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## THE MATURING OF ARBITRATION: CONTINUITY AND CHANGE\*

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Season of mists and mellow fruitfulness,  
close bosom-friend of the maturing sun,  
conspiring with him to load and bless,  
with fruit the vines that round the thatch-eves run.

John Keats, Ode to Autumn (1819)<sup>1</sup>

### A. Introduction: The Two Faces of Autumn

Tucked between summer and winter, autumn gives us days that grow shorter, flowers that fade, and leaves that fall from the trees. Often invoked as a symbol for decline and decay, the season possesses its share of melancholy tones.

Autumn carries positive connotations as well. A sense of robust maturity infuses a season of mellow fruitfulness when apples turn red, orchards fill with fruit, grain ripens, and pumpkins present themselves for picking. In many places, the season triggers a new academic year for students and teachers.

This dual metaphor carries into the field of arbitration, that chameleon-like process by which litigants renounce otherwise competent courts in favor of private and binding dispute resolution. According to some observers, arbitration has fallen into an autumn of decline and

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\* Adapted from *Arbitration in Autumn*, 2 J. Int'l Disp. Settlement 3 (2011).

<sup>1</sup> Composed as Keats walked along the River Itchen in southern England, the poem has been read as both a personification of autumn's bounty and a meditation on the poet's impending death.





decay, shedding leaves of efficiency and coherence to reveal barren branches of rules without reason. Recent literature laments that a golden age of cheap and cheerful arbitration has yielded to backlash against a system marked by too many rules, excessive costs and undue delay.<sup>2</sup> One group of critics has published a manifesto condemning arbitration for its negative effect on human development and environmental sustainability.<sup>3</sup>

On closer scrutiny, however, international arbitration reveals itself as having arrived at its autumn with fruitful maturity, not decay or decline. The harvest of a more refined arbitral process derives from productive exchanges among arbitrators, judges, scholars, legislators, counsel and professional associations, all of whom find their place among arbitration's stakeholders.<sup>4</sup>

The very volume of debate about arbitration during the past decade testifies to robust growth rather than to decline. Geneva's great criminal lawyer, the late Dominique Poncet, used to say, "On sert bien la justice en la critiquant."<sup>5</sup> In contrast, decay and death normally announce themselves by silence rather than debate.<sup>6</sup>

Testing this thesis, of course, calls for consideration of the context in which litigants choose arbitration. Not surprisingly, motives vary according to the type of dispute. For international transactions, arbitration justifies itself as a path to more level procedural playing fields,<sup>7</sup> which in turn boost predictability in finding facts and applying law.<sup>8</sup> In construction and

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<sup>2</sup> See e.g. Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* 189 (Kluwer, 2010).

<sup>3</sup> Public Statement on the International Investment Regime, 31 August 2010 (visited 30 May 2011), available at <[http://www.osgoode.yorku.ca/public\\_statement](http://www.osgoode.yorku.ca/public_statement)>, which expressed concern regarding the ability of governments to act for their people in response to the concerns of human development and environmental sustainability because the current investment treaty arbitration process "is not a fair, independent, and balanced method for the resolution of investment disputes." Michael McIlwrath commented on a recent survey sponsored by PricewaterhouseCoopers on corporate attitudes and practices on international arbitration. Michael McIlwrath, *Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices 2008*, 2(5) *World Arb. & Med. Rev.* 111 (2008). McIlwrath notes that 56% of the interviewees who tried to enforce their awards did not recover the full value. He suggests that more thought should be given to ways one might enhance corporate counsel preference for international arbitration.

<sup>4</sup> This positive comparison holds true not only in arbitration's traditional commercial stomping grounds, but also in newer frontiers such as finance, taxation, sports and foreign asset protection. For example the OECD has published a Model Tax Convention on Income and Capital, most recently updated in 2010. See generally, William W. Park and David R. Tillinghast, *Income Tax Treaty Arbitration* (Sdu Fiscal & Financial Publishers, 2004).

<sup>5</sup> "We advance justice by our critiques." An illustration of how honest debate fosters improvement can be found in the reaction of Korean Air Lines to a disaster in Guam in 1997. An investigation revealed that one of the contributing factors was a culture among pilots of speaking obliquely rather than directly. A junior officer might say to his senior, "Sir, it's raining," rather than "Put on the weather radar right now!" To its credit, the airline took corrective action, requiring English in the cockpit to reduce the sometimes ambiguous verbal formulae used in Korean as a matter of courtesy. See Malcolm Gladwell, *Outliers* (2008) 213–23.

<sup>6</sup> Such critical debate, of course, in no way diminishes the achievements of or the deference owed to the pioneering grand old men (as they all were back then) who built international arbitration on a line that ran from London to Geneva stopping in Paris, with occasional detours to places like Stockholm and Zürich. Indeed, their contributions play a vital part in the maturing of international dispute resolution.

<sup>7</sup> In an intractably heterogeneous world, lacking effective supra-national courts with general jurisdiction, arbitration promotes respect for shared *ex ante* expectations. The search for political and procedural neutrality finds special application in claims for discriminatory expropriation brought pursuant to investment treaties. In safeguarding property rights against unjust deprivation, arbitration also promotes public welfare and human rights, constituting a key element in the rule of law and facilitating creation of what Australian jurist Julius Stone called "enclaves of justice". Julius Stone, *Human Law and Human Justice* (Stanford U. Press, 1965). See also Jan Paulsson, *Enclaves of Justice*, *Transnat'l Disp. Mgmt.*, Sept. 2007.

<sup>8</sup> For present purposes, the notion of "law" encompasses an authoritative dispute resolution process including principles to guide general conduct as well as procedures for deciding cases, without the distinction often





insurance, the goal might be expertise. In the United States, arbitration often serves to remove consumer and employment disputes from the perceived vagaries of civil juries.<sup>9</sup> With this caveat, let us turn to the maturing of arbitration through norms chosen to guide proceedings.

## B. From Hard Law to Soft Law

For better or for worse, legal discourse sometimes distinguishes between “hard law” and “soft law” norms. In the realm of arbitration, the former looks at the process from the outside: the perspective of judges and legislators charged with providing a framework of statutes, treaties and cases setting the contours for judicial recognition of arbitration agreements and awards. By contrast “soft law” addresses arbitration as seen from the inside: the procedural and professional standards used in finding facts or ascertaining applicable law. The Federal Arbitration Act would exemplify the former, while the International Bar Association Rules on Taking Evidence might illustrate the latter.

During the past half century, the arbitration community shifted much of its attention from the statutes and treaties, which permit modern arbitration to exist, toward the soft law guidelines that aim to balance fairness and efficiency.<sup>10</sup> The hard law phase began in earnest in 1958 with the adoption of the New York Arbitration Convention,<sup>11</sup> which aimed to create mechanisms to promote arbitration’s international currency by making awards transportable from one country to another. That treaty was followed in short order by the ICSID Convention,<sup>12</sup> serving to remove non-commercial impediments to the free cross-border flow of private investment, and the Panama Convention,<sup>13</sup> intended to facilitate arbitration implicating Latin America.

Thereafter, national arbitration statutes were streamlined to enhance the finality of awards through less intrusive judicial review. Significant reforms have been adopted notably in England, France, Belgium, Switzerland, Germany, and the sixty or so countries that enacted some variant of the UNCITRAL Model Law.<sup>14</sup>

In comparison, during the past dozen years the arbitration community turned its gaze toward guidelines for the conduct of proceedings. The Chartered Institute of Arbitrators has issued protocols on subjects ranging from interviewing arbitrators to calculating interest.

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imposed by francophone jurists between “*loi*” (an enactment) and “*droit*” (legitimate norms of a more general character).

<sup>9</sup> In some instances, arbitration may serve to create new agreements in otherwise politically charged climates. See Jeff Jacoby, *Arbitration’s Intolerable Bind*, Boston Globe, 12 January 2011 discussing arbitration to fix salaries for municipal employees. Arbitration has also been used to resolve emotionally-charged wrongful death claims (*Blackwater Sec. Consult. LLC v. Nordan*, [2011] WL 237840, [2011] EDNC) and is a questionable process for settling sexual harassment claims (*Nelson v. Am. Apparel, Inc.*, [2008] WL 4713262, [2008] Cal. Ct. App.).

<sup>10</sup> Interestingly, development of personal computer technology presents a similar pattern. In the early years engineers focused on improved hardware: better screens and smaller hard drives. Today the emphasis has shifted more to software, including internet search engines and debate on the relative merits of various operating systems.

<sup>11</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, entered into force 7 June 1959.

<sup>12</sup> The ICSID Convention, opened for signature on 18 March 1965 and entered into force on 14 October 1966.

<sup>13</sup> Inter-American Convention on International Commercial Arbitration, 30 January 1975.

<sup>14</sup> See generally, William W. Park, *Arbitration of International Business Disputes* 205–317 (OUP, 2006).





The International Bar Association adopted standards on evidence and conflicts of interest. And the International Chamber of Commerce (ICC) published its *Techniques for Controlling Time and Cost in Arbitration*.<sup>15</sup>

In the United States, which has sometimes lagged behind the rest of the world in sensitivity to arbitration's complexities, the American Bar Association in 2004 overhauled its Code of Ethics for arbitrators. Two years later the College of Commercial Arbitrators issued a guide to "Best Practices,"<sup>16</sup> followed in 2008 by American Arbitration Association protocols on "information exchange" aimed at making document production more efficient.<sup>17</sup>

Whatever might be the merits or drawbacks of the particular protocols, they demonstrate a deep concern for doing things right. Increasingly these guidelines enjoy the status of para-regulatory texts pressed into service for filling gaps in national law.<sup>18</sup>

### C. The Three Musketeers of Arbitral Duty

#### Accuracy, fairness and efficiency

Articulating the contours of arbitral duty remains anything but an easy task, with or without the help of soft-law guidelines. The enormity of the mission brings to mind a comment by the French General Charles de Gaulle, when a protester tried to interrupt by shouting, "Away with all idiots!"<sup>19</sup> Without missing a beat, the general repeated the taunt and then, gaze fixed directly on the heckler, responded, "*Un vaste programme, en effet*," which would translate as "A formidable task, indeed." Likewise, attempts to circumscribe arbitral obligations have tossed the best of minds upon the storm waves of inquiry, as they seek to express through sequential grammar a reality that remains stubbornly simultaneous.

As a starting point for discussion, one might suggest three principal obligations of an arbitrator: accuracy, fairness and efficiency. These "Three Musketeers" of arbitral duty, however, often interact in anything but the "One-for-all" spirit of the original heroes in the Alexandre Dumas novel.<sup>20</sup>

The first duty of an arbitrator lies in rendering an accurate award, in the sense of fidelity to the text and the context of the relevant bargain, whether memorialized in a private

<sup>15</sup> ICC Publication No. 843 (2007). Adding to the fabric of soft law, the ICC has also published a selection of procedural orders addressing matters such as organization of proceedings, witnesses and experts, hearings and interim measures. See ICC Bulletin, 2010 Special Supplement, Decision on ICC Arbitration Procedure (2003–04) (ICC Pub. No. 728E, 2011).

