sup>

In some countries, notably England, the path to the “procedural fairness” paradigm has been well documented. At one time, English law permitted *de facto* appeal through a procedure

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<sup>23</sup> Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008). See also Kyocera Corp. v. Prudential-Bache Trade Services, 341 F.3d 987 (9th Cir. 2003).

<sup>24</sup> Where appeal on points of law exists, it will usually derive from the parties' opting in (or failure to opt out) or through special regimes to protect consumers and employees against ill-informed choices.

<sup>25</sup> Notable jurisdictions include Belgium, England, France, Hong Kong, Netherlands, Singapore, Sweden, Switzerland and the United States, as well as countries that have adopted some form of the UNCITRAL Model Arbitration Law such as Australia, Bermuda, Canada and Germany. See William W. Park, *Jurisdiction to Determine Jurisdiction*, 13 ICCA Congress Series 55 (PCA, 2007).

<sup>26</sup> Article V, New York Arbitration Convention, cited *supra*.; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Articles 52 & 53, 18 March 1965, 17 U.S.T. 1270 (“ICSID Convention”).

requiring arbitrators to “state the case” for court determination. On the assumption that the commercial community had little interest in judges second-guessing arbitrators’ decisions, the law in 1979 moved to a model in which courts no longer controlled the legal exactness of an award.<sup>27</sup> En route to the current statutory regime, amended again in 1996, the law flirted with a halfway house of merits appeal in maritime, insurance and commodities cases, where arbitration was deemed of special value in fertilizing development of substantive legal principles.<sup>28</sup>

Even with arbitration friendly paradigms, some grounds for challenge remain difficult to define with intellectual rigor.<sup>29</sup> In particular, no easy method exists to trace the line between excess of authority and an arbitrator’s simple mistake, the latter normally being a risk assumed when parties agree to arbitrate.<sup>30</sup>

When law diverges from country to country, the disparity often derives not from discord on policy goals, but by reason of the relative weight given to rival risks. French courts generally delay judicial review of an arbitrator’s jurisdiction until an award has been made, to reduce prospects for sabotage by dilatory challenges.<sup>31</sup> In comparison, American courts may assess the

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<sup>27</sup> William W. Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT’L L.J. 87 (1980); William W. Park, *The Interaction of Courts and Arbitrators in England*, 1 INT’L ARB. REV. 54 (1998). ARBITRATION IN ENGLAND (Julian Lew, Harris Bor, Gregory Fullelove & Joanne Greenaway eds., 2013).

<sup>28</sup> Appeal on questions of English law exists only if not “otherwise agreed,” with such opt-out allowed by reference to institutional rules. Challenge to awards as of right exists only for defects related to “substantive jurisdiction” and “serious irregularity.” 1996 English Arbitration Act, Sections 67-69.

<sup>29</sup> The English judge Lord Denning once suggested (albeit in an administrative context) that going wrong in law meant exceeding authority, since a tribunal was not authorized to decide in error. See LORD DENNING, *THE DISCIPLINE OF THE LAW* 74 (1979). This position was rejected by the House of Lords in 2005 in the *Lesotho Highlands* decision. *Lesotho Highlands Development Authority v. Impreglio SpA* [2005] UKHL 43 (30 June 2005).

<sup>30</sup> In some instances, challenge may be heard on hybrid grounds such as “manifest disregard of the law” which falls shy of full appeal, albeit constituting something more than simple excess of authority. See note 3 of *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 n.3 (2010). See also “manifest excess of powers” in ICSID Convention, Article 52(1)(b).

<sup>31</sup> See Articles 1448 & 1506 of the French Code of Civil Procedure.

validity of an arbitration agreement at any moment, to avoid expensive proceedings that ultimately prove futile.<sup>32</sup>

### C. Annulled Awards: Convergence and Conflict

The effect of award annulment remains an enduring source of divergence among legal systems in their assessment of optimum counterpoise among finality, efficiency and fairness in arbitration. If a Swiss court sets aside an award made in Geneva, should the award be enforceable in Paris or London? To what extent does annulment at the seat of proceedings eliminate or restrict the award's effect in other countries? These questions overlap with, but remain distinct from, the debate on proper grounds for the setting aside at the arbitral seat.

