Additionally, Article III of the Geneva Protocol attempted to provide for the recognition of international arbitral awards. It declared:

> Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory....[223]

This provision was extremely limited, providing only for Contracting States to enforce awards made on their own territory (*i.e.*, not "foreign" awards, made in other countries). Even then, enforcement was required only in accordance with local law—effectively making the commitment dependent on each individual state's arbitration legislation. In contrast to the simple, but dramatic, provisions of the Geneva Protocol regarding arbitration *agreements*, Article III's treatment of arbitral *awards* was at best tentative and incomplete.

The Geneva Protocol was augmented by the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927.[224] Recognizing the Protocol's deficiencies in dealing with this issue, the Geneva Convention expanded the enforceability of arbitral awards rendered pursuant to arbitration agreements subject to the Geneva Protocol. It did so by requiring the recognition and enforcement of such "foreign" awards within any Contracting State (rather than only within the state where they were made, as under the Protocol), and forbidding substantive judicial review of the merits of such awards in recognition proceedings.[225]

Regrettably, the Convention placed the burden of proof in recognition proceedings on the award-creditor, requiring the award-creditor to demonstrate both the existence of a valid arbitration agreement,[226] concerning an arbitrable subject matter,[227] and that the arbitral proceedings had been conducted in accordance with the parties' agreement.[228] The Convention also required the award-creditor to show that the arbitral award had become "final" in the place of arbitration[229] and was not contrary to the public policy of the recognizing state.[230] This requirement of finality led to the so-called "double *exequatur*" requirement—whereby an award could effectively only be recognized abroad under the Geneva Convention if it had been confirmed by the courts of the place of the arbitration.[231] This proved a major source of uncertainty regarding the finality of international arbitral awards.

Despite these shortcomings, the Geneva Protocol and Geneva Convention were major steps towards today's legal framework for international commercial arbitration. Most fundamentally, both instruments established, if only imperfectly, the basic principles of the

223. Geneva Protocol, Art. III.

224. Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, 92 L.N.T.S. 302 (1929-1930). *See* G. Born, *International Commercial Arbitration* 67 (2d ed. 2014); A. van den Berg, *The New York Arbitration Convention of 1958* 6-7, 113-18 (1981).

225. Geneva Convention, Arts. 1-4.

226. Geneva Convention, Art. 1(a).

227. Geneva Convention, Art. 1(b).

228. Geneva Convention, Art. 1(c).

229. Geneva Convention, Art. 1(d).

230. Geneva Convention, Art. 1(e).

231. *See infra* pp. 1189-90, 1196-97; A. van den Berg, *The New York Arbitration Convention of 1958* 7 (1981).

presumptive validity of international arbitration agreements[232] and arbitral awards,[233] the enforceability of arbitration agreements by specific performance,[234] as well as recognition of the parties' autonomy to select the substantive law governing their relations[235] and to determine the arbitration procedures.[236]

Further, the Geneva Protocol and Convention both inspired and paralleled national legislation and business initiatives to augment the legal regime governing international commercial arbitration agreements. In 1920, New York enacted arbitration legislation, largely paralleling the Protocol, to ensure the validity and enforceability of commercial arbitration agreements.[237] With an eye towards ratification of the Geneva Protocol, France adopted legislation in 1925 that made arbitration agreements valid in commercial transactions,[238] while similar legislation was enacted in England.[239]

Also in 1925, the United States enacted the Federal Arbitration Act—providing the first federal legislation in the United States governing domestic (and international) arbitration agreements. The centerpiece of the FAA was §2, which provided that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[240] while §§9 and 10 of the Act provided for the presumptive validity and enforceability of arbitral awards.[241] Much like the 1923 Geneva Protocol, the stated purpose of the FAA was to reverse decades of judicial mistrust in the United States of arbitration and render arbitration agreements enforceable on the same terms as other contracts.[242]

3. *New York Convention*

The Geneva Protocol and the Geneva Convention were succeeded by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[243] Generally referred to as the "New York Convention," the treaty is by far the most significant contemporary legislative instrument relating to international commercial arbitration. It provides what amounts to a universal constitutional charter for the international arbitral process, and whose sweeping terms have enabled both national courts and arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and arbitral awards.

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232. *See infra* pp. 177-90.

233. *See infra* pp. 1189-91, 1194-96.

234. *See infra* pp. 315-34.

235. *See infra* pp. 983-92.

236. *See infra* pp. 785-90.

237. *See* Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803-807 (providing for validity of arbitration agreements); G. Born, *International Commercial Arbitration* 68 (2d ed. 2014).

238. French Commercial Code, 1925, Art. 631. *See also* von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 La. L. Rev. 1045, 1049-51 (1985-1986) (discussing impact of 1925 amendment).

239. *See* G. Born, *International Commercial Arbitration* 68 (2d ed. 2014); Samuel, *Arbitration Statutes in England and the USA*, 8 Arb. & Disp. Resol. L.J. 2, 13 (1999).

240. U.S. FAA, 9 U.S.C. §2. For discussion of §2, *see infra* pp. 53-54.

241. U.S. FAA, 9 U.S.C. §§9, 10. For discussion of §§9, 10, *see infra* pp. 53-54, 1150-55, 1165-68, 1171-72.

242. *See supra* pp. 21-26 & *infra* pp. 189-90

243. 330 U.N.T.S., No. 4739; www.uncitral.org.

"1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again." ...

When the trial is viewed as a whole right through from the *voir dire* to counsel's closing address, it can be seen that the O'Keefe case was presented by counsel against an appeal to home-town sentiment, favouring the local party against an outsider. To that appeal was added the element of the powerful foreign multi-national corporation seeking to crush the small independent competitor who had fought for his country in World War II. Describing "Loewen" as a Canadian was simply to identify Loewen as an outsider. The fact that an investor from another state, say New York, would or might receive the same treatment in a Mississippi court as Loewen received is no answer to a claim that the O'Keefe case as presented invited the jury to discriminate against Loewen as an outsider....

TREATY OF WASHINGTON
Articles I-VI, X (1871)

[excerpted in Documentary Supplement at pp. 65-68]

[During the U.S. Civil War, the Confederacy contracted with English ship-builders to construct several warships in English shipyards. The United States protested to the United Kingdom, claiming that construction of the vessels was a violation of U.K. obligations of neutrality towards the United States. Despite the U.S. protests, the vessels left English ports and subsequently were manned by Confederate sailors, who inflicted substantial losses on U.S. shipping (sinking or capturing roughly 100 cargo ships). The most formidable of the Confederate vessels, named the Alabama, successfully attacked U.S. vessels in waters around the world, before finally being sunk, towards the end of the Civil War, by Union warships.

After the Civil War concluded, the United States demanded compensation from the United Kingdom, claiming that the U.K. acquiescence and tacit support for construction of the Alabama and other vessels resulted in massive damage to the United States, including the value of cargo vessels that were sunk or captured, the lost cargo (which was allegedly diverted from U.S. vessels to "safer" foreign vessels (primarily U.K. vessels)), and the costs of an allegedly prolonged war. The United Kingdom rejected the U.S. demands, provoking bitter diplomatic and political disputes. The two states eventually agreed, in the 1871 Treaty of Washington, to refer this dispute (and other disputes) to international arbitration. Pursuant to the Treaty, the United States and United Kingdom conducted the so-called "Alabama Arbitration" (seated in Geneva), which produced an award partially upholding the U.S. claims. The background of the Treaty of Washington and the ensuing arbitration are described in Bingham, *The Alabama Claims Arbitration*, 54 Int'l & Comp. L.Q. 1 (2005) and F. Hackett, *Reminiscences of the Geneva Tribunal of Arbitration* (1911).]

1907 HAGUE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES
Articles 37, 38, 40, 41

[excerpted in Documentary Supplement at p. 43]

ARBITRATION AGREEMENT BETWEEN THE GOVERNMENT OF SUDAN AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY ON DELIMITING THE ABYEI AREA
Articles 1-3 (2008) (also excerpted in Documentary Supplement at pp. 79-80)

[Since Sudan's independence in 1954, the country was engulfed by almost continuous civil war, generally pitting the largely Muslim, Arabic-speaking north against the primarily Christian and other non-Muslim south. In 2004, the Government of Sudan ("GoS") and the Sudan Peoples' Liberation Movement/Army ("SPLM/A"), the principal Sudanese resistance group, negotiated and signed a Comprehensive Peace Agreement ("CPA"). The CPA, concluded under United Nations auspices, aimed at ending the civil war and permitting a referendum in which southern Sudan could decide whether or not to form an independent state.

A central issue addressed by the CPA was the status of a territory located in south-central Sudan, called the Abyei Area, which lay on the border between southern and northern Sudan. Among other disputes, the GoS and SPLM/A disagreed about the territorial boundaries of the Abyei Area. The CPA provided for the Abyei Area to be delimited by a commission of experts (the Abyei Boundaries Commission ("ABC Experts")). After extensive submissions from the parties, the ABC Experts issued a report in July 2005 delimiting boundaries for the Abyei Area. Dissatisfied with the result, the GoS refused to accept the Report, leading to a prolonged stalemate with the SPLM/A, which threatened the broader peace process envisaged by the CPA.

The stalemate between the GoS and the SPLM/A was broken in July 2008, when the two parties agreed to arbitrate their disagreements regarding the ABC Experts Report and the boundaries of the Abyei Area. The parties' agreement is excerpted in the Documentary Supplement at pp. 79-84.

The Abyei Arbitration Agreement, and the resulting Abyei Arbitration, are described in materials on the website of the Permanent Court of Arbitration, under whose auspices the arbitration was conducted. Among these materials are the parties' written submissions, webcasts of the oral proceedings and the arbitral award made by the tribunal. *See* www.pca-cpa.org; www.wx4all.net/pca.]

