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The Need for a Transnational Appellate Arbitral Review Body

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THE NEED FOR A TRANSNATIONAL APPELLATE ARBITRAL REVIEW BODY

by

PRIYA SAMPATH

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

This thesis analyzes the necessity for the establishment of a transnational body of arbitral appeal. The paper also elaborates on how the establishment such a body will serve as a suitable replacement for judicial review and be an effective source of appeal in general. Also prescribed are suggestions based on which the appellate body may be conceived.

INDEX WORDS: Appellate Arbitral Review, Judicial Review, International Commercial Arbitration, Appeal Options in International Commercial Arbitration, Transnational Appellate Arbitral Review Body.

THE NEED FOR A TRANSNATIONAL APPELLATE ARBITRAL REVIEW BODY

by

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A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment
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DEDICATION

To my ever-inspiring nephews.

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CHAPTER 1

INTRODUCTION

Judicial review of arbitral awards is afforded a great deal of importance and scrutiny in international commercial arbitration proceedings. It is much debated as to whether judicial review of arbitral awards is appropriate, given that international arbitration is considered to be a mechanism that secures the *final and binding* determination of disputes.¹ On one hand, scholars opine that judicial review undermines the finality of arbitral awards and interferes with the integrity of the arbitral process², while others believe that, “much as the efficacy of international commercial arbitration demands finality of awards, it is incumbent on national legal systems to ensure the integrity of the arbitral process”.³

The opponents of judicial review also endorse the strong argument that relying on national courts to correct possible errors in arbitration defeats the advantages of selecting “neutral and potentially expert tribunals” and avoiding the possible “congestion, corruption and

¹ See JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003) at 1-5 for definitions of international arbitration : “A specially defined mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties”, *id* quoting Halsbury’s Laws of England: “The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law”, *id* at 3 quoting Domke: “Commercial Arbitration” “[A] process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitral tribunal. The parties agree in advance that the arbitrator’s determination, the award, will be accepted as final and binding upon them.”

² For e.g., Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147 (1997); Kenneth Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 Ohio St. J. on Disp. Resol. 337, 339 (2000).

³ Chukwuemeke Okeke, *Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondoggle?* 10 N.Y. INT’L L. REV. 29 (1997); see for e.g., William W. Park, *National Law and Commercial Justice: Safeguarding Procedural*

procedural pitfalls of national courts”.⁴ Given the contrasting opinions and potential problems surrounding judicial review, it is advocated that if parties need to seek review of arbitral awards, appellate *arbitral* review may be a suitable alternative to judicial review.

The concept of appellate arbitral review is not entirely new, given that a few existing arbitration rules offer “built-in avenues of review”.⁵ However, a unified system of arbitral appeal that offers predictability and universality is yet to be established. Eminent scholars and legal experts have continuously been expressing a desire for the creation of a single transnational institution for the enforcement and review of arbitral awards.⁶

The central focus of this thesis is how the establishment of a transnational appellate arbitral review body (*hereinafter* AARB, the AARB) will serve as a suitable replacement for judicial review *and* be a viable source of appeal in general. The thesis also encompasses an elaborate set of suggestions based on which the AARB may be structured.

Integrity in International Arbitration, 63 Tul. L. Rev. 647 (1989); *infra* Chapter III for a more elaborate discussion of this argument.

⁴ William H. Knull, III & Noah D. Rubins, *Betting The Farm On International Arbitration: Is It Time To Offer An Appeal Option?* 11 Am. Rev. Int'l Arb. 531 (2000).

⁵ *Id* at 534.

⁶ Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards* in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE (Martin Hunter, Arthur Marriott & V.V. Veeder eds., 1995) at 109: “A valuable task for the 21st century would be to create a new international court that would take the place of municipal courts in resolving disputes concerning the enforceability of international commercial arbitration awards”; Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards* in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION at 115-116: “Accordingly, as things now stand, there is no international court with an effective capacity or jurisdiction whose processes can be directly activated by a private party which seeks the recognition or enforcement of a foreign arbitral award. The need is there, and no existing international court can meet it. So the case for creating such a new International Court of Arbitral Awards is...sound”; *see also* F.S. Nariman., Martin Hunter and Bola A. Ajibola and Hans Van Houtte endorsing the propositions of Holtzmann and Schwebel at 155-163 in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION; *see also* MAURO-RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE, 2 (2001) at 35.9: “The solution which has been proposed by this writer is to institutionalize the appellate instance by entrusting the appointment and supervision of appellate proceedings to a new body, an International Arbitral Court of Appeal”; Knull & Rubins, *supra* note 4; Conrad K. Harper, *Has the Time Come for a Truly Neutral Forum? Reconsidering a Court of International Arbitration* in HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR (Thomas E. Carbonneau & Jeanette A. Jaeggi, eds., 2006) Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution*, 25 COLUM. J. TRANSNAT'L L. 9, 29 (1986).

Chapter 2 of this thesis will examine how different national laws view the concept of judicial review of international arbitral awards. Chapter 3 will address the various arguments against judicial review and how the AARB will be a suitable replacement for the same. Chapter 4 will talk about the available appeal options within the realm of arbitration and the need for a unified system through which appellate review of awards may be conducted. Chapter 5 will list various recommendations for the AARB and Chapter 6 will draw a conclusion.

CHAPTER 2

JUDICIAL REVIEW OF ARBITRAL AWARDS - A TRANSNATIONAL SURVEY

“The whole point of arbitration is that the merits of the dispute will not be reviewed in courts, wherever they be located”.⁷

Judicial review of an international arbitral award is conducted by the national courts at the place of arbitration or enforcement.⁸ The most important interaction of the arbitral procedure with the judicial procedure is the judicial review of awards.⁹ Judicial review of arbitral awards can happen in two different ways. Either the losing party seeks to attack the award or the winning party seeks to confirm the award.¹⁰ Generally, if an award is successfully annulled, recognition of that award will be refused in any other country on the basis of that annulment.¹¹ On the other hand, the effects of confirmation or refusal of confirmation of an award are limited to the jurisdiction where such confirmation is sought.¹²

The standard of judicial review for setting aside or annulling an award varies with each country. While some countries allow for judicial review on the entire merits of the case¹³, most countries limit the grounds of judicial review, most of which correspond to the exceptions to

⁷ Justice Conboy's comment in *International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F.Supp. 172 S.D.N.Y., 1990.

⁸ See CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF & GABRIEL SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS*, 2 (2006) at 54,55.

⁹ *Id* at 52.

¹⁰ Wang Shengchang & Cao Lijun, *National Courts and Lex Fori in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION*, (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) at 177

¹¹ BÜHRING-UHLE ET AL., *supra* note 8 at 54.

¹² *Id*.

¹³ *Id* at 55.

recognition and enforcement contained in the New York Convention.¹⁴ Since the trends in judicial review of international arbitral awards can best be observed from the practices of the United States and the major European arbitration countries,¹⁵ we will examine the laws of those countries hereunder.