French courts take a clear position, showing little difficulty giving effect to awards set aside where rendered. On receiving confirmation (*exequatur*), an award enters the French legal order with a *res judicata* effect that trumps the effect of annulment by the curial courts at the seat of proceedings.<sup>33</sup>

Some scholars justify such recognition of annulled awards by reference to a free-floating international legal order.<sup>34</sup> Others remain skeptical.<sup>35</sup> Each side of the debate can invoke the rhetoric of regard for the parties' agreement. If litigants bargain to arbitrate, says one side, why

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<sup>32</sup> See *Three Valleys Municipal Water District v. E.F. Hutton*, 925 F.2d 1136 (9th. Cir. 1991); *Sandvik A.B. v. Advent International Corp.*, 220 F.3d 99 (3rd Cir. 2000).

<sup>33</sup> *Société Hilmarton Ltd v. Société OTV*, Cour de cassation, 23 March 1994, 1994 REV. ARB 327, note Ch. Jarrosson; *PT Putrabali Adyamulia Rena Holding Ltd*, Cour de cassation, 29 June 2007, 2007 REV. ARB. 507, note E. Gaillard. See commentary by Philippe Pinsolle, *The Status of Vacated Awards in France*, 24 ARB. INT. 277 (2008); Richard Hulbert, *When the Theory Doesn't Fit the Facts A Further Comment on Putrabali*, 25 ARB. INT. 157 (2009).

<sup>34</sup> EMMANUEL GAILLARD, *ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL* (2008), adapted as *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010). Compare Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulment* 9 (No. 1) ICC BULL. 14 (1998).

<sup>35</sup> Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27 (2) J. INT. ARB. 189 (2010); Albert Jan van den Berg, *Should Setting Aside of the Arbitral Award be Abolished?*, 2014 ICSID REV. 1.

defer to a judicial annulment? In reply, the other side can note that most arbitration clauses specify a geographical venue, thus implying expectation of judicial control at the arbitral seat.<sup>36</sup>

A middle position suggests that sound policy treats annulment decisions like other foreign country money judgments, respected unless reason exists to see the vacating judgment as lacking procedural integrity.<sup>37</sup> Initially suggested in an American law review article,<sup>38</sup> this intermediate view has gained traction in recent case law and scholarship.<sup>39</sup>

Dutch and British courts have adopted this more nuanced view in recent cases arising from the much-publicized *Yukos* saga.<sup>40</sup> An Amsterdam court confirmed awards made in Moscow that had been vacated by Russian courts, reasoning that foreign annulments should be respected

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<sup>36</sup> Analogous issues arise for awards confirmed at the arbitral seat but challenged abroad. See *Commissions Imp. Exp. S.A. v. Republic of Congo*, 2014 WL 3377337 (D.C. Cir. 2014). A Paris award confirmed in England was subsequently presented for enforcement under the District of Columbia Money Judgments Recognition Act. Reversing the lower court, the Court of Appeals held that the Federal Arbitration Act does not preempt the longer limitations period in the Judgments Act. See also *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973). Compare *Dallah Real Estate & Tourism Holding Co. v. Gov't of Pakistan*, [2010] UKSC 46.

<sup>37</sup> For an illustration of questionable annulment see *Telecordia Tech. v. Telkom SA*, 458 F.3d 172 (3d Cir. 2006). An ICC award made in South Africa was vacated by a judge who instead of letting the ICC name a new arbitrator, constituted a replacement tribunal composed of three retired South African judges nominated by the losing South African side.

<sup>38</sup> William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999).

<sup>39</sup> See discussion *infra* of the *Yukos* and *Pemex* decisions. See American Law Institute, Restatement (Third) U.S. Law of International Commercial Arbitration, Tentative Draft No. 2 (2012) § 4-16, comment c: "Though courts in the United States ordinarily decline to recognize and enforce awards that have been set aside by a court having proper jurisdiction, the Restatement acknowledges that under the [New York and Panama] Conventions a court may in certain exceptional situations confirm, recognize, or enforce an award that has been set aside."

<sup>40</sup> The Russian energy giant *Yukos*, once controlled by oligarch Mikhail Khodorkovsky, was declared bankrupt after a tax investigation resulting in its owner being eliminated as a political opponent of Vladimir Putin. In bankruptcy proceedings, Rosneft, an entity controlled by the Russian state, acquired the majority of *Yukos*'s assets, giving rise to multiple arbitrations. The saga drew public attention in July 2014 when awards were issued in three Energy Charter Treaty arbitrations brought against the Russian Federation for which the Permanent Court of Arbitration served as Registry. See Stanley Reed, "Yukos Shareholders Awarded About \$50 Billion in Court Ruling," N.Y. Times 28 July 2014 (Int'l Business).