RAINBOW WARRIOR AFFAIR
(1985)

[In July 1985, agents of the French Directorate General of External Security ("DGSE") planted mines on the "Rainbow Warrior," a protest vessel belonging to Greenpeace (an environmental advocacy group), when it was moored in Auckland Harbour, New Zealand. The vessel had been scheduled to sail to Mururoa Atoll, in French Polynesia, to protest against French nuclear testing; that voyage was prevented by the actions of the DGSE agents, which resulted in the vessel's sinking (and the death of one Greenpeace member). Criminal investigations by New Zealand police resulted in the arrests of two French DGSE agents (and their subsequent criminal convictions). France initially denied responsibility for the attack on the Rainbow Warrior and imposed economic sanctions on New Zealand in retaliation for the DGSE agents' arrest. Subsequently, however, France acknowledged responsibility for the sinking of the Rainbow Warrior and offered to pay reparations to both New Zealand and Greenpeace.

arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in U.S. courts unless it has a reasonable relation with a foreign state." H.R. Rep. No. 91-1181, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. & Ad. News 3601, 3602.

Does this language justify the result in *Northstar*? Cannot one appropriately conclude that the *Northstar* agreement had a reasonable relationship to England, by selecting an English arbitral seat? Particularly where the (foreign) arbitral seat was selected because of its expertise, experience and (less clearly) neutrality?

12. *Application of New York Convention to transactions between U.S. nationals involving property or performance abroad.* U.S. nationals frequently enter into agreements with one another with respect to property located, or performance occurring, outside the United States. Section 202 seeks to make it clear that these agreements are subject to the Convention, even though they involve only U.S. nationals. *See Fuller Co. v. Compagnie des Bauxites de Guinea*, 421 F.Supp. 938 (W.D. Pa. 1976). What exactly is required to satisfy §202's requirement for property or performance located abroad?
13. *Application of New York Convention to transactions between U.S. nationals having a "reasonable relationship" to a foreign state.* Even if a transaction does not involve property or performance abroad, §202 also applies the Convention to agreements between U.S. nationals having a "reasonable relationship" to a foreign state. What would satisfy §202's "reasonable relationship" requirement? As a matter of statutory interpretation, doesn't a "reasonable relationship" necessarily involve things *other* than property or performance abroad (which are separately mentioned in §202)? Note that London was selected in *Northstar* for historical and legal reasons relating to the salvage industry. Why wasn't this sufficient to satisfy the reasonable relationship requirement?

Section 202's "reasonable relationship" standard was based on §1-105 of the U.S. Uniform Commercial Code, dealing with choice-of-law clauses. *See infra* pp. 990-91, 1090. As discussed elsewhere, §1-105 generally permits parties to a transaction to select a neutral foreign law that has no connection to the place where the parties' transaction was negotiated or will be performed; a "reasonable relationship" can be found in cases where the parties agree to the application of a neutral, predictable foreign legal system. *See infra* pp. 990-91. Why shouldn't §202 be interpreted as permitting selection of a neutral arbitral seat (especially where the seat has particular expertise or historical experience)? Should this be permitted even where a transaction only involves local nationals and is purely domestic in scope?

14. *Application of §202 outside consumer/employee context*. Suppose two sophisticated U.S. companies, from different parts of the United States, agree to arbitrate in Montreal, Canada (or London). What U.S. public policy would forbid this? Suppose that the arbitration agreement in *Northstar* had been carefully negotiated, with the advice of counsel. Isn't the real concern in *Northstar* that of a one-sided adhesion contract with unsophisticated consumers? If so, are there not mechanisms under the Convention for dealing with this concern? Note Article II's provision that Contracting States are not obligated to enforce agreements that are "null and void"; wouldn't that provision include defenses based on unconscionability? *See infra* pp. 393-412. Note the provisions in Articles II(1) and V(2)(a) regarding disputes that are nonarbitrable. *See infra* pp. 475-510.

15. *Consequences of concluding that §202 does not apply to arbitration agreement*. Assume, as the *Northstar* court held, that an arbitration agreement between two U.S. nationals is not subject to the Convention (and that the domestic FAA does not require enforcement). Then what? Is the entire arbitration agreement void? What does *Northstar* hold? Is the offending term, selecting a foreign arbitral seat, to be severed, leaving an arbitration agreement without a selection of an arbitral seat? Could a U.S. court then select, or could the arbitral tribunal select, a U.S. arbitral seat? *See also infra* pp. 658-69.
16. *Scope of 1907 Hague Convention*. Consider what category of disputes is encompassed by the arbitration provisions of the 1907 Hague Convention. Note that the Convention is directed towards "disputes between states." Is there any reason that the same provisions could not apply to disputes between a state and a non-state actor? Consider Article 38 of the Convention, excerpted at p. 43 of the Documentary Supplement. Does it limit the types of inter-state disputes that are subject to the Convention? Does it suggest that some disputes are better suited for arbitration than others? What disputes? What is meant by a dispute of a "legal matter"?
17. *Scope of ICSID Convention*. Consider the disputes that may be submitted to ICSID jurisdiction under Article 25 of the Convention, excerpted at pp. 18-19 of the Documentary Supplement. Note that the disputes must involve a Contracting State and the national of another Contracting State. Why is that? What would be wrong with a French investor proceeding against France in an ICSID arbitration?

d. Reciprocity Requirements Under International Conventions and National Arbitration Legislation

The concept of reciprocity plays a significant role in many private international law contexts. For example, the availability of international judicial assistance and the enforceability of foreign judicial judgments often depend on principles of reciprocity.[37] Reciprocity can also be relevant to the enforceability of international arbitral awards and arbitration agreements, under both international conventions and national arbitration legislation. The decision excerpted below examines the role of reciprocity in both contexts.

As discussed below, Article I(3) of the New York Convention provides Contracting States with the possibility of making a "reciprocity reservation"; additionally, Article XIV of the Convention also contains a general reciprocity provision (although its meaning is disputed).[38] In contrast, most contemporary national arbitration statutes do not contain express reciprocity requirements. Moreover, national courts have generally not considered whether such requirements should or may be implied. The materials excerpted and discussed below examine the role of reciprocity as applied to arbitration agreements under the New York and Inter-American Conventions and leading arbitration statutes, including the UNCITRAL Model Law.

37. *See* G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1094 *et seq.* (5th ed. 2011).

38. *See* G. Born, *International Commercial Arbitration* 343-44 (2d ed. 2014).

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the object of the Act would be defeated if proceedings remain pending in court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by §45, the court is required to take only a *prima facie* view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the court at the post-award stage....

[A]s I have pointed out, adopting a final and determinative approach under §45 may not only prolong proceedings at the initial stage but also correspondingly increases costs and uncertainty for all the parties concerned. Finally, having regard to the structure of the Act, consequences arising from particular interpretations, judgments in other jurisdictions, as well as the opinion of learned authors on the subject, I am of the view that, the correct approach to be adopted under §45 at the pre-reference stage, is one of a *prima facie* finding by the trial court as to the validity or otherwise of the arbitration agreement....

BUCKEYE CHECK CASHING, INC. v. CARDEGNA
546 U.S. 440 (2006)

[excerpted above at pp. 201-05]

FIRST OPTIONS OF CHICAGO, INC. v. KAPLAN
514 U.S. 938 (1995)

JUSTICE BREYER. In this case we consider a question about how courts should review certain matters under the [FAA, including] how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute....

The case concerns several related disputes between, on one side, First Options of Chicago, Inc., ..., on the other side, three parties: Manuel Kaplan; his wife Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center around a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred.... In 1989, after entering into the agreement, MKI lost an additional $1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration....

MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favor of First Options. The Kaplans then asked the Federal District Court to vacate the arbitration award, and First Options requested its confirmation. The court confirmed the award.... [O]n appeal the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. The Court of Appeals said that courts "should *independently* decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." 19 F.3d at 1509 (emphasis added). First Options asked us to decide whether this is so (*i.e.*, whether courts, in "reviewing the arbitrators' decision on arbitrability," should "apply a *de novo* standard of review or the more deferential standard applied to arbitrators' decisions on the merits") when the objecting party submitted the issue to the arbitrators for decision.

The ... question—the standard of review applied to an arbitrator's decision about arbitrability—is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter.* Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. *See, e.g.*, 9 U.S.C. §10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

We believe the answer to the "who" question (*i.e.*, the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, *see, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard in reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583, n.7 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. *See, e.g.*, 9 U.S.C. §10. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should decide

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tract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

JUDGMENT OF 20 DECEMBER 1993, MUNICIPALITÉ DE KHOMS EL MERGEB v. SOCIÉTÉ DALICO

1994 Rev. arb. 116 (French Cour de cassation)

[excerpted above at pp. 182-83]

LEDEE v. CERAMICHE RAGNO

684 F.2d 184 (1st Cir. 1982)

[excerpted above at pp. 181-82]

RHONE MEDITERRANEE COMPAGNIA FRANCESE DI ASSICURAZIONI E RIASSICURAZONI v. ACHILLE LAURO

712 F.2d 50 (3d Cir. 1983)

GIBBONS, Circuit Judge. Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni ("Rhone"), a casualty insurer, appeals from an order of the District Court of the Virgin Islands staying Rhone's action pending arbitration. The action results from a fire loss which occurred when the vessel Angelina Lauro burned at the dock of the East Indian Co. Ltd in Charlotte Amalie, St. Thomas. At the time of the fire the vessel was under time charter to Costa Armatori SpA ("Costa"), an Italian Corporation. Rhone insured Costa, and reimbursed it for property and fuel losses totalling over one million dollars. Rhone, as subrogee of Costa, sued the owner of the vessel, Achille Lauro, ("Lauro"), and its master, Antonio Scotto di Carlo, alleging breach of the Lauro-Costa time charter, unseaworthiness, and negligence of the crew. The district court granted defendants' motion for a stay of the action pending arbitration, and Rhone appeals....