<sup>16</sup> The College of Commercial Arbitrators published a second edition in October 2010. The Swiss Arbitration Association had published its own views on the matter in M. Wirth (ed.), *Best Practices in International Arbitration*, ASA Bulletin Special Series No. 26 (2006).

<sup>17</sup> During the same period of time, the CPR (International Institute for Conflict Prevention and Resolution) issued multiple protocols on arbitral procedure, including recent guidelines on determining damages, adopted in 2010.

<sup>18</sup> See *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F. 3d 132 (2nd Cir. 2007), affirming 2006 WL 1816383 (S.D.N.Y. 2006). The District Court, at notes 12 and 13, considered ethical standards adopted in 2004 jointly by the American Bar Association and American Arbitration Association, as well as guidelines of the International Bar Association adopted in 2004.

<sup>19</sup> The original French is variously quoted as "*A bas tous les imbéciles!*" or something even more discourteously vulgar.

<sup>20</sup> As recorded by Dumas, the musketeers lived by the motto "Tous pour un, un pour tous" (All for one and one for all). Alexandre Dumas, *Les Trois Mousquetaires* (1844) (Modern edition Elibron Classics edn., Adamant Media Corp. 2001).





contract or the terms of a public investment treaty. The arbitrator should aim to get as near as reasonably possible to understanding what actually happened between the litigants, and how the pertinent legal norms apply to the controverted events. The fact that arbitral awards are not generally reviewable for simple mistakes of law or fact in no way diminishes this obligation. Arbitration would provide poor justice if arbitrators aspired to nothing higher than to meet the minimum grounds for annulment.

The second duty relates to procedural fairness, a capacious notion that incorporates several elements, notably (i) the responsibility to hear before deciding;<sup>21</sup> (ii) the obligation to respect the contours of arbitral jurisdiction;<sup>22</sup> and (iii) the observation of the general duty of impartiality and independence.<sup>23</sup>

The third obligation lies in an aspiration toward efficiency, to promote the optimum administration of justice. To the extent possible, the good arbitrator will seek to measure accuracy and fairness so as to arrive at a counterpoise which reduces the prospect of undue cost and delay.<sup>24</sup>

A violation of the duties of accuracy and efficiency normally would not in itself trigger intervention by a reviewing authority, whether it be a national court or an *ad hoc* ICSID committee.<sup>25</sup> The possibility that an arbitrator might make a mistake, or be less than efficient, remains a risk assumed by both sides. By contrast, violation of arbitration's basic procedural fairness does and should give rise to sanctions.<sup>26</sup>

The penalty for breach of an arbitrator's duty of fairness carries a certain irony, in that sanctions do not fall directly on the arbitrator who breached his or her duty. Although they may suffer a loss of reputation, offending arbitrators can benefit from immunity even for

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<sup>21</sup> Often called "due process" or "natural" justice in the Anglo-American legal world, and "*principe du contradictoire*" or "*droit d'être entendu*" in francophone legal systems. Likewise, Germans sometimes refer to the "fair-trial principle" (*rechtsstaatliches Verfahren*) or speak of a "hearing in accordance with law" (*Anspruch auf rechtliches Gehör*). In public international law, particularly in investment disputes, due process inheres the notion of "denial of justice" claims.

<sup>22</sup> In the negative, the duty might be expressed as avoidance of decisions which constitute an excess of authority either under the contract or by reason of some public policy constraint imposed on subject matter arbitrability or procedure.

<sup>23</sup> Arbitrator bias, of course, presents tensions of its own. Critics of arbitration often talk as if bias remains a problem unique to arbitrators. Yet in the real world, judges also fall prey to unacceptable predispositions. See e.g. Notice & Order of George H. Painter, Administrative Law Judge, Commodity Futures Trading Commission, 17 September 2010, reporting on a colleague who during nearly twenty years of service on the bench had never ruled in favor of a claimant. See also, Michael Schroeder, *If You've got a Beef With a Futures Broker, This Judge Isn't for You*, Wall Street J. (Washington), 13 December 2000, A1.

<sup>24</sup> A 2010 study by the Corporate Counsel International Arbitration Group found that 100% of corporate counsel think that arbitration takes too long, and 69% think that it costs too much. Lucy Reed, *More on Corporate Criticism of International Arbitration*, Kluwer Arbitration Blog (16 July 2010) (visited 30 May 2011), <<http://kluwerarbitrationblog.com>> (blaming delays on the limited availability of top-tier arbitrators and their "excessive concern for due process"). Another study, co-sponsored by a major law firm and a London university, suggested that 50% of the participating respondents were dissatisfied with the performance of arbitrators in international arbitration. See *2010 International Arbitration Survey: Choices in International Arbitration*, White & Case LLP & School of International Arbitration (Queen Mary, University of London, 2010). The study follows an earlier survey sponsored by PricewaterhouseCooper in 2006.

<sup>25</sup> Although grounds for annulment find different articulations from one system to another, most aim at matters such as tribunal excess of powers, bias, or departure from a fundamental rule of fair procedure. See e.g. Federal Arbitration Act § 10; French *Code de procédure civile*, Art. 1520; ICSID Convention of 1965, Art. 52.

<sup>26</sup> Such scrutiny of procedural fairness also serves to promote accuracy by encouraging arbitrators to listen to both sides before deciding.





violations of basic procedural integrity.<sup>27</sup> The price of misconduct thus falls most directly on the prevailing party, in the form of award annulment for breach of procedural integrity.

#### **An enforceable award: the fourth musketeer**

Enthusiasts of *The Three Musketeers* will remember a fourth member of the group, young d'Artagnan, who hoped to become one of the King's guards along with his friends Athos, Porthos and Aramis. Likewise, an additional duty figures prominently in the catalogue of arbitral obligations.

To reduce the prospect that the arbitrator's decision will remain nothing more than a piece of paper, arbitrators are expected to exercise vigilance in promoting an enforceable award. To the extent possible, and consistent with their other duties, arbitrators should avoid giving cause for annulment or non-recognition of the award by reviewing authorities.<sup>28</sup>

In practice, an inherent rivalry often permeates the intersection of the arbitrators' various obligations. Too much efficiency may mean too little time to hear evidence. Overly intricate procedural safeguards can paralyze proceedings. In some cases, attempts to please a reviewing court can reduce the arbitrator's fidelity to the parties' expectations.

### **D. The Challenge of *Caribbean Niquel***

#### **The right to comment**

To illustrate the complex interaction among arbitral duties, it would be hard to find a better cautionary tale than the one supplied by a French court in *Caribbean Niquel v. Overseas Mining*.<sup>29</sup> Emphasizing procedural fairness over efficiency, the Paris *Cour d'appel* affirmed the parties' right to comment on new legal theories even at the addition of cost and delay.

After a Cuban mining joint venture had gone sour, arbitrators sitting in Paris awarded the claimant U.S. \$45 million on a theory of "lost chance" (*perte de chance de poursuivre le projet*). The parties, however, seem to have focused on a theory of lost profits (*gain manqué*), which the arbitrators might have found less than satisfying with respect to a mine not yet operative.<sup>30</sup>

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<sup>27</sup> In one case, where a sole arbitrator failed to disclose his romantic relationship with the sister of respondent's counsel, immunity was upheld even though the award had been vacated. See *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 112 Cal. Rptr. 3d 597 (Cal. Ct. App. 2010), in which claimants argued that the arbitrator should be liable for fraudulently inducing them to approve his appointment in a case which essentially denied the claim. The reviewing court found disclosure to be an integral part of the arbitral process, and thus protected by common law immunity for quasi-judicial acts.

<sup>28</sup> This duty of enforceability has been memorialized in institutional arbitration rules. Article 35 of the International Chamber of Commerce Arbitration Rules provides: "In all matters not expressly provided for in these Rules, the [ICC] Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law." The Rules of the London Court of International Arbitration provide in Article 32.2: "In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable."

<sup>29</sup> *La Société Commercial Caribbean Niquel c. La Société Overseas Mining Investments Ltd.*, Paris Court of Appeals, 1st Chamber, 08/23901, 25 March 2010.

<sup>30</sup> Indeed, the tribunal held that calculating the lost economic benefit was too uncertain, whereas calculating the value of the chance to take advantage of an economic opportunity could "undeniably" be evaluated. The tribunal therefore based the reasoning in its award on the legal theory that the party should be compensated for the economic value of the lost opportunity.





The court vacated the award for violation of provisions in the Code de procédure civile related to the right to be heard (*principe du contradictoire*) and public policy (*ordre public*).<sup>31</sup> Although not questioning the assumption that arbitrators know the law, often expressed as *jura novit curia*,<sup>32</sup> the Court found it unacceptable that an award should rest on a theory of damages which the Court assumed, rightly or wrongly, had not been addressed by counsel.<sup>33</sup>

### Conflicting duties

The decision provides a stark example of the difficulty in balancing various arbitral duties. Each alternative approach seems to spring its own trap.<sup>34</sup> In particular, measures aimed at reducing cost can diminish the litigants' opportunity to present their cases.

Imagine that the arbitrators in the midst of their deliberations had re-opened the proceedings to set a briefing schedule on the new legal theory of lost chance. Loud moaning would have been heard about added expense and delay.

In raising the new theory with the parties, to provide counsel an opportunity to comment, the tribunal might also have exposed itself to criticism about lack of even-handed impartiality. The respondent would likely have said, with some justification: "Hey! You arbitrators are acting as counselors for claimant, sending a not-so-subtle signal that its chances of success will be greater with an amended pleading that includes a new method of damages calculation."

Finally, it would have been equally problematic for the arbitrators to decide the case without any consideration of the "lost chance" measure of damages. Granting recovery simply for lost profits would not necessarily have yielded a correct amount. Denying recovery entirely

<sup>31</sup> The notion commonly called "le principe du contradictoire" has been memorialized in the Code de procédure civile as "le principe de la contradiction." At the time of the decision, these provisions were contained in *Code de procédure civile*, Art. 1502, but now have been shifted to Art. 1520. See Décret no. 2011-48, 13 January 2011. In both the old and the new articles, the relevant text reads as follows:

L'appel de la décision qui accorde la reconnaissance ou l'exécution n'est ouvert que dans les cas suivants: \*\*\*\* 4° Lorsque le principe de la contradiction n'a pas été respecté; 5° Si la reconnaissance ou l'exécution sont contraires à l'ordre public international.

<sup>32</sup> For a recent decision on the judge's ability to deal with questions of law, see Judge Posner's concurrence in *Bodum USA v. La Cafetière Inc.*, 621 F.3d 624, 631-8 (7th Cir. 2010). Although Rule 44.1 of the Federal Rules of Civil Procedure allows a court to take into account any admissible evidence in understanding a rule of foreign law, including expert testimony, it does not require reliance on an expert. Federal courts in the United States regularly apply the law of all fifty states without necessarily being well versed in the intricacies of state law, and without relying on expert testimony, because "judges are experts on law." A party-appointed expert, however, is chosen not because of their objective expertise in a country's law, but rather because his or her interpretation of that law helps the appointing party.

