3

Norms Arising from the Institutional Structure of International Commercial Arbitration

> What I like about the international arbitration community is that … it's not some sort of self-protection society, where the infirm or those … who are not good are shaded from criticism. If someone is poor at their job, it will get out there.… It's enormously competitive. And that's a good thing. Choice is key. There are choices of venues; there are choices of arbitrators; there are choices of law firms. And that is … what gives the user trust in the process.[1]

I. Introduction

Judges are state officials, while arbitrators are private citizens. Judges are paid by the government, and may be part of the broader civil service, while arbitrators are paid by the parties. Judges are randomly assigned to cases, while the parties individually select their arbitrators. Judges adjudicate full time, while arbitrators are freelancers, openly competing with each other for work. Judges enjoy strong job security, regardless of the quality of their decisions, while arbitrators are reliant on maintaining a reputation for high quality decision-making. Judges can order enforcement of their own judgments, while arbitrators must rely on the goodwill of courts to enforce their awards. Judges make a fixed salary, while arbitrators earn more the more they work.[2] Judges' decisions may be appealed on points of law, while there is in general no appeal on issues of fact or law from the decision of an arbitral tribunal (although the decision may be set aside[3] or refused enforcement). Courts are tied to a particular country's legal system, while arbitral tribunals apply and are regulated by many different laws—they have no *lex fori*. Courts are permanent, while arbitral tribunals are ad hoc. Courts are physically rooted, while successful arbitrators regularly work with a variety of arbitral institutions and in a variety of locations all over the world.

Institutional structures are an important component of communities and their cultures.[4] This chapter deals with three categories of institutional differences that correspond to distinct aspects of ICA culture: the sources of international arbitral authority

[1] A London-based independent arbitrator, interviewed for this book.

[2] A 2000 survey by Gotanda revealed that when given the choice (ie, when the administering institution does not impose a particular fee system), most arbitrators charge fees based on the amount of work done (by an hourly or daily rate) rather than under a fixed fee or *ad valorem* (percentage of the amount in dispute) calculation. In addition, a significant percentage of arbitrators (although still a minority) charge cancellation fees if a case is settled prior to the hearing. Gotanda 2000.

[3] The term 'set aside' is used here interchangeably with 'annul' and 'vacate'.

[4] See, eg, Bell's comparative study of the judiciaries in five European countries, which focuses on the effects of institutional factors, such as recruitment and selection methods, avenues of promotion and means of management and governance. Bell 2006, 13–34. Bell justifies his adoption of an institutional perspective on three bases: that law is an 'institutional fact', that legal actors operate primarily through institutions, and that judiciaries relate to and are accountable to the wider society as institutions. Ibid, 6–10.

and the constraints on that authority, the professional context within which arbitrators work, and the competitive market forces operating in the ICA system.

II. Sources of and Constraints on Arbitral Authority

The most fundamental difference between arbitrators and judges is that judges are officers of state—they derive their authority ultimately from the coercive power of their respective governments—while arbitrators are private contractors—they derive their authority from the will of parties that enter into arbitration agreements. So far, this is not controversial. However, the extent to which arbitral authority is a function of party autonomy continues to be disputed.[5] The following section canvasses the major schools of thought as to the sources of and constraints on international arbitral authority.

1. Sources of international arbitral authority

Some arbitrators maintain that ICA derives its force *entirely* from the parties' choice. Robert was among the first to make this argument:

> Except for the eventual necessity of rendering an enforceable award, the law has no influence on the formulation, the promulgation, and the voluntary execution of an award. It is possible to consider that arbitration derives none of its institutional force from the law, and develops entirely from the will of the parties, via the contractual expression of that will.[6]

This position is often called the 'consensual theory' or the 'transnational approach'. Its most important implication is that arbitration can be entirely delocalized, or separated from national laws and court systems, in particular those of the seat of arbitration. In its extreme form, the consensual theory denies national courts any role except in the enforcement of arbitral awards and grants arbitrators the power to establish any procedure or apply any substantive rule that the parties permit.

The consensual theory is controversial because it assigns no jurisdictional importance to national laws and courts.[7] State courts (with the possible exception of those in France), have long resisted the consensual conception of arbitral authority. For example, in *Bank Mellat v Helliniki Techniki SA*, Kerr LJ, himself a leading figure in ICA, wrote 'despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law'.[8]

The opposing theory is often called the 'jurisdictional theory' but Gaillard labels it the 'monolocal approach'. It emphasizes the fact that an international arbitration must take place somewhere, and therefore can only exist to the extent that a single national legal order—that of the jurisdiction that is the seat of the arbitration—permits it to exist.[9] The classic formulation of this theory is Mann's 1967 screed against the consensual theory, entitled *Lex Facit Arbitrum* ('the law makes the arbitration'). Mann decries the notion that 'the autonomy of the parties … may produce a contract without

[5] For a relatively brief overview of the different theories of arbitral authority, see Yu 2004 and 2005. The philosophical underpinnings of the different theories are explored in depth in Gaillard 2010a.

[6] Robert 1967, 229. [7] Ibid, 15. [8] [1984] 1 QB 2901, 301.

[9] Gaillard 2010a, 35–9.

law… so that arbitrators are not called upon to apply any fixed rules of a specific system of law, but may have resort to a law of their own creation'.[10]

Of course, it is true that 'in the legal sense no international commercial arbitration exists', since arbitration cannot exist without national laws and national courts, at least as an enforcement system.[11] More recent commentators have advocated a third theory:

> Transnational private law is one among multiple regimes of cross-border governance, but one distinguished by its particular mode of governance: indirect intervention through private contestation and ordering. Through private law, the state offers a set of background norms and processes that can be used by private parties to make claims against each other. The state has a necessary role in this plural system, but it forgoes dominant 'command and control' regulation, and acts rather as a kind of indirect 'facilitative' actor.[12]

Gaillard describes this theory as 'multilocal' or 'westphalian'. It sees arbitration as deriving not from a single order—that of the seat of arbitration[13]—but rather from 'all the legal orders that are willing, under certain conditions, to recognize the effectiveness of the award'.[14] The multilocal theory recognizes the fact that jurisdictions other than the seat may legitimately insist on respect for their mandatory laws when recognizing and enforcing arbitral awards.[15] It is often characterized as occupying an intermediate position between the transnational and monolocal theories.[16] However, the multilocal theory is more properly understood as an update or refinement of the monolocal theory that takes into account the overlapping claims of multiple national legal orders. The monolocal and multilocal theories share a focus on the role of state power in constructing the international arbitral system. Both emphasize that neither arbitration agreements nor arbitral awards would be enforceable without the active cooperation of states.

Nevertheless, it is equally obvious that arbitrations can only exist with the will of the parties, so the consensual theory cannot be ignored. Arbitrators may ultimately be empowered by states, but they are proximately empowered by the parties. In particular, it is the parties that define the scope of the arbitrators' powers and that appoint and pay them.

Thus, on the macro level, arbitrators' and judges' obligations flow in different directions: 'Unlike the state official or politician, whose duty is to the national interest, the lawyer-diplomat can develop an intellectual capital which transcends particular national legal fields.'[17] More concretely, the difference in who 'employs' judges (the state) and arbitrators (the parties) affects how these adjudicators are selected and remunerated.[18]

Whether this difference in the source of judicial and arbitral authority makes it impossible for arbitrators to be independent of the parties is controversial.[19] Menkel-Meadow argues that conflicts of interests are 'systemic' and 'inherent' in ICA;[20]

[10] Mann 1967, 158 (citations omitted). [11] Ibid, 159.
[12] Wai 2005, 475
[13] The *situs*, or seat, is the jurisdiction in which the arbitration legally takes place—the jurisdiction whose arbitration law governs the arbitration. The hearings and other proceedings may occur elsewhere.
[14] Gaillard 2010a, 24–5.
[15] For a brief but comprehensive description of the nature of mandatory laws and their relationship to public policy, see Bermann 2007.
[16] See, eg, Gaillard 2010a, 24–5. [17] Picciotto 1997, 1021.
[18] Franck 2006, 509.
[19] The effect of the arbitrator-party relationship on arbitral decision-making on the individual level will be discussed in the following section.
[20] Menkel-Meadow 2002, 956.

others, such as Franck, argue that, in the abstract, the differences in arbitrators' and judges' sources of authority 'are minor and should not affect an adjudicator's capacity and willingness to render impartial decisions'.[21] However, it is reasonable to conclude that this institutional difference in the sources of their authority makes arbitrators more likely than judges to see matters from the point of view of the parties and to be more attuned to the interests of the parties than to the interests of the legal system and the society as a whole. (This is apart from the issue of party-appointed arbitrators' relationships with the parties that appoint them, a potential source of bias that will be discussed below.[22])

International arbitrators' own perspectives seem to bear out this observation. Although arbitrators recognize the importance of state law, they tend to see their power as deriving from the will of the parties. Arbitrators may debate the proper approach to determining the jurisdiction of ICA tribunals, but seem all to be consensualists at heart. For example, a Swiss practitioner who now acts almost exclusively as an arbitrator said: 'the arbitrator … gets his mandate from the parties; he is appointed by the parties. The state court judge is an official of the state, and has a totally different authority than an arbitrator.' An interviewee with a common law background noted that, because arbitrators' authority comes from the parties, arbitrators must 'manage' that authority.

Indeed, every arbitrator interviewed for this book characterized arbitrations as 'belonging' to the parties in some sense. One interviewee said: 'I take a more deferential approach. Fundamentally, it's the parties' process.' Another interviewee, a French practitioner and academic, said: 'You are an arbitrator because you have been appointed as an arbitrator and it's the parties' arbitration; it's for them. So you are at their service.' An American attorney put it this way: 'When I sit as an arbitrator … I think of providing a service that the parties have contracted with me to provide. I do think of myself as having a real obligation to be flexible and responsive to their needs and desires—the mode of dispute resolution that … they expect when they do arbitration.'

The national laws of the seat and the mandatory laws of other jurisdictions come to the fore only when courts annul an award or refuse to enforce it. However, this concern, too, was characterized by several interviewees in terms of an obligation *to the parties* to render an enforceable award. The duty to render an enforceable award is expressly imposed by many of the various arbitral rules of procedure,[23] but interviewees took this duty seriously and imbued it with a kind of moral force. For example, one London-based barrister described his role in this way: 'You have a very specific task, particularly in jurisdictions where there is very limited right of recourse against your award. There's a legal obligation on you and also, I would say, a moral obligation to very carefully consider the decision you're going to make. That for me is a key point.'

If the arbitration belongs to the parties, so too does the award. Interviewees were clear that they write the award with the parties and their specific dispute in mind. Several even contrasted their party-oriented perspective with the broader systemic perspective that national court judges must take into account. One interviewee observed:

> Awards … may touch on and decide a general point of interest. But they tend to do so in a very … abbreviated manner, because they are not for external publication. They are for the

[21] Franck 2006, 508–9 (citations omitted).

[22] See Section III.1 of this chapter.

[23] A typical provision is art 32(2) of the Arbitration Rules of the London Court of International Arbitration ('LCIA Rules'), which requires tribunals to 'make every reasonable effort to ensure that an award is legally enforceable'.

benefit of the parties and possibly the institutions. They provide reasons sufficient only for those purposes. Whereas a judgment in a court is written for the public; the judge is in a sense accountable not only to the parties but ultimately to the court of appeal if it goes that way.

Another interviewee, a Swiss arbitrator and academic with a reputation for taking an intellectually and legally rigorous approach to drafting awards, described the difference in this way: 'the judge will also write for other judges—maybe it sets precedent, maybe not *stare decisis* but still persuasive, etc. A court judgment has a function in developing the law. That is not at all what I have to do. I'm not developing the law. I'm trying to decide this case and nobody will ever read it, hardly, and it will not change the law.'

Beyond developing the law, arbitrators draft awards with the parties—in particular the losing party—in mind. Most rules oblige tribunals to provide reasoned awards, but arbitrators see it as their job to explain their decisions in a way that the parties will accept and will understand. As one put it: 'Because you get the mandate from the parties you try to find the solution or to solve the case in a way that takes account of what really happened, because in the end you also want to have the parties accept your decision even if they don't like it, at least they say "That's how it was, we have to bear the legal consequences."'[24] Another interviewee expressed a similar sentiment, and took the opportunity to criticize some arbitrators (especially certain members of the older generation) for failing to explain their decisions in a legally and commercially rigorous manner:

I think the most important thing is that when you read the award, as a party, you should say 'Yes, that makes sense. If I had known—in fact I should have known and I could have known—that these were the rules and that is how they should have been applied.' … If you achieve that, you reconcile the parties with the function of the legal system, which is to be predictable. …

That is very general, but I feel that it is an important thing. You get too many people who talk to you about discretion. They're like wise men under the tree. … To me, that's almost shocking … I don't think we're supposed to be wise men under the tree; we are supposed to adjudicate the contractual dispute. People work hard; they make predictions. They expect something. They have computed for their own budget how much this contract was going to be worth to them. And when you are an arbitrator you have to respect that; you can't just say 'my wisdom, fairness … '.

The self-imposed obligation to explain the outcome in a way that the parties will accept takes on an additional dimension due to the internationality of ICA. One Swiss interviewee noted that he always takes into account the necessity of drafting the award in such a way that it will be comprehensible to counsel and parties from a variety of legal systems:

What we have normally is parties from all over the world, with totally different backgrounds, represented by totally different kinds of lawyers, not lawyers that were all trained at the local university and then took the bar here and know how we do things here. So you have to write in a very different way if you want to explain things to, say, a party from Argentina.

2. Constraints on international arbitral authority

Grants of authority are invariably accompanied by corresponding constraints on the exercise of that authority. The decision-making of arbitrators, like that of all adjudicators, occurs within the boundaries delineated by those constraints. Accordingly, the

[24] See also Tschanz 2009.

decision-making of arbitrators can only be understood within the context of the constraints upon it. This issue will be examined first with respect to formal constraints that derive from the applicable laws and rules (legal norms), and second with respect to informal constraints (social norms).

