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GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF ARBITRATION AFTER ZF AUTOMOTIVE

by Michael Arada Greenop and Augusto García Sanjur

I. INTRODUCTION

Evidence gathering is critical to success in international arbitration. The more relevant documentary evidence a party has access to, the better positioned its legal team will be to assess the strength of its claims and establish the elements necessary for that party to succeed in its claims.

Commencing an arbitration is an important strategic decision which involves risks and costs. Before doing so, a party should carefully consider the prospects of success and the potential risks of failing, including any risk of counterclaims and liability for costs. This involves a detailed assessment of the factual and legal basis for a claim. In doing so, a party will need to identify what documentary evidence is available to support its claim, and what additional evidence might be required.

The challenge is that important evidence is sometimes outside of the parties' reach. In international arbitration, parties can face difficulties whilst obtaining or compelling the production of evidence, especially where the seat of arbitration is in a jurisdiction other than where the evidence is located. Part of the difficulty is that arbitral tribunals do not have the coercive means to force a party to produce documents or evidence in the same way that a court might. It is doubtful whether a tribunal can enforce a disclosure order against a third party, because it has no jurisdiction over third parties: The parties' agreement to arbitrate creates *inter partes* rights and obligations but does not generally bind third parties to the arbitration. Instead, a tribunal's powers are typically limited to encouraging or urging a third party to assist voluntarily. Further, it is now generally accepted in international arbitration that disclosure should be limited. For these reasons, international litigants can face

difficulty obtaining evidence for use in international arbitration proceedings.

So what tools are available to parties involved in international arbitration proceedings? Until recently, the United States (US) left the door open for procuring evidence from persons located in its territory in support of foreign arbitral proceedings via Section 1782 of Title 28 of the US Code ("Section 1782"). Section 1782 allows interested parties to a foreign proceeding to seek an order for production of a document or testimony from a person or entity in aid of the proceeding before a foreign or international tribunal. This enables parties to strategically collect evidence before commencing an arbitration, as well as during ongoing proceedings. However, it resulted in a controversy as to whether it was right for US domestic courts to allocate resources in support of private foreign arbitrations. It also raised the issue as to whether it had the counterproductive effect of undermining the efficiency of international arbitration if parties ended up fighting over burdensome discovery requests in a foreign jurisdiction.

In *ZF Automotive US, Inc. v. Luxshare, Ltd.* ("*ZF Automotive*"),[1] the US Supreme Court addressed the issue as to whether Section 1782 includes within its scope arbitral tribunals formed by a commercial arbitration agreement and arbitral tribunals constituted under the United National Commission of International Trade Law (UNCITRAL) Rules in accordance with a Bilateral Investment Treaty (BIT). The Supreme Court unanimously decided that it does not. At the time the judgment was rendered, there were suggestions that the door could still be open in relation to arbitrations under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"). However, subsequent to *ZF Automotive*, courts in the US shut that door too.

This article considers the implications of *ZF Automotive* for parties attempting to gather evidence for use in international arbitrations. It also aims to provide practical guidance on a range of tools that remain available to parties, especially from national courts located in jurisdictions other than the arbitral seat. Section II begins by describing the legislative and judicial evolution of Section 1782. Section III covers the

[1] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (U.S. 2022).

circuit split that Section 1782 gave rise to in relation to international arbitrations. It then outlines the use of Section 1782 in international practice before addressing the US Supreme Court's decision in *ZF Automotive*. In doing so, it also analyzes the US court decisions issued post-*ZF Automotive*, which have rejected the argument that International Centre for Settlement of Investment Disputes (ICSID) arbitrations fall within Section 1782's scope, and considers whether procedures before a Multilateral Investment Court ("MIC") may qualify. Section IV considers some of the tools that remain available to international litigants to collect evidence from the US and other jurisdictions for use in international arbitration proceedings. In particular, it analyzes the 2020 IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), selection of arbitral seats, international conventions, and recourse to national courts, as well as other special mechanisms to gather evidence.

The article concludes by addressing the concern in US courts that Section 1782 enabled parties to international arbitration proceedings to request evidence without the pre-authorization of an arbitral tribunal. This was said to have caused international arbitration proceedings to have an advantage over domestic ones when it came to the issue of evidence gathering from foreign jurisdictions. This was perceived as leading to a situation of a lack of uniformity. By way of a solution to this, this article explains that the typically "pro-arbitration" jurisdictions require the arbitral tribunal's consent before seeking assistance from a national court (except in the case of an interim measure that necessitates a degree of urgency). This approach could provide a blueprint for the US and other jurisdictions to follow in order to achieve greater uniformity.

II. EVOLUTION OF SECTION 1782

A. *Historical Background*

By way of a brief historical overview, the US Congress first began providing assistance to foreign institutions in the form of letters rogatory as early as 1855.[2]

[2] LUCAS V. M. BENTO, THE GLOBALIZATION OF DISCOVERY: THE LAW AND PRACTICE UNDER 28 U.S.C. § 1782, 31 (2019); Rebeca Mosquera, *La Obtención De Evidencia Bajo La Sección 1782 Del Título 28 Del Código De Los Estados Unidos Y Su Uso En Disputas Internacionales* in MÉTODOS ALTERNOS DE SOLUCIÓN DE CONFLICTOS EN PANAMÁ 152 (2016).

However, US assistance to foreign proceedings finds its origins in a 1930 dispute submitted to an international commission between the US and Canada involving a ship sinking. At the time, there was no mechanism available to the international commission to compel testimony of witnesses. The US Congress therefore approved a statute "authorizing commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records and to punish for contempt".[3]

In 1948, the US Congress expanded its support to international proceedings and enacted Section 1782. This section eliminated the requirement for the requesting party to be a country participating in the proceedings.[4] However, it did not include the possibility to request tangible documents.[5] In 1949, the scope of the statute was expanded by replacing the term "civil action" with "judicial proceeding" in order to also capture criminal investigations.[6]

Following an upsurge in international commerce and the advent of several issues relating to evidence gathering in international litigation, the US Congress in 1958 decided to amend Section 1782.[7] The commission responsible for drafting worked closely with the Columbia Law Project on International Procedure, led by Professor Hans Smit.[8] The text of the new Section 1782 was enacted in 1964.

The most significant changes to Section 1782 included: (i) removal of the need for a proceeding to be pending or have commenced in order to qualify; and (ii) the inclusion of administrative and quasi-judicial proceedings, as well as investigative magistrates.[9] Further, the statute also allowed the production of tangible documents, whereas in the past it only allowed parties to request oral depositions.[10]

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[3] Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 COLUM. L. REV. 1264, 1264 (1962); *see also* Mosquera (n 2) 153-154.

[4] Bento, *supra* note 2, at 32.

[5] *Id.* at 37.

[6] Mosquera, *supra* note 2, at 153-54.

[7] Bento, *supra* note 2, at 33-35.

[8] *Id.* at 35.

[9] *See* S. REP. NO. 88-1580, at 7 (1964).

[10] *Id.* The section was last reformed in 1996 that added "criminal investigations conducted before formal accusation" to the text of the statute.

One year later, in 1965, Professor Hans Smit, the principal drafter of the amendments to Section 1782, published an article, *International Litigation under the United States Code*, in which he suggested that the term "tribunal" as used in Section 1782 should be understood as including arbitral tribunals.[11]

B. *Text of the Current Section 1782*

By way of historical background, the subsections that follow explore some of the concerns raised regarding the Section 1782 criteria in the context of arbitration proceedings and will provide more context when compared to other jurisdictions. These concerns may reappear when Section 1782 requests reach US courts.

Since its inception, Section 1782's principal function has been to gather evidence in the format of "US style discovery".[12] However, Section 1782 does not provide for full discovery as it is understood in the context of domestic US litigation. Rather, unlike the US discovery process where litigants conduct discovery without court intervention, evidence gathering under Section 1782 is authorized and controlled by the courts.[13]

Section 1782 prescribes certain elements that need to be complied with before a court will be able to grant an application. Specifically, Section 1782 provides that "an interested person"[14] may request a district court of "the district in which a person resides or is found" to order that person "to give his testimony or statement" or "to produce a document or other thing" for use "in a proceeding in a foreign or international tribunal". These elements are discussed further below.

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[11] Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965).

[12] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247-49 (2004); *see also generally* S. I. Strong, *Discovery under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 370-72 (2013).

[13] *See* John Fellas, *Obtaining Evidence From Persons or Entities In The United States For Use In An International Arbitration Proceeding In Another Country*, 12(1) INT'L J. OF ARAB ARB. 153, 166 (2020); PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION – DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 155 (2nd ed. 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214-15 (4th Cir. 2020); Caroline Simson, *Questions Remain About Powerful Foreign Discovery Tool*, LAW360 (Jun. 14, 2022), https://www.law360.com/articles/1502698/questions-remain-about-powerful-foreign-discovery-tool.

[14] The request can also be made by the foreign or international tribunal. However, we analyze whether tribunals of an international commercial or ad hoc arbitration under the UNCITRAL Rules in accordance with a BIT are covered by Section 1782 in Section III below.

1. An Interested Person

A Section 1782 request may be submitted *ex parte* by a party to the proceeding or by a non-party. The Supreme Court has expressed its view that an "interested person" is someone that "merely possess[es] a reasonable interest in obtaining the assistance".[15]

2. The District in Which a Person Resides or is Found

A Section 1782 request must be submitted to the district court of the relevant district in which the individual or company from whom discovery is sought resides regardless if it is a party or not to the proceedings.[16] For an individual, it is the place of residence or business.[17] In the case of a corporation, some district courts have decided that they either have general jurisdiction according to the place where a corporation is at home (where it was incorporated or where it has its principal place of business) or specific jurisdiction (in the place where its activities are continuous and systematic).[18]

Additionally, a Section 1782 request may be filed in the district where an individual may be "found" – meaning that a district court will have jurisdiction even if the relevant person is merely in transit within its territorial district.[19] For corporations conducting business in multiple states, the court will determine whether such a corporation can be "found" within a particular district and if it can be a target of service of process. This exercise involves examining the nexus or connection between the corporation and the forum where the application was made to determine if the connection is continuous and systematic.[20]

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[15] *Intel*, 542 U.S. at 257.

[16] *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999).

[17] *See* In re: Application of Gazprom Latin Am. Servicios, C.A., 2016 WL 3654590, at *10 (S.D. Tex. July 6, 2016); In re Hallmark Cap. Corp., 534 F. Supp. 2d 951, 952 (D. Minn. 2007); In re Escallon, 323 F. Supp. 3d 552, 557 (S.D.N.Y. 2018).

[18] Bento, *supra* note 2, at 87-91.

[19] *See* In re Edelman, 295 F.3d 171, 180 (2d Cir. 2002); In re Eli Lilly & Co., No. JKB-20-0150, 2022 WL 152376, at *3 (E.D. Va. Jan. 18, 2022).

[20] *See* Fellas, *supra* note 13, at 158 (discussing In re Del Valle Ruiz, 939 F.3d 520, 533 (2d Cir. 2019); *In re Eli Lilly*, 2022 WL 152376, at *8.

3. To Give His Testimony or Statement

A district court may subpoena an individual to render testimony through a deposition. Section 1782 follows the Federal Rules of Civil Procedure. Depositions in the US are conducted by the applicant's attorneys while the attorneys of the deposed individual may also be present during the deposition.[21]

4. To Produce a Document or Other Thing

A district court may also require the requested target to produce documents. This aspect of Section 1782 is significant because of the practice by international companies of storing documents within the servers of third parties often located in the US,[22] such as cloud computing providers (e.g., Google, Microsoft, AWS, and others).

5. Use in a Proceeding

The proceeding need not have commenced, nor must it be imminent (only within "reasonable contemplation").[23] As the application to a court may be filed even before the arbitral tribunal has been constituted, scholars expressed concerns that Section 1782 could lead to fishing expeditions[24] that will be outside of the arbitral tribunal's control. To avoid this outcome, the US Supreme Court decided that Section 1782 requests that would be unduly intrusive or burdensome could be trimmed or even

[21] H. M. Elul & R. E. Mosquera, *28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings*, *in* INTERNATIONAL ARBITRATION IN THE UNITED STATES 393, 394 (Laurence Shore et al. eds., 2017).

[22] *See* GOOGLE DATA CENTERS, https://www.google.com/about/datacenters/locations/ (last visited Jul. 28, 2023); AWS GLOBAL INFRASTRUCTURE, AWS GLOBAL INFRASTRUCTURE MAP, https://aws.amazon.com/about-aws/global-infrastructure/ (last visited Jul. 28, 2023); MICROSOFT AZURE, AZURE GEOGRAPHIES, https://azure.microsoft.com/en-gb/global-infrastructure/geographies/#customer-stories (last visited Jul. 28, 2023); *see also* In re Grupo Unidos Por El Canal, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *9 (D. Colo. Apr. 17, 2015). Case law has expressed the view that there needs to be a nexus with the digital evidence and the United States for a Section 1782 request for digital evidence located in the United States to be successful. In re Kreke Immobilien KG, No. 13 Misc. 110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013).

[23] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004); *see also* In re Hattori, No. 21-MC-80236-TSH, 2021 WL 4804375, at *3 (N.D. Cal. Oct. 14, 2021) ("Applicant has shown a 'reasonable contemplation' of litigation because the discovery sought is for purposes of a civil lawsuit to be filed in Japan, and for a criminal complaint to be filed in Japan that will initiate a criminal investigation."); In re Med. Corp. Seishinkai, No. 21-mc-80160-SVK, 2021 WL 3514072, at *2 (N.D. Cal. Aug. 10, 2021) ("Applicant requests this discovery for use in a civil action that it intends to file in Japan once it learns the identity of the Google account users responsible for the relevant postings.").

[24] Giorgio Sassine, *There Should be an Answer to § 1782(a) – as to whether its scope includes private arbitral tribunals*,'3(1) MCGILL J. OF DISP. RES. 1, 32 (2016).

rejected by the court determining the application.[25]

The fact that Section 1782 enables an interested person to request discovery from a court without the permission of the arbitral tribunal or even prior to the tribunal being constituted has been a controversial issue. This approach is said to conflict with the notion that, in accordance with the arbitration agreement, the arbitral tribunal, and not a court, should direct and control the evidentiary procedure. Some scholars have suggested that, if a litigant acts unilaterally in this way, it may circumvent the arbitration agreement,[26] while others do not share this view.[27]

Arguing in favour of the use of such tools prior to the commencement of an arbitration, scholars have suggested that there may be advantages to pre-arbitration production of evidence, such as helping the parties reach a settlement rather than commencing protracted arbitration proceedings.[28]

6. In a Foreign or International Tribunal

This statutory element is the most debated issue in relation to Section 1782 – i.e., whether an arbitral tribunal appointed by the parties qualifies as a "foreign or international tribunal". This discussion is addressed below in Section III.

C. *Intel Test*

Even if all of the elements required by the text of Section 1782 are satisfied, a district court can exercise its discretion to either grant or decline the application.[29] In 2004, the US Supreme Court provided four factors to be considered when deciding on a Section 1782 request, discussed in turn below.[30]

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[25] *See Intel*, 542 U.S. at 245; In re Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 730 (6th Cir. 2019).

[26] FRANZ T. SCHWARZ AND CHRISTIAN W, KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA ¶¶ 20-256 (2009).

[27] TOBIAS ZUBERBÜHLER ET AL., IBA RULES OF EVIDENCE: COMMENTARY ON THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 91 (2d ed. 2022) ("Art. 3(9) [of the IBA Rules on Taking of Evidence] does not expressly prohibit parties from involving a local court without first seeking leave from arbitral tribunal.").

[28] Martinez-Fraga, *supra* note 13, at 155, 164.

[29] In re Google Inc., No. 14-mc-80333-DMR, 2014 WL 7146994, at *2 (N.D. Cal. Dec. 15, 2014).

[30] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004); In Re Application of Pola Mar., Ltd., No. CV 416-333, 2017 WL 3714032, at *3 (S.D. Ga. Aug. 29, 2017).

1. Whether the Person From Whom Discovery is Sought is a Participant in the Foreign Proceeding

The Supreme Court expressed the view that most foreign tribunals have jurisdiction over the parties appearing before them. Accordingly, arbitral tribunals may order the parties to produce evidence. On the other hand, tribunals do not usually have jurisdiction over non-parties to the proceedings, and it is not possible to order discovery from such non-parties.[31] Accordingly, if the requested target of the order is not a party to the dispute, this will tend to favor the application being granted.

2. The Nature of the Foreign Tribunal, the Character of the Proceedings Underway Abroad, and the Receptivity of the Foreign Government or the Court or Agency Abroad to US Federal-Court Judicial Assistance

A court shall also assess whether the relevant foreign or international tribunal will accept the evidence requested by the Section 1782 application. In this regard, "the party resisting discovery must point to 'authoritative proof' that the foreign tribunal would reject the evidence sought".[32] Such a standard is generally met where: "a representative of the foreign sovereign or the foreign tribunal itself has made clear its opposition to the petitioner's request";[33] "the parties arrived at the foreign tribunal with 'bargained-for expectations' based on a deliberative process concerning the governing procedural process and discovery rule";[34] and "the foreign proceedings . . . are the type that would otherwise bar petitioners from presenting evidence and engaging in discovery" (e.g., evidence in criminal proceedings that are under the responsibility of public authorities).[35]

3. Whether the Section 1782 Request Conceals an Attempt to Circumvent Foreign Proof-Gathering Restriction or Other Policies of a Foreign Country or the US

A district court may reject the Section 1782 request when the party opposing the discovery proves that the foreign tribunal has a "definitive determination" to not

[31] *Intel*, 542 U.S. at 244; *In re Google Inc*., 2014 WL 7146994 at *3.

[32] In re Veiga, 746 F. Supp. 2d 8, 23-24 (D.D.C. 2010).

[33] In re Barnwell Enterprises Ltd., 265 F. Supp. 3d 1, 10-11 (D.D.C. 2017).

[34] In re Application of Caratube Int'l Oil Co.., LLP, 730 F. Supp. 2d 101, 106; *In re Barnwell Enterprises*, 265 F. Supp. 3d at 11.

[35] Lazaridis v. Int'l Ctr. for Missing & Exploited Child., Inc., 760 F. Supp. 2d 109, 114 (D.D.C. 2011).

accept the evidence obtained in discovery.[36] For instance, when the parties try to circumvent the arbitration agreement or the applicable law – e.g., when a Section 1782 application constitutes an attempt to circumvent the arbitral tribunal's control over the arbitration's procedure.[37] Nevertheless, it is not a requirement for the evidence sought to be discoverable in the foreign country for a Section 1782 application to be granted.[38]

4. Whether the Request is Otherwise Unduly Intrusive or Burdensome

This factor protects the requested party from overly broad discovery requests that may become fishing expeditions.[39] It also addresses situations in which the requested information includes material that is protected by attorney-client privilege or attorney work-product.[40]

In summary, this section has described the historical evolution of Section 1782 and the key elements that must be satisfied. Assuming the elements are met in a particular case, a district court has the discretion to grant the request and will be guided by the *Intel* test. It is important to note that neither the statutory elements of Section 1782 nor the *Intel* test require exceptional circumstances or a degree of urgency for a party to seek assistance from a court before the arbitral tribunal is formed.[41] This differs from other jurisdictions that only allow a party to directly request assistance from a court through an interim measure which involves a degree of urgency.

The next section will address the circuit split regarding the availability of Section 1782, as well as the decision in *ZF Automotive*, in which the Supreme Court held that the Section 1782 procedure is not available for international commercial and ad hoc

[36] In re Chevron Corp., 633 F.3d 153, 163 (3d Cir. 2011).

[37] *In re Application of Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d at 107.

[38] *In re Chevron Corp*, 633 F.3d at 163; In re Hallmark Cap. Corp., 534 F. Supp. 2d 951, 958 (D. Minn. 2007).

[39] In re Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 730 (6th Cir. 2019).

[40] In re Application for an Order Pursuant to 28 U.S.C. § 1782, 286 F. Supp. 3d 1, 6-7 (D.D.C. 2017).

[41] Several US courts, based on section 7 of the Federal Arbitration Act (FAA), have held that a court is allowed to grant a request for evidence gathering before an arbitration has started. These requests are similar to provisional measures, as they require proof of an exceptional circumstance. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2580-81 (3d ed. 2021).

arbitration under the UNCITRAL Rules according to a BIT. The analysis will then turn to the post-*ZF Automotive* judgments that have stated that ICSID tribunals are not included within the scope of Section 1782. Additionally, it will analyze whether proceedings before a MIC might be included within the scope of Section 1782.

III. DEBATE AND USE OF SECTION 1782

A. *Circuit Split*

Between 1964 and 2004, the accepted rule was that Section 1782 did not apply to arbitral tribunals.[42] One of the most exemplary decisions analyzing this issue was the judgment in *NBC v. Bear Stearns*, issued by the United States Court of Appeals for the Second Circuit.[43]

1. *NBC v. Bear Stearns & Co.*

The US broadcasting company NBC had a dispute with the Mexican television channel TV Azteca. After NBC's claim was registered with the International Chamber of Commerce (ICC) but before the tribunal was appointed, NBC requested financial documents of TV Azteca that were in possession of different banks located in the US, including Bear Stearns. The US District Court for the Southern District of New York quashed the requests, and NBC appealed.

The question before the Court of Appeals was whether an ICC arbitration, seated in Mexico, was a proceeding in a foreign or international tribunal as those words are used in Section 1782. The Second Circuit answered the question in the negative.

The starting point of the court's analysis was that the term "foreign or international tribunals" neither unambiguously excluded nor included private arbitral panels. Accordingly, the Second Circuit looked to the legislative history and purpose of Section 1782 to determine the meaning of the term "foreign or international tribunals". In doing so, the Second Circuit decided to adopt a restrictive view of the term such that arbitral tribunals of this type were not included within the scope of

[42] *See* Strong, *supra* note 12, at 302; Fellas, *supra* note 13, at 155; La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008) ("Prior to 2004, the prevailing view was that § 1782 did not encompass private, international arbitration proceedings.").

[43] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).

the section.[44] According to the Second Circuit, the legislative history showed that the revisers in 1964 "had in mind only governmental authorities, such as administrative or investigative courts, acting as state instrumentalities or within the authority of the state."[45] The court concluded that when the statute mentions an international tribunal, it only refers to intergovernmental tribunals as this term derived from provisions referring to the US-German Mixed Claims Commission.[46] The Second Circuit noted that "those international arbitrations were intergovernmental, not private arbitrations."[47]

The approach taken by the Second Circuit in *NBC* was later followed by other courts.[48] However, in 2004, the Supreme Court in *Intel* opened the door of Section 1782 to international arbitration proceedings.

2. *Intel Corporation v. Advanced Micro Devices, Inc.*

In *Intel*,[49] the company Advanced Micro Devices ("AMD") filed a complaint against Intel with the European Commission. To support its complaint, AMD applied under Section 1782 to the US District Court for the Northern District of California for an order requiring Intel to produce potentially relevant documents.

Although the case was not related to an international arbitration, the US Supreme Court appeared to invite the application of Section 1782 to arbitral tribunals.[50] The Supreme Court had to decide whether the European Commission acted as a tribunal for purposes of Section 1782. The Supreme Court decided in the affirmative. Importantly for international arbitration, the Supreme Court's judgment cited Professor Hans Smit's article of 1965. In this article, Professor Smit expressed his view

[44] *See* Lawrence Shore, *State Courts and Document Production*, *in* 6 WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION: NEW ISSUES AND TENDENCIES, DOSSIERS OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 61-62 (Teresa Giovannini & Alexis Mourre eds., 2009).

[45] *Nat'l Broad. Co.*, 165 F.3d at189.

[46] *Id.*

[47] *Id. See also* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

[48] *See* Strong, *supra* note 12, at 302 ("Initially, U.S. courts opposed the use of section 1782 in arbitration-related matters."); Fellas, *supra* note 13, at 155.

[49] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

[50] *See* Shore, *supra* note 44, at 63.

that the term "tribunal" in Section 1782 included arbitral tribunals.[51]

It should be noted that the Supreme Court stated that the authority to grant a Section 1782 application did not mean that the district court was required to do so. Instead, district courts were expected to exercise their discretion, considering the factors discussed above.

Post-*Intel*, Section 1782 placed the US in somewhat of an "outlier" position in terms of the level of national court assistance available to foreign arbitral tribunals and parties for the purpose of evidence gathering.[52] This was because Section 1782 allowed interested persons to circumvent the arbitral tribunal's control of the process when seeking the assistance of a national court to gather evidence.

After the *Intel* decision, US federal courts interpreted this judgment inconsistently in relation to the question as to whether Section 1782 includes arbitral tribunals. Whereas the Fourth and Sixth Circuits included arbitral tribunals within the scope of Section 1782,[53] the Second, Fifth, and Seventh Circuits decided to exclude them.[54]

3. *Servotronics, Inc. v. Boeing Co. and Servotronics, Inc. v. Rolls-Royce PLC*

The circuit split in relation to Section 1782 can be illustrated by the *Servotronics* cases. In a case before the Court of Appeals for the Fourth Circuit, Servotronics filed an *ex parte* request to obtain testimony from three Boeing employees residing in South Carolina to be used in a London-seated arbitration administered by the

[51] *Intel*, 542 U.S. at 258.

[52] *See* Shore, *supra* note 44, at 66-67.

[53] *See* Linda H. Martin et al. , *The Circuit Split on the Scope of Section 1782 Discovery in the United States: Will it Ever Get Resolved?*, KLUWER ARBITRATION BLOG (Sept. 14, 2021), https://arbitrationblog.kluwerarbitration.com/2021/09/14/the-circuit-split-on-the-scope-of-section-1782-discovery-in-the-united-states-will-it-ever-get-resolved/; Abdul Latif Jameel Transp. Co. v. Fedex Corp., 939 F.3d 710 (6th Cir. 2019); In re P.T.C. Prod. & Trading Co., AG, No. 1:20-mc-00032-MR-WCM, 2020 WL 7318100, at *2 (W.D.N.C. Dec. 11, 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 211 (4th Cir. 2020).

[54] *See* Martin et al., *supra* note 53; In re Dubey, 949 F. Supp. 2d 990, 995 (C.D. Cal. 2013); In re Arb. between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009); La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008).

Chartered Institute of Arbitrators.[55] The Court of Appeals granted the request after indicating that Section 1782 reflected a purposeful decision by Congress to "authorize U.S. district courts to provide assistance to foreign tribunals as a matter of public policy".[56]

However, in a separate application involving the same facts, Servotronics filed an *ex parte* request to obtain documents from Boeing's headquarters in Illinois.[57] The Court of Appeals for the Seventh Circuit took a different approach and rejected the request. It found that Section 1782 does not include arbitral tribunals and that, if arbitral tribunals were included, this would conflict with the Federal Arbitration Act (FAA). The court pointed out that Section 1782 would confer greater rights on international arbitration tribunals than to domestic ones. In particular, subject to Chapter 1 of the FAA, only the arbitral tribunal may request a court to order the production of documents or issue subpoenas in domestic arbitrations, while Section 1782 allows a party to the proceedings (and even an interested non-party) to petition a court to do so unilaterally.[58]

Due to this circuit split, whether the targets of the request were located or found in a circuit with a favorable interpretation of the statute became an important consideration for applicants to determine the viability of a Section 1782.[59] As the Second Circuit did not include arbitral tribunals within the scope of Section 1782, the targets that resided or were found in New York, Vermont and Connecticut would not be compelled to produce evidence.[60] The same situation would occur in relation to

[55] *Servotronics, v. Boeing*, 954 F.3d at 211.

[56] *Id.* at 215.

[57] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 695 (7th Cir. 2020).

[58] *Id.*

[59] *See* Simson, *supra* note 13.

[60] *See* Fellas, *supra* note 13, at 166. In one case, the Second Circuit held that a private arbitration was considered as a foreign tribunal. In re Ex parte Application of Kleimar N.V., 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) ("The Court also finds that the LMAA is a 'foreign tribunal' within Section 1782.") Then, in a later judgment the Second Circuit held that NBC still constituted good law. In re Petrobras Sec. Litig., 393 F. Supp. 3d 376, 385 (S.D.N.Y. 2019).

targets located in the Fifth Circuit (i.e. Mississippi, Louisiana, and Texas)[61] and the Seventh Circuit (i.e. Indiana, Illinois, and Wisconsin).[62]

The circuits where Section 1782 requests in relation to arbitration were successful included the Fourth Circuit (i.e. West Virginia, Virginia, Maryland, North Carolina and South Carolina) and the Sixth Circuit (i.e. Ohio, Michigan, Tennessee and Kentucky).[63]

B. *Use of Section 1782 in International Practice*

Section 1782 has been used in relation to international arbitrations seated in a multitude of countries.[64] However, Section 1782 requests in connection with international arbitration proceedings have been criticized for having given rise to widespread satellite or separate litigations on discovery issues.[65] These satellite litigations were said to have damaged the purpose of arbitration as a "one-stop shop" for parties to resolve their disputes. Further, these satellite litigations could jeopardize confidentiality as requests for evidence in public courts may result in the dispute becoming public knowledge.

The fact that a subject could be compelled to produce evidence located in the US and the foreign counterparty did not have the same obligation – because of the evidentiary rules of the court where its documents or information were located – was

[61] *See* La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008).

[62] *See* Eric van Ginkel, *How Should the United States Supreme Court Have Decided in the Controversy over* 28 U.S.C. § 1782(*a*)?, KLUWER ARBITRATION BLOG, (July 6, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/14/how-should-the-united-states-supreme-court-have-decided-in-the-controversy-over-28-u-s-c-%C2%A7-1782a/.

[63] *See* Fellas, *supra* note 13, at 166.

[64] *See* Aymeric Discours & Nisrin Abelin, *France: Foreign Discovery Under 28 US Code Section 1782 In French Proceedings*, MONDAQ (Dec. 15, 2016), https://www.mondaq.com/france/civil-law/553304/foreign-discovery-under-28-us-code-section-1782-in-french-proceedings; Yanbai Andrea Wang, *Exporting American Discovery*, 87 UNIV. CHICAGO L. REV. 2089, 2115 (2020) ("[Between 2005 and 2017] a steady number are for use in commercial arbitrations (approximately 9.9 percent) . . . and investor state arbitrations (approximately 2.5 percent)."); Louis Christe, *The Use of 28 U.S.C. § 1782 in Swiss Seated Arbitrations*, 39(3) ASA BULL. 521, 533-44 (2021); Lawrence S. Schaner & Brian S. Scarbrough, *The Arbitration Procedure – U.S. Discovery in Aid of International Arbitration and Litigation: The Expanded Role of 28 U.S.C. § 1782*, AUSTRIAN Y.B. INT'L ARB. 299, 299, 305-14 (2008); Karsten Faulhaber & Ilka H. Beimel, *The Best of Both Worlds? The Power of 28 U.S.C. § 1782 in International Commercial Arbitration*, 20(1) SCHIEDSVZ|GERMAN ARB. J. 1, 2 (2022); Calvin A. Hamilton, *What U.S.C. §1782 means for International Commercial Arbitrations in Spain*, 3 SPAIN ARB. REV. 23, 31-33 (2008).

[65] BORN, *supra* note 41, at 2586.

perceived as a comparative disadvantage for US companies involved in international arbitration proceedings.[66] It was also a risk for international companies with significant information or data stored within the US on third-party servers. For instance, as mentioned earlier, due to the use of cloud computing for international companies to store their information on third-party servers, certain documents could be subject to a Section 1782 request.[67] The benefits of using US cloud services to store data made companies vulnerable to requests for discovery under Section 1782. If companies stored their data on cloud services providers located in US territory, then their counterparties could request a district court to order the cloud service company to produce documents without the pre-authorization of the arbitral tribunal or even before it was formed.

The circuit split created the need for certainty in the international arbitration community. Scholars expressed the need for a pronouncement from the Supreme Court as to whether Section 1782 applied to international arbitration.[68] The call was answered by the Supreme Court in June 2022, as discussed below.

C. *ZF Automotive US, Inc. v. Luxshare, Ltd.*

In *ZF Automotive*, the Supreme Court resolved the circuit split and decided that private adjudicatory bodies (i.e., arbitral tribunals) constituted for an international commercial arbitration and under the UNCITRAL Rules pursuant to a BIT did not count as "foreign or international tribunals" for the purposes of Section 1782. The Supreme Court consolidated two cases where this issue was debated: the first case was related to an international commercial arbitration tribunal, and the second related to an investment tribunal.

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[66] *See* Anthony B. Ullman & Diora M. Ziyaeva, *Section 1782: can arbitration parties come to the US to obtain information located abroad?*, 2023 ARB. REV. OF THE AMS. 2023, 148-50 (2023), *available at* https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2023/article/section-1782-can-arbitration-parties-come-the-us-obtain-information-located-abroad.

[67] *See generally* Christophe Guibert de Bruet & Johannes Landbrecht, *Cloud computing and US-style discovery: new challenges for European companies*, 32 ARB. INT'L 297 (2016); Gabriela B. Clark, *Interpretative Challenges of 28 U.S.C. § 1782 in the Aftermath of* Intel Corp. v. Advanced Micro Devices, Inc., 53 VAND. L. REV. 1377 (2021).

[68] *See* Fellas, *supra* note 13, at 169; Martin et al., *supra* note 53.

The first case, between ZF Automotive US, Inc. (a company located in Michigan) and Luxshare, Ltd. (a company located in Hong Kong), related to a contract providing for arbitration before the German Institution of Arbitration ("DIS"). Whilst preparing the DIS arbitration, Luxshare filed an *ex parte* request to the US District Court for the Eastern District of Michigan[69] seeking evidence from ZF Automotive and two of its senior officers. The request was granted. ZF Automotive then requested a stay from the Court of Appeals for the Sixth Circuit, which was rejected. However, the Supreme Court overturned that decision and granted the stay and judicial review of the decision.

The second case related to a dispute between Lithuania and a Russian investor who argued that Lithuania expropriated his investment in a Lithuanian bank. Then, a Russian corporation, The Fund for Protection of Investors' Rights in Foreign States, became the investor's assignee. Based on the BIT between Lithuania and Russia, the Fund initiated an ad hoc arbitration under the UNCITRAL Rules against Lithuania.[70] Prior to the arbitral tribunal being constituted, the Fund filed an *ex parte* request in the US District Court for the Southern District of New York. The application was granted. Even though the Second Circuit had previously rejected the notion that arbitral tribunals were included within the scope of Section 1782, it then concluded that an ad hoc panel under the UNCITRAL Rules in accordance with a BIT was "foreign or international" rather than private in nature. Thus, an ad hoc tribunal could be (and was) included within the scope of Section 1782.