<sup>33</sup> Other decisions in both France and Switzerland have come to similar conclusions. In *Engel Austria v. Don Trade* (Paris Cour d'appel, 3 December 2009), the court annulled the award for having been based on "imprévision" (*Wegfall der Geschäftsgrundlage*) without giving the parties an adequate opportunity to comment on that doctrine. See Andrea Carlevaris, *L'arbitre international entre Charybde et Scylla: le principe de la contradiction et impartialité de l'arbitre*, Les Cahiers de l'arbitrage 433 (2001-02). When faced with a similar problem, the highest court in Switzerland, the *Tribunal fédéral*, or *Bundesgericht*, annulled a decision of the *Tribunal Arbitral du Sport* for voiding an exclusivity clause on the basis of a law never discussed with the parties. See *José Urquijo Goitia c/Liedson Da Silva Muñiz*, *Tribunal fédéral*, 9 February 2009. However, the trend is not universal. See Supreme Court of Finland, *Werfen Austria GmbH v. Polar Electro Europe B.V.*, Zug Branch, 2 July 2008.

<sup>34</sup> For a thoughtful discussion of the delicate balance involved in arbitral duties, see *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do* (Belgian Centre for Arbitration and Mediation, CEPANI40, Colloquium, 29 September 2010). Contributions include essays by Maud Piers, Marc Dal, Jan Schäfer, Caroline Verbruggen, Bernd Ehle, Dirk de Meulemeester, Joana Kolber and Olivier Caprasse, addressing, *inter alia*, the arbitrator as "private judge" as well as the arbitrator's role in ascertaining applicable law and costs.





would have penalized an otherwise meritorious claim simply because of nuances in related recovery theories not apparent to counsel, particularly in an international case with counsel from different legal cultures.<sup>35</sup>

Tensions thus exist not only among the various arbitral duties, but within the notion of procedural fairness itself, which encompasses a variety of distinct yet related obligations which in practice often compete against each other. Allowing an opportunity to address a new legal theory promotes the parties' right to be heard. Yet suggesting the new theory in the first place potentially opens the door to a charge of bias. In the words of an old American adage, arbitrators will be damned if they do and damned if they don't.<sup>36</sup>

## E. Arbitral Jurisdiction

### *The Parcel Tankers case*

The decision of the U.S. Supreme Court in *Stolt-Nielsen v. AnimalFeeds*<sup>37</sup> presents another testing ground for the elusive balance among an arbitrator's various duties. The case arose from actions for price fixing against several shipowners by customers who had chartered vessels commonly known as "parcel tankers" to transport liquids such as food oils and chemicals. The customers alleged that the owners had engaged in anti-competitive practices.<sup>38</sup> All of the charter parties included similar arbitration clauses.

The customers requested a single consolidated proceeding to address their combined claims, often known as "class action arbitration", borrowing a term from American court procedures.<sup>39</sup> The customers may have felt that consolidation would permit them to muster more significant legal firepower and to reduce legal costs to the level of making the litigation worthwhile.<sup>40</sup>

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<sup>35</sup> Although an arbitrator must hear the parties' arguments on any legal theory, it is not always easy to draw a line between legal reasoning (which is properly presented in the arbitral award) and the legal theories on which the award is based (upon which the parties must be allowed to comment). Fear of stepping over the line cautions arbitrators away from suggesting new legal theories, and potentially appearing to favor one side or the other. 23 *La Semaine Juridique* Ed. G. 1202–3 (7 June 2010), observation of Christophe Seraglini.

<sup>36</sup> On the interaction between an arbitrator's discretion to craft proceedings and the elements of due process, see e.g. William W. Park, *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure*, 23 *Arb. Int'l* 499 (2007).

<sup>37</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>38</sup> In a companion criminal case, *Stolt-Nielsen* itself had admitted to engaging in an illegal cartel. In exchange, the Department of Justice granted amnesty. In 2003, however, the Department of Justice attempted to renegotiate the deal, claiming *Stolt-Nielsen* had failed to take corrective action. In 2007, the Eastern District of Pennsylvania held that the Department of Justice could not withdraw its bargain once *Stolt-Nielsen* executives had relinquished their Fifth Amendment right against self-incrimination. *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp. 2d 586 (E.D. Pa. 2007).

<sup>39</sup> Although slightly misleading in the context of arbitration, the term "class action arbitration" is now widely used to describe consolidated arbitration proceedings. In a true class action, under Rule 23 of the Federal Rules of Civil Procedure, a small number of plaintiffs is "certified" to represent a larger class of plaintiffs who have substantially similar claims, whether they know it or not. By contrast, in *Stolt-Nielsen* there was no attempt to join parties who had not signed arbitration agreements with each other. In essence, the term is used as another way to describe consolidation of related claims and counterclaims which implicate different parties, all of whom have agreed to arbitration with each other on a bilateral basis, if not necessarily in a group proceeding. Herein, "class action arbitration" and "class arbitration" will be used interchangeably to refer to consolidation of arbitral proceedings.

<sup>40</sup> During the arbitration proceeding, counsel for *AnimalFeeds* argued that the claims against *Stolt-Nielsen* were "negative value" claims that would cost more to litigate than could be recovered in case of a victory. Transcript of *Stolt-Nielsen* arbitration, at 82a–83a. Rightly or wrongly, Justice Ginsburg in her dissent suggested that "only a lunatic or a fanatic sues for \$30." See *Stolt-Nielsen*, 130 S. Ct. 1783. One can only speculate on the





After a district court had ordered consolidation of related court actions, the parties agreed to constitute an arbitral tribunal, pursuant to the American Arbitration Association's Supplementary Rules on Class Arbitration (AAA Supplementary Rules),<sup>41</sup> to address whether the various arbitrations could and should be consolidated.<sup>42</sup> In a partial award, the tribunal construed the arbitration clause to permit class arbitration. This left to a subsequent stage the determination of whether consolidation should in fact be ordered on a finding that the AAA Supplementary Rules had been met, including a determination of common questions of law and fact among the claims.

### Excess of authority

The asserted efficiencies in class arbitration, with savings from grouping-related claims into a single case, did not impress the shipowners, which sought to vacate the award for excess of authority under the Federal Arbitration Act.<sup>43</sup> Ultimately a majority of the U.S. Supreme Court<sup>44</sup> held that the arbitrators had exceeded their authority by imposing personal views of sound policy rather than deciding pursuant to applicable law as it then existed.<sup>45</sup> The Court based its conclusion on a somewhat unusual feature of the case, which was a post-dispute stipulation concluded by the parties confirming that their contracts were silent on the matter of class action arbitrations, in the sense that "no agreement" had been reached. Significantly, the Court did not say that parties must agree explicitly to class arbitration, but simply that the case at bar implicated no agreement, whether explicit or implicit.<sup>46</sup>

In the view of the majority, the shipowners' procedural right *not* to be subject to a class arbitration trumped the arbitrators' ability to craft a more efficient proceeding. Procedural fairness, in giving effect to the parties' original agreement, proved more important than avoiding costs which might otherwise discourage pursuit of the claim.

### The political context

The decision divided the Court sharply along political lines. A vigorous dissent by three of the more liberal Court members argued that the arbitrators were simply doing what the

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effect of this "negative value" on the settlement reached between Stolt-Nielsen and AnimalFeeds on 26 October 2010, when the District Court for the District of Connecticut approved AnimalFeeds' voluntary dismissal of its claim. On the effect of "negative value" claims, see generally Robert G. Bone, *The Economics of Civil Procedure* (Foundation Press, 2003).

<sup>41</sup> The agreement to AAA arbitration came after a district court had ordered consolidation of related anti-trust proceedings pending before that court. See *Re Parcel Tanker Shipping Services Antitrust Litigation*, 296 F. Supp. 2d 1370 (JPML, 2003).

<sup>42</sup> AnimalFeeds brought the claim on behalf of itself and all others similarly situated in a putative class action against Stolt-Nielsen, Odffell, Jo Tankers and Tokyo Marine.

<sup>43</sup> FAA §10(a)(4) "arbitrators exceeded their powers."

<sup>44</sup> The majority opinion of the Supreme Court was authored by Justice Alito, joined by Justices Scalia, Thomas, Kennedy and Chief Justice Roberts. Justice Ginsburg wrote a dissent, joined by Justices Breyer and Stevens. Prior to reaching the Supreme Court, the District Court for the Southern District of New York had vacated the award, and the Second Circuit Court of Appeals reversed. Although Justice Sotomayor took no part in the Supreme Court's decision, having been on the Second Circuit when the case was on appeal, she did agree with Justices Stevens, Ginsburg and Breyer later that year by joining a dissent in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), another politicized case addressing arbitral jurisdiction.

<sup>45</sup> Justice Alito wrote, "It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." *Stolt-Nielsen* at 1767–8.

<sup>46</sup> See *Stolt-Nielsen*, 130 S. Ct. 1782, note 10: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."





parties had asked of them in the supplemental arbitration agreement invoking the AAA Supplementary Rules.<sup>47</sup>

The political dimensions of the case resist simple analysis. American conservatives tend to favor arbitration as a process in line with freedom of contract. Yet their preferences get reversed for class proceedings, which appear as an anti-business tool of plaintiffs' lawyers fomenting litigation on a contingency fee basis. In contrast, liberal justices often express skepticism of arbitration as a device to sidestep the perceived safeguards of a civil jury.<sup>48</sup> Yet they seem to perceive class proceedings as a pro-consumer mechanism permitting multiple litigants to engage jointly a legal team, making pursuit of the claims feasible.<sup>49</sup>

### The right answer to the wrong question

#### *The second agreement*

The chief mischief of *Stolt-Nielsen* lies in its potential to decrease the finality of arbitration by making it easier for courts to vacate awards. Few would disagree that arbitrators must remain faithful to the parties' contract, not create new public policy.<sup>50</sup> Unfortunately, the majority opinion took that general proposition as an avenue to justify award annulment simply because the arbitrators got it wrong on a question submitted for their determination.

In its zeal to send a signal of the admittedly problematic nature of class action arbitration, the majority conflated two distinct questions. The first relates to the limits of an arbitrator's jurisdiction, which falls within the province of a national court's review. The second concerns the merits of an arbitrator's substantive decision, which courts would not normally disturb.<sup>51</sup>

The opinion by Justice Alito rightly noted the parties' post-dispute stipulation that the contract was silent in the sense of containing "no agreement" on class action arbitration. However, the litigants had unequivocally asked arbitrators, not judges, to construe their *ex ante* intent on class arbitration. Article 3 of the AAA Supplementary Rules, titled "Construction of the Arbitration Clause," provides the arbitrators with an explicit grant of jurisdiction as follows:

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration

<sup>47</sup> The dissent pointed out that the parties had executed a supplementary agreement providing that the question of whether the dispute should proceed as a class action arbitration was to be decided pursuant to the AAA Supplementary Rules. Rule 3 of these rules explicitly grants the arbitrators jurisdiction to determine whether the arbitration might, as a matter of contract, proceed on behalf of a class, assuming satisfaction of the relevant criteria for class certification. Set forth in Rule 4, these factors largely parallel those in the Federal Rules of Civil Procedure.