only if they meet minimal criteria for procedural due process.<sup>41</sup> Likewise, the English High Court ruled that annulment at the seat of arbitration does not automatically foreclose enforceability abroad under what the Court called an *ex nihilo nil fit* principle. It would be quite unsatisfactory to give effect to judgments that offended basic “honesty, natural justice and domestic concepts of public policy,”<sup>42</sup>

American case law has evolved in a similar direction, respecting annulment except upon a showing of irregularity by the vacating court. In 2007 a federal court refused enforcement to an award made in Colombia that had been vacated because local law did not permit arbitration under the ICC Rules.<sup>43</sup> Six years later, however, a federal court confirmed a Mexican award notwithstanding annulment in Mexico, reasoning that *ex post* application of Mexican procedural law violated basic notions of due process.<sup>44</sup>

### III. Two Case Studies

The legitimacy of arbitration raises a range of questions touching everything from Sunday hearings<sup>45</sup> to waiver of arbitrator bias,<sup>46</sup> stopping along the way at two matters that persistently

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<sup>41</sup> *Yukos Capital Sarl v. OAO Rosneft*, Court of Appeal of Amsterdam (Enterprise Division), 28 April 2009, LJM BI2451 s. 3.10, refusing to recognize the Russian annulment. See Lisa Bench Nieuwveld, *Yukos v. Rosneft: The Dutch Courts find that Exceptional Circumstances Exist*, (11 Feb. 2010), [www.kluwerarbitrationblog.com](http://www.kluwerarbitrationblog.com).

<sup>42</sup> *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co.*, [2014] EWHC 2188 (Comm) (Simon J.). An earlier English decision, *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co.*, [2012] EWCA Civ 855 (Rix, Longmore and Davis) held that Rosneft (the Russian controlled entity) was not estopped from objecting to award enforcement in England since public policy issues (the fairness of the Russian annulments) might be decided differently from country to country.

<sup>43</sup> *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), which sounded the death knell of an earlier decision (*Chromalloy v. Arab Republic*, 939 F. Supp. 907, D.D.C. 1996) enforcing an award made in Cairo but set aside by an Egyptian court.

<sup>44</sup> *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F.Supp.2d 642, (S.D.N.Y. 2013), arising from an award made in Mexico in favor of a Mexican subsidiary of a U.S. construction company against a state-owned Mexican petroleum entity.

<sup>45</sup> In *Bauer v. Bauer* (No. 507082/2013, N.Y. Sup. Ct. 2014), an inheritance dispute was decided by a Beth Din after sitting on Sunday. At the request of the losing side, a Brooklyn judge annulled the award on the basis that arbitrators perform a judicial function and thus must respect §5 of the New York Judiciary Law which says that courts may not be open Sunday. For a

vex courts and commentators: (i) allocating tasks between judges and arbitrators and (ii) determining what law applies to an arbitration clause. These questions were addressed recently in the well-publicized American and British cases discussed below.

### **A. Who Decides What?**

In *BG Group v. Argentina* the U.S. Supreme Court reviewed an award arising from gas distribution in Buenos Aires.<sup>47</sup> Argentine emergency measures had “pesified” tariffs by converting dollar-denominated rates into pesos at a third the original value. An UNCITRAL arbitral tribunal sitting in Washington awarded a British investor \$185 million for violation of the “fair and equitable treatment” standard in the UK-Argentine investment treaty, which allowed arbitration by an investor, but only eighteen months after submitting the dispute to host country courts. Notwithstanding failure to respect the eighteen-month rule, the arbitral tribunal took jurisdiction, reasoning that the emergency decrees restricted access to the judiciary so as to preclude a literal reading of that provision.

The award was challenged for excess of authority under the Federal Arbitration Act.<sup>48</sup> A majority opinion by the U.S. Supreme Court applied what it described as ordinary contract principles to require deference to the arbitrators’ determination of the conditions at issue in the case. The eighteen-month rule was characterized as a purely procedural matter in the nature of a claims-processing rule governing when the arbitration may begin, not whether it may occur at all.

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similar case decided earlier, but coming to a different result, see *Karapschinsky v. Rothbaum*, 163 S.W. 290 (Mo. Ct. App. 1914).

<sup>46</sup> *Schwartzman v. Harlap*, 377 Fed. Appx. 108 (2d Cir. N.Y. 2010).

<sup>47</sup> *BG Group PLC v. Argentina*, 134 S. Ct. 1198 (2014). See Larry Shore & Amal Bouchenaki, Note, 2012 CAHIERS DEL’ARBITRAGE 675; Brief for Professors and Practitioners as Amici Curiae Supporting Petitioner, *BG Group PLC v. Republic of Arg.*, 134 S. Ct. 1198 (U.S. 2014) (No. 12-138).