The Supreme Court first analyzed whether the phrase "foreign or international tribunal" in Section 1782 included private adjudicatory bodies or only governmental

[69] The US District Court for the Eastern District of Michigan belongs to the Sixth Circuit that usually includes arbitral tribunals within the scope of Section 1782.

[70] Noah Rubins & Evgeniya Rubinina, *Investment Treaty Arbitration: Russia*, GLOBAL ARBITRATION REVIEW (last updated July 28, 2022), https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/russia (citing Fund for the Protection of Investors' Rights in Foreign States v. Lithuania, PCA Case No. 2019-48, Award (Jul. 1, 2022) (not public)). There have been different reports that have indicated that the arbitration was administered by the Permanent Court of Arbitration. For this reason and due to its similarities with the elements of an ad hoc arbitration mentioned in the decision, we consider that the US Supreme Court decision also leaves arbitrations administered by the PCA outside of the scope of Section 1782. *See id.*

or intergovernmental bodies.[71] Finding that it only included governmental or intergovernmental bodies,[72] the Supreme Court then proceeded to determine whether arbitral panels qualified as either governmental or intergovernmental.

As to the first part of its analysis, the Supreme Court indicated that if the term "tribunal" was taken in isolation that "would be a good case for including private arbitral panels."[73] However, the Supreme Court then interpreted Section 1782 based on the surrounding context.[74] The Supreme Court held that "'foreign' takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations"[75] and that "tribunal" is a word with governmental or sovereign connotations.[76] When these two are combined, they represent a tribunal belonging to a foreign nation rather than just simply "located in a foreign nation."[77]

Analyzing the term "foreign tribunal", the Supreme Court held that it is a body that follows the practice and procedures prescribed by the government that conferred authority upon it instead of a private adjudicative body created by a parties' contract.[78] The Supreme Court expressed the view that a foreign tribunal is a tribunal imbued with governmental authority by one nation and that an international tribunal is imbued with governmental authority by multiple nations.[79]

Moreover, the Supreme Court decided that according to the statutory history of Section 1782, the range of governmental and intergovernmental bodies included in Section 1782 shall be based on the principle of comity.[80] The Supreme Court asked why Congress would lend the resources of the district courts to aid purely private

[71] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022).

[72] *Id.* at 2089.

[73] *Id.* at 2086.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2087.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2088.

bodies.[81] Further, similar to the Second Circuit in *NBC*, the Supreme Court indicated that Section 1782 would conflict with the FAA approach, as it would grant greater rights to parties in international arbitrations than in domestic ones. The Supreme Court stated that Section 1782 allows a pre-arbitration request from an interested party and that the FAA only allows a request once an arbitration has commenced, and the request needs to be made by the arbitral tribunal instead of an interested party.[82]

After the Supreme Court decided that the phrase "foreign or international tribunal" in Section 1782 included only governmental or intergovernmental bodies, the Supreme Court analyzed the second question, namely whether private adjudicative bodies (such as the tribunal of the DIS arbitration) are governmental or intergovernmental.[83] The Supreme Court found the DIS tribunal not to be a governmental body since no government is involved in its creation or in setting its procedures.[84]

In the situation of the ad hoc tribunal provided for in the BIT between Lithuania and Russia, the Supreme Court indicated that the question was more complex. The Supreme Court asked whether States intended to confer governmental authority on an ad hoc panel.[85] The Supreme Court decided that an ad hoc arbitration panel does not have governmental authority, as the BIT does not in itself create the panel, and its members are not public officials or officially affiliated with Lithuania or Russia.[86] The Supreme Court held that a body does not possess governmental authority just because parties to a treaty agree to arbitrate before it.[87] The Supreme Court

[81] *Id.*

[82] *Id.*

[83] *Id.* at 2089.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 2090.

[87] *Id.* at 2090-91. *See also* Dana McGrath, *"I Can See Clearly Now the Rain Is Gone . . . " U.S. Supreme Court Definitively Holds that Section 1782 Does Not Permit Discovery Assistance from U.S. Courts for Private Foreign or International Arbitrations*, KLUWER ARBITRATION BLOG (Jun. 14, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/14/i-can-see-clearly-now-the-rain-is-gone-u-s-supreme-court-definitively-holds-that-section-1782-does-not-permit-discovery-assistance-from-u-s-courts-for-private-foreign-or-i/.

established that the main question is whether the Contracting States intended that the tribunal should exercise governmental authority.[88]

The Supreme Court decided that only governmental or intergovernmental authorities can be considered as a "foreign or international tribunal" under Section 1782. Therefore, a private adjudicative body such as a commercial arbitral tribunal or a tribunal constituted under the UNCITRAL Rules according to a BIT is not a "foreign or an international tribunal" because it does not constitute a governmental or intergovernmental authority. As such, evidence to be used in a proceeding before these arbitral tribunals cannot be obtained through Section 1782.

D. *Implications for International Arbitration*

As the judgment precluded the use of Section 1782 for commercial and ad hoc arbitrations under the UNCITRAL Rules according to a BIT, the legal community started to question whether arbitrations under the ICSID Convention and proceedings before a MIC may still fall within the scope of Section 1782 as delimited by the US Supreme Court.[89]

The judgment left the door of Section 1782 open only for cases before governmental and intergovernmental adjudicatory bodies. To determine whether an entity complies with this criterion, one must consider whether the Contracting States intended for the tribunal to exercise governmental authority.

On this topic, the Supreme Court expressed that it did not attempt to prescribe how governmental and intergovernmental bodies should be structured as they may take many forms, but it referred to the following factors which may provide guidance as to what a court will take into consideration: 1) whether the treaty itself creates the decision-making body;[90] 2) the involvement of government funding;[91] 3) official affiliation of the members of the tribunal with the Contracting Parties or any other

[88] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022).

[89] Simson, *supra* note 13.

[90] Instead of just providing for the rules of appointment as the UNCITRAL Rules.

[91] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2090 (2022).

governmental or intergovernmental entity;[92] 4) State involvement in the formation of the bodies;[93] and 5) whether the instrument indicates the place where the decision-making body will meet.[94]

1. Arbitrations under the ICSID Convention and Arbitrations under the ICSID Additional Facility Rules

The ICSID Convention is a multilateral treaty ratified by 158 parties.[95] It was created to increase and protect foreign investment while addressing a concern that national courts may have a potential bias in favour of the host States in the event of a dispute with foreign investors.[96] As a consequence, several States agreed to develop a mechanism in which the financial interests of investors in host States could be protected in an international forum.[97] The ICSID Convention created an intergovernmental centre called ICSID. Although ICSID itself does not adjudicate disputes, it provides the centre under whose authority arbitration panels may be convened to adjudicate disputes between international investors and host governments in Contracting States.[98]

The Contracting States to the ICSID Convention recognize an ICSID's tribunal power to adjudicate disputes. The Contracting States empowered ICSID tribunals to render a judgment of mandatory enforcement – an award rendered by a tribunal acting under the ICSID Convention receives the same treatment as if "it w[as] a final judgment of a court" in a State that has ratified the ICSID Convention.[99] Awards issued under the ICSID Convention are not subject to review in a Contracting State other than to confirm the authenticity of the award. On the other hand, awards

[92] *Id.*

[93] *Id.* at 2090-91.

[94] *Id.* at 2091.

[95] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[96] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION A COMMENTARY 4 (2d ed. 2009).

[97] *See* James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause: a Hindrance to Foreign Direct Investment in LDCs*, 5(1) OHIO STATE J. DISP. RES. 75, 76-80 (1989).

[98] Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96, 101 (2d Cir. 2017).

[99] ICSID Convention, *supra* note 95, art. 54; SCHREUER ET AL., *supra* note 96, at 1142-43.

where the New York Convention applies, for example non-ICSID Convention awards including the ones issued under the Additional Facility Rules or the UNCITRAL Rules, are subject to review before national courts and may be set aside or annulled based on the domestic law or the New York Convention.[100]

Owing to these types of considerations, prior to the decision on *ZF Automotive*, US courts regularly recognized ICSID tribunals as international tribunals for the purposes of Section 1782.[101] However, *ZF Automotive* appeared to have caused a paradigm shift. In two recent judgments, district courts located in New York have recognized that arbitral tribunals created by a BIT and by ICSID are not foreign or international tribunals. Thus, they are not within the scope of Section 1782.

(i) *In Re Alpene Ltd.*

In October 2022, the first judgment post-*ZF Automotive* was issued *In Re Alpene Ltd.*[102] Whilst interpreting *ZF Automotive*, the US District Court for the Eastern District of New York decided that ICSID tribunals fell outside of the scope of Section 1782.

Alpene Ltd., a corporation from Hong Kong, requested discovery from a New York resident in connection with an ICSID arbitration against Malta. The arbitration was based on the Malta-China BIT.[103] The court recognized that, before *ZF Automotive*, "federal courts uniformly held that investor-state arbitrations were eligible for § 1782 discovery."[104] However, it decided that an ad hoc panel constituted under the UNCITRAL Rules pursuant to a BIT and an ICSID tribunal are different.[105] This difference stemmed from the fact that the ICSID Convention creates a permanent institution and ICSID awards "are binding as a matter of public law in all ICSID

[100] SCHREUER ET AL., *supra* note 96, at 1142-43.

[101] In re Ex parte Application of Eni S.p.A. for an Ord. Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery for Use in Foreign Proc., No. 20-mc-334-MN, 2021 WL 1063390, at *3 (D. Del. Mar. 19, 2021); Islamic Republic of Pak. v. Arnold & Porter Kaye Scholer LLP, Misc. Action No. 10-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019).

[102] In re Alpene, Ltd., No. 21 MC 2547 (MKB) (RML), 2022 WL 15497008 (E.D.N.Y. Oct. 27, 2022).

[103] *Id.* at *2.

[104] *Id.* at *4.

[105] *Id.* at *3.

member states."[106] However, the court held that the fact that courts play a role in the enforcement of awards "does not give an arbitral panel 'governmental authority'."[107] It further held that the principal purpose of Section 1782 was "comity,"[108] and stated that the "statute was intended to promote assistance and cooperation between the United States and foreign countries."[109] The court opined that it was hard to imagine ICSID tribunals providing "reciprocal discovery assistance for United States proceedings."[110] It also stated that "ICSID (and investor-state arbitration generally) did not yet exist in 1964 when § 1782 was amended to include the phrase 'foreign or international tribunals'."[111]

(ii) *In Re Webuild S.p.A.*

In December 2022, in another case post-*ZF Automotive*, it was also decided that ICSID tribunals fell out of the scope of Section 1782. In the case *In Re WeBuild S.p.A.*, the US District Court for the Southern District of New York decided a motion to vacate an order granting Webuild an *ex parte* application for discovery pursuant to Section 1782 related to an ICSID arbitration pursuant to the Panama-Italy BIT.[112] The issue before the court was whether the arbitration panel at issue – an ICSID panel – was a foreign or international tribunal according to Section 1782. The court held that it was not.[113] The court analyzed the factors mentioned in *ZF Automotive* and established that an ICSID tribunal formed in accordance with a BIT and the ICSID Convention was similar to an ad hoc arbitral tribunal created under the UNCITRAL Rules pursuant to a BIT.[114]

In their submissions, the parties compared ad hoc arbitral tribunals and ICSID

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] In re Webuild S.p.A., No. 1:22-mc-00140-LAK, 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

[113] *Id.*

[114] *Id.*

tribunals constituted under the ICSID Convention. Webuild attempted to draw a distinction between an ICSID arbitral tribunal and an ad hoc tribunal created under the UNCITRAL Rules pursuant to a BIT – such as the UNCITRAL arbitration of *ZF Automotive*.[115] Webuild argued that, unlike the ICSID Convention and the ICSID Arbitration Rules, the "UNCITRAL Rules do not regulate the jurisdiction or the annulment and enforcement of ad hoc awards."[116] The UNCITRAL Rules did not create a permanent body such as the ICSID Convention.[117] ICSID plays a greater role in administering disputes than the Permanent Court of Arbitration (PCA) in ad hoc arbitrations under its administration.[118] In comparison to ICSID (which may designate panels to review awards and mandate rules different from those selected by the parties), the PCA only provides for administrative support to the arbitral tribunal.[119]

Moreover, ICSID is funded by governments.[120] Its centre, and thus, its Member States, retain a measure of control over the jurisdiction of ICSID because the Secretary General (appointed by the ICSID Member States) has a duty of jurisdictional screening of all requests for arbitration.[121] In cases where parties are unable to agree on the appointment of an arbitrator, an arbitrator will be appointed by the "ICSID's Chairman from the Panel of Arbitrators designated by the Member States."[122] Additionally, all arbitrators sitting on an annulment committee are appointed by the Chairman from this panel.[123] Further, the immunity granted by ICSID is broader than the one granted in private arbitrations.[124] While private arbitrations only limit the

[115] Consolidated Sur-Reply in Opposition to (i) The Republic of Panama's Motion to Intervene, to Vacate the Court's May 19, 2022 Order, and to Quash the WSP USA Subpoena and (ii) WSP USA's Motion to Quash the Subpoena and Vacate the Court's May 19, 2022 Order, In re Webuild S.p.A., No. 1:22-mc-00140-LAK (S.D.N.Y. Sept. 15, 2022), ECF No. 56.

[116] *Id.* at 2.

[117] *Id.*

[118] *Id.* at 3.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 3-4.

[122] *Id.* at 4.

[123] *Id.*

[124] *Id.* at 5.

liability of arbitrators, ICSID grants them absolute immunity.[125]

Webuild further argued that, unlike ad hoc tribunals, ICSID proceedings require that both Contracting Parties be signatories to the ICSID Convention.[126] Regarding confidentiality, not all governmental courts publish their decisions, whereas the 2022 edition of the ICSID Arbitration Rules has a presumption in favor of publication of awards, unless the parties object.[127] Regarding the difference in enforceability of an award issued by an ICSID tribunal and one issued by an ad hoc tribunal, Webuild argued that the ICSID Convention authorized ICSID tribunals to issue awards that must be enforced by Member States.[128] For instance, in the US, the award debtor can only challenge the jurisdiction of the US court, but it cannot challenge the award based on the grounds present in the New York Convention that can be used to set aside other arbitral awards.[129] Further, an ICSID award can only be annulled by an ICSID annulment committee that are appointed by the Chairman of the Panel of Arbitrators designated by the Member States.[130]

In its decision, the court rejected Webuild's arguments and held that, first, the ICSID panel "does not have standing or pre-existing arbitration panels."[131] Thus, it is only formed upon a request for arbitration.[132] Second, the BIT does not create the panel. Rather, the arbitration panel is only created "if an investor chooses that forum."[133] Third, none of the arbitrators of the panel are affiliated with either of the Contracting Parties of the BIT.[134] Fourth, the tribunal does not receive government funding, but it is only funded by the parties to the dispute – an investor and the

[125] *Id.*

[126] *Id.*

[127] *Id.* at 6.

[128] *Id.* at 7-9.

[129] *Id.* at 9.

[130] *Id.*

[131] In re Webuild S.p.A., No. 1:22-mc-00140-LAK, 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

[132] *Id.*

[133] *Id.* at *2.

[134] *Id.*

respondent State.[135] Fifth, the proceedings may remain confidential if the parties so choose, and this characteristic is "more akin to private commercial than adjudication by a governmental body."[136] Sixth, the tribunal only derived its authority from the consent of the parties (the investor and the State) and not because the Contracting Parties "clothed the panel with governmental authority."[137] As such, the court held that Panama and Italy "did not intend to imbue the ICSID Panel with governmental authority, and therefore the ICSID tribunal did not constitute a 'foreign or international tribunal' within the meaning of Section 1782."[138]

Although these post-*ZF Automotive* decisions provide a very clear signal of the direction that will be taken by New York courts to such applications, other courts may have different interpretations as to whether ICSID tribunals are considered foreign or international tribunals. If contradictory decisions are then issued by the circuit courts (appeal courts), this may cause another circuit split focused on the ICSID tribunals. However, at the time of this article, the post-*ZF Automotive* decisions have adopted the approach that: (1) ICSID tribunals would not be in a position to act in comity and reciprocity to a US proceeding to assist it in the gathering of evidence; and (2) ICSID tribunals are only constituted to resolve a specific dispute and not before a dispute arises.

Additionally, arbitral tribunals under the ICSID Additional Facility Rules are constituted when parties decide to resolve their dispute before this type of tribunals when one of the States involved is not a party to the ICSID Convention.[139] As these tribunals are only created to resolve a particular dispute and only come into existence as a result of the parties' agreement, this makes them similar to tribunals constituted under the UNCITRAL Rules and in accordance with a BIT. They are thus similar to the UNCITRAL tribunal present in *ZF Automotive*, and a district court would likely rule

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at *3.

[139] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), ICSID ADDITIONAL FACILITY RULES AND REGULATIONS, art. 2 (2022).

that they are out of the scope of Section 1782.

2. Multilateral Investment Court

In recent years, the European Union (EU) announced its intention to establish a permanent standing MIC to replace the current investor-State dispute settlement system, with judges appointed by the Contracting Parties.[140] The decisions of the MIC would be subject to appeal before an Appellate Tribunal.[141] The EU has included this type of court in its treaties with Canada,[142] Singapore,[143] and Vietnam.[144]

The EU's proposal of a MIC would appear to comply with the factors that the Supreme Court considered when determining whether a body is governmental or intergovernmental in nature, but it remains to be seen whether a MIC sufficiently reciprocates the judicial assistance offered by US courts via Section 1782 (for the purposes of establishing comity). The EU proposes to create - through international agreements - a permanent MIC that will decide different disputes that may arise out of its numerous treaties. The MIC will be created according to an international convention and will function as a permanent body.

According to the EU's proposal, the judges appointed to the MIC will be chosen

[140] *See* Danielle Morris et al., *The U.S. Supreme Court Rules That U.S. Discovery Under 28 U.S.C. 1782 Is Unavailable For Use in Most International*, WILMERHALE (Jun. 15, 2022), https://www.wilmerhale.com/insights/client-alerts/20220615-the-us-supreme-court-rules-that-us-discovery-under-28-usc-1782-is-unavailable-for-use-in-most-international-arbitrations; *see generally* Andrea K. Bjorklund, *Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court*, 37(2) ARB. INT'L 433 (2021).

[141] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part art. 8.28, Oct. 30, 2016, 2017 O.J. (L 11/23).

[142] *Id.*

[143] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part, Oct. 19, 2018, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement/texts-agreements_en. *See also* Lino Torgal, *The Multilateral Investment Court Project: The "Judicialization" of Arbitration?*, GARRIGUES (July 24, 2019), https://www.garrigues.com/en_GB/new/multilateral-investment-court-project-judicialization-arbitration.

[144] Investment Protection Agreement between the European Union and its Member States and the Socialist Republic of Viet Nam, Jun.30, 2019, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en.

by all Contracting States, will be funded by States[145] and will have full-time employment in the court.[146] Thus, in principle, an interested person involved in a proceeding before a MIC should be able to pursue a Section 1782 request.

IV. MECHANISMS AVAILABLE FOR INTERNATIONAL LITIGANTS TO OBTAIN EVIDENCE

The recent *ZF Automotive* judgment has limited the scope of application of Section 1782 in relation to international arbitration. However, after considering this development, this section of the article aims to provide practitioners with guidance on the tools available to parties to obtain evidence for use in their international arbitrations.

A. *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules")

1. Evidence from Counterparties

To obtain documents or testimony in international arbitration, parties could use the procedure established in the IBA Rules (provided that such rules have been adopted in their arbitration). Under these rules, a party can request the tribunal to order the other party to the arbitration to produce certain documents or categories of documents under Article 3 and to order the testimony of a witness under Article 4. If the counterparty refuses to produce a document or testimony ordered to be produced by the tribunal, then the tribunal may draw a negative inference that such document or testimony was adverse to the interests of that party.[147]

2. Evidence from Third Parties

According to Article 3(9) of the IBA Rules, if a party asks the tribunal to request a document in possession of a third party, the tribunal may take whatever steps are

[145] Submission of the European Union and its Member States to UNCITRAL Working Group III (18 January 2019) Establishing a standing mechanism for the settlement of international investment disputes § 3.13, *available at* https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/467c4df7-8596-4a2e-bcae-5e2d9fa98742/details; Gary Born, "*Court-Packing*" *and Proposals for an EU Multilateral Investment Court*, KLUWER ARBITRATION (Oct. 25, 2021), https://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/.

[146] Decision No 1/2021 of the CETA Joint Committee 29 January 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal [2021/264], 2021 O.J. (L 59/41).

[147] INTERNATIONAL BAR ASSOCIATION (IBA), IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION arts. 9(6)-(7) (2020).

legally available to obtain the requested documents or authorize the party to take such steps itself. Article 4(9) provides a similar procedure for the attendance of witnesses who would not appear voluntarily at the request of a party.

The text of the IBA Rules indicates that a tribunal's prior authorization is required before making a request to a court to order the production of evidence.[148] Interpreting the IBA Rules, the High Court of Singapore indicated that the IBA Rules require the parties to obtain the permission of the arbitral tribunal if they would elect to subpoena a witness into the arbitration. The Singaporean court expressed its view that, when parties agree to the IBA Rules, they enter into a contractual commitment and that "to circumvent and sidestep these directions seemed to obviate the very purpose of entering into such detailed directions with the Arbitrator in the first place."[149]

Scholars have also argued that the IBA Rules do not expressly forbid a party to request assistance from a national court for gathering evidence from third parties without seeking prior authorization from the arbitral tribunal.[150] Additionally, there is case law supporting the view that the IBA Rules do not forbid a party from unilaterally applying to a court without the prior permission of the arbitral tribunal.[151]

Other scholars argue that the IBA Rules only authorize an applicant to request evidence from a national court without prior tribunal authorization in certain exceptional circumstances where "it may be impossible or impractical to seek the tribunal's permission."[152] For example, this will be the case when "a tribunal has not yet been formed or cannot, for some reason, act effectively"[153] or when "the

[148] NATHAN D. O'MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE ¶ 3.94 (2d ed. 2019).

[149] ALC v. ALF [2010] SGHC 231, [34]. *See also* In re Grupo Unidos Por El Canal, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *11 (D. Colo. Apr. 17, 2015) ("Further, the IBA Rules, under which the parties have agreed to arbitrate, expressly limit third-party discovery, requiring advance authorization from the panel of arbitrators for its collection and use.").

[150] Zuberbühler et al., *supra* note 27, at 129.

[151] *See e.g.*, In re Application of Republic of Ecuador, 2011 WL 10618727, at *2 (N.D. Fla. Aug. 24, 2011).

[152] ROMAN MIKHAILOVICH KHODYKIN ET AL., A GUIDE TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION ¶ 6.321 (2019).

[153] *Id.* at ¶ 6.322.

documents are held by a third party connected in some way to one of the parties to the arbitration."[154]

B. *Selection of Seats Depending on the Location of the Evidence*

Parties may also consider the selection of the seat of arbitration more carefully when entering into arbitration agreements. If a party is likely to require access to evidence located in the US, it may strategically agree on an arbitration seated within US territory. Section 7 of the FAA establishes that the arbitral tribunal may order any person to attend before the arbitral tribunal and/or bring the required evidence with them. In case the requested person does not comply with the order, the arbitral tribunal may request the assistance of a district court which will then have the discretion to compel or punish the person for contempt for non-compliance.[155]

C. *Recourse to National Courts*

After *ZF Automotive*, parties in international arbitration may consider seeking documentary evidence through international conventions such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 ("Hague Convention") and the Inter-American Convention on Letters Rogatory of 1975 ("Inter-American Convention"). In addition, parties still have the option to petition a variety of state courts in jurisdictions which allow evidence requests from arbitral tribunals. This approach is possible in jurisdictions which have adopted the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), as well as jurisdictions that have not. However, the possible scope of these requests varies from jurisdiction to jurisdiction.[156]

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[154] *Id.*

[155] FAA,9 U.S.C. § 7a. Scholars have expressed the view that an arbitration under Section 7 of the FAA may activate Section 1783 to collect evidence. The purpose of Section 1783 is for a court to request a US citizen located overseas to produce a document or testimony. *See* Rekha Rangachari et al., *Evolution of 28 U.S.C. § 1783: An Unexplored Tool to Support International Arbitration?*, 38(4) J. INT'L ARB. 483, 489-91, 492-94 (2021).

[156] An example would be Germany, which does not allow broad discovery requests. *Cf.* Klaus Sachs & Torsten Lörcher *Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Conduct of the Arbitral Proceeding, § 1050 – Court Assistance in Taking Evidence and Other Judicial Acts*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 298 (Patricia Nacimiento et al. eds., 2nd ed. 2015).

1. Hague Convention

A resource that parties have available to obtain evidence located in the US and elsewhere is through the Hague Convention.[157] This convention provides that a court may request judicial assistance in evidence gathering to another country.[158] The court has to request the assistance from the central authority of the requested country. The central authority will then transmit the request to the authority competent (i.e., a national court) to execute the order.[159] International litigants may request the arbitral tribunal to request the help of the court located in the arbitral seat.[160] Access to this convention would depend on whether the arbitral seat and the country where the evidence is located are parties to this convention.[161]

The Special Commission on practical operation of the Hague Convention indicated that, in accordance with national law, the Hague Convention has been used to gather evidence for international arbitration.[162] As the convention is available to collect evidence to be used in "judicial proceedings, commenced or contemplated,"[163] it is a matter of the national law whether arbitration is considered as a judicial proceeding. The website of the Hague Convention provides for the form that may be

[157] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention].

[158] *Id.* at art. 1. *See also* Don Hawthrone, *Discovery, Jurisdiction and Service: Changes in U.S. Law and Implications for Japanese Companies*, CURTIS (Jun. 29, 2022), https://www.curtis.com/our-firm/news/discovery-jurisdiction-and-service-changes-in-u-s-law-and-implications-for-japanese-companies.

[159] Hague Convention, *supra* note 157, at arts. 2-3.

[160] BORN, *supra* note 41, at 2599-2600.

[161] Currently, the Hague Convention has 64 contracting parties. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH), STATUS TABLE - CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Jan. 14, 2023).

[162] HCCH, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS, Conclusion and Recommendation 38 (2003).

[163] Hague Convention, *supra* note 157, at art. 1; *see also* HCCH, SUMMARY OF RESPONSES TO THE QUESTIONNAIRE OF MAY 2008 RELATING TO THE EVIDENCE CONVENTION, WITH ANALYTICAL COMMENTS (SUMMARY AND ANALYSIS DOCUMENT) ¶¶ 131-132. (2009).

used as a guide for the request.[164] In court proceedings, this form is filed as an exhibit of the request to the court.[165]

The Hague Convention also allows the pre-trial discovery of information. Article 23 of this convention establishes that a party to the convention can file a reservation to not grant pre-trial discovery of information as it is applied in common law countries. However, the Special Commission clarified that the convention does not allow fishing expeditions as the request "must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding."[166] The commission also clarified that, for purposes of the convention, pre-trial discovery includes requests before the start of the proceeding, and it also includes "evidence requests submitted after the filing of a claim but before the final hearing on the merits."[167]

Whether this approach remains feasible for international arbitral tribunals for evidence located in the US remains to be seen. Part of the reasoning of the Supreme Court in *ZF Automotive* was that it would not have been the intention of Congress to extend the rights granted in Section 1782 (and therefore also the resources of district courts) to private bodies.[168] An approach under the Hague Convention as described would, prima facie, only shift the availability of those resources from a direct to an indirect access of the arbitral tribunal. This might give ground to refuse the execution of a letter of request as provided by Article 12(a) of the Hague Convention. However,

[164] HCCH, MODEL FORMS -CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, https://www.hcch.net/en/instruments/conventions/publications1/?dtid=65&cid=82 (last visited Jan. 16, 2023).

[165] Marc Zell & Noam Schreiber, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, LEXOLOGY (Sept. 11 2019), https://www.lexology.com/library/detail.aspx?g=b1fe07db-9032-44e1-95ba-b37d30013d21.

[166] HCCH, CONCLUSIONS AND RECOMMENDATIONS, *supra* note 162, at Conclusion and Recommendation 29 (emphasis in original).

[167] *Id.* at Conclusion and Recommendation 31.

[168] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2088-89 (U.S. 2022).

the Supreme Court identified comity as the animating purpose of Section 1782.[169] Under this aspect, US courts would have to execute a letter of request if it came from a foreign state court, if this court in turn was approached by an arbitral tribunal seated in that foreign jurisdiction.

2. Inter-American Convention

Spain, the US, and countries in Latin America may seek to take advantage of the Inter-American Convention for the collection of evidence from courts located in these jurisdictions. The convention may be useful when a court of the arbitral seat sends a letter rogatory to the central authority of the country where the evidence is located.[170] The central authority then will transmit the request to the authorized entity for its execution. Unlike the Hague Convention, the Inter-American Convention only allows evidence requests once the proceedings have started.[171] The request must be legalized – unless it is issued through diplomatic channels – and it must contain an authenticated copy of the complaint with its exhibits and additional supporting documentation.[172]

If a State expressly agrees, the convention also provides that arbitral tribunals may directly transmit a letter rogatory to the authority of another State. This thus eliminates the requirement for the arbitral tribunal to first request help to the national court where the tribunal is seated. However, to date, only Chile has made such a declaration.[173]

3. Non-Model Law Jurisdictions

Some of the most popular arbitral seats – from jurisdictions whose arbitration laws are not based on the UNCITRAL Model Law – provide that national and also foreign seated arbitral tribunals may require the production of evidence from persons

[169] *Id.* at 2088.

[170] Inter-American Convention on Letters Rogatory art. 4, Jan. 30, 1975, 14 I.L.M. 339; *see also* In re Clerici, 481 F.3d 1324, 1329 (11th Cir. 2007).

[171] Inter-American Convention, *supra* note 170, at art. 8.

[172] *Id.* at arts. 5-8.

[173] DEPARTMENT OF LAW, ORGANIZATION OF AMERICAN STATES (OAS), B:36: INTER-AMERICAN CONVENTION ON LETTERS ROGATORY - GENERAL INFORMATION OF THE TREATY: B-36, https://www.oas.org/juridico/english/sigs/B-36.html.

located in their territory.[174] The section that follows explores the approaches taken by England and Wales,[175] Sweden,[176] Brazil,[177] and Switzerland.[178]

(i) England and Wales

In England and Wales, an application can be made under section 43 of the English Arbitration Act 1996 ("Arbitration Act") to permit a targeted request to a witness to produce specific documents, provided that these are identified with sufficient certainty.[179] This is not the same as the court ordering disclosure. If the request for documents is too widely drawn, the application will be refused because it will be regarded as tantamount to disclosure. One drawback to section 43 is that it requires permission of the tribunal or the agreement of the other party.[180]

In rare cases, section 44 can also be used, provided that the parties have not excluded it by agreement in writing (in their arbitration agreement). Section 44 deals with interim measures and may be used to obtain documents from third parties.[181] However, the availability of section 44 of the Arbitration Act has also recently been called into question by a consistent line of first instance authority.[182] The court may

[174] France only allows for production of documentary evidence from a third party when the arbitral tribunal is seated in France according to Article 1469 of its civil procedure code. *See* Dilara Khamitova, *Document Production in International Arbitration in France - a smoking gun or puff of smoke?*, CLYDE & CO. (May 19, 2022), https://www.clydeco.com/en/insights/2022/05/document-production-in-international-arbitration-i.

[175] Arbitration Act 1996, c. 23, § 43 (Eng.). Other authors opine that the arbitral procedure must have its venue in England. *See* Robert Bradshaw, *How to Obtain Evidence from Third Parties: A Comparative View*, 36(5) J. INT'L ARB. 629, 650-51 (2019).

[176] Lagen om skiljeförfarande, §§ 26, 50 (SFS: 1999:116, amended by SFS: 2018:1954) (Swed.) (Swedish Arbitration Act); Bradshaw, *supra* note 175, at 656.

[177] Lei Nº 9.307 de 23 de Setembro de 1996, art. 22-C (Braz.) (Brazilian Arbitration Act).

[178] Schweizerische Zivilprozessordnung [ZPO], Civil Procedure Code [CPC], art. 166 (Switz.) (Swiss Civil Procedure Code); Zuberbühler et al., *supra* note 27, at 90.

[179] *See e.g.*, BNP Paribas & Ors v. Deloitte & Touche LLP [2003] EWHC 2874 (Comm); Tajik Aluminium Plant v. Hydro Aluminium AS [2005] EWCA (Civ) 1218, [2006] 1 WLR 767 (Eng.).

[180] MINISTRY OF JUSTICE, CIVIL PROCEDURE RULES (CPR) – RULES AND DIRECTIONS, Part 34 (UK).

[181] *See e.g.*, Assimina Maritime Ltd. v. Pakistan Shipping Corp. and HR Wallingford Ltd. [2004] EWHC (Comm) 3005.

[182] *See* LOUIS FLANNERY & ROBERT MERKIN, MERKIN AND FLANNERY ON THE ARBITRATION ACT 1996 § 44.7.5 (6th ed. 2019). In *A & Another v. C & Others* [2020] EWHC (Comm) 258, the issue was whether section 44 could provide the basis for an order for a deposition from a witness in England and Wales for a US-seated

order production of documents in order to preserve the evidence and, in exceptional cases, can even do so before the commencement of the arbitration, but not as part of a disclosure order.[183] Sections 43 and 44 of the Arbitration Act may be used even where the seat of the arbitration is, or is likely to be when designated, outside the jurisdiction of England and Wales and Northern Ireland, but only if it is deemed appropriate to do so.[184]

(ii) Sweden

In Sweden, the Swedish Arbitration Act provides that a party with the tribunal's consent may request a national court to order the other party or a third party to produce a document.[185] This provision applies regardless of whether the arbitral tribunal is seated in Sweden or abroad.[186] Regarding the attendance of a witness to the proceedings, national courts cannot intervene.[187] However, if the witness or expert has agreed to testify, if a party would like a witness or expert to testify under oath, a party needs to obtain the consent of the tribunal and then request permission to the national court.[188]

(iii) Brazil

The Brazilian Arbitration Act provides the parties and the arbitral tribunal with a valuable tool for direct assistance before Brazilian courts named *carta arbitral* or

arbitration. Following the dicta in *Cruz City 1 Mauritius Holdings v. Unitech Ltd. & Ors* [2015] 1 All ER (Comm) 305, and *DTEK Trading S.A. v. Morozov* [2017] EWHC (Comm) 94, Justice Foxton held that section 44 could not be used against non-parties to the arbitration. The current line of authorities is only at first instance, and the position reached by them is a matter of significant academic debate.

[183] *See* Cetelem S.A. v. Roust Holdings [2005] EWCA (Civ) 618.

[184] *See* FLANNERY & MERKIN, *supra* note 182, at §§ 43.5, 44.7.1.