<sup>48</sup> Liberal doubts about arbitration are not new. See e.g. the dissent by Justice Stevens in the landmark *Mitsubishi* case allowing arbitration of antitrust claims in an international context. Stevens wrote: "Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 666 (1985).

<sup>49</sup> The current vogue for protecting consumers from arbitration in the United States can be seen in the Dodd-Frank Act (21 July 2010), which invalidates (or in some cases permits invalidation of) pre-dispute arbitration agreements in cases with deemed imbalances in bargaining power. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376-2223. If enacted, the pending Arbitration Fairness Act would yield similar results on a broader scale. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009). See also Department of Defense Regulation Restricting the Use of Mandatory Arbitration Agreements, 48 C.F.R. §§ 212, 222, 252 (19 May 2010).

<sup>50</sup> The *Stolt-Nielsen* majority opinion at 1767-8 declared that the award must be vacated because the tribunal simply "impose[d] its own view of sound policy regarding class arbitration."

<sup>51</sup> See generally, William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, in A.J. van den Berg (ed.), 13 ICCA Congress Series 55 (2007).





clause permits the arbitration to proceed on behalf of or against a class (the “Clause Construction Award”).<sup>52</sup>

The arbitrators were thus empowered by the parties to address whether the arbitration clause permitted the case to proceed on behalf of a class.<sup>53</sup> The litigants moved the class action question to the realm of the dispute’s substantive merits, which under the Federal Arbitration Act normally remains within the purview of the arbitrators.

In essence, the majority gave the right answer to the wrong question. The relevant inquiry facing the Court was not, “What did the parties agree in general?” but the more limited issue, “What did the parties agree to arbitrate?” By accepting the AAA Supplementary Rules, the parties gave to the arbitrators the question of whether the contract allowed class action arbitration, thus generally precluding judicial second-guessing on that matter. Courts might still intervene to monitor bias or lack of due process, but not to correct a simple mistake in the arbitrators’ contract interpretation.

*Substantive merits versus arbitral jurisdiction*

In holding that the award should be vacated, the majority invoked excess of authority by the arbitral tribunal, one of the limited statutory grounds for vacatur under the Federal Arbitration Act.<sup>54</sup> Under the facts of the case, however, the Court may well have blurred the distinction between excess of jurisdiction and simple mistake of law, dressing the latter in the garb of the former.

True enough, articulating a robust definition of excess of authority has often proved elusive.<sup>55</sup> On the basis that litigants do not expressly empower arbitrators to make mistakes, at least one judge has gone so far as to suggest that errors always constitute an excess of authority.<sup>56</sup>

Such a stretch, however, ignores that the parties asked an arbitrator, not a judge, to decide the case, assuming the risk that the arbitrator might get it wrong. Nothing in the Federal Arbitration Act permits judges to impose their own views on matters submitted to arbitration.

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<sup>52</sup> Moreover, Rule 3 recognizes that such a determination will be considered an award subject to review pursuant to the delineated grounds for vacatur, but no more, as provided in the Federal Arbitration Act. The Rule continues: “The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.” The point of Rule 3 is to construe the contract, as a threshold matter, to determine whether the parties agreed to submit their dispute to class arbitration at all.

<sup>53</sup> The applicability of these AAA procedures was explicitly recognized by the majority. See *Stolt-Nielsen*, 130 S. Ct. 1765.

<sup>54</sup> 9 U.S.C. § 10(a)(4) provides award annulment if arbitrators have “exceeded their powers.”

<sup>55</sup> Attempts to define jurisdiction sometimes bring to mind the line by U.S. Supreme Court Justice Potter Stewart, admitting an inability to define “hard core” obscenity but adding, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184 (1964) at 197 (concurring opinion), examining when erotic expression falls outside the limits of Constitutionally protected speech in the context of a Louis Malle film *Les Amants* about a woman in an unhappy marriage. British judges sometimes apply a less risqué characterization test. In deciding that a floating crane was not a “ship or vessel” for purposes of insurance policy, Lord Justice Scrutton referred to the gentleman who “could not define an elephant but knew what it was when he saw one.” *Merchants Marine Insurance Co. Ltd. v. North of England Protecting & Indemnity Association*, [1926] 26 Lloyd’s Rep. 201, at 203; 32 Com. Cas. 165, at 172.

<sup>56</sup> The great English jurist Lord Denning once suggested (albeit in an administrative context) that “Whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void.” See Lord Denning, *The Discipline of the Law* 74 (OUP, 1979). See also *Pearlman v. Keepers and Governors of Harrow School*, [1978] 3 WLR 736, 743 (CA) (“The distinction between an error which entails absence of jurisdiction and an error made within jurisdiction is [so] fine . . . that it is rapidly being eroded.”). Happily for the health of English law, the House of Lords in 2005 rejected this position in the *Lesotho Highlands Development Authority v. Impreglio SpA* [2005] UKHL 43 (30 June 2005).





The integrity of the arbitral process requires not only that judges scrutinize gateway matters related to the contours of the litigants' agreement to arbitrate, but equally that courts respect the arbitrators' decisions on questions given to them for adjudication.

In this context, one may recall words used from an earlier U.S. Supreme Court decision addressing a dispute between a New York merchant and an Illinois store owner before arbitrators who ultimately awarded damages to the ill-treated storekeeper. Having lost in arbitration, the unhappy New Yorker succeeded in having the award set aside by a lower court. The Supreme Court reversed with the following reasoning:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation.<sup>57</sup>

Litigants should not be allowed to renege on their bargain to arbitrate simply when a decision proves not to their liking.

There is nothing odd in saying that parties express their intent to arbitrate matters which might otherwise be jurisdictional in nature. For example, allegations that the signature in an arbitration clause had been forged would normally give rise to a judicial review. Yet it would always be up to the parties to agree that the allegation of forgery should be arbitrated,<sup>58</sup> in which case the arbitrator would be the one to determine the genuineness of the signature.<sup>59</sup>

At some point, of course, arbitrators might simply invent a legal standard informed only by their personal policy preferences.<sup>60</sup> In such an instance, they would be exceeding their authority. The facts of *Stolt-Nielsen*, however, do not lend themselves to painting the arbitrators as such wild cards.<sup>61</sup>

<sup>57</sup> *Burchell v. Marsh*, 58 U.S. 344, 349 (1855).

<sup>58</sup> With respect to the very existence of an agreement to arbitrate (such as raised by the allegations of forgery), a separate post-dispute agreement to arbitrate would normally be needed to confer arbitral jurisdiction. By contrast, with respect to procedural matters (such as respect for time limits) the parties might well confer arbitral authority in a single contract containing a clear mandate to arbitrate. See *Howsam v. Dean Witter*, 537 U.S. 79 (2002), addressing the right to interpret a requirement that arbitration be filed within six years after "the occurrence or event giving rise to the dispute."

<sup>59</sup> Such delegation of jurisdictional authority in a separate agreement is exactly what happened in *Astro Valiente Compania Naviera v. Pakistan Ministry of Food & Agriculture (The Emmanuel Colocotronis No. 2)* [1982] 1 All ER 823, where buyers of wheat refused to arbitrate a dispute with the shipper on the theory that the arbitration clause in the charter party had not been incorporated in the bill of lading. The parties submitted to *ad hoc* arbitration the question of whether the arbitration clause was incorporated into the bill of lading, and were subsequently held to be bound by an award finding that the buyers had agreed to arbitrate based on language in the bill of lading providing "All other conditions . . . as per . . . charter party."

<sup>60</sup> The sting in the majority's vacatur of the award lies in the line, "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." *Stolt-Nielsen* at 1767–8. However, Justice Ginsberg in her dissent notes that the tribunal did in fact tie its conclusion "to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 [of the AAA Supplementary Rules]." 130 S. Ct. 1780.

<sup>61</sup> In *Stolt-Nielsen*, the arbitrators' understanding of the law was made on the basis of an earlier U.S. Supreme Court decision in which a mere plurality of the Court held that determinations on consolidation were for the arbitrators themselves. See *Green Tree v. Bazzle*, 539 U.S. 444 (2003). The legacy of this case was anything but clear. None of the four opinions in *Bazzle* commanded a majority. The plurality felt that the arbitrator should decide whether the parties' agreement allowed for class action arbitration. Justice Stevens concurred with the outcome but did not endorse its reasoning. The dissent by Chief Justice Rehnquist argued that the parties' contract demonstrated no consent to class action arbitration. The dissent by Justice Thomas noted that the case originated before South Carolina state courts, and contended that the Federal Arbitration Act did not apply to





It may well be that the majority's aversion to forced joinder represents sound policy. Absent legislative pronouncement banning class arbitration, however, it was for the parties to adopt whatever path they preferred. Under the facts in *Stolt-Nielsen*, they had asked arbitrators, not courts, to interpret their agreement on this matter. In this respect, the dissent fared better in construing the various agreements together, reading the "no agreement" stipulation in conjunction with the post-dispute adoption of the AAA Supplementary Rules.<sup>62</sup>

*Opt-in for class members*

The balance between efficiency and fairness finds further complications in the way the AAA Supplementary Rules describe the criteria for class certification, according to factors that largely parallel those set forth in the Federal Rules of Civil Procedure.<sup>63</sup> As mentioned earlier, if arbitrators find that the contract permits class action arbitration, they proceed to examine whether satisfaction of other prerequisites (such as common issues of law and fact) justifies proceedings on a class basis. Among these prerequisites is the requirement that each class member has entered into an agreement containing an arbitration clause substantially similar to the one signed by the class representative.

A careful observer will note the reference to an agreement by "each class member," which is to say, the claimant, not the respondent. On its face, such language seems to leave open the prospect that a company which never had an arbitration clause with the shipowners (to take the *Stolt-Nielsen* context) might become part of the arbitration through a unilateral post-dispute "opt-in" process. Lacking reciprocity, such a mechanism poses policy concerns of significant magnitude, given that arbitration (unlike court proceedings) presupposes consent.

Under the facts of *Stolt-Nielsen*, all owners and all customers had agreed to arbitrate with each other through clauses in the charter-parties.<sup>64</sup> Consolidation simply moved things from bilateral to multilateral proceedings, without deeming into life an agreement to arbitrate where none had existed.

The calculus for class arbitration, however, would change dramatically if a unilateral "opt-in" process were to bring into the arbitration potential claimants with which respondents had never concluded any arbitration agreement at all.<sup>65</sup> Courts must show special vigilance in

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state proceedings. In the context of the point made by Justice Thomas, it is interesting that *Stolt-Nielsen* implicated a maritime matter, falling within the purview of federal rather than state law.