A. Judicial Review under Different National Laws

The Federal Arbitration Act of the United States¹⁶ was amended in 1970 to implement the New York Convention.¹⁷ The Act provides for arbitration awards to be enforced pursuant to the New York Convention and stipulates that confirmation proceedings may be initiated where the prevailing party seeks to enforce the award in the United States, but not when the party seeks to enforce the award abroad.¹⁸ The Act provides limited grounds for challenging an award, as per the Article V of the Convention and United States courts interpret Article V defenses narrowly.¹⁹

¹⁴ Knull & Rubins, *supra* note 4 at 544; Article V of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (hereinafter the New York Convention) states that :

(1) Recognition and enforcement of the award may be refused [if]: a) The parties to the [arbitration] agreement ... were ... under some incapacity, or the said agreement is not valid ...; or b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or c) The award deals with a difference not contemplated by [the arbitration agreement]; or d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (2) Recognition and enforcement of an arbitral award may also be refused if ...: a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or b) The recognition or enforcement of the award would be contrary to the public policy of that country.

¹⁵ Okeke, *supra* note 3 at 43.

¹⁶ 9 U.S.C. §§ 201, available at http://www4.law.cornell.edu/uscode/html/uscode09/usc_sup_01_9_10_2.html.

¹⁷ Okeke, *supra* note 3 at FN 158: The United States ratified the New York Convention under two reservations. The Convention only applies to matters considered commercial under United States law and on the basis of reciprocity. The nationality of the parties is subordinate to the arbitral situs.

¹⁸ Okeke *supra* note 3 at 52-53.

¹⁹ *Id.*

United States courts have also extended the application of the New York Convention to awards rendered in the United States between foreign parties.²⁰

Article 103 of the English Arbitration Act of 1996²¹ provides for arbitration awards to be enforced pursuant to the New York Convention and stipulates that recognition or enforcement of these awards may not be refused except in specific instances which are based on the grounds provided in the New York Convention.²² The Act does not distinguish between domestic and international arbitral awards, but certain specific provisions relate solely to recognition and enforcement of foreign arbitral awards.²³

While the English Arbitration Act is largely influenced by the provisions of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration of 1985 (hereinafter UNCITRAL Model Law)²⁴, Section 69 of the Arbitration Act allows the parties to challenge an arbitration award on questions of law. If, however, the parties agree to waive such appeal, a challenge may be brought only under the grounds specifically listed in Section 68 of the Arbitration Act.²⁵ Thus English Law provides the parties to the arbitration an opportunity to agree (prior to the dispute) whether the English courts will have the power to review the arbitral award on issues of law.²⁶

²⁰ Okeke *supra* note 3 at 52-53.

²¹ UK ST 1996 c 23 available at <http://www.opsi.gov.uk/ACTS/acts1996/1996023.htm>.

²² Dan C. Hulea, *Contracting To Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 Brook. J. Int'l L. 313, 343.

²³ *Id* at 341.

²⁴ Knull & Rubins, *supra* note 4 at 544: "The UNCITRAL Model Law establishes six bases for setting aside awards. They are: (1) invalidity of the agreement to arbitrate (2) lack of notice to a party or other inability to present the case (3) inclusion in the award of matters outside the scope of submission (4) irregularity in the composition of the tribunal (5) non-arbitrability of the subject matter (6) violation of domestic public policy"; see also The Text of the Model Law available at <http://www.uncitral.org/uncitral/en/index.html>.

²⁵ Hulea, *supra* note 22 at 342-343

²⁶ *Id*; Okeke, *supra* note 3 at 47-48.

The arbitration rules of Germany are set forth in Book X of the ZPO (German Code of Civil Procedure) (1985).²⁷ The German arbitration laws are based on the UNCITRAL Model Law.²⁸ Similar to the English Arbitration Act, the German counterpart does not distinguish between domestic and international arbitration. Regarding the grounds of review of awards, the German statute provides a “definite and exclusive” list of grounds on which an award may be challenged.²⁹

Articles 1484 and 1502 of the French New Code of Civil Procedure (NCPC) contain very specific provisions for setting aside arbitral awards and strictly stipulate that the setting aside of an arbitral award is available only in those cases; if parties invoke any other grounds, the reviewing court will not take those grounds into consideration because such grounds are not provided under the law.³⁰

In some countries such as Belgium, Switzerland and Sweden, judicial review of awards in arbitrations not involving any nationals or residents could be excluded by agreement of the parties, even for violation of the most basic procedural protections, the rationale behind such exclusion being that judicial review can still be conducted at the place where enforcement of the award is sought.³¹

Article 1717 of the Belgian Code Judiciaire, introduced in 1984, stipulated that Belgian Courts had the authority to review an arbitral award only if at least one of the parties to the dispute was either an individual having Belgian nationality or residence or a legal entity

²⁷ Hulea, *supra* note 22 at 345.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Hulea, *supra* note 22 at 344; Okeke, *supra* note 3 at 49; for the text of the code visit http://www.lexinter.net/ENGLISH/code_of_civil_procedure.htm.

³¹ BÜHRING-UHLE ET AL., *supra* note 8 at 55; Shengchang & Lijun, *supra* note 10 at 179, where this trend has been described as “Delocalization” or “Denationalization” of International Commercial Arbitration.

constituted in Belgium or had a subsidiary or other establishment in Belgium.³² Thus Article 1717 completely denied Belgian courts the authority to review international awards where the parties were non-Belgian, even if the situs of the arbitration was Belgium.³³ However, in 1998, the Belgian Law “stepped back” from its approach to state that the parties may, by agreement, exclude any application for the setting aside of an arbitral award, in case none of the parties had their domicile, residence or principal place of business in Belgium.³⁴

Article 190 of the Swiss Private International Law Act lists very specific grounds for non-recognition of an award.³⁵ However, Article 192 of the same law gives parties the option to agree to exclude one or all of those grounds, or to limit their recourse to one of the grounds provided in Article 190 but it applies only to cases where none of the parties to the arbitration have their domicile, residence, or principal place of business in Switzerland.³⁶ Thus under Swiss arbitration law, there is a difference between the judicial review of foreign arbitral awards and domestic arbitral awards. The Swedish Arbitration Act contains similar provisions as the above-mentioned Swiss Law.³⁷

³² Shengchang & Lijun, *supra* note 10 at 179, BÜHRING-UHLE ET AL., *supra* note 8 at 55

³³ Hulea, *supra* note 22 at 346

³⁴ Shengchang & Lijun, *supra* note 10 at 179, BÜHRING-UHLE ET AL., *supra* note 8 at 55

³⁵ Hulea, *supra* note 22 at 348.

³⁶ *Id.*

³⁷ Shengchang & Lijun, *supra* note 10 at 179: “Section 51 of the Swedish Arbitration Act 199 provides, inter alia, that where none of the parties is domiciled or has its place of business in Sweden, such parties may in commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award... An award which is subject to such an agreement shall be recognized and enforced in Sweden in accordance with the rules applicable to a foreign award.”