As subrogee, Rhone stands in place of its insured, the time charterer Costa. In the time charter contract there is a clause:

> "23. Arbitration. Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed according to box 24) one arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.
> Box 24. Place of arbitration (only to be filled in if place other than London agreed (cl. 23) NAPOLI."

All the parties to the time charter agreement and the lawsuit are Italian. Italy and the United States are parties to the [New York] Convention. The [FAA] implements the United States' accession ... to the Convention by providing that it "shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. §201. [Rhone does not dispute that the Convention is applicable.]

What Rhone does contend is that under the terms of the Convention the arbitration clause in issue is unenforceable. Rhone's argument proceeds from a somewhat ambiguous provision in Article II(3) of the Convention [which the court quoted in full.] ... Rhone contends that when the arbitration clause refers to a place of arbitration, here Naples, Italy, the law of that place is determinative. It then relies on the affidavit of an expert on Italian law which states that in Italy an arbitration clause calling for an even number of arbitrators is null and void, even if, as in this case there is a provision for their designation of a tie breaker.

The ambiguity in Article II(3) of the Convention with respect to governing law contrasts with Article V, dealing with enforcement of awards. Article V(1)(a) permits refusal of recognition and enforcement of an award if the "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." ... Thus Article V unambiguously refers the forum in which enforcement of an award is sought to the law chosen by the parties, or the law of the place of the award.

Rhone and the defendants suggest different conclusions that should be drawn from the differences between Article II and Article V. Rhone suggests that the choice of law rule of Article V should be read into Article II. The defendants urge that in the absence of a specific reference Article II should be read so as to permit the forum, when asked to refer a dispute to arbitration, to apply its own law respecting validity of the arbitration clause....

None of the limited secondary literature sheds so clear a light as to suggest a certain answer. However, we conclude that the meaning of Article II(3) which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, *see Ledee v. Ceramiche Ragno*; *I.T.A.D. Associates, Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981), or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate....

[S]ignatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum, and hence the agreement is not void.

Rhone urges that this rule may result in a Neapolitan arbitration award which, because of Italy's odd number of arbitrators rule, the Italian courts would not enforce. The defendants insist that even in Italy this procedural rule on arbitration is waivable and a resulting award will be enforced. Even if that is not the law of Italy, however, Rhone's objection does not compel the conclusion that we should read Article II(3) as it suggests. The parties did agree to a non-judicial dispute resolution mechanism, and the basic purpose of the Convention is to discourage signatory states from disregarding such agreements. Rhone is not faced with an Italian public policy disfavoring arbitration, but only with an Italian procedural rule of arbitration which may have been overlooked by the drafters of the time charter agreement. Certainly the parties are free to structure the arbitration so as to comply with the Italian procedural rule by having the designated arbitrators select a third

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testimony of Robert Moore, who drafted most of the Memorandum, and on what the court termed the "unambiguous" language of the document itself. However, as Nicaragua correctly points out, Moore's testimony directly conflicts with contemporary documents in the record, which should have precluded any summary judgment. As a matter of law, the key language in Paragraph IV seems highly ambiguous, since it refers to "the arrangements contemplated hereunder," and thus requires extensive inquiry into just what arrangements are being referred to….

[We repeat] *Prima Paint*'s clear directive that courts disregard surrounding contract language and "consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. The correct analysis is set forth in *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983):

> "White argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. The conclusion does not follow its premise. The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other." *Ibid.*

There, the Seventh Circuit ordered arbitration despite the facts that the district court had found the contract "vague and ambiguous," and construed it against its drafter. *See also Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990). Thus, in the absence of any evidence that Paragraph IV of the Memorandum was intended as non-severable, we must strictly enforce any agreement to arbitrate, regardless of where it is found. Under *Prima Paint* and *Teledyne*, we hold that the district court erred in considering the contract as a whole to determine the threshold question of whether Nicaragua may enforce the arbitration agreement contained in Paragraph IV….

The next question is whether Paragraph IV in fact constitutes an agreement to arbitrate, and whether it encompasses the dispute at hand. The district court stated that the parties had not made any present agreement to submit all disputes under the Memorandum to arbitration, but merely agreed to include such clauses in future contracts…. It is unclear whether [this] statement[] [was] based on the language of the Memorandum itself, or on the evidence of the parties' intent developed during the evidentiary hearing. In any case, since "the issue of arbitrability 'is to be determined by the contract entered into by the parties,' the task before this court remains one of contractual interpretation." However, because of the presumption of arbitrability established by the Supreme Court, courts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator. Here, the district court disregarded "the emphatic federal policy in favor of arbitral dispute resolution [which] applies with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631….

The district court also found that the clause's "lack of specificity" mitigated against its enforcement. However, the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes. *See, e.g.*, *Bauhinia Corp. v. China Nat'l Mach. and Equip. Co.*, 819 F.2d 247 (9th

valid contract between the parties. Although this appears logical, it goes beyond the requirements of the statute and violates the clear directive of *Prima Paint*, 388 U.S. at 404….

Cir. 1987) (arbitration ordered where contract contained two incomplete and contradictory arbitration clauses); *Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir. 1983) (broadly construing scope of Korean arbitration clause under the Act). Under this analysis, Paragraph IV here was not too vague to be given effect, especially when considered in light of Robert Moore's letter explaining the ambiguity…. Nicaragua's motion to compel arbitration is granted, and the case remanded to determine the appropriate arbitral agency.

JUDGMENT OF 30 MARCH 1993, NOKIA-MAILLEFER SA v. MAZZER

XXI Y.B. Comm. Arb. 681 (1996) (Vaud Tribunal Cantonal)

[On March 30, 1988, Nokia-Maillefer SA ("Nokia"), a Swiss company, sent one Mr. Mazzer, an Italian businessman, a confirmation of an order which he had placed. The confirmation referred to Nokia's enclosed general conditions of sale, which contained a forum-selection clause choosing Swiss courts. On March 31, 1988, Leasindustria, an Italian financing company, replied to Nokia by sending a purchase order to which its general conditions of purchase were annexed. Article 10 of the general conditions included a forum selection clause providing for "jurisdiction of Milan courts." Two months later, Nokia returned the purchase order, replacing the word "Milan" in Article 10 with "International Chamber of Commerce, Paris." By a telex to Leasindustria, Mr. Mazzer accepted the modification. When a dispute arose, the Italian buyer commenced court proceedings before a Swiss court in the Canton of Vaud, where Nokia was headquartered. Nokia requested the Court to refer the dispute to arbitration.]

The dispute is whether Article 10 of the purchase order, as modified, is a valid arbitration clause. The autonomy of the arbitration clause as to the contract in which it is contained or to which it refers is unanimously recognized. Hence, to the exception of cases where a ground for nullity of the contract also affects the clause, the validity of the arbitration clause must be examined separately.

An arbitration clause can only be validly concluded where there is a common intention of the parties to refer a possible dispute to arbitration. The existence of such an agreement must be ascertained according to the general principles of the Code of Obligations, in particular Art. 2 CO.[13] Considering the important consequences of an arbitration agreement, the court shall beware of finding too easily that such an agreement has been concluded.

In the present case, the … question of the authority having jurisdiction to decide on a possible dispute has been dealt with in different stages in two different documents, one of which has been modified by one party. In the annex to the confirmation of order … which it sent on 30 March 1988 to [Mr.] Mazzer, Nokia enclosed the general conditions of sale which, at no. 17.1, provided that the forum be at the seat of the supplier. Subsequently, the general conditions of purchase annexed to the purchase order sent on 31 March 1988 by

13. Article 2 of the Swiss Code of Obligations reads: "When the parties have agreed with regard to all essential points, it is presumed that a reservation of ancillary points is not meant to affect the binding nature of the contract. Where agreement with regard to such ancillary points so reserved is not reached, the judge shall determine them in accordance with the nature of the transaction. The foregoing shall not affect the provisions regarding the form of contracts (Arts. 9-16)."

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mentioned above …, it is this law that must guide the decision of the tribunal. There is no doubt that the international community has developed a law in relation to this question. In many international disputes, arbitral tribunals, while applying international principles, have lifted the corporate veil. It is important to remember the remarkable precedent and to emphasize the authority of the decision taken by a group of distinguished arbitrators (Professors Sanders, Goldman and Vasseur) in the case of *Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131* (1982). In this case, the tribunal, in lifting the corporate veil, according to international principles, stated that:

> "The decisions of these tribunals … have progressively formed an established jurisprudence which should be taken into account since the jurisprudence has taken to heart the consequences of the economic reality and is in conformity with the needs of international commerce, which must respond to specific rules, themselves progressively elaborated, by international arbitration."

Significantly, in the case determined by that tribunal, the principal circumstances on which the tribunal was founded were that the subsidiary of which the corporate veil were to be lifted was part of a company group that constituted "one and the same economic reality" and that the parent company exercised such total control over the subsidiary that it executed and terminated contracts of its subsidiary. By way of comparison, in the present case, as we see above …, there are numerous significant circumstances which provide even more reasons to lift the corporate veil. For other international precedents of application of international principles to this question. *See also Westland Helicopters Limited vs. AOI, etc., ICC Case No. 3879/AS*, in which the tribunal, confronted with an international entity deprived of financial resources, declared liable the states which created that entity and considered that: "Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment." …

JUDGMENT OF 30 MAY 1994

XX Y.B. Comm. Arb. 745 (1995) (Tokyo High Ct.)

[excerpted above at pp. 288-90]

PETERSON FARMS INC. v. C&M FARMING LTD

[2004] 1 Lloyd's Rep. 603 (Comm) (English High Ct.)

MR. JUSTICE LANGLEY. The claimant ("Peterson") seeks a declaration that certain findings in an ICC Arbitration Award were made without jurisdiction. The application is made under §67 of the Arbitration Act 1996 [excerpted in Documentary Supplement at p. 131].