[185] Swedish Arbitration Act, *supra* note 176, at §§ 26, 50.

[186] *Id.* at § 50.

[187] *See* Lina Bergqvist & Maria Zell, *International Arbitration Law and Regulations Sweden 2021-2022*, ICLG (Aug. 20, 2021), https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/sweden.

[188] Swedish Arbitration Act, *supra* note 176, at § 26.

arbitral letter.[189] An arbitral tribunal located in Brazil[190] may require through a *carta arbitral* to Brazilian courts to enforce its decisions, including interim relief, exhibition/production of documents and coercive orders to testify.[191] The applicability of *carta arbitral* for decisions issued by arbitral tribunals located outside Brazil is still debatable.[192] Thus, litigants may also request the arbitral tribunal to demand assistance from the court of the seat, so the court of the seat can, in turn, send a rogatory letter to the Brazilian court to obtain the required evidence.[193] Moreover, the arbitral tribunal may also request a national court to order a third party to testify before the arbitral tribunal.[194] This request may be made by an interim measure (in case of urgency) or through a request to compel the appearance of the defaulting witness (*condução coercitiva*).[195]

(iv) Switzerland

In Switzerland, until recently, courts only provided assistance to collect evidence to arbitral tribunals seated in Switzerland. In 2021, Switzerland modified its Swiss Private International Law Act and incorporated article 185a that now authorizes an "arbitral tribunal seated abroad or a party to a foreign arbitral proceeding with the consent of the arbitral tribunal" to seek assistance from a Swiss court.[196] However,

[189] Brazilian Arbitration Act, *supra* note 177, art. 22-C.

[190] *See* Leonardo Ohlrogge & Bernardo Borchardt, *Aspectos práticos sobre pedidos de exibição de documentos em arbitragens internacionais à luz das regras da* IBA, 70 REVISTA BRASILEIRA DE ARBITRAGEM 46, 66-74 (2022).

[191] Brazilian Arbitration Act, *supra* note 177, art. 22; *see also* Ted Rhodes, *International Arbitration Law and Rules in Brazil*, CMS (Nov. 3, 2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/brazil.

[192] *See* Selma Ferreira Lemes & Aécio de Oliveira, *Carta arbitral para execução de tutelas de urgência estrangeiras*, CONSULTOR JURÍDICO (Jun. 12, 2022), https://www.conjur.com.br/2022-jun-12/opiniao-carta-arbitral-execucao-tutelas-proferidas-exterior?pagina=2; *see generally* Aécio de Oliveira & Caroline de Moura, *A aplicação da carta arbitral para execução direta de tutela de urgencia estrangeira no foro de efetivação da medida*, 73 REVISTA BRASILEIRA DE ARBITRAGEM 34 (2022).

[193] *See* Ferreira Lemes & de Oliveira, *supra* note 192.

[194] *See* Ohlrogge & Borchardt, *supra* note 190, at 64-67.

[195] *See* de Oliveira & de Moura, *supra* note 192, at 45.

[196] Switzerland Code of Civil Procedure, *supra* note 178, at art. 166; *see also* Evin Durmaz & Yves Klein, *Switzerland: A Swiss § 1782? Article 185a PILA and the Assistance of Swiss Courts to Obtain Evidence In Support Of Foreign Arbitral Proceedings*, MONDAQ (Jun. 20, 2022),

some third parties have a limited right to refuse to cooperate, e.g., due to banking secrecy.[197] In theory, the arbitral tribunal may request the court to order a witness to appear before the arbitral tribunal, testify in front of the court or to produce a document.[198] However, requests for a witness to appear in an arbitration are not usual in practice.[199]

4. Model Law Jurisdictions

The UNCITRAL Model Law provides that an arbitral tribunal, and parties that have obtained the tribunal's consent, may request court assistance for obtaining evidence in certain circumstances.[200] Even though the text of the Model Law indicates that its provision on court assistance in taking evidence only applies to domestic arbitrations,[201] different jurisdictions allow national courts to help with the gathering of evidence for tribunals seated outside of their territory. This section now analyzes four of the most popular arbitral seats that permit this type of assistance, including Austria, Germany, Singapore, and Hong Kong.

(i) Austria

In Austria, sections 577(1) and (2) of the Code of Civil Procedure provide that parties (with the tribunal's consent) or arbitral tribunals seated in Austria or in another country can request the help of Austrian courts for the production of evidence, including from third parties.[202] Scholars have expressed the view that in Austria, the court only provides the framework for the production of the evidence,

https://www.mondaq.com/arbitration-dispute-resolution/1203910/a-swiss-1782-article-185a-pila-and-the-assistance-of-swiss-courts-to-obtain-evidence-in-support-of-foreign-arbitral-proceedings; Zuberbühler et al, *supra* note 27, at 90.

[197] Durmaz & Klein, *supra* note 196.

[198] *See* Alexandra Johnson & Nadia Smahi, *International Arbitration Law and Regulations Switzerland* 2021-2022, ICLG (Aug. 20, 2021), https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/switzerland.

[199] *See id.*

[200] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, art. 27, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[201] *Id.* at art. 1(2).

[202] Austrian ZPO, section 602, 577(2); Bradshaw, *supra* note 175, at 655.

but it is the arbitral tribunal that asks the questions to the witnesses and experts.[203]

(ii) Germany

Under German law, sections 1033 and 1050 of the German Code of Civil Procedure provide for court assistance in the gathering of evidence in international arbitration. The court assistance applies to arbitrations seated in Germany as well as overseas.[204] According to section 1033, a party may request to a court an interim measure for the preservation of evidence.[205] While according to section 1050, the tribunal or a party to the arbitration with the consent of the tribunal must make a petition to a local court to obtain court assistance in the taking of evidence.[206] The assistance is only granted for measures which the arbitral tribunal is not allowed to take by itself[207] and may not be abusive.[208] The assistance is subject to the German Code of Civil Procedure as applied in civil proceedings.[209] The arbitrators are entitled to take part in the taking of evidence and can ask questions.[210] Evidence can also be obtained from a third party unless that party has the right to refuse to give evidence under other rules of the Code of Civil Procedure (*Zeugnisverweigerungsrecht*) and the request is not unreasonable.[211]

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[203] SCHWARZ & KONRAD, *supra* note 26, at ¶¶ 20-253-255.

[204] According to the German Code of Civil Procedure, section 1025(2), the provisions of sections 1033 and 1050 also apply if the seat of arbitration is outside of Germany or not yet determined. *See* Elliot Friedman et al., *National Court Assistance in the Taking of Evidence in Support of Commercial Arbitral Proceedings*, *in* FRANCO FERRARI & FRIEDRICH ROSENFELD, HANDBOOK OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION 403 (2022).

[205] *See* Friedman et al., *supra* note 204, at 402.

[206] *See* Joachim Münch, § 1050, *in* MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG ¶ 13 (Wolfgang Krüger ed., 6th ed. 2022); Sachs & Lörcher, *supra* note 156, at 298.

[207] *See* Wolfgang Voit, § 1050, *in* MUSIELAK & VOIT ZIVILPROZESSORDNUNG ¶ 7 (eds., 19th ed. 2022).

[208] *See* Friedman, *supra* note 204, at 403 ("for example where a tribunal lacks the power to carry out the specific act requested but could obtain the desired evidence through other means, court assistance would be inappropriate").

[209] *See* Sachs & Lörcher, *supra* note 156, at 299.

[210] *See* Voit, *supra* note 207, at ¶ 7.

[211] *See* Jörn Fritsche, §§ 142-144, *in* MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG ¶ 14 (Wolfgang Krüger ed., 6th ed. 2020) ("a request is unreasonable, if inter alia time, costs and disruptions of the third party outweigh the interests of the requesting party").

(iii) Hong Kong

In Hong Kong, evidence for an arbitration may be obtained before the start of an arbitration through an interim measure, during an ongoing arbitration, or from a request for inspection, photographing and protection of property.[212] An interim measure is available for arbitrations seated in Hong Kong and foreign seated arbitrations that render an award that may be subject to enforcement in Hong Kong. The request for evidence may be before the start of an arbitration. Courts, exceptionally, compel third parties to produce documents or give testimony.[213] The request for assistance in the taking of evidence in an ongoing arbitration is only available if the arbitration is seated in Hong Kong.[214] The inspection, photographing and protection of property must be made a by a party to the arbitration and not by the arbitral tribunal. This type of request can only be made in respect of a third party, and it is only available for arbitrations seated in Hong Kong and arbitrations seated abroad that render an award that may be enforceable in Hong Kong.[215]

(iv) Singapore

In Singapore, the International Arbitration Act provides that national courts may compel the production of a document or testimony from a party or a third party to an arbitration.[216] This order may be made through an interim measure (in case of urgency) or through a subpoena.[217] In the case of an interim measure based on urgency, it can be requested directly by the requesting party to the court even before the tribunal has been constituted, but only for an affidavit or preservation of evidence.[218] The court will take into account the fact that the arbitral tribunal is

[212] *See* Friedman, *supra* note 204, at 407.

[213] *Id.*

[214] Arbitration Ordinance (2011), Cap. 609, § 55 (H.K.).

[215] *Id.* at § 60.

[216] International Arbitration Act 1994, Cap. 143A, § 13 (amended by International Arbitration (Amendment) Act 2020) (Singapore) (Singapore IAA).

[217] *Id.* at § 12A.

[218] *Id.* at § 12A(5).

seated outside of Singapore in determining whether to grant the interim measure.[219] In the case of a subpoena, arbitral tribunals seated in Singapore or abroad can request a subpoena to Singaporean courts.[220] Even though the statute does not explicitly provide that permission from the tribunal is necessary, it is requested in practice.[221] The requests in Singapore must be defined with sufficient precision.[222] It is worth noting that the International Arbitration Act does not allow discovery from third parties.[223]

The analysis of these eight jurisdictions suggests that there is uniformity in the requirements for a court to assist a foreign seated arbitral tribunal. These jurisdictions require the arbitral tribunal's consent to accept a request for evidence located in its territory.

One common exception to this rule derives from an interim measure request. However, interim measures require the interested party to prove an exceptional circumstance or certain degree of urgency. As mentioned above, Section 1782 did not require an exceptional circumstance for a US court to grant request to gather evidence before starting the arbitration. In *ZF Automotive*, the US Supreme Court criticized that parties could request assistance from a national court without the approval of the arbitral tribunal, while this advantage was not available for domestic arbitrations.

For this reason, if the international pattern to request the tribunal's authorization – except in cases of interim measures – is followed (in the US and in other countries) and the evidentiary scope of a request is also uniformized, this will then provide greater uniformity and level the playing field for the different parties in the evidence gathering in international arbitration.

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[219] *Id.* at § 12A(2).

[220] The Lao People's Democratic Republic v. Sanum Investments Ltd. and another and another matter [2013] SGHC 183.

[221] Singapore IAA, *supra* note 216, at § 13; Friedman, *supra* note 204, at 409.

[222] The Lao People's Democratic Republic, *supra* note 220, at § 23.

[223] *Id.*

D. *Additional Mechanisms*

Other scholars have also mentioned additional options for parties to obtain evidence for use in international arbitration. Some of these options include the use of data subject requests under privacy laws such as the EU General Data Protection Regulation ("GDPR") and freedom of information requests.[224]

First, regarding data subject requests under different data privacy laws, this may become relevant to request information on the personal data that the counterparty may have about the interested party.[225]

Second, regarding freedom of information requests, they could be used to collect evidence from State companies or relating to government procurement acts, such as public bids. Scholars have suggested filing this request early in an arbitration (or before the arbitration), as these requests usually take months for a State to process.[226] Moreover, combining a request for document production with a freedom of information request under the State's own legislation may give rise to a potential claim of a human rights violation against the right to access information.[227]

V. CONCLUSION

The recent judgment of the Supreme Court in *ZF Automotive* has effectively brought an end to Section 1782 requests in support of international commercial arbitration and ad hoc investment-treaty arbitration cases under the UNCITRAL Rules pursuant to a BIT. Subsequent decisions have since clarified that ICSID tribunals too fall out of the scope of Section 1782. Whether a MIC will qualify as a foreign or international tribunal for the purpose of a Section 1782 request remains to be seen.

As well as exploring the *ZF Automotive* decision, this article draws attention to the fact that several popular arbitral seats empower their national courts to assist

[224] *See* Anna Masser et al., *Special Mechanisms for Obtaining Evidence*, *in* GLOBAL ARBITRATION REVIEW - THE GUIDE TO EVIDENCE IN INTERNATIONAL ARBITRATION 190, 197-204 (Amy C. Kläsener et al. eds., 1st ed. 2021).

[225] *See* Markus Burianski, *Data Privacy in International Arbitration*, WHITE & CASE (Oct. 19, 2018), https://www.whitecase.com/publications/alert/data-privacy-international-arbitration.

[226] *See* Masser et al., *supra* note 224, at 200.

[227] *Id.* at 199.

arbitration proceedings seated domestically or internationally in the practice of evidence gathering.

While the ability of a national court to help local or foreign seated tribunals varies from jurisdiction to jurisdiction, parties should bear in mind the place(s) where relevant persons or evidence may be located when selecting an arbitral seat for the purposes of their arbitration agreements. Such a decision may impact whether a seat's national court will be supportive of evidence gathering activities or whether it will be able to secure the assistance of another national court to assist.

As explained above, Section 1782 gave access to evidence gathering to parties without requiring the pre-authorization of a tribunal or to prove an exceptional circumstance or urgency. These characteristics of Section 1782 gave rise to a concern that it created an unequal playing field depending on the nationalities of the parties in dispute. The lack of the requirement for tribunal's pre-authorization prior to seeking assistance from the courts was one of the issues which US courts identified as an unfair advantage for international arbitrations over domestic ones.

This article has shown, from a comparative law perspective, that there are common grounds in the evidence gathering process for foreign seated arbitral tribunals, which may serve as a guide for other jurisdictions and eventually provide for greater uniformity in assisting international arbitration proceedings.

For the moment, parties to international arbitrations still have a number of mechanisms provided in conventions and other instruments through which they can seek assistance in obtaining relevant evidence – from their counterparties or third parties – located in States other than the arbitral seat.

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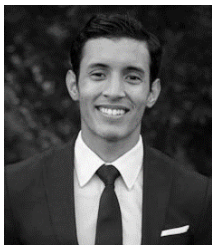

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2022-2023 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" FINALIST

THE NEW YORK CONVENTION ON THE ENFORCEMENT OF DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES

by David Molina Coello

I. INTRODUCTION

Internet users have grown to almost five billion in just 22 years.[1] This is approximately 62% of the current world population.[2] On one of its many applications, internet has changed the way international business and transactions operate by eliminating geographical limitations for the exchange of information.

That, however, is not all. Only ten years after the internet's big boom, blockchain technology came into existence. The blockchain is a form of connectivity in which information and any of its variations are registered in an unalterable network. The chain comprises all the network's devices.[3] Consequently, it is virtually impossible to hack,[4] because hackers must enter all the chain's devices to modify any information. Therefore, the blockchain creates a "secure transfer of value and data directly between parties."[5] Put simply, blockchain technology is a new form of bookkeeping[6]

[1] Abby McCain, *How fast is technology advancing? [2023]: Growing, evolving and accelerating at exponential rates*, ZIPPIA (Jan. 11, 2023), https://www.zippia.com/advice/how-fast-is-technology-advancing/#:~:text=This%20is%20up%20from%20a,hit%201.43%20billion%20in%202022.

[2] The world population prospect for 2022 is 8 billion people. *See* United National Department of Economic and Social Affairs, *World population prospects* 2022, UNITED NATIONS (2022), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022_summary_of_results.pdf.

[3] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1127-1129 (2020).

[4] Santiago Enrique Rodríguez, *The what, the why, and the how: Blockchain as a solution for Institutional Arbitration*, 37 SPAIN ARBITRATION REVIEW 77, 79 (2020).

[5] Organization for Economic Co-operation and Development, *OECD Blockchain Primer* 3, OECD (Jul 27, 2019), *available at* https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf.

[6] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 92 (2019).

that ensures the fidelity of the information presented in the system.

Initially, blockchain became a business network to decentralize payments from the control of financial institutions by using cryptocurrencies, the blockchain's coinage.[7] Now, it has evolved to serve as a platform for automating international transactions by the implementation of self-enforceable agreements. There are smart contracts (SCs) and smart legal contracts (SLCs).[8] SCs are completely self-enforceable, upon the meeting of the conditions expressed in the program.[9] Currently, SCs cannot foresee every possible scenario involving a transaction, and their code is not built to deal with uncertainty.[10] As a consequence, parties will look to avoid uncertainty by coding as many scenarios as possible, increasing negotiation costs.[11] As an alternative, parties can conclude SLCs which are "an amalgam of [SC] and traditional contract[s]."[12] While the SLC is concluded as if it was a plain contract, it might contain, for example, a self-enforceable clause for payment.[13] Parties might choose one or the other depending on factors that increase the likelihood of encountering an unexpected scenario, like the contract's duration or the market's volatility.[14] SCs and SLCs' popularity is likely to grow exponentially.

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[7] Julie Pinkerton, *The History of Bitcoin, the First Cryptocurrency*, U.S. NEWS (Aug. 7, 2023), https://money.usnews.com/investing/articles/the-history-of-bitcoin#:~:text=%22In%20June%202011%2C%20it%20hit,was%20worth%20more%20than%20%241%2C000.

[8] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, 78 (2019). *See also* Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP, 545 (2021), *available at* doi:10.1017/S1744137421000138.

[9] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1135 (2020).

[10] Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP 545, 549 (2021), *available at* doi:10.1017/S1744137421000138.

[11] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, 81-82 (2019).

[12] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 95 (2019).

[13] *Id.*

[14] Smart contracts are less suitable for executory contracts. *See* Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP 545, 551 (2021), *available at* doi:10.1017/S1744137421000138.

SCs and SLCs generally include dispute settlement (DS) clauses opting for a DJS, especially in case of SCs.[15] DJS solve blockchain disputes by cyber proceedings that conclude with a decision rendered by a jury or a tribunal which is then implemented using computational code. Although DJS' were designed for blockchain disputes, they are not limited to them. Pursuant to the principle of freedom of contract, and due to their cost and efficiency, they are an attractive option for regular or off-chain disputes.[16] Thus, there is a need to determine the legal treatment that states will give to DJS decisions and whether they will recognize and enforce them.

This work deals with the possibility of enforcing DJS decisions under the New York Convention[17] asserting that such scenario is possible by interpreting its provisions in an autonomous and evolutionary manner.

Chapter two explains how DJS operate and the issues surrounding their enforcement as arbitral awards within the scope of the Convention [**II**]. Chapter three describes the Contracting States' approaches to the Convention's territoriality criterion to conclude that there is a tendency to exclude DJS decisions from its scope of application [**III**]. Chapter four sets out an autonomous and evolutionary

[15] This work assumes that the electronic form of the dispute resolution clause in SCs is no limitation for its validity under Art. II of the New York Convention to narrow the scope of the discussion to the recognition and enforcement of DJS decisions. Two reasons sustain this assumption. First, the general tendency of states is to allow the conclusion of electronic agreements, especially after the sanitary crisis that started in 2020 by the COVID 19 propagation. For example, there are states like the UK where the encouragement of electronic commerce goes as far as being recognized as a matter of public policy. Second, paragraph 57 of the Explanatory Note on the United Nations Convention on the Use of Electronic Communications in International Contracts States that the convention applies to arbitration agreements in electronic form and recognizes its validity. Thus, there is a tendency among states to allow the conclusion of arbitral agreements by electronic means, and code is one of them. *See* U.N. Comm. on International Trade Law, *Explanatory Note on the United Nations Convention on the Use of Electronic Communications in International Contracts* ¶ 57, Jan. 2007, UNCITRAL; *see also* Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3), AMERICAN BAR ASSOCIATION STABLE (Publisher), 1129, 1132 (2008), *available at* https://www.jstor.org/stable/23824404.

[16] The off-chain and on-chain classification is taken from the categories of blockchain governance. *See*. Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1178-1179 (2020). Also *See* Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 96 (2019); *see also* Ramona Elisabeta Cirlig, *Party Autonomy in Determining the Law Applicable in International Commercial Arbitration and its Limits Derived from the New York Convention*, 34 SPAIN ARBITRATION REVIEW 47, 49 (2019).

[17] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046. [hereinafter New York Convention].

interpretation of the Convention's provisions to disregard the Contracting States' local approaches to the territoriality criterion and justify the enforcement of DJS decisions [**IV**]. Following the comparative process of chapters three and four, chapter five conducts an evolutionary interpretation of the Convention while addressing the rest of the issues surrounding the enforcement of DJS decisions [**V**]. Finally, chapter six deals with the possibility of states refusing the enforcement of DJS decisions under Art. V (2) of the Convention and suggests a solution through blockchain governance [**VI**].

II. ISSUES SURROUNDING THE ENFORCEMENT OF DJS DECISIONS UNDER THE CONVENTION

DJS emulates conventional adversarial proceedings to settle bilateral disputes in the blockchain. They are decentralized because they operate in the blockchain with no anchor to a state's jurisdiction to govern the proceeding.[18]

DJS generally work as follows: the claimant files a claim in the DJS, the defendant submits a response, both parties present digital evidence, and a collegiate body (jurors or tribunals) rules on the dispute. Finally, the decision is self-enforced using blockchain in two ways. It could take the form of an SC itself or become an order (also called *oracle*) in computational code to enact the preestablished consequence that an existing SC forecasts in case of a breach.[19]

Kleros is an example of a DJS. Its procedure is akin to the description above. However, it has three key features. First, Kleros' decisions are taken by a jury selected by the system. Jurors have different specializations and are elected from a pool according to their expertise. Second, parties can challenge the decisions within the system by filing an appeal. Parties can file as many appeals as they see fit, one after the other. Every time there is an appeal, however, a jury twice as big as the last one will solve the dispute, increasing the costs. This is to dissuade parties from such

[18] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 565 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[19] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, at 87, 93 (2019).

recourse. Finally, jurors are not obliged to state the reasons for their decision. The matrix asks them a yes or no question regarding their findings in a specific case.[20] Even though Kleros is currently used in minor cases, their developers expect to eventually enter the market of medium and large disputes.[21]

Can DJS proceedings be considered as arbitrations? Arbitration works under the belief that parties can decide to opt-out of the jurisdiction of states' judiciary to submit their dispute to a private tribunal and proceedings of their choice.[22] Thus, arbitration as a concept may differ from arbitration as a legal institution. As a concept, it only refers to the submission of a dispute to a private person whose decision the parties have agreed to implement. As a recognized legal institution, arbitration encompasses states' legislation, finding limitations for its use. For example, while an arbitration regarding family law is conceptually an arbitration, there are jurisdictions in which states have prohibited arbitration in matters of family law,[23] making them inarbitrable.[24]

When arbitration is recognized as a legal institution in a domestic jurisdiction, the arbitrators' awards are final.[25] The award's creditor can draw upon a state's means of compulsory enforcement to oblige the debtor's compliance. Also, awards can only be challenged in domestic courts on a specific number of grounds, narrowed to reduce a state's regulatory power, enhancing the principle of parties' autonomy.[26] The

[20] Federico Ast, *Kleros, a Protocol for a Decentralized Justice System*, MEDIUM (Sept 11, 2017), https://medium.com/kleros/kleros-a-decentralized-justice-protocol-for-the-internet-38d596a6300d.

[21] Fernando Quirós, *Federico Ast, cofundador y CEO de Kleros: "Blockchain tiene muchas aplicaciones en el ámbito legal"*, COINTELEGRAPH (Feb. 10, 2020), https://es.cointelegraph.com/news/federico-ast-co-founder-and-ceo-of-kleros-blockchain-has-many-applications-in-the-legal-field.

[22] THOMAS SCHULTZ & THOMAS D GRANT, ARBITRATION: A VERY SHORT INTRODUCTION 20 (Oxford University Press 2018).

[23] *Id.* at 25.

[24] For the concept of arbitrability *see* Loukas A. Mistelis, *Part I Fundamental Observations and Applicable Law, Chapter 1*, in 19 INTERNATIONAL ARBITRATION LAW LIBRARY – ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1, 3-6 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

[25] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3520 (Kluwer Arbitration, 3rd ed. 2021).

[26] U.N. Comm. on International Trade Law, Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 (Vienna: UN, 2008), UNCITRAL [hereinafter UNCITRAL Model Law], Art. 34.

importance of the recognition of arbitration by states relies on these features.

DJS proceedings are conceptually arbitrations.[27] Parties agree on a procedure and choose their private adjudicators. Likewise, they accept to be bound by an eventual decision. Thus, also conceptually, DJS decisions are awards. The issue is whether DJS decisions can be regarded as enforceable awards under the Convention.

For the New York Convention to be applicable, the decision must be taken by an arbitral tribunal, comply with formalities and be rendered in a different state than the one where enforcement is sought.[28] Hence, there are four issues to analyze while determining the possibility of enforcing DJS decisions by way of the Convention. These are:

1. Whether the DJS platforms can be characterized as arbitrators, or the anonymous jurors appointed in DJS like Kleros can be categorized as arbitrators.
2. Whether the DJS decisions can be defined as awards in either the Contracting states' national legislation or the Convention.
3. Whether DJS decisions adopt the form of an award as provided in the Convention or the Contracting States' national legislation.
4. Whether DJS decisions comply with the Convention's territoriality requirement.

It is worth mentioning that there are considerations for enforcing DJS decisions that are not part of this analysis as they are better dealt with by modifying the DJS' protocols. For example, blockchain members only know the other participants' cryptographic private keys but not their physical identity.[29] This issue, which makes the enforcement of a DJS decision in the physical world near impossible, is better solved by creating a rule in the DJS by which the parties will provide information

[27] The platform is the administrator of the proceedings. *See* U.N. Comm. on International Trade Law, Technical Notes on Online Dispute Resolution ¶ 26, UNCITRAL (2017).

[28] UNCITRAL Model Law, *supra* note 26, Arts. 10, 31; New York Convention, *supra* note 17, Arts. I and IV.

[29] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 563 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

about their physical identity to the system. Furthermore, when this is the case, the code could include a condition by which the physical identity of the counterparty will be revealed if there is a DJS decision in need of enforcement in national courts.

III. NATIONAL INTERPRETATIONS OF THE TERRITORIALITY REQUIREMENT IN ART. I (1) OF THE CONVENTION AND ITS APPLICATION TO DJS

Art. I (1) sets out the Convention's scope of application. The Convention applies to awards "made in the territory of a State"[30] different than the State of the enforcement action, or "not considered as domestic awards"[31] in that State. This chapter deals with the treatment of the territoriality requirement in the Contracting States' national legislations and judicial interpretations of the Convention. First, it shows states' tendency to reject "a-national" decisions as awards within the scope of the Convention and the scholarly assertion that the same logic applies to DJS decisions [A]. Second, it describes a clever but ineffective option to enforce DJS decisions as traditional awards [B]. Finally, it presents the USA and France's approaches to recognizing and enforcing "a-national" awards as a further practical step towards the enforcement of DJS decisions [C].

A. *States are Likely to Disregard Decentralized Decisions*

This segment explains the foundations of the current discussion surrounding the territoriality criterion of Art. I (1) of the Convention and its connotations in enforcing DJS decisions.

Territoriality appears to be a criterion derived from common sense. Sovereignty is generally understood in its Westphalian definition, perceiving interaction between states as the polarized representation of regulatory and political power.[32] States hold a police powers' monopoly within their territories and are equal in the realm of international law.[33] Thus, states can conclude international agreements to affect their monopoly of power in favor of other states to recognize and enforce their

[30] New York Convention, *supra* note 17, Art. I (1).

[31] *Id.*

[32] Rainer Grote, *Westphalian System*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum dirs., 2006).

[33] *Id.*

judicial decisions. For the equation to work, every binding decision relies on a state, that has agreed to be part of this international system for the enforcement of such decisions.

It seems that the arbitral system also works under the same logic. Under Art. 1 (3) of the UNCITRAL Model Law, territoriality determines whether an arbitral proceeding is regarded as international and, in consequence, within the law's scope of application.[34] Further, the territoriality criterion in Art. I (1) of the Convention was instituted with the apparent assumption that every arbitral decision must be anchored to a state's legal order. Thus, this logic commands that every arbitration needs to be governed by the law of a physical seat to be enforced under the Convention.[35]

Nonetheless, the Convention has two unique features that empower the tendency to accept a broader interpretation of the territoriality criterion. First, Arts. V and VII have been interpreted to offer the possibility to enforce an award regardless of, for example, the fact that proceedings were set aside in the seat of the arbitration.[36] Second, awards rendered in states that are not a party to the Convention also fall within the scope of Art. I (1).[37] The default rule is that Contracting States must recognize and enforce arbitral awards seated in states that are not obliged to reciprocate them. In other words, the Convention general framework departs from the PIL rule on reciprocity. Consequently, states need to make a reservation to apply reciprocity to Art. I (1).[38] Currently, roughly 75 of more than 160 nations have made

[34] UNCITRAL Model Law, *supra* note 26, Art 1 (3). Also U.N. Comm. on International Trade Law, A/CN.9/WG.II/WP.49 at 6-7, *Note on the Model law on international commercial arbitration: territorial scope of application*, UNCITRAL, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_wg.ii_wp.49_e.pdf.

[35] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice* in ARBITRATION: THE NEXT 50 YEARS 66, 67 (Albert Jan van den Berg ed., Wolters Kluwer 2012).

[36] Furthermore, Art. V (1) (d) of the New York Convention provides that the composition of the arbitral tribunal will be firstly determined by the agreement of the parties. The law of the seat is only a default rule in case of lack of agreement. *See* Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 23.

[37] New York Convention, *supra* note 17, Art. (I) 1.

[38] It takes the name of "reciprocity reservation".

this reservation.[39] More than 50% of the signatories agree with the Convention's default framework, allowing the recognition and enforcement of arbitral awards regardless of whether the State of the seat has ratified the treaty.

The unique features of the Convention and the principle of autonomy of the parties as the foundation of the arbitral system[40] are the basis for a debate as old as the Convention.[41] The issue is whether the territoriality criterion of the Convention, understood as the unchanging requirement that an arbitral award be connected to a state law via the seat of arbitration, is preferred to an absolute application of the principle of autonomy of the parties, which would allow the parties to proceed with an arbitration without a designated seat. Accepting that there is a primacy of the principle of autonomy of the parties comes with embracing the idea that a-national awards, or awards without a seat, are enforceable under the Convention.[42]

While arguing the possibility of enforcing an award set aside in the court of the seat, Prof. Emmanuel Gaillard explains that the debate is about legitimacy. Any position on this matter will depend on one of three competing visions of international arbitration.[43] First, the monolocal vision contests that the arbitral proceeding is preauthorized by the law of the seat. Hence, an award set aside at the seat cannot be enforced in a different jurisdiction.[44] Second, the Westphalian vision believes the law of the seat is one of several laws relevant to international arbitration. Of course, another relevant law is the law of enforcement. Thus, the award's legitimacy can be

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[39] *Contracting States*, NEW YORK ARBITRATION CONVENTION, https://www.newyorkconvention.org/countries (last visited Sep. 7, 2023).

[40] Ramona Elisabeta Cirlig, *Party Autonomy in Determining the Law Applicable in International Commercial Arbitration and its Limits Derived from the New York Convention*, 34 SPAIN ARBITRATION REVIEW 47, 49 (2019).

[41] The *travoux preparatoires* registered a debate on the territoriality criterion that ended in the Contracting States leaving Art. I as it is but modifying Art. V to fit the possibility to relax the criterion. *See (a) Awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*, 1958 NEW YORK CONVENTION GUIDE, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1#617 (last visited Sep. 7, 2023).

[42] Marike & Paulsson, THE 1958 NEW YORK CONVENTION IN ACTION 107-109 (Kluwer Law International 2016).

[43] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice* in ARBITRATION: THE NEXT 50 YEARS 66, 67 (Albert Jan van den Berg ed., Wolters Kluwer 2012).

[44] *Id.*

based on different legal systems.[45] Finally, the transnational vision "considers that international arbitration is anchored in the collectivity of legal systems." In other words, international arbitration is an "a-national legal order, not an autonomous legal order."[46] Hence, the legitimacy of awards is based on majoritarian principles and not on "idiosyncratic or outdated rules of law."[47] The Convention allows for the enforcement of set aside awards under the Westphalian and transnational approaches to international arbitration.[48] Likewise, the transnational view enables the possibility to enforce an award rendered with no seat.

The majority view on the discussion is that a-national awards fall outside the Convention's scope. It relies on the plain text of Art. I (1), the fact that other provisions recognize the role of the *lex arbitri*,[49] and an inference from the Convention's legislative history asserting that Contracting States intended to exclude this type of awards from the treaty's scope of application. In Prof. Van den Berg's words:

> The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the 'a-national' award, on the other hand, deny that such award is made in a particular country ('sentence flottante', 'sentence apatride'). How could such award then fit into the Convention's scope?[50]

Art. 36 of the UNCITRAL Model Law uses the exact wording as Art. V of the Convention. Thus, the debate regarding recognizing a-national awards in national legal systems resembles the one under the Convention. However, some states have decided to lean their legislation toward rejecting a-national awards. For example, Art. 840 (5) of the Italian Code of Civil Procedure and Art. 1076(1)(A)(e) of the Netherlands Private International Law Act provide for the mandatory refusal of

[45] *Id.*

[46] *Id.* at 69.

[47] *Id.* at 70.

[48] *Id.*

[49] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 23.

[50] ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 (Deventer, Kluwer Law and Taxation Publishers 1981).

enforcement in cases in which the award has been set aside by the courts of the seat,[51] creating the logical necessity for every arbitration to have a seat.

In sum, the majority view on the Convention's territoriality criterion, and which has been incorporated in some national systems, is that a-national awards fall outside of the scope of the Convention since they are not rendered in connection with a seat. Thus, awards should have a seat for enforcement under the Convention.

The majority view arguments to reject the enforcement of a-national awards are applicable to DJS decisions due to its even greater level of decentralization. Referring to Kleros, Mauricio Virues asserted that "[g]iven that Kleros … decisions cannot be … considered 'foreign' by any of the contracting States[,] [they fall] out of the scope of [the] New York Convention".[52]

Thus, the narrow view on the territoriality criterion of the Convention and a-national awards creates a tendency to interpret DJS decisions as falling outside the Convention's scope of application. There are two pragmatic reasons to rethink this approach. First, blockchain creates a new reality for international transactions that will be limited in development if the regulation's approach is not dynamic. Second, and likewise, disregarding DJS decisions under the Convention without considering their purpose and functionality is against the treaty's purpose. These issues will be dealt with in chapter three below.