Arbitrators act within three layers of formal, rule-based constraints. First, the agreement of the parties determines the scope of the tribunal's jurisdiction, whether through an arbitration clause in a contract, by a submission agreement, or (in the case of ICC arbitrations and sometimes in ad hoc arbitrations) by terms of reference. If the tribunal exceeds this authority, as when the parties did not freely and lawfully choose arbitration, or when the tribunal rules on issues not submitted to it, or when the tribunal is constituted in a manner contrary to the agreement of the parties, any eventual award may be set aside or refused recognition and enforcement, as per article V(1)(a), (c) and (d) of the New York Convention.[25]

The rules of procedure constitute second layer of constraints. These are the rules of the administering institution if it is an institutional arbitration, and frequently the UNCITRAL Rules of Arbitration ('UNCITRAL Rules') if it is an ad hoc arbitration.[26] Failure to abide by the rules of procedure can result in removal of an arbitrator or annulment of the award. However, when it comes to the conduct of the hearing, these rules are often very general or provide for flexibility. They place few constraints arbitrators' power to structure the proceedings in the manner they deem appropriate. Moreover, they seldom place any significant constraints on arbitrators' ability to choose, determine, and apply the governing substantive law.

Applicable national laws constitute the third layer of formal constraints on arbitral authority. The New York Convention provides that recognition and enforcement of an award may be refused if the party against whom the award is invoked was 'unable' to present its case.[27] As a result, many national arbitration laws permit the annulment of an award or the refusal of recognition or enforcement if the tribunal did not give both parties full and equal opportunities to state their cases and to respond to the other parties' cases. For example, the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') states: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'[28] Similarly, the English Arbitration Act 1996 requires the tribunal to: 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.[29]

In addition, under article V(2)(b) of the New York Convention and every national arbitration law, courts may set aside awards or refuse them recognition or enforcement if they contravene the fundamental public policy of the state in which the application is made. Generally, the tribunal is bound by any mandatory provisions of law of the seat of arbitration; however, tribunals must also consider the mandatory laws of other states where enforcement of the award is likely to be sought.

[25] 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).

[26] The UNCITRAL Rules were designed to be used in ad hoc international arbitrations and, when promulgated in 1976, were the only rules available for that specific purpose. Born 2009, 151. See also Lew et al 2003, 25. Unless otherwise noted, all references to the 'UNCITRAL Rules' are to the 2010 version of those rules.

[27] Article V(1)(b). [28] Article 18.

[29] Section 33(1)(a). Violation of s 33 can result in annulment of the award under s 68(2)(a) if the violation caused 'substantial injustice' to one party.

A key characteristic of the relationship between national law and ICA is that, in annulment or recognition and enforcement proceedings, the focus is on procedural matters. Not only is there in general no appeal process within international commercial arbitration, but also, generally speaking, judges may not set aside an award or refuse enforcement on grounds that the arbitrators made an error of law or otherwise made a wrong decision. There are, in essence, no formal constraints on the arbitrators' ability to err in choosing the governing substantive law (unless they ignore the express choice of the parties), determining the content of that law, or applying the law to the facts.[30] Carbonneau wryly puts the matter thus: 'The content of the governing *lex*, however chosen, is quite malleable … with the degree of malleability being determined by the arbitrator's ingenuity.'[31] As Rogers points out, this state of affairs vests arbitrators with broad, virtually unreviewable decision-making power: 'Even clear mistakes of law in arbitral awards are virtually immune from appellate review.'[32]

By contrast, judges must apply the law—substantive and procedural—as written in domestic statutes and as interpreted by superior courts. If they make an error of law, it may be overturned on appeal. In some jurisdictions, arbitrators are subject to liability for negligent performance of their duties, while judges everywhere enjoy blanket immunity.[33]

Broadening the disparity between judges and arbitrators is the fact that arbitrators in ICA may recognize and apply general principles of international commercial law, also called '*lex mercatoria*', the 'new law merchant', 'a-national law', or 'transnational law'. The very existence of such principles, let alone their applicability to the resolution of actual disputes or their importance in practice, is controversial. However, they are in many ways central to ICA's self-image. It is therefore worth making a brief digression to discuss the place of general principles of law in ICA.

The importance of general principles of law is often overstated. Only a small percentage of contracts provide for the application of general principles.[34] As the ICC reported: 'In 79.8% of the contracts giving rise to disputes referred to ICC arbitration in 2007, the parties had specified the law applicable to the merits. They opted for state laws in all but three contracts.'[35] The three exceptions called for the application of the UNIDROIT Principles, the CISG, and the rules of the Organisation for the Harmonisation of Business Law in Africa (OHADA).[36] Thus, in no dispute filed with the ICC in 2007 did the parties call for the direct application of 'general principles' or '*lex mercatoria*'.[37] Similarly, in a study of arbitration clauses in disputes filed with the ICC over roughly the second half of the 20th century, Dasser found that only 0.3 per cent referred to *lex mercatoria* or general principles.[38]

[30] The rules regarding substantive law determinations in ICA will be discussed in greater detail in Chapter 5.

[31] Carbonneau 2004, 1204. [32] Rogers 2002, 414–5 (citations omitted).

[33] Arbitrator immunity is a controversial subject and the rules vary greatly from jurisdiction to jurisdiction. See Rutledge 2004; Franck 2000.

[34] The available empirical evidence is discussed in Drahozal 2005, 536–44. One interviewee, a specialist in construction and engineering disputes, said that in his field, 'the reason there's arbitration at all is because the standard form has specified it. There are only a dozen standard forms that matter and none of them calls for general principles or amiable composition. In one or two, they actually say, "There will be no *compositeur*-ish behaviour by the tribunal." There's no question of it—parties want a court-like approach'.

[35] ICC Statistical Report 2007, 12. [36] Ibid. [37] Ibid.

[38] Dasser 2008, 140.

Contracts calling for the application of general principles tend to come from a few specific areas, such as contracts involving Middle Eastern government entities or investment guarantee contracts involving the World Bank's Multilateral Investment Guarantee Agency.[39] In other cases where parties choose to be governed by general principles, it is often because 'there was no published and publicly available national law on point. In other words, the new law merchant applied only in the absence of national law, not in lieu of national law'.[40] Finally, there is some evidence that both parties and tribunals are calling for the application of general principles less frequently than in the past; from 2003 to 2007, the percentage of arbitration clauses in ICC disputes that called for the application of such principles declined from 1.2 per cent to 0.5 per cent.[41]

Nevertheless, general principles constitute a potentially important body of law to which many arbitrators are dedicated, and which is almost entirely absent from national courts. The dedication of arbitrators and arbitral institutions to promoting general principles is evident in the publication policies of the major institutions. For example, as was noted above, the ICC has prioritized the publication of arbitral awards where the tribunal does not apply national laws.[42] Such a policy exists only to promote the legitimacy of general principles as a basis for the resolution of international commercial disputes.

In addition, as a reflection of the doctrine's roots in public international law, clauses providing for some manner of general principles remain common in contracts involving governments or government enterprises: 'The government does not wish to submit to the laws of a foreign state. A private party will not wish to have the contract governed by the laws of the foreign government since they may be changed to his disadvantage after the contract is made.'[43] Of course, private parties need not resort to general principles to protect themselves from their sovereign contractual partners; other means exist, such as expropriation insurance, stabilization or renegotiation clauses in the contract, and choice of the law of a 'third state'.

Finally, general principles are notoriously indistinct. The flexibility of general principles means that decisions applying them provide some of the most direct evidence of the actual preferences of arbitrators. The 'standard explanation' for why parties would not contract for the application of general principles is that they are 'too vague and uncertain to serve as a useful substitute for national law'.[44] Indeed, the primary criticism of general principles is that they are so vague as to constitute a mere façade for the preferences of the arbitrator: 'While not completely standardless, [general principles] and *lex mercatoria* tend to be very elastic concepts whose content changes as much with the arbitrator as with the industry.'[45] Thus, the way arbitrators select and apply general principles of international private law tells us a great deal about what arbitrators think the law ought to be.

Interviewees were highly aware of the absence of constraints imposed upon them by the applicable laws and rules, especially with respect to their decisions on the merits. They expressed the obvious point that this gave them greater freedom than national court judges: '[there is] practically no court control over the application of the law, of the substantive law. I'm sure that is an important factor that makes arbitrators more free

[39] As one interviewee observed, contracts involving general principles or amiable composition tend to be 'intensively located in a few particular kinds of trade practice'.
[40] Drahozal 2005, 526.
[41] Drahozal 2009a, 1039; see also Dezalay and Garth 1996, 63.
[42] See Chapter 2, Section IV.3.
[43] Lando 1989, 143–4.
[44] Drahozal 2005, 546.
[45] McConnaughay 1999, 471.

to apply the law than a judge, who knows he has a court of appeal above him.' However, interviewees also described themselves as feeling a countervailing duty to the parties to restrain the urge to make arbitrary decisions. One said: 'As an arbitrator, because there are so limited possibilities of appeal against your decision, that makes you cautious.'

More generally, the gap between the constraints on judicial and arbitral authority does not seem so wide when one includes informal constraints imposed by social norms. Arbitrators, like judges, do not want their awards annulled or denied enforcement. Indeed, despite the high degree of freedom afforded them by the limited means of recourse against an award, the arbitrators interviewed for this book were keenly aware of the risk that their awards may be annulled or refused enforcement by the courts. This concern permeates their thoughts in every stage of their involvement in an arbitration, from accepting an appointment to issuing a final award. Throughout the interviews, whenever an issue arose that touched on a ground for non-enforcement of awards, interviewees used phrases like 'you have to be careful' or 'I would be very cautious'.

This concern most obviously applies to procedural matters, such as ensuring that the tribunal stays within the scope of submission to arbitration and ensures that both parties have a reasonable opportunity to present their cases. But it also carries through to the drafting of the award. One interviewee, who frequently presides over arbitrations seated in Switzerland, spoke of the need to keep courts in mind when drafting an award, especially since judges in many jurisdictions are unfamiliar with ICA law and practice. After discussing the ways that awards can be drafted to increase their acceptability to the parties, he added:

> Of course I will write for the Swiss Federal Supreme Court, the one that is breathing down our necks. . . . But that's by no means the only court I am writing for. I am also writing for the courts in the place of enforcement, if I can predict it. . . . I had a case that had to be enforced in eastern Siberia. . . . I had to explain things, especially in the early days—this was a case that I had to do in the early days when they just came out of the Soviet system and started doing things in a modern way. You have to explain things to these judges.

Rendering an award that is the subject of a successful challenge implies (in arbitrators' perception, if not always in fact) a failure on the part of the tribunal. It is a black mark on an arbitrator's résumé and may even affect his or her ability to garner future appointments. Even if an award is not published or challenged in a public court proceeding, the parties will see it and will be able to evaluate the arbitrator's skill and conscientiousness. Given how small and tightly-knit the arbitration community remains, both exemplary and incompetent work will affect an arbitrator's prospects. Franck is therefore correct to conclude that: 'While arbitrators and judges are subject to different review processes, both processes provide an opportunity to evaluate their conduct.'[46]

In addition, increasing publication of awards, greater sophistication of the parties, and more frequent use of ready-made rules like those promulgated by the International Bar Association (IBA) mean that arbitrators now have less control over procedures than they did in the past.[47] Modern arbitral rules have also removed earlier constraints on the parties' freedom to choose the applicable substantive and procedural rules.[48] The parties' power in these areas balances the almost unconstrained power that arbitrators have over the decision on the merits.

[46] Franck 2006, 511.
[47] Rogers 2002, 416 (citation omitted).
[48] See Chapter 4, Section II.1–2.

III. The Professional Context of Arbitration

International arbitrators work in a professional milieu entirely different from that of judges. Two important factors specific to ICA must be addressed: the multiple roles played by arbitrators and the fact that arbitrators are appointed by the parties.

1. Arbitrators' multiple roles

An important difference between judges and arbitrators is that the individuals who are appointed as arbitrators also participate in arbitrations in other capacities: as advocates, consultants, expert witnesses (hired by the parties or by the tribunal itself), and (in the case of the ICC's Court of International Arbitration) reviewers of awards.[49] Indeed, it is practically impossible to be appointed as an arbitrator in a major international dispute without prior experience in one or more of these roles.[50]

Three consequences arise from this state of affairs. The first is the greater likelihood in arbitration than in litigation that an adjudicator will have a prior professional relationship with a party or counsel that could create an inference of bias or an outright conflict of interest and duty. However, such relationships are, with adequate disclosure by arbitrators, relatively easy to police. Moreover, they do not substantially differ from potential conflicts experienced by judges, many of whom (at least in common law countries) were previously practising lawyers.

The second consequence is that arbitrators, counsel and expert witnesses often maintain ongoing personal and professional relationships. Arbitrators are not only likely to have worked together with counsel or expert witnesses in the past, they may work together in the future on an unrelated dispute, as co-counsel, as consultant and client, or as counsel and arbitrator with the positions reversed. In addition, while members of the same law firm may not appear in front of each other, arbitrators who are barristers may generally hear arguments by barristers from the same chambers.[51] Arbitrators are often in a position to appoint other arbitrators, either when co-arbitrators choose a tribunal chair or when arbitrators serve on the boards of arbitral institutions that act as appointing authorities.

Repeated interactions between arbitration practitioners are often not coincidental, but rather the result of mutual referrals. As Dezalay and Garth note, the 'exchange of favours is essential to success in arbitration, a career dependent on personal relations'.[52] For this reason, international arbitration is often described as a 'club'.[53] Judges, on the

[49] The ICC Court's review is nominally limited to the form of the award but often goes beyond this. One interviewee, a former UK representative on the ICC's Commission in International Arbitration, reflected on the character and effects of the ICC Court's review: 'The ICC Court scrutinizes awards not only on the grounds of form to see whether they will be capable of being enforced, but also looks at the reasons because a complete deficiency of reasons might be regarded as a defect in form. And it will provide advice on how to restructure the reasons or suggest different reasons. But it's only advice; it can't actually make you do it. And if you don't want to do it there's not much that it can do in the sense that, although the reasons may not be good, they are the reasons.'

[50] Retired judges, who are popular as arbitrators, are an exception to this trend. However, high-level judicial experience can substitute for experience as an arbitrator; in addition, the retired judges who find success as arbitrators may have had experience as arbitration counsel prior to being elevated to the bench.

[51] *Hrvatska Elektroprivreda, dd (Croatia) v Slovenia*, ICSID ARB/05/24, award of 6 May 2008 (Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings).

[52] Dezalay and Garth 1996, 124.