The arbitration involved a claim for damages by the respondent ("C&M") as claimant against Peterson as respondent arising out of the sale by Peterson of live poultry. C&M is an Indian company. It changed its name from "Nasik" in the course of the material events. Peterson is a company organized under the laws of the State of Arkansas, U.S.A. The sales of poultry were made under a written contract entitled "Sales Right Agreement" made on September 7, 1996 ("the Agreement"). Clause 17 of the Agreement provided that: "All disputes … which may arise between the parties out of or in relation to or in connection with this agreement or for the breach thereof, shall be finally settled by International

Chamber of Commerce, U.K." Clause 19 of the Agreement provided: "This agreement shall be interpreted and construed in accordance with the laws of Arkansas, U.S.A."

The poultry was infected with an avian virus. C&M claimed some U.S. $16 million in damages. C&M initiated the arbitration by a Request dated April 27, 2000. The appointed tribunal was Joel Hirschhorn, Judge Abraham Gafni and Julian D.M. Lew as Chairman…. The Final Award … was dated March 10, 2003. The tribunal awarded C&M damages in the sum of U.S. $6,747,217.

Under the Agreement Peterson sold to C&M male "grandparent" birds. C&M mated the birds to produce "parent" males which it would sell on as hatching eggs or day-old chicks. Those sales were made both to other "C&M group entities" (60 per cent) and (40 per cent) to other purchasers. The other C&M group entities used the parent males to breed with parent females to produce broiler chicks which they would sell on as chicks or hatching eggs. The award of damages was made up of two parts: i. Losses suffered by C&M itself, consisting of lost sales because of the reduced numbers of parent male chicks and hatching eggs it was able to produce and lost market share and loss of future profits. The total of this award ("the grandparent loss") was U.S. $1,222,448. There is no challenge to this part of the award. ii. Losses suffered by the other C&M group entities consisting also of lost sales, lost market share and loss of future profits ("the parent losses") in the total sum of U.S. $5,524,768. It is this part of the award which is the subject of Peterson's challenge. Essentially it is Peterson's submission that the tribunal had no jurisdiction to entertain claims by entities which were not named as parties to the Agreement.

The jurisdiction issue was before the tribunal itself. Entirely sensibly, it was agreed that the issue should be dealt with in the course of the hearing and in the award…. The tribunal had jurisdiction to rule on its own substantial jurisdiction as there was no contrary agreement: §30. It … dealt with jurisdiction in its award on the merits: pars. 78 to 102 and Section Fa of the Final Award. It ruled that it did have jurisdiction to consider and determine the damages claims of the other entities not named as parties to the Agreement….

The tribunal decided that it had jurisdiction on two bases: i. First, and primarily, by application of what has come to be known as "the group of companies doctrine." The "doctrine" finds its origin in the [*Interim ICC Award in Case No. 4131*] in which the claimants were a number of companies in the Dow Chemical "group;" and ii. Second, on the basis that C&M entered into the Agreement as agent for the other entities in the group who were thus parties to the Agreement and the arbitration clause contained in it….

The tribunal recorded Peterson's submissions that C&M had not mentioned a principal and agent relationship and that reliance on the group of companies doctrine was misplaced because identification of the parties to the Agreement was a matter of substantive law governed by Arkansas law. The Award continues:

> "86. The tribunal does not accept Peterson's arguments. Under the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears. The autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration. A corollary to the separability doctrine is that the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract underlying the dispute and to the arbitral proceedings themselves. The right of C&M to make claims for the C&M Group is a question of interpretation of the arbitration agreement contained in the Agreement, including the intention of the parties. In the absence of any choice of law made by the parties with regard to the arbitration agreement itself, this tribunal will determine this question in accordance with the common intent of the

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competent to appoint or remove arbitrators and that, instead, the courts of State B would exercise such authority. If State A's arbitration legislation denied effect to such an agreement—as with §4(1) of the English Arbitration Act—would that be consistent with Articles II(1) and V(1)(d) of the Convention?

6. *Selection of foreign procedural law*. The decisions in *Garuda* and *Karaha Bodas* refer to the possibility of the parties choosing a foreign procedural law to govern their arbitration. That is, although the arbitral seat is in State A, the parties agree that the procedural law of the arbitration (variously also called the curial law or the *lex arbitri*) shall be that of State B. As the *Karaha Bodas* decision makes clear, it is unusual for parties to agree to arbitrate in one place, subject to the procedural law of another state. The choice of a foreign procedural law is discussed below, *see infra* pp. 625-40.
7. *Ascertaining location of arbitral seat—place the parties have agreed*. Where is the arbitral seat located? This is often a straight-forward question: the arbitral seat is the place that the parties have agreed upon as the arbitral seat or place of arbitration. Consider Article 20(1) of the Model Law, which provides that the "place of arbitration" is located where the parties have agreed. Compare Article 176(1) of the SLPIL, excerpted at p. 157 of the Documentary Supplement. Consider how the *Garuda* court analyzes the question where the arbitral seat is located. The selection of the arbitral seat by the parties is discussed in greater detail below, *see infra* pp 640-58. Where was the arbitral seat in *Garuda*? In *Karaha Bodas*? How difficult is this question in each case?
8. *Ascertaining location of arbitral seat—the place chosen pursuant to procedures the parties have agreed*. Arbitration agreements sometimes do not specify the seat (or place) of the arbitration, and instead incorporate institutional rules which provide a mechanism for selecting the arbitral seat—usually that the arbitral institution or the arbitral tribunal shall select the seat. This mode of selecting the seat is discussed in greater detail below, *see infra* pp. 653-55.
9. *Ascertaining location of arbitral seat—absent agreement, place the arbitrators have chosen*. Arbitration agreements sometimes do not specify either the seat (or place) of the arbitration or any means for selecting the seat (for example, pursuant to the provisions of institutional rules). In these circumstances, how is the arbitral seat selected? Consider Article 20(1) of the UNCITRAL Model Law and Article 176(3) of SLPIL, providing that the arbitral tribunal shall, in the absence of agreement by the parties, select the arbitral seat. Is there any other means for selecting the arbitral seat in these circumstances?
10. *Issues affected by choice of arbitral seat and procedural law of arbitration*. What issues are affected by designation of the arbitral seat? Consider the following:
    (a) *Where award is "made" under New York Convention*. The arbitral seat is usually (but not always) the place where the arbitral award will be "made" for purposes of the New York Convention. *See infra* pp. 1086-87. This has significant legal consequences for the enforceability of arbitral awards outside the country where they are rendered. If a state is party to the Convention, awards made within its territory will generally be subject to the Convention's pro-enforcement rules in other Contracting States; conversely, if a state is *not* party to the Convention, its awards often will not enjoy the benefits of the Convention, and may instead be subject to parochial or archaic domestic legislation when sought to be enforced abroad. *See infra* pp. 1093-99.
    (b) *Supervisory jurisdiction*. As *Karaha Bodas* illustrates, the courts of the arbitral seat will almost always possess supervisory (or primary) jurisdiction over the arbitral process. This includes the "external" issues detailed above, *supra* pp. 620-21, such as selection and removal of arbitrators, assistance in evidence-taking, and annulment of arbitral awards.
    (c) *Forum and standards for annulment of awards*. The national courts in the arbitral seat are usually competent (and exclusively competent) to entertain actions to annul or set aside the arbitral award. Note the analysis to this effect in *Garuda* and *Karaha Bodas*, and *infra* pp. 1099-12. The scope and extent of judicial review of an award is primarily a matter of national law that varies from country to country. Under many national arbitration regimes, an arbitral award is subject to little or no review of the merits of the tribunal's decision and little review of the arbitral procedures. *See infra* pp. 1156-63. In contrast, other states permit relatively extensive review of the merits of arbitral awards and of the procedures used in the arbitration, either explicitly or in the form of extensive public policy inquiries. *See infra* pp. 1163-68.
    (d) *Effects on selection of arbitrators*. The selection of an arbitral seat will often have a material influence on the selection of the arbitrators. Some states impose idiosyncratic nationality or religion requirements on the identities of arbitrators, *infra* pp. 696, 712-14, 732-40, the number of arbitrators, *infra* pp. 687-88, or procedures for selecting and removing arbitrators, *infra* pp. 715-16, 758-76. Even absent such laws, choosing the arbitral seat often has an important indirect effect on the identity, nationality and legal training of the arbitrators, who are more likely to be drawn from the arbitral seat than otherwise. *See infra* pp. 698-99. In turn, this will often influence the parties' selections of co-arbitrators or their agreement on a sole or presiding arbitrator. Consider why this might occur.
    (e) *Effects on choice of procedural and substantive laws*. The local law of the arbitral seat may have a material influence on the substantive or procedural issues that arise in the arbitration. For example, local law may purport to mandatorily impose particular choice-of-law, *infra* pp. 969-73, or particular rules regarding the arbitral procedures, *infra* pp. 793-95. Further, although local procedural rules (applicable in national court litigation) should not be understood to apply to international arbitral proceedings with a local seat, *infra* pp. 634, 639, local law can nonetheless have an important indirect impact on the arbitral procedures. As a practical matter, it is sometimes the case that local procedural rules and practices will influence the arbitrators' procedural decisions (*e.g.*, an international arbitration seated in England, with English substantive law applying, will more likely entail common law document disclosure and cross-examination than an arbitration seated in Switzerland with Swiss substantive law applying), *infra* pp. 818-19.
    (f) *Convenience and cost*. The selection of the arbitral seat is also relevant to issues of logistics, cost and convenience. If the hearings are conducted in an expensive place (*e.g.*, where hotels, meetings rooms, or support services are costly), this might preclude some individuals or other parties from pursuing their claims or

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accept a Tribunal appointed in accordance with the relevant statute to which the term refers.