<sup>62</sup> Although stressing that the award was not yet "ripe" for review, the opinion by Justice Ginsburg acknowledged the effect of the agreement to apply the AAA Supplementary Rules. Her dissent notes: "The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case." 130 S. Ct. 1780.

<sup>63</sup> AAA Supplementary Rule 4 provides that the arbitrator shall permit one or more parties to represent the class only if each of the following conditions is met: (i) the class is so numerous that joinder of separate arbitrations is impracticable; (ii) there are questions of law or fact common to the class; (iii) claims or defenses of the representative parties are typical of the claims or defenses of the class; (iv) representative parties will fairly and adequately protect the class interests; (v) counsel selected to represent the class will fairly and adequately protect the class interests; and (vi) each class member has entered into an agreement containing an arbitration clause substantially similar to that signed by the class representative(s) and other class members.

<sup>64</sup> *Stolt-Nielsen*, 130 S. Ct. 1765.

<sup>65</sup> Statutory court-ordered consolidation of arbitration is a different matter, of course, given that all parties will presumably be subject to the relevant judicial jurisdiction. See e.g. Mass. Gen. Laws, ch. 251, § 2A, allowing consolidation of actions involving a common question of law or fact, held applicable in federal cases, at least if the parties' agreement is silent on the matter. *New England Energy v. Keystone Shipping*, 855 F.2d 1 (1st Cir. 1988). See also Mass. Gen. Laws ch. 90 § 7N1/2, requiring non-voluntary arbitration of claims over allegedly defective vehicles. See also Cal. Code Civil Procedure, § 1281.3, which permits consolidation of arbitration proceedings that involve a common issue of law or fact. Compare *Gov. of United Kingdom v. Boeing Co.*, 998 F.





connection with attempts to extend arbitration clauses to non-signatories,<sup>66</sup> a much-vexed matter which recently gave rise to conflicting high-profile decisions in France and Britain during the *Dallah* saga.<sup>67</sup> Like marriage, commercial arbitration implicates mutual consent, not an open-ended option to be exercised by a host of partners.<sup>68</sup>

### A legacy of open questions

Although the peculiar facts of *Stolt-Nielsen* limit its precedential value,<sup>69</sup> the case does signal greater latitude for award annulment. By ignoring the litigants' agreement to arbitrate the question of whether class proceedings were authorized, the decision raises the prospect that arbitration will become mere foreplay to litigation.

Apart from sowing confusion on the allocation of tasks between judges and arbitrators, the case leaves a legacy of open questions. For example, the majority provides little if any guidance on factors that might demonstrate the parties' intent to permit class arbitration. In a key footnote, the majority punts to future decisions the important question of how to define the contours of an agreement to class action proceedings, stating: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."<sup>70</sup>

Likewise, the Court fails to address the much-vexed matter of whether "manifest disregard of the law" continues to exist as an independent ground for review of arbitral awards.<sup>71</sup>

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2d 68, 69 (2nd Cir. 1993), limiting judicial discretion to grant consolidation of arbitration proceedings "absent the parties' agreement to allow such consolidation."

<sup>66</sup> Non-signatories may sometimes be brought into proceedings on the basis of agency or corporate veil piercing. See generally, William W. Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma" in *Multiple Party Actions in International Arbitration: 3* (Permanent Court of Arbitration, 2009). The U.S. Supreme Court, of course, is well aware of the various theories on which non-signatories might be joined in arbitration. See *Arthur Andersen v. Carlisle*, 129 S. Ct. 1896 (2009) (addressing notions of third party beneficiaries).

<sup>67</sup> See *Dallah Real Estate and Tourism Holding Co. v. Government of Pakistan*, [2010] UKSC 46 (3 November 2010), implicating an award made in Paris but presented for enforcement in Britain. Although the British Supreme Court held that there was no justification to join the government of Pakistan, the Paris *Cour d'appel* came to an opposite decision on 17 February 2011. In determining whether Pakistan was bound, each court purported to apply the same principles of French law, known as the *Dalico* rule, emphasizing the "common will of the parties" (*commune volonté des parties*) as a transnational standard free from the idiosyncrasies of national law. As *Dallah* illustrates, however, transnational principles may prove themselves stubbornly parochial in their application. The French court emphasized post-contract behavior by the government of Pakistan, while the British focused on the relationship of the parties. For a general discussion of the conceptual difficulties in determining the applicable law for purposes of joining non-signatories, including New York Convention, Art. V(1) (a) which tests the validity of an arbitration agreement by the law of the country where the award is made, see William W. Park, *Rules and Standards in Private International Law*, 73 Arbitration 441, 444 (2007).

<sup>68</sup> A different analysis applies to proceedings based on bilateral investment treaties and free trade agreements, where host states provide standing offers to arbitrate with potential investors.

<sup>69</sup> The decision rests on an explicit "no agreement" stipulation not likely to be repeated if the parties resisting class arbitration have competent counsel. For a scholarly perspective on the effect of *Stolt-Nielsen* in future cases, see S.I. Strong, *Opening More Doors than it Closes*, Lloyd's Maritime & Comm. L.Q. 565 (Nov. 2010).

<sup>70</sup> See *Stolt-Nielsen* 130 S. Ct. 1782, note 10.

<sup>71</sup> First introduced in dictum of the 1953 U. S. Supreme Court decision *Wilko v. Swann*, "manifest disregard of the law" has raised considerable concern in some quarters. See e.g. the opinion by Chief Judge Posner in *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994), which refers to the doctrine as having been "Created *ex nihilo* [as] a nonstatutory ground for setting aside arbitral awards." Judge Posner, continued: "If [manifest disregard] is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators 'exceeded their powers'—it is superfluous and confusing."





Instead, the decision says only that if such a standard exists, it was satisfied under the facts of *Stolt-Nielsen*,<sup>72</sup> thus leaving the vitality of the doctrine open to question.<sup>73</sup>

Regardless of any substantive guidance it may offer, the decision will likely provoke further politicization of arbitration in the United States.<sup>74</sup> The drama springs from idiosyncrasies of American legal culture, including the absence of any general nation-wide statute to insulate consumers and employees from abusive arbitration arrangements,<sup>75</sup> and doubts about the reliability of civil juries, sometimes perceived as facilitating unreasonable verdicts tainted with bias against manufacturers or employers.

One of the next battlegrounds will implicate contractual waivers of class action arbitration.<sup>76</sup> In one federal appellate case, the court invalidated a waiver of class action arbitration even after an earlier decision was remanded by the Supreme Court for reconsideration in light of *Stolt-Nielsen*.<sup>77</sup> The court maintained its view that the waiver was invalid because it raised the cost of arbitration so as to preclude plaintiffs from enforcing statutory rights under competition law.

Such an approach leaves respondents in a difficult position. If a contract contains a class action waiver, a judge would be unable to compel class proceedings due to the decision in *Stolt-Nielsen*, which requires agreement on the matter. Yet the same judge might feel unable to grant a motion for non-class arbitration, considering bilateral proceedings to be unconscionable because the cost effectively denies the claimant an ability to enforce statutory rights on an individual basis. Practitioners will in any event focus more on drafting arbitration clauses,<sup>78</sup> whether within the framework of consumer transactions or business-to-business contracts.<sup>79</sup>

<sup>72</sup> See *Stolt-Nielsen*, 130 S. Ct. 1768, note 3: "We do not decide whether 'manifest disregard' survives . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." The Court then continued: "Assuming, arguendo, that such a standard applies, we find it satisfied for the reasons that follow [in the majority opinion]."

<sup>73</sup> Whether "manifest disregard of the law" exists as an independent ground for judicial review of awards was put into doubt by the 2008 Supreme Court decision in *Hall Street v. Mattel*, 552 U.S. 576. *Stolt-Nielsen* avoided the question by stating that if such a standard exists it was satisfied. 130 S. Ct. 1768, note 3. The Supreme Court passed up another opportunity to consider "manifest disregard" in *Certain Underwriters at Lloyd's, London v. Lagstein*, 607 F.3d 634 (9th Cir. 2010), *petition for cert. denied*.

<sup>74</sup> For the current state of controversy over the costs and benefits of arbitration in the United States, readers are directed to the history of the Arbitration Fairness Act of 2009, H.R. 1020 & S. 931 (111th Congress, 1st Session).

<sup>75</sup> The U.S. Congress, however, can and has passed legislation limiting arbitration on behalf of special interest groups. See Motor Vehicle Franchise Contract Act of 2002, § 11028, Pub. L. No. 107-273, 116 Stat. 1758, 1835-6 (codified at 15 U.S.C. § 1226 (2000)), sometimes known as the Bono Bill in recognition of its original sponsor, the late Sonny Bono. Recently, Senators Jeff Sessions and Russell Feingold proposed a bill intended to provide broad protection of consumer interests, albeit perhaps of an over-inclusive nature that sacrifices vital elements of party autonomy and efficient dispute resolution.

<sup>76</sup> The effectiveness of waivers drafted to preclude recourse to class action arbitration is currently before the U.S. Supreme Court in its review of a decision by the Federal Court of Appeals for the Ninth Circuit in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 45 (2010). Oral arguments heard on 9 November 2010 explored whether the Federal Arbitration Act pre-empts reliance on state law related to unconscionability principles that might be invoked to strike down such waivers.

<sup>77</sup> See *Re Am. Express Merchants Litigation*, 2011 WL 781698 (2nd Cir., 8 March 2011).

<sup>78</sup> See Paul Friedland and Michael Ottolenghi, *Drafting Class Action Clauses After Stolt-Nielsen*, 65 Dispute Res. J. 22 (May-Oct. 2010), who suggest explicitly addressing the question of class action arbitration in the arbitration clause to avoid any confusion resulting from how future courts will interpret *Stolt-Nielsen*.

<sup>79</sup> Justice Ginsburg's dissent noted that the parties in *Stolt-Nielsen* were sophisticated businesses with sufficient resources and experience to bargain, rather than parties subject to contracts of adhesion. Whether this argument cuts in favor or against a presumption to allow class action arbitration remains an open question. *Stolt-Nielsen*, 130 S. Ct. 1783.





Finally, *Stolt-Nielsen* raises the question of whether courts outside the United States will stay legal actions in conflict with class arbitration if and when arbitrators allow unilateral “opt-in” by individuals or companies which had not previously agreed to arbitrate.<sup>80</sup> In the context of litigation in France or England, for example, it is far from evident that a French or English court would refuse to hear a claim merely because a respondent had opted into a class proceeding in the United States.

Whatever lessons might or might not be apparent from *Stolt-Nielsen*, the case is sure to highlight the way in which tensions among the arbitrator’s various duties resist facile analysis. In large measure, resolving these tensions, to promote an optimal accommodation among the different obligations, will depend on honest and mature debate about the relevant rivalries.<sup>81</sup>

## E. Signposts to the Future

Lectures about legal trends often speculate on the future, a mission fraught with peril.<sup>82</sup> If arbitrators had special knowledge of what lies in store, they would be in another business.<sup>83</sup> Although tomorrow cannot be built on an assumption of yesterday’s permanence, it must nevertheless be built on something. Our knowledge of yesterday and today usually provides the only possible starting point.<sup>84</sup> With this caution, let us explore the challenges of the next decade.