[53] See, eg, Menkel-Meadow 2002, 958–9; Ridgway 1999, 51; Dezalay and Garth 1996, 10 (quoting a 'well-informed New York partner').

other hand, must not fraternize with advocates or potential witnesses, especially in states where judges are drawn from the ranks of prominent advocates, and may not act as advocates or expert witnesses while they are on the bench. For example, the House of Lords held in 2003 that lawyers who serve as part-time judges may not appear as counsel before a panel of the Employment Appeal Tribunal consisting of one or two lay members with whom they had previously sat, because such arrangements give rise to a real possibility of subconscious bias, and thereby undermine public confidence in the administration of justice.[54] These characteristics of the ICA community give rise to legitimate concerns regarding the independence of arbitrators.

Even more importantly, arbitrators are likely to have in the past and will in the future encounter the advocates appearing before them, with the positions reversed. Dezalay and Garth see such fluidity of roles as a benefit:

> The principal players … acquire a great deal of familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration.[55]

Such a statement may well be shocking to those who take conflicts of interest seriously. Indeed, there is cause for concern, given that an arbitrator's future livelihood may depend on the goodwill of the other participants in a current arbitration. As Garth notes, 'the world of ICA operates to a great extent as a "favour bank": Those who can provide a favour for the individuals at the core tend to get rewarded with referrals and recognition.'[56] There is thus a strong incentive to cooperate with the other participants in an arbitration and to conform to accepted practices and standards.

Nevertheless, several interviewees praised the close relationships between arbitrators and counsel and the fluidity with which individuals move between the two roles. One interviewee, who described his practice as 'about 50–50 acting as counsel and arbitrator', described the fluidity of roles as creating greater incentives for professionalism:

> It's an advantageous way of practising. If you are a counsel, it's good to be an arbitrator also, so that you can remember when you are arguing a case what it's like to be receiving the argument.… It is a small world; you often see the same people before you and then you argue a case before them. That, I think, is not bad because it's a way of ensuring a higher standard of practice, honesty, being genuine. You won't get away with being less than honest, if you are going to face the same people two years later in a different case.[57]

[54] *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [21]–[23].

[55] Dezalay and Garth 1996, 49.

[56] Garth 1997, 11; Dezalay and Garth also note: 'It is good arbitration politics to thank business lawyers or other acquaintances who bring nice arbitration matters by letting them have limited access to the arbitration market. This system of exchange of favours is essential to success in arbitration, a career dependent on personal relations.' Dezalay and Garth 1996, 124.

[57] Other interviewees also emphasized the benefits they derive personally from acting as both arbitrator and advocate. For example, one French interviewee who regularly acts in both capacities commented: 'I think sitting as an arbitrator helps me a lot be effective as a lawyer addressing an arbitration tribunal or even a state court.… Because it helps me realize that only clear, important, convincing arguments are of any use and that all of the little legal discussions you advance in argument and there's a counter-argument but then in the reply, you criticized the counter-argument and you will cite another case and then they will again reply—all of that will not convince anybody.… But I like oral arguments, which I think carry much more weight to convince a tribunal. There, you have to completely forget about all these tiny things. Be very strong and straightforward. That I derived from my experience as an arbitrator.'

The only major arbitral rules of procedure that limit role switching are those of the Court of Arbitration for Sport. The Code of Sports-Related Arbitration ('CAS Rules') provides that only arbitrators on a list maintained by the CAS may be appointed.[58] In the 2009 revision to the CAS Rules, the 'most significant change' was a 'prohibition of the double-hat arbitrator/counsel role'.[59] Article S18 of the CAS Rules provides that arbitrators on the CAS list may not act as counsel for parties before a CAS tribunal. The CAS's stated goals in prohibiting such role-switching were 'to limit the risk of conflicts of interest and to reduce the number of petitions for challenge [to arbitrators] during arbitrations'.[60]

One arbitrator, who is familiar with CAS and investor-state arbitrations, noted that such a provision may make sense in fields that involve a relatively small number of legal issues that present themselves with frequency. This arbitrator has no qualms about role-switching in commercial arbitrations, but disapproves of it in investment arbitrations:

> I don't think you can be an arbitrator and counsel at the same time in different cases in investment arbitration, just because of the issue conflicts, because you always find the same notions and the same standards in investment treaties. When you have to define what fair and equitable treatment is as an arbitrator and then you have to argue something different or the reverse as counsel … that is not credible. You don't have this problem in commercial arbitration because you have a negotiated contract between two private parties. The decision affects these two parties and it's specific to this contract.

Another interviewee made a similar point, that the CAS prohibition on role-switching should not be applied more widely:

> The rule … is helpful in the close environment of the CAS. But in the international field I'm not sure such a general rule would make much sense. … There is a tendency of some 'guru arbitrators' to … lose sight of the perspective of party counsel. It's important as arbitrator to always imagine 'How would I react as party counsel to the decision I make now?' A small example is time limits. Some arbitrators have no connection anymore to acting as a party representative; they set unrealistically short time periods or don't take into consideration attorneys' problems in setting dates for hearings.

The close relationships between arbitrators and counsel are also manifested in a high degree of collegiality and informality in their interactions. Several interviewees emphasized the lengths that they go to in order to establish a friendly and cooperative working relationship with other arbitrators and with the parties.

Some spoke of the importance of socializing with other members of a tribunal, such as one London-based arbitrator who makes it a habit, when sitting in London, to invite the other members of the tribunal to his house for dinner. Another arbitrator found that such socializing reduces disagreements within the tribunal and contributes to unanimous awards: 'In my experience, it's generally a very good relationship. We get along well. We'll have lunches, sometimes dinners. And generally we come to an agreement.'

[58] CAS Rules, S3, S6.3 R33, R40.2, R54 available at <http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_En_2001.01.pdf> accessed 27 August 2012.

[59] Court of Arbitration for Sport, 'Press Release: The Court of Arbitration for Sport (CAS) Amends Its Rules' (1 October 2009).

[60] Ibid. For an in-depth discussion of the CAS's rule change, see Brubaker and Kulikowsky 2010.

Interviewees often described themselves as 'equal to' the parties. This, they said, is in contrast to judges, who 'need a sort of aloofness'.[61] For example, one interviewee described the importance of maintaining an informal tone in hearings. Arbitrators, he said, are 'equal' to the parties, while a judge is 'superior'. Arbitrators are invariably selected because the parties consider them to be appropriate for the case in question. The interviewee noted that, upon entering a hearing room, he/she might offer to pour coffee for the parties, as a way of showing them respect and encouraging a cooperative atmosphere. He concluded: 'You have to keep your independence but also earn the parties' respect, and you can earn that respect by not being "above" or overly distant from them.'

Other interviewees spoke of the need to work with the parties to create a cooperative atmosphere. One called the relationship with counsel 'a give-and-take … you need to keep the trust of the parties and have a sort of civilized relationship with counsel, which is based on agreements and not on orders'. Another interviewee spoke of the importance of having a good 'bedside manner'.[62] A third expressed the satisfaction she feels from achieving a collaborative relationship with the parties and their counsel:

> I would hope … that you create a good working relationship, a good cooperation, with counsel so that they know they can contribute to the resolution of the case. … My biggest reward is when I close a hearing and I have a feeling everybody is happy … One party will lose, or half lose; but at least it will have had the impression that it was heard, that it was treated fairly. And that's really the goal.

The collegiality prized by arbitrators is also illustrated by ICC Case No 8694 of 1996. There, the tribunal thanked 'the parties' counsels for their competence, professionalism, courtesy, and good humour manifested during the course of the arbitration. Without such a cooperative and constructive approach, our work would have been much more difficult'.[63] Former ICC Secretary-General Yves Derains characterized the tribunal's statement, which was not unusual, as 'refreshing', 'encouraging', and characteristic of the 'comradely spirit' of ICA.[64] Dezalay and Garth go even further:

> In the community of the initiated, the proximity and interchangability of roles makes the advocates comport themselves in a very subtle manner as auxiliaries of the arbitral tribunal. Defending the interests of their clients in a case does not push them to actions that jeopardize their own credibility or, worse still, the social legitimacy of arbitration. Such an attitude would have been equivalent to professional suicide in building the practice of international commercial arbitration.[65]

[61] Indeed, several interviewees noted that judges sometimes have difficulty making the transition to arbitrating because they are used to being separate from the parties, above them. One interviewee put it sharply: 'Some old-fashioned judges would have a problem [arbitrating] because they think that they're high and mighty.'

[62] 'Arbitrators are there because the parties want them to be there. And arbitrators, generally speaking, have very good bedside manner. They know how to deal with people and so on. Often judges have no bedside manner, they're so used to being the god-like figure that everybody defers to.'

[63] Award in ICC Case No 8694 of 1996 [1997] JDI 1056 (author's translation) ('*Le Tribunal exprime sa reconnaissance aux conseils des parties pour leur compétence, professionnalisme, courtoisie, et bonne humeur manifestés pendant le déroulement de l'arbitrage. Sans une telle coopération et approche constructive, notre travail aurait été beaucoup plus difficile.*').

[64] Ibid.

[65] Dezalay and Garth 1996, 56–7. This is explicable in part by mere professional courtesy and something similar could be said of judges. However, due to the interests and constraints described here, the effect is likely to be stronger among arbitrators than among judges.

Of course, collegiality has it limits; in the end, arbitrators must maintain their authority. But there is a balance to be struck. Observed one interviewee: 'You have to be respected and make people accept what you tell them and not because you force them, but because they believe you are right. But also listen to them and be modest. People who are both modest and have authority—you have to look for them.' Similarly, arbitrators would not allow socializing to create grounds for a challenge to them or to the award. For example, one arbitrator mentioned that he might occasionally have social contact with both counsel during a hearing, if they are all travelling to the same city, but that he would never see one party's counsel separately: 'if you are travelling in a cab you make sure are both parties have people in the cab with you. You absolutely don't do anything with one party alone'.

A third consequence of the fluid roles played by arbitrators is so-called 'issue conflicts', situations where actual bias, or an appearance of bias, arises from the adjudicator's relationship with the subject matter of the dispute, as opposed to a relationship with a party.[66] Because they tend to speak and publish frequently in academic and professional contexts, arbitrators may have committed themselves to particular points of view on issues that arise in a dispute in which they have been appointed; they may also have taken a position on the same legal issue in an unrelated dispute.

Parties are free to choose arbitrators who are generally predisposed to the legal or factual theory of their case.[67] Indeed, party-appointed arbitrators are often selected because the party and its counsel expect the arbitrator to be sympathetic to the arguments that the party intends to make. As Mosk notes: 'Doctrinal sympathies or antipathies are not disqualifying. A small distributor bringing an action for wrongful termination might be attracted to an arbitrator who is known to believe that the law should be zealously applied to curtail abuse of a dominant position.'[68] Carter even asserts that '[s]uch potential receptivity is one of the advantages of arbitration, whether international or domestic, in which parties can quite legitimately "shop" for arbitrators with specific backgrounds and experience'.[69]

In general, interviewees noted that it is often a mistake to try to choose an arbitrator based on their predispositions, partly because other qualities are more important and partly because one can never be certain how an arbitration will develop. There are no available statistics, but it seems likely that only a small number of arbitrators are chosen on this basis.[70] However, these kinds of predispositions can cross into outright bias. The problem of issue conflicts (although not necessarily under that name) has been noted by commentators[71] and, on occasion, has arisen in proceedings challenging arbitrators.[72] Still, existing codes of conduct and impartiality standards may be insufficient to address issue conflicts.[73]

[66] See Brubaker 2008.
[67] Craig, Park, and Paulsson 2001, 196.
[68] Paulsson 1997, 15.
[69] Carter 2000, 295–6.
[70] At least in commercial arbitrations; the problem is arguably more acute in investment arbitration, where the recurrence of a relatively small number of issues makes it possible for arbitrators to establish themselves as state-friendly or investor-friendly.
[71] See, eg, Grigera Naón 1999, 119 ('Neutrality should be understood not only as premised upon the independence and impartiality of arbitrators but also upon their mental openness and disposition.'); Singhal 2008, 125; Brubaker 2008.
[72] See, eg, a pair of Dutch cases arising from an investment treaty dispute: *Republic of Ghana v Telekom Malaysia Berhad* (District Court of the Hague, 18 October 2004), HA/RK 2004, 667; *Republic of Ghana v Telekom Malaysia Berhad* (District Court of the Hague, 5 October 2005), HA/RK 2004, 788, reprinted in (2005) 23(1) ASA Bull 186.
[73] For analysis of the relevant provisions of the major institutional rules, see Brubaker 2008, 126–34.

2. Appointment of arbitrators by the parties

Perhaps the most obvious concern regarding the independence of arbitrators arises from the fact that the parties appoint the arbitrators, or most of them, in the majority of international disputes.[74] The perception that party-appointed arbitrators are by definition biased has serious implications for the legitimacy of ICA.[75] All arbitrators are required by the rules of procedure to act neutrally, that is, both to judge the dispute with an open mind and to refrain from advocating for the parties that appointed them.[76] However: 'A certain perception of reality and a distaste for hypocrisy cause some practitioners to conclude that one should simply expect that a party-appointed arbitrator will not behave as impartially as one appointed jointly or by a neutral authority.'[77]

The bare fact that arbitrators depend for their livelihood on the continuing favour of the parties—or more properly their counsel[78]—affects their independence and impartiality. As a 'leading member of the pioneering generation' put it when interviewed by Dezalay and Garth, to be 'really independent', an arbitrator must be older than seventy-five and so not dependent on further arbitration business.[79] A 'senior English arbitrator' interviewed by Dezalay and Garth mused that: 'You're often appointed a party arbitrator by someone with whom you have worked before. . . . You know you're going to work with him again. Does that unconsciously bias one? I think it's a difficult one.'[80]

Yet, there is no objective evidence that party-appointed arbitrators systematically favour the parties that appoint them, and there is anecdotal evidence that most awards are unanimous.[81] Lowenfeld writes: 'The suspicion . . . that the chairperson decides and the other two arbitrators are simply other kinds of advocates is not borne out in the practice I have seen in the international commercial arena.'[82] Interviewees echoed this observation; several said that they had never encountered a truly partial co-arbitrator, or that they had encountered one only once or twice in a hundred arbitrations.