As we will see there may be room for argument as to which that statute was, and what it requires. I will come to that. But what seems to me to flow from that first point is important. If … Sumukan would seek to attack the award on the basis that a procedure in accordance with the statute could not produce an impartial tribunal, and that on that basis there was a serious irregularity (relying on §68(2)(a) taken together with §33 of the Act), that attack is doomed to failure. Having agreed to it, they must be taken to have waived any objection….

The most difficult part of the case arises out of the fact that it is accepted that there was a degree of non-compliance with the relevant statute in the appointment both as a member and then as President of the CMS arbitral panel, Professor Chappel. It was he that presided over the Tribunal of three which sat and made the award. The key issues on the appeal are (1) whether any non-compliance with the relevant statute was such as to affect the substantive jurisdiction of the panel that sat and made its award; and (2) if so, whether CMS can succeed in their arguments that any failures to comply with the statute was cured in some way, or that the failures could with reasonable diligence have been discovered by Sumukan, so as preclude reliance on them by virtue of §73….

[The court provided a chronology of Professor Chappell's appointment both as a member of the Panel and as President thereof. In sum, Professor Chappell was inadvertently appointed to these positions without consultations among the members of the Commonwealth governments as required by Article 4(5) of the 1999 statute. Sumukan commenced its arbitration against CMS in 2003. In July 2004, Professor Chappell determined that the constitution of the tribunal to hear Sumukan's claim should be himself, Ms. Weekes, and Dame Joan Sawyer, and Sumukan was notified accordingly. A hearing was held in February 2005, following which the tribunal made an award in favor of CMS, rejecting Sumukan's claims.]

Any arbitration tribunal was to be presided over by the President of the Panel, and indeed the persons to sit on the Tribunal were selected by that President. If therefore there was a defect in the appointment of the President so as to make his appointment to the Panel invalid, that would as it seems to me have an effect on the substantive jurisdiction of the arbitrators. Furthermore if the arbitrators were to be selected from a Panel, and if there was a procedure for the appointment of the Panel aimed at guarding against any apparent lack of independence, it seems to me right that a substantial failure to comply with that procedure should have an effect on the jurisdiction of the tribunal itself.

It is accepted by CMS that prior to Professor Chappell being appointed as a member of the Panel there was no consultation with member states under Article IV(4) of the 1999 statute; it is accepted that prior to his appointment as President in 2001 there was no consultation with member states under Article IV(4)…. It follows there has been non-compliance with the appointment procedure. [The CMS statutes] were incorporated into the contract between Sumukan and the CMS, and Sumukan are prima facie entitled to have the agreed procedure for appointment of any arbitrator complied with. Thus once non-compliance is established it is for CMS to show that a failure to comply with the relevant statute was either inconsequential in some way or cured by the fact that the States clearly knew he was acting as a member and as a President and made no protest; or to show that the procedural failure was of a kind which did not lead to an invalid appointment. This latter

they seek to do in reliance on the nature of the provision as surplusage or because they submit that a de facto principle applies in arbitration so as to cloak the tribunal that sat with jurisdiction….

We were referred to a number of cases [which] demonstrat[e] that the court will wrestle to avoid setting aside an otherwise perfectly good decision by virtue of non-compliance with a provision which really does not matter. In the instant case it seems to me that the correct question is whether, as a matter of contract, compliance with the obligation to consult member states was a provision simply for the benefit of the Commonwealth Governments so that they could check whether a fair balance between different parts of the world was being kept, or whether the provision was also for the benefit of those who might become involved in arbitration with CMS in the sense that the requirement to consult might assist in promoting the independence of panelists from whom arbitrators were to be drawn. I accept … that the main point of the requirement to consult was probably to enable member states to see that the balance of representation on the panel between different parts of the world was maintained. However CMS have difficulty in arguing that the provision had nothing to do with promoting the independence of the arbitrators or the President. Their own skeleton argument paragraph 63 says that one aim was to promote "independence"….

In my view, Sumukan are entitled to say that even if they must be taken to have agreed to a tribunal appointed without any input from them, and with a major influence of the party with whom they were contracting, they were at least entitled to rely on compliance with any measure that might protect even to a small degree the independence of the panel or the President. I should add, although the statute contemplated appointees of very high calibre that fact does not preclude Sumukan being entitled to so insist. I would thus hold unless the lack of consultation was cured or was something which Sumukan are precluded by §73 from relying on, Sumukan should succeed in their appeal.

Was any lack of consultation cured? … In truth … curing the lack of consultation is not pressed with any vigour [by CMS] and rightly. Informing the member states of a fait accompli cannot equate with consultation intended to take place before an appointment has been made. I would not hold that any failure to consult had been cured.

Does the de facto concept apply? I do not think it does in the arbitration context. The question is whether the agreement under which the arbitrators have been appointed has been complied with. Where one party has failed to abide by the procedure required for appointing the President it lies ill in his mouth to seek to rely on any de facto arguments. I understand an argument that it is unsatisfactory to allow an arbitration to go ahead with the costs incurred, and indeed the more unsatisfactory for the person who loses only to take a point on jurisdiction once they have lost, but it is §73 which will assist in that regard if it applies and not an appeal to a de facto principle.

I turn therefore to §73 [dealing with waiver of objections]. [Is it possible] to find that Sumukan could not with reasonable diligence have discovered the lack of validity? This again is not straightforward. As one sees from the language of the 1996 Act, e.g. §31, the Act is concerned that substantive jurisdiction points should be taken before expense and time is incurred. It could be said to be an obvious point to check whether the appointment procedures have been complied with….

However the [lower court] found that it would be wrong to construe §73 so as to hold that Sumukan could with reasonable diligence have discovered facts which it neither knew

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(S.D.N.Y. 1997) ("less stringent standards for disqualification of arbitrators than for federal judges").

Recall that, unlike judges, arbitrators are not subject to appellate review, to governmental disclosure obligations, to democratic appointment or confirmation, or other related requirements. Recall also that arbitrators can (and do) decide important public law claims and that they often need not render reasoned awards. Does this suggest that arbitrators ought to be held to higher—or at least equivalent—ethical standards than judges?

What are the disadvantages of imposing rigorous ethical standards on arbitrators? Consider the following: "The unique role of arbitrators, whose special expertise arises from wide experience in their fields, sometimes leads to a gain of their professional knowledge and skill at the cost of the appearance of less than complete impartiality." *Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.2d 419, 423 (2d Cir. 1986). *See also Morelite Constr. Corp.*, 748 F.2d at 83 ("Familiarity with a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth. Moreover, specific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time."). Compare the similar observations in *Commonwealth Coatings* and *Judgment of 9 February 1998*. *See also AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 135 (English Ct. App.) ("The courts are responsible for the provision of public justice. If there are two standards I would expect a lower threshold [for bias or lack of independence] to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts").

Are there really so few lawyers, academics, and judges that obtaining qualified arbitrators requires lowering ethical standards? Why is there fairly robust competition for appointments among would-be arbitrators if there are insufficient potential arbitrators?

(c) *Authorities requiring higher standards of impartiality for arbitrators than judges.* Some authorities have concluded that arbitrators should be subject to higher standards of independence and impartiality than judges. Note that Justice Black's opinion in *Commonwealth Coatings* required that arbitrators be "even more scrupulous" than national court judges. Similarly, *see* Nariman, *Standards of Behaviour of Arbitrators*, 4 Arb. Int'l 311, 311-12 (1988): "standards of behaviour expected of arbitrators … are no less stringent than those demanded of judges; in fact, arbitrators are expected to behave a shade better since judges are institutionally insulated by the established court-system, their judgments being also subjected to the corrective scrutiny of an appeal" Is this conclusion persuasive? What justifies the general conclusion that "arbitrators are expected to behave" better than judges? Expected by whom? The parties to the arbitration agreement? In all cases?

(d) *Relevance of standards of impartiality of judges to international arbitrators.* Is it in fact useful to look to standards of independence and impartiality applicable to

domestic court judges in determining standards of impartiality and independence for international arbitrators? Note that, in international disputes, parties will almost always come from different legal systems, with differing standards of judicial independence and impartiality; note also that parties to arbitration agreements will often share common expectations regarding the independence and impartiality of "their" arbitrators (*e.g.*, when they agree to institutional rules specifying such standards). Given these characteristics of the arbitral process, how useful are domestic standards for judicial impartiality?

Consider again the analysis in *Judgment of 9 February 1998*. Would it be permissible for a national court to ignore fundamental legal (European Convention on Human Rights) protections in adopting standards for international arbitrators? Are those standards in fact applicable to international arbitration? If not, do they nonetheless provide guidance? What about the standards of impartiality and independence developed in inter-state arbitration; do they also provide guidance?

11. *Relevance of parties' agreement to standards of independence and impartiality of arbitrators.* Suppose that the parties expressly or impliedly agree that their arbitrator(s) will be bound by standards of impartiality and independence that are more (or, alternatively, that are less) rigorous than those applicable to national court judges. Should this agreement be respected? Why or why not?

Note the analysis in *Sphere Drake*. How important are the parties' expectations regarding the arbitrators' impartiality in Judge Easterbrook's analysis? Consider the following discussion, by Judge Posner in *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679-81 (7th Cir. 1983):

> If Leatherby had wanted its dispute with Merit resolved by an Article III judge … it would not have inserted an arbitration clause in the contract, or having done so move for arbitration against Merit's wishes. Leatherby wanted something different from judicial dispute resolution. It wanted dispute resolution by experts in the insurance industry, who were bound to have greater knowledge of the parties, based on previous professional experience, than an Article III judge, or a jury…. It is no surprise, therefore, that the standards for disqualification in the [AAA's] Commercial Arbitration Rules and the Code of Ethics for Arbitrators are not so stringent as those in the federal statutes on judges…. (In fact the arbitration rules and code do not contain any standards for disqualification as such, though such standards are implicit in the disclosure requirements of the AAA's Rules and the AAA-ABA Code.)
>
> The [AAA] is in competition not only with other private arbitration services but with the courts in providing—in the case of the private services, selling—an attractive form of dispute settlement. It may set its standards as high or as low as it thinks its customers want. The statute has a different purpose—to make arbitration effective by putting the coercive force of the federal courts behind arbitration decrees that effect interstate commerce or are otherwise of federal concern…. The statute does not provide a dispute settlement mechanism; it facilitates private dispute settlement. The standards for judicial intervention are therefore narrowly drawn to assure the basic integrity of the arbitration process without meddling in it. Section 10 is full of words like corruption and misbehavior and fraud. The standards it sets are minimum ones…. The fact that the AAA went beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention.