B. Contractually Expanded Judicial Review

As detailed above, most national arbitration statutes set very narrow limits for the review of arbitration awards.³⁸ This factor, combined with the fear of arbitrary or “unprincipled” arbitration awards has led some contracting parties to augment their arbitration agreements with provisions expanding the scope of judicial review.³⁹ Usually, such provisions call for judicial vacatur of arbitral awards for errors of law, errors of fact, or both.⁴⁰

National laws differ on whether or not to allow parties to contract for expanded judicial review. The Arbitration Laws of England offer parties the possibility to expand judicial review beyond the grounds listed in the New York Convention, provided enforcement is not sought under the New York Convention, but under Articles 68 and 69 of the English Arbitration Act.⁴¹

Courts in the United States hold divergent opinions regarding contractually expanded judicial review of awards. Some courts have held that since “Arbitration is a creature of contract”, parties may contract to expand the review of awards.⁴² Other courts are of the opinion that parties cannot alter court process to their own needs.⁴³

³⁸ Knull & Rubins, *supra* note 4 at 545.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Hulea, *supra* note 22 at 342-343.

⁴² *Id.* at 335-340; Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 Ohio St. J. Disp. Res. 151 (2002); *Recent Case, Arbitration--Standard of Review--The Tenth Circuit Rejects Contractual Expansion of Judicial Review of Arbitration Awards: Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), 115 Harv. L. Rev. 1267, 1272 (2002).

⁴³ Smit, *supra* note 2; Brian T. McCartney, Note, *Contracting for Judicial Review of Arbitration Awards: Can an "Errors of Law" Clause Provide Two Bites of the Apple?* 1997 J. Disp. Resol. 151, 151 (1997), Cynthia A. Murray, Note, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 St. Johns L. Rev. 633 (2002); Kevin Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 St. Louis L.J. 509 (2002).

Unlike courts in the United States, French courts have not been asked to decide whether to allow parties to contractually expand the judicial review of arbitral awards.⁴⁴ In spite of this situation, scholars believe that if presented with this issue, the French courts' response to such agreements would be in the negative.⁴⁵ It is believed that in Germany, as in France, expanded review of arbitral awards will probably not be available even if parties had contracted for it.⁴⁶ In the case of Belgian courts, experts believe that expanded judicial review will definitely not be available⁴⁷, as in the case of Swiss Courts.⁴⁸

C. Conclusion

Judicial review in the country where recognition or enforcement is sought has gained much uniformity due to the success of the New York Convention.⁴⁹ In seeking enforcement of the award, the winning party to the arbitration will have to obtain an exequatur (order to execute) to render the award equivalent to a local court judgment, from the courts of the country where the enforcement is sought.⁵⁰ In such proceedings, foreign awards are usually not reviewed on the merits but only on a limited number of grounds for procedural defects, which are more or less similar to the grounds under Article V of the Convention.⁵¹

The New York Convention has been very successful in its efforts to provide a harmonized system for the recognition and enforcement of international arbitral awards.

⁴⁴ Hulea, *supra* note 22 at 344 -345.

⁴⁵ *Id.*

⁴⁶ *Id.* at 345.

⁴⁷ *Id.* at 347.

⁴⁸ Hulea, *supra* note 22 at 348.

⁴⁹ BÜHRING-UHLE ET AL., *supra* note 8 at 55.

⁵⁰ *Id.*

⁵¹ *Id.*

However, this success is not without defects.⁵² The Convention, while providing uniform standards to decide the validity of arbitration agreements and awards,⁵³ still leaves the interpretation of the standards to the discretion of national courts.⁵⁴ Further, the Convention fails to provide a mechanism to solve the conflicts between national jurisdictions on matters relating to arbitration.⁵⁵ Thus, no mechanism exists till date which can secure the uniform application of the provisions of the convention in national courts.⁵⁶

Evidently, there is a need for a permanent body of arbitral appeal such as the AARB that provides uniformity and singularity with respect to the appellate review of all arbitral awards. The replacement of judicial review with a single appellate review mechanism will eliminate much of the conflict, uncertainty and discrepancy that surround such review. Crucial determinations as to the validity of arbitral awards and agreements will no longer be left to the determination of national courts.⁵⁷ Parties should contract that any option of review of an arbitral award should be available only through the AARB. Once an arbitral award has been rendered, any attempt to review the award may only be made through the AARB. There will be no challenge of the award at the place where the award is rendered or anywhere else. Further, by providing for a system of appeal that is reliable, parties will no longer fear unprincipled or capricious awards and hence they will not opt for expanded review provisions.

⁵² BÜHRING-UHLE ET AL., *supra* note 8 at 60.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.*

CHAPTER 3

THE PROBLEMS OF REVIEWING ARBITRAL AWARDS IN COURTS - HOW APPEAL THROUGH THE AARB WILL BE A SUITABLE REPLACEMENT FOR JUDICIAL REVIEW

Several arguments have been advanced against subjecting international arbitral awards to judicial review. The chief contentions are that judicial review leads to loss of confidentiality, relegates expertly rendered awards to generalized review by judges, affects the institutional integrity of the judicial and arbitral processes, adds additional burden to an already overworked judiciary, subjects international awards to possibly biased national reviews and leads to the problem of parallel proceedings.⁵⁸ The following sections elaborate on these arguments.

A. Loss of Confidentiality

“People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property.”⁵⁹

Confidentiality is mentioned as one of the chief reasons why parties choose arbitration over litigation. However, by involving courts in the proceeding, the parties acquire the risk of “sacrificing the secrecy of the arbitral forum for the presumptive openness of the courtroom”.⁶⁰ Highly confidential information of the parties will become known to competitors and others, and

⁵⁸ Hulea, *supra* note 22, Okeke, *supra* note 3, Knull & Rubins, *supra* note 4 and Smit *supra* note 2.

⁵⁹ Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine In On Alternative Dispute Resolution*, 81 CHIKLR 463 (2006) quoting *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

the advantage of arbitral confidentiality will be completely lost.⁶¹ As Dore aptly describes, “Once arbitration documents are filed with the court with a request for judicial action, they become judicial records subject to the right of public access. As with other judicial records, the court will assess whether the need for privacy outweighs any applicable public interest in disclosure... neither the arbitrator’s order nor the parties’ confidentiality agreement will necessarily bind the court”.⁶²

National Laws and Confidentiality

The decision of the Australian High Court in *Esso*⁶³ has been described as a “nuclear event in Australia” whose “seismic tremors” were felt throughout the arbitration world.⁶⁴ The *Esso* court rejected the view that a general duty of confidentiality existed in arbitration proceedings.⁶⁵ The approach of the *Esso* court was followed by Sweden in the *Bulgarian Foreign Trade Bank*⁶⁶ case. In the United States, no federal court above the district court level has ruled on this issue and the “handful” of district court decisions reject any implied duty of confidentiality.⁶⁷ This is demonstrated by the leading case of *United States v. Panhandle Eastern Corporation*, 118 F.R.D. 346 (D.Del.1988). Thus it is evident that Australia, Sweden and the United States do not recognize a general legal obligation of confidentiality.

⁶⁰ Doré, *supra* note 59 at 507.

⁶¹ Knull & Rubins *supra* note 4 at 549.