Arbitrators from some cultures are reputed to see their role as a party-appointed arbitrator as a kind of advocate. One interviewee recounted a case where he was a party-appointed arbitrator. The lawyer who represented the other party, a personal friend, told the arbitrator (after the award was issued) that the lawyers who had appointed the

[74] Institutional rules generally permit the parties to agree that they will appoint (separately or jointly) one or more of the arbitrators. Moreover, under most of the major arbitral rules of procedure, selection by the parties is the default position. See, eg, ICC Rules art 12(3)–(4); ICDR Rules, art 6; UNCITRAL Rules, arts 7–10. An exception is the LCIA Rule, art 5, which makes the default position selection by the LCIA Court. However, under art 7, the parties can agree that they will nominate the arbitrators, and such agreement will derogate from the default rule in art 5. In practice, there is little difference from the other sets of rules.

[75] It has also been blamed for other negative perceptions of arbitration, such as 'the persistent myth that arbitrators "split the baby"'. Keer and Naimark 2001, 576.

[76] Redfern and Hunter 2004, 236. Some domestic arbitration rules allow for the appointment of explicitly non-neutral arbitrators. For example, the Commercial Arbitration Rules of the AAA, which apply to US domestic arbitrations, provide that party-appointed arbitrators need not meet standards of impartiality and independence if the parties 'have specifically agreed . . . that the party-appointed arbitrators are to be non-neutral'. S R-12(b).

[77] Paulsson 1997, 13–4.

[78] As one interviewee observed: 'Whenever I say "parties," I'm really meaning "counsel." Most clients don't have enough knowledge to take an informed view.'

[79] Dezalay and Garth 1996, 35 fn 3.

[80] Ibid, 50.

[81] One interviewee said of majority awards: 'I have encountered it, but it really is quite rare. I think if you were to be quite brutal and frank, if you have three people of equivalent and experience in background, the chances of that arising are extremely slim.'

[82] Lowenfeld 1987, 53.

arbitrator were disappointed that he did not share with them discussions within the tribunal.

A more common concern is identification with a party that comes from a career representing similar parties. As one interviewee put it: 'it isn't necessarily that you're deliberately doing it; it's part of your background actually. Here, you get an insurance claim, Bermuda Form or something, and appoint a QC who's spent his life representing insurance companies and drawing up these bloody forms. And he'll be very pro-insurer, instinctively. It's not quite fair to call it partisanship; it's just part of their makeup'.

Probably the main reason biased arbitrators are rare is that a reputation for overt partisanship will harm arbitrators' career prospects in the long run, as they will lose influence over their fellow arbitrators.[83] One English interviewee said:

> You never derogate from being entirely independent and neutral as a co-arbitrator. That is your stock in trade as a good arbitrator. The reason why you would get appointed in the future is because you are totally neutral and independent and you are not an advocate for the party that appoints you. That is the kiss of death for your reputation if you ever start doing that.

Partiality is a 'kiss of death' because partial arbitrators lose credibility with the tribunal. After all, as one interviewee pointed out, 'in a three-person tribunal, you need at least two votes to win. . . . If someone is partial, then the chair tends not to listen to that person, and the ability of a partial arbitrator to influence an independent and capable chairman is much diminished'. The other members of the tribunal cannot help but notice even subtle attempts to sway the proceedings on behalf of a party, such as asking helpfully leading questions of the counsel who appointed the arbitrator, or sharply questioning the other party's witnesses. As one interviewee noted: 'As a tribunal, the minute you see that one of you is partisan, [that arbitrator is] completely side-lined . . . so it's not at all helpful for them, or for their client.'[84]

The most significant danger therefore lies with those who arbitrate infrequently, and who therefore 'may not appreciate or be cognizant of these informal market mechanisms'.[85] As Park notes: 'A considerable disjunction exists between the arbitration aficionado and the newcomer. For the latter, there exists no arbiter of proper procedure.'[86] Arbitrators who seek repeated appointments by the same party present a particular problem. 'In the case of an arbitrator who considers that his only chance lies with the party which has already named him once, this might result in more or less dissimulated, but nevertheless systematic, favouritism.'[87] Not surprisingly, arbitrators take seriously the risk that they will be perceived to be biased. One interviewee, who comes from an Asian country that has produced only a few prominent arbitrators, related that he tends to turn down appointments from parties of his nationality simply to avoid the perception that he will want to support their positions.

Many arbitrators see the role of party-appointed arbitrator as distinct from that of chair. The chair takes on additional procedural responsibilities, manages the hearings,

[83] Cf Webster 2003, 129–30. This is particularly so because the two party-appointed arbitrators usually select the presiding arbitrator, either directly or by deciding who is placed on the lists maintained by the various arbitral institutions. 47 per cent of survey respondents cited 'likelihood arbitrator will be able to influence Chair of tribunal' as a factor in their choice of a party-appointed arbitrator. W&C/QMUL 2010, 26.

[84] Franck makes a similar point: 'In multi-million and multi-billion dollar disputes, parties are likely to be unwilling to appoint an arbitrator who is likely to be challenged, who cannot fully consider … the facts and laws at issue and who may be incapable of delivering an enforceable award.' Franck 2006, 517.

[85] Ibid. [86] Park 2002, 292. [87] Paulsson 1997, 14.

and typically drafts the award. More important for present purposes is the notion that, as Lowenfeld puts it, 'one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel'.[88] Several interviewees acknowledged that when they act as a party-appointed arbitrator, they take on the additional obligation of ensuring that all of the party's arguments have been understood by the tribunal and are at least addressed in the award. One interviewee put it this way: 'If I am party-appointed, I interpret my remit as ensuring that my co-arbitrators dealt with and considered all of the arguments that have been put forward by the party that appointed me.' Another said:

> [Party-appointed arbitrators] see their job as ensuring that the party that appointed them is not … going to have an injustice, the decision is going to be justifiable vis-à-vis this party.… To be frank, I think there's nothing wrong with that. I want to make sure that when the party that appointed me reads the award, that they will understand why they win or why they lose. Especially if they lose, because … there's no review and usually there are large stakes and therefore a party that loses would want to have all their defences not just decided, but decided in a convincing way. That, I think, is my job. It doesn't change the outcome but it is important that supporting reasons are convincing.

In any event, despite the risk of bias presented by party-appointed arbitrators and the cost of employing three arbitrators rather than one, tripartite tribunals 'are not withering away'.[89] Of parties that reported a preference as to the number of arbitrators, 87 per cent preferred three-member tribunals.[90] Carter concludes that the sense of control that accompanies the act of choosing one's own adjudicator outweighs cost and bias concerns.[91] The presence of a party-appointed arbitrator also reassures parties that at least one arbitrator is a known quantity, reducing the risk of a 'runaway tribunal'.[92] Finally, the presence of party-appointed arbitrators is said to improve the legitimacy of the ICA system by making awards more acceptable to the losing party.[93]

IV. International Commercial Arbitration as a Competitive Marketplace

Arbitrators, arbitral institutions, and even states compete with each other for a larger share of the dispute resolution market. The pervasive impact of market competition constitutes an important institutional distinction between arbitration and litigation.

The field of ICA was once 'the delightful discipline of a handful of academic aficionados on the fringe of international law' but has now become 'a matter of serious concern for a great number of professionals'.[94] Starting with a series of high-profile oil arbitrations in the 1970s, large US- and UK-based multinational law firms began to enter the field. These firms, with clients and offices around the world, expanded the ICA market. ICA became a multinational market because its primary consumers were

[88] Lowenfeld 1995, 62. [89] Carter 2000, 295.

[90] W&C/QMUL 2010, 25. 'Respondents said that three arbitrators lead to greater neutrality, less risk of a poor decision and a more "balanced" award. The desirability of being able to appoint one of the three arbitrators was another factor cited by respondents. A panel of three arbitrators also offers the opportunity to have a diversity of background and experience that may be useful in particular disputes, such as those with a great deal of technical evidence.'

[91] Carter 2000, 295. [92] Paulsson 1997, 14.

[93] Mosk 1988, 254; Paulsson 1997, 14. [94] Paulsson 1985, 2. See also Garth 2002.

themselves multinational: multinational fora for multinational firms.[95] This phenomenon, combined with an explosion in cross-border transactions generally, has led to an increase in the use of ICA services.[96] The potential profits have increased accordingly, leading to the entry into the field of many new practitioners.[97] As one interviewee observed:

> It has become a business, but it didn't used to be a business; it used to be a vocation. If you talk about certain people, of a certain generation in France, for example.... There are still people who see this as a sort of privilege ... and it is a privilege, but it has become a business and I think rightly so. Obviously the service that you are rendering, if it's done well it's very valuable.

The modern ICA system encompasses a variety of arbitrators, arbitral institutions, and fora, all anxious to distinguish themselves from their competitors. As Dezalay and Garth describe it:

> Arbitration is often presented quite overtly as a kind of market where the clients are able to choose from a palette of potential arbitrators according to the nature of their problems, their affinities, and above all their strategies. The parties—and their advisors—thus choose their terrain, their arms, and the rules of the game that will govern their confrontation.[98]

As this observation highlights, the key factor in competition within arbitration is that the parties call the shots. Carbonneau and Janson conclude: 'At the end of the day, transborder adjudication will be guided by the dictates of the marketplace and the international commercial community.'[99]

Despite the existence of increasing numbers of international arbitrators and arbitral institutions, there is 'a growing convergence in procedures and mutual goals'.[100] Since a rising tide of arbitral business lifts all boats, cooperative efforts to improve the standing of ICA as a whole have accompanied the increase in competition among arbitrators and institutions.[101] The process of competition reveals the rules and practices that are more effective and more attractive to disputing parties; these are quickly copied, so that the field progresses en masse. Thus, even without any *stare decisis* doctrine (and even without most decisions being reported), ideas and trends become disseminated when arbitrators work together and when they meet in conferences and social settings.

A good example of the role of competitive forces is provided by Rogers. She charts the increase of transparency within ICA in recent years and ascribes this change to the effects of market competition among arbitrators and arbitral institutions:

> ... rather than external pressure, [transparency gains] are the product of a range of collective, institutional and individual initiatives, leavened by a healthy dose of competition and drawing upon collaterally disclosed information.[102]

Understanding the operation of market forces in ICA is key to understanding the type of justice that ICA provides.[103] Competition is now so intrinsic to the operation

[95] Dezalay and Garth 1996, 7 (citation omitted). See also Flood 2007.

[96] Since different institutions use different systems to count arbitrations filed with them, it is difficult to come up with global numbers. However, the rate of change within a single institution can be measured. The ICC registered 32 new arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, 529 arbitrations in 1999, and 599 arbitrations in 2007—an increase of about twenty times over fifty years. Similarly, the AAA-ICDR administered approximately 100 international arbitrations in 1980, 207 in 1993, 510 in 2000, and 621 in 2007—an increase of more than six times in just twenty-seven years. Born 2009, 68.

[97] Helmer 2003, 41.

[98] Dezalay and Garth 1996, 209.

[99] Carbonneau and Janson 1994, 221–2.

[100] Thirgood 2004, 342.

[101] Rogers 2006, 1313–4 (citations omitted).

[102] Ibid, 1322.

[103] Dezalay and Garth 1996, 8–9.

of the international arbitral system that it constitutes a social norm. Competition in ICA takes place on three levels: arbitrators and would-be arbitrators compete with each other for appointments, arbitral fora (institutions and states) compete with each other to host arbitrations, and practitioners of arbitration collectively compete for market share against other forms of dispute resolution.

1. Competition between arbitrators

Judges have security of tenure and income and a full-time workload assigned to them, while arbitrators are free agents, without tenure, and must attract the cases that they decide.[104] Arbitrators normally will not be aware of a dispute until and unless they are approached to adjudicate it.[105] Moreover, arbitrators' work product is, for the most part, only seen by the parties, their counsel, and in-house lawyers at the arbitral institution.[106] (When awards are published, the arbitrators' names are sometimes listed, even when the parties' identities are redacted.[107]) The result is a market for arbitration services that is far from transparent.

Consequently, competition between arbitrators must occur in alternative venues that allow them to demonstrate their expertise and build a reputation within the ICA community. Junior counsel and academics who hope to 'graduate' to being arbitrators may seek in-house positions at arbitral institutions,[108] work toward partnerships in major law firms,[109] serve as officers of arbitral institutions, take academic positions at universities (even if they work primarily within law firms or as barristers),[110] give presentations at academic conferences, publish academic papers, write for blogs or online fora, and teach at training events for practitioners.

The elite arbitrators maintain their dominance in part by 'defining themselves through writings, conferences, and meetings of the community of experts in international commercial arbitration'.[111] There are now hundreds of treatises and guidebooks on such topics as the drafting of arbitration agreements, the selection of arbitrators, and effective advocacy in arbitration. Such resources 'are principally the work of the

[104] Historically, English judges received no fixed salary but instead kept the court fees as their compensation. At least one judge believed this to be the cause of English courts' so-called hostility to arbitration: 'there was a great competition to get as much as possible of litigation into Westminster Hall for the division of spoil. [Judges] had a great jealousy of arbitrations whereby Westminster Hall was robbed of those cases … Therefore, they said that the courts ought not to be ousted of their jurisdiction'. *Scott v Avery* (1856), 5 HL Cas 811.

[105] It is, of course, possible for arbitrators to hear about a dispute through the ICA 'grapevine' or from their professional activities. In such cases, they are able to (and sometimes do) lobby the parties' counsel to be appointed; however, such blatant marketing is likely to be frowned upon.

[106] That said, some arbitrators try to write their awards in a manner that will catch the attention of the lawyers who read them. Said one interviewee: 'I try to write awards that are also fun to read. I have a principle: the first sentence of the award should be such that the reader will want to read the second sentence. And the second should be written so he wants to read the third. I admit, once you have the reader down one page you are already pretty good; afterwards it probably gets boring.'

[107] Rogers 2006, 1323 fn 64.

[108] Dezalay and Garth 1995, 38, calling working for an institution 'the quick route' to arbitration expertise.

[109] See Alford 2003, 88: 'the Anglo-American juggernaut we know as the modern international law firm is the defining feature affecting the industry today'.

[110] Professorships are especially prized. Toby Landau, an English barrister and Visiting Professor at King's College, University of London, noted that '[i]n my particular field, the title of professor may be of greater value than that of QC'. Swallow 2004.