<sup>48</sup> A different result might be obtained in arbitration conducted under the ICSID rules, which enhance award finality by precluding challenge under the law of the arbitral seat, instead providing for consideration of by an ad hoc committee convened by ICSID. See ICSID Convention, cited *supra*, Articles 52 and 54, the latter providing for award recognition in the same way as a judgment of the state where relied upon.

A dissent by Chief Justice Roberts reasoned that jurisdictional challenges bear an added layer of complexity for investment treaties and free trade agreements. Each state extends a standing offer to arbitrate which the investor must accept on terms stipulated by the host country. Until acceptance of the offer, no agreement to arbitrate exists, since the investor was not party to the treaty.<sup>49</sup> It thus falls to courts to decide whether the offer was accepted, which in the instant case required consideration of whether a litigation attempt would have been futile.<sup>50</sup>

Arguments can certainly be made for an arbitrator's right to determine questions properly characterized as matters of ripeness, *recevabilité* or admissibility, which may be cured during the arbitration. Much depends on the relevant arbitration provision. One treaty might say that arbitration claims may be filed "only a year after a local court action has been commenced," while another might say arbitration can begin "provided that *if* a court action has been filed the courts shall be given a year to resolve the matter."

Whether pursuant to contract or treaty, some procedural steps remain essential to contract formation, and as such constitute preconditions to arbitral authority, while others do not.<sup>51</sup> Likewise, arbitrators possess discretion on some procedural matters, but not others.<sup>52</sup> Sound

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<sup>49</sup> For investment treaty arbitration, it might be possible that the contracting nations agree that alleged jurisdictional flaws be evaluated by some third body, whether a tribunal seized of the claim or an institution supervising the proceedings as happens in ad hoc review pursuant to Article 52 of ICSID Convention. Whether such designation happens will depend on the facts of each case.

<sup>50</sup> In this connection, the concurring opinion of Justice Sotomayor urged that close attention be paid to expressions of intent as articulated by the treaty partners: "[I]f the local litigation requirement at issue here were labelled a condition on the treaty parties' consent to arbitrate, that would . . . change the analysis as to whether the parties intended the requirement to be interpreted by a court or an arbitrator." *BG Group PLC*, 134 S. Ct. 1198, 1214 (U.S. 2014) (Sotomayor, J., concurring).

<sup>51</sup> If a house painting contract is offered on condition that the contractor post a bond, the painter cannot say that the contract's arbitration clause became effective although the bond was rejected. By contrast, if the contract provided for painting the second floor after payment for the first floor, a dispute about whether the first floor had been painted would fall to the arbitrator. See argument by counsel for Argentina, Oral Argument Transcript 2 December 2013, at 51-52.

<sup>52</sup> If an adequate advance on cost must be deposited before proceedings begin, arbitrators would normally be the ones to decide what amount will be sufficient. By contrast, if the contract or

analysis requires attention to the facts of each case, along with the language and structure of the contract or treaty allegedly creating arbitral authority. Dispute resolution will be ill served if judges and lawyers simply incant catchphrases about procedural conditions.

## **B. What Law Applies?**

On occasion, the law governing an agreement to arbitrate may differ from the legal principles applicable to other aspects of the parties' commercial relationship. *Sulamérica v. Enesa Engenharia* involved claims under two insurance policies relating to construction of a hydro-electric plant in Brazil. English courts were asked to restrain litigation in Brazil.<sup>53</sup>

At first blush, applicability of English law seems odd. The contracts were concluded among Brazilian companies, with express choice of Brazilian law and exclusive jurisdiction given to Brazilian courts. Recourse to the law of England becomes more plausible, however, given the parties' agreement to arbitrate in London. The insurers commenced arbitration in order to contest liability, whereas the insured began a court action in Brazil. In considering whether to enjoin the Brazilian litigation, the English court had to decide what law governed the parties' agreement to arbitrate.<sup>54</sup>

The court reasoned that an arbitration clause might be subject to a law different from that of the substantive contract. The parties had not expressly chosen a law to govern the arbitration clause itself. Rejecting an implied choice of Brazilian law, the Court found the law of England, as the seat of the arbitration, to have the most real connection with the question presented, and upheld the anti-suit injunction restraining the litigation.