⁶² Doré, *supra* note 59; see THE LEADING ARBITRATOR’S GUIDE TO ARBITRATION (Lawrence W. Newman & Richard Hill eds., 2004) at 417-459.

⁶³ *Esso Australia Resources Ltd and others v. The Hon Sidney James Plowman, The Minister for Energy and minerals and others*, 10 Commonwealth Law Reports 183(1995).

⁶⁴ Gordon Smith & Meef Moh, *Confidentiality of Arbitrations - Singapore's Position Following the Recent Case of Myanma Yang Chi Oo Co Ltd v. Win Win Nu*, 8 VJ 37 quoting Neill, P.,QC, “Confidentiality in Arbitration”, (1996) 12 Arbitration International 287. This article was based on the 1995 Bernstein lecture given under the auspices of the Chartered Institute of Arbitrators.

⁶⁵ *Id* at 38.

⁶⁶ Supreme Court, 27 October 2000, *Bulgarian Foreign Trade Bank Ltd v. AI Trade Finance Inc*, 15(11) Mealey’s IAR B1 (2000), 13(1) WTAM 147(2001).

⁶⁷ Jeffrey W. Sarles, *Solving The Arbitral Confidentiality Conundrum In International Arbitration*, available at <http://www.mayerbrownrowe.com/publications/article.asp?id=1006&nid=6>.

Although there is no statutory provision in the English Arbitration Act of 1996, English law recognizes an implied term in arbitration agreements that the proceedings are private and confidential subject to certain limited qualifications or exceptions.⁶⁸ The cases of *Dolling-Baker v. Merrett*,⁶⁹ *Hassneh Insurance Co. v. Mew*⁷⁰ and *Ali Shipping v. Shipyard Trogir*⁷¹ testify this. The recent English Court of Appeals judgment in the *Bankers Trust*⁷² case confirmed that court proceedings which were related to arbitration were also confidential and the publication of a court judgment connected to the arbitration was barred.⁷³

France holds a “pro-confidentiality” stance. This can be witnessed from the notable case of *Aita v. Oijeh*.⁷⁴ In *Aita*, the Court of Appeal in Paris ruled that the very bringing of the proceedings violated the principle of confidentiality and therefore ordered the challenging party to pay significant costs to the other party for having caused in court a “bad faith” public debate on matters which should have remained confidential between the parties.⁷⁵

Two countries to statutorily provide for a duty of arbitral confidentiality are New Zealand and Bermuda. Section 14 of the New Zealand Arbitration Act (1996) provides that “An Arbitral agreement, unless other wise agreed by parties, is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.”⁷⁶ This enactment was done post *Esso* to

⁶⁸ Sarles, *supra* note 67 at pages 3-4.

⁶⁹ [1991] 2 All ER 890.

⁷⁰ *Hassneh Insurance Co. of Israel and Others v Steuart J. v Mew* [1993] 2 Lloyd's Rep. 243.

⁷¹ 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App. 1998).

⁷² *Department of Economics, Policy & Development of the City of Moscow & another v. Bankers Trust and another*[2005] QB 207, on appeal from the Commercial Court[2003] 1WLR 2885 (Cooke J.).

⁷³ V.V. Veeder, *The Transparency of International Arbitration in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) at 92-98

⁷⁴ 1986 REVUE DE L'ARBITRAGE 583 (Cour d'Appel de Paris, Feb. 18, 1986).

⁷⁵ Sarles, *supra* note 67 at 4, Veeder, *supra* note 73 at 91.

⁷⁶ Newman & Hill, *supra* note 62 at 443; Sarles, *supra* note 67 at 4.

prevent the Australian *Esso* decision from serving as a precedent in New Zealand's courts.⁷⁷ However, in the subsequent case of *TV New Zealand Ltd. v. Langley Productions Ltd.*,⁷⁸ New Zealand's constitutional requirement for public court hearing was give precedence over a party's request for privacy and the details of a confidential arbitral award become public information.⁷⁹

Another important example is the Bermuda International Conciliation and Arbitration Act of 1993 which added two important provisions relating to confidentiality: Section 45 and Section 46.⁸⁰ Between them, Sections 45 and 46 provide that any party to the proceedings may apply to opt out of open court proceedings and there is no judicial discretion to hold hearing in an open court. There is limited judicial discretion to direct that any information from a private hearing can be published. The publication of any judgment of "major legal interest" is permitted subject to the removal of names and other details of the case (if parties apply for such removal) and a delay in publication, not to exceed ten years.⁸¹

As is evident, there exists a huge difference in the way countries treat confidentiality. The words of Sarles aptly describe the situation:

"These national differences generate uncertainty. For example, one cannot simply assume that an arbitration held in London will be universally subject to English confidentiality standards, because a confidentiality dispute will not necessarily be heard in the national courts of the arbitration situs. It might be raised in a pending enforcement action elsewhere or in the country where the information is disclosed."⁸²

It has been suggested that in countries which do not recognize an implied duty of confidentiality, parties may expressly contract for it in their arbitration agreements.⁸³ But the fact remains that

⁷⁷ Sarles, *supra* note 67 at 4.

⁷⁸ *Television New Zealand v. Langley Productions Ltd* [2000] 2 NZLR 250

⁷⁹ Veeder, *supra* note 73 at 93.

⁸⁰ *Id* at 91-92.

⁸¹ *Id.*

⁸² Sarles, *supra* note 67 at 1.

⁸³ *Id.*

the parties, in their haste to “seal the deal”, often do not think that far ahead.⁸⁴ Hence pre-dispute arbitration agreements are often silent on the question of confidentiality. Even if parties did incorporate provisions relating to confidentiality, there is no guarantee that national courts might enforce those provisions.⁸⁵

One strong argument that has been advocated against keeping *all* arbitration proceedings confidential is that matters of public policy sometimes dictate the publicizing of certain confidential information. If such information was withheld, it would detrimentally affect the society at large.⁸⁶ The American cases of *Zurich American Insurance Co. v. Rite Aid Corp.*⁸⁷ and *Malek v. 24 Hour Fitness*⁸⁸ demonstrate this fact.⁸⁹

The absence of uniform national standards on confidentiality strongly warrants the establishment of a supranational body such as the AARB to ensure such uniformity and confidentiality in arbitration proceedings. An ideal solution would be to incorporate strong provisions to maintain party confidentiality with an equal regard for matters of public policy. In

⁸⁴ Sarles, *supra* note 67 at 1.

⁸⁵ *Id* at 7-8.

⁸⁶ See generally Doré, *supra* note 59.

⁸⁷ 345 F. Supp. 2d 497 (E.D. Pa. 2004).

⁸⁸ No. NO3-1473 (Super. Ct. Cal., Contra Costa County, June 4, 2004) (unpublished).