[111] Dezalay and Garth 1995, 31 fn 9.

top international arbitration specialists, who use these publications as a form of elite advertising'.[112]

One interviewee described publishing as integral to his career: 'Having a certain stature even if you're not a professor is still important. If people like to read what you write, this is a good beginning to get appointed.' Another interviewee, who was initially sceptical, came to see the professional value of publishing in garnering appointments:

> I did not know this before I arrived. I really thought the way you became an arbitrator was to basically get your friends to appoint you then show how good you are and get appointed again. I did not think you could get much mileage from writing or making your views known; they're my views, why would they be better than somebody else's views? I didn't really think it was a waste of time, but almost. And I was wrong. They are very important and are taken seriously.[113]

Maintaining a presence at conferences is considered de rigeur, particularly for arbitrators who are trying to make a name for themselves.[114] The topic was raised by several interviewees. One said: 'The conferences are good for the younger ones to be known; to get their profiles raised so that we're conscious that they exist. We're aware that they can speak in public, they are articulate. We're not going to be ashamed when our client is in the room. It is necessary for the younger ones to start, definitely.' Another interviewee, who said that he continues to attend a large number of conferences despite now being more senior, pointed out the peculiarity but also the benefits of advocates and adjudicators marketing themselves to each other at conferences:

> It's a little bit of an odd field … when you're at a conference, the arbitrators … are selling to their employers, who are … lawyers.… There's a sense that often lawyers are seeing their future career as arbitrators and all of those dynamics are very, very awkward.… For that reason, there's a utility to arbitration conferences that, I think, is not present in certain other kinds of professional gatherings of employers; there's judges and advocates really mixing together.

There are now so many conferences that some arbitrators fret about overexposure. One interviewee, who left a private advocacy practice to become a full-time arbitrator, said:

> Early on when I started I did a lot of that because people had to understand my change [from full-time advocacy to full-time arbitrating].… And now I go less for very many reasons … I find over-exposure in this field is a real threat, a real danger. You have to be careful.… People think you are at the conferences because you have no work.… Conferences are a double-edged sword and you have to choose your public.

Of course, many arbitrators and would-be arbitrators publish and speak at conferences for less mercenary reasons. ICA is known to be a field for academically minded lawyers, and many arbitrators have an intrinsic intellectual interest in research. One interviewee, who has maintained parallel careers as a practitioner and academic for many years, said that his practice would be sufficient for most people but that he enjoys giving lectures and seeing his words in print. Whether he has something useful to contribute is for others to judge.[115]

[112] Rogers 2006, 1321.

[113] Several interviewees noted that, when considering appointments, they look closely at a candidate's publications, given that publications are sometimes the best available indication of a potential arbitrator's views. As one interviewee put it: 'What they've written, we always read. Although they can change their mind, what they've written is something at least. They cannot claim they didn't know what they had written.'

[114] This phenomenon is discussed in Garth 1997.

[115] Even as this interviewee explained his intrinsic interests in publishing, he acknowledged the role of the market in determining the value of his commentary.

In addition to serving as venues for advertising, academic and professional journals and symposia are effective means for disseminating both standard practices and innovations. Jones cites the annual symposia organized by the LCIA at Tylney Hall for providing an effective forum in which participants and observers can 'pick up, in a relatively short space of time, a range of current ideas and trends which would otherwise be quite unavailable'.[116] This phenomenon highlights an essential feature of competition: it acts as a harmonizing (or at least homogenizing) force. Those seeking to break into the ranks of arbitrators are constrained to emulate the résumés, practices, and perspectives of the elite, thus reinforcing existing values and standards.

Indeed, it is arguable that the primary beneficiaries of arbitral competition (and of the massive expansion of the field in the last few decades) have been the small cadre of elite arbitrators. Summarizing the interviews they conducted with numerous practitioners in the mid-1990s, Dezalay and Garth relate that: '[T]he same, relatively few, names of arbitrators were repeated over and over on both sides of the Atlantic.'[117] Indeed, a 'leading arbitrator of the new generation' told Dezalay and Garth that: 'There are, I suppose, forty to fifty people in Western Europe who could claim that they make their living doing this.'[118]

The field has expanded greatly since the 1990s, when Dezalay and Garth conducted their research, but a few elite arbitrators continue to dominate. Several interviewees find this state of affairs to be understandable and defensible. Said one interviewee: 'A relatively small number of people get a large number of cases. This has been criticized by many people, including arbitral institutions. But to me, it's just perfectly logical … if you're a good cardiac surgeon, a good house painter, you'll get a lot of repeat work. It's inevitable.' Another interviewee explained the dominance of a small number of arbitrators as a function of the risk involved whenever a party chooses an arbitrator: 'They want certainty; they want people they can trust. They don't want mavericks; they want a safe pair of hands; they want dependable consistency. That's why it's a small field, because people go towards people they have total confidence in, and there's not that many people around.'[119]

The demand for these few leading arbitrators has created problems. Writing in 2004, Fellas noted that: 'Some arbitrators are in such demand that they are booked well over 18 months ahead.'[120] The packed schedules of these arbitrators are enough of an issue that 'availability' now counts as one of the most important factors in parties' choice of an arbitrator.[121]

Webster expresses a common perception: 'A chairman who cannot meet the parties' reasonable expectations as to dates for hearings is probably also going to have problems taking the time to read submissions prior to the hearings and to review the documents and submissions in preparation for deliberations.'[122] More than one interviewee complained that some of the most prominent arbitrators are overextended: 'when somebody

[116] Jones 2006, 282. Other ICA conference organizers now routinely describe their own events as featuring 'Tylney Hall-style discussions'.

[117] Dezalay and Garth 1996, 8. [118] Ibid, 50.

[119] Another interviewee put the matter even more bluntly: 'Basically, you don't appoint someone you don't know. It's too risky.'

[120] Fellas 2004, 80–1.

[121] W&C/QMUL 2010, 25. Availability 'was emphasized by a number of interviewees as an extremely important factor and an issue of increasing concern'. Ibid.

[122] Webster 2003, 133. Note that arbitral rules have begun to be adapted in response to this problem. In 2011, the ICC began requiring appointed arbitrators to disclose not just their potential conflicts but also their availability. Fry 2011.

is so well known, so famous, that person may not be in a position to pay proper attention to the case. They have too many cases. Or somebody who pays more attention to the bigger cases than the smaller cases. Somebody who relies on assistants rather than himself or herself. That causes a problem.'

All of the interviewees communicated the sense that they work in a competitive marketplace, where they must differentiate themselves from their competitors. Most often, they emphasized their case management skills. Some characterized technical backgrounds as an asset, especially for certain specialist fields (in particular engineering/construction disputes).[123] Others highlighted their expertise in certain types of transactions, such as joint ventures, or in certain industries, such as oil and gas. A few pointed out the importance of multilingualism, and of training (or at least experience) in both common law and civil law. Many spoke of the importance simply of being personable, of getting along well with other arbitrators and with counsel.

One aspect of the community of successful arbitrators is the number and extent of direct personal links between prominent arbitrators of different generations. Notes Garth:

> … clubs are built on the basis of personal relations, not just abstract resumes. … This personal dimension gives considerable importance to meetings, such as conferences, where individuals can both assess the market value of resumes and build relationships of trust and respect. It is also not surprising that many who are brought into international commercial arbitration are in fact disciples of those already in the field.[124]

Many leaders of the current generation of arbitrators were the protégés of well-known members of the previous generation: Albert Jan van den Berg worked under Pieter Sanders, numerous Swiss arbitrators under Pierre Lalive, Yves Derains, and Julian Lew under René David, James Carter under Jack Stevenson, David Rivkin under Robert von Mehren. Dezalay and Garth conclude: 'The systems of patronage may no longer be as extreme as the European legal dynasties of the past, but they are artificial recreations of the same phenomenon.'[125]

The dominance of the small number of successful arbitrators and the dynastic connections between arbitrators of different generations have led some to describe ICA as a 'cartel'[126] or 'mafia'.[127] Taking issue with such characterizations, Paulsson argues:

> … whereas an operating mafia would bar entry to outsiders, the milieu of international arbitration has shown repeatedly its eagerness to welcome new outstanding arbitrators. In fact there is a short supply of people who command the kind of transnational respect which is essential in this context.[128]

Entry into the international arbitration services market is not barred to newcomers, as would be the case with a cartel. Still, Paulsson's own emphasis on 'transnational

[123] However, as one interviewee (a generalist) noted, many disputes involving highly technical transactions turn on more ordinary questions of commercial law: 'Even if you have some highly esoteric industry, a lot of space related work on satellites and what have you. Sometimes it can be quite useful to have people who understand something about either that business or the relevant technologies, sometimes the disputes turn out to be very commercial in nature and happen to be about, you know, satellites. How useful is it then to have somebody who knows a lot about satellites? Maybe not as much as you think … people are hard working lawyers or arbitrators. It is our business to learn industries.… In many cases, having broad experience, judgement, and commercial understanding, rather than intensive industry background, is the key factor in my selection of arbitrators.'

[124] Garth 1997, 11.

[125] Dezalay and Garth 1996, 40.

[126] Rogers 2005, 960.

[127] Dezalay and Garth 1996, 83.

[128] Paulsson 1997, 19.

respect' highlights the importance for would-be arbitrators of esteem from the ICA community.

ICA is no longer dominated by quite so small a cadre of 'grand old men'—almost entirely white, male, and European—as it was prior to the 1980s.[129] However, it cannot be denied that, as Hacking put it in a response to Paulsson: 'Any grouping of professionals which becomes exclusive will tend to operate (intentionally and unintentionally) against the arrival of new persons into their ranks.'[130] Indeed, as a general rule, access to the ranks of international arbitrators continues to be controlled by the dominant arbitrators. They hold positions of authority at arbitral institutions (thereby exerting influence upon who gets appointed as an arbitrator) and, informally, are in a position to recommend particular up-and-comers. This effect is compounded by the fact that past experience as an arbitrator is considered among the most important qualifications for appointment as an arbitrator.[131] Indeed, commercial parties report that the 'ability to select experienced arbitrators' is one of the main reasons they choose arbitration over litigation.[132] They cite prior experience as an arbitrator as second only to 'open-mindedness and fairness' in influencing their choice of both sole/presiding arbitrators and party-appointed arbitrators. As a result, 'the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate'.[133]

Despite its privileged position, the current generation of leading arbitrators should not be—and clearly is not—complacent. One arbitrator, among the most in-demand in the world, remarked that: 'In the end, the market selects you on the basis of your performance, really.' As Ogus notes: 'The fact that a particular set of [standards] has become … dominant … does not necessarily mean that it is, and will remain, the most efficient (in the sense of meeting consumer preferences at lowest cost) of the alternatives available.'[134] Indeed, arbitrators' writings indicate a concern that arbitration must continue to evolve or the field as a whole will wither. Crowter and Tobin's handwringing is typical: 'if the conduct of arbitrations is not efficient, even expeditious, arbitration may fall into disfavour as the preferred forum for the resolution of international commercial disputes'.[135]

If there were a perfect market for arbitration services, competitive forces would inevitably lead to improved arbitration services. However, a variety of factors make the current market highly imperfect. Severe 'information asymmetries prevent the market … from being fully competitive'.[136] The confidential nature of arbitral work means that 'professional credibility and word-of-mouth recommendations … play a significant role'.[137] 68 per cent of corporate counsel surveyed in 2010 said that they lacked sufficient information to make an informed choice about arbitrators independently of input from external counsel (who are more likely to be familiar with the ICA community).

[129] Dezalay and Garth 1996, 10. Despite some increase in diversity, the leading arbitrators continue to be overwhelmingly white and male. The Chambers and Partners 2012 list of the thirty-two 'most in demand arbitrators' includes only two women (Gabrielle Kaufmann-Kohler and Brigitte Stern) and one non-white (Michael Hwang). <http://www.chambersandpartners.com/Global/Editorial/36194> accessed 23 August 2012. Who's Who Legal's 2012 list of twenty 'most highly regarded individuals' in the field includes three women (Judith Gill, Gabrielle Kaufmann-Kohler, and Lucy Reed) and no non-white practitioners. <http://www.whoswholegal.com/news/analysis/article/29384/most-highly-regarded-firms-commercial-arbitration-2012/> accessed 23 August 2012.

[130] Hacking 1998, 75. [131] Webster 2003, 129; Redfern and Hunter 2004, 233.

[132] PwC/QMUL 2008, 5. [133] Rogers 2005, 967–8. [134] Ogus 2002, 424.

[135] Crowter and Tobin 2002, 301.

[136] Rogers 2005, 968 (citing Rutledge 2004, 195).

[137] Franck 2006, 516.

With such input, 67 per cent felt that they could make an informed choice.[138] The survey authors note that, even with the input of counsel, 33 per cent of respondents were not confident that they could make an informed choice of arbitrator, which 'seems rather low considering the importance of making a good appointment'.[139]

Several interviewees commented on the important role played by personal knowledge of the candidates in their decisions on whom to appoint. Said one: 'If you're counsel and you're asked to suggest arbitrators, you're obviously going to flick through, in your memory, the kind of people who are the right kind of people for the job.' Another interviewee discussed relying on the kinds of factors that no outsider could know, even referring to it as proprietary information:

> Sometimes I have some confidential information how this arbitrator has behaved … because when I saw the same arbitrator previously he or she was very good [but] recently became tired and doesn't pay attention to the case. Or recently that person lost a really good assistant.… Those things are all proprietary information that is not easy to figure out.

2. Competition between arbitral fora

Competition between arbitral fora—both institutions and states—is no less fierce or significant than that between individual arbitrators. As one might expect, competition between arbitral institutions, as with competition between individual arbitrators, has engendered a high degree of convergence in arbitral rules of procedure. However, differences remain. In addition, there is now almost complete freedom on the part of the parties to designate any state as the seat of the arbitration.[140] Arbitration lawyers will choose the institution and the state which provide the best likelihood of reaching the desired outcomes at the lowest cost.[141]

Like individual arbitrators, these competing fora are sensitive to any innovations introduced by their competitors. Beneficial innovations quickly spread, leading to a general harmonization in institutional rules of procedure and national arbitration laws: 'If there are efficiency advantages to particular rules, we might expect a trend toward harmonization under conditions of market competition. Indeed, long-time observers of the arbitral process have observed greater efficiencies over time.'[142] This process is exemplified by the widespread and continuing adoption of national arbitration laws based on the UNCITRAL Model Law,[143] which was intended to further 'the development of harmonious international economic relations' by establishing an arbitration law 'acceptable to States with different legal, social and economic systems'.[144]

[138] W&C/QMUL 2010, 27. [139] Ibid.