### Arbitral duties and societal values

The right way to do things from the arbitrator’s perspective may be the wrong way to do things from the viewpoint of society at large. The general community often has a stake not only in the outcome of arbitration, but also in the way proceedings have been conducted.<sup>85</sup>

A recent English Court of Appeal decision, now on appeal, provides an example of one of the less tractable conflicts between the expectations of the arbitration community and the values

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<sup>80</sup> See previous discussion of Rule 4(6) of the AAA Supplementary Class Arbitration, which makes references to agreements by “each class member,” (i.e., the claimant) to enter the arbitration, irrespective of any prior agreement to arbitrate with the respondent.

<sup>81</sup> See generally, William W. Park, *Les devoirs de l'arbitre: ni un pour tous, ni tous pour un*, 2011 Cahiers de l'arbitrage 13.

<sup>82</sup> A brief look into our past provides a stern reminder of the limits of forecasts. This lecture was delivered on 29 September, the date when, at the 1938 Munich conference, the so-called four Great Powers of Europe partitioned Czechoslovakia, granting Adolf Hitler the Sudetenland region of that country. When the agreement was announced the next morning, British Prime Minister Neville Chamberlain hailed it as a guarantee of “peace in our time.” Less than a year later Europe was experiencing anything but peace, as the Second World War was beginning.

<sup>83</sup> It has been observed that prediction is particularly difficult when it concerns the future. Attributed to French Resistance leader Pierre Dac: “*La prévision est difficile surtout lorsqu'elle concerne l'avenir.*” For a more systematic treatment of the unforeseeable nature of great events see Nassim Nicholas Taleb, *The Black Swan* (2007).

<sup>84</sup> Even the computational algorithms used in the random sampling of so-called Monte Carlo Simulations derive from knowledge linked to past experience.

<sup>85</sup> In some instances the conflicts between public and private interests will be more theoretical than real, as exemplified in matters of arbitral confidentiality. If arbitration implicates societal interests, the public wants to watch, as demonstrated by calls for transparency with respect to investor-state disputes. Yet when such proceedings have been opened to the public, hearings usually prove so utterly boring that the audience dwindles quickly. Moreover, investor-state awards usually end up being published, in full or in sanitized versions, providing some accommodation between the public and private interests.





of society at large.<sup>86</sup> The court struck down an arbitration clause providing for a tribunal composed of Ismaili Muslims, deemed to violate the anti-discrimination provisions of British law based on a European Union human rights Directive,<sup>87</sup> finding the allegedly discriminatory provision not severable from the general duty to arbitrate.<sup>88</sup>

Concern has been expressed within the arbitration community that the logic which prohibits religion from being taken into account would also apply to nationality-based considerations in arbitral appointments. From that perspective, an extension of the court's logic runs afoul of the practice of many arbitral rules and institutions that see nationality requirements as surrogates for impartiality, intended to foster a sense of fair play.

Traditionally, litigants have insisted on a default rule by which the sole arbitrator or tribunal president should not share the nationality of either side. In a dispute between a Paris claimant and a Boston respondent, there is nothing odd about asking that the presiding arbitrator be neither French nor American, however fine and noble the respective candidates from those two countries might otherwise be. If the parties want a different rule, they can always agree otherwise.

The nationality requirement affects both sides equally, and operates to reduce fears and perceptions of bias, which in a cross-border context may be significant.<sup>89</sup> One can imagine the outcry if an international sports match were to be refereed by nationals of one of the two opposing teams. The principle of party autonomy, as well as understandable fear of bias, raises legitimate apprehension about attempts to sanitize arbitral tribunals from all nationality qualifications. The matter provokes more anxiety than certainty, and leaves much suspense.

### Enforceability revisited

#### *Procedural rules on costs*

Of all the arbitrators' duties, the obligation to seek an enforceable award may prove the most persistently troublesome, as it implicates not only tensions among the various duties themselves, but also conflicts between the arbitral seat and the law of the enforcement forum.

<sup>86</sup> *Jivraj v. Hashwani* [2010] EWCA Civ 712.

<sup>87</sup> A business dispute arose between two individuals who were members of the Ismaili Muslim community, a branch of Sunni Islam. The agreement to arbitrate provided that the arbitrators be members of that community. When one side had second thoughts and appointed a retired English judge who was not Muslim, the clause was challenged as a violation of the Employment Equality (Religion and Belief) Regulation of 2003, which had been introduced into English law to comply with a European Union Directive. EU Council Directive 2000/78/EC. The Court held that arbitrators are "employees" within the meaning of the Regulation and that the provision for only appointing Ismaili arbitrators violated the anti-discrimination provisions.

<sup>88</sup> For a contrasting New York decision in which a religious requirement was severed from the general duty to arbitrate, see *Re Ismailoff et al.*, 836 N.Y.S.2d 493 (2007, Table Decision, Surrogate's Court, Nassau County, New York), 14 Misc.3d 1229, 2007 WL 431024. Faced with an arbitration clause requiring arbitrators to be "persons of the Orthodox Jewish faith," the court felt unable to make the appointment due to the Constitutional provisions (First Amendment, Establishment Clause) prohibiting civil courts from resolving issues concerning religious doctrine, as enunciated by the U.S. Supreme court in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969). A general reference to a Beth Din (Jewish rabbinical court) would have been acceptable, since the court would not have been required to pass judgment on who was or was not a member of the Orthodox Jewish faith. In the end, the court avoided the problem by having each side name one arbitrator, and designating the American Arbitration Association to appoint the third tribunal member in the event of further disagreement.

<sup>89</sup> Those with experience in international arbitration readily bring to mind many fine arbitrators for whom nationality plays no role in decision-making. Moreover, the use of citizenship as a surrogate for legal culture or national predisposition clearly has limits. Well-known arbitrators include an Irishman raised and educated in the United States, a Bahraini citizen born in Sweden and living in Paris, and dual nationals who might have ties to both Switzerland and the United States, or to both France and Brazil.





To illustrate, few legal rules serve as well as the English invalidation of pre-dispute agreements to allocate arbitration costs “in any event”.<sup>90</sup> In advance of the dispute, parties may not by contract forbid an arbitrator from allocating costs on the basis of who won and who lost.<sup>91</sup>

The provision casts a wide net, catching even reasonable arrangements among sophisticated business managers to split arbitrator compensation on a 50/50 basis, and/or to require each side to cover its own legal expenses. In such an instance, what is to be done by a conscientious arbitrator?

Aiming at fidelity to the parties’ agreement, an arbitrator would normally let the costs lie where they fall. Yet to do so might run the risk of award annulment if proceedings are seated in London. Arbitrators may find themselves between a rock and a hard place when the award must be enforced in a jurisdiction that values respect for the parties’ procedural choices. Although flouting clear contract language on cost allocation would please an English judge,<sup>92</sup> the disregard of the parties’ *ex ante* expectations may appear as excess of authority to a New York court called to enforce an award of legal costs inconsistent with the terms of the agreement.<sup>93</sup>

#### *Substantive mandatory norms*

The double-edged nature of promoting award enforceability remains problematic in respect of substantive as well as procedural norms. In the well-known *Mitsubishi* case, the U.S. Supreme Court considered a dispute between a Japanese manufacturer and an American automobile distributor providing for application of Swiss law by arbitrators in Japan.<sup>94</sup> Ordering arbitration, the Court nevertheless warned that American antitrust law must be considered in connection with any antitrust counterclaim, despite the contractual choice-of-law clause.<sup>95</sup>

The *Mitsubishi* pronouncements on U.S. competition law, like the English rule on cost allocation, place arbitrators between the Scylla and the Charybdis of inconsistent requirements.

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<sup>90</sup> Section 60, Arbitration Act of 1996: “An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.” Section 61 goes on to set forth the general principle that “costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.” This standard, however, is made subject to the parties’ agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen.

<sup>91</sup> The rule’s most understandable application lies in an anti-abuse mechanism to prevent clauses that would require weaker parties to pay all costs, thus discouraging otherwise legitimate claims. To be clear, the statute does not impose the English “costs follow the event” rule, but simply invalidates pre-dispute attempts to eliminate the arbitrator’s discretion in fixing obligations for items such as attorneys’ fees and amounts paid to the arbitrators and the arbitral institution.

<sup>92</sup> Presumably Section 68 of the 1996 Act (serious irregularity causing substantial injustice) would permit judicial intervention with respect to an arbitrator’s failure to respect Section 60.

<sup>93</sup> Not infrequently, contracts between American policyholders and British insurers provide for London arbitration but subject to New York substantive law. These so-called “Bermuda Form” arbitrations are discussed in Richard Jacobs, Lorelie S. Masters and Paul Stanley, *Liability Insurance in International Arbitration: The Bermuda Form* (Hart Publishing UK, 2004).

<sup>94</sup> *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). This particular choice of law explains itself by the fact that a Swiss affiliate of the American company Chrysler was also involved in the contractual arrangement with the distributor and the manufacturer.

<sup>95</sup> *Mitsubishi* footnote 19 suggests a “prospective waiver” doctrine that would invalidate choice-of-law agreements that operated to waive a right to pursue American remedies. Moreover, the so-called “second look” doctrine warned that American courts would exercise their power at the award enforcement stage to “ensure that the legitimate interest in the enforcement of the antitrust laws [of the United States] had been addressed.” *Ibid.* 638.





An arbitrator must satisfy norms both at the arbitral seat, where proceedings take place, and at the recognition forum, where the winner goes to attach assets.

Another such conflict was presented in *Accentuate Ltd. v. Asigra Inc.*,<sup>96</sup> involving an English distributor of software products for a Canadian company, pursuant to a license calling for application of Ontario law and arbitration in Toronto. After the Canadian company attempted to terminate the license, an arbitral tribunal in Toronto found for the distributor on a breach of contract counterclaim. The tribunal rejected a parallel request for damages under EU commercial agency regulations, considering the regulations outside the scope of Ontario law.

A competing action was brought in England, where the Canadian company argued that the Toronto award barred claims related to the EU Regulations. Overturning a lower court stay of proceedings, the High Court required a determination on whether the Regulations gave the distributor an action independent of Ontario law.<sup>97</sup> If so, the award would have no *res judicata* effect on that matter.<sup>98</sup> The English court thus raised the prospect that the EU Regulations might constitute mandatory norms, not unlike the antitrust counterclaims in *Mitsubishi*, from which the parties could not derogate.<sup>99</sup>

Such cases raise the vexed matter of divergence between an arbitrator's duties and the perspectives of courts called to intervene in the arbitral process. Whatever the obligation of judges reviewing awards, arbitrators themselves normally aim for fidelity to the parties' bargain, and thus hesitate to ignore explicit contract language, whether related to applicable law or cost allocation. Judges are answerable to the citizenry as a whole, while arbitrators remain in large measure creatures of contract.<sup>100</sup>

### Refining notions of bias

Few would disagree that an arbitrator should hesitate to accept an appointment after publishing an article on a genuinely open question of law forming the precise object of the dispute. Yet it would be alarming to allow overly abstract notions of impartiality to disqualify arbitrators with knowledge and experience. Pushed to an extreme, the author of a learned treatise on commercial law might be challenged for knowing too well that contracts require

<sup>96</sup> [2009] EWHC 2655 (QB).