Is Judge Posner's analysis persuasive? Are there not two propositions at work in Judge Posner's analysis: (a) by agreeing to arbitrate, parties impliedly agree to lower

withdraw its claims in the ICC arbitration (and finally to terminate that arbitration) or (b) to stay the LCIA arbitration pending the outcome of the ICC arbitration…."

The letter also stated that if the Tribunal was not prepared to make [such an] order, then Elektrim would: "… be forced to make an application for an injunction … enjoining Vivendi and the Tribunal from proceeding with the LCIA arbitration pending the outcome of the ICC Arbitration." …

[T]he LCIA Tribunal rejected this application for a stay in a letter sent to the parties on 17 January 2007. This decision was confirmed in the Tribunal's Procedural Order Number 8, dated 22 January 2007…. The Tribunal noted that similar requests for a stay had been made by Elektrim in April and May 2006, which the Tribunal had refused. [After the LCIA arbitrators refused to stay the LCIA arbitration, Elektrim sought an injunction from the English courts against the LCIA arbitration. The court's opinion denying the request is excerpted below.]

I think that it is helpful to begin by asking: what Elektrim is trying to achieve by this action? Although the action is for a final injunction to restrain the LCIA arbitration pending the outcome of the ICC arbitration, its real aim is "case management" of the two arbitrations. Elektrim does not claim that the LCIA arbitration must stop for all time. Elektrim simply does not wish to fight in these two theatres of war at once. Presumably it judges the ICC arbitration to be the better battle ground at present and its chances of success there are greater….

I do not intend to explore generally the question of whether the court has any jurisdiction at all … to grant either interim or final injunctions to restrain arbitrations that are subject to the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in the cases of *Cetelem SA v. Roust Holdings Ltd* [2005] 2 Lloyd's Rep 494; and *Weissfisch v. Julius* [2006] 1 Lloyd's Rep 716….

There is no dispute, of course, that the court has jurisdiction … to grant an injunction to restrain a party from engaging in court proceedings in another jurisdiction, in breach of an English arbitration clause in a contract by which the parties are bound. [*See, e.g., Aggeliki Charis Compania Maritima SA v. Pagnan SpA ("The Angelic Grace")* [1995] 1 Lloyd's Rep 87 at 96 per Millett LJ….] But in this case [Elektrim] urges the court to [grant an injunction] for a very different purpose. It is to grant a final injunction to restrain the prosecution of an arbitration whose seat is in England, so is governed by Part 1 of the 1996 Act. The LCIA arbitration results from an admittedly valid arbitration clause which is itself a term in a contract (the TIA) which the arbitrators have held is valid and binding on Elektrim and Vivendi. As far as the English courts are concerned, Elektrim cannot challenge either the validity of the TIA, nor the validity of the current LCIA arbitration, nor the authority of the arbitrators. Elektrim does not try to do any of those things in the present proceedings.

It seems to me that there are two initial difficulties that Elektrim has to overcome before the court could consider granting an injunction to restrain an arbitration that is governed by the 1996 Act. First, it must demonstrate that the prosecution of the LCIA arbitration is an act which would entitle the court to invoke the jurisdiction to grant injunctions [under English statutory authority, being §37 of the Supreme Court Act 1981 ("SCA"). Section 37(1) of the SCA provides: "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases where it appears to the court to be just and convenient to do so…."] Secondly, it must show that the grant of an injunction

to restrain the LCIA proceedings is consistent with the statutory scheme of the 1996 Act. In my view, Elektrim faces great difficulties in respect of each of these issues….

Although the present case involves a claim for a final injunction to restrain an arbitration, I think it is useful at this stage to consider, by analogy, the basis on which the court grants an injunction (often interim) to restrain *proceedings* in a foreign court. An injunction can be granted on one of two bases. First, if the proceedings are an infringement of a legal or equitable right of a party; secondly, where those proceedings are vexatious, oppressive or unconscionable. The first analysis is usually applied to cases where the parties have contractually agreed to submit disputes to a particular court or to arbitration and one party has started proceedings in breach of that agreement. The second analysis applies where there is no such agreement but the court concludes that the ends of justice require an injunction to restrain foreign proceedings that are vexatious or oppressive. In each case the court has a discretion to grant or refuse the injunction sought, depending on the particular facts of the case.

[Elektrim] did not argue that there was any different juridical basis … to grant an injunction to restrain an arbitration. Indeed, [its] argument is that the continuation of the LCIA Arbitration is vexatious and oppressive to Elektrim. So, the first difficulty for Elektrim is this: what legal or equitable right of Elektrim has been infringed by Vivendi that entitles the court to consider restraining the LCIA Arbitration from continuing? Alternatively, on what basis is it vexatious or oppressive or unconscionable towards Elektrim for Vivendi to continue the LCIA Arbitration, so as to entitle the court to consider restraining the LCIA Arbitration from continuing? … [T]he court has to be satisfied (on a balance of probabilities) that Elektrim has demonstrated that one or other of these bases exists….

Elektrim [claims] a legal or equitable right to have a fully and unquestionably enforceable award, which right is reflected in the duty placed on the tribunal by Article 32 of the LCIA Rules. Elektrim has a right not to be oppressed or vexed by having to face the LCIA and the ICC arbitrations and Polish proceedings at once in the present circumstances. Whilst I can follow the first stage, I cannot accept the second stage of that submission as a satisfactory analysis.

Elektrim and Vivendi agreed to the arbitration clause in the TIA. The current LCIA Arbitration was set up by agreement between the parties once disputes had arisen concerning the TIA. The LCIA Arbitration has continued by the agreement of the parties until Elektrim issued the present proceedings. Neither the existence of the LCIA Arbitration nor its prosecution can be characterized as being in breach of any legal or equitable right of Elektrim. It is, in fact, the opposite. The resolution of disputes concerning the TIA through an LCIA Arbitration is what the parties agreed to do by their contract in the TIA.

I fail to see how the fact that Vivendi has started the ICC Arbitration after the start of the LCIA Arbitration can create a new legal or equitable right for Elektrim in respect of the LCIA Arbitration that might allow the court to invoke its jurisdiction under §37. So far as I can see, only two possible arguments might be raised. The first is that there is an implied term of the LCIA Arbitration agreement that if another arbitration is started between the same parties, but not relating to the same subject-matter as the existing arbitration, then the parties have a right to call a halt to the LCIA Arbitration. Such an implied term is neither reasonable nor necessary to the working of the LCIA arbitration agreement….

The second possible argument is Elektrim has a legal right to the conduct of the LCIA Arbitration by the arbitrators in a manner consistent with their duties as set out in

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where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties.

Whilst it is in the wider public interest to ensure that accurate information about the parties' dispute and its resolution is broadcast, this is not always easy to achieve. That is particularly true while an arbitration is ongoing, and an arbitral record has yet to be completed.… Importantly, these are not concerns that are inconsistent for all time with transparency—since they are limited in duration, and do not impact beyond the end of the proceedings themselves. Once the arbitration has finally concluded, most restrictions would not normally continue to apply. While the proceedings remain pending, however, there is an obvious tension between the interests in transparency and in procedural integrity.…

The UROT asserts that none of the rights or interests identified by BGT are actually the subject of any existing threat, such as to warrant the imposition of provisional measures at this stage. It is true that the risks to the integrity of these proceedings, and the danger of an aggravation or exacerbation of this dispute, have yet to manifest themselves in concrete terms. Neither party has demonstrated that it has yet been inhibited, in fact, from participating fully in these proceedings or that any of the existing arbitration procedures have been hindered or impaired by the publicity that has occurred to date. In truth, BGT's complaint amounts to a concern about the risk of future prejudice, or the potential risks to the arbitral process as it unfolds hereafter.

The Tribunal disagrees, however, with the suggestion that actual harm must be manifested before any measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect). Among other things, its mandate extends to ensuring that potential inhibitions and unfairness do not arise; equally, its mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties. Given the media campaign that has already been fought on both sides of this case (by many entities beyond the parties to this arbitration), and the general media interest that already exists, the Tribunal is satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some form of control.