[140] This aspect of party autonomy is guaranteed in all of the major arbitration rules, usually by a provision that if the parties have not chosen the seat of arbitration, then a specified procedure will apply for choosing the seat: UNCITRAL Rules, art 18(1) (the tribunal may decide); ICDR Rules, art 13(1) (the tribunal may decide); ICC Rules, art 18(1) (the ICC Court may decide); LCIA Rules, art 16.1 (London, unless the LCIA Court decides otherwise).

[141] Ogus 2002, 421. In this model, lawyers act as 'transaction cost engineers'.

[142] Ginsburg 2003, 1344.

[143] Legislation based on the UNCITRAL Model Law has now been enacted in ninety-two jurisdictions (including seven US states and all ten Canadian provinces). It was originally promulgated in 1985. In its first decade, thirty-three countries adopted it; in its second decade, there were thirty-four adoptees; and in the past six years, there have already been twenty-five adoptees. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 20 July 2012.

[144] These statements are taken from the preamble to the UN General Assembly resolution that adopted the original UNCITRAL Model Law. UNGA Res 40/72 (11 December 1985).

Competition between arbitral institutions

One might wonder why international arbitral institutions, which are after all not-for-profit entities, might be so concerned about competing for a greater share of the arbitration market. One interviewee described competition among the institutions as arising from the desire of those who run them to enhance or at least maintain the institution's position in the international arbitration world. The senior officials of arbitral institutions do not receive banker-style bonuses, but they are anxious to ensure that the case loads of their institutions continue to grow year-on-year. The interviewee concluded: 'They are running a service and there is nothing wrong with trying to persuade people that the institution runs an effective service.'

The growing arbitration market and increased competition have redounded largely to the benefit of the handful of dominant institutions: the ICC, LCIA, American Arbitration Association (AAA) and its international disputes division, the International Centre for Dispute Resolution (ICDR), and (for investment treaty arbitrations) ICSID.[145] Newer entrants, particularly in Asia, have begun to earn a greater market share,[146] but most remain essentially regional institutions and do not yet seriously challenge the market leaders for the highest-stakes disputes. For example, in a 2008 survey, only 3 per cent of corporations involved in ICA reported ever having participated in SIAC arbitrations, and that was the highest rate for any Asian arbitral institution.[147] This number has undoubtedly risen in the years since 2008, and SIAC is arguably the model up-and-coming institution. This is the result of a conscious programme of raising SIAC's profile. As one interviewee, who is involved with SIAC's governance, proudly related:

> We have had an enormous leap in a number of cases in Singapore. SIAC has developed now into one of the leading arbitral institutions in the world in terms of its caseload and recognition, It's very, very strong.… These things don't happen without planning and execution.…
>
> We have to make sure that our case administration is the world standard or equal to the best in the world. That involved a lot of training, recruiting the right personnel. We reviewed our practice notes.… We hosted the ICCA Congress, which was the biggest ICCA Congress held.… We now have a fully international board. The majority is non-Singaporeans on it. It's been re-developed as a very international institution. One can see that from the fact that parties come from so many different countries.

Historically, the ICC held a 'position of quasi-monopoly' on the highest-stakes cases; it is no longer pre-eminent, but remains the 'central institution'.[148] The AAA/

[145] See Dezalay and Garth 1996, 9. Similarly, London, Geneva, and Paris remain the most popular arbitral seats, although Tokyo and Singapore now eclipse New York. W&C/QMUL 2010, 19.

[146] In 2008, survey respondents reported 'an increased preference for regional arbitration institutions', in particular (in Asia), the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), and the Chinese International Economic and Trade Arbitration Commission (CIETAC). To take one example, arbitrations filed at the HKIAC nearly doubled from 2003 to 2007, while those filed at the ICC increased by only 3 per cent over the same time period. PwC/QMUL 2008, 15. A 2010 survey indicated that the market share of regional institutions, especially Asian ones, has continued to increase, although corporations continue to be concerned that institutions have 'proven themselves' or possess a solid 'track record'. W&C/QMUL 2010, 22.

[147] PwC/QMUL 2008, 15. In 2010, in response to a similar but differently worded question, 2 per cent of survey respondents reported that, in the previous five years, they had been involved in more arbitrations administered by SIAC than by any other institution, and this rate was higher than for any other institution not located in Europe or the United States. W&C/QMUL 2010, 22.

[148] Dezalay and Garth 1996, 45. 56 per cent of survey respondents reported having been involved in an ICC arbitration from 2005 to 2010, more than any other institution. 50 per cent cited the ICC

ICDR now attracts a larger number of disputes, but they come from a smaller number of repeat parties. A 2008 survey indicated that 45 per cent of corporations active in ICA had been involved in ICC arbitrations, while only 16 per cent had been involved in AAA/ICDR arbitrations.[149] Although the presence in the United States of many large multinational corporations would suggest that the AAA would be popular with parties of any nationality, the AAA's share of cases where neither party is American remains modest.[150] Helmer suggests that 'The really big cases get to the AAA only when the American party's economic power is overwhelming'.[151]

There are three domains of competition between arbitral institutions. First, institutions seek to attract prominent arbitrators to serve on their boards of directors (which go by a variety of names) and to appear on their lists of arbitrators.[152] However, since arbitrators may appear on the lists more than one institution, and the most in-demand arbitrators appear on many institutional lists, competition in this area is not intense.

Attracting notable arbitrators matters most for new or regional arbitral institutions seeking to build a global clientele. For example, the Dubai International Arbitration Centre (DIAC) states in its website that it 'regularly updates its lists of highly-skilled national and international arbitrators experienced in different fields of trade and business'.[153] Other younger institutions, like SIAC, CIETAC, and the Australian Centre for International Commercial Arbitration (ACICA), also have such panels, but two of the best-established institutions, the ICC and LCIA, just provide access to databases of available arbitrators.[154]

The second potential arena of competition is fees. Arbitral institutions charge a fee for administering arbitrations, generally set at a percentage of the amount in controversy, and may also mandate a fee schedule for arbitrators. Institutions can compete on both, although arbitrators' fees make up a much larger proportion of the overall costs than the institution's administrative fees.[155] The overall costs of institutional administration, along with such matters as whether fees are due up-front or at the end of arbitrations, are cited by consumers of arbitration services as important factors in their choice of institution.[156]

Several arbitral institutions, especially the less-well-established, advertise their 'very competitive rates'.[157] For example, for a dispute with US$1,000,000 in controversy

as their preferred institution. W&C/QMUL 2010, 23. The ICC's continued prominence is explicable in part by its long history. As Dezalay and Garth note, 'history is a key legitimator in the legal field'. Dezalay and Garth 1996, 45 (citing Weber 1954).

[149] PwC/QMUL 2008, 15.

[150] Craig, Park, and Paulsson 2001, 3.

[151] Helmer 2003, 42.

[152] These panels and lists vary in their characteristics. Some institutions maintain exclusive panels, in the sense of fixed lists of arbitrators from which appointments must be made. Others have panels from which the institution will draw when called upon to make an appointment, while some institutions maintain just 'sources of information' on available arbitrators and their relevant experience. Jones 2006, 285.

[153] <http://www.diac.ae/idias/services/diac/advantages/> accessed 20 July 2012.

[154] Jones 2006, 285.

[155] Administrative fees charged by an institution typically amount to about 2 per cent of the total costs of an arbitration. See ICC Commission 2007, stating that the sources of costs in ICC arbitrations were 82 per cent for counsels' fees and expenses, 16 per cent for the arbitrators' fees, and 2 per cent for the institutions' fees. A survey of other institutions produced general agreement that the split in costs of arbitration is similar to that found in the ICC survey. Scherer 2011b. See also CIArb 2011, 11–12.

[156] W&C/QMUL 2010, 22.

[157] The DIAC <http://www.diac.ae/idias/services/diac/advantages/> accessed 23 August 2012.

and three arbitrators, the ICC charges US$21,715 as its administrative fee (not counting a registration fee) and allows its arbitrators to charge between US$14,627 and US$64,130 for their fees.[158] Meanwhile, the DIAC charges only around US$5,450 and sets arbitrators' fees at around US$5,000–US$21,000,[159] and the ACICA charges around US$7,800 in administrative fees.[160] Institutions sometimes lower their fees in absolute numbers, as the ICC has done repeatedly.[161]

Institutions can also compete for arbitrators' favour by reducing or removing restrictions on the fees arbitrators may charge. For example, the ACICA Arbitration Rules state only that arbitrators should be compensated according to an hourly rate agreed to by the parties or, failing such agreement, determined by ACICA, and that this rate should be commensurate with the nature of the dispute, the amount in dispute, and the standing and experience of the arbitrator.[162] Some arbitral institutions impose fee arrangements that many arbitrators will not accept, effectively limiting the range of arbitrators available to the parties.[163] On the other hand, higher fee schedules may drive away disputing parties.[164]

Some recently amended rules of arbitration provide for flexible or high fee arrangements, but provide means to discipline arbitrators who may abuse their power to set their own fees. For example, the 2010 revision of the UNCITRAL Rules provides that, promptly after its constitution, the tribunal must notify the parties how it proposes to determine its fees and expenses. The parties may raise objections with the tribunal and with the appointing authority (if one was used), which has the power to adjust the tribunal's fees if they are not 'reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case'.[165] The 2012 ICC Rules go a step further; they direct the ICC Court to take into account, inter alia, 'the timeliness of the submission of the draft award' when it sets arbitrators' fees.[166] This provision was intended specifically to permit the ICC Court to adjust the fees of arbitrators if they unduly delay in rendering a decision.[167]

Third, and most importantly, arbitral institutions compete based on the efficiency and effectiveness of the services they provide and the procedural rules they impose on parties that contract for arbitration under their auspices. Arbitral rules were cited as the third-most important reason for choosing a particular institution, while such factors as the efficiency with which institutions' secretariats manage disputes, their expertise in managing particular types of disputes, and their ability to administer arbitrations worldwide were also cited as influential.[168]

[158] <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Cost-and-payment/Cost-calculator/> accessed 19 August 2012.

[159] <http://www.diac.ae/idias/resource/doc/en/DIACTableOfFees_1July2011.Eng.pdf> accessed 23 August 2012.

[160] <http://acica.org.au/assets/media/Rules-inc-emergency-provisions.pdf> accessed 19 August 2012.

[161] Dezalay and Garth 1996, 44. The SIAC advertised in 2003 that it was reducing the fee it charged for appointing arbitrators. <http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=87:siac-cuts-appointment-fee&catid=43:archive-2003&Itemid=96> accessed 20 August 2012.

[162] ACICA Arbitration Rules, art 40.

[163] Webster 2003, 123.

[164] Methods of remunerating arbitrators and restrictions on the fees arbitrators may charge were cited as factors in parties' choice of an institution. W&C/QMUL 2010, 22.

[165] Art 39.

[166] ICC Rules Appendix III, art 2(2). Unless otherwise noted, all reference to the 'ICC Rules' are to the 2012 version of those rules.

[167] Fry 2011.

[168] Ibid.

While differences continue to exist between the rules of various arbitral institutions, they tend to take the same approach on the important issues. These rules are periodically amended to reflect business preferences,[169] and in particular with an eye to improving efficiency. Successful innovations tend to be copied, so 'competition among arbitration institutions … has moved their respective technical details closer to conformity'.[170] A recent example of this phenomenon is the spread of provisions for the appointment of an emergency arbitrator to rule on urgent applications for interim relief prior to the constitution of the tribunal. The Arbitration Institute of the Stockholm Chamber of Commerce and the Singapore International Arbitration Centre both amended their rules in 2010 to provide for appointment of emergency arbitrators.[171] The ICC followed in 2012.[172]

There are some notable exceptions. For example, the ICC maintains a 'Court of International Arbitration' composed of notable arbitrators nominated by each country whose national chamber of commerce is affiliated with the ICC. The members of the Court review each award drafted by tribunals organized by ICC. This practice is unique; other institutions do not formally supervise their tribunals' awards. This measure of 'quality control' provided by the ICC Court is credited as one of the reasons for the ICC's continued success.[173] One commentator even asserted that the scrutiny of the award performed by the ICC Court 'may explain the infrequency with which national courts have set aside ICC awards'.[174]

Other institutions have adopted unusual rules designed to attract a particular type of party. For example, some regional institutions seek out a niche by giving the domestic party a linguistic advantage. The Rules of the Hungarian Chamber of Commerce provide in article 8(5) that international arbitrations (ie, those where the two parties come from different countries) must be conducted in Hungarian, while the rules of the Polish Chamber of Commerce and the DIAC include a presumption that international arbitrations will be conducted and the awards rendered in Polish and Arabic, respectively.[175]

Many in the ICA system see the variety among different institutions' rules of procedure as a virtue in itself. It gives parties a range of options, allowing them to select the institution and the rules that best suit the particular characteristics of their contract or their dispute. This attitude is illustrated by an anecdote told by a senior English arbitrator interviewed for this book. In the early 1980s, when the LCIA was revamping its rules, the interviewee disagreed with a colleague about some matter. The colleague replied that the interviewee's point was well taken, but that the LCIA's rules should reflect its own character and style. The rules might not be attractive to everyone but they will work; parties who like the rules will use them, and those who do not will not.

[169] Wood 2004, 402, noting that the ICC Rules are periodically updated to reflect the current 'business climate'.

[170] Malloy 2002, 45.

[171] For the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Appendix II; for the Arbitration Rules of the Singapore International Arbitration Centre, art 26.2 and Schedule 1.

[172] ICC Rules, art 29.

[173] See, eg, Weisman 2007, 75; Bishop 2003, 34.

[174] Coe 1997, 209. This assertion may well be correct, but it should be noted there is no statistical evidence that ICC awards are set aside less often than the awards of the other major arbitral institutions.

[175] See Webster 2003, 123–4.