B. *The Enforcement of a Kleros Decision as a National Award in Mexico: A Clever but Ineffective Solution.*

At this point of the analysis, it is important to disregard what seems to be an obvious observation against the relevance of this study. States generally recognize parties' autonomy to a large, but not absolute, extent. Thus, if the seat of the arbitration is of secondary importance in practice, why wouldn't the parties agree on

[51] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 24.

[52] Mauricio Virues Carrera, *Accommodating Kleros as a Decentralized Dispute Resolution Tool for Civil Justice Systems: Theoretical Model and Case of Application* 8-9, *available at* https://ipfs.kleros.io/ipfs/QmfNrgSVE9bb17KzEVFoGf4KKA1Ekaht7ioLjYzheZ6prE/Accommodating%20Kleros%20as%20a%20Decentralized%20Dispute%20Resolution%20Tool%20for%20Civil%20Justice%20Systems%20-%20Theoretical%20Model%20and%20Case%20of%20Application%20-%20Mauricio%20Virues%20-%20Kleros%20Fellowship%20of%20Justice.pdf (last visited Aug. 13, 2022).

a seat that allows waiving the awards' challenge and use a DJS for their arbitral procedure? Furthermore, why would the parties not agree that the DJS decision is rendered in a way that complies with the formal requirements of the physical world to be enforced? Said differently: if parties can adapt DJS technology to the current arbitral system, is there a need to contest the narrow interpretation of the territoriality criterion adopted by most states in their national interpretations of the Convention?

This issue is addressed in three steps. First, is the possibility of adapting DJS' technology to traditional arbitration through the example of a national award enforced in Mexican courts. Second, is the option of adjusting this solution to international arbitration. Third, is the disadvantages of following this seemingly pragmatic approach.

First, a case of enforcement of a national arbitral award whose ruling was decided by Kleros jurors in the courts of Jalisco, Mexico is empirical evidence that applying DJS technology to traditional arbitration is possible. The case related to the breach of a lease of MXN$4.000,00 (US$200) per month. The lease contained an arbitration agreement (AA) in which parties appointed a sole arbitrator (SA) and agreed that a Kleros jury would solve the merits of their disputes. Furthermore, the parties waived their right to challenge the award. Both parties were Mexicans, the property object of the lease was in Jalisco, and the seat of the arbitration was also Jalisco.

The lessor instituted arbitral proceedings to terminate the agreement due to the lease's lack of payment. As the parties agreed in the AA,[53] the proceedings concluded in a month and envisaged the following steps: (i) the claimant sent his claim and the supporting evidence via email to the SA;[54] (ii) the SA notified the defendant,[55] and the latter submitted her response and evidence; (iii) the SA drafted a Procedural Order No. 1 summarizing the parties' positions, listing the evidence and outlining the

[53] *Id.* Annex I: Original Arbitration Agreement, at 28-30.

[54] *Id.* Annex II, at 32.

[55] *Id.* Annex II, at 33-34.

procedure to submit the dispute to Kleros;[56] (iv) the SA submitted the electronic file and the order to Kleros for adjudication;[57] (v) Kleros initiated a proceeding in its system and appointed a jury; (vi) the jury came to a decision declaring the breach;[58] (vii) the SA was notified with the decision; and, (viii) rendered an award implementing it.[59] Then, the claimant filed for enforcement of the award in the courts of Jalisco, which recognized and enforced it under Jalisco's Code of Civil Procedure.[60] The parties to the lease agreement came up with a clever solution to submit their disputes to Kleros while ensuring its enforcement by agreeing that the decision will be rendered in the form of a traditional award.

Second, to implement this solution in international arbitrations, parties should agree on a seat for the proceedings depending on their type of contract and the DJS they wish to implement. If the dispute is regarding an SC or an SLC, the seat should be in a place in which these contracts are regulated, to avoid the risk that the award is set aside for breach of public policy.[61] Also, if the DJS chosen by the parties provides for a revision in the system, like in the case of Kleros, parties will need to find a jurisdiction in which the right to challenge an award is waivable, as it happens in France[62] or Switzerland.[63] This way, they will ensure there is no re-litigation. It goes without saying that this option solves not only the issue of the territoriality of the award but those surrounding the award's definition, its formal requirements, and the DJS as arbitrators, which will be dealt with in chapter four.

However, there are three reasons to deem this option inefficient.

First, it allows the parties to challenge the validity of the AA in the courts of the

[56] *Id.* Annex III, at 37-39.

[57] *Id.* Annex III, at 40.

[58] *Id.* Annex IV, at 43.

[59] *Id.* Annex V, at 45-50.

[60] *Id.* Annex VIII, at 63-65.

[61] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 129 (2019).

[62] CODE OF CIVIL PROCEDURE, Art. 1522 (Fr.).

[63] FEDERAL ACT ON PRIVATE INTERNATIONAL LAW, Art. 192 (Ch.).

seat via Art. II of the Convention, before initiating proceedings in the DJS. This denaturalizes DJS' proceedings applied to SCs and SLCs, abolishing some of their benefits. One of the reasons Kleros proceedings are expedited is because juries cannot decide jurisdictional issues.[64] There is no doubt about the parties' agreement to access the DJS since it is coded in detailed conditions. The same happens with their capacity, certified via their cryptographic private keys. In other words, DJS replaced judicial revision of the AA's validity with the coded corroboration of the parties' agreement. Thus, the dispute is solved directly on the merits. Likewise, the legality of the AA is determined by the parties' agreement coded in the blockchain. Attaching it to national legislation is against the chain's nature, which was created to avoid states intervention.[65]

Second, it adds a further obstacle to enforce DJS' decisions. In the case above, the SA did not resolve the dispute. It operated as a formal nexus between the parties and the real adjudicators in the DJS. Thus, courts of enforcement will need to assess the legality of this theoretically feasible situation. The outcome will depend on the treatment that each legislation gives to arbitrators. If the enforcement is sought in a jurisdiction in which arbitrators are equated to judges in their duty to preserve the rule of law,[66] the courts of enforcement might be obliged to make a two-step analysis to determine if both the SA and the jury in the DJS are arbitrators within the scope of their national law. In an unfavorable scenario, enforcement could be rejected due to violation of public policy for lack of the minimum due process guarantees in the proceeding–*i.e.*–the right to be judged by a competent and state recognized authority.[67] Under this solution, the issue of whether DJS or their juries are

[64] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 569 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[65] Georgios Dimitropoulos, *The Law of Blockchain*, 95 Wash L Rev 1117, 1120 (2020).

[66] Like it happens, for example, in Italy where arbitrators are equated to judges. *See* CODE OF CIVIL PROCEDURE, Art. 824-bis (It.).

[67] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Art. 6(1) (Nov. 4, 1950), ETS 5, *available at* https://www.refworld.org/docid/3ae6b3b04.html (last visited Sep. 7, 2023).

arbitrators for the purposes of enforcement remains outstanding. It is preferable to assess this issue directly, to seek a greater degree of certainty regarding the applicability of the Convention to DJS decisions.

Finally, adapting DJS to traditional arbitral proceedings limits the development of international arbitration as it does not deal with the new technologies' regulatory challenges. This is a concern because it could institute a states' practice in favor of the territoriality principle in a globalized world in which decentralized dispute settlement is a plea for efficiency. There are two considerations. First, the institution of a states' practice in favor of the territoriality principle will complicate, if not make it impossible to interpret the Convention in favor of the direct enforcement of DJS decisions in the future.[68] Second, improving DJS' technology will take longer due to the increased risks of implementation in medium and large disputes. In consequence, implementing DJS decisions in the form of traditional awards is contrary to the reality of blockchain applied to international transactions and could affect the technology's development. Consequently, dealing with the possibility to enforce DJS decisions by interpreting the Convention is preferable.

C. *The USA and France Interpretations of the New York Convention's Territoriality Criterion: A Step Towards the Enforcement of DJS Decisions*

There are jurisdictions whose national legislation and courts' interpretation of the Convention adopt a broader approach to the territoriality criterion that may allow enforcement of DJS decisions. This segment deals with the USA and France's acceptance that a-national awards fall within the scope of the Convention and its application to DJS decisions.

First, US courts have accepted the possibility of applying the Convention to enforce a-national awards, or awards without a seat. The US Court of Appeals for the Ninth Circuit enforced an award rendered by the Iran-United States Claims Tribunal holding that an award need not be rendered under a national law to be enforceable under the Convention.[69] It relied on Art V (1) (d), which does not allow parties to resist

[68] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31 (3) (b), 1155 U.N.T.S. 331.

[69] *Islamic Republic of Iran v. Gould Inc et al.*, 887 F.2d 1357 (9th Circuit. 1989).

enforcement if the procedure was in accordance with their agreement. In other words, it interpreted the provision as an indication that parties can validly decide to detach their proceedings from any seat. The court clarified that Art. I (1) of the Convention does not include a "separate jurisdictional requirement that the award be rendered subject to a national law."[70]

It is uncertain if the US courts would allow the enforcement of DJS decisions following the same logic adopted for a-national awards since cyberspace is qualified as a "no place." However, it is reasonable to expect that US courts would accept that there is no need to render an a-national award in a physical place for its enforcement under the Convention, given that they already excluded the need of a *lex arbitri*. In any case, the risk exists. The outcome is contingent on the interpretation of the US courts regarding the requirement of having an award rendered in a different territory than the enforcement proceedings.[71] In other words, a decision to enforce a DJS in the US will depend on the way judges solve the issues surrounding jurisdiction over cyberspace and the blockchain. Suppose they decide to allow self-regulation in the blockchain by application of the parties' autonomy principle. In that case, DJS decisions will be enforceable under the US approach to the Convention's territoriality criterion.

Second, the courts in France have held that parties can agree to detach the arbitration from any seat. This conclusion came from the French perception of international arbitration which is "based on the premise that there is an arbitral legal order, which is distinct from the legal order of individual states … [and that] this arbitral legal order – and no national legal order – … confers juridicity to arbitration."[72]

The courts understand international arbitration as a separate regime, unrelated and more important than national law.[73] On that note, the Court of Appeal of Roen

[70] *Id.*

[71] New York Convention, *supra* note 17, Art. I (1).

[72] Dominique Hasher, *The Review of Arbitral Awards by Domestic Courts – France*, in 6 IAI SERIES ON INTERNATIONAL ARBITRATION: THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 97 (Emmanuel Gaillard ed. Juris 2010).

[73] Paris Cour d'Appel [Paris Court of Appeal] Dec. 18, 2018, Rev. Arb. 847, *New Euro. Corporate Advisory Ltd v. Innova 5/LP-ès Qualités de Liquidateur de la Société Twelve Hornbeams Sarl* (Fr.).

decided to enforce an award based on an AA that expressly excluded any national law as *lex arbitri*.[74] Even though the courts in France have not dealt with the enforcement of DJS decisions, a favorable decision seems likely.

In sum, both the USA and France interpretations that the scope of the Convention includes the enforcement of a-national awards are aligned with the path to recognition and enforcement of DJS decisions. Thus, they are likely to become popular *forums* for the enforcement of DJS decisions, or at least their courts will be the starting point to attempt their enforcement.

The broad and narrow interpretation of the Convention's territoriality criterion leads to different results. While the broad interpretation is likely to allow the enforcement of DJS decisions as a-national awards, the narrow interpretation deems them as falling outside the scope of the Convention. This limits the adaptability of the Convention to new realities and the uniform application of its provisions in the Contracting States' courts. The issue is the different interpretations of the Convention performed by the Contracting States.[75] The problem is evident when analyzing DJS decisions, the way states understand blockchain and cyberspace, and any other technology to decentralize commercial operations.

IV. THE TERRITORIALITY REQUIREMENT OF ART. I (1) OF THE NEW YORK CONVENTION IS OUTDATED

This chapter deals with the possibility that DJS decisions meet the territoriality criterion via an autonomous and evolutionary interpretation of the New York Convention. First, it analyzes the theory of sovereignty over cyberspace and the existence of an autonomous legal order in the blockchain. It does so by showing that the traditional approach to territoriality is not fit for the new reality created by the blockchain [**A**]. Second, it proposes an autonomous and evolutionary interpretation of Art. I (1) of the Convention to contest that DJS decisions comply with the

[74] Rouen Cour d'Appel [Rouen Court of Appeal] Nov. 13, 1984, 982/82, *Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. République Socialiste Fédérale de Yougoslavie* ; *see also* Paris Court d'Appel [Paris Court of Appeal], 9 Dec. 1980, Rev. Arb. 306, *Société Aksa v. Société Norsolor* (Fr.).

[75] Cristina M. Mariottini & Burkhard Hess, *Chapter 3: The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 27, 49 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

Convention's territoriality criterion [**B**].

A. *The Territoriality of International Awards and the Jurisdiction over Cyberspace: Westphalian Sovereignty against the Blockchain Legal Order*

This section explains the struggle to regulate the internet. Then, it justifies changing the theoretical foundations of jurisdiction over the internet to deal with blockchain, which will shape the new cyberspace.[76]

For the first time in history, humanity started interacting outside the physical world using the internet. Thus, states have had issues deciding whether internet should be regulated, finding ways to create minimum standards for internet navigation, and identifying which of its spheres will be relevant for their legal systems. There are two primary considerations. First, the access to cyberspace's democratization allows categorizing it as a global public good.[77] Second, there are no treaties or international instruments in which states have come to an agreement on how to regulate cyberspace at an international level.

The current approach to regulation is that every state creates legislation prohibiting several types of conduct performed on the internet.[78] Hence, the attempts to regulate the internet are concentrated on rejecting its delocalization and adapting it to the Westphalian concept of sovereignty.[79] In consequence, states deem their jurisdiction over the internet as being of a local or national nature. Also, they only regulate the effects that the internet might have in their territories, but they cannot shape the way it is used, creating conflicting *de facto* jurisdictions.[80]

An example of the above is the 2018 Cambridge Analytica scandal involving

[76] This work understands cyberspace as a global infrastructure "consisting of the interdependent network of information systems structures including the Internet, telecommunications networks, computer systems, and embedded processors and controllers." *See Definition of cyberspace*, COMPUTER SECURITY RESOURCE CENTER, https://csrc.nist.gov/glossary/term/cyberspace (last visited Sep. 7, 2023).

[77] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 7 (2021), *available at* https://www.sciencedirect.com/science/article/pii/S0267364921000042.

[78] *Id.* at 9.

[79] Even though the Westphalian concept of sovereignty is not applicable. *See Id.*

[80] Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3) AMERICAN BAR ASSOCIATION STABLE (Publisher) 1129, 1134 (2008), *available at* https://www.jstor.org/stable/23824404.

Facebook users' personal information. The matter became so significant that Mark Zuckerberg, Facebook's CEO, was summoned to the US Senate to explain the company's actions.[81] For the same matter, Facebook had to pay a fine in the UK in the amount of GBP 0.5 million.[82] Nonetheless, there was no possibility to oblige Facebook to comply with a unified and worldwide standard on the use and protection of its users' personal data. Also, most states could not impose substantive sanctions against the company's assets, so they could only condemn it via statements. Facebook's policies on personal data changed from that day but were shaped solely by those states with some sort of control over the company's transactions.

The problem is even deeper. States cannot create rules to ensure their citizens' rights are respected on the internet. Even though there could be decisions in which national courts determine a violation of rights, the use of the power of police for compliance will depend on the ability of the State to interfere with the rights or assets of the person or company committing the violation. The truth is that most of the infringements will not even be noticed by the states due to their lack of relevance and judicialization. Realistically, most operations on the internet are governed by the terms and conditions of the different platforms, regardless of their compliance with any national law.

There is scholarly opposition to the "nationalization" of the internet for regulation purposes. The criticism is that it denies its decentralized nature and status as a global public good. States should be worried about internet governance by doing their due diligence and accepting they have shared jurisdiction over the internet on an international level.[83]

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[81] *Facebook, Social Media Privacy and the Use and Abuse of Data : Hearing on Hart 216 before the S. Comm. on Commerce, Science, & Transportation* (Apr. 10, 2018), *available at* https://www.commerce.senate.gov/2018/4/facebook-social-media-privacy-and-the-use-and-abuse-of-data.

[82] Paolo Zialcita, *Facebook Pays $643,000 Fine For Role In Cambridge Analytica Scandal*, NPR (Oct. 30, 2019), https://www.npr.org/2019/10/30/774749376/facebook-pays-643-000-fine-for-role-in-cambridge-analytica-scandal?t=1659627829342.

[83] Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, 1319 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

In any case, the territorial approach to internet's regulation has prevailed since it is not difficult to spot the links between the object of regulation and the physical world by locating it and its assets. This is not the case when dealing with the blockchain.

An operation in the blockchain does not involve a developer incentivized to comply with certain regulations due to the potential risks for its rights or physical assets. It does not have a specific server located in a physical place to store the information. It uses nodes located all over the world.[84] Likewise, it generally involves cryptocurrencies, which were specifically created to bypass the costs of financial institutions and state regulation with them.[85] Finally, transactions are self-executed within the system. For these reasons, it is said that blockchain "promises a spaceless economy."[86]

While the internet changed the way people interact, it is undeniable that blockchain departs from the known cyberspace and creates a new reality in which there are self-sufficient cyber communities with no strings attached to any state. The blockchain has a clear jurisdiction to prescribe, adjudicate and enforce transactions,[87] using code to generate an effect that looks a lot like the states' police powers. Thus, it goes as far as creating a legal order autonomous from any state's jurisdiction.[88]

Even though it seems that the general understanding is that states have no jurisdiction over the blockchain,[89] they have started to regulate some of its developments. For example, in states like the UK, cryptocurrencies are considered

[84] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 564 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[85] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1120 (2020).

[86] *Id.* at 1161.

[87] This is the criteria to determine the existence of a legal system. *See* Thomas Schultz, *Private Legal Systems: What Cyberspace Might Teach Legal Theorists*, 10 (1) YALE JOURNAL OF LAW AND TECHNOLOGY 151, 173 (2008), *available at* http://digitalcommons.law.yale.edu/yjolt/vol10/iss1/5.

[88] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1122 (2020).

[89] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 122 (2019).

money for tax purposes.[90] Again, the method merely adapts what was previously done with internet regulation. The steps are finding a connection with the physical world and then regulating as if cyberspace was part of it.

What is important for this work is to spot the problems in the very logic of this approach, that assumes that the jurisdiction of cyberspace is of national or local nature because the regulation is national. There are two issues. First, it rejects the international effects of cyberspace, its nature, and worldwide reach. Second, it allows states to regulate the internet as a form of interaction between people, but it does not allow cyberspace users to benefit from the treaties created by states for other transnational interactions, like the Convention.

The same effect with no disadvantages can be accomplished if the theoretical assumption changes to accept that the legitimacy of every national cyber regulation comes from a shared jurisdiction of states over cyberspace at an international level.[91] This way every state has the right to regulate the internet's impact in their territories, but they also acquire an international obligation of due diligence and a tendency for uniformity in the treatment of cyberspace. This can be done by application of the general principles of Public International Law (PIL), such as cooperation and good faith.[92]

The assumption that jurisdiction over the internet is of local nature is unsustainable when analyzing the new reality offered by blockchain technology. This reality is better explained if cyberspace is understood as a global public good that is used for people's interactions and in which there is room for states' regulation due to their shared jurisdiction at an international level. Hence, states hold the power to regulate cyberspace with the limits portrayed by the recognition of the parties'

[90] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1134 (2020).

[91] Some will go as far as contesting the existence of a *Jus Internet* as an adaptation of the Roman institution of *Jus Gentium* to cyberspace. *See* Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, 1317 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

[92] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 9 (2021), *available at* https://www.sciencedirect.com/science/article/pii/S0267364921000042.

autonomy principle. Thus, some of the features and alleys of cyberspace cannot be regulated as they are legitimized in cyber communities which do not abide by rules from the physical world but are operating without affecting any national legal system. Therefore, one of the aims should be to create ways to ensure cooperation between these blockchain communities and the physical world.[93]

By accepting that there is a shared and non-absolute jurisdiction over cyberspace, states would be in a better position to interpret the existing framework and apply it efficiently to the new challenges brought by technology. For the purposes of this work, this new assumption allows contesting that the issue of DJS decisions is of transnational nature, when there are no indications that the matter is local or national, and therefore it should be solved by interpreting the existing international framework. In other words, it is a way to ensure that the discussion remains in the realm of international law, even though the regulation over cyberspace tends to be national.

B. *The Autonomous and Evolutionary Interpretation of Art. I (1) of the New York Convention Towards the Acceptance of the Transnational Approach To Arbitration*

Changing the assumption for the jurisdiction over cyberspace locates the phenomenon of blockchain in the realm of international law. Generally, this new reality would not have a specific effect since there are no international treaties dealing with cyberspace. Nonetheless, it also allows interpreting treaties whose scope might encompass one of the multiple applications of the blockchain. This section interprets Art. I (1) of the Convention to contest that DJS decisions fall within the Convention's territorial scope of application. To do so, it deals with two issues. First is the need to interpret the Convention's provisions autonomously from the Contracting States' national legal systems. Second is the possibility to give a new interpretation to the territoriality requirement in Art. I (1) of the Convention due to the new circumstances that international transactions face with the implementation

[93] Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, at 1313, 1349 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

of the blockchain.

First, the Convention must be interpreted autonomously from the Contracting States' national laws. The Convention is a framework treaty. It aims to unify the proceedings for the enforcement of arbitral awards among the Contracting States. Thus, the interpretation of its provisions is not governed by party autonomy or the law of the seat.[94] It is governed by the rules on interpretation under Customary International Law (CIL) codified in Arts. 31, 32, and 33 of the Vienna Convention on the Law of Treaties (VCLT).[95] Furthermore, a uniform interpretation of the Convention is likely by using rules of international law. Uniformity contributes to the Convention's goal to ensure the effectiveness of arbitration by safeguarding the recognition and enforcement of arbitral awards.[96] Consequently, an autonomous interpretation of the Convention is preferred over the national perception of its provisions.

Pursuant to Art. VII (1), courts have held that they are allowed to use national conflict of law rules in an enforcement proceeding under the Convention if the analysis triggers the application of a law that is more favorable for the recognition or enforcement of the award.[97] This possibility is not limited by the autonomous interpretation of the Convention. The interpretation is to determine the meaning of the treaty's wording and its scope of application as a framework treaty. Furthermore, it ensures that the Convention is not interpreted to widen its scope instead of broadening it according to its object and purpose. Said in a different way, the

[94] Franco Ferrari & Friedrich Jakob Rosenfeld, *Chapter 11: The Interplay of Autonomous Concepts and Municipal Law under Article V(1)(d) of the New York Convention*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 273, 247 (Franco Ferrari & Friedrich Jakob Rosenfeld eds. Kluwer Law International 2021).

[95] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31 (3) (b), 1155 U.N.T.S. 331.

[96] Cristina M. Mariottini & Burkhard Hess, *Chapter 3: The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 28, 49 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

[97] Bundesgerichtshof [BGH] [Federal Court of Justice] Sep. 21, 2005, III ZB 18/05 (Ger.), https://newyorkconvention1958.org/index.php?lvl=notice_display&id=278 (the application of German conflict-of-laws rules via Art. VII (1) of the New York Convention directed the Court to apply Dutch law, which contained more liberal formal requirements for an arbitration agreement than those under Art. II).

autonomous interpretation of the Convention allows for a unifying understanding of its provisions to ensure that national legislations do not take steps backwards on recognizing and enforcing awards. That is precisely the aim of the interpretation to allow the enforcement of DJS decisions under the Convention.

Second, according to Art. 31 of the VCLT, a treaty must be interpreted in good faith and in accordance with: (i) the ordinary meaning of its terms; (ii) its context, and (iii) considering its object and purpose.[98] The recourse to the treaty's preparatory work is reserved for when the interpretation leads to an ambiguous, obscure, unreasonable, or absurd result.[99] Every treaty interpretation must follow the steps set out in Art. 31 VCLT.

As a rule, the interpreter will analyze the ordinary meaning of the terms of the treaty in two moments in time: the conclusion of the treaty and the moment the interpretation is carried out. This exercise is the content of the contemporaneity principle of interpretation.[100] Nonetheless, this rule is not absolute. There are exceptions that allow the interpreter to analyze the meaning of the treaty's terms solely with the context set out when the interpretation is taking place. This is called evolutionary interpretation and is a tool to implement the principle of evolution of treaties. This principle consists in the ability of treaties to adapt to new realities when their terms cannot reasonably apply in the way they were used in the past.[101]

There are two scenarios where the evolutionary interpretation is accepted. First, when the wording of the treaty is proof of an implied choice of the parties to make it subject to an evolution of its content. Second, when there are objective reasons to opt for an evolutionary interpretation in absence of a guide as to the parties' intentions.[102] The Convention meets both scenarios.

First, the Convention is a framework treaty with general rules for the recognition

[98] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31, 1155 U.N.T.S. 331.

[99] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 32, 1155 U.N.T.S. 331.

[100] Eirik Bjorge & Robert Kolb, *Part V: Treaty Interpretation, 20.- The Interpretation of Treaties over Time* in THE OXFORD GUIDE TO TREATIES 489, 493 (2nd ed.) (Duncan Hollis ed. 2020.

[101] *Id.* at 494

[102] *Id.* at 495.

and enforcement of arbitral awards. It was open for signature after the United Nations Conference on International Commercial Arbitration held in New York City in 1958. The Conference's Final Act gives context to the Convention's provisions. It expresses the goal of states to increase arbitration's effectiveness and that the Convention was one of the many tools they saw fit for the mission.[103] The other enlisted fronts to work in favor of arbitration are: the creation of new arbitral institutions, publishing the information on arbitral laws, and procuring uniformity in national arbitral laws.[104] The Contracting States wanted to protect the right of their citizens to opt for an arbitral proceeding to solve their transnational disputes at an international level, admitting that there is room for change and aiming that it will be aligned with a broad room for arbitration. They wanted to ensure the party's autonomy prevalence.

With this intention in mind, one can understand the way the Convention is drafted. Art. I (1) does not define arbitral award. Also, the territoriality criterion is descriptive rather than prescriptive. It states that the Convention applies to awards rendered in a place different than the enforcement territory to characterize awards as foreign, as opposed to national awards which are governed by the relevant local law. By reading the Convention this way, the second scenario of application of Art. I (1) becomes obvious. The Convention also applies to awards rendered in the place of enforcement but characterized as non-domestic according to the local arbitration law. Thus, the seat system is a way to give nationality to an award and determine if it is local or foreign in the enforcement stage. In other words, it is just a formal rule the parties can opt-out from.[105]

Likewise, Art. I (1) of the Convention is drafted in a way that ensures the broadest possible application. The provision repealed the reciprocity rule to determine the

[103] UNCITRAL, *Final Act of the United Nations Conference on International Commercial Arbitration* ¶ 1, E/CONF.26/8 Rev.1 (1958).

[104] *Id.* at ¶16.

[105] Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3), AMERICAN BAR ASSOCIATION STABLE (Publisher), 1129, 1140-1141 (2008), *available at* https://www.jstor.org/stable/23824404.

Convention's scope of application. The text mandates that any foreign award is to be enforced under the treaty. This intention can also be identified in the treaty's text. Art. X (1) creates the obligation for the Contracting States to declare that the Convention extends to all the territories under their control. The New York Convention was created to become a framework treaty accepted worldwide, in all territories, and across all jurisdictions. Thus, the Contracting States intended for the Convention's provisions to be capable of adapting and evolving over time.

Rendering awards in a physical seat was the only foreseeable option when the Convention was opened for signature. Cyberspace was far from becoming a reality. Hence, the wording of Art. I (1) is adapted to the context of the treaty's signature, in which it was unthinkable that people could interact on a decentralized and transnational platform, far from the reach of states' legal systems. In any case, the fact that the wording of the Convention is adapted to a certain reality does not contradict the fact that it suggests that the Contracting States chose to allow the evolutionary interpretation of its text.

Second, the Convention does not include rules for the interpretation of its provisions and there is an objective reason to make an evolutionary interpretation of its terms: efficiency. Assuming that the future tendency in international transactions is to use blockchain, DJS will become the most popular means for solving international commercial disputes. The Convention at its very core is a recognition of the principle of autonomy of the parties and the right to choose arbitration to solve their disputes. Blockchain and DJS represent a new expression of such autonomy. On that note, DJS decisions encompass the goal of the Convention which is to recognize decisions rendered in arbitral proceedings pursuant to the agreement of the parties. Thus, Art. I (1) of the Convention should be interpreted in an evolutionary manner.

To make an evolutionary interpretation, the interpreter must follow the same steps provided in Art. 31 VCLT. The aim is to employ the new reality as context for the plain meaning of the treaty's terms. Up to this point, the context of the treaty's creation was useful to find that the Convention's terms can be subject to an

evolutionary interpretation. The next step is to establish the ordinary meaning of Art. I (1) solely in the context of blockchain and cyberspace, in light of the object and purpose of the Convention.

As already established, DJS decisions are rendered in cyberspace. That means the proceedings are "everywhere and nowhere at the same time."[106] Thus, the notion of the arbitral seat and foreign award need adjustments. On this point, it has been said that the concept of foreign or national awards is no longer relevant in cyberspace arbitrations and the application of the Convention should concentrate exclusively on whether the decision deserves to be enforced.[107] This view should not be accepted as it disregards the terms of Art. I (1) without interpreting them. It does not adapt the current system to enforce DJS decisions.

Considering DJS decisions as the product of a new form of arbitration created in the blockchain, and with the assumption that States have shared sovereignty over cyberspace at an international level, an evolutionary interpretation of Art. I (1) of the Convention allows for the enforcement of DJS decisions. Where the Convention says it "shall apply to the recognition and enforcement of arbitral awards *made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*,"[108] the ordinary meaning should be that the Convention applies to any award rendered outside of the jurisdiction of the State where the enforcement is sought. Thus, national courts will determine if the award is national or foreign considering the reality of the transaction, like the US approach to non-domestic awards, but with a presumption in favor of accepting that there is international jurisdiction over decisions rendered in the cyberspace. This way, DJS decisions comply with the requirement of Art I (1) and fall within the Convention's scope of regulation.

This interpretation is consistent with the Contracting States' practice, which is one of the criterions to consider when interpreting a treaty according to Art. 31

[106] *Id.* at 1140.

[107] *Id.* at 1145.

[108] New York Convention, *supra* note 17, Art. I (1) (emphasis added).

VCLT,[109] but in an indirect manner. As it was explained in chapter two, the general tendency of national courts is to disregard decentralized decisions from the scope of application of the Convention. Hence, the position of the Contracting States contradicts the evolutionary interpretation of the treaty. Nonetheless, the general view of states on this issue comes from their understanding of jurisdiction. A-national awards are not accepted as part of the scope of application of the Convention because the general understanding is that they are not anchored to any jurisdiction. Thus, it can be said that the states' practice in its core is to enforce arbitral awards that come from a jurisdiction different than the one of enforcement. If the assumption changes to accept a shared jurisdiction over the cyberspace at an international level, state practice remains consistent, while accepting the evolution of the concept of jurisdiction to deal with the reality created by cyberspace and the blockchain.

Finally, DJS can be perceived as the sacralization of the transnational approach to arbitration, which states that its legitimacy comes from an international consensus,[110] given its self-enforcement capabilities.[111] The same goes for the assumption that there is a shared jurisdiction over the blockchain. It helps to build in favor of the existence of an arbitral legal order that is not anchored to any jurisdiction and which states have recognized because of an international consensus found in the Convention's provisions. Hence, the evolutionary interpretation of Art. 1 (1) has the potential not only to allow for the enforcement of DJS decisions but to terminate the debate regarding the different views about the legitimacy of international arbitration by preferring the transnational approach.

V. DJS PLATFORMS, JURORS, AND ELECTRONIC DECISIONS: NATIONAL LEGISLATIONS VS. THE NEW YORK CONVENTION'S AUTONOMOUS AND EVOLUTIONARY INTERPRETATION

This chapter deals with the remaining issues to enforce DJS decisions under the

[109] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31, 1155 U.N.T.S. 331.

[110] DOLORES BENTOLILA, 43 INTERNATIONAL ARBITRATION LAW LIBRARY: ARBITRATORS AS LAWMAKERS 5-6 (Kluwer Law International 2017).

[111] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 575 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

Convention. It uses the same structure as the analysis regarding the territoriality criterion in Art. I (1) of the Convention, contrasting national courts interpretations of the Convention and making an autonomous and evolutionary interpretation of its provisions. First, it deals with whether DJS platforms or jurors can be understood as arbitrators under the Convention [**A**]. Second, it analyses whether DJS decisions can be considered arbitral awards [**B**]. Finally, it contests that DJS decisions comply with the formal requirements for arbitral awards under the Convention [**C**].

A. *DJ Platforms or Jurors as Arbitrators*

In an oversimplification, DJS' like Kleros rely on people for the decision-making process. Juries are human beings that have agreed to solve a dispute using their expertise. Thus, they are arbitrators in the ordinary meaning of the word, a group of persons that adjudicate a dispute by agreement of two parties. Hence, there should be no need to go any further in the analysis on whether DJS decisions are rendered by arbitrators.

Nonetheless, there are two considerations. First, even though juries decide on the dispute, the code implements it. Thus, the allocation of responsibility behind the implementation of the decision should have some influence on who is considered the adjudicator in DJS disputes. Second, juries are generally anonymous. This could complicate the enforcement of a DJS decision given the possibility that having an unidentified decision maker violates the public policy of the place of enforcement.[112] Thus, this section addresses the possibility that the DJS themselves are considered as arbitrators, allocating the liability for implementing the award in the blockchain on them to ensure the recognition and enforcement of the award. This is regardless of the possibility that the platforms' protocols reveal the identity of the arbitrators, oblige them to give reasons for their decisions, and make them sign the awards, which will also ensure the enforcement of DJS decisions under the Convention.

The next issue is whether the company that owns the DJS could sit as an arbitrator. National legislations do not generally prohibit this possibility, but the

[112] New York Convention, *supra* note 17, Art. V (2) (b).

underlying assumption is that the arbitrators should be natural persons. For example, the UNCITRAL Model Law assumes that the arbitrators will be natural persons by using the pronouns he/she or his/her in its text.[113] The same happens with the national arbitration laws of the United Kingdom and the USA.[114] However, in states like Qatar, the role of an arbitrator is reserved for natural persons only.[115] There are different views in national legislation on this issue. Thus, as with the territoriality criterion of Art. I (1), an autonomous interpretation of the Convention is preferred to procure uniformity on whether corporations can sit as arbitrators.