⁸⁹ Doré, *supra* note 59 at 508 : In *Zurich American Insurance Co. v. Rite Aid Corp.*, an employment dispute and a resulting coverage controversy arising out of a high-profile financial scandal concerning Rite Aid Corporation were submitted to confidential arbitration. Rite Aid's liability insurer sued to vacate the confidential arbitration award that required it to indemnify Rite Aid for a separate multimillion dollar arbitral award won by a former Rite Aid employee. Both the docket and record in the court proceedings were sealed by stipulation of the parties, who were negotiating a settlement of the underlying arbitration awards. In analyzing “whether it [was] appropriate for [the] case to remain shrouded under seal,” the district court sua sponte engaged in the balancing of interests applicable to the sealing of judicial records and proceedings. According to the Rite Aid court, neither the confidentiality of the arbitral forum nor the federal policy of encouraging arbitration, “trump[ed] the clear law and policy standards . . . for maintaining open and accessible records of legal matters for public scrutiny.” Instead, the significant public interest in the case required that the record be unsealed: [I]n light of the recent, well-publicized corporate scandals and fraud perpetrated on both the public and financial community, and pursuant to the common law public policy of open disclosure standards . . . for legal proceedings, allowing transparency into the unprecedented Rite Aid corporate scandal weighs heavily in favor of unsealing the record. The author also gives a description of the *Malek* case at FN 245: “In *Malek v. 24 Hour Fitness*, No. NO3-1473 (Super. Ct. Cal., Contra Costa County, June 4, 2004) (unpublished), for example, an arbitrator awarded a victim of sexual harassment and retaliation substantial compensatory and punitive damages against her health club employer. Unlike Rite Aid, the underlying arbitration in *Malek* was not covered by a confidentiality agreement or rule. Although the health club sought to prevent disclosure

order to ensure that public welfare is not affected, confidentiality standards may be relaxed only in cases that warrant the release of such information.

B. Lack of Expertise

The specialized expertise for which arbitrators are often selected and which is of pivotal importance to the resolution of complex international disputes, is largely lost when review is conducted by a national court of general jurisdiction because judges are unlikely to possess extensive experience in dealing with technical details and other problems peculiar to international disputes.⁹⁰ Opponents of judicial review opine that one of the main disadvantages of litigation is its failure to render suitable decisions for specialized disputes which require resolution by a party with expertise in the area of dispute.⁹¹ The technically or scientifically complex subject matter of many international transactions, added with the “interplay of legal regimes that can complicate even a relatively simple cross-border sale of goods” may require “expertise that is rarely found among judges, even in the most industrialized countries”.⁹²

Opponents of judicial review also endorse the view that the prospect of (contractually) expanded or heightened judicial review might deter arbitrators from giving highly specialized solutions for which their help is sought, in the first place.

by satisfying the award, the successful plaintiff sued to reduce it to judgment. Both the arbitrator and the court refused the health club's requests for confidentiality.”

⁹⁰ Knull & Rubins, *supra* note 4 at 550; Smit, *supra* note 2 at 152.

⁹¹ See Robert H. Smit, *General Commentary On The WIPO Arbitration Rules, Recommended Clauses, General Provisions And The WIPO Expedited Arbitration Rules*, 9 AMRIARB 3,5 (1998).

⁹² Knull & Rubins, *supra* note 4 at 540: The author further elaborates on expertise as follows: “The importance of this advantage is witnessed by the dominance of arbitration in settling construction disputes both domestically and internationally, with engineers and lawyers alike serving on specialized arbitration boards. Specialized arbitration rules for use in construction disputes include the Construction Industry Model Arbitration Rules (CIMAR) in use in the UK, the American Arbitration Association Construction Arbitration Rules, and the rules promulgated by the Fédération Internationale des Ingénieurs-Conseils (FIDIC)”.

In the words of Hans Smit:

It enables parties to obtain satisfactory resolution of disputes by sophisticated arbitrators, especially selected for the purpose, by reference to legal rules that might not meet with approval in the lower courts, but would require pursuing appeals into the courts of highest instance. The contributions made by arbitrators, specially selected for their expertise and competence, to the proper development of the law should not be underestimated. Their ability to fashion creative solutions by reference to rules that properly promote the common good, but may not always be the ones endorsed by the (lower) courts, should be given free rein. Clearly, arbitrators might shun reasonable solutions if they had to worry that courts might not be willing or able to endorse the legal bases on which they rest. Arbitrators have made very significant contributions both to finding appropriate solutions and to promoting enlightened development of the law. Their readiness to do so would be affected unfavorably by broadening the scope of review by judges not specifically selected for their experience and independence.⁹³

The *Bowen*⁹⁴ decision supports the standpoint that an arbitrator chosen for his experience in the area tends to possess greater knowledge about the disputed subject than “ordinary judges or juries” thereby giving parties more confidence in the award rendered.⁹⁵ However, through contractually expanded judicial review, arbitrators might be required to submit findings of fact and conclusions of law or be discouraged from seeking specialized solutions for fear that their decisions would be vacated on appeal.⁹⁶ In the opinion of the court, such a policy would undermine the independence of the arbitrator and jeopardize the “simplicity, expediency, and cost-effectiveness of arbitration”.⁹⁷ Arbitration would become “just another step in the litigation dance”.⁹⁸ Additionally, contractually expanded review could put courts in the “awkward position

⁹³ Smit, *supra* note 2 at 152.

⁹⁴ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

⁹⁵ Sullivan, *supra* note 43 at 553

⁹⁶ Lee Goldman, *Contractually Expanded Review Of Arbitration Awards*, 8 HVNLR 171,179 (2003), *Bowen*, 254 F.3d 925 at 936.

⁹⁷ *Id.*

⁹⁸ *Id.*

of having to apply unfamiliar rules and procedures”.⁹⁹ Other court decisions and commentators have also expressed the importance of arbitrators’ expertise.¹⁰⁰

While some commentators warn that arbitrators’ “familiarity with a discipline often comes at the expense of complete impartiality”,¹⁰¹ courts themselves recognize the “tradeoff between expertise and impartiality” in arbitration.¹⁰² It is acknowledged that arbitrators may have had previous knowledge of the situation or the parties, but also presumed that they are sufficiently impartial to serve as arbitrators.¹⁰³

It must be said that the quality of an arbitration proceeding depends upon the quality of the arbitrator.¹⁰⁴ There will undoubtedly be a difference between an expert arbitrator’s appraisal of a dispute and a judge’s appraisal of the same dispute. Hence, it is advisable to opt for appellate arbitral review conducted by sophisticated technical and arbitral experts instead of judicial review. One of the propositions for the AARB is to enlist the services of such experts to function as arbitrators.

⁹⁹ *Bowen*, 254 F.3d 925 at 935; Goldman, *supra* note 96 at 179.

¹⁰⁰ *International Produce Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (1981) expressing that “The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose”; Stephen J. Ware, *Teaching Arbitration Law*, 14 AMRIARB 231(2003): “In addition to the (unwritten) presuppositions and understandings of the trade, some industries have elaborate written trade rules. An arbitrator’s familiarity with these written rules can be an especially important factor in making a good arbitrator because in several of these industries arbitrators are expected to rely on these written rules in deciding cases”. The author cites various other commentators expressing a similar opinion. *See also B.L.E. v. Canadian Pacific Railway*, 2003 Carswell Alta 596, observing that “The Supreme Court of Canada has long noted the expertise of arbitrators and arbitration panels in general.”