<sup>97</sup> The High Court also expressed the view that if the EU Regulations did apply, a claim for compensation would be governed by English law. Thus the award could not defeat the claim brought before the English court, given that the arbitrators had never addressed a matter they considered governed solely by Ontario law. *Ibid.* para. 92.

<sup>98</sup> The award was tested not in an application to refuse recognition, but rather in the collateral context of Section 9 of the English Arbitration Act which permits a stay of legal proceedings connected to matters governed by an arbitration agreement, as long as that agreement does not fail for being null, void or inoperative. According to the High Court, the district judge "fell into error" by failing to determine whether a binding arbitration clause applied to the claims under the EU Regulations, in the absence of which no award could be recognized on that point. Opinion of Justice Tugendhat, para. 95.

<sup>99</sup> In this connection, it is important to note that the effect of the award was challenged in the context of a competing legal claim brought in an English court. It may well be that the award would nevertheless retain its vigor under Article III of the New York Convention in some other recognition forum. However, the peculiar facts of this case make it unlikely for the Canadian company to rely on the award except as a bar to a rival judicial action. Although the arbitral tribunal held for the distributor under Ontario law, the amount of quantum presumably was far less than that available under the EU Regulations.

<sup>100</sup> Of course, fidelity to the agreement would not justify violation of international public norms on matters such as bribery, corruption or money laundering. However, for most matters on which sophisticated parties bargain (applicable law, costs, and damage limitations) arbitrators normally strive to let the chips fall where they may notwithstanding idiosyncratic local rules.





offer and acceptance.<sup>101</sup> To exclude service by those with learning would leave arbitration to dim-wits who live alone in caves, a state of affairs that hardly serves economic justice or commercial security.<sup>102</sup>

### Rehabilitating the search for truth

#### *Perceptions of accuracy*

Assertions about the end of arbitration's golden age often contain a disturbing subtext which marginalizes an arbitrator's search for truth when compared with efficiency. Not long ago, at a major conference on truth-seeking in arbitration, several in-house lawyers suggested that what they really want from arbitrators is simply imposition of a peace treaty providing a fair end (whatever that might mean) to the commercial warfare.<sup>103</sup> Along similar lines, much recent arbitration literature focuses only on saving money and time,<sup>104</sup> sometimes with positive suggestions about making the process more efficient.

Without denying the value of speed and economy, thoughtful observers might wonder whether the baby risks being thrown out with the bath water.<sup>105</sup> Indeed, some have predicted a strong comeback for truth seeking in arbitration.<sup>106</sup> Not truth in some absolute sense, with a capital "T" in the mind of God. Rather, truth in the sense of an accurate award, which in a commercial context means fidelity to the parties' bargain. As mentioned earlier, arbitrators would normally seek to get as near as possible to understanding what happened between the parties, to grasping what the contract says, and to ascertaining what the applicable law provides.

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<sup>101</sup> At least two recent analyses have emphasized the repeat arbitrators' concern to maintain reputation as an incentive to render fair and accurate awards. See generally, Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47 (2010); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 San Diego L. Rev. 629 (2009).

<sup>102</sup> The requisite open-mindedness comes into play at the beginning of the case (lack of pre-judgment or pre-disposition) not at the end of the arbitration, after evidence and argument have been heard and the arbitrator must render an award. In this context, one remembers the observation attributed to G.K. Chesterton, to the effect that "impartiality is a pompous name for indifference, which is an elegant name for ignorance." Chesterton probably had in mind a lack of sensitivity to violations of universal values (such as brutality or racism) rather than adjudication of commercial disputes.

<sup>103</sup> The proceedings of the 2009 annual meeting of the Swiss Arbitration Association held in Zürich will soon be published in the ASA Bulletin. In the interim, the meeting was reported in Nathalie Voser's article *Document Production in International Arbitration: What Does It Have to Do with Discovery?*, 3 World Arb. & Med. Rev. 491, 489 (2009), stating that "four in-house counsel responsible for dispute resolution at large multinational companies unanimously expressed the view that the truth was not their primary concern in dispute resolution."

<sup>104</sup> See e.g. Jean-Claude Najjar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25 Arb. Int'l 515 (2009). After listing arbitration's current defects, the author concludes: "By whatever means necessary, arbitration needs to be repaired, to be returned to its simple foundations—speed, cost efficiency, and user-friendliness." In the article's introduction the "purpose" of arbitration is defined as "cost efficiency, speed, and user-friendliness," with no reference to a reasonably correct result. For contemporary debate on efficiency, see also Alan Redfern, *Stemming the Tide of Judicialisation of International Arbitration*, 2 World Arb. & Med. Rev. 21, 37 (2008); Jean-Claude Najjar, *A Pro Domo Pleading: of In-House Counsel, and their Necessary Participation in International Commercial Arbitration*, 25 J. Int'l Arb. 623 (2008); Michael McIlwrath, *Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices*, 2 World Arb. & Med. Rev. 111 (2008); Steven Seidenberg, *International Arbitration Loses Its Grip*, ABA J. 50 (April 2010).

<sup>105</sup> In this connection, Biblical scholars may also recollect the parable of wheat and the tares in Matthew's gospel, chapter 13, where a farmer must intervene to stop hired hands from uprooting wheat along with the weeds.

<sup>106</sup> See William W. Park, *Arbitrators and Accuracy*, 1 J. Int'l Disp. Settlement 25 (2010). For a comparative approach to the search for truth in arbitration, see Laurence Shore, "Arbitration, Rhetoric, Proof: The Unity of International Arbitration Across Cultures" in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009*, 293 (2010).





Lawyers trained in some Continental traditions sometimes suggest that their litigation tradition does not concern itself with seeking truth. What seems to be meant, however, is that German or Swiss procedure lays stress on what has sometimes been called the “formal truth” rather than absolute truth: what the documents demonstrate, rather than what may be true in the eyes of an all-knowing Deity, thus permitting a more efficient administration of justice.<sup>107</sup>

Admittedly, not many business managers or government administrators beat the drum for bad case management or expensive proceedings. Yet even fewer get excited about losing a big case they should have won based on a fair assessment of the law and the facts.<sup>108</sup>

Without suggesting that the grumbling amounts to professional pandering, one might question the amount of good which comes from grieving for a lost era of quick and cheerful decision-making. The potential harm lies not in seeking innovative ways of deciding complex economic disputes, but in a general disparagement of modern arbitration that diverts attention from hard choices about procedural dilemmas, many of which implicate finely balanced costs and benefits.

Nothing prevents litigants from giving decision-makers the power to decide *amiable composition* or *ex aequo et bono*, thereby dispensing with the need for findings of fact and law. They might even confer the power to flip a coin. The problem arises when they refuse to do so, giving every indication that they want proceedings with full due process leading to a reasoned award based on an accurate view of what happened combined with rigorous legal analysis.

#### *The interaction of accuracy, fairness and efficiency*

Although a fair search for truth, requiring time and expense, may appear as the enemy of efficiency, the goals of fairness, accuracy and efficiency may ultimately run together in the same harness. Justice too long delayed becomes justice denied. Thus fairness requires some measure of efficiency. Likewise, without fairness an arbitral proceeding would hardly be efficient in the sense of delivering the desired product, which includes a reasonably correct result combined with a sense that the process has been just. Finally, a procedurally deficient award, even if reached in record time, would carry an inherent inefficiency by inviting time-consuming judicial challenge.

<sup>107</sup> See e.g. Niccolò Raselli (a judge at the Swiss Federal Supreme Court), “Sachverhaltserkenntnis und Wahrheit; Rechtsanwendung und Gerechtigkeit” in *Zeitschrift für juristische Weiterbildung und Praxis*, Heft 3/08, 67–75 (Stämpfli Verlag AG Bern, 2008). Dr Raselli seems to contrast “materielle Wahrheit” (what actually happened) and “formelle Wahrheit” (what the parties proffered by evidence). See also Nathalie Voser, *Document Production in International Arbitration: What Does It Have to Do with Discovery?*, 3 World Arb. & Med. Rev. 481 (2009). Dr Voser states: “[A]ccording to my civil law background, which is based on inquisitorial traditions, determining the truth has never been my understanding as to the main purpose of a court proceeding. Rather, there is the German saying ‘Recht hat wer Recht beweisen kann,’ which means, ‘the party who can prove that it is right is right.’ In other words, the party who holds the evidence to prove its case will win the case.” She continues that if the case cannot be proven with evidence available, then it is “just tough luck”. Ibid. 488.

<sup>108</sup> To test the hypothesis that speed is what litigants really want, one might imagine management contemplating breach of a joint venture in the following circumstances. The in-house lawyer tells her boss, “We have a good case on the law and the facts.” Moreover, she says, board minutes of the joint venture entity (now controlled by the other side) will prove manipulation of that company’s trading and permit recovery. When the claim is filed, the proceedings go forward with great speed. The tribunal denies pre-trial information exchange (and the joint venture’s minute book remains with the breaching party) on the basis that document production is a waste. The claim is denied, and all parties are wished good fortune in the future. The company gets an end to hostilities at low cost.





To take a culinary analogy, a chef might fail either by making customers wait too long for their meal, or by rapid service of a dish they never ordered. Whether in dining or in arbitration, an experience may be quick and cheap and yet fail to deliver what was expected.

In evaluating the trade-offs in this area, many of us stumble by reacting against our last bad experience, forgetting the specters of other unattractive alternatives. A business manager who emerged victorious in an arbitral proceeding may lament the very existence of judicial review, even if to hear challenges based on alleged procedural defects. Had that same manager lost the case, disappointment would likely have been aimed at the unavailability of full appeal on the legal and factual merits.<sup>109</sup>

*Common sense and compromise*

If arbitrators faced only questions with obvious answers, proceedings would go quickly, with little need to hear argument and evidence on matters of substance or procedure. Reality, however, often presents shades of gray.

In this connection, pre-hearing information exchange presents a classic battleground in critiques of arbitral efficiency.<sup>110</sup> Document production takes time as well as money. Yet losing the case can be much worse, especially if the loss could have been avoided through routine document exchange. Business managers will complain either because victory escaped them due to non-production of documents or because they are put to the burden of scouring their files. In this connection, the arbitrator's job remains a difficult one given that decisions about relevancy and materiality must be made before the case is fully understood.