Art. I (2) provides that awards made by appointed arbitrators and by "permanent arbitral bodies" are within the scope of the Convention. Furthermore, the Convention does not assume arbitrators can only be natural persons. On the contrary, it expressly accepts awards rendered by arbitral bodies.[116] It will be a matter of interpretation of what the provision means by arbitral bodies. Traditionally, it might be understood that the Convention refers to arbitral institutions whose existence has been accepted by the State in which they are located, like the ICC Court of Arbitration or the SCC Arbitration Centre. Nonetheless, an evolutionary interpretation of the provision allows the inclusion of DJS as arbitral bodies, since the parties agreed to submit their disputes to them, and they exist in cyberspace. Again, this position builds in favor of the transnational approach to arbitration, with the AA being sufficient to determine the existence of such arbitral body.

However, the Convention does not specify if the appointed arbitrators should be natural persons. Thus, understanding the DJS as a corporation appointed in an ad hoc arbitration could also be an option. An autonomous and evolutionary interpretation of the Convention in this matter creates the possibility of comparing

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[113] UNCITRAL Model Law, *supra* note 26, Art. 11; *see also* João Ilhão Moreira & Riccardo Vecellio Segate, *The 'It' Arbitrator: Why Do Corporations Not Act as Arbitrators?*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 525, 536 (2021), *available at* https://doi.org/10.1093/jnlids/idab022.

[114] *Id.* at 537-538.

[115] Civil and Commercial Arbitration Law 2017 (State of Qatar), Art. 11.1.b.

[116] João Ilhão Moreira & Riccardo Vecellio Segate, *The 'It' Arbitrator: Why Do Corporations Not Act as Arbitrators?*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 525, 537 (2021), *available at* https://doi.org/10.1093/jnlids/idab022.

DJS decisions to arbitrators or arbitral institutions. Therefore, the criterion in Art. I (2) of the Convention is met since DJS decisions are rendered by arbitrators.

B. *DJS Decisions and the Arbitral Award's Definition*

The Convention is applicable to "arbitral awards" according to its Art. I (2).[117] Nonetheless, it does not provide a definition of arbitral awards. The same happens with the UNCITRAL Model Law where arbitral award is not defined either. They solely provide for arbitral awards' formal requirements, an issue that is addressed in the next section, and their characteristics. Regarding the latter, Art. V (1) (e) of the Convention and Art. 36 (1) (a) (v) of the UNCITRAL Model Law provide that an enforceable award must be final and binding between the parties.

The definition of arbitral awards for both the Convention and the UNCITRAL Model Law should be pragmatic. An arbitral award is a decision rendered by an arbitrator or arbitral body after a proceeding to solve a dispute referred to them by the agreement of the parties. Under this definition, DJS are arbitral awards. The issue is the finality and binding effect of DJS decisions, which are the requirements for their enforceability under both the Convention and the Model Law.

First, the finality requirement is met if the arbitral award cannot be subject to challenge or revision. DJS decisions comply with it when the proceeding in the revision mechanism ends, and the code is enacted. Thus, DJS decisions are final when the decision is rendered in the system or when the code is enacted, depending on whether the dispute is regarding an SC, an SLC, or a traditional contract. At this point, it is futile to analyze the finality requirement linked to the seat of arbitration. The use of the seat was already disregarded for the territoriality criterion of the Convention. Thus, the rest of the issues to enforce DJS decisions under the Convention should follow the same fortune.

Second, there is a debate regarding the enforceability of arbitral awards. The issue is whether the binding effect of arbitral awards required by the Convention is met if the decision comes from a contractual source, or the award must be binding

[117] New York Convention, *supra* note 17, Art. I (1).

according to the law of the seat.[118] The general view is that arbitral awards must be binding according to the law of the seat and the binding effect of the award by the contractual agreement of the parties is not enough to avail recourse to the Convention.[119] Nonetheless, states like Italy have interpreted the Convention as lacking a requirement for the award to be judicially binding in the law of the seat. Thus, contractual finality is enough to enforce an award using the Convention. The Italian courts reached this conclusion with the assumption that the Convention is a framework treaty that should be interpreted in a flexible manner, beyond concepts and provisions of their own national law.[120] In other words, the Italian courts performed an autonomous and evolutionary interpretation of the Convention.

At first sight, DJS decisions fall in the discussion on its bindingness. If that is the case, the Italian interpretation should be preferred. The ordinary meaning of "binding" in the context of a treaty whose goal is to protect the recourse to arbitration, as an expression of the principle of autonomy of the parties, can only be that the parties acquired the obligation to comply with the juries' decisions, regardless of its source.

However, the assumption that there is a shared jurisdiction over cyberspace is another way to solve this issue. It can be contested that the judicially binding character of DJS decisions comes from all the other states where enforcement is not sought, since they share jurisdiction over cyberspace. This is just an extra step in the evolutionary interpretation for the territoriality criterion carried out in the last chapter.

In conclusion, an autonomous and evolutionary interpretation of the Convention allows the conclusion that DJS decisions are binding arbitral awards.

C. *Formal Requirements for Arbitral Awards*

Finally, there is the issue of the formal requirements that the Convention and

[118] Cristina M. Mariottini & Burkhard Hess, *Chapter 3: The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 28, 34 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

[119] *Id.* at 35-38.

[120] *Id.* at 39-41.

national laws demand on arbitral awards. On the one hand, Art. IV of the Convention imposes three formal requirements for enforcement of awards: (i) presenting the original or certified copy of the award, (ii) the AA and (iii) their translations to the language of the State of enforcement.[121] On the other hand, the formal requirements in Art. 31 of the UNCITRAL Model Law are that the awards are: (i) made in writing, (ii) signed by the arbitrators, (iii) with a statement of the reasons for the tribunal's decision, (iv) and with determinations of the date (v) and place of arbitration.[122]

The UNCITRAL Model Law standard is incompatible with DJS decisions because it requires the determination of the place of the arbitration. It assumes that every award must have a seat and nationality. The other requirements can be met by changing the system's rules to reveal the identity of the jurors or to render the decision itself, sitting as arbitrator, and implementing the obligation to express the reasons for the decision. The Model Law standard is higher than the one of Art. IV of the Convention. For the Convention is enough if the decision is in writing and the originals or certified copies of the award and the AA are provided to the court of enforcement.

It has been said that the formal requirements for the enforceability of an arbitral award are to be understood from the national law of the enforcement state, as it is the way a state implements the Convention. Furthermore, one view on digital blockchain awards is that lacking a determination in the Convention on what is the meaning of having an award in writing, their enforceability will depend on the standard in the law of enforcement.[123] This creates a complication for the enforcement of DJS decisions in Model Law jurisdictions. While Art. 7 provides for the possibility to conclude an AA by electronic means, Art. 31 implies that the award should be physically rendered, in hard copies, and manually signed by the arbitrators. This approach is far behind the current reality of international transactions. Now,

[121] New York Convention, *supra* note 17, Art. IV.

[122] UNCITRAL Model Law, *supra* note 26, Arts. 31 (1), (2), and (3).

[123] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, at 572-573 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

the identity of a person is easily determined by electronic means with encrypted information. Tools like electronic signatures and tokens allow for signing documents with the guarantee of the signatory's identity. This is especially true regarding blockchain technology, in which the cryptographic key is an irrefutable way of identification, and the DJS is easily recognizable. Furthermore, even a debate on whether DJS decisions comply with the Model Law's formal requirements on awards proves that the Convention's standard is to be preferred since it is less restrictive. This is a scenario in which the national standard is less favorable for enforcement of the award. Thus, Art. VII of the Convention is inapplicable. The Convention should be applied autonomously from the Contracting States' national law when their formal requirements on awards are more burdensome than the ones in the Convention.

Next, the issue is whether DJS decisions are in writing according to Art. IV of the Convention. The provision does not describe the criteria for the writing requirement, it merely states that the party seeking to enforce an award should provide the courts of enforcement with the original or certified copy of the decision. In other words, a corroboration of the award's authenticity is enough to meet the criterion. The term "original" must be interpreted under the CIL rules on treaties interpretation, instead of applying the Contracting States' national laws. Also, the term is broad enough to conclude that the Contracting States had the intention to allow an evolutionary interpretation of the criterion. The ways to corroborate the authenticity of a document have changed since the Convention was concluded. This new reality allows the interpreter to determine what is the ordinary meaning of an original document in the context of blockchain and cyberspace.

The answer is somehow less formalistic than the one expected in the traditional definition of original documents, while complying with any possible standard of documents' authentication. Instead of a signature with a certification of authenticity, an original document in the blockchain will have a specific identification in the chain, including its creator and any modification within. Thus, the courts of enforcement can corroborate that the decision was rendered by a DJS, based on the specific contract from which the dispute between the parties arose. This with a higher level

of certainty than any other certification in the physical world, which may depend on the corroboration of the document made by a third person who has been entrusted with the responsibility to certify the veracity of documents. By interpreting the Convention in an autonomous manner and accepting the evolutionary interpretation of the requirements in Art. IV, the interpreter can ensure compliance with the goal of the Convention to promote the effectiveness of arbitration worldwide. Hence, the interpretation is consistent with all the steps in Art. 31 of the VCLT.

By interpreting Art. IV in this way, the Convention will become accessible for all awards rendered in cyberspace, constituting a milestone in the evolution of international commercial arbitration. Consequently, national laws might enter a period of adjustment to relax their formal requirements for the enforcement of arbitral awards, meeting the Convention's standard.

In sum, an autonomous and evolutionary interpretation of the Convention's provisions allows enforcing DJS decisions as arbitral awards. First, Art. I (1) territoriality would be met when the decision is rendered out of the jurisdiction of the enforcement state. DJS' decisions are within the scope of Art. I (1) by using the theoretical assumption that there is a shared jurisdiction over cyberspace at an international level. Second, the DJS jurors are conceptually arbitrators and, in any case, the DJS could render the decisions themselves, pursuant to Art. I (2) of the Convention. Third, DJS decisions are binding awards by both contractual and jurisdictional criteria. Finally, Art. IV formal requirements allow for the enforcement of blockchain-rendered arbitral awards. Hence, DJS decisions can be recognized and enforced under the New York Convention.

VI. THE AFTERMATH: HOW SHOULD STATES GOVERN DJS?

The final step of this analysis is dealing with the grounds for refusing enforcement that Contracting States' courts can raise *proprio motu*, according to Art. V (2) of the Convention. The enforcement of an award is to be denied when the subject matter of the dispute is not arbitrable under the law of the enforcement; or if the award is contrary to that state's public policy. The issue is how to reconcile the autonomous and evolutionary interpretation of the Convention conducted in this work with the

fact that states have a discretionary right to refuse enforcement in cases of non-arbitrability or breach of public policy.

There are three considerations. First, the issues related to the use of new technologies like blockchain, and artificial intelligence can raise public policy concerns in the enforcement stage,[124] given the fact that most legal systems have not adopted their procedural standards for the use of these new technologies. Hence, they lack regulation. Second, blockchain creates a practical impediment for states' regulatory powers to reach the cyber communities using this network. Hence, the only control states could exercise in the blockchain dispute settlement system is when a specific case has an enforcement stage in the physical world. In addition, there is uncertainty in the treatment that states will give to DJS decisions. Finally, DJS developers exercise a *de facto* jurisdiction over their proceedings in the blockchain, from their institution to their self-enforcement in the system.

There is a possible solution to allow states to set minimum standards to ensure that the enforcement of DJS decisions does not represent a violation of their public policies. The first step is accepting that some of the blockchain communities' activities are beyond the reach of any state's jurisdiction. Thus, the principle of autonomy of the parties is to be extended as a legal fiction encompassing these activities. This way, the factual situation in which states cannot regulate blockchain is covered by a legal fiction that creates a previous step dealing with the legitimacy of states' control over cyberspace. When a state jurisdiction cannot reach a private activity in the blockchain it means that it is protected by the principle of autonomy of the parties, accepted and guaranteed by that state. This illusion of control reinforces the need for the theoretical assumption that states have shared jurisdiction over the blockchain at an international level. If the issue is of an international nature, the solution can be found in one of the options for cyberspace

[124] Bianca Berardicurti, *25. Artificial Intelligence in International Arbitration: The World is All That is The Case*, in 40 UNDER 40 INTERNATIONAL ARBITRATION 377, https://www.kluwerarbitration.com/document/kli-ka-40under40-2021-029-n?q=Artificial%20Intelligence%20in%20International%20Arbitration%3A%20The%20world%20is%20All%20That%20is%20The%20Case.

governance that have been proposed due to the lack of treaties dealing with the internet.[125]

The idea is that states should enter into agreements with the non-state actors operating in the blockchain to set the minimum standards needed for the recognition of their activities in national jurisdictions.[126] This way, states can accept the autonomous and evolutionary interpretations of the Convention to safeguard the possibility to enforce DJS decisions in the physical world, while ensuring the system's compliance with national public policy issues and clarifying the range of arbitrable disputes in their territories, all in the form of contractual obligations.

This form of cyberspace governance is opposed to the traditional view of the absolute and authoritative jurisdiction of states, which are only allowed to enter into agreements amongst themselves to regulate global public goods. However, it is a practical way to reach the spheres where states have no power by using cooperation with non-state actors. For the purposes of this work, the conclusion of agreements between the states and the DJS will allow fulfilling two significant goals. On the one hand, states can ensure compliance with minimum standards of due process and other public policy considerations. On the other hand, there will be certainty on the treatment of states to DJS decisions if one of the parties pursues enforcement in the physical world. Hence, the blockchain technology applied to dispute settlement will be able to enjoy free reign for its development and use in medium and large disputes.

VII. CONCLUSION

Blockchain technology is shaping the future of international transactions. SCs and SLCs are automated and cost-effective options to do business. Unlike traditional contracts, SCs eliminate the risk of non-compliance. The applications of the blockchain in businesses and transactions are growing in importance. DJS' are no exception. They are blockchain-based decentralized dispute settlement mechanisms created for disputes involving SCs and SLCs. Their decisions are self-enforceable in

[125] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 7 (2021), https://www.sciencedirect.com/science/article/pii/S0267364921000042.

[126] *Id.* at 12.

the blockchain. Nonetheless, DJS' are likely to be chosen as a dispute settlement forum for traditional contracts, due to their multiple benefits when compared with conventional arbitration and court litigation. DJS is faster, cheaper, automated, and specialized. Thus, it is important to analyze the possibility to recognize and enforce DJS decisions under the Convention.

There are four issues for the recognition and enforcement of DJS decisions under the Convention. First, the territoriality criterion of Art. I (1) of the Convention. Second, the concept of arbitrators and the possibility that it includes DJS providers and juries. Third, whether DJS decisions fall within the definition of awards. Fourth, DJS decisions' compliance with the formal requirements of Art. IV of the Convention.

First, DJS decisions are enforceable under the Convention by making an autonomous and evolutionary interpretation of its provisions. The autonomous interpretation is necessary to ensure the uniform application of the Convention since Contracting States have different views on the issue of territoriality. The main view is that all awards need to be seated or governed by a state to fall within the scope of application set out in Art. I (1) of the Convention. This logic is extended to DJS decisions given the nature of cyberspace, which is not located in a physical destination. Nonetheless, states like the USA and France have accepted the possibility to enforce a-national awards, or awards without a seat. They are examples of jurisdictions in which DJS decisions can be enforced as a-national awards even though their views come from their local interpretation of the Convention. This also constitutes a pragmatic reason to make an autonomous interpretation of the Convention since the views on the territoriality criterion are contradictory between states, which is inconsistent with the goal of the Convention to ensure uniformity in favor of international arbitration.

Art. I (1) of the Convention can be interpreted in an evolutionary manner. It is written in broad wording to include all the possible scenarios it could be extended to. Likewise, the Convention is a framework treaty for international arbitration. There are objective reasons to interpret its provisions in an evolutionary manner since arbitration is linked to the way international transactions are made, and blockchain

technology has created a new reality for them. Equally, blockchain is a new expression of party autonomy, a principle protected by the Convention.

The goal of the evolutionary interpretation of the Convention's territoriality criterion is to adapt the treaty's text to the new blockchain reality. To do so, the assumption on the jurisdiction over cyberspace and blockchain must change. The current understanding is that cyberspace is beyond any state's jurisdiction and any existing regulation has a local or national nature since their effects are not corroborated directly in the cyberspace but in the physical territory of the state that enacts them. The new understanding should be that states have a shared jurisdiction over cyberspace at an international level. This theoretical assumption is consistent with the nature of cyberspace as a global public good and allows it to elevate any debate regarding its changes and new technologies to the international arena. Likewise, it allows cyberspace users to benefit from the international framework existing for transnational transactions, including the Convention.

The conclusion of interpreting Art. I (1) of the Convention in an evolutionary manner is that the territoriality criterion refers to the exercise of jurisdiction of other states over the award to be enforced. In other words, the requirement is that the award does not fall within the jurisdiction of the state in which enforcement is sought. By assuming there is a shared jurisdiction over cyberspace there is a presumption that the jurisdictional requirement is met if the decision was rendered in the blockchain. Thus, DJS decisions comply with the Convention's territoriality requirement unless there are indications that the decision is to be governed by the enforcement state's national law.

Second, companies owning DJS can sit as arbitrators according to Art. I (2) of the Convention. The provision allows for permanent arbitral bodies to render awards, and it does not assume arbitrators must be natural persons. An autonomous interpretation of Art. I (2) of the Convention is preferable to deal with this issue since there is no uniformity on the national laws' treatment. Also, an evolutionary interpretation of the provision should understand that DJS are permanent arbitral bodies even if they are not formally accepted as such by any state. Their legitimacy

comes from the principle of autonomy of the parties governing the blockchain and the parties' agreement to refer their disputes to the systems.

Third, the Convention does not define "arbitral award". This is an indication that an evolutionary interpretation of this concept can take place. Thus, what is understood as an arbitral award depends on the context at the time of the interpretation of the treaty. Blockchain-rendered decisions are arbitral awards since they solve a dispute referred by agreement of the parties to a DJS, which can be equated to an arbitrator or arbitral body. Thus, the requirement is met.

Fourth, the formal requirements for the enforcement of arbitral awards in Art. 31 of the UNCITRAL Model Law assume that all awards must be physically rendered and signed. This is not the case with Art. IV of the Convention which only requires the authenticity of the decision and its translation, if necessary. The Convention is to be interpreted in an autonomous manner. Using the Model Law to modulate Art. IV of the Convention is against the Convention's goal to create a favorable framework for international arbitration. The Convention does not provide for a criterion on documents' authenticity, and an evolutionary interpretation taking blockchain into account concludes that the electronic certification of authenticity meets the requirement. Thus, DJS decisions are enforceable as awards under the Convention.

Finally, even though an autonomous and evolutionary interpretation of the Convention ensures the enforcement of DJS decisions in the courts of the Contracting States, there is the issue of Art. V (2) of the Convention. States can refuse enforcement of awards on grounds of arbitrability or public policy. To ensure that Contracting States' public policy is not breached by DJS decisions, states can enter into agreements with the systems' providers, to set minimum requirements for the proceedings. This way of blockchain governance gives non-state actors an active role in the regulation of DJS, ensuring states' authority in arenas that are otherwise unreachable.

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NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES

by Bernardo Sepúlveda-Amor

I. INTRODUCTION

The North American Free Trade Agreement (NAFTA)[1] and the United States-Mexico-Canada Agreement (USMCA)[2] represent fundamental trade and arbitration agreements concluded between Mexico, the US, and Canada.[3] The treaties have been the legal instruments governing the investment rights relative to investor-state dispute settlement as well as the potential controversies that may arise between the three State signatories of the treaties. These conventions have been essential to the contemporary development of international arbitration.

On July 1, 2020, NAFTA was terminated as a result of a political controversy, based on a series of declarations made by President Trump indicating that NAFTA was the worst treaty ever signed by the US.[4] Set to officially end on July 1, 2023—when the USMCA will take its place—NAFTA will still apply beyond its termination if certain requirements provided in the USMCA are met. But it shall apply only for arbitrations filed during a "Sunset Period," between July 1, 2020—the entry into force of the USMCA—and July 1, 2023, three years after the termination of NAFTA.[5] Such a mechanism has already been invoked in thirteen cases: nine against Mexico,[6] three

[1] North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, 17 December 1992, 32 I.L.M. 612 [hereinafter NAFTA].

[2] Canada-United States-Mexico Agreement ch. 14, Dec. 10, 2019, Agreement between the United States of America, the United Mexican States, and Canada, OFF. U.S. TRADE REPRESENTATIVE: FREE TRADE AGREEMENTS (Dec. 13, 2019), [hereinafter USMCA].

[3] While this article follows the US's use of the term "USMCA," Canada refers to the agreement as the Canada-United States-Mexico Agreements (CUSMA) and Mexico refers to it as the Tratado entre México, Estados Unidos y Canadá (T-MEC).

[4] Patrick Gillespie, *Trump Hammers America's 'Worst Trade Deal'*, CNN MONEY (Sept. 27, 2016), https://money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/index.html.

[5] USMCA, *supra* note 2, at Annex 14-C (noting that each Party's consent to submit "legacy investment claims" to arbitration under NAFTA will expire three years after the termination of NAFTA).

[6] *See* First Majestic Silver Corp. v. Mexico, ICSID Case No. ARB/21/14; *Finley Resources Inc. v. Mexico*, ICSID Case No. ARB/21/25; L1bre Holding, LLC v. Mexico, ICSID Case No. ARB/21/55; Doups v. Mexico, ICSID Case No. ARB/22/24; Amerra Capital Management LLC v. Mexico, ICSID Case No. UNCT/23/1;

against Canada,[7] and one against the US.[8]

NAFTA and the USMCA have a good number of similarities but are not identical. There exist substantial differences between the two treaties. The purpose of this paper is to identify the most relevant of them and discuss the impact of those differences.

II. SUBSTANTIAL DIFFERENCES

As an initial matter, Canada has decided not to be part of the investor-state dispute settlement (ISDS) provisions of the USMCA, as provided in its Annex 14 D and Annex E.[9] These two sections regulate investment between Mexico and the US and disputes related to covered government contracts applicable to the US and to Mexico. Thus, investors from Canada or the US will not have access to investor-State dispute settlement as between those countries. In the case of Mexico and Canada, if an investment dispute arises, resort to The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) will provide the arbitral means to settle the controversy.

A. *The Definition of Investment*

NAFTA did not include a clear-cut definition of investment; instead, ICSID tribunals undertook this task. In contrast, the USMCA provides a very precise definition of investment, inspired to some extent by decisions of ICSID arbitral tribunals. It provides that "Investment" means:

a) Every asset that an investor owns or controls, directly or indirectly;

Goldgroup Resources, Inc. v. Mexico, ICSID Case No. ARB/23/4; Sepavede International LLC v. Mexico, ICIS Case No. ARB/23/6; Access Business Group LLC v. Mexico, ICSID Case No. ARB/23/15; Enerflex US Holdings Inc. v. Mexico, ICSID Case No. ARB/23/22; *but see also* Coeur Mining v. Mexico, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1258/coeur-mining-v-mexico.

[7] *See* Koch Industries Inc. v. Canada, ICSID Case No. ARB/20/52; Windstream Energy LLC v. Canada (II), PCA Case No. 2021-26; Ruby River Capital LLC v. Canada, ICSID Case No. ARB/23/5.

[8] *See* TC Energy Corp. v. US, ICSID Case No. ARB/21/63.

[9] USMCA, *supra* note 2, at Annex 14-D.1 (defining "Annex Party" as Mexico or the United States, but not Canada); USMCA, *supra* note 2, at Annex 14-E (using the definition of Annex Party from Annex 14-D).

b) That has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk.[10]

The USMCA provides a long and detailed list of items that may be considered as investment, similar but not identical to the NAFTA list, and some items that do not fall under the definition of investment.[11]

B. The Issue of Covered Sectors

Under the USMCA, a privileged group of US or Mexican investors who possess a covered government contract and that operate in a covered sector, enjoy a strong and extensive protection in terms of both procedure and material investment claims.

To qualify as a member of this elite group of investors, the investment must operate in one of the five covered sectors: (i) oil and gas activities; (ii) public power generation services; (iii) public telecommunications services; (iv) public transportation services; or (v) infrastructure.[12]

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[10] USMCA, *supra* note 2, Article 14.1.

[11] *Compare* NAFTA, *supra* note 1, Article 1139 *with* USMCA Article 14.1:

> … investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:
>
> (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases,
>
> but investment does not mean:
>
> (i) an order or judgment entered in a judicial or administrative action; (j) claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i).

[12] USMCA, *supra* note 2, Annex E2.6(b) (defining "covered sector" as

> (i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale,
>
> (ii) the supply of power generation services to the public on behalf of an Annex Party,
>
> (iii) the supply of telecommunications services to the public on behalf of an Annex Party,

Further, in order to benefit from the USMCA's protections, an investor operating in a covered sector must have a covered government contract concluded with a national authority, which means an authority at the "central level of government," as defined by the treaty itself.[13] Such a contract entitles investors to a series of substantive rights, such as a minimum standard of treatment (which includes fair and equitable treatment and full protection and security), protection against direct or indirect expropriation,[14] and exception from the requirement to exhaust local court proceedings as a prerequisite to resort to investment arbitration.[15]

But investors not belonging to the covered sector will have a less substantial protection of their rights under the USMCA than they had under NAFTA. Their investment-treaty arbitration claims will be limited to breaches of national treatment,[16] recourse to most-favored-nation treatment,[17] and to a claim of expropriation.[18] And, unlike investors belonging to the covered sector, those claims may be brought only after first successfully exhausting local remedies before local courts. Beyond their legal reach will be the right to claim a violation of a fair and equitable treatment or the existence of an indirect expropriation, now reserved for covered sector investors.

Unlike NAFTA, the USMCA considerably limits the scope of "national treatment" by applying a "like circumstances" test.[19] Thus, under the USMCA, the decision to

(iv) the supply of transportation services to the public on behalf of an Annex Party, or

(v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party.).

[13] *Id.* at Annex 14-E.6(c).

[14] *Id.* at Article 14.D.3.

[15] *Compare id.* at Article 14.D.5.1 *with* Annex 14-E.4.

[16] *Id.* at Article 14.4.

[17] *Id.* at Article 14.5.

[18] *Id.* at Article 14.4.

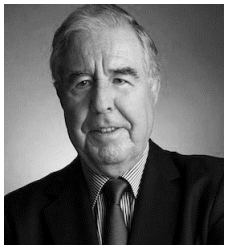
[19] *Compare* NAFTA, *supra* note 1, ch. 3, article 301 (" [N]ational treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part."), *with* USMCA, *supra* note 2, Article 14.4 ("[National treatment] means, with respect to a government other than at the central level, treatment no less favorable than the most favorable

allow "national treatment" for a foreign investor will depend on "the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate welfare objectives."[20] This qualification introduces not a minor amount of lassitude in the interpretation of the prescription.

III. FUTURE OF INVESTMENT ARBITRATION UNDER THE USMCA

It is not an easy task to explain and justify the introduction of a privileged scheme that substantially benefits the investors and their investments included in the five covered sectors in obvious detriment to investors operating in non-covered sectors of the economic system, especially where those non-covered investors were previously entitled to claim incentives and rights under NAFTA.

There does not seem to be a precedent in investment arbitration treaties to grant privileges to investors operating within certain covered sectors and simultaneously discriminate against all other investors. It is still too early to assess the manner in which investors, be they beneficiaries of the USMCA rules favoring covered sectors or those excluded from this privileged system, will react to this innovative scheme. Perhaps measuring the flow and volume of future foreign investment to Mexico, under the pathways of both the covered and the uncovered sectors, will allow a determination and evaluation of the virtues, the usefulness, and the impact to the economy as a whole of the two distinct systems the USMCA has established.



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treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.").

[20] USMCA, *supra* note 2, Article 14.4.

ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS IMPACT ON INTERNATIONAL ARBITRATION IN INDIA

by Sushant Mahajan

I. INTRODUCTION

On March 10, 2023 the Bar Council of India ("BCI"), which is the apex disciplinary and regulatory body for legal profession and legal education in India, came out with the Rules for Registration of Foreign Lawyers and Foreign Law Firms in India, 2022 ("Rules").[1] Under the Rules, foreign lawyers/law firms[2] are permitted, after registration, to provide legal services in non-litigious matters as detailed in the Rules. One important area where foreign Lawyers would be allowed to provide legal services is any international arbitration case which is conducted in India. This is a drastic change from the protectionist stance previously adopted by the BCI pertaining to entry of foreign Lawyers into the Indian legal industry and could help India gain popularity as a hub for international arbitration proceedings.

II. BACKGROUND

The question of allowing foreign Lawyers to practice in India reached the Indian Supreme Court in 2015, after challenge to judgments of two High Courts. In its 2018 decision in Bar Council of India v. A.K. Balaji,[3] the Indian Supreme Court ruled that foreign law firms could operate in India only on a limited 'fly-in and fly-out' basis, i.e., via temporary visitation. The Court further opined that as far as international commercial arbitration is concerned there is no absolute bar and the same would be subject to rules and regulations of the arbitral institution or of the provisions of the Advocate Act, 1961.

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[1] Bar Council of India Notification, Bar Council of India Rules for Registration of Foreign Lawyers and Foreign Law Firms in India, 2022 (Mar. 10, 2023), https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf [hereinafter "The Rules"].

[2] For purposes of clarity, "lawyers/law firms" or "lawyer/lawfirm" will be referred to as "Lawyers" or "Lawyer" respectively.

[3] Bar Council of India v. A.K. Balaji & Ors., AIR 2018 SC 1382 (2018) (India).

In the absence of clarity as to whether foreign Lawyers could provide legal services for international commercial arbitration, international arbitration practitioners were discouraged from representing clients in international commercial arbitration proceedings in India. This however was not the case for international arbitrations involving Indian parties that were seated outside of India, as in such proceedings the Indian parties typically chose to engage Lawyers based in London, the Middle East or Singapore to represent them.

III. THE (NEW) RULES

The ambiguity concerning representation in international arbitrations seated in India was clarified with the introduction of the Rules. Under the Rules, foreign Lawyers may register with the BCI to provide legal services in India in non-litigious matters as detailed in the Rules. Notably, the practice of foreign Lawyers may include:

> providing legal expertise/advise and appearing as a lawyer for a person, firm, company, corporation, trust, society etc. who/which is having an address or principal office or head office in a foreign country in any international arbitration case which is conducted in India and in such arbitration case ' [sic] foreign law may or may not be involved.[4]

Two interesting facets of this provision are, firstly, that it permits foreign Lawyers to appear for a person, firm, company, corporation, trust, society, etc., provided that the party's address or principal office or head office is in a foreign country. This implies that any law firm, company, corporation, trust, or society which is Indian but has an address in a foreign country would be able to seek representation of a foreign Lawyer. Secondly, the foreign Lawyer can appear for a person or an entity in an international arbitration even if foreign law is not relevant to the underlying dispute. Thus, foreign Lawyers are essentially permitted to advise on issues relating to domestic law in international arbitration proceedings.

Noting the inconsistency, the BCI attempted to clarify the above noted facets by a March 19, 2023 Press Release titled "True Facts about the BCI's Rules regarding Entry, Rules and Regulations of Foreign lawyers and Law firms in India."[5] There, the

[4] The Rules, Rule 8(2)(ii).

[5] Press Release, *Bar Council of India, True Facts about the BCI's Rules regarding Entry, Rules and Regulations of Foreign lawyers and Law firms in India* (Mar. 19, 2023),

BCI stated that foreign Lawyers shall be allowed to advise their "foreign clients about foreign laws and international laws only."[6] The Press Release notes that foreign commercial entities and multi-national corporations generally do not prefer India as a venue of arbitration since they are not allowed to seek representation of foreign lawyers. The BCI further hopes that the change in rules would encourage India being preferred as a venue for international arbitration proceedings.

IV. ANALYSIS

The Rules and the Press Release, though confounding in certain aspects, make it abundantly clear that foreign Lawyers can represent foreign clients in international arbitration proceedings conducted in India. This is surely going to boost India's image as a center for international arbitration. Institutional arbitration centers such as the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre (HKIAC) remain popular destinations for Indian parties. In 2021, Indian parties were the top users of the facilities of SIAC with 164 parties and an additional 23 parent companies of parties hailing from India.7 However, domestic institutions such as the Mumbai Centre for International Arbitration (MCIA), the Delhi International Arbitration Centre (DIAC) and the Indian Council of Arbitration International Arbitration and Mediation Centre (IAMC), Hyderabad, which was established in 2021, are gaining increasing traction and popularity for parties to international arbitration proceedings.8 This growth in popularity has coincided with inflow of huge amounts of foreign direct investment to India.9 The immense inflow of capital and increase in popularity of arbitration

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https://images.assettype.com/barandbench/2023-03/57a2a39d-a1a9-4d43-ae22-aa1a5fbf3e8d/Press_Release_Dated_19_03_2023.pdf.

[6] *Id.* at ¶ 1.

[7] SINGAPORE INTERNATIONAL ARBITRATION CENTRE, ANNUAL REPORT 2021, at 21 (2022), https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf.

[8] Chambers & Partners, International Arbitration 2022 – Law and Practice in India, https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/india.

[9] *See* Arijit Barman & Bodhisatva Ganguli, *India over the next 10 years will see a dramatic increase in FDI: Bruce Flatt, CEO, Brookfield*, THE ECONOMIC TIMES, Mar. 20, 2023, https://economictimes.indiatimes.com/news/company/corporate-trends/india-over-the-next-10-

institutions in India when coupled with the changes brought about by the Rules present a great opportunity for foreign Lawyers seeking to establish a presence in the burgeoning international arbitration community in India. However, whether this on its own is sufficient to make foreign parties choose India as a venue may be aspirational at best given the substantial economic burdens that the Rules impose on any foreign Lawyer aiming to practice in India. An individual foreign lawyer must pay a registration fee of US$25,000, whereas a foreign law firm has to pay double that amount. These are considerable amounts which are likely to discourage foreign lawyers, especially solo practitioners, from practicing in India. In addition to the above, registration has to be renewed every five years, entailing a renewal fee of US$10,000 for an individual or US$20,000 for a law firm. Such registration and renewal fees are significantly higher than those charged in other jurisdictions. This higher fee may hinder a number of foreign lawyers looking to set up a base in India.

Another significant aspect of the Rules is that registration of foreign Lawyers is allowed only on a reciprocal basis, i.e., Lawyers of only those nations would be permitted in India where Indian lawyers are permitted to practice. The UK, Canada, Australia, Singapore, UAE, and a few other African and South Asian nations allow Indian lawyers to practice. As far as the US is concerned, 34 States allow foreign trained attorneys to practice. How the BCI would interpret this qualification provision with respect to Lawyers from the US remains to be seen. While uncertainties remain, these changes are sure to be lauded by international arbitration practitioners the world over and bode well for India as a venue for arbitration in the years to come.