¹⁰¹ Stephanie Smith, *Establishing Neutrality In Arbitrations Involving Closely-Knit Industries*, 12 WAMREP 237 at 238.

¹⁰² *Id.*

¹⁰³ *Id.* mentioning the following cases: *Merit Insur. Co. v. Leatherby Insur. Co.*, 714 F.2d 673, 679 (1983); *Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 83-84 (1984).

¹⁰⁴ LEW ET AL., *supra* note 1 at 10-30.

C. The Institutional Integrity Argument

The Institutional Integrity Argument is perhaps the most raised contention against judicial review of arbitral awards. When parties decide that any unsatisfactory outcome of the arbitration process may be settled by judicial review, they may tend to seek expanded judicial review through contractual provisions.¹⁰⁵ Expanded judicial review affects the institutional integrity of the court process and any form of judicial review, contractually expanded or not affects the integrity of the arbitral process. It is opined that “With respect to arbitral institutions, the argument is the need to shield against undue interference by the judiciary. In the case of the courts, institutional integrity presumably dictates that the freedom of parties to set the ground rules in arbitration does not extend beyond the arbitral process itself”¹⁰⁶.

Expanded judicial review sought by the parties has been both permitted¹⁰⁷ and denied¹⁰⁸ by American Courts which hold contrasting views on the institutional integrity argument as do commentators who have both declined¹⁰⁹ and endorsed¹¹⁰ the idea of contractually expanded review.

¹⁰⁵ See generally *Fils et Cables D’Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *Gateway Tech. Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Bowen*, 254 F.3d 925; *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (LaPine II) and *Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp.*, 427 F.3d 21 (1st Cir. 2005) where parties sought expanded judicial review through contractual provisions.

¹⁰⁶ Hulea, *supra* note 22 at 350.

¹⁰⁷ For example, *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Chicago v. Kaplan*, 514 U.S. 938 (1995); *Roadway Packaging Systems, Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int’l Corp. v. McLeland*, 120 F.3d 262, 1997 WL 452245, (4th Cir. Aug. 11, 1997); in re *Gateway Tech. Inc.*, 64 F.3d 993.

¹⁰⁸ In re *Bowen*, 254 F.3d 925; *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991); in re *Kyocera Corp* 391 F.3d 987 (overruling the 1997 decision in *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884).

¹⁰⁹ Curtin, *supra* note 2 at 339; Smit, *supra* note 2 at 149; McCartney, *supra* note 43 at 151; Murray, *supra* note 43; Sullivan, *supra* note 43.

¹¹⁰ Hulea, *supra* note 22 at 367; Maggio & Bales, *supra* note 42 and *Recent Case, Arbitration--Standard of Review--The Tenth Circuit Rejects Contractual Expansion of Judicial Review of Arbitration Awards: Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), 115 Harv. L. Rev. 1267; Okeke *supra* note 3 at 56.

Similarly, there exist divergent opinions as to whether the institutional integrity of arbitration is affected by judicial review. Some commentators and courts¹¹¹ observe that judicial review of an arbitral award amounts to undue interference of the courts in the arbitral process, while others opine that judicial review is a necessary tool to ensure the integrity of the arbitral process.¹¹²

The establishment of the AARB is advocated as a solution that addresses the both these issues. By opting for review of awards to be conducted by the AARB, not only is the institutional integrity of arbitration preserved by making it free of judicial interference, but the judiciary is not subject to the whims and fancies of the contracting parties. The freedom of the contracting parties will be limited to the arbitral process. Further, by providing for a system of appeal for arbitral awards, there are significant chances to rectify erroneous or flawed awards, thereby protecting the interests of the disputing parties and ensuring parties' faith in the arbitral process.

D. Burden on the Judiciary

Much has been said about the role of arbitration as an efficient means of mitigating congestion in the court system. Congress has acknowledged that arbitration is a quick and relatively inexpensive method of dispute resolution that relieves the burden on the federal

¹¹¹ *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (Stating that “The standards for judicial intervention are ... narrowly drawn to assure the basic integrity of the arbitration process without meddling in it.”); see *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); Knull *supra* note 4 at 548: “Besides the potential lack of cross-border recognition of court orders to set aside awards, a losing party who appeals to the judicial system of any country undermines the true virtues of arbitration, to some degree injecting most of the disadvantages of the litigation process into arbitration at the appellate level. One European commentator has remarked that “it appears that the institution of arbitration is distorted, and even loses the essence of its value, if the arbitral procedure is followed by an external procedure before national tribunals.” At least one commentator has suggested that parties who enter into an agreement to arbitrate their disputes breach that agreement whenever they turn to courts for assistance not contemplated by the arbitration rules they have selected.”

¹¹² See Victoria L. C. Holstein, *Co-Opting The Federal Judiciary: Contractual Expansion Of Judicial Review Of Arbitral Awards*, 12 WAMREP 276 (2001), Okeke *supra* note 3 at 56.

courts.¹¹³ In *Timken Co. v. United Steelworkers*, 492 F.2d 1178, 1180 (6th Cir. 1974) it was opined that arbitration is “an expeditious and relatively inexpensive means of settling grievances and ... it obviates the enormous burden which would rest upon the judiciary if it should be required to settle, case by case, the endless number of grievances and disputes ...”. Chief Justice Burger in his speech to the American Bar Association on Jan. 24, 1982, endorsed the use of arbitration to reduce judicial backlog.¹¹⁴ Other commentators have also expressed the opinion that arbitration reduces the burden on the court system.¹¹⁵ To quote, “Arbitration, along with mediation and other forms of alternate dispute resolution, answers the public's need to resolve disputes in an expeditious, cost-effective and just manner, without further burdening the tax-supported court system.”¹¹⁶ In the words of yet another commentator, “Whatever the original justifications or purposes of ADR, arbitration's current support from the judiciary and other federal and state entities, as well as the business community, is a function of two largely economic purposes. First, from a public-interest perspective, arbitration is intended to reduce the burden on courts, providing a “shift in cost from the public sector to private parties. Second, for private parties, arbitration is said to provide a flexible dispute resolution model, allowing parties to maximize efficiency.”¹¹⁷

While arbitration has the effect of lightening the burden on courts, the review of arbitral awards in courts has quite the opposite effect. A frequently-raised argument against contractually

¹¹³ Goldman, *supra* note 96 at 183; H.R. Rep. No. 96, at 2 (1924).

¹¹⁴ H.R. Rep. No. 97-542 (1982); Michael Z. Green, *Preempting Justice Through Binding Arbitration Of Future Disputes: Mere Adhesion Contracts Or A Trap For The Unwary Consumer?* 5 Loy. Consumer L. Rep. 112 (1993) at FN 9 mentioning the various articles of Warren E. Burger: Warren E. Burger, *Isn't There a Better Way?* 68 A.B.A.J. 274, 277 (Mar. 1982) Warren E. Burger, *Using Arbitration to Achieve Justice*, 40 Arb.J. 3, 3 (Sept. 1985); Warren E. Burger, Agenda for 2000 A.D.--A Need for Systematic Anticipation, 70 F.R.D. 83, 93-96 (1976).