Competition between states

Like arbitral institutions, states also compete to attract international arbitrations to their jurisdictions. For example, the Law Society of England and Wales published a brochure to promote England and Wales as 'the jurisdiction of choice' for both litigation and arbitration.[176] Nor are these efforts limited to public relations campaigns. In 2010, some German courts began permitting English language proceedings. In support of the plan, one German lawyer argued: 'The focus on the German language has been perceived as a disadvantage for German courts in regards to being a centre for commercial litigation.... [T]his is a way for German courts to be more competitive and attractive.'[177]

States have also established or amended their national arbitration laws in order to make them more 'friendly' to international arbitration, in particular by removing restrictions on arbitration procedures or by narrowing the grounds on which awards may be challenged.[178] As Kerr puts it, countries have engaged in 'open rivalry' to provide attractive venues for ICA.[179] This process is exemplified by the 1979 and 1996 revisions to the English Arbitration Act, the 'main object' of which was 'to attract arbitration to London'.[180] After the 1979 Act was passed, there ensued a 'scramble among western European nations' to compete for that business.[181]

The 'common feature' of the new and newly amended arbitration laws of the last twenty years is that they expand the scope of party autonomy (in matters such as choosing the governing substantive and procedural rules of law) and the scope of arbitral powers (in matters such as competence-competence[182] and the issuance of interim orders), while restricting the role of national courts.[183] The primary systemic effect of this regulatory competition has been to detach ICA 'from the scrutiny and regulation of the national court systems'.[184] For example, in its marketing materials, the HKIAC trumpets the fact that: 'Hong Kong's courts are considered pro-arbitration and take a "hands off" approach with respect to arbitration.'[185] Similarly, the SIAC advertises that

[176] <http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf> accessed 20 July 2012.

[177] A Collins 2010, 15. This kind of competition also takes place within countries. In 2012, New York State established a task force to study how to make New York more attractive to litigants. The Chief Judge of New York, Jonathan Lippman, said in his annual address that he was tired of 'losing' commercial cases to other states. Palazzolo 2012.

[178] This phenomenon has been recognized by the courts. For example, in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] 1 All ER (Comm) 794 [18] (HL), Lord Hoffman noted that 'arbitration cannot be self-sustaining. It needs the support of the courts; but ... it is important for the commercial interests of the European Community that it should give such support ... an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests'.

[179] Kerr 1985, 7.

[180] Park 1983, 38 (referring to the 1979 Act). See also Lord and Salzedo 1996, ix ('One of the aims of the 1996 Act is to enhance England's competitive position as an international arbitration center.'); Mustill 1989, 53 ('One must take note of the efforts made by individual nations to make their arbitration laws ... more attractive.') This effort appears to have been successful. From 2005 to 2010, London was the world's most popular arbitral seat. W&C/QMUL 2010, 17.

[181] Park 1989, 680.

[182] Competence-competence refers to the power of tribunals to determine whether they possess jurisdiction. Courts retain the right to take a 'second look' at the tribunal's jurisdiction after an award has been issued and either to set aside that award or refuse it recognition or enforcement on the ground that the tribunal did not possess jurisdiction.

[183] Bernardini 2004b, 115.

[184] Dezalay and Garth 1996, 7 (citation omitted).

[185] <http://www.hkiac.org/index.php/en/why-hong-kong> accessed 20 August 2012.

the Singaporean courts 'offer maximum judicial support of arbitration and minimum intervention'.[186]

The French arbitration law that came into force in 2011 exemplifies the new generation of arbitration statutes.[187] It has the stated goal of sustaining Paris's leading role as a seat of arbitration, and seeks to accomplish this goal in large part by reducing opportunities for parties to involve the courts.[188] For example, it permits parties to waive their right to seek annulment of an award in front of the national courts at the seat of the arbitration,[189] and provides that a challenge to an award does not automatically result in suspension of enforcement proceedings before a French court. Rather, under article 1526, a suspension must be specifically requested and will be granted only if enforcement of the award would be 'highly detrimental to the rights of the party requesting the suspension'.[190]

Courts have unsurprisingly been reluctant to surrender substantive and procedural control of arbitrations taking place within their jurisdictions. However, such reluctance has been overcome due largely to market forces. As Leahy and Bianchi point out, the use of arbitration in international commercial disputes is self-reinforcing:

> As the use of international arbitrations grows in commercial contexts, many governments and business entities in non-Western and developing states are realizing that they must 'opt in' to the Western system of arbitration in order to maintain and grow business relationships with Western partners.[191]

As Ginsburg notes, in many countries, the number of international arbitrations held hardly justifies the legislative effort to draft and approve a new arbitration law designed to make the jurisdiction a more attractive *situs*.[192] However, the benefits of adopting an arbitration law that conforms to the international state-of-the-art go beyond attracting arbitrations. It symbolizes a state's friendliness to international commerce. More directly, if a country adopts an arbitration law based on the UNCITRAL Model Law, lawyers trained in that country will be better able to compete for business overseas and to negotiate arbitration clauses with foreign investors.[193]

States sometimes use blunter tools to attract arbitrations. In 2008, Singapore enacted a five-year tax break on income of Singaporean practitioners related to international arbitrations when the hearings are held in Singapore. This effectively reduced the cost of holding hearings in Singapore. Singapore also removed a requirement that foreign professionals obtain a temporary work visa to participate in arbitrations and mediations

[186] <http://www.siac.org.sg/index.php?option=com_content&view=article&id=47&Itemid=65> accessed 20 August 2012. An interviewee elaborated: 'Singapore's got a lot of natural advantages as a venue for arbitration, because of its geographic location. It has an excellent court system and judges who understand arbitration. It ticks all of the boxes for what one requires in an arbitral venue. That helps enormously.'

[187] For a comprehensive description and assessment of the changes brought by this statute, see Carducci 2012.

[188] Scherer 2011a.

[189] *Code de procédure civile*, art 1522; amendments enacted by the Decree No 2011-48 of 13 January 2011. Unofficial English translation available at <http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf> accessed 20 July 2012.

[190] Ibid, art 1526.

[191] Leahy and Bianchi 2000, 58. They speculate that the next step in this regulatory competition may be for countries to modify their rules setting security requirements. Ibid, 47; see also Rogers 2002, 349–50: 'Any nation interested in participating in the global economy must adjust its laws to accommodate the demands of international arbitration.'

[192] Ginsburg 2003, 1343.

[193] Ibid.

there.[194] As a Singapore-based interviewee observed, Singapore's rise to prominence as an arbitral venue would not have been possible without significant governmental support: 'The support given is very important … the encouragement of the government officials, making available their time, making available support systems, and facilitating legislative changes such as allowing foreign lawyers and foreign arbitrators to be involved.… More and more liberties were granted by them.'

States can also compete to attract arbitrations through their substantive laws and their court systems. Parties that choose a particular state's substantive law to govern their dispute are likely to choose that state as the seat of the arbitration.[195] After all, the arbitration law of the arbitral seat will govern the arbitration, and the courts of that jurisdiction will have the power to set aside an eventual award. Attracting arbitrations to its jurisdiction will bring revenue to the state and will make it more likely that parties will hire advocates and arbitrators from that state (who are the most likely to be expert in that state's law).

A country with a competent and impartial judiciary and a well-developed body of domestic commercial law will be preferred as an arbitral venue over one with rudimentary laws and incompetent or corrupt judges. The 'formal legal infrastructure' of a state (including such factors as the 'arbitration-friendliness' of the state's arbitration laws, its courts' track record of enforcing arbitration agreements and awards, and the neutrality and professionalism of its judiciary) was cited by corporate counsel as the most important influence on parties' choice of a seat of arbitration.[196]

For example, parties in the shipping and insurance industries continue to choose English law, even where there is no English party and despite the fact that England is no longer economically dominant in either industry. The primary explanations are that, especially in areas where England was historically dominant, English law is more finely developed (and therefore more predictable) and the English bar and courts more expert than those of other countries. Several interviewees commented that, in their experience, English law is in fact becoming more popular among non-English parties, even beyond the sectors where it has traditionally been chosen. One non-English arbitrator based in London related that, in his practice, he is seeing more and more contracts with no connection to England that contain a choice of English law: 'English law as the governing law is really starting to take a prominent place, probably beyond all others.'

A well-developed set of laws and a high-quality judiciary may not be enough to attract arbitral business, as a number of factors that are not strictly legal can also play a role. Said a senior London-based independent arbitrator:

> I've had Paris law firms that have told me they're moving people over here because of the infrastructure … all the services you can get here, the court reporters and interpreters and all that kind of stuff. It's the infrastructure. You can get a brilliant Turkish interpreter tomorrow if you want it in London, which you can't always do elsewhere.

America provides an interesting case in point. US commercial and arbitration laws are well developed,[197] the judiciary (in the federal courts at least, which are the ones

[194] See the SIAC press release: <http://www.siac.org.sg/pdf/20080411-WP.pdf?phpMyAdmin=OP8vu698 vunuzJZYZoW2%2CoDB3yb> accessed 20 August 2012.

[195] Corporate counsel reported that the law governing the substance of the dispute was the second most important influence (after the quality of the state's legal infrastructure) on their choice of the seat of arbitration. W&C/QMUL 2010, 18.

[196] Ibid.

[197] However, the arbitration laws are quite dated, as the US Federal Arbitration Act (FAA) has not been updated since it was enacted 1925, before the drafting of the New York Convention. On the shortcomings of the FAA, especially those related to its age, see Bermann 2011a.

foreign parties are likely to encounter) highly professional. However, many non-US lawyers are put off by the complexity of US federal and state laws (and the corresponding mass of precedents), 'which seem extremely tricky, and even bizarre, to foreign parties and lawyers trained in different legal traditions'.[198] For this reason, Helmer asserts that American courts and the laws of American states are not chosen as frequently as English courts and law in situations where neither party is American or English.[199]

Finally, some countries present advantages or disadvantages unrelated to their legal systems. Switzerland and Sweden are preferred for their political neutrality. Thus, the Stockholm Chamber of Commerce built up a reputation in the 1970s and 1980s as a neutral site for arbitrations between western and Soviet bloc corporations.[200] Despite the reservations that many foreign parties have about the US courts and US legal system, some parties choose to arbitrate in the US because the respondent has significant assets there.[201]

3. Competition with other forms of dispute resolution

The pervasiveness of competition in the international arbitral system does not mean that competition is all-encompassing; there are many areas in which the interests of different arbitrators and different arbitral institutions converge. First, arbitrators and arbitral institutions tend to support globalization and free trade.[202] Self-interest partly accounts for this phenomenon—more cross-border transactions will mean more international arbitrations—but arbitrators tend to be committed free-traders.[203]

Second, arbitrators recognize that they are dependent upon cooperation from national courts; without courts willing to enforce arbitration agreements and arbitral awards, 'the effectiveness of the entire arbitral process (and its attractiveness to international business) will be undermined'.[204] Until recently, courts limited the scope of arbitral authority and reserved the right to supervise arbitral decision-making.[205] Arbitrators and arbitral institutions have successfully lobbied national legislatures, executives, and courts to enact laws supporting international arbitration.[206]

Third, arbitrators and arbitral institutions actively cooperate to promote arbitration (over other forms of ADR and litigation) as the preferred method for resolving international commercial disputes.

As a result, extolling the virtues of ICA (especially its superiority over litigation) is part of the business of an arbitrator. Many arbitrators seldom miss an opportunity to proclaim arbitration's superiority. For such arbitration apologists, arbitration is 'a valuable commodity as yet too little known but capable of being proved superior to its competitors',[207] while courts are 'unaccustomed to international commercial transactions

[198] Helmer 2003, 42.

[199] Ibid. Helmer provides no statistical support for this assertion, but several interviewees agreed.

[200] Born 2009, 165–6. Similarly, one interviewee ascribed Singapore's increasing popularity as an arbitral seat to the fact that Singapore is 'a truly neutral venue in Asia'.

[201] Alford, 86.

[202] Trakman 2006, 29; Thirgood 2004, 344.

[203] Such an ideological position is itself attributable in part to arbitrators' identification with business interests and their internationalist values. See Chapter 4, Sections III and V.

[204] Thirgood 2004, 346.

[205] See Section II.2 of this chapter.

[206] Thirgood 2004, 344.

[207] Minoli et al 1967, vii. This statement was made more than forty years ago, but the sentiment persists.

and … [their] laws and practices are not adequate to deal with them'.[208] Effective promoters of ICA are lauded by their fellow arbitrators. For example, in their introduction to a *liber amicorum* for Martin Domke, Minoli, Pearson, and Sanders praise Domke for having been a 'shrewd … salesman' for arbitration during his extensive travels: 'Always the gospel of Arbitration has been preached *con brio* and tirelessly.'[209]

Arbitration treatises and student textbooks typically include, in their first chapters, lists of the advantages of arbitration.[210] Moreover, arbitration scholars continue to publish arguments for arbitration's importance and prescriptions for how to ensure that arbitration remains, as in the title of one such article, the 'preferred option for international dispute resolution'.[211]

Too often, academic commentary on ICA takes the form of cheerleading; as Rogers notes, most commentators in domestic contexts are 'sceptics who focus on the … power differentials that characterize most disputes', but 'international commercial arbitration scholars have traditionally been insiders.… When they criticize the system and call for improvement, their tone is most often that of loyal opposition from within, not that of external detractor.'[212] (Investment treaty arbitration, on the other hand, has attracted some persistent lines of criticism, in particular that both arbitral tribunals and the system of bilateral investment treaties itself systematically favour corporations over developing states[213] and that inconsistent awards regarding inadequately defined substantive rights threaten the legitimacy of the system.[214])

Not surprisingly, arbitrators tend to take wide views of arbitral jurisdiction and the arbitrability of disputes. Doctrines such as interpretation *in favorem validatis*, widely applied by arbitrators, tilt jurisdictional disputes toward a finding that jurisdiction exists.[215] The tribunal's decision in consolidated ICC Cases Nos 6515 and 6516 is typical. The arbitration agreement read as follows:

> Any eventual dispute between the Parties arising herefrom should be ironed out by the Parties undertaking to make all necessary efforts for settling them amicably. However, if a dispute finally had to be litigated, it would be by Arbitration in Athens, in accordance with the provisions of the International Chamber of Commerce.[216]

The tribunal found this clause to be 'defective under a number of respects'—the indefiniteness of the statement that the parties 'should' attempt to 'iron out' the dispute, the reference to 'provisions' of the ICC as opposed to its rules of procedure, the reference to 'litigation' of the dispute. However, it held that 'none of these defects … is of such gravity as to vitiate the clauses'.[217]

[208] Redfern and Hunter 2004, 31. [209] Minoli et al 1967, vii.

[210] For this kind of list, see, eg, Born 2009, 70–89; Redfern and Hunter 2004, 26–54; Lew et al 2003, 4–8.

[211] Crowter and Tobin 2002. For another example of this type of article, see Carbonneau 2009b.