V. CONCLUSION

The new Rules reflect a sea change in the policy that had been place in India since time immemorial. These Rules are likely to encourage foreign Lawyers to tap into a

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years-will-see-a-dramatic-increase-in-fdi-bruce-flatt-ceo-brookfield/articleshow/98788903.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cp)pst; *see also FDI flowing out of China, into India: Noted economist Nouriel Roubini*, MINT, Feb. 20, 2023, https://www.livemint.com/news/india/see-fdi-flowing-out-of-china-into-india-noted-economist-nouriel-roubini-11676875454197.html.

hitherto unavailable market. The Rules specifically providing for international arbitration is especially noteworthy as it recognizes the global nature of the practice of international arbitration. These Rules also bode well for arbitral institutions in India which are likely to benefit if India is chosen as a seat for an international arbitration proceedings. All things considered, the Rules are likely to propel forward the practice of international arbitration in India.

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BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY

by Iván Larenas Lolas

In March 2023, the Institute for Transnational Arbitration ("ITA") held its third session in a series of conferences focusing on ESG in practice. These virtual conferences are part of the first online program series of the Americas Initiative Dialogues. The third session's panel was composed of Vanessa Silveyra de la Garza (Director of Sustainability and Customer Service at ALEATICA) and Isabel Barba Menchen (Quality and Environmental Manager at SACYR), with Christian Conejero (Partner at Cuatrecasas, Santiago) acting as moderator. The panelists discussed Environmental, Social and Governance (ESG) factors and risks in the context of the infrastructure and construction sector. The Panel focused on how ALEATICA and SACYR have adapted their respective business strategy to sustainability practices. The Panel shared their insights and the challenges and opportunities they face in their industries, which could enlighten practitioners when ESG disputes arise on how to mitigate risks and de-escalate them.

I. INTRODUCTION

Almost two decades have passed since the seminal "Who Cares Wins" Conference[1] and sustainability, as well as ESG factors, have indeed become a strategic imperative for companies.[2] As a matter of fact, in today's world, it is not enough for a product or service to just be "good."[3] Regulators and other stakeholders now demand that the product or service meet certain ESG standards.[4]

[1] The term ESG was first coined in the Who Cares Wins 2005 Conference Report entitled *Investing for Long-Term Value Integrating Environmental, Social and Governance Value Drivers in Asset management and Financial Research*. Who Cares Wins Conference, *Investing for Long-Term Value: Integrating Environmental, Social and Governance Value Drivers in Asset Management and Financial Research* (Oct. 26, 2005).

[2] *EY Sustainability and ESG Leaders Share Insights on how Organizations can Embed Sustainable Business Practices into their Operations*, EY, https://www.ey.com/en_us/sustainability/esg-evolution.

[3] Ari D. Mackinnon & Martin Vainstein, *The Rise of ESG Disputes and the Role of Arbitration in Resolving them*, FINANCIER WORLDWIDE, Dec. 2022, at 91, 92, *available at* https://docs.financierworldwide.com/magazine/FWDEC22_yjb748jso763_digital/#page=94.

[4] *Id.*

Investors, as one of these stakeholders, are increasingly paying more attention to ESG standards when investing.[5] The so-called "socially responsible investing" ("SRI") or "sustainable investing" is indeed growing and is estimated at over $20 trillion in AUM or around a quarter of all professionally managed assets around the world.[6] As such, ESG standards have become vital for business success, compelling corporations to encompass non-financial interests in their operations,[7] which nonetheless have financial relevance.[8] Given that ESG standards are vital for business success, they require effective governance to mitigate external business risk.[9]

As both panelists acknowledge, the mitigation of these external risks through compliance with ESG policies is deeply important for the infrastructure industry. The infrastructure industry is the backbone of economic development as it sits at the very center of development pathways and is closely linked to economic growth, environmental outcomes and well-being.[10] But it is no secret that it can also have a considerable impact on the environment and local communities.[11] Work in the infrastructure or construction sector often involves the use of natural resources, such as land and water,[12] and can result in the displacement of communities and

[5] Jane Courtnell, *ESG Reporting Preparation Guide: What is ESG Reporting?*, GREEN BUS. BUREAU, June 2, 2022, https://greenbusinessbureau.com/business-function/finance-accounting/esg-reporting-what-is-esg-reporting/.

[6] Georg Kell, *The Remarkable Rise of ESG*, FORBES, July 11, 2018, https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/.

[7] Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 652 (2009).

[8] Kell, *supra* note 6.

[9] Courtnell, *supra* note 5.

[10] OECD, *OECD Reference Note on Environmental and Social Considerations in Quality Infrastructure* (June 2019), *available at* https://www.oecd.org/g20/summits/osaka/OECD-Reference-Note-on-Environmental-and-Social-Considerations.pdf.

[11] A study titled *Infrastructure for Climate Action*, published by UNOPS, UNEP and the University of Oxford, highlights that the infrastructure industry is responsible for 79% of all greenhouse gas emissions and 88% of all climate adaptation costs. UNOPS et al., *Infrastructure for Climate Action* (2021), *available at* https://content.unops.org/publications/Infrastructure-for-climate-action_EN.pdf?mtime=20211008124956&focal=none.

[12] Sustainable Infrastructure Tool Navigator, *Resource Efficiency: How to Reduce the Footprint of Infrastructure*, https://sustainable-infrastructure-tools.org/resource-efficiency/.

entire ecosystems.[13] Therefore, and as both panelists agree, it is crucial to incorporate ESG standards in the industry since ESG policies are seen as a necessary investment to mitigate external risks.

II. INFRASTRUCTURE, ESG AND THE "LICENSES TO OPERATE"

The infrastructure industry, like other industries, is dependent on various stakeholders.[14] These stakeholders form part of what Neil Gunningham referred to as the different "licenses to operate."[15] This concept encapsulates the idea that business is dependent upon and has relationships with different stakeholders that form part of the different licenses to operate.[16] Therefore, to better understand corporate social responsibility ("CSR") and ESG policies, a starting point is to stress that ESG can largely be explained by how corporations interpret and react to risks, external pressures and drivers.[17]

These licenses to operate are profoundly intertwined in the sense that they interact with each other. They sometimes pull in different directions, which is usually the case with the economic license,[18] but they often gain strength through their interaction.[19] A few examples may illustrate this point.

There is an obvious interaction between the social license, composed of social stakeholders, such as communities, consumers and activists, and the corporation's economic license to operate. This is discussed by the panelists, as they recognize that it is crucial for their corporations to have the social license in order to properly

[13] Korinna Horta, *Paying the Price for Development*, D+C, Aug. 20, 2020, https://www.dandc.eu/en/article/when-people-are-displaced-make-room-large-scale-development-projects-trauma-and.

[14] Neil Gunningham, *Corporate Environmental Responsibility: Law and the Limits of Voluntarism*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 476, 480 (Doreen McBarnet et al. eds., 2007).

[15] *Id.*

[16] *Id.*

[17] Neil Gunningham, *Environmental Law, Regulation and Governance: Shifting Architectures*, 21 J. ENV'T L. 179, 195 (2009).

[18] Lisa Benjamin, *The Responsibilities of Carbon Major Companies: Are they (and is the Law) Doing Enough?*, 5 TRANSNAT'L ENV'T L. 353, 359 (2016).

[19] Gunningham, *supra* note 14, at 482.

operate.[20] But if companies fail to respond adequately to the social license, aside from the economic impact such failure entails, these companies also risk a tightening of their regulatory license, as frustrated community activists usually turn to politicians and regulators for help, calling for stricter legislation and sanctions.[21] In turn, the legal license can expand the social license by imposing mandatory ESG reporting as opposed to voluntary, market-based ESG reporting.[22] This not only compels companies to adopt a more positive approach to ESG, it also allows the disclosed standards to become more consistent and comparable.[23] The disclosed standards provide social actors and other stakeholders, such as investors, banks and credit institutions, with the legal framework and appropriate standards to access information on ESG compliance.[24] This information is in turn used by these stakeholders not only in their decision to invest but also to grant preferential rates and better financing conditions. This is extremely important for infrastructure projects because they require considerable investment efforts and financing, thus affecting the economic license.

The aforementioned are just some examples of the interplay of the different licenses to operate. These examples help to provide context for the discussion that follows on how these companies operate in practice.

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[20] *Id.*

[21] *Id.* at 485.

[22] Market-based reporting has been criticized for multiple reasons including: the influence of the four market-leading rating companies that compete among themselves to provide ESG metrics; the disparities of the components of ESG performance indicators; the multiplicity of ESG standard-setting initiatives, which cause "option overload" for companies; the quality of the information provided by companies; industry sector bias; and the overall failure to identify risks by the aforementioned methodologies, which can mislead investors and materially affect investment decisions. *See* Javier El-Hage, *Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading ESG Ratings?*, 26 FORDHAM J. CORP. & FIN. L. 359 (2021). *See also* Timothy Doyle, *The Big Problem with "Environmental, Social and Governance" Investment Ratings? They're Subjective*, INVS. BUS. DAILY, Aug. 9, 2018, https://www.investors.com/politics/commentary/the-big-problem-with-environmental-social-and-governance-investment-ratings-theyre-subjective/; Dennis T. Whalen, *It's Time to Reassess ESG and Sustainability Reporting*, NACD BOARDTALK, Oct. 28, 2019, https://blog.nacdonline.org/posts/reassess-sustainability-reporting.

[23] *See* Cynthia A. Williams & Jill E. Fisch, Petition for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure (Oct. 1, 2018), *available at* https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf.

[24] Gunningham, *supra* note 14, at 482.

III. INDUSTRY PRACTICE: HOW DOES THE INFRASTRUCTURE SECTOR INCORPORATE ESG STANDARDS?

As mentioned, understanding the inherent dynamics and interplay between the external pressures or drivers is key for comprehending how ESG initiatives are adopted. Considering the different stakeholders and including them in the discussion process is essential for determining which ESG policies to adopt.

Both panelists approach this issue through a materiality analysis. Materiality assessment is understood as "the process of identifying, refining, and assessing numerous potential environmental, social and governance issues that could affect a business, and/or its stakeholders, and condensing them into a short list of topics that inform the company strategy, targets, and reporting."[25] This type of analysis enables the elaboration of effective ESG policies that incorporate and mitigate ESG risks while focusing their resources accordingly.

For Isabel Barba, the key issues identified after conducting SACYR's materiality analysis were climate change; energy efficiency; corporate ethics; and good relations between analysts and stakeholders. Based on these three main issues, SACYR elaborated its sustainability plan to include environmental, social and governance measures. This plan includes measures such as diminishing CO2 emissions and neutralizing carbon footprint, circular economy,[26] increasing the number of women in leadership roles social action and investing in the development of its workers, who in turn usually prefer to work in ESG-committed companies. The plan likewise encourages all operations to abide by good corporate ethics, elaborating codes of conduct to that effect.

[25] KPMG, SUSTAINABLE INSIGHT: THE ESSENTIALS OF MATERIALITY ASSESSMENT (2014), *available at* https://assets.kpmg.com/content/dam/kpmg/pdf/2014/10/materiality-assessment.pdf.

[26] Circular economy is a model of production and consumption that involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products for as long as possible. This allows the life cycle of products to be extended. *Circular Economy: Definition, Importance and Benefits*, NEWS EUR. PARLIAMENT, May 24, 2023, https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits#:~:text=The%20circular%20economy%20is%20a,reducing%20waste%20to%20a%20minimum.

Vanessa Silveyra, who describes her company as "agents of welfare," states that ALEATICA also conducts a materiality analysis to flag key ESG issues and allocate resources and efforts accordingly. The process involves the participation of communities and other stakeholders to identify the issues that are truly relevant to those participants. As with SACYR, climate change, corporate governance and human rights surfaced as the most important matters. Ms. Silveyra stressed the importance of designing a global sustainability strategy tailored not only to the needs of the company as a whole, but also to the needs of its different business units in order to gain precision and better allocate resources to key issues. She also emphasized the importance of constructing resilient structures, adapted to climate change and severe weather phenomena which only serves to demonstrate how environmental issues such as climate change must be incorporated in the different aspects of an infrastructure company's activities.

This inevitably leads to the conclusion that organizations can get the most benefit from their materiality analysis by using it as an opportunity to apply a sustainability lens to business risk, opportunity, trendspotting and enterprise risk management processes.[27] The better view, as both panelists agree, appears to be that ESG planning should be an integral part of the business, rather than a separate, isolated process.

IV. ESG-RELATED DISPUTES: WHAT TO EXPECT?

Given that the expertise of both panelists falls outside the scope of dispute resolution, arbitration and other forms of dispute resolution was barely touched upon by the panel. Nonetheless, the panelists agreed that it is in their respective company's best interest to avoid ESG-related disputes altogether. This is not only because of the legal consequences such disputes entail, but also because nowadays, more than ever, the risk of reputational harm is tremendous. As ESG is increasingly important for different stakeholders, the importance of preventing these disputes by actively engaging in ESG practices is fundamental. Similarly, it is important for companies to responsibly report their ESG frameworks and standards in order to avoid the

[27] *Id.*

reputational harm that a mismatch or false information of ESG performance could cause.

Despite the fact that the panelists do not focus much on dispute resolution mechanisms, they nevertheless conclude that as the importance of ESG in corporate policies and investment decisions increases, so too will the number of disputes arising out of ESG-related issues.[28]

Prior to briefly discussing this issue, a distinction should first be drawn between commercial arbitration and investment arbitration.

A. *Commercial Contract Claims*

One can foresee that the inclusion of ESG standards and commitments in concession bids and infrastructure contracts, especially after the pandemic, will certainly influence the number of ESG-related disputes. In this context, the panelists confirm this tendency, as they see an increasing trend in concession bids that incorporate ESG policies. For example, and as mentioned by Isabel Barba, bids today increasingly require the companies to calculate and inform the irruption of their carbon footprint, which entails not only the carbon footprint of their activities but also of the materials used in the project and the whole supply chain, including transportation. This elevates the responsibility of construction companies who now must scrutinize and consider all parts of the construction cycle.

On the other hand, companies such as SACYR and ALEATICA incorporate ESG standards in their supplier contracts, enhancing their due diligence commitments to ESG standards throughout the entire supply chain.

But contracts are not the only source of ESG commitments; legislation is also moving towards the mandatory inclusion of ESG policies. An example is the German Supply Chain Due Diligence Act, recently in force, which imposes heavy diligence obligations on companies regarding ESG standards in the supply chain.[29]

[28] Holly Stebbing & India Furse, *ESG Disputes in International Arbitration*, LEXOLOGY, Dec. 1, 2022, https://www.lexology.com/commentary/arbitration-adr/international/norton-rose-fulbright/esg-disputes-in-international-arbitration.

[29] *The New German Supply Chain Due Diligence Act (LkSG) – What Needs to be Done*, RÖDL & PARTNER, Jan. 2, 2023, https://www.roedl.com/insights/supply-chain-act-due-diligence-obligations.

The aforementioned will certainly lead to disputes concerning novel issues of interpretation, enforceability and measurement of compliance with ESG-related provisions. It will also impact disputes relating to breaches of contract claims for non-performance of ESG-related obligations or overstated ESG-related representations or warranties.[30]

In terms of overstated ESG representations and warranties, the issue of greenwashing[31] is mentioned by the panelists as an attempt of some companies to capitalize on the growing demand for environmentally sound products.[32] This will certainly give rise, as it already has, to disputes as well as sanctions for companies that incur in misleading statements and inaccurate reporting of their ESG policies.[33] Greenwashing can be perceived as another reason to impose mandatory ESG reporting obligations. This is because mandatory ESG reporting can further a more uniform methodology, which could overcome some of the market-based reporting shortcomings, such as the enabling of greenwashing practices.[34]

Given the international component of most of these disputes, and as many companies now include ESG-related provisions in their contracts to operate globally, international arbitration could become the natural forum choice for the resolution of disputes with ESG components.[35] The fact that the parties can select arbitrators with

[30] Stebbing & Furse, *supra* note 28.

[31] "Greenwashing is the act of exaggerating the extent to which products or services take into account environmental and sustainability factors. Funds and advisers that engage in greenwashing may exaggerate or overstate the environmental and sustainability practices or factors considered in their investment products or services, while labeling and marketing themselves in a manner that makes it difficult for investors to distinguish them from funds and advisers that are truly using environmental and sustainability strategies." *Greenwashing*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/greenwashing.

[32] Josie Moore, *What is Greenwashing and what can you do About it?*, WORKFORCLIMATE,https://www.workforclimate.org/post/what-is-greenwashing-and-what-can-you-do-about-it?gclid=Cj0KCQjwi46iBhDyARIsAE3nVrYAwT6wKi54WRPbRTcU4nxX8vQQ2qQQ3jBG0598ASWqnGVd7CeGgtYaAqPvEALw_wcB.

[33] In the United States most of these claims are under SEC Section 10(b). *See* Sue Choi, *ESG Metrics: Safeguard Against Greenwashing or Safe Harbor for Greenwashing*?, 14 GEO. WASH. J. ENERGY & ENV'T L. 27 (2023).

[34] *Id.*

[35] Stebbing & Furse, *supra* note 28.

experience and competence in ESG-related issues, and the fact that arbitration can respond to urgent matters that require relief through injunctions, provisional measures or emergency arbitrations, only reinforces international arbitration as an appropriate mechanism to resolve ESG-related disputes.[36]

B. *Investment Treaty Claims*

New international investment treaties and revised, existing treaties increasingly include human rights, due diligence and environmental obligations as well as other ESG-related substantive protections.[37] This could certainly give rise to novel claims and defenses in Investor-State Dispute Settlement ("ISDS"), with more claims being brought by, rather than against, states.[38] States being entitled to bring claims (or counterclaims) against investors for ESG failures, and the dilution of investor protection where that protection conflicts with a state's ESG objectives, are just a few examples.[39] Latin America, in particular, could be a point of interest, given that it is home to half of the world's biodiversity and has seen environmental issues rise in the context of investor-state disputes.[40]

Issues involving corruption, which entails a company's good governance, have long been a part of investor-state disputes. It is not uncommon for states and sometimes investors to resort to corruption defenses or claims in ISDS. As corruption is viewed as against public policy, the issue has been raised as an illegality of the investment, as affecting the arbitral tribunal's jurisdiction, or as resulting in a denial on the merits of the claim, if the investment was procured or tainted by corruption.[41] The recent Odebrecht scandal,[42] which occurred precisely in the infrastructure

[36] Mackinnon & Veinstein, *supra* note 3, at 93.

[37] *Id.*

[38] Stebbing & Furse, *supra* note 28.

[39] *Id.*

[40] Jack Ballantyne, *GAR Live Miami: Has the ESG Era Already Begun?*, GLOB. ARB. REV., May 27, 2022, https://globalarbitrationreview-com.proxygt-law.wrlc.org/article/gar-live-miami-has-the-esg-era-already-begun.

[41] *See* ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014).

[42] Odebrecht is one of the companies caught in Operacao Lava Jato, Brazil's corruption probe into the state oil giant Petrobras. Dozens of companies acknowledged paying bribes to politicians including former president Dilma Rousseff and Michel Temer and other officials in exchange for contracts with

industry, proves it is especially vulnerable to these practices. Notwithstanding, the increased attention to ESG issues by corporations and their adoption of anti-corruption programs could mean that in the future, allegations of corruption feature less frequently in investment arbitration.[43]

C. *Mediation and Dispute Resolution Prevention*

Given the nature of ESG-related disputes, dispute resolution boards and mediation emerge as viable, cost-effective solutions to prevent and de-escalate such disputes. On the one hand, the high and long-term impact of infrastructure projects in local communities exposes the projects to constant tensions, not only with local communities but also with other social stakeholders such as Non-Governmental Organizations (NGOs) or other interest groups. These tensions could be dramatically reduced not only by the incorporation of ESG policies, as the panelists stress, but also through mediation mechanisms that incorporate the relevant actors and help balance the various interests in a sustainable and satisfactory manner.[44] On the other hand, as Christian Conejero points out, dispute boards can also serve to prevent and resolve ESG-related disputes at an early stage. Dispute boards have been quite relevant in the infrastructure and construction industry, as their natural function is to assist parties in resolving or avoiding disputes and, ideally, preventing such disputes from escalating.[45] After all, it makes perfect business sense to avoid conflict. As both

Petrobras. Corruption cases were not limited to Brazil but also expanded to other Latin American countries where Odebrecht did construction business, such as Peru. In Peru, an arrest warrant was issued against former President Alejandro Toledo who was recently extradited back to Peru. The case gained notoriety after 2015 when the group's chief executive, Marcelo Odebrecht, was arrested and sentenced to 19 years of prison. Since then, the group's officials have admitted to various acts of corruption all over Latin America. Odebrecht was penalized for more than US $3.5 Billion dollars globally with a US $1.78 Billion-dollar penalty imposed under the Foreign Corrupt Practices Act ("FCPA"). Odebrecht's corruption scandal was so big that it had to change its corporate name to Novonor. *See* Daniel Gallas, *Brazil's Odebrecht Corruption Scandal Explained*, BBC NEWS, Apr. 17, 2019, https://www.bbc.com/news/business-39194395.

[43] Alison Ross, *We Need to Talk About ESG*, GLOB. ARB. REV., Apr. 19, 2022, https://globalarbitrationreview-com.proxygt-law.wrlc.org/we-need-talk-about-esg.

[44] Dr. Victoria R. Nalule, *6th ICC Africa Conference on International Arbitration*, 3 ICC DISP. RESOL. BULL. 61 (2022), *available at* https://jusmundi-com.proxygt-law.wrlc.org/en/document/publication/en-6th-icc-africa-conference-on-international-arbitration.

[45] Aceris Law LLC, *Dispute Boards and International Construction Arbitration*, ACERIS L., June 7, 2020, https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/.

panelists emphasize, good relations with the different stakeholders are crucial for infrastructure projects.

V. CONCLUSION

ESG, much like CSR, implies "a shift in the focus of corporate responsibility from mere profit maximization for shareholders to a broader spectrum of stakeholders, including community concerns like the protection of the environment and accountability on ethical as well as legal obligations."[46] In that vein, ESG standards have become vital for business success. As such, today they fall within the fiduciary duties of managers, overcoming old paradigms that traditionally excluded them.[47] Today, more and more corporations are compelled to encompass non-financial interests, which nonetheless have financial relevance.

The infrastructure industry is no exception. The dialogue initiated by ITA on ESG in the practice of arbitration sheds light on the importance of incorporating ESG standards in the infrastructure and construction industry. Given the infrastructure sector's close link with economic development and its potentially high environmental and social impact, it requires effective governance and strategic planning to mitigate external business risks by incorporating ESG standards.

Overall, this dialogue provides insights and opportunities for practitioners to better understand how ESG policies are thought out and implemented in the infrastructure industry. It also offers a window into the future. As mentioned, there is a growing demand for ESG standards in concession contracts and bids, as well as an increasing inclusion of ESG standards in construction and infrastructure contracts and a progressive inclusion of ESG-related obligations in international treaties. This

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[46] Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9, 9 (Doreen McBarnet et al. eds., 2007).

[47] The traditional view, as advanced by Milton Friedman's school of thought, compared the legal obligation of managers to stewardship for the owners of the company. Their obligation is to focus on profit maximization, constrained only by the need to comply with regulations imposing particular duties. Going beyond these particular duties would mean acting beyond their legal powers (*ultra vires*), in breach of their fiduciary duties and powers. *See* Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

certainly plants the seed for ESG-related disputes to be resolved by arbitration and other forms of alternative dispute resolution, which will grow and blossom, giving rise to novel issues. In the end, ESG in construction and infrastructure is really all about Who(ever) cares, Wins.

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THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT?

by Dr. Üzeyir Karabiyik and Charles B. Rosenberg

I. INTRODUCTION

In investor state dispute settlement (ISDS), host states have progressively defended themselves by alleging investor misconduct, such as bribery, fraud, abuse of process, and bringing frivolous cases. Tribunals have adopted a range of approaches to address such allegations, including the unclean hands doctrine, transnational public policy, outright dismissal of claims, and costs awards. This article explores the potential of third-party funding, a generally unregulated and burgeoning industry, to deter and reduce investor misconduct in ISDS.

II. THIRD-PARTY FUNDING AND FRIVOLOUS CLAIMS

As a preliminary matter, whether a claim is "frivolous" entails a variety of considerations that present a challenge to assess the extent to which third-party funding contributes to the proliferation of such claims. For example, skeptics of the ISDS system may cynically argue that the remuneration system of arbitrators—which is often based on an hourly or daily rate—may incentive arbitrators to adopt a more lenient interpretation of the law or assessment of the facts to allow "frivolous" claims to proceed that would otherwise be rejected early in the proceeding as "manifestly without legal merit"[1] or "not within the competence of the Tribunal."[2]

The impact of third-party funding on frivolous claims has generated considerable debate. Critics of third-party funding contend that it amplifies the occurrence of abusive litigation and fosters the proliferation of frivolous claims. Their argument boils down to: (i) litigants may be more likely to pursue a frivolous claim if they are not paying for it; and (ii) the potential for a substantial financial recovery may motivate a third-party funder to assume the risk of pursuing a claim that has a low likelihood of success. Empirical research suggests that third-party funders may

[1] ICSID Arbitration Rule 41(5).

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States Art. 41(3), Mar. 18, 1965, 575 U.N.T.S. 159; ICSID Arbitration Rule 41(1).

exhibit a preference for investing in riskier claims with relatively lower prospects of success if they have the potential for a substantial financial recovery.[3]

Critics draw parallels with contingency fee arrangements to support their argument that third-party funding incentivizes frivolous claims. They contend that whereas contingency fee attorneys bear the ethical responsibility of advising their clients against pursuing meritless claims, no such duty exists for third-party funders. As a result, claims with questionable merit may be more likely to proceed because they are funded by third-party funders motivated by the prospect of extremely large profits.

In contrast, some commentators argue that the involvement of third-party funders weeds out many frivolous claims. Prior to making a commitment to fund a claim, third-party funders normally undertake a thorough examination of the strengths and weaknesses of the claim to evaluate the potential risks and ensure an adequate return on their investment. A funder's evaluation is largely motivated by considerations of business and risk management. Funders frequently rely on the expertise of external law firms and consultants to conduct this due diligence, which often takes several weeks or months and can cost tens of thousands of dollars. Funders recognize that investing in unmeritorious cases not only undermines their financial interests but also poses the potential threat of tarnishing their standing within the industry.

The nature of third-party funders themselves may also influence the effect of third-party funding on abusive litigation and meritless claims. Currently, the market for litigation financing is dominated by large investment firms that are well-known repeat players in the industry. Safeguarding their reputation within the expanding market is vital for their long-term financial objectives. Such funders likely would be reluctant to jeopardize their professional reputations by financing and facilitating frivolous claims. Nonetheless, as compared to smaller funders, larger funders are better suited to undertake "portfolio funding," which involves obtaining a financial

[3] *See* Brooke Guven & Lisa Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, at 24 (Columbia Center on Sustainable Investment Working Paper 2019).

stake in a group of claims that may or may not involve the same claimant or counsel.[4] As a result, the funder's returns are determined by the overall performance of the portfolio, minimizing the risk and influence of each particular claim. By grouping higher-risk cases into a larger bundle of claims, portfolio funding may lead to an increase in the funding of frivolous claims.

On the other hand, small or medium-sized new entrants may be more willing to fund riskier claims, given that the possibility of exceptionally high returns could help them establish a reputation and gain a foothold in the market. Further, as the market for third-party funding continues to expand, one can anticipate an increase in the number of new entrants. The influx of additional participants could result in heightened competition among funders, potentially fostering a climate in which even high-risk claims are in demand.

III. THIRD-PARTY FUNDING AND OTHER TYPES OF MISCONDUCT

Investor misconduct may have a variety of adverse consequences. For example, an investor's misconduct may lead to a tribunal dismissing the claim for lack of jurisdiction or as inadmissible.[5] A tribunal also may reduce the damages awarded to the investor or factor in the investor's misconduct when apportioning the costs of the proceeding.[6] In light of these risks, a third-party funder can impose certain responsibilities and constraints on a litigant through representations and warranties in a litigation financing agreement to protect the funder's interest in the case.

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[4] *See* Annual Report 2018, IMF Bentham, at 14, https://www.annualreports.com/HostedData/AnnualReportArchive/o/ASX_OBL_2018.pdf ("Portfolio investing allows costs and risks to be collateralised across the cases within the portfolio, with a commensurate reduction in return. Investing in single-party cases generally involves greater risk, given the binary nature of the outcome, but concurrently delivers greater returns.").

[5] *See*, *e.g.*, Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 143-147 (Apr. 15, 2009) (dismissing for lack of jurisdiction because "the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration"); Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 389 (Oct. 4, 2013) (dismissing for lack of jurisdiction due to corruption).

[6] *See*, *e.g.*, Occidental Petroleum Corp. & Occidental Exploration & Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 687, 825 (Oct. 5, 2012) (reducing damages by 25% as a result of the claimants' material and significant wrongful act); Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, ¶¶ 176-78 (Sept. 17, 2009) (ordering the claimant to pay the respondents costs because the claimant "filed a fraudulent claim").

Representations: The litigant would represent to the funder that it did not engage in any misconduct regarding the claim and provide guarantees about its past actions. For example, the litigation financing agreement could provide: "[t]he Plaintiff represents that, as of the date of this Agreement, the Plaintiff has provided the Funder all material information relating to the Claim, excluding information protected solely by the attorney-client privilege" or "[o]ther than as already disclosed to the Funder, the Plaintiff has not taken any action (including executing documents) or failed to take any action, which would materially and adversely affect the Claim."[7]

Warranties: The litigant would promise to the funder that it will not engage in misconduct throughout the arbitration. For example, the litigation financing agreement could provide: "The Plaintiff agrees and undertakes that . . . it will not take any step reasonably likely to have a materially adverse impact on the Claim or the Funder's share of any Proceeds … ."[8]

Third-party funders are likely to abstain from funding claims that involve prior investor misconduct directly linked to the claim, such as corruption, fraud, or abuse of process. Similarly, an investor who has concluded a litigation financing agreement that includes robust representations and warranties likely would be hesitant to participate in any type of wrongful conduct in the future due to the risk of losing the funding and subjecting itself to liability from the third-party funder. Accordingly, due to the contractual obligations between the third-party funder and the investor, third-party funding has the real potential to deter and reduce the occurrence of ISDS claims that involve investor misconduct.

IV. CONCLUSION

Although there are strong arguments that third-party funding deters and reduces investor misconduct in ISDS, there currently is a lack of empirical evidence. The need for regulating third-party funding in investment arbitration has been one of the most popular topics of the recent ISDS reform process. The continuous expansion of third-

[7] *See* Maya Steinitz & Abigail C. Field, A *Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 757-58 (2014).

[8] *Id.*

party funding combined with further regulation of the third-party funding industry (perhaps under the ambit of United Nations Commission on International Trade Law (UNCITRAL)) would help shed further light on the effects of third-party funding on investor misconduct.

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PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS

by The Hon. Charles N. Brower, interviewed by Rafael T. Boza

For the 40th anniversary of the Iran-US Claims Tribunal, Rafael Boza interviewed Judge about his experience serving on the Court.

Rafael Boza: Good afternoon, everyone. My name is Rafael Boza and I thank you for joining us this afternoon with Judge Brower to have a conversation about the Iran-US Claims Tribunal (the Tribunal), including its development, its history, its future, and the views of Judge Brower on several interesting topics related to the Tribunal.

I could spend the whole hour talking about Judge Brower's résumé and accolades, and his general accomplishments. But I am going to make a short introduction in order to get us straight to the point.

Judge Brower is currently Judge *ad hoc* at the International Court of Justice (ICJ) where he was first appointed in 2014 and he is sitting in three active cases, two by appointment of the US and one by appointment of Colombia. He is also appointed to the Inter-American Court of Human Rights by Bolivia. He has served on the Iran-US Claims Tribunal since 1983, and he has continuously served on the Tribunal except for a short period of time in which he was serving in the White House as Special Counsel for the President of the US.

Judge Brower has practiced law with White & Case for over 30 years in New York City and Washington, DC and has been involved in arbitrations for most of his professional career. He has also served as President of the American Society of International Law and has been on the Board of Editors of the American Journal of International Law. He has been involved with the Institute for Transnational Arbitration (ITA), which is where I had the pleasure of meeting Judge Brower about 10 to 15 years ago. He has received the Pat Murphy Award for exceptional civic contribution and extraordinary professional achievements, and last year he was also awarded a lifetime achievement award by the ITA.

Without further ado, Judge Brower, it is a pleasure to have you here and a privilege to have you share your thoughts with us.

Judge Brower: Thank you.

Rafael Boza: We all know that the Iran-US Claims Tribunal arose after the Iranian Revolution, but can you give us a bit of a historical context for the Tribunal, if you will?

Judge Brower: Of course. Thank you very much and thank you for that kind introduction. On November 4, 1979, 52 Americans were seized as hostages at the American embassy in Tehran. Eventually, they were held for 444 days. Reacting to that, President Carter, 10 days later on November 14, 1979, froze all Iranian government assets that were within the jurisdiction of the US, which of course included branches of American banks abroad in London and Hong Kong, among others. It would be called perhaps a "Mexican standoff." Iran wanted its money back; the US wanted its hostages back. Iran was under the pressure of two resolutions of the UN Security Council to return the hostages and free them.[1] It was also under the pressure of an action brought by the US against Iran at the International Court of Justice, which pretty soon resulted in what is the equivalent of a preliminary injunction ordering the hostages to be released because it is against international law to seize and imprison diplomats,[2] and later was an International Court of Justice judgment to the same effect.[3]

Now this was a time when there was an election in 1980 for the presidency of the US. Jimmy Carter ran for re-election and Ronald Reagan became the Republican candidate. Once the election was in progress, at one point, there was concern that Reagan would be elected and he might be a tougher nut to crack than Jimmy Carter

[1] Sec. Council Res. 457 (1979) [on diplomatic relations between Iran and the United States], *available at* https://digitallibrary.un.org/record/5826?ln=en; Security council resolution 461 (1979) [on detention of persons of United States nationality in Iran], *available at* https://digitallibrary.un.org/record/9656?ln=en.

[2] Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Order on Request for the Indication of Provisional Measures of Dec. 15), ICJ General List No 64, *available at* https://www.icj-cij.org/sites/default/files/case-related/64/064-19791215-ORD-01-00-EN.pdf.

[3] Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 23 (Order of Dec. 24, 1979), *available at* https://www.icj-cij.org/sites/default/files/case-related/64/064-19791224-ORD-01-00-EN.pdf.

from the Iranian point of view. Then, of course, the election was held early in November and Reagan won. That is when actual serious negotiations began.