In balancing a search for a right answer against sensitivity on time and cost, hard choices must be made from the very start of the arbitration. In a system where party appointment of arbitrators remains the norm, selecting the right tribunal requires considerable input of time and effort. Yet losing the case due to a bad tribunal is not an attractive alternative.<sup>111</sup>

The process of choosing the tribunal also can implicate competing goals. The profile of an ideal arbitrator might be described as someone knowledgeable in the substantive field, able to write awards in the relevant language, free of any nationality restrictions, and experienced in conducting complex proceedings. To this laundry list, a claimant might add availability for hearings in the not too distant future. Yet someone who meets the bill with respect to experience and qualifications may have commitments that interfere with early hearings.<sup>112</sup>

<sup>109</sup> In international commerce and investment, another blind spot derives from lack of any standard against which to compare arbitral procedures. What seems excessive document production to a Paris lawyer, accustomed to French court practices, may appear as woefully inadequate to the New York attorney who would shoot first and aim later under the Federal Rules of Civil Procedure.

<sup>110</sup> For one observer's expression of concern about arbitral efficiency in the context of "uncontrolled discovery," see William K. Slate II, *Addressing Speed and Cost*, 65(4) *Dispute Res. J.* 1 (Nov. 2010–Jan. 2011). One might question whether "uncontrolled" is the right word for document production in international arbitration, given the restrictions imposed by the AAA Protocols on Information Exchange and the IBA Rules of Evidence.

<sup>111</sup> As "location, location, location" constitute the three keys to real estate value, so "arbitrator, arbitrator, arbitrator" endure as the most critical factors in the integrity of any arbitration.

<sup>112</sup> Although it is fashionable to blame the presiding arbitrator for difficulty in finding dates or setting speedy timetables, it remains uncontroverted that at least five different schedules must usually be accommodated: each of three arbitrators and the legal teams for claimant and respondent. In international cases, variant vacation practices come into play. Scandinavian companies shut down in July. New Zealanders take holiday in January. Asking the French to work during August triggers protests about violation of international human rights standards.





Challenges for arbitrator bias can also prove disruptive to timetables. Even less attractive, however, would be a system with no mechanism to monitor the arbitrator's impartiality and independence. Until a challenge has actually been heard, it will not be known whether allegations of bias are valid or simply represent procedural sabotage.

One might also explore the following half dozen specific questions which arise after the start of proceedings. Each resists facile analysis and blanket responses, with the efficiency-promoting decision depending on the nature of the case:

*Bifurcation.* Deciding jurisdiction as a preliminary issue adds time and cost. Even less satisfactory would be a system that forces a respondent in all events to present evidence and argument on the merits of a dispute before arbitrators who clearly lack authority.<sup>113</sup>

*Consolidation.* Even outside the context of class actions, motions made to consolidate claims and proceedings takes time to hear. It would be more problematic to ignore the parties' agreement on the matter, particularly if consolidated hearings would permit cost savings.

*Applicable law.* Deciding the applicable law takes time. Having an award vacated for refusal to apply the parties' agreement, or otherwise applicable mandatory norms, however, may be even worse.

*Summary judgment.* Listening to arguments about whether the tribunal should dispose of a case on summary judgment adds time. Equally unsatisfactory would be a requirement of evidentiary hearings in the absence of any genuine issue of contested fact.

*Damages.* Determining the value of an expropriated company or a lost business opportunity usually calls for sophisticated economic analysis, with written and oral testimony, using time and money. Calculating damages without the help of experts, however, would often be little more than guesswork, hardly worthy of an arbitrator who was expected to direct payment of the proper quantum.

*Reasoned awards.* It takes time to write awards explaining the decision, particularly when three arbitrators disagree on the reasoning. It can be even more unsettling, however, to receive a decision without explanation, or with a minority dissent pointing to flaws that might have been resolved in good-faith deliberations.

An arbitrator addressing these matters will usually find that the search for truth operates in tandem with procedural fairness, but at the expense of adding time and cost. The quickest and cheapest way to decide a case would be simply not to listen to the parties. Such a path, however, would hardly be consistent with the litigants' shared *ex ante* expectations when they agreed to arbitrate. Some reasonable middle ground must be found.

Absent the parties' agreement otherwise, the arbitrator's mission includes consideration of evidence and analytic argument, not gazing into a crystal ball. In making hard choices, compromise and common sense, not dogma or ideology, remain the touchstone for reaching toward an appropriate counterpoise among accuracy, fairness, efficiency and enforceability.

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<sup>113</sup> The relative costs and benefits of bifurcation vary according to the facts of each case, with much depending on whether the alleged jurisdictional defect remains so intertwined with the substantive merits of the case so as to make a separate hearing duplicative.





### Vacated awards

The emerging significance of procedural standards does not, of course, mean that all “hard law” questions have been settled. The matter of what to do with vacated awards remains one such unresolved aspect of arbitration’s legal framework.

If an award rendered in Geneva is set aside in Switzerland, should it (can it) be given effect against assets in Paris, London or Washington? Different courts take varying positions. Although the French have no difficulty enforcing annulled awards, the Americans and the British have tended to say, “Not so fast.”

The subject retains considerable sex appeal, continuing to provoke controversy among scholars and practitioners. Some eminent writers suggest a free-floating autonomous legal order for arbitration (*un ordre juridique arbitral*) distinct from any national legal orders.<sup>114</sup> Others are more skeptical on that score.<sup>115</sup>

The matter was revisited in lively debate about a Dutch court decision granting enforcement of four arbitral awards that had been annulled in Russia, all arising from the much publicized *Yukos* controversies.<sup>116</sup> Some scholars express sympathy with enforcement of vacated awards, at least if the annulment was for a “local” standard.<sup>117</sup> Others argue that the Dutch case was wrongly decided because an arbitral award has no existence after annulment.<sup>118</sup>

Each side of the debate seems to invoke the same regard for party intent. If litigants agree to remove a dispute from the courts, why defer to a judicial annulment? On the other hand, the parties often agree to arbitration not in the abstract, but in a specific geographical venue. Thus the prospect of annulment at the arbitral seat forms part of the bargain.

A middle position suggests that the soundest policy lies in treating annulment decisions like other foreign money judgments. The annulment should be respected except when reason exists to think that the judgment vacating the award lacked procedural integrity.<sup>119</sup> First put forward a dozen years ago,<sup>120</sup> this intermediate position has so far received little attention among arbitration aficionados, perhaps due to lack of entertainment value as compared with more extreme alternatives. At least one author, however, takes the view that the Amsterdam

<sup>114</sup> The theme is further explored in Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2008); English version published as *Legal Theory of International Arbitration* (2010). See also Emmanuel Gaillard, *The Representations of International Arbitration*, 1 J Int'l Disp. Settlement 271 (2010).

<sup>115</sup> See e.g. Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9 ICC Int'l Ct. Arb. Bull. 16 (No. 2, 1998).

<sup>116</sup> *Yukos Capital Sarl v. OAO Rosneft*, Court of Appeal of Amsterdam (Enterprise Division), 28 April 2009, LJN BI2451 § 3.10. The case implicated loan agreements between Yukos Capital as lender and OJSC Yuganskneftgas as borrower concluded at the time when both Yukos Capital and Yuganskneftgas were part of the Yukos group. The underlying dispute derived from a Russian oil company once controlled by Russian oligarch Mikhail Khodorkovsky until his imprisonment after a bankruptcy and tax assessment which some commentators suggest was manufactured for political reasons.

<sup>117</sup> See e.g. Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9(1) ICC Bulletin 14 (1998).

<sup>118</sup> Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia, Case Comment on Court of Appeal of Amsterdam 28 April 2009*, 27(2) J. Int'l Arb 189 (2010).

<sup>119</sup> For an illustration of an annulment lacking procedural integrity, one might point to the underlying South African case implicated by the enforcement proceedings in *Telecordia Tech. Inc. v. Telkom SA Ltd.*, 458 F. 3d 172 (3rd Cir. 2006). An award in an ICC arbitration, rendered in South Africa against a South African company, had been vacated by a South African judge who refused to allow the ICC to appoint a new and neutral tribunal. Instead, the vacating judge constituted a new arbitral tribunal composed of three retired South African judges nominated by the losing South African party.

<sup>120</sup> William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805 (1999).





court in the *Yukos* case adopted this position.<sup>121</sup> Moreover, the American Law Institute now advances a similar approach, suggesting in commentary that set-aside awards may be recognized where there are “justifiable doubts about the integrity or independence of the set-aside court with respect to the judgment in question.”<sup>122</sup>

### G. Conclusion: Why Maturity Matters

Arbitrators are individuals to whom others entrust their wealth and welfare, often in an international context when neither side wants to end up in the other’s home court. By providing a relatively neutral adjudicatory mechanism, arbitration promotes the type of commercial and investment reliability that strengthens cross-border economic cooperation. Without a trustworthy arbitral process, many transactions will either remain unconsummated or be concluded at higher costs to reflect the absence of an adequate way to vindicate rights.

The continued appeal of arbitration, however, depends in large measure on finding a delicate balance among accuracy, fairness and efficiency, while at the same time providing confidence in award enforceability.

No easy fix can be expected in the search for a process which is reliable and just, as well as quick and cheap. Yet the quest for balance continues even if a perfect equilibrium remains elusive.

The needed spirit of diligence might be illustrated by an incident two hundred and thirty years ago on a day when the skies over New England turned inky black right in the middle of the day. Historians differ on its cause, whether a solar eclipse or a volcanic eruption. The people of that time, however, feared the dramatic darkness as a sign that the Day of Judgment had arrived. Some legislators at the Connecticut General Assembly proposed adjournment.

One man refused to follow the general panic. Colonel Abraham Davenport, a devout Puritan, admitted he did not know whether or not the world was about to end. He reasoned, however, that only two possibilities presented themselves. If the end of the world had not come, there was no need to close debate. In the alternative, if the Day of Judgment was in fact at hand, then Colonel Davenport wanted his Creator, the Lord Almighty, to find him faithful at his post. So he proposed that someone fetch candles, to bring more light that work might continue. The speech carried the Assembly.

That same aspiration, to bring more light that work may continue, commends itself to the study of arbitration today, just as it did to civic life two centuries ago. That ambition advances through lively debate and dedicated scholarship, fostered by the worldwide arbitral community. Step by step, international dispute resolution thus moves forward to an abundant harvest.

<sup>121</sup> Lisa Bench Nieuwveld, *Yukos v. Rosneft: The Dutch Courts find that Exceptional Circumstances Exist*, (11 February 2010), available at <<http://www.kluwerarbitrationblog.com>>.

<sup>122</sup> ALI Restatement (Third) of the U.S. Law of International Commercial Arbitration, § 5–12 Tentative Draft, September 2010. Comment “d” provides, “In extraordinary circumstance, an award that has been set aside may also be recognized or enforced . . . when it is shown that the set-aside court knowingly and egregiously departed from the rules governing the set-aside in that jurisdiction [or] substantial and justifiable doubts [exist] about the integrity or independence of the rendering court with respect to the judgment in question.”