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treaty requires arbitration in Washington pursuant to the UNCITRAL, it would be a brave judge indeed who would defer to an arbitrator's decision to hear proceedings in Paris under the ICC Rule, absent some special circumstance or further agreement by the parties.

<sup>53</sup> *Sulamérica Cia Nacional De Seguros SA v. Enesa Engenharia SA* [2012] EWCA (Civ) 638.

<sup>54</sup> The notion of one proper law to govern an agreement's material validity, scope and interpretation has deep roots in English legal thinking. With respect to arbitration agreements, the relevant principles have often been summarized through reference to Rule 57 of the Dicey, Morris & Collins treatise on Conflicts of Law. For an exploration of the limits of this approach, see William W. Park, *Rules and Standards in Private International Law*, Review Essay of DICEY, MORRIS AND COLLINS: THE CONFLICT OF LAWS (Sir Lawrence Collins, 14th ed.), 73 ARBITRATION 441 (2007).

Not all choice-of-law questions will be answered in favor of the arbitral seat. In one American case, a boat owner brought an action against a salvage company seeking indemnity or contribution for damages to a coral reef.<sup>55</sup> The court denied the salvage company's motion to compel arbitration, finding that U.S. federal law, not English law as provided in the contract, applied to determine whether parties had agreed to arbitrate.

#### **IV. Shifting Images of Arbitration**

One challenge in explaining arbitration law lies in the dramatically divergent images evoked by arbitration. All may be correct, yet inadequate, in a way reminiscent of the Hindu parable of blind men who experience an elephant differently depending on the parts being touched: a wall (the side), a snake (the trunk), a tree (the knee) a fan (the ear) or a rope (the tail).<sup>56</sup>

Arbitrators determine billion dollar international investment claims. In some countries, they also hear claims related to student loans, credit card debt, consumer sales and employment discrimination. Arbitrators address disputes arising from construction projects, baseball salaries, biotech licenses, uncompensated expropriation, automobile franchises, liability insurance and Internet domain names. Not surprisingly, the values that commend arbitration in transactions concluded by sophisticated business managers may seem ill placed when an arbitral clause sends poorly-informed consumers to seek an uncertain remedy in an inaccessible venue. In consequence, scholarly and judicial debate on arbitration often resemble the proverbial ships passing in the night, with different camps clinging to contrasting notions of what remains at stake.

In a sense, arbitration has become a victim of its own success, with new frontiers creating new criticism.<sup>57</sup> Disputes decided by arbitration run far beyond traditional stomping grounds of

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<sup>55</sup> *Cape Flattery Ltd. v. Titan Maritime*, 647 F.3d 914 (9th Cir. 2011). The contract provided that "Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act 1996 and any amendments thereto, English law." The clause was interpreted to cover only disputes relating to interpretation and performance of agreement itself.

<sup>56</sup> The poem by John Godfrey Saxe, "The Blind Men and the Elephant," ends with the line, "Though each was partly in the right, And all were in the wrong!"

<sup>57</sup> See William W. Park, *Arbitration's Discontents*, in *MÉLANGES EN L'HONNEUR DU PROFESSEUR BERNARD AUDIT* (2014). One recent book carries a dedication page, "For the Millions of Americans Unjustly Bound by an Arbitration Agreement." See IMRE SZALAI, *OUTSOURCING*

shipping, insurance, and merchant-to-merchant sales. Arbitrators address patent validity, Olympic events<sup>58</sup> and income tax allocations.<sup>59</sup> In the United States, with its distinctive legislative tradition,<sup>60</sup> arbitration can involve class actions,<sup>61</sup> sports doping,<sup>62</sup> beauty pageants,<sup>63</sup> and trade unions grievances, the last being an outgrowth of labor's distrust of judges.<sup>64</sup>

Notwithstanding its diversity and chameleon-like character, in all its forms the core of arbitration involves renunciation of otherwise competent courts in favor of a binding private adjudication. Such renunciation may be explained by a multitude of narratives.<sup>65</sup> In

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JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013), which started with a story about arbitration over rape in Baghdad. Compare a less sensationalized treatment of the subject in IAN R. MACNEIL, AMERICAN ARBITRATION LAW (1992).

<sup>58</sup> ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT (Bâle, Helbing & Lichtenhahn 2005); ARBITRATION AT THE OLYMPICS (Kluwer 2001).

<sup>59</sup> WILLIAM W. PARK & DAVID R. TILLINGHAST, INCOME TAX TREATY ARBITRATION (2004); William W. Park, *Arbitrability and Tax*, in ARBITRABILITY 179 (L. Mistelis & S. Brekoulakis, eds., 2008); Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23 ARB. INT'L 405 (2007).