The negotiations were taking place in Algeria with the intermediation of the Algiers government. The Americans and the Iranians never met face-to-face, and eventually the Algiers Accords[4] were negotiated by Warren Christopher in the lead, who was then the Deputy Secretary of State, and the deal basically was: the US got its hostages back and Iran got its money back. Those of you who were old enough to watch the Reagan Inauguration in January of 1981, would have seen split-screen televisions with Reagan being sworn in and giving his speech on one-half of the screen and the American hostages arriving at Rhein-Main Air Force Base in Frankfurt, Germany to be medically checked before they be sent on to the US on the other-half of the screen.

Rafael Boza: That is the historical context. You mentioned the Algiers Accords, which obviously is the international instrument that gives legitimacy to the Tribunal.

Judge Brower: Right.

Rafael Boza: That was negotiated during the Carter administration?

Judge Brower: Well, yes, but also post-election of Reagan.

Rafael Boza: In those three months, between November 1980 and January 1981, the US negotiated with Iran through Algiers for the Algiers Accords.

Judge Brower: Exactly, and the Tribunal had to be legitimized by the US Supreme Court, and actually the Accords allowed a six-month period for that happen – knowing that someone who did not like it, and who was a claimant in court in US court against Iran, would take it to the US Supreme Court. This happened in a case called *Dames & Moore*.[5] In *Dames & Moore*, the US Supreme Court basically blessed

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), Jan. 19, 1981, *available at* https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration_.pdf; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), Jan. 19, 1981, *available at* https://iusct.com/wp-content/uploads/2021/02/2-Claims-Settlement-Declaration.pdf (together, Algiers Accords).

[5] Dames & Moore v. Regan, 453 U.S. 654 (1981).

the Iran-US Claims Tribunal as constitutionally acceptable under the Fifth Amendment as a substitute for the then-existing 300 or more cases in US federal courts, mostly, against Iran, by American claimants being removed as part of the Accords from the US courts.

Rafael Boza: There was no arbitration agreement that could be relied on, to go to the Tribunal to seek redress for their claims. They were in US courts obviously trying to get some relief.

Judge Brower: Right.

Rafael Boza: The Tribunal was established through the Algiers Accords through a specific document, a declaration, which authorizes the Tribunal to come into effect. How was that actually negotiated? Because it is a unique piece of international law that has not been replicated. How was it negotiated?

Judge Brower: It was negotiated by Warren Christopher, and a delegation including the then legal adviser to the State Department, and the Iranians with the Algerians in-between. It was complicated because you were dealing with English, French, Arabic and, of course, Farsi. There was a lot of translation going back and forth. We have never had any arguments about any disagreement between any versions, as far as I know. It was signed in English, and we have always worked with the English text at the Iran-US Claims Tribunal, even though the two official languages of the Tribunal are Farsi and English.

Rafael Boza: The Algiers Accords provide that there would be a period of time for claims to be made before the Tribunal. That period was between January 1981 and January 1982 for disputes between private individuals and entities and the Iranian government. Given that, why are there still disputes after 40 years?

Judge Brower: Well, to be more precise, that limitation was for claims by nationals of one country against the other state party (official claims). Official claims were claims based only on contracts for provision of goods and services. There are also claims of a limited nature between the two states (A-Cases). A-Cases are complaints by one state party that the other state party breached the Algiers Accords. A-Cases can be filed at any time. A-Cases still could be filed if someone had a claim.

The question was what is left and why is there anything left. Well, the answer is there are fairly few things left and they are all A-Cases, state-to-state claims, and they are essentially all Iranian claims against the US. All the official cases have been resolved by one of three means: (1) an award was issued, and of course it was necessarily paid out of the security account that was established, starting with $1 billion of the returned Iranian assets and with a mechanism for being replenished; (2) a great number of settlements were reached which would be recorded as awards on agreed terms and paid out of the securities account; or, (3) claims of less than $250, which were quite a large number, were settled along the way in, I believe, the late 1990s by an agreement between the US and Iran in a lump sum settlement to cover all of those claims. Those claims were shunted off by the US to a foreign claim settlement commission run out of the State Department in Washington, DC, which had to operate in accordance with precedence that had already been established at the Tribunal.

So, we are down to a few state-to-state claims. They are dealt with by all nine judges, not panels of three as was the case with the nationals. Six of the nine are civil law trained lawyers: three Iranian lawyers and three third-country lawyers; and then you have the three American common law lawyers. Now, presently one of the three American common law lawyers is not American: that is Sir Christopher Greenwood, formerly of the International Court of Justice, from the UK. He of course is a common law lawyer.

I will tell you one anecdote, which will tell you why things take a long time. Judge Ansari, with whom I sat in the 1980s in chamber cases, said to me once: You know what is the difference between you-Americans and us-Iranians? I said, I am sure you will educate me. He said, well, my house in the Hague, where I live with my family, has a bottom floor that goes out to the garden in the back. It is sort of an informal room, recreation room, like a family room. Then on the ground floor above it, which is the ground floor to the front of the house, is a kitchen and dining room and so on and so forth. One evening in the summer we had the doors open downstairs. I was sure somebody had entered the house and so I ran down the stairs and sure enough

someone had entered the house. As soon as he saw me, he ran out to the garden and climbed over the garden wall. I climbed over the garden the wall and I chased him until I just could not go any more. He was younger. He got away but if I had gotten a hold of him, I would have been beating the living daylights out of him. He said, now Americans, what does American do? He goes downstairs, the guy is out over the fence, fine. Problem solved. Maybe I will call the police. I said that is pretty accurate for the American view, I think.

Rafael Boza: That is, if you are not in Texas.

Judge Brower: Well, those who have negotiated with the Iranians in other situations will all tell you they will never, never, never, never, I could say never a hundred times, stop negotiating or arguing until they are totally convinced that there is just nothing left to be wrung out of the situation. It is difficult for some presidents of the Tribunal to just drop the guillotine or stop the watch and say that is enough. And of course it is just one case at a time. You only do one case at a time. They happen to be involved now in deliberations on the hearing of exemplary cases from the thousands of foreign military sales claims that were made by the US government to Iran when it was under the rule of the Shah. That has been going on for a long time and I am glad to say that I did not have to sit on that particular case.

Rafael Boza: Talking about the Tribunal a little bit more broadly as a creation of international law, technically there is not anything like it because it was created for the specific purpose of dealing with investment claims. Obviously, the International Centre for Settlement of Investment Disputes (ICSID) exists, but it is a different kind of creature. The Tribunal is two nations getting together and agreeing on a single tribunal to resolve disputes between their nationals and nationals of another country. That is something that has not been repeated in history. What is your take on that particular aspect of the Tribunal?

Judge Brower: Well, it is unique because not many of these peaceful dispute settlement mechanisms arise out of what I refer to as a "Mexican standoff" where there are two parties and neither one has prevailed in war. There have been many post-WWI and post-WWII commissions or tribunals that would settle a series of

claims, but it was a form, I suppose, of victor's justice. As a tribunal limited by the discreet volume of work before it, it is quite unusual. Now there is, of course, the UN Compensation Commission [6] which was formed as a suborganization of the UN Security Council, to handle millions of claims against Iraq arising out of the unlawful invasion and occupation of Kuwait in 1990. Again, that is different. It obviously had a discrete number of claims within a certain time and there were so many that it had to be handled in much more of an administrative manner. You could not have a nine-member tribunal dealing with all of those cases. That is different. I guess in peaceful dispute settlement, you have to be inventive and put something together that suits the situation. We have never had quite a situation like we had with Iran.

Rafael Boza: Do you think it could be useful to try to maybe expand the jurisdiction of the Tribunal to deal with, for example, the nuclear deal or the sanctions that the US has imposed on Iran for so many years?

Judge Brower: Well, Iran has chosen to try and do that at the International Court of Justice in two of the three cases on which I am sitting. They are Iran versus the US. One of them is entitled Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights.[7] They are there making claims of breach of sanctions. A second case which actually was the first to be brought deals with the fact that under what is called the US terrorism legislation, the US government was empowered by domestic statute to seize, not only freeze but seize, certain Iranian assets.[8] In that case, $2 billion I believe that were on deposit at the Federal Reserve Bank in New York had been allocated pursuant to a US statute approved by the Supreme Court to so-called terrorism claimants –people with judgments against Iran for the fact that somebody in the family was killed.

[6] United Nations Compensation Commission, https://uncc.ch/home.

[7] Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights (Iran v. U.S.), 2021 I.C.J. 9 (Judgment on Preliminary Objections of Feb. 3) *available at* https://www.icj-cij.org/case/175/judgments.

[8] Certain Iranian Assets (Iran v. U.S.) 2023 I.C.J. (Judgment of March 20), *available at* https://www.icj-cij.org/case/164.

Rafael Boza: You do not think there is an opportunity maybe through diplomatic channels, or informal diplomatic channels, to expand the jurisdiction of the Iran-US Claims Tribunal to deal with things that were not initially contemplated?

Judge Brower: Well, the nuclear deal, the Joint Comprehensive Plan Of Action (JCPOA), was never a legally binding instrument. It was a political arrangement, and I have written about it a little bit in my separate opinion on jurisdictional objections in the case that I just mentioned.[9] I believe that the political situation on both sides – Iran under the president who was just replaced within the last few months by the election of a much more hardline president; the political realities on both sides of this were such that what was entered into as the JCPOA, the nuclear deal, could not have gotten through the necessary parts of government that would have to be involved to become a legally binding agreement. Neither side wants to make a legal proposition at this point. It is in political negotiation.

Rafael Boza: Once the handful of cases that the Tribunal has in its docket are completed, which could take any number of years–

Judge Brower: Do not ask me for a prediction on that!

Rafael Boza: –should the Tribunal dissolve? One the case load is completed, should the Tribunal be dissolved?

Judge Brower: Yes, when the last award is issued, that is the end of the Tribunal.

Rafael Boza: OK

Judge Brower: We are settled.

Rafael Boza: The Tribunal has done a monumental amount of work in its 40 years of existence and the volume of cases that it has resolved is about 4,000. I found statistics that said 4,700 but you corrected me that it is about 4,000. How do you view the impact of the Tribunal in terms of international law in general?

Judge Brower: We are looking now at the substance of its decisions or awards. Its impact has been quite considerable, actually. Of course, I have been sitting – apart

[9] Alleged Violations of the 1955 Treaty of Amity Economic Relations and Consular Rights (Iran v. U.S.), 2021 I.C.J. 48 (Judgment on Preliminary Objections, Separate, Partly Concurring and Partly Dissenting, Opinion of Judge *ad hoc* Brower of Feb. 3) *available at* https://www.icj-cij.org/case/175/judgments.

from the Iran-US Claims Tribunal and the ICJ – in a long series of arbitrations usually under the initials of ISDS (investor-state disputes) initiated under bilateral investment treaties, and occasionally, NAFTA or the Energy Charter Treaty. Decisions of the Iran-US Claims Tribunal have probably had the most impact in that area of expropriation cases. Other cases deal with contractual issues of the garden variety, but the really big cases largely have been, and the most cited or noted ones, have involved expropriation. It happens to be a favorite subject of mine, but quite apart from that, when I am sitting as an arbitrator, I expect cases in which I have been involved to be cited back to me by one side or the other—trying to persuade the Tribunal, and generally speaking there has been quite an influence -

Rafael Boza: At least one member of the Tribunal would have to remember what they said.

Judge Brower: You come to expect that. I believe now the current volume is 40 or 41 of the Iran-US Claims Tribunal Reports, published by Cambridge University Press. I have them all sitting here on my library shelves in another room. That is quite a volume of precedence. Also, necessarily also, because the Tribunal adopted in the Algiers Accords the UNCITRAL arbitration rules, subject to refinements made by the Tribunal in order to adjust the rules to the fact that you have a nine-member court. That adoption really got the UNCITRAL rules into business. They were founded in 1976. The Tribunal was established January 1981, and that really—my former law clerk and then later colleague in The Hague, David Caron, has published a book together with Lee Caplan, who has just done a second edition, or a third edition, I cannot recall which, on the UNCITRAL rules as used by the Iran-US Claims Tribunal. They are good authorities, and they are frequently referred to as well.[10]

Rafael Boza: We have a question from the audience: How about the Security Council Resolution 2231 that endorsed the nuclear deal (JCPOA)? Does that give enough standing to bring the nuclear deal to the Tribunal?

[10] THE UNCITRAL ARBITRATION RULES. A COMMENTARY (David D. Caron & Lee M. Caplan eds., 2013).

Judge Brower: In a sense, it is already in the International Court of Justice in the case to which I referred. There the complaint is only against the sanctions that had been suspended by the nuclear deal. Which deal, obviously, President Trump withdrew from. What Iran wants in that case is a judgment from the Court, which of course would be legally binding, that the US should abolish the sanctions which were restored once the US left the nuclear deal. My opinion is public, and I have taken the view at the jurisdictional stage that to do so is an abuse of process, because the objective if achieved would subject the US to a legally binding requirement to basically honor the nuclear deal, making it bound to live by it, whereas Iran is not bound to live by it, because the JCPOA is not a legally binding agreement in itself. That is the field of battle on that subject.

Rafael Boza: You have mentioned that the Tribunal's influence in international law was mostly felt in the field of expropriation law. What is your take on the tests that are being developed in the international arena specifically in ICSID related to the regulatory powers of the states: For example, when the states are regulating validly, expropriation should not be an applicable claim.

Judge Brower: Well, the usual problem is this: Of course, generally speaking, in many of the bilateral investment treaties and other investment promotion and protection treaties, expropriation is valid if it is for a public purpose, it is not discriminatory and there is a provision for prompt, adequate and effective compensation. Where things usually fall apart is absence of compensation or insufficient compensation. That is the definition of what is the appropriate application of the police powers because the doctrine of what is lawful and unlawful is well established. You have to meet those requirements. It is quite interesting: states have done very well. If you look at the exit statistics or the UNCTAD statistics, states do very well. They do, by and large, a bit better than the investors. But there is a whole lot of uninformed people in the West, like the lady senator from Massachusetts and a guy named Bill Moyers who used to be a close associate in the Lyndon Johnson White House, who have been very public about saying how horrible this all is. It is all for corporations. A lot of people are really not informed well on the

subject. Somebody caught their ear and said the right words and it sort of played into some kind of a predisposition. I have seen cases in which, to take an example, the *Ethyl versus Canada* NAFTA case,[11] in which I sat. People screamed – screamed - in the environmental community when the case was settled for, I think, $13 million. What they did not know was that an internal Canadian body which deals with the issues of whether or not provincial laws are compatible, or federal laws are compatible, with trade law of Canada had ruled against Canada before we even found jurisdiction, and so they had no leg to stand on. Yet, the environmental activists who are less, how should I say, less rational perhaps, just screamed about this: "How could you settle with these people?" Just ignoring the fact that Canada was done in on its own turf. That is a bit of a digression.

Rafael Boza: No, for example, we just saw a case from Colombia coming out of ICSID, the *Eco Oro* case,[12] in which Colombia regulated and designated as an environmentally protected area, land that it had previously given in concession to mining companies, removing the concession or part of the concession that it had previously granted. That was not considered an expropriation. The states are starting to get a little bit more leniency, I think, in terms of their regulatory power, specifically for environmental purposes.

Judge Brower: You see it also in the negotiation of new bilateral investment treaties, or the models. Look at the US, which I have accused from time to time of being a primary offender in how it handles investor-state cases. You look at the 2012 model, which I believe is the most current one. Many states are trying to denounce treaties if they are subject to denunciation, and then negotiate the new ones with very elaborate, almost footnote-like provisions related to indirect expropriation. A lot of what is happening is in the actual treaty formation and negotiation area. There are unfortunate tendencies in the procedural sense, principally the European Union idea of a completely state-appointed 15-member International Investment Court that

[11] Ethyl Corp. v. Canada, NAFTA/UNCITRAL, Award on Jurisdiction, (June 24, 1998), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf.

[12] Eco Oro Minerals Corp. v. Colombia, ICSID Case No. ARB/16/41, Award (Sept. 9, 2021), *available at* https://www.italaw.com/cases/6320.

excludes the investors from their present role of having an equal role in constitution of the Tribunal.

Rafael Boza: We have a question from the audience, and this goes back to the Iran-US Claims Tribunal: To what extent have apparent limitations on actions by some Iranian lawyers have precluded some of them from taking the bench, and how has that impacted the international tribunals as we discussed them today? Specifically, maybe politics and the genders of the Iranian lawyers.

Judge Brower: It is distinguishing between lawyers and people, and the Iranians that have become judges of the Tribunal?

Rafael Boza: Yes. For example, apparently there is a Nobel Prize winner who was precluded from taking the bench because of her gender or her politics. Do you know about that case?

Judge Brower: Well, I am not familiar with that particular case. But knowing what I have learned about Islam and the role it plays in the Iranian state under the present constitution, and so on and so forth, I think generally speaking females are not favored a lot as far as public involvement is concerned or political involvement, except for a very few lawyers defending what they regard as human rights cases in Iran. I can tell you that to be an Iranian judge of the Iran-US Claims Tribunal is in part a wonderful thing and in part not such a wonderful thing. The wonderful thing is you are getting to live in The Hague. As I say, when I was there in the 1980s, all the fancy automobiles, the BMWs, Mercedes and so on and so forth in the portion of our Tribunal parking lot allocated to the members of the Tribunal were Americans. Now they are all from the Iranian judges, and two of the three judges on the American side own and use bicycles but do not own cars in The Hague.

Rafael Boza: I think in The Hague it is probably better to own a bicycle than a car.

Judge Brower: Well, you are certainly in the majority.

Rafael Boza: Except when it rains.

Judge Brower: Yes, and it is safer than riding a bicycle down in Washington, DC, I am sure, but in any event, however, I think, let us put it this way, with one very odd and explicable exception, no Iranian judge has ever voted against the Iranian

government's position in a case. Period. Now, American judges have voted against the US's positions and against US claimants. I think it would be personally dangerous, that is the way I analyze it, for an Iranian judge to do otherwise, and they profess very vocally at times: "To be judges. We are independent. We are impartial." But when you look at the record of decisions, there becomes, shall we say, a serious question about that. There are some other countries, where if a national of that country is appointed in an international proceeding as an arbitrator, that person just cannot go home, or his family will not be safe. He or she may have left the country, if they do not follow what I call, the party line. That is just the reality, and it is supported by the decisions.

Rafael Boza: One of the audience members has provided the name of the judge who was not allowed to be a part of the Tribunal because of her gender, and that is Shirin Ebadi, if I am pronouncing that name correctly. If not, I apologize. But she used to be a judge, is what it says, and she was removed from the bench in 1979 because of her gender.

Judge Brower: I think, if I have the name right, I suspect that that is someone who is defending people accused by the Iranian authorities of some crime, or anyway, of doing something that was not liked by the authorities. I could be wrong, but that is what comes to mind when I hear the name.

Rafael Boza: Judge, tell us a little bit about your work in the Inter-American Court of Human Rights, talking about the discrimination case.[13]

Judge Brower: That is an interesting case, and because I am in the process of writing, with some help, my professional memoirs and that is covered there as well, I have been reading those decisions of 20 years ago.[14] It is an interesting case, because it involved the disappearance of individuals, many years before, by the then-dictatorship of Colonel Hugo Banzer. By the time it came to the court–

[13] Trujillo-Oroza v. Bolivia, Inter-Am. C.H.R., Judgment (Jan. 26, 2000), *available at* https://www.corteidh.or.cr/docs/casos/articulos/seriec_64_ing.pdf.

[14] The memoir is now published. HON. CHARLES N. BROWER, JUDGING IRAN. A MEMOIR OF THE HAGUE. THE WHITE HOUSE, AND LIFE ON THE FRONT LINE OF INTERNATIONAL JUSTICE (2023).

Rafael Boza: Forgive me for interrupting, but I wanted to make sure that everybody knew Judge Brower was appointed by Bolivia to this case.

Judge Brower: Yes. Exactly. By the time it came to the Court to be heard 20 years or more later, the same Colonel Hugo Banzer was the democratically elected president of Bolivia.

Rafael Boza: This can only happen in Latin America.

Judge Brower: Incredible case of political survival from one system to another. In any event, it was quite interesting because the government of Bolivia conceded jurisdiction and liability. Essentially the question we ultimately had to decide was, what was the relief? Of course that got me into a whole different field, because in such a case there are many forms of relief: monetary, or orders to the government to do a better investigation of what happened, or can they find the remains, and so on and so forth. That was quite intriguing. And just as an aside, how I got to this position: the then-senior official dealing with this in Bolivia got a hold of a friend of his who happened to be in Costa Rica, and that was a person with whom I had worked during the five years before I went back to The Hague in 2000. I was representing Costa Rica in international matters, and that Costa Rican former attorney general said to his Bolivian friend: "Do not appoint a Bolivian as judge *ad hoc*. Do not even appoint anybody from Latin America. Appoint someone from a completely other part of the world with I guess a global or decent reputation in international adjudication." The idea being that the judge *ad hoc*, then might be given more distance and certainly would not be seen as having geographically favored arguments of some kind. The president at the time was Antônio Augusto Cançado from Brazil, who is now a colleague on the International Court of Justice, and I wrote a separate opinion in that case after consulting with him, just contributing to the Court's jurisprudence of the Court's basis for jurisdiction in that case. It is sort of who you get to know along the way and so that is where I wound up.

Rafael Boza: We have a question from the audience: Can you give us a view of when, what months, you are working in The Hague as a judge of the Tribunal? What was your schedule as a Judge of the Tribunal?

Judge Brower: Well, I have been a judge in different capacities since 1983. Periods I was a titular judge, rather than a substitute judge rather than stepping in for other cases. I was there from January 16, 1985, through the end of March 2008. During that time we had very few cases that were heard by all nine judges. We were in chambers of three, and most of the year, excluding maybe two of the summer months, we would have two hearings each month, usually one big case and one smaller case. It was impossible to do anything else other than that. I would fly to the US periodically because I was, during most of that period, a member of the Board of Governors of the American Bar Association and we would meet around the country. But that was limited. Otherwise, I was constantly in The Hague. Constantly in The Hague. And of course, the pressure on the Tribunal and especially from the American side of course, was to get through the cases of nationals as fast as possible, get those cleaned up, and then we went into the dual national cases. And that is when I left. We had in my chamber, apart from dual national cases and the eventual state to state cases, we just had 10 cases left, none of which was seeking more than $10 million. We had been through the big cases, and so it was time for me to step out. And I would continue as a substitute judge, of course. Now, it was completely different when I went back to the beginning of 2000. I will add that I was first appointed by the Reagan administration, and when I went back at the beginning of 2001, it was because I had been reappointed as a titular judge by the outgoing Clinton administration. So, having been appointed by the next previous American administration to these two cases at the ICJ, the name begins with a T, I have some record of being acceptable to all administrations.

Rafael Boza: Crossing political boundaries, which is what we need to do.

Judge Brower: I finished a case in which I had been substituted earlier, the last case of a dual national, and therefore the last case of any national of either side. We were quickly into these interminable hearings and then deliberations of the state-to-state cases. And because of the pace of that work, which I think I have described, I was able to take on a lot of arbitrations outside the Tribunal. And they of course caused me to go to London, Paris, Zurich, I think, Geneva, Singapore, the US. And I

could do that while being present for all the sessions of the Tribunal to carry out my duties there.

Rafael Boza: In that vein, how many cases do you think you have arbitrated directly in that Tribunal? Because in your career I am sure there are many.

Judge Brower: I would have to go through page by page, or index by index through 40 or 41 volumes of the reporter. Anyway, it sure has been a lot. That is all I can say. I do know, because a US lawyer did in a survey in certain success years, in two-year period, I would have 25 cases outside the Tribunal. Eventually my Iran-US Claims Tribunal paid law clerk could not handle both the work there and my other arbitrations, so I had a hire another clerk in 2007 on my own payroll, someone to deal with the other arbitrations.

Rafael Boza: We have a few arbitrators in the audience that are in that situation. And with that said, we are five minutes to the time, so I guess we can open it to Q&A, and there is a question from the audience that asks: Did the Tribunal have any role in returning the bodies of the eight servicemen who were killed during the Operation Eagle Claw in Iran? Which was the rescue operation in 1980, I believe.

Judge Brower: Referring to the Desert One raid?

Rafael Boza: No, this was, I think this was, if I am not mistaken, this was an attempt to rescue the hostages from the embassy back in 1980.

Judge Brower: That is the Desert One raid that Jimmy Carter launched in an area called Desert One with Delta Force. It never was able to make two steps towards Tehran because of an aircraft crash. I think a helicopter ran into one of the transport aircraft and the whole thing had to be scrubbed. And the Secretary of State at the time resigned in protest over ever having launched the war, which made Senator Muskie of Maine, Secretary of State for the last eight months or so of the Carter administration. I was not aware, or I do not recall that bodies would have been left on site because the military creed is "no soldier left behind."

Rafael Boza: It seems strange.

Judge Brower: In any event, I cannot tell you, because I am not aware of the fact that the Tribunal, once it was established as of January 19–

Rafael Boza: 1981.

Judge Brower: Yes. I am old enough to still keep trying to put 19 instead of 20 before my references to years on the calendar. There may have been a lot going on outside the Tribunal, but in The Hague between Iran and the US, of which we would not be aware.

Rafael Boza: And the jurisdiction of the Tribunal, obviously was limited to the extent provided in the Algiers Accords; so, it would not have participated in other topics that were outside the Court's jurisdiction.

Judge Brower: No. And those claims basically had to be tied to the revolutionary period, effectively.

Rafael Boza: I do not know if anyone in the audience has any additional questions. Feel free to raise your hand. Somebody is asking if you have any recommended homework reading.

Judge Brower: Oh well, I can tell you, there was a book published in 1998 by a guy named Brower and a then-former law clerk by the name of Jason Brueschke, published by Kluwer, entitled, strangely enough, *The Iran-United States Claims Tribunal.*[15] It won the relevant book prize that year of the American Society of International Law. It happens to be in the process of a second edition after so many years, bringing things up to date. I do not suggest you wait for that because it is still in progress. There is another book available written by my now-deceased colleague George Aldrich. I think the title is *Jurisprudence of the Iran United States Claims Tribunal.*[16] But the book that I mentioned that I co-authored dealt, not with just the jurisprudence, but a lot of procedural and stuff about challenges and so on and so forth that is, well, it is as far as I am concerned, and I realize I could be subject to "Ah! Is he just advertising his own book?" Well, frankly, there is not much else out there that is as comprehensive as that one. Look it up.

[15] CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN - UNITED STATES CLAIMS TRIBUNAL (1998).

[16] GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1996).

Rafael Boza: Well, Judge, if we do not have any more questions from the audience, I thank you so much for the time that you have devoted to being with us, and I have thoroughly enjoyed talking to you about all this. Again, thank you.

Judge Brower: Thank you very much, and thanks to everyone who took the trouble to attend. I hope you feel you have learned something, or at least on the path of learning something useful, and it has been a pleasure to have the opportunity to speak with you.

Rafael Boza: I am sure we have all learned a lot. Thank you so much Judge and we will see you soon. Hopefully in Houston.

Judge Brower: Goodbye.

JUDGE CHARLES N. BROWER is judge *ad hoc* of the International Court of Justice (the World Court). First appointed in 2014 he sits in three active cases (two by appointment of the US and one by Colombia. Judge Brower has been a Judge of the Iran-US Claims Tribunal continuously since 1983, and from 1999 to 2002 also sat as Judge *ad hoc* of the Inter-American Court of Human Rights (by appointment of Bolivia). Earlier he served (1969-1973) in the US Department of State successively as Assistant Legal Adviser for European Affairs, Deputy Legal Adviser and Acting Legal Adviser on international law to the US Government. In 1987 he took leave from the Iran-US Claims Tribunal to serve in the White House as sub-Cabinet-rank Deputy Special Counselor to the President of the US.
Judge Brower practiced with the law firm White & Case LLP for 30 years, and since 1980 principally as counsel and arbitrator in international arbitrations. Since 2001 he has been an Arbitrator Member of London's Twenty Essex (barristers) Chambers. In 2013 The American Lawyer named him "the reigning king of international arbitrators."

RAFAEL T. BOZA is Special Counsel at Pillsbury Winthrop Shaw Pittman LLP. Rafael T. Boza focuses his practice on all aspects of international arbitration, dispute resolution and litigation. He also practices in transactions and corporate matters. He has over 20 years of experience advising local and multinational companies, litigating and arbitrating. His experience includes providing legal services in the US and abroad, utilizing his comprehensive legal knowledge of multiple jurisdictions, including the US, Latin America, and Europe. He is a litigator in arbitrations, domestic and international, and in Texas and federal courts in a variety of matters. He participates in complex, high-stakes, ICC, ICSID, LCIA and other international arbitration cases. He has also arbitrated cases (as arbitrator) since 2003 in a variety of economic sectors, including commercial, construction, investment, and intellectual property disputes in mostly ad hoc cases.

BOOK REVIEW:
GUÍA DE ARBITRAJE DE INVERSIÓN
CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES

Reviewed by Pilar Álvarez

I. INTRODUCTION

As is widely known, cases against states from Latin America, Central America and the Caribbean make up a significant portion of the total international investment arbitration caseload. However, despite this sustained trend, high-quality and updated specialized literature in Spanish is scarce. The *Guía de Arbitraje de Inversión* (the "Guide"), co-edited by Yael Ribco and Sandro Espinoza, seeks to reduce this gap by providing Latin American and Spanish-speaking practitioners with high-quality material on investment arbitration.[1] With the collaboration of top experts in the field, and addressing a wide array of topics, the Guide amply accomplishes its goal.

As illustrated by the brief overview of the Guide's content provided in the next Section, the Guide offers an overview of the crucial aspects of the theory and practice of investment arbitration, making it a valuable resource for students and young practitioners alike.

II. THE STRUCTURE AND CONTENT OF THE GUIDE

The Guide begins with a general overview of the origin and evolution of investment arbitration, following which it analyses concepts relevant to the different stages of an arbitration proceeding, in their natural order: the initiation of the proceedings with the notice of arbitration; issues of applicable law which determine the legal framework of the dispute; matters pertaining to jurisdiction and admissibility; the substantive legal obligations analyzed in the merits stage and the determination of liability; the concept and quantification of damages; and, finally,

[1] The Guide, published in 2023, comes as a new initiative by the Arbanza Escuela de Arbitraje in its commitment towards generating and spreading knowledge among the Spanish-speaking arbitration community. Founded in 2021 as the first Latin American School of Arbitration, Arbanza periodically provides online courses on a variety of topics, which are taught by an impressive team of world-renowned experts in the field, many of whom have contributed to the Guide.

practical insight into the preparation of hearings and the conduct of cross-examinations.

Chapter One of the Guide, jointly written by Colombian attorneys *Juan Felipe Merizalde Urdaneta* and *María José Monroy Valencia*, sets the stage for the Guide by explaining the origin and evolution of investment arbitration. The authors provide a thorough historical chronicle of the evolution of investment arbitration, including references to developments pertinent to Latin America, such as the Calvo Doctrine, regional integration efforts, and the increase in cases against states from Latin America and other developing regions following the cases relating to the Argentinean economic crisis of 2001. Mr. Merizalde and Ms. Monroy then analyze some of the arguments wielded against investor-state arbitration during the last two decades, including its alleged lack of adequacy to address environmental issues or issues affecting local communities, as well as the challenges posed by double hatting and the increase in third-party funding. The authors ably describe different mechanisms to respond to each of these common concerns, including recent arbitral case law as well as institutional efforts such as those carried out by Working Group III of the UN Commission on International Trade Law ("UNCITRAL") and the leading arbitral institutions (ICSID, ICC, LCIA, ICDR). As Merizalde and Monroy conclude, the field of investment arbitration, which is still developing, has shown its willingness and ability to adapt and improve itself.

Chapter Two, written by London-based Colombian attorney *Ximena Herrera-Bernal*, with the collaboration of *Juan Pablo Pontón Serra*, provides practical insight on the relevance and content of the *Notice of Intent* and *Request for Arbitration*. Ms. Herrera-Bernal first focuses on the Notice of Intent, analyzing its impact on the dispute, as well as its potential impact on the admissibility of the claimant's claims and/or the jurisdiction of the arbitral tribunal, while identifying elements for strategic decision-making. Ms. Herrera-Bernal then analyses the Request for Arbitration, particularly regarding the timing of its submission (mainly with regards to *cooling-off* periods) and practical requirements under various investment treaties. Throughout the Chapter, the authors often refer to both case law and multilateral

and bilateral investment treaties to illustrate each of the points made, resulting in a thought-provoking read on a subject that is not frequently explored.

In Chapter Three, Washington, DC-based *Francisco X. Jijón* addresses fundamental aspects of the jurisdiction of international investment tribunals, with a particular focus on Latin American cases. Mr. Jijón begins by analyzing the evolution of the relationship between state sovereignty and investor-state dispute settlement, providing a brief overview of the changing paradigms that led Latin American states first to reject the ICSID Convention,[2] then to its signature and, in the case of some states, to its denunciation in more recent times. The author then addresses the need for *consent* in international arbitration, as a natural consequence of state sovereignty. Further, Mr. Jijón explains each of the dimensions of a tribunal's jurisdiction: jurisdiction *ratione voluntatis*, *ratione materiae*, *ratione personae* and *ratione temporis*. In this Chapter, Mr. Jijón identifies several relevant cases against Latin and Central American states in which jurisdictional issues have been discussed, providing a region-specific overview of the matter which, as the author himself expresses, has richly evolved, and will continue to evolve in the coming years.

In Chapter Four, New York-based attorneys *Florencia Villaggi* and *Carolina Rocha* analyze issues pertaining to the tribunal's jurisdiction and/or the admissibility of investment claims. The authors first address the scope and purpose of denial of benefits clauses in a variety of bilateral and multilateral investment treaties, as well as their application by investment arbitration tribunals. Mses. Villaggi and Rocha then discuss the phenomenon known as *treaty shopping*, its relationship with the doctrine of abuse of process and its treatment in investment arbitration case law. The authors also address the issue of the potential impact of parallel proceedings on investment claims, through the lenses of fork-in-the-road provisions and the principles of *res judicata* and *lis pendens*. Further, the authors address other procedural requirements, such as cooling-off periods and exhaustion of local remedies clauses. Finally, Mses. Villaggi and Rocha analyze the treatment of states' counterclaims in

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965), 575 UNTS 159 (hereinafter the "ICSID Convention").

investment arbitration, providing a comprehensive overview of the relevant case law on the matter.

Chapter Five of the Guide, by Madrid-based attorneys *José Angel Rueda García* and *Lucía Pérez-Manglano Villalonga*, contains valuable practical and strategic insight regarding the initial stages of an investment arbitration, including the appointment of the tribunal and the negotiation of the first procedural order. In addition to analyzing specific proceedings that may apply to both ICSID and non-ICSID arbitrations regarding the constitution of the arbitral tribunal, the authors elaborate on how the use of ballots for the appointment of chairpersons through the *strike and rank* methodology works in practice. Mr. Rueda and Ms. Pérez-Manglano also address each of the procedural items customarily decided in the first procedural order, describing the most widely extended practices in the matter in a clear and concise manner, to the benefit of students and young practitioners alike.