¹¹⁵ Sally Engle Merry, Book Review, *Disputing Without Culture*, 100 Harv. L. Rev. 2057, 2072 (1987) (noting that “ADR is usually justified by the congestion of the courts and the demand placed upon them by ordinary persons”).

¹¹⁶ Lester H. Berkson, *Demise Of Binding Arbitration In Nevada*, 2-AUG NVLAW 15 (1994).

expanded judicial review is that it burdens an already overworked court system.¹¹⁸ The *Bowen* court has opined that expanded review might encourage a number of additional appeals.¹¹⁹ This would result in sacrificing the simplicity, informality, and expedition of arbitration and further burden an already overburdened judiciary.¹²⁰

The *La Pine* court has opined that under expanded review, the reviewing court would be engaging in work different from what it would do if it had simply heard the case itself.¹²¹ The Eighth Circuit has observed that: “We have served notice that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication”¹²² and “...parties may not force reviewing courts to apply unfamiliar rules and procedures”.¹²³

In stark contrast to these opinions other courts and commentators have opined that (expanded) judicial review is not a burden on courts and that parties had the right to contract for such review, thus exemplifying the divide on this subject. In so stating, they reason that without judicial review, a party might so fear the work of a “maverick arbitrator” to give up the idea of arbitration altogether.¹²⁴ “Expanded review is more burdensome than the narrow review provided for in Section 10 of the FAA. Nevertheless...it is quite possible that refusing to permit

¹¹⁷ Cameron L. Sabin, *The Adjudicatory Boat Without A Keel: Private Arbitration And The Need For Public Oversight Of Arbitrators*, 87 IALR 1337 (2002). The author, however, argues that “Whether growing delays actually plague the public courts and whether arbitration achieves either of its economic purposes is debatable”.

¹¹⁸ McCartney, *supra* note 43 at 162; Sullivan *supra* note 43 at 550-553; Di Jiang-Schuerger, *Perfect Arbitration = Arbitration – Litigation?* 4 HVNLR 231, 236 (1999).

¹¹⁹ *Bowen*, 254 F.3d 925 at 936.

¹²⁰ *Bowen*, 254 F.3d 925 at 936.

¹²¹ *Lapine*, 130 F.3d at 891 (Kozinski, J., concurring).

¹²² *In re UHC Mgmt. Co.*, 148 F.3d 992, 998; Holstein, *supra* note 112 at 281.

¹²³ *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1525 (7th Cir.1989).

¹²⁴ Goldman, *supra* note 96 at 184.

contractually expanded review will encourage parties to forego arbitration altogether and to litigate their entire dispute in federal court.”¹²⁵

It has also been stated that arbitration with expanded judicial review would place a lesser burden on the judiciary than full litigation in the court system.¹²⁶ Commentator Goldman observes that: “Parties, by their agreement, are already permitted to increase the work of the judiciary. Choice of law provisions may require judges to spend extra hours in the library. Furthermore, clauses limiting which disputes are subject to arbitration also result in a heavier judicial workload, yet no one suggests that such clauses are improper or undermine judicial integrity”.¹²⁷ He further reasons that “The fear that courts would be placed in the position of applying unfamiliar standards of review or appraising strange rules and procedures is overstated and does not justify a blanket rejection of clauses expanding judicial review. To date, every case providing for expanded judicial review has required substantial evidence either to support the arbitrator's award or to show that the arbitrator did not commit legal error. These are standards that courts routinely apply. Finally, Section 10 of the FAA and the judicially created exceptions to award confirmation already require courts to review arbitration awards. Expanded review does not make the procedures and rules of arbitration any more unfamiliar.”¹²⁸

While the opinion of courts is anything but uniform on this issue, an interesting fact is that the same courts who found expanded review unacceptable have also endorsed the view of parties opting for appellate *arbitral* review. While the contractual expansion of judicial review

¹²⁵ Goldman, *supra* note 96 at 186.

¹²⁶ *La Pine Tech v Kyocera*, 130 F.3d 884, 889; *In re Fils Et. Cables D'Acier De Lens*, 584 F. Supp. 240 at FN 9; Margaret Moses, *Can Parties Tell Courts What To Do? Expanded Judicial Review Of Arbitral Awards*, 52 UKSLR 429, 465: “Congress' intent in enacting the FAA was to permit parties' arbitration agreements to be enforced according to their terms, like any other contract. Moreover, if parties who want this safety net are denied it, they will simply impose the full burden of their disputes on the courts”.

¹²⁷ Goldman, *supra* note 96 at 186.

¹²⁸ *Id.*

was not permissible, desirable or appropriate, parties that sought additional review could appoint an appellate arbitration panel.¹²⁹

Irrespective of whether courts consider the review of arbitral awards a burden or not, review by an appellate arbitral body would definitely lighten their workload. The fact that courts themselves advocate appellate arbitral review adds further merit to the idea of the establishment of a body such as the AARB.

E. Potential for Bias in National Courts

One of the main reasons for parties to choose international arbitration is that it ensures neutrality. There is a tendency for parties to presume, rightly or wrongly, that the national courts of the opposing party would be biased against them or that judges are likely to be more sympathetic to their own countrymen.¹³⁰ To avoid the “potentially biased” national courts of their opponents, parties in international commercial transactions enter into agreements that prevent national courts from deciding their case and instead place decision-making power in the hands of a neutral arbitral tribunal.¹³¹ By transferring decision making power from national courts to a private arbitral tribunal, parties obtain a “uniquely neutral forum for resolving their

¹²⁹ *La Pine*, 130 F.3d at 891 (Mayer, J., dissenting). Judge Mayer reasoned that the parties' only alternative for expanded review was to provide for an appellate arbitration panel; Judge Posner, in *Chicago Typographical Union.*, 935 F.2d 1501 at 1504 -05, Judge Wollman in *UHC Management*, 148 F.3d 992, 998 and Judge Tascha in *Bowen*, 254 F.3d 925 at 934 all express the opinion that if the contracting parties seek broader appellate review, they can opt for an appellate arbitration panel to review the arbitrator's award instead of judicial review. See Eric Van Ginkel, *Reframing The Dilemma Of Contractually Expanded Judicial Review: Arbitral Appeal Vs. Vacatur*, 3 PEPDRLJ 157.

¹³⁰ Catherine A. Rogers, *Fit And Function In Legal Ethics: Developing A Code Of Conduct For International Arbitration*, 23 MIJIL 341, 408; See Knull & Rubins, *supra* note 4 at 537,538; see also Constantine Partasides, *Solutions Offered by Transnational rules in Case of Interference by the Courts of the Seat in* IAI SERIES ON INTERNATIONAL ARBITRATION NO.3, TOWARDS A UNIFORM ARBITRATION LAW? (Anne- Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005).

¹³¹ Rogers, *supra* note 130 at 409.

disputes”.¹³² However, the benefits conferred by such a neutral tribunal would be totally lost if parties resorted to judicial review of the arbitral award in a national court with potential for bias and corruption.