<sup>60</sup> See Christopher Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

<sup>61</sup> See e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (U.S. 2013); LAURENCE TRIBE & JOSHUA MATZ, THE ROBERTS COURT AND THE CONSTITUTION 291-299 (2014); William W. Park, *La jurisprudence américaine en matière de Class Arbitration: Entre débat politique et technique juridique*, 2012 REV. DE L'ARBITRAGE 507.

<sup>62</sup> On 5 August 2013 Major League baseball announced the 211 game suspension of New York Yankees player Alex Rodriguez for use of steroids. The Uniform Player's Contract signed by major league players contains a grievance procedure which includes an agreement to arbitrate.

<sup>63</sup> *Miss Universe L.P. v. Monnin*, 952 F. Supp. 2d 591 (S.D.N.Y. 2013). A disappointed Miss Pennsylvania, failing to reach the finals and losing to Miss Rhode Island, charged the pageant was rigged.

<sup>64</sup> Concern about judicial hostility to trade unions led to arbitration of collective bargaining agreements in the United States, albeit on a statutory foundation separate from that of the Federal Arbitration Act. See Taft-Hartley Labor-Management Relations Act, § 301, 29 U.S.C. § 185 (2003).

<sup>65</sup> Even within a single field, such as investor state arbitration, conflicting models present themselves. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L LAW 45 (2013); Joost Pauwelyn, *At the Edge of Chaos: Foreign Investment Law as a Complex Adaptive System*, 29 ICSID REVIEW 372 (2014);

international disputes, arbitration enhances more level playing fields. In construction and insurance, the goal might be expertise. In the United States, arbitration removes disputes from the perceived vagaries of civil juries.

Inevitably, conclusions about why people arbitrate bear on how the law develops. In a case involving consumer cellphone contracts, the U.S. Supreme Court struck down, as inconsistent with the purposes of arbitration, a California rule that had invalidated waivers of class arbitration. The rule was deemed to run afoul of the goals of arbitration, a conflict summarized as follows: “class arbitration sacrifices the principal advantage of arbitration —its informality— and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>66</sup>

Careful thinkers may scratch their heads at the assertion that informality constitutes arbitration’s “principal advantage” in an era when arbitration routinely serves to decide complex international investment cases which often unfold like judicial proceedings. A more sensible summary might be taken from language in an earlier Supreme Court case, which spoke of arbitration as a process to avoid “unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”<sup>67</sup>

## V. Conclusion

One Nobel Prize winner suggested that understanding a subject means reducing it to a “freshman level” of simplicity.<sup>68</sup> Of course, plain speaking will have obvious limits. The best-

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CHARLES N. BROWER, *INVESTOMERCIAL ARBITRATION*, 80 *ARB’N* 179 (2014). Compare Gus van Harten, *Investment Arbitrators’ Evident Lack of Restraint*, 5 *J. INT’L DISP. SETTLEMENT* 1 (2014).

<sup>66</sup> *AT &T Mobility v. Concepcion*, 131 S. Ct. at 1751-53 (2011), with majority opinion by Justice Scalia.

<sup>67</sup> *Scherk v. Alberto-Culver*, 417 U.S. 506 (U.S. 1974), echoed in a later case deciding that the New York Arbitration Convention trumped the U.S. Bankruptcy Code’s automatic stay of arbitration. See *Sonatrach v. Distrigas Corp.*, 80 B.R. 606 (D. Mass. 1987), where Judge Young concluded, “It is important and necessary for the United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors.”

<sup>68</sup> Attributed to Richard Feynman, winner of the 1965 Nobel Prize for Physics, who in his day combined academic recognition with an eccentric persona that created a wide public following.

chosen words connect themselves sequentially through human grammar, while the reality of legal doctrine implicates a multitude of caveats and exceptions that remain obstinately simultaneous in nature.

Hemmed by this caution, a tentative explanation of arbitration law suggests tension between two sets of expectations. First, courts should give effect to arbitration commitments obtained through informed consent. Second, judges must monitor arbitration's basic procedural integrity, which includes impartial arbitrators who hear before deciding and respect both contractual limits of their authority and relevant public policy. The role of arbitration law thus aims to enhance the rule of law in its broadest sense, seeking balance between respect for parties' agreement and the correlative judicial duty to monitor fairness in the process. Thus conceived, arbitration law will serve to promote the type of economic cooperation enhanced by reliable vindication of *ex ante* expectations.