In Chapter Six, Argentine attorney *Ignacio Torterola* analyses the role of investment treaties, domestic law, and general public international law in the determination of the applicable law to investment disputes, contrasting contract and treaty-based arbitrations. The author first addresses Article 42(1) of the ICISD Convention,[3] describing how its interpretation by investment tribunals has evolved from the preferential application of domestic law over international law, to the complementary application of both legal systems. The author then proceeds to explain the role of each legal order: first, Mr. Torterola explains the relevance of the investment treaty itself, which he describes as the primary source for the law applicable to a domestic dispute. Further, Mr. Torterola conducts a systematic review of those matters generally understood to be governed by domestic law, including the nationality of an investor, the existence of property rights regarding an investment, issues of attribution and the legality of the investment (where relevant). The author also briefly addresses the impact of the domestic arbitration legislation at the seat of

[3] Article 42(1) of the ICSID Convention provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

the arbitration on the proceedings (in non-ICSID arbitration). In addition, Chapter Six explores the importance of general public international law, particularly in light of the principle of systemic integration. Lastly, the author analyses novel issues pertaining to the law applicable to investment disputes, including regarding its interaction with human rights law and environmental law.

Having addressed a wide array of theoretical and practical topics relating to jurisdiction and admissibility, as well as the initial stages of arbitration proceedings, the Guide continues on to address the substantive aspects of investment arbitration.

In particular, Chapter Seven addresses the standards of protection regarding the prohibition of unlawful expropriation, as well as national treatment and most favoured nation treatment. In this Chapter, Geneva-based attorneys *Luis Miguel Velarde Saffer* and *Isabella Cannatà* conduct a thorough analysis of the evolution of international law and practice regarding each of the standards, as well as their interpretation and application by investment tribunals. The authors adeptly explain the most salient points of debate for each substantive protection.

Chapter Eight of the Guide analyses the substantive standards of protection; of Fair and Equitable Treatment, Full Protection and Security, and the Umbrella Clause. In this Chapter, US-based *Caroline Richard* and *Rosario Galardi* define each of the standards and clearly summarize the profuse case law on each of the specific topics, providing a complete overview of their historical evolution. Particularly, the authors explore the relationship between Fair and Equitable Treatment and the concept of *legitimate expectations*, as well as with the minimum standard of treatment under international law. Regarding Full Protection and Security, Mses. Richard and Galardi explain the different interpretations offered by arbitral tribunals regarding the scope of protection. Finally, as regards the role of the Umbrella Clause, the authors compare the positions held by the tribunals in SGS *v. Paraguay*, BIVAC *v. Paraguay*, and CMS *v. Argentina* to provide a thorough panorama of the matter.

In Chapter Nine, Frankfurt-based *Yael Ribco Borman*, co-coordinator of the Guide, addresses defenses and exceptions to the responsibility of States under international law. The author first addresses the states' right to regulate, including

an analysis of the requirements set forth by the tribunal in the landmark case of *Philip Morris v. Uruguay*. Ms. Ribco Borman then refers to the International Law Commission's Draft Articles on State Responsibility[4] as the starting point for her analysis of the exceptions of state of necessity and force majeure. While there is no investment case law on force majeure, Ms. Ribco Borman addresses the differing views on state of necessity adopted by the tribunals on *LG&E v. Argentina* and *CMS v. Argentina*. Finally, Ms. Ribco Borman deftly summarizes the main points of concern regarding the much-debated topic of the impact of corruption claims in investment arbitration. As Ms. Ribco Borman explains, analyzing several relevant cases on the matter, the consequences of a finding on corruption may vary, depending on the specific factual circumstances and the language of the investment treaty (*e.g.*, whether it requires an investment to have been legally made for it to be entitled to protection).

Chapter Ten of the Guide turns to the subject of damages. In it, Madrid-based *Krystle Baptista Serna* and *Cruz Bosch Albarracín* address the foundations of damages in investment arbitration. The authors begin by describing the standards of compensation provided by investment treaties, particularly with regards to claims for unlawful expropriation. Mses. Baptista and Bosch also address the full compensation principle, as developed by the Permanent Court of International Justice in its pivotal *Chorzów* factory case,[5] and the forms of reparation available in international law. Among other topical issues, the authors address the limits to compensation, including causation, contributory negligence, and failure to mitigate. The Chapter also addresses issues of quantum, such as the concept of fair market value and the relevant timing for damage assessment. In their comprehensive overview, the authors also address the issue of moral damages in investment arbitration, referring to the seminal cases of *Lemire v. Ukraine* and *Desert Line v. Yemen*. Finally, the authors briefly explain the different types of interest, while pointing out arbitral

[4] International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001) II(2) ILC YB (hereinafter "Draft Articles on State Responsibility").

[5] Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. 17 (Judgement of Sept. 13).

tribunals' tendency to award simple interest and provide a short overview of the principles on cost allocation generally applied by investment tribunals.

Chapter Eleven of the Guide provides a much-needed yet often-overlooked perspective in the literature on damages in investment arbitration: that of quantum experts, such as the Chapter's co-authors, *Daniela Bambaci* and *Alejandro Martinolich*. Precisely, the authors begin by addressing the role of the quantum expert to provide independent damage assessments in view of the full compensation principle. The experts describe the theoretical framework for damages calculations, including the concept of *Fair Market Value*, the relevance of the *but-for scenario* and the differences between *ex-ante* and *ex-post* approaches, including figures that clearly depict how these concepts interact. In the second section of the Chapter, the authors explain how the different valuation methods operate in practice, comparing income approaches (simplified DCF,[6] APV[7] and CCF[8]), market valuation approach and the cost approach.

The last three chapters of the Guide focus on the practice of investment arbitration, providing useful guidelines and methods for drafting persuasive memorials (Chapter 12), preparing for hearings (Chapter 13) and making the most of cross-examinations (Chapter 14).

In Chapter Twelve, US-based attorneys *Ari D. Mackinnon*, *Elisa Zavala* A. and *Alejandro Nava Cuenca* provide techniques for drafting persuasive memorials by telling a compelling story and having a strong theory of the case, that will assist any practitioner at every stage of the drafting process: from brainstorming, to defining a memorial's structure and drafting itself. The authors insist on the importance of drafting clearly and avoiding complicated ideas and burdensome phrasing, providing a useful checklist of drafting *do's and don'ts*.

Chapter Thirteen of the Guide, by Argentine attorneys *Luciana T. Ricart* (based in London) and *Fernando A. Tupa* (based in the US and Argentina), contains practical

[6] Discounted Cash Flow.

[7] Adjusted Present Value.

[8] Capital Cash Flow.

advice on the preparation and celebration of hearings in investment arbitrations. As the authors note, hearings mark the end of the evidentiary phase and are a crucial part of the proceedings. As such, they should be prepared and planned for from the outset of the arbitration (including, for example, in the negotiation and drafting of the first procedural order). The authors address the changes brought by the COVID-19 pandemic, particularly in relation to the rise of remote hearings, which the authors consider *are here to stay*. The authors address the preparation of opening and closing statements, as well as the preparation, direct examination, cross-examination and re-direct examination of experts and witnesses. In their closing remarks, the authors also emphasize the importance of teamwork in the efforts required to prepare for and conduct a successful hearing.

In the Guide's final chapter, US-based *Mélida N. Hodgson* addresses cross-examination techniques, providing highly insightful recommendations and techniques. Ms. Hodgson explains the difference between *destructive* and *constructive* objectives in the preparation of cross-examinations, while emphasizing the importance of cross-examination to undermine the credibility of a witness or expert. The author compares the *common law* and *civil law* traditions regarding cross-examination, and briefly comments on the way that these have been balanced in the widely utilized IBA Rules on the Taking of Evidence.[9] Ms. Hodgson also includes valuable advice regarding the preparation and conduct of cross-examinations, including the elaboration of questions and *cross outlines* as well as strategies to handle typical situations in which the witness attempts to gain control over the exercise. Finally, in a style that adequately reflects the Guide's spirit, Ms. Hodgson provides a highly illuminating list with the *principles of cross-examination*- a valuable resource for any practitioner's toolkit.

[9] IBA Rules on the Taking of Evidence in International Arbitration (2020), *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ibanet.org/MediaHandler?id=3E6FF222-61EB-4ED6-9A3D-67D642629539.

III. CONCLUSION

By providing comprehensive, well-researched and updated materials on many of the most salient aspects of investment arbitration, the Guide amply accomplishes what it set out to provide: an accessible yet thought-provoking quality source to expand the knowledge of investment arbitration for Spanish-speaking practitioners in the arbitration community. With collaborations from such a distinguished list of authors, the Guide will surely position itself as a near-mandatory text for legal education in investment arbitration in Spanish.

Hopefully, this initiative will be followed by many more of its kind, as the field of international investment arbitration continues to expand, both in size and diversity.

PILAR ÁLVAREZ is an associate at Gaillard Banifatemi Shelbaya Disputes. Pilar's practice includes commercial and investment arbitrations conducted under the ICC, ICDR, UNCITRAL and ICSID Rules, with particular focus on arbitrations involving parties from Latin America. Her previous experience includes working as Legal Counsel to the Deputy Secretary to the Uruguayan Presidency (Prosecretaría de la Presidencia de la República), where she advised the Uruguayan government in matters related to the country's defense in international investment arbitrations and arbitration-related proceedings before national courts and represented the State before the Inter-American Court of Human Rights.

#YOUNGITATALKS MÉXICO Y AMÉRICA CENTRAL, UN COMENTARIO: HABILIDADES Y ESTRATEGIAS EN EL ARBITRAJE: CÓMO PRESENTAR MEJOR EL CASO

por Liliana Pérez Rodríguez

I. INTRODUCCIÓN

El 29 de noviembre de 2022 se celebró virtualmente el evento "#YoungITATalks México y América Central: Habilidades y estrategias en el arbitraje: cómo presentar mejor el caso," con expositores Francisco González de Cossío, Dyalá Jiménez Figueres y Carlos Loperena, moderados por Rodrigo Macín Sánchez. Juntos expusieron las técnicas que, a lo largo de su carrera profesional como árbitros y abogados de parte, han desarrollado, adoptado y observado como idóneas para la presentación de casos en arbitraje.

En años recientes, ha aumentado el número de controversias que son sometidas a arbitraje. Acorde con la International Arbitration 2022 publicada por Chambers and Partners, diversas instituciones arbitrales han registrado un número elevado de nuevos casos, incluso la Cámara de Comercio Internacional (CCI) (la institución con mayor preferencia), la Corte de Arbitraje Internacional de Londres (LCIA) y el Centro de Arbitraje Internacional de Singapur (SIAC) como las sedes más seleccionadas para los arbitrajes. No obstante, México no se queda atrás, puesto que, conforme a la mencionada guía, México es la segunda sede más seleccionada para arbitrajes en Latinoamérica. Cabe destacar que México ocupó el décimo lugar entre las nacionalidades más representadas en la CCI, con el 3.11% del total de arbitrajes a nivel mundial.[1]

Debido a lo anterior, la presentación adecuada de casos ante tribunales arbitrales debe ser uno de los temas más relevantes a tomar en consideración durante los años próximos.

[1] Gary Born & Matteo Angelini, *International Arbitration 2022*, CHAMBERS AND PARTNERS, 16 de agosto de 2022, https://practiceguides.chambers.com/practice-guides/international-arbitration-2022; Rodrigo Zamora, Adriana Lozano, et al., *International Arbitration 2022, México*, CHAMBERS AND PARTNERS, 16 de agosto de 2022, https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/mexico.

Durante el transcurso del evento, los puntos principales respecto de los cuales se pronunciaron los expositores fueron: (i) la exposición de hechos y derecho aplicable a la controversia; (ii) la presentación de pruebas periciales; (iii) la conducta de las partes en el desarrollo de un arbitraje; y (iv) la elaboración de alegatos de apertura en las audiencias como herramienta para apoyar la exposición de las partes.

Al escuchar las posturas de los ponentes respecto a la presentación de un caso en arbitraje no pude evitar notar que las técnicas para "presentar mejor el caso" correspondían no solo a formas para ser más persuasivos ante un tribunal arbitral o asertivos ante los clientes, sino a mecanismos para conducir un arbitraje en forma eficiente. Lo anterior me parece particularmente relevante puesto que un tema que constantemente se discute en arbitraje es la eficiencia que dicho mecanismo de solución de controversias puede ofrecer a las partes que acuden a éste en virtud de que una resolución rápida de las controversias representa menor interrupción de los negocios y menores costos para los usuarios.[2] Incluso, recientemente se han reformado los reglamentos de distintas instituciones arbitrales para incluir procedimientos abreviados y técnicas que permitan al tribunal arbitral la conducción eficaz de los procesos. No obstante, si bien los reglamentos arbitrales proporcionan una guía para la conducción del arbitraje, la regulación detallada del procedimiento a seguir se establece por acuerdo de las partes, dirección del tribunal arbitral o ambas, representando una ventaja para las partes debido a la flexibilidad para conducir el arbitraje,[3] pero también, una responsabilidad para llevar a cabo un arbitraje eficiente.

Así, constituye un punto elemental responder ¿qué podemos definir como eficiencia en el arbitraje? Comúnmente, se suele argumentar que, la eficiencia se materializa por menores costos y tiempos relacionados con el arbitraje; sin embargo,

[2] Uno de los elementos claves del arbitraje es que constituye una herramienta para la solución eficiente de disputas, disminuyendo las afectaciones a las operaciones de los negocios y los costos a los usuarios de arbitraje. *Ver* Martin Ågren et al., *Time and Cost in Arbitration*, *in* INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE 61 (2021) (en adelante Ågren, *Time and Cost*).

[3] Si bien las reglas arbitrales proporcionan una serie de pasos a seguir, las partes tienen flexibilidad para conducir el arbitraje, lo que lo vuelve en un mecanismo atractivo. *Ver* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 6.01 (7a ed. 2023) (en Adelante BLACKABY).

al buscar responder esta pregunta, debemos agregar un tercer factor: la calidad.[4] No tiene sentido llevar un arbitraje rápido y barato, si el laudo que se emite no puede ser ejecutado.[5] Encontrarnos frente a un laudo ejecutable, representa comúnmente que, el tribunal arbitral ha logrado resolver la controversia entre las partes, respetando el debido proceso.[6] Por tanto, en términos generales, la eficiencia en el arbitraje puede conceptualizarse como la capacidad del procedimiento arbitral para gestionar la complejidad de las disputas.[7]

Respecto de lo anterior, como se refería brevemente líneas arriba, la responsabilidad de generar arbitrajes eficientes corresponde tanto al tribunal arbitral como a las partes, siendo relevantes para la presente opinión, las conductas que los practicantes pueden adoptar para contribuir con este fin. En este sentido, a continuación enunciaré mis comentarios referidos a los temas expuestos en el evento "#YoungITATalks Mexico and Central America: Habilidades y estrategias en el arbitraje: cómo presentar mejor el caso" y observaciones relacionadas.

II. EXPOSICIÓN DE HECHOS Y DERECHO APLICABLE A LA CONTROVERSIA

Sobre la exposición de los hechos de la controversia y el derecho aplicable a la misma, Dyalá Jiménez Figueres insistió sobre la importancia de exponer al tribunal arbitral las disposiciones del contrato base de la controversia y señaló que, las partes tienen un deber de familiarizar al tribunal con el contrato. De igual forma, recalcó

[4] En palabras de Jennifer Kirby, la eficiencia en el arbitraje debe medirse con tres parámetros, tiempo, costo y calidad, a pesar de que, en la mayoría de las reflexiones al respecto solo se tiende a hablar de tiempo y costo. *Ver* Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, 32(6) J. INT'L ARB. 689, (2015) (en adelante, Kirby, *Efficiency in International Arbitration*).

[5] Johannes Landbrecht expone que considerar simplemente dentro de la eficiencia del arbitraje los aspectos sobre reducción de tiempo y costos, se omite considerar el resultado del arbitraje, lo que podría provocar la existencia de un arbitraje rápido y barato con un laudo inejecutable. *Ver* Johannes Landbrecht, *Recalibrating arbitration's efficiency debate with Luhmann*, 2021(1) b-Arbitra | BELGIAN REVIEW OF ARBITRATION 7, 9 (2021) (en adelante Landbrecht, *Recalibrating arbitration*).

[6] Kirby, *Efficiency in International Arbitration*, *supra* nota 4, en 691-692. La calidad de un arbitraje puede ser percibida de distintas formas por las partes, algunas pueden enfocarse en el proceso y otras en el laudo; sin embargo, un laudo correcto y ejecutable evidencia el desarrollo de un arbitraje en el que se respetó el debido proceso.

[7] Landbrecht, *Recalibrating Arbitration*, supra nota 5, en 8-9. El debate sobre qué debe considerarse como eficiente en un arbitraje ha sido amplia y poco uniforme, no obstante, señala que, tomando en cuenta la teoría de los sistemas de Luhmann, la eficiencia de un arbitraje se refleja en la posibilidad de que en este se opere la complejidad de disputas.

que, una forma de asegurarnos de transmitir los elementos necesarios para resolver las disputas al tribunal arbitral es que, antes de exponer nuestro caso, pensemos en las preguntas que se necesitan responder para resolver la disputa y, en consecuencia, expongamos en forma clara y persuasiva las respuestas a éstas. Por otro lado, Carlos Loperena señaló que, la exposición de los hechos de la controversia debe hacerse de forma clara y soportada con las pruebas con las que cuenten las partes, además mencionó que, consideraba importante que la exposición que se haga al tribunal sobre el derecho aplicable se acompañe con los precedentes y doctrina que las partes estimen que soportan su postura para permitir al tribunal utilizar estas bases en el laudo. La exposición del derecho aplicable y su interpretación debe hacerse tomando en cuenta la nacionalidad, experiencia y, en caso de ser posible, formación académica de los árbitros. Finalmente, Francisco González de Cossío mencionó que, para determinar la forma en la que deben exponerse los hechos de una disputa y el derecho aplicable a éstos, debe conocerse ampliamente el caso puesto que, dependiendo de sus características, será necesario presentar con mayor amplitud aspectos fácticos o jurídicos. Refirió que la finalidad de la exposición debe ser facilitar a los árbitros la comprensión de la controversia, entendiendo al tribunal como un equipo, puesto que, como conjunto, un tribunal arbitral puede actuar distinto a como lo harían en forma individual las personas que lo integren.

No obstante, me parece que existen ciertas interrogantes a considerar en relación con la exposición de los hechos y el derecho de la controversia: ¿esta exposición debe ser amplia o breve?, ¿una explicación breve puede perjudicar la exposición de las posturas de las partes?

Es posible que, bajo los consejos prácticos anteriores, al buscar presentar sus posturas, las partes se vean orilladas a aumentar la complejidad de la disputa para reducir el riesgo de afectar sus posibilidades de éxito o las perspectivas de éxito que los clientes tengan en el arbitraje.[8] Por ende, al encontrarnos ante esta circunstancia

[8] *Id.* en 51. En ocasiones el deseo de las partes por ganar un arbitraje puede disuadirlas de evitar elevar la complejidad de la controversia, puesto que, se presenta un miedo en éstas de afectar sus posibilidades de tener éxito en el arbitraje.

debe tomarse en consideración que, el número, la extensión y el alcance de los escritos en los que las partes presentan sus argumentos acarrean tiempo y costos, así, las posturas largas y repetitivas generan el riesgo de prolongar el procedimiento, aumentar los costos e incluso perjudicar la comprensión y la resolución del caso por parte del tribunal arbitral.[9] La presentación completa del caso en etapas tempranas del arbitraje—en la medida de lo posible—evitando la repetición innecesaria de argumentos permitirá controlar la eficiencia del arbitraje y sus costos asociados.[10]

En consecuencia, la amplitud de los escritos sobre los argumentos de las partes deberá decidirse conforme a las circunstancias que rodeen a cada caso, sin perder de vista que una presentación clara, oportuna y concisa puede acarrear mayores beneficios al arbitraje a diferencia de la presentación de posturas amplias y repetitivas.

III. PRESENTACIÓN DE PRUEBAS PERICIALES

En relación con la presentación de pruebas periciales, Dyalá Jiménez Figueres recomendó que la exposición de las partes se vincule siempre a las pruebas con las que éstas cuenten, incluyendo la prueba pericial. Señaló que, incluso, el que la prueba pericial incorpore referencias a las pruebas documentales y testimoniales de las partes representa una ventaja puesto que, permite a los árbitros conocer mejor el caso. Acorde con su postura, se debe buscar que los memoriales y las periciales se presenten en forma armónica siempre valorando que, la prueba pericial es un elemento independiente. De igual forma, recalcó que, así como se hace al redactar un memorial, la prueba pericial debe elaborarse teniendo presentes qué preguntas técnicas deben ser resueltas para comprender la controversia y resolverla y no

[9] Ågren, *Time and Cost*, *supra* nota 2, en 83. En ocasiones, los escritos de las partes tienden a ser largos y repetitivos, lo que no solo implica la generación de costos, sino que puede perjudicar el entendimiento de la controversia por parte del tribunal arbitral.

[10] *Informe Control del Tiempo y de los Costos en el Arbitraje: Técnicas para Controlar el Tiempo y los Costos en el Arbitraje*, Comisión de Arbitraje y ADR de la Cámara de Comercio Internacional, marzo de 2018, *disponible en* https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-spanish-version.pdf. En este informe se explica que dentro de las sugerencias para reducir los costos y la duración de un arbitraje las partes deben procurar presentar sus casos de manera completa al inicio del procedimiento para permitir al tribunal arbitral entender la controversia y garantizar la eficiencia del arbitraje. *Id.*

guiarse por los argumentos que el perito de la contraparte presentará. Respecto a este tema, Francisco González de Cossío señaló que la prueba pericial debe ser interesante, estar elaborada por un experto con credenciales idóneas para pronunciarse respecto al tema técnico en cuestión y presentar los elementos necesarios para que se resuelvan las interrogantes técnicas de la controversia.

En consonancia con lo anterior, Carlos Loperena resaltó que se debe buscar que la prueba pericial sea técnica y sustentada, y no se encuentre orillada a beneficiar en forma desmedida a la parte que la presenta, puesto que, de encontrarse comprometida la objetividad de los peritos, el tribunal se verá orillado a solicitar el apoyo de un tercer experto. En relación con este punto, los ponentes coincidieron en que los peritos de las partes deben evitar faltar a la verdad y procurar siempre estar preparados para responder a las preguntas que pueda tener el tribunal arbitral más allá de sus peritajes.

Sobre las reflexiones anteriores, consideró importante recordar que, en términos generales, las partes se encuentran obligadas a probar sus afirmaciones, por lo que las pruebas que presenten idealmente deben operar en su beneficio, sin embargo, pueden hacerlo también en su perjuicio, razón por la cual debe prestarse la diligencia necesaria a su presentación, incluyendo a la selección y preparación de reportes técnicos.

Las pruebas periciales presentadas por las partes deben ser elementos objetivos e imparciales que permitan exponer hechos técnicos de la controversia al tribunal arbitral con la finalidad de resolverla en la forma más apegada a la verdad.[11] Por ende, coincido con las posturas expuestas por los ponentes puesto que, de no mantener la imparcialidad y objetividad de los peritos, se generará la necesidad de contar con la opinión de un perito adicional a los presentados por los partes, afectando la presentación del caso de éstas, así como la eficiencia y costos del arbitraje, puesto

[11] *Ver* CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, Chartered Institute of Arbitrators, art. 4 (2007), *disponible en* https://www.ciarb.org/media/6824/partyappointedexpertsinternationalarbitration.pdf (en adelante Reglas CIArb); Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional, art. 5(2) (2020), *disponible en* https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b (en adelante Reglas IBA).

que, es probable que el perito designado por el tribunal omita considerar hechos relevantes para las partes, se deban destinar tiempo y esfuerzos de las partes y el tribunal para la designación de dicho perito y los honorarios de éste impacten las costas del arbitraje.[12]

IV. CONDUCTA DE LAS PARTES EN EL ARBITRAJE

La conducta de las partes en el arbitraje tendrá una influencia determinante en la forma en la que se conducirá el procedimiento, así como, la facilidad con la que se podrá llegar a un resultado. Al respecto, los ponentes expusieron una serie de reflexiones respecto a las actitudes que benefician y merman el arbitraje. Carlos Loperena puntualizó que las partes pueden tener actitud litigiosa siempre y cuando no sean percibidos como agresivos por el tribunal arbitral. Dyalá Jiménez Figueres señaló que estratégicamente hay ocasiones en las que una alta litigiosidad puede ser una mala decisión porque presenta el riesgo de generar distorsión y apartar la atención de los puntos relevantes de la controversia. Mencionó que hay ocasiones en las que la litigiosidad se incrementa por instrucción de los clientes o por una percepción de los abogados sobre un deber frente al cliente de defender ampliamente su postura. Sin embargo, las partes deben aprender a escoger sus batallas y asesorar a sus clientes respecto de las circunstancias en las que, un exceso de litigiosidad pueda perjudicar el desarrollo del arbitraje y la exposición de los puntos relevantes. En sentido similar a las opiniones anteriores, Francisco González de Cossío expresó que las discusiones en el arbitraje deben realizarse en forma cortés, evitando la existencia de conductas agresivas o groseras. Señaló que, si bien pueden estarse tratando temas delicados, es importante que las partes sepan escoger el tono y las palabras correctas para asegurar que se transmita al tribunal toda la información necesaria de la disputa. Finalmente, Dyalá Jiménez Figueres y Francisco González de Cossío coincidieron en que la litigiosidad de las partes debe ser selectiva, para generar un resultado favorable para éstas.

[12] Los artículos 6(1) y 21.1 de las Reglas IBA y artículo 21.1 del Reglamento de Arbitraje del LCIA respectivamente señalan que el tribunal arbitral podrá designar peritos en el arbitraje previa consulta con las partes.

Pero ¿cómo podríamos relacionar las conductas de las partes con la eficiencia del arbitraje?

Desde mi punto de vista, los abogados de las partes–y en general sus representantes–presentan un rol principal en la conducción eficiente de los arbitrajes y el control de los costos. Para ello pueden establecer, al inicio de los procedimientos una serie de reglas que les permitan controlar la duración y costos del arbitraje.

Las partes deben tomar responsabilidad sobre la forma en la que deciden participar en un arbitraje y las consecuencias de estas decisiones. Existe una tendencia de los tribunales arbitrales a considerar en la asignación de los costos del arbitraje, además de la postura que prevaleció en el arbitraje, la conducta de las partes en el mismo. La presentación de peticiones u objeciones frívolas, la provocación de retrasos indebidos y la falta de cooperación de las partes son componentes que el tribunal arbitral podrá considerar para la condena en costos.[13]

La posibilidad de condenar en costas a las partes de un arbitraje constituye una herramienta eficaz para mantener un curso adecuado del procedimiento y evitar la distracción de los puntos y etapas relevantes de la controversia, además puede influir como factor disuasivo de conductas excesivamente adversariales sin fundamento o con un resultado poco relevante para el procedimiento.

La consideración de la conducta que las partes adoptan en el arbitraje se encuentra respaldada por diversos reglamentos arbitrales que invitan al tribunal a contemplar la conducta de las partes o, en su defecto, las circunstancias del caso para realizar su determinación sobre el pago de costas del arbitraje. Por ejemplo, el Reglamento de Arbitraje de la CCI establece en su artículo 38(5) que "el tribunal arbitral podrá tomar en cuenta las circunstancias que considere relevantes, incluyendo la medida en la que cada parte haya conducido el arbitraje de forma

[13] George A. Bermann expone que existe una tendencia a favor de dividir los costos de un arbitraje entre las partes tomando en consideración la conducta que éstas tuvieron, incluyendo un análisis sobre presentaciones frívolas, falta de cooperación y la provocación de retrasos en el procedimiento. *Ver* GEORGE A. BERMANN, TWILIGHT ISSUES IN INTERNATIONAL ARBITRATION: LATENT CHOICE OF LAW CHALLENGES 82, 83 (2023).

expedita y eficaz." El Reglamento de Arbitraje de la LCIA señala en su artículo 28.4 que el tribunal arbitral podrá tomar en consideración para dictar su decisión sobre la asignación de costos del arbitraje la cooperación de las partes, así como cualquier falta de cooperación que provoque retrasos indebidos y gastos innecesarios. Incluso el Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) incluye el su artículo 42(1) la potestad del tribunal arbitral de asignar los costos en la forma que lo considere pertinente tomando en cuenta las condiciones del caso, siempre que esta decisión sea razonable. Respecto al este último ejemplo, al interpretar en forma sistemática la potestad del tribunal arbitral de conducir el procedimiento y de considerar las circunstancias del caso en la condena de costas del arbitraje, puede concluirse que el tribunal tiene la capacidad de condenar al pago de las costas del arbitraje a la parte que se haya conducido con mala fe y/o haya perjudicado sin justificación el desarrollo del procedimiento.

Por ende, al determinar la estrategia a seguir en un arbitraje y el nivel de litigiosidad por adoptar, las partes deberán evaluar los puntos en los que buscan que el tribunal arbitral enfoque su atención, así como, las decisiones o eventos respecto de los cuales una conducta litigiosa favorezca la exposición de su caso y encuentre justificación suficiente para evitar la dilación del arbitraje y el aumento de costos.

V. ALEGATOS DE APERTURA EN AUDIENCIA

La presentación de alegatos de apertura constituye una oportunidad esencial para que las partes presenten su caso enfocando la atención del tribunal en los puntos más relevantes de su postura y las interrogantes que consideran necesarias para la resolución de la controversia.

Sobre la preparación y presentación de los alegatos de apertura en audiencia, los ponentes coincidieron en una idea en particular: los alegatos deben ser breves, ordenados y persuasivos. Particularmente, Carlos Loperena expresó que una técnica que suele adoptar es no suponer que los árbitros conocen el caso de memoria y en función de ello procurar presentar un alegato que resuma en forma breve, sucinta y directa su postura. Señaló que es importante aprovechar el tiempo de la audiencia para hacer énfasis en los puntos centrales de la controversia. Por su parte Dyalá

Jiménez Figueres mencionó que prefiere que al preparar un alegato de apertura las partes presuman que el tribunal arbitral conoce la controversia y aprovechen el espacio para exponer en forma sucinta y ordenada su teoría del caso. Finalmente, Francisco González de Cossío opinó que, en la preparación de los alegatos de apertura, deben tomarse en cuenta las circunstancias y necesidades del caso, siendo un elemento clave la brevedad y el orden.

En relación con lo anterior, las partes deben considerar la organización de las audiencias, la administración del tiempo y recursos, así como el desafío al que se enfrentarán las partes de demostrar la capacidad que tengan para manejar la complejidad de la controversia.[14] Lo anterior se verá reflejado, en la presentación de los alegatos de apertura, entre otras instancias.

Al elaborar un alegato de apertura las partes deben evitar perder de vista que esta será su oportunidad para resumir su caso y centrar la atención del tribunal arbitral en los puntos claves de la controversia; sin embargo, las partes deberán evitar perder de vista que, mientras más largo sea su alegato de apertura, más costoso será.[15] ¿Por qué? porque implicará que las partes y el tribunal arbitral tengan que dedicar mayor tiempo al desarrollo de la audiencia, ocasionando que los representantes de las partes, su personal auxiliar, testigos, funcionarios, etc., distraigan por mayor tiempo su atención respecto de sus actividades ordinarias. Esto, sin considerar todos los gastos administrativos asociados (pago del sitio donde se lleve a cabo la audiencia, pago del personal de apoyo técnico, pago de servicio de grabación y transcripción, entre otros).

[14] Landbrecht, *Recalibrating Arbitration*, *supra* nota 5, en 8. La eficiencia en el arbitraje debe traducirse en la capacidad del tribunal arbitral para manejar la complejidad de la controversia; sin embargo, considero que, esta definición puede ampliarse a la conducta de las partes, quienes también se verán frente a una oportunidad de actuar eficientemente en el arbitraje presentando una postura que logre exponer claramente una controversia sin importar su grado de complejidad.

[15] *Conducción Eficaz del Arbitraje*: *Una guía para abogados internos y para otros representantes de las partes* 58, COMISIÓN DE ARBITRAJE Y ADR DE LA CÁMARA DE COMERCIO INTERNACIONAL, mayo de 2015, *disponible en* https://iccwbo.org/content/uploads/sites/3/2015/05/Conduccion-Eficaz-del-Arbitraje-SPA.pdf. Esta guía señala que al evaluar la necesidad de celebrar una audiencia se debe tomar en consideración que éstas conllevan una serie de costos asociados que, conforme se incremente la duración de la audiencia, estos costos se incrementarán también.

La solución que generalmente es adoptada para controlar la duración de las audiencias es la asignación de tiempos específicos de los que podrán hacer uso las partes en el arbitraje;[16] no obstante, esto también representará un desafío en cuanto a la consideración del tiempo y la exposición de un buen alegato de apertura.

Por tanto, es esencial para los abogados conocer y comprender profundamente su caso, para poder determinar los puntos clave a exponer durante la audiencia y asegurarse de desarrollar métodos persuasivos para transmitir al tribunal arbitral la postura que buscan que éste tome en consideración al momento de emitir su laudo. Planear un buen alegato de apertura beneficia a las partes tanto en la exposición de su postura, como en el control de los gastos relacionados con las audiencias.

VI. CONCLUSIÓN

El arbitraje es cada vez más empleado para resolver controversias alrededor del mundo, por tanto, al acudir a este mecanismo ya sea como partes o representantes de las partes debemos buscar no solo acudir con una postura sólida y definida sino considerando la existencia de una serie de estrategias que beneficiarán nuestra capacidad de transmitir al tribunal arbitral nuestro punto de vista y aprovechar la flexibilidad del arbitraje en forma eficiente, esto es, aprovechando la posibilidad de diseñar un mecanismo para resolver controversias en la forma más adecuada atendiendo a las circunstancias del caso y de las partes que asegure la obtención de una resolución ejecutable.

Así, como practicantes, especialmente los jóvenes, debemos buscar acercarnos a aquellos con mayor experiencia y de ser posible, colegas que se han desempeñado tanto como abogados de parte como árbitros con fin de aprender a presentar nuestros casos eficientemente e incidir en la práctica del arbitraje en general.

[16] Ågren, *Time and Cost*, *supra* nota 2, en 89. La limitación de tiempo en la audiencia y su asignación igualitaria o basada en situaciones justificadas permitirá celebrar una audiencia eficiente y dar oportunidad a las partes de preparase para ésta.

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