Equally, however, given the public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public information, the Tribunal is also of the view that, as far as possible, any restrictions must be carefully and narrowly delimited.… Having carefully considered each category of documents and information involved in Claimant's request for provisional measures, the Tribunal concludes that an appropriate balance between the competing interests, at least for the time being, is as follows:

i. General Discussion about the Case[:] Subject to the restrictions on disclosure of specific documents set out below, neither party should be prevented from engaging in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to the Republic's duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult. Part of the UROT's opposition to the measures sought by BGT is based upon a concern that there ought not to be

any: *"curtailment of a sovereign State's right (and obligation) to inform the public about a matter of great public importance and comment"* The Tribunal agrees with this, and considers that the direction … above adequately caters for UROT's concern.

ii. Awards[:] In light of the parties' agreement … that the Centre may publish awards at such time and in such manner as it deems fit, there is no need for any direction in this regard.

iii. Decisions, Orders and Directions of the Tribunal (other than Awards)[:] Given the treatment of awards, and the treatment of such materials in investment arbitration generally, the presumption should be in favour of allowing the publication of the Tribunal's Decisions, Orders and Directions. Publication of the Tribunal's decisions also, as a general matter, will be less likely to aggravate or exacerbate a dispute, or to exert undue pressure on one party, than publication of parties' pleading or release of other documentary materials. However, the nature and subject matter of Decisions, Orders and Directions varies enormously, and for some it may still be inappropriate to allow wider distribution. It follows that this category ought to be considered by the Tribunal on a case-by-case basis as such determinations are made. In the exercise of this mandate, the Tribunal considers it important that no confidentiality restriction be imposed upon this Procedural Order No. 3, given the need to explain to parties with interests in transparency the precise basis upon which the Tribunal is proceeding.

iv. Minutes or Records of Hearings[:] The Tribunal considers itself responsible to ensure that the hearing is conducted in an efficient manner, to resolve the parties' dispute fairly and impartially. The publication of minutes or records of hearings has at least the potential to affect the procedural integrity and efficiency of the hearing itself. Indeed: (a) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of the minutes and other records of proceedings if both parties to a proceeding so consent, and; (b) Rule 32(2) of the new ICSID Arbitration Rules provides that the hearing may not be opened by the Tribunal to third parties of a party objects. Accordingly, it is appropriate that minutes or records of hearings should not be disclosed unless the parties so agree, or the Tribunal so directs.

v. Documents Disclosed in the Proceedings[:] No restriction is appropriate upon the publication by one party of its own documents, even if those documents have been produced in the arbitral proceedings pursuant to a disclosure exercise, or otherwise. (Of course, if there are separate contractual or other confidentiality restrictions on such publication, then the nature, applicability and enforceability of those restrictions would need to be raised and considered. No such restrictions have been suggested in this case.) However, in the interests of procedural integrity, the Tribunal does consider it appropriate to restrict publication or distribution of documents that have been produced in the arbitration by the opposing party. The interests of transparency are here outweighed, since the threat of wide publication may well undermine the document production process itself, as well as the overall arbitration procedure. The production of documents by a party, whether in response to a disclosure request or otherwise, is made for the purpose of resolving the parties' dispute and the presumption is that materials disclosed in this manner should be used only for such purpose.

vi. Pleadings/Written Memorials[:] Given that (a) the pleadings and written memorials are likely to detail documents that have been produced pursuant to a disclosure exercise, and (b) any uneven publication or distribution of pleadings or memorials is likely to give a

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in Korea. Taking these special elements of the Agreement into account this Tribunal is satisfied that the Agreement is for a larger part to be performed in Korea and that for that reason Korean private law should prevail as the law governing the Agreement….

[W]hatever national private law may govern the Agreement, the latter is likely to affect the domain of Korean (public) law, so that this Tribunal must determine whether Korean law as invoked by the Defendant is applicable to the Agreement, even if it does not govern it. However, the national public law as invoked by the Defendant in this case (antitrust law, price law, fair trade law) is by nature of public order. Usually, the very application of these public laws is based upon considerations of national public policy. It is for this reason that this Arbitral Tribunal is not free directly to apply the Korean public law as invoked by the Defendant when such considerations of public policy would be involved to an appreciable extent.

On the other hand, the tribunal is empowered to apply national public law insofar as the Tribunal is satisfied that in the circumstances of the case pursuant to published jurisprudence of the competent national courts and/or the published and stated policy of the competent national authorities the acts under consideration of the Arbitral Tribunal are deemed null and void and unenforceable as prohibited by any relevant national public law. As a consequence of this, the party which in arbitral proceedings appeals to any national public law must prove that this law, indeed, is applicable in the case, and to what extent…. Since the Defendant did not provide sufficient evidence as to the [elements of a Korean statutory claim,] the Tribunal is of the opinion that the Defendant did not sufficiently prove his case….

[W]ith respect to national public laws also the rules on competition (Article 85 *et seq.*) of the Treaty [of Rome] are of public order and part of the public policy of the Community. As far as the possible application of those rules on competition of the Treaty in this arbitral case is concerned, the Tribunal refers, *mutatis mutandis*, to its considerations here above…. Pursuant to Article 85(2) of the Treaty … all agreements between undertakings, decisions by associations of undertakings, and concerted practices in violation of Article 85 … are prohibited and shall be automatically void. If this Tribunal will find that the Agreement in whole or in part contravenes Article 85 …, the consequence thereof is likely to be that the relevant clauses, if not the Agreement *in toto*, are deemed void, and unenforceable. With reference to its considerations hereabove, the Tribunal must, therefore, on its own initiative investigate whether the Agreement comes under the prohibition of Article 85(1)….

According to pertinent decisions of the [European Court of Justice] pertaining of Article 85 … the prohibition, as contained in the first paragraph of this Article, is applicable only in so far as the relevant agreements, decisions by associations of undertakings, and concerted practices have as their object or effect the prevention, restriction, or distortion of competition within the common market of the Community and may affect trade between Member States, to an appreciable extent. Since the Agreement is a contract between an Italian and a Korean undertaking and was for larger part performed in Korea, this Tribunal is not satisfied that the Agreement may affect trade between Member States and that the Agreement, particularly its clause 2, has as its object or effect a prevention, restriction or distortion of competition within the common market of the Community, to any appreciable extent. Therefore, the Tribunal … does not accept the applicability of Article 85 of the Treaty to the Agreement….

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NOTES

1. *Arbitrators' selection of substantive law applicable to merits of parties' dispute.* All of the decisions excerpted above provide, absent agreement by the parties, for the arbitrators to select the substantive law applicable in an arbitration (subject to very limited judicial review in annulment or recognition proceedings). Consider also Article 28 of the UNCITRAL Model Law and Article 187 of the Swiss Law on Private International Law, as well as Article 35 of the UNCITRAL Rules and Article 21(1) of the ICC Rules, excerpted at pp. 92 & 159 and pp. 174 & 190 of the Documentary Supplement. What alternatives exist for this means of selecting the applicable law and how would they work? Are they desirable? Could national courts play a positive role in this process?

2. *Choice of substantive law in international arbitration under New York and European Conventions.* What do the New York Convention and Inter-American Convention provide with regard to the choice of the substantive law governing the parties' dispute? Recall that both Conventions address the law governing the arbitration agreement. *See supra* pp. 302, 308-14. Why is the law governing the substance of the parties' dispute treated differently?

   Compare the European Convention, excerpted at pp. 29-36 of the Documentary Supplement. What is the point of Article VII(2)? What does it prevent? Would Article VII(2) permit a Contracting State to require arbitrators to apply local substantive law in any locally-seated arbitration? To apply local conflict of laws rules? Compare the approach of the ICSID Convention. Would it be desirable for the New York and Inter-American Conventions to have a choice-of-law provision like that in the ICSID Convention? What would it provide?

3. *Arbitrators' choice of substantive law under UNCITRAL Model Law.* What does Article 28(2) of the Model Law, excerpted at p. 92 of the Documentary Supplement, permit arbitrators to do? Does it permit arbitrators to "directly" apply a substantive law, without first considering choice-of-laws rules? *See infra* pp. 971-72, 977.

4. *Arbitrators' choice of substantive law under SLPIL.* Consider Article 187(1) of the SLPIL, excerpted at p. 159 of the Documentary Supplement. How does Article 187(1) differ from Article 28(2) of the Model Law? Do arbitrators in a Swiss-seated arbitration, where the parties have not chosen the applicable law, have freedom to apply the conflict of laws rules they consider appropriate? Or must they apply the conflicts rule contained in Article 187(1)?

   Other states have adopted statutory provisions comparable to Article 187(1), including Germany, Japan and Egypt. *See* German ZPO, §1051(2) ("Where the parties to the dispute failed to determine which statutory provisions are to be applied, the arbitral tribunal is to apply the laws of that state to which the subject matter of the proceedings has the closest ties"); Japanese Arbitration Law, Art. 36; Egyptian Arbitration Law, Art. 39(2). What are the benefits of the approach adopted by the SLPIL? What are the disadvantages?

5. *Arbitrators' choice of substantive law under national arbitration legislation providing for "direct" choice of law.* Some arbitration legislation grants arbitrators power "directly" to apply whatever substantive rules of law they consider appropriate, without applying conflict of laws principles. Consider Article 1511 of the French Code of Civil Procedure. Other legislation, in Europe and elsewhere, is similar. *See* Hungarian Ar-

See also Talecris Biotherapeutics, Inc. v. Baxter Int'l Inc., 491 F.Supp. 2d 510 (D. Del. 2007) (court has power to supervise professional conduct of attorneys appearing before it, which includes power to disqualify attorney). In many jurisdictions, the local bar association or a judicial committee has primary responsibility for conducting disciplinary proceedings, which can indirectly force counsel not to proceed with a representation.

Consider the arbitral tribunal's decision in *ICC Case No. 8879*. What law did the claimant rely upon in order to attempt to disqualify the respondents' counsel? What did the arbitral tribunal hold in response to the claimant's request? Why is it that the claimant's request to disqualify the respondent's counsel supposedly did not fall within the scope of the agreement to arbitrate? Was this not a dispute between the claimant and respondent? Did it not relate to the parties' agreement (*e.g.*, what legal representatives could represent a party in disputes under the contract's arbitration clause)?

Is a tribunal not responsible for ensuring the fairness of the arbitral proceedings before it? Would it be fair for Respondent R, in *ICC Case No. 8879*, to be represented by Claimant's former counsel on the underlying contract?

Consider *Hrvatska*. Note that the tribunal disqualifies counsel for one party, ordering that he not appear in future proceedings. Is this approach—of permitting the arbitrators to decide applications to disqualify counsel—more persuasive than that in *ICC Case No. 8879*? What was the source of the tribunal's authority to disqualify Mr. Mildon in *Hrvatska*? Would any tribunal have this authority? Or only an investment arbitration tribunal in an ICSID arbitration? Would a tribunal in an inter-state arbitration have authority to disqualify counsel?