[212] Rogers 2006, 1324 (citations omitted), noting that arbitration has only 'recently … attracted some skeptics, who are calling for … reforms'. However, even these critics remain few in number and 'their proposals have demonstrated an appreciable sense of reserve'. Ibid, 1325. Dezalay makes a similar point: 'In the world of arbitration, academics and practitioners frequently work together as arbitrators and advocates and there is no activist community to speak of' (Dezalay 2007, 163).

[213] See, eg, Sornarajah 2006; Chimni 2004.

[214] See, eg, Franck 2005; Afilalo 2005.

[215] There is no single doctrine of interpretation in favour of validity, but rather an attitude that is exhibited in a variety of circumstances where the arbitral tribunal's jurisdiction is contested. For example, where it is alleged that a valid arbitration agreement exists but the dispute is outside the scope of that agreement, there is 'a strong tendency to favour a broad interpretation of arbitration clauses'. Lew et al 2003, 151–2. See also Hanotiau 2011.

[216] (1999) XXIVa Ybk Comm Arb 80 [1]. [217] Ibid, [54].

In a similar vein, an empirical study of ICC awards by then ICC Secretary-General Schwartz revealed what he called a 'liberal' view of arbitrability. Schwartz reviewed over 500 ICC awards rendered over five years and found not a single award in which the tribunal held that the dispute referred to it was unarbitrable.[218] As Thirgood wryly comments on these findings: 'It is clearly in the ICC's interests to create as many new opportunities for arbitration as possible (provided that in doing so it does not jeopardize the enforceability of its awards or its good reputation).'[219]

Arbitral institutions actively encourage this trend. When the ICC revised its rules in 1998, ICC tribunals' jurisdiction was expanded to include 'disputes not of an international character' if the parties so provide in their arbitration agreement.[220] Derains and Schwartz—both former Secretaries-General of the ICC Court of International Arbitration—write that the purpose of this revision was to allow an ICC tribunal to extend its jurisdiction to cases 'where the international character of the dispute may be in doubt'.[221] The equivalent provision in the 2012 Rules goes a step further. It refers simply to 'the resolution of disputes'. In other words, the ICC arbitrations under pre-1998 Rules were limited to disputes of an international character. Next, they were presumptively limited to such disputes under the 2010 Rules but the parties could provide otherwise. Today, under the 2012 Rules, they are no longer limited at all in that way.

Competition between arbitrators and courts is largely one-sided. Judges and national legislators derive no personal benefits from attracting more lawsuits to their courts; they even encourage parties to go to arbitration. Courts tend to see arbitration as, at minimum, a means of easing their crowded dockets.[222] As Ridgway notes, increasing international trade will generate an increasing number of cases, which may overwhelm already-overworked national judicial systems.[223] Perhaps in response to this development, states 'have overcome their historical mistrust of arbitration … to consider that it represents an important factor of stability and development in transnational economic relations'.[224] The role of national courts has therefore 'evolved from the supervision and control of the arbitrator's activity to the more fruitful one of co-operation with a view to more efficient conduct of the proceedings'.[225]

Despite the cooperative attitude of most national courts, arbitrators must overcome the fact that courts have an inherent legitimacy. Not surprisingly, '[t]he international arbitration community is deeply concerned with its real and perceived legitimacy.'[226] Indeed, ICA as a field must continually justify its legitimacy: 'Large portions of international arbitration procedure can be explained as attempts to maximize the legitimacy of a process detached from the normal sources of authority.'[227]

[218] Schwartz 1994, 19. Courts may or may not have agreed that these 500 disputes were arbitrable; however, without access to the awards on which Schwartz based his study, it is impossible to reach any conclusion regarding abitrators' and judges' differing conceptions of arbitrability.

[219] Thirgood 2004, 351. The limitation on the enforceability of ensuing awards remains important. As Mistelis notes, one could argue an arbitral tribunal has no duty to respect national standards of arbitrability. Nevertheless, a tribunal 'should on its own initiative deny jurisdiction if the dispute is inarbitrable on the basis of the facts submitted by the parties'. Mistelis 2009 [1]–[18].

[220] Art 1. [221] Derains and Schwartz 1998, 22.

[222] For example, Bales and Eviston note, in the context of civil litigation in the US, 'without pre-dispute arbitration, court dockets would be overloaded with claims'. Bales and Eviston 2010, 11.

[223] Ridgway 1999, 52. For budgetary reasons, states are generally reluctant to increase the number of judges, even as the population and the number of claims filed increase.

[224] Bernardini 2004b, 118–9 (citations omitted). [225] Ibid, 115. But see Wallace 1990.

[226] Rogers 2006, 1335. [227] Park 2003, 1257–8.

Today, one of the major concerns expressed by interviewees is ensuring the legitimacy of ICA in developing countries. This is a greater issue in investment arbitration,[228] but ICA also suffers from a perception that it is largely a creation of the global North, foisted upon the global South. One interviewee described the current state of affairs:

> I personally see one of the bigger challenges for arbitration is to make certain we have a diversity of players from the developing world. Now, diversity is a word that can very easily be [limited to] gender diversity … one could put together a series of tribunals that would be all women, but … because all the women would be either from New York or London or Washington—big firm solicitors or very senior barristers.… [If] the parties are from the developing world then all they see are three Western faces.… We need to look at the buy-in from the rest of the world. This does not detract from the importance of gender diversity but we need to pursue in parallel diversity in all its forms.

Primarily, this means promoting arbitration as sophisticated enough to serve the multifarious needs and interests of international commerce and reliable enough to trust with the resolution of major disputes. The sophistication is provided largely by ICA's academic sheen. As Dezalay and Garth describe it: 'The academic theorization of arbitration … gave the field … a sophisticated legal expertise suitable for high-level practitioners. This academic pedigree has helped promote the acceptance and recognition of arbitration throughout much of the world.'[229]

Reliability concerns are somewhat more intractable: indeed, they may well be endemic to arbitration. In 1938, before the modern era of international arbitration, Judge Learned Hand memorably wrote that 'arbitration sometimes involves perils that surpass those of the sea'.[230] In 1965, when ICA was just beginning to coalesce as a distinct field of law, Martin Domke called 'predictability of result' the 'principal challenge' facing arbitration.[231] As discussed above, the internecine nature of the arbitration community continues to raise concerns about conflicts of interest.[232] Moreover, informal procedures can lead to denials of due process, cross-cultural misunderstandings can lead to serious miscommunications, and unsupervised and unaccountable arbitrators can render superficial or clearly erroneous awards.

The last concern is the most serious. Given arbitrators' lack of any inherent authority over the parties, 'the success … of arbitration as a means of resolving disputes depend[s] upon the quality of … the skills, training and experience of those involved'.[233] Consequently, faulty or inadequate awards not only 'destroy any trust parties can have in a particular panel, but … also destroy the parties' trust in arbitration'.[234] As Ridgway notes, trust is critical in ICA, which depends for its effectiveness on a high rate of voluntary compliance.[235]

[228] Some commentators have criticized the investment arbitration system for being biased in favour of (mostly Western) investors and against developing states. The debate has now produced a voluminous literature. See generally Waibel et al 2010.

[229] Dezalay and Garth 1996, 42.

[230] *Canadian Gulf Line v Continental Grain Co*, 98 F2d 711, 714 (2d Cir 1938).

[231] Domke 1965, 14. See also Redfern 2003.

[232] See Section III.1 of this chapter.

[233] Jones 2006, 276.

[234] Giovannini 2003, 351.

[235] Ridgway 1999, 50. The ICC has estimated that over 90 per cent of its awards are complied with voluntarily. Lalive 1984, 319. However, Drahozal notes that an empirical basis for that estimate is not provided, and it appears to be based entirely on anecdotal reports of members of the ICC Court. Drahozal 2009a, 1040 fn 41. Survey data indicate that the rate of voluntary compliance is indeed high, although not as high as the ICC asserts. 84 per cent of corporations regularly involved in international arbitration reported that the opposing party had honoured an award in more than three quarters of the disputes in which the respondent was involved. PwC/QMUL 2008, 8. However, these figures are difficult to verify, as only about half of the arbitral institutions have any system in place for

As a result of these concerns, arbitrators and arbitral institutions have promoted more detailed rules on conflicts of interest and arbitral ethics,[236] drafted clearer and more harmonized rules of procedure,[237] increased transparency in such matters as the selection and challenge of arbitrators,[238] required reasoned awards,[239] advocated for the publication of more awards,[240] and established training and certification programs for would-be arbitrators.[241]

V. Conclusion

The institutional structures of the ICA system are important components of ICA culture. Based on those structures, it is possible to predict a variety of effects on international arbitral decision-making.

Whatever jurisdictional theory one subscribes to, it is clear that arbitrators derive their authority from both state legal orders and the agreement of the parties. Similarly, both state laws and the parties' agreement place constraints on the exercise of that authority. However, within the culture of ICA, the parties are the primary focus, since they are the direct cause of the tribunal's existence and since they select and pay the arbitrators.

These are purely logistical realities, but their predictable consequence is that international arbitrators will identify with the perspectives and interests of the parties. Arbitrators interviewed for this book did not characterize the parties as limiting their authority, although parties do often agree to limit the power of the tribunal (for example, by restricting the scope of submission to arbitration to a narrow set of issues, or by agreeing to limited document production or short hearings). The mirror image of this tendency is that international arbitrators perceive the risk of non-enforcement of an award—and the corresponding risk to their reputations and their livelihoods—as the primary checks on their authority. Accordingly, interviewees referred to state laws

monitoring arbitrations after the award is rendered. Ibid, 16. Similar findings from other surveys are summarized in Drahozal 2009a, 1040.

[236] See generally Rogers 2006.

[237] Jolivet 2006, 270. In particular, attention has been paid to streamlining rules of procedure to increase the speed and lower the cost of arbitration. Crowter and Tobin 2002, 301.

[238] For example, the LCIA now publishes its decisions on challenges to arbitrators, despite the fact that its rules do not require publication. See 11(2) LCIA News 1 (June 2006). In its 2012 revision to its Rules, the ICC decided not to begin publishing decisions of the ICC Court on challenges to arbitrators. Fry 2011. The two approaches may be explained by differences in the institutional structure of the LCIA and the ICC. An interviewee pointed out: 'It would be difficult for the ICC to publish its decisions on challenges, because those decisions are formally taken by the ICC Court of Arbitration at plenary sessions at which thirty or more members of the ICC Court may be present. The LCIA procedure is more formalistic. A tribunal of one or three members of the LCIA Court are appointed to adjudicate upon the challenge and make a reasoned decision. At the ICC, there is a report from the Secretariat, a report from the Rapporteur, and then it is very much the essence of the meeting at the plenary session of the Court. And it may not be unanimous.'

[239] Rogers 2006, 1316–7. The increase in detailed reasoning in arbitral awards is illustrated by the fact that, on average, published arbitral awards have increased dramatically in length over time. Rogers canvassed the ICC awards published in the Yearbook of Commercial Arbitration and noted that the average length of ICC awards in the volumes for 1986 and 1987 were 5.7 pages and 8.4 pages, respectively, while those for 2003 and 2004 were 16.5 and 20 pages. Ibid, 1317 fn 64. See also Park 2002, 823: 'The marketplace has pushed international arbitration toward reasoned awards.'

[240] Rogers 2006, 1323 fn 64.

[241] Grizel 2006, 167.

mainly in terms of the limits that they place on arbitral decision-making.[242] Of course, state laws also empower arbitrators in the first place by enforcing both arbitration agreements and arbitral awards.

Identification with the parties does not translate into identification with *one* party. Despite the obvious risk of bias presented by the direct appointment of arbitrators by parties, party-appointed arbitrators are not systematically partial. Incidents of party-appointed arbitrators who act as advocates for 'their' parties are rare, and such conduct is stigmatized in the ICA community. Market competition obliges arbitrators to maintain neutrality (or at least the appearance of neutrality); biased arbitrators lose credibility with their fellow tribunal members, so parties are unlikely to appoint arbitrators with a reputation for partiality.[243]

By contrast, market forces may not discipline the tendency of arbitrators to cooperate with each other and with the counsel who appear before them. It is unclear how much the fluidity of arbitral roles and the personal and financial ties between arbitrators and counsel affect the decision-making of arbitrators. However, it seems reasonable to conclude that market and social forces act together to disincentivize arbitrators from making decisions that might harm the interests of the ICA community (which overlap with but are distinct from the interests of the parties who employ that system). Market forces affect ICA culture in other ways. They create an incentive to redesign arbitral procedures to better serve the needs of the parties—the primary consumers of arbitration services. Similarly, market forces may lead arbitrators away from substantive rules of law, such as *lex mercatoria*, that are disfavoured by parties.

Competition also acts as a harmonizing force, as beneficial innovations are quickly copied, and as would-be arbitrators market themselves in terms of the career paths of the currently dominant generation. Conferences and publications serve as a means for arbitrators to advertise their expertise (especially since almost all commercial arbitration awards are confidential) and also provide avenues for the dissemination of new ideas among arbitrators and counsel.

Despite the trend toward 'professionalization' or 'judicialization' of ICA, arbitral decision-making is relatively unconstrained when it comes to determinations of substantive law. Beyond a choice of the governing law (which appears in most cross-border contracts), parties' agreements typically do not address the way in which the tribunal should apply the governing law. Similarly, national laws do not normally intrude upon the arbitrators' decision on the merits; the grounds for non-enforcement of awards are almost entirely jurisdictional and procedural.

Combined with the confidentiality of awards and the lack of a *stare decisis* doctrine in ICA, these institutional facts mean that arbitrators largely need not concern themselves with developing the law in a systemic sense when they render awards. Interviewees repeatedly emphasized that the award is 'for' the parties, and not for any larger constituency. As one interviewee put it, he is a 'problem-solver' not a 'policy-maker'.

This not to say that international arbitrators ignore notions of legal coherence when they render awards. For example, they routinely refer to national court judgments on

[242] The limits that interviewees most frequently referred to are the requirement to obey state mandatory laws and the requirement that both parties have an adequate opportunity to present their cases.

[243] These phenomena are also reinforced by the neutrality norm, which will be discussed in Chapter 4.

matters of national substantive law. However, international arbitrators are not directly supervised by courts of appeal and must make their decisions acceptable primarily to the parties (and in some cases, to a lesser extent, to arbitral institutions). One would therefore expect both the substance of their decisions and the style in which those decisions are written to display less concern for legal formalism and more concern for commercial reasonableness.