Was the decision to disqualify Mr. Mildon correct? Note that the tribunal acknowledges the "fundamental" importance of a party's right to choose counsel. *See supra* p. 1045. Note also the three factors that the tribunal relies upon at the end of its order; do these establish genuine questions of the tribunal's impartiality or are they expressions of frustration with the respondent's procedural actions? Consider the tribunal's analysis of the "conflict" arising from Mr. Mildon's membership in the same barrister's chambers as the presiding arbitrator. Is this persuasive? Is there a difference between disqualifying counsel based on their violation of local rules of professional responsibility (as in *ICC Case No. 8879*) and based on their effect on the tribunal's independence (as in *Hrvatska*)? Does this distinction make a difference?

What do the IBA Guidelines on Party Representation provide with respect to conflicts of interest? Why is that? Note Guidelines 4 and 5.

Consider the position taken in the IBA Guidelines on Conflicts of Interest with respect to disclosure of counsel's and arbitrators' membership in barristers' chambers. Compare General Standard 7(b) with the Explanation to General Standard 6(a).

7. *Privilege and communications with opposing counsel*. The privileged character of lawyer-client communications is an important feature of most legal systems. Many jurisdictions take very different approaches to the types of communications (and actors) entitled to privilege, the scope of privilege and the possibility of waivers of privilege. Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 371 (2002). In some jurisdictions, privileges will be relatively narrow (*e.g.*, communications with an in-house lawyer may not be privileged, or the types of communications that are privileged may be limited); in other cases, privileges may be broad (*e.g.*, communications between opposing counsel may be inadmissible and confidential as between counsel). *Ibid.* These issues can be particularly important in the context of discovery or disclosure during the arbitral proceedings, and are discussed above. *See supra* pp. 828-29.

Suppose an English company communicates, in London, with its English lawyers about English law advice. If the company is later involved in arbitral proceedings seated in Switzerland (or New York), against a German counter-party, what law should apply to the question of whether the communications were privileged? English, Swiss (or New York), something else? What if the underlying contract is governed by German law? What if the advice rendered by the English law firm concerned German, not English, law?

Should the decisions be based on the privilege rules of the relevant legal advisers' jurisdictions? If there are doubts about arbitrators' authority to disqualify counsel, are there doubts about arbitrators' authority to decide privilege issues? Is there any reason to treat the arbitrators' authority with regard to the two issues differently?

8. *Settlement communications*. In many jurisdictions, settlement communications between parties or their representatives are generally not admissible in legal proceedings, at least to prove liability or damages. *See* U.S. Federal Rules of Evidence, Rule 408; California Evidence Code §1152; New York Civil Practice Law & Rules §4547; *Barnetson v. Framlington Group Ltd* [2007] EWCA Civ. 502 (English Ct. App.); Vaver, *"Without Prejudice" Communications—Their Admissibility and Effect*, 9 U. B.C. L. Rev. 85, 97-101 (1974). Nonetheless, rules governing the definition and disclosure of settlement communications differ materially among jurisdictions.

There may be instances in which one jurisdiction's law or ethical rules forbids certain uses of a communication, while another jurisdiction's law or ethical rules requires counsel to attempt to introduce the communication (as part of his or her obligation to represent the client zealously). For example, in some jurisdictions (*e.g.*, Italy and France), labeling a communication as "confidential" is presumed to mean that the receiving attorney cannot disclose the document to the adjudicating tribunal and can require that confidentiality be maintained even against the receiving attorney's client. *See* Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341, 373 (2002); C. Rogers, *Ethics in International Arbitration* 111-32 (2014). At the same time, such correspondence could very readily contain information that a U.S. lawyer would be ethically obliged to convey to a tribunal (*e.g.*, if it contains concessions) or to a client (*e.g.*, if it touches on issues of settlement). *See ibid.*; ABA Model Rules of Professional Conduct, Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."), Rule 1.4 (requiring attorney to "keep a client reasonably informed about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation").

Suppose a U.S. (or English) lawyer represents a U.S. (or English) party in an arbitration seated in Italy and that the Italian lawyers (for the Italian counter-party) send a document entitled "confidential" to the U.S. (or English) lawyer, making significant concessions about the merits of the parties' dispute and offering a settlement. Are the U.S. (or English) lawyers permitted (or required) to disclose the letter to their client?

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the excerpted sections provide with regard to the legal consequences of an award? *See* Belgian Judicial Code, Art. 1713(9) ("The award shall have the same effect as a court decision in the relationship between the parties."); Netherlands Code of Civil Procedure, Art. 1059(1) ("Decisions relating to the legal relationship which is in dispute and are comprised in a final arbitration award, have the force of *res judicata* in other legal proceedings between the same parties from the day on which they are rendered.").

Why should awards have the same *res judicata* and other preclusive effects as a national court judgment? Are there not vital differences between the arbitral and litigation processes (*e.g.*, public court proceedings, institutional judiciary, appellate review)? Do these differences argue for less extensive preclusive effects for awards? Why or why not?

Conversely, consider the objectives that lead parties to agree to arbitrate their disputes—including the desire to obtain a single, centralized dispute resolution mechanism and to avoid multiplicitous litigation in multiple forums. *See supra* pp. 109, 111-12, 527-28. Do these objectives argue in favor of narrower—or broader—rules of preclusion in arbitration than in national court litigation?

From when exactly do arbitral awards have *res judicata* effect? From when the tribunal decides the dispute? From when the tribunal completes its award? Signs its award? Delivers the award to the parties? Deposits the award with a local court? *See supra* p. 1069. From when any challenge to annulment is rejected? *See infra* pp. 1125-34, 1134-73.

5. *Finality and preclusive effects of awards under Inter-American Convention.* Consider Article 4 of the Inter-American Convention, excerpted at p. 9 of the Documentary Supplement. How does Article 4 compare with Article III of the New York Convention? Which approach is preferable?

6. *Finality and preclusive effects of awards under Article III of New York Convention*. Do the provisions of the New York Convention expressly address the finality or other legal consequences of an award? Consider Article V(1)(e) of the Convention. Note that one of the grounds for non-recognition of an award is that it "has not yet become binding on the parties" (discussed below at pp. 1120-22). Note that, as with other exceptions to recognition under Article V, the burden of proving that an award has not yet become binding is on the party resisting recognition.

Consider Article III of the Convention. Does Article III require Contracting States to grant awards *res judicata* or other preclusive effects? How clear is Article III's text? Would Article III leave Contracting States free to afford arbitral awards no (or *de minimis*) preclusive effect—for example, by treating awards as having no *res judicata* effect and instead as allowing relitigation of disputes without regard to the results of prior arbitral proceedings? Would this not frustrate the purpose of the Convention? Note that Article V of the Convention enumerates a limited number of exceptions to the obligation, under Article III, to recognize awards. *See infra* pp. 1189-90, 1195-97. Would it not frustrate the purpose of Articles III and V if Contracting States were free to define their recognition of awards as essentially meaningless—permitting relitigation of disputes which had already been decided in the award?

Assuming that the Convention requires Contracting States to accord awards some measure of *res judicata* or other preclusive effect, what defines the character and scope of that effect? Does Article III prescribe any particular *res judicata* or preclusion

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standards? What does it mean for an award to be recognized as "binding" under Article III? To what sources might one look in defining the preclusion standards of Article III? Consider the following:

"If the New York Convention is understood as requiring Contracting States to afford some measure of preclusive effect to arbitral awards, the decisive issue is determining the content of this preclusion principle. Article III of the Convention should not be interpreted to prescribe particular rules of preclusion, but instead to provide a constitutional statement of principle—mandating recognition of the "binding" effects of arbitral awards—that must be elaborated over time by national courts and arbitral tribunals.

Most clearly, Article III would forbid the courts of a Contracting State from denying any preclusive effect to arbitral awards, permitting litigants to relitigate claims or issues that were rejected in arbitral proceedings and awards between the same parties. This result … would make a mockery of the Convention's requirement that Contracting States "recognize" the "binding" effect of arbitral awards, permitting states to say that awards have binding effect, but that the effects which are binding are non-existent. That is contrary to both the language and fundamental purposes of the Convention.

It is inherent in the nature of an agreement to arbitrate, and the concept of an arbitral award, that such an award will have binding, and thus preclusive, effects. Equally, it would be inherently contrary to the obligations to recognize an arbitration agreement and an arbitral award for a state to deny preclusive effects to a valid award and instead to entertain litigation of disputes that the parties had both agreed to arbitrate and arbitrated. That would contradict the obligation to recognize agreements to finally resolve disputes by arbitration, as well as the obligation to recognize awards setting forth such resolutions.

Beyond this, the Convention's objectives of ensuring the final, binding resolution of international disputes, and the effective recognition of arbitral awards, argue in favor of presumptively affording at least the same preclusive effects to arbitral awards as accorded national court judgments: where the parties have agreed to resolution of their disputes in a single, centralized forum, specifically to avoid the costs and delays of multiplicitous litigations in national courts, the Convention's requirement that Contracting States recognize such agreements, and the resulting awards, imply at least equally broad principles of preclusion as those applicable to national court judgments, which rest on a structural premise of multiple possible forums and proceedings. Indeed, a substantial argument can be made that presumptively broader preclusion rules are required, as between the parties, for international arbitral awards than for national court judgments.

The precise contours of the international preclusion rules, mandated by the New York Convention, which are applicable in particular cases is to be developed by national courts in light of general principles of international law and the parties' expectations in particular cases. Fundamental to this analysis, however, is the obligation presumptively to treat arbitral awards no less favorably, insofar as preclusive effects are concerned, than national court judgments and to give effect to the terms and objectives of the parties' agreement to arbitrate. As discussed below, most developed jurisdictions have applied rules of preclusion to international arbitral awards which are consistent with this analysis, generally treating such awards as identical for preclusion purposes to national court judgments.

More controversially, principles of preclusion mandated by the New York Convention should generally prevent parties from relitigating a dispute that has been resolved by an arbitral award—regardless whether particular claims arising out of that dispute were or were not asserted in earlier arbitral proceedings. So long as claims were within