Evidence suggests that the fear of bias among parties is not totally unfounded, as the detailed description of the following cases illustrates:

(1) *Himpurna California Energy Ltd. v. Republic of Indonesia*¹³³

The dispute originally arose from an Energy Sales Contract (“ESC”) by which CalEnergy was to develop and exploit geothermal resources in Indonesia and sell the resulting energy to PLN, the Indonesian State Electricity Corporation. The ESC was priced in dollars. In the wake of South East Asian financial crisis of the late 1990s, and the collapse of the Indonesian Rupiah, PLN defaulted on its payment obligations under the ESC. Pursuant to an UNCITRAL arbitration clause in the ESC, CalEnergy brought arbitral proceedings and obtained an award in its favor. Following PLN’s failure to make payment pursuant to the award rendered against it, CalEnergy commenced further arbitral proceedings against the Republic of Indonesia itself under letters of comfort issued by the Ministry of Finance as security for PLN’s obligations under the ESC. These were also UNCITRAL proceedings, and the seats were Jakarta. Following the commencement of proceedings, the national oil company of Indonesia, Pertamina, which although a party to the original ESC had not been a party to the PLN arbitration and was not a party to the Republic of Indonesia arbitration, applied to the Central Court of Jakarta seeking an injunction suspending arbitral proceedings on grounds that were less than entirely clear. Pertamina alleged that its rights as a third party would be affected by the arbitration. The Jakarta Court duly issued an injunction, which in many respects was anomalous. The Arbitral Tribunal declined to suspend the arbitration, and convened witness hearings in The Hague.¹³⁴ Following a failed attempt to obtain an injunction suspending the proceedings in The Netherlands, agents of the Republic of Indonesia intercepted one of the three arbitrators, an Indonesian national, at Schipol airport on the eve of the witness hearings in The Hague. The arbitrator was in no position to resist the pressures being brought to bear upon him, he was accompanied back to Jakarta. In the face of these events, the Arbitral tribunal proceeded in truncated form to render final awards against the Republic of Indonesia. The tribunal held that the injunction of the local court did not constitute “sufficient cause”; that the

¹³² Rogers, *supra* note 130 at 409.

¹³³ Sept. 26, 1999 *ad hoc* Interim Award, *Himpurna California Energy Ltd. v. Republic of Indonesia*, XXV Y.B. COM. ARB. 109 (2000); Oct. 16, 1999 *ad hoc* Final Award, *Himpurna California Energy Ltd. v. Republic of Indonesia*, 15(2) INT’L ARB. REP. A1 (2000), XXV Y.B. COM. ARB. 109 (2000); October 16, 1999 *ad hoc* Final Award, *Patuha Power Ltd. v. Republic of Indonesia*, 15(2) INT’L ARB. REP. B1 (2000).

¹³⁴ Partasides, *supra* note 130 at 150-153.

legal basis for the injunctions was “unclear” and ultimately rendered its decision.¹³⁵

(2) *Petrobart Ltd. v. Kyrgyz Republic*¹³⁶

In 1988, Petrobart (a Gibraltar company) delivered a large quantity of gas to Kyrgyzyrgyzgazmunaizat (KGM), a company owned by the Kyrgyz Republic. After KGM had failed to pay for all of the gas, Petrobart obtained a favorable decision against it from a Kyrgyz Arbitration Court. Later, however, this court (with, it appeared, the informal support of the government of the Kyrgyz Republic) granted a stay of enforcement of that decision. KGM was then reorganized by presidential decree so that its assets (but not its liabilities) were transferred to other state entities, leaving the company insolvent. In 2003, Petrobart submitted a Request for Arbitration to the SCC Institute alleging that the Kyrgyz Republic was in breach of its obligations pursuant to the ECT. The tribunal first ruled that the ECT applied on a provisional basis to Gibraltar and then held that the Kyrgyz Republic failed to accord fair and equitable treatment to Petrobart's investment and, therefore, was in breach of Article 10(1) of the ECT. In reaching this conclusion, the tribunal highlighted the Kyrgyz Republic's decision to transfer assets out of KGM to the detriment of its creditors (including Petrobart). The tribunal also cited the State's intervention in the stay proceedings before the Kyrgyz Arbitration Court (again, to the detriment of Petrobart). Indeed, that intervention, the tribunal found, was itself a breach of the State's obligation to provide an effective means for the enforcement of investment rights under its domestic law (under Clause 10(12) of the ECT). In a final award issued under the auspices of the Arbitration Institute for the Stockholm Chamber of Commerce (the SCC Institute), recently made public, an arbitral tribunal upheld Petrobart Limited's claim alleging breaches of the Energy Charter Treaty (ECT) by the Kyrgyz Republic.¹³⁷

In *Sonatrach v. Ford, Bacon & Davis*¹³⁸, a Brussels court ordered execution of an ICC award that had been set aside after a merits review by an Algerian court at the seat of arbitration in Algiers. It is likely that the Belgian court suspected political interference at the arbitral situs because the Algerian defendant was the national gas agency which was among the most powerful of state agencies in Algeria.¹³⁹

¹³⁵ Partasides, *supra* note 130 at 150-153.

¹³⁶ *Petrobart Ltd. v. Kyrgyz Republic*, Arbitral Award Case No. 126/2003, Stockholm Chamber of Commerce Arbitration Inst. (Mar. 29, 2005), available at http://www.iisd.org/pdf/2005/investsd_petrobart_kyrgyz.pdf.

¹³⁷ Vera van Houtte, Stephan Wilske & Michael Young, *What's New in European Arbitration?* 60-JAN DRJ 7.

¹³⁸ Judgment of Dec. 6, 1988, Trib. pr. inst. de Bruxelles, *aff'd*, Judgment of Jan. 9, 1990, Cour d'appel de Bruxelles (8e chambre) (Belg.).

¹³⁹ William W. Park, *Illusion and Reality in International Forum Selection*, 30 TXILJ 135 at FN 274.

The above-mentioned examples illustrate a certainty of bias, rather than a supposed possibility. Sometimes the bias transgresses to the extent of actual, physical threat as the *Himpurna* case illustrates. It must be noted that “possibility of bias” exists not only in the courts of developing nations because of their “presumed lack of judicial independence or their vulnerability to corruption”.¹⁴⁰ Bias against foreign defendants is said to be present in all countries, including the United States.¹⁴¹ Hence, if parties need to obtain a uniquely neutral, truly transnational forum for appealing arbitral awards, an ideal solution would be an institution such as the AARB. The neutrality and impartiality of the AARB would be yet another asset in the list of the previously - mentioned several advantages.

F. The Problems of Parallel Proceedings

In international commercial arbitration proceedings, when a losing party seeks to set aside or vacate an award on one hand and the winning party seeks to enforce the same award on the other hand, it gives rise to parallel proceedings in different national courts, each with its own laws and procedural standards.¹⁴² Litigants find it difficult to stay court proceedings in one jurisdiction on the basis of ongoing litigation in another country.¹⁴³ However, it must be mentioned that parallel proceedings do not arise only in cases of post-award enforcement in national courts; there are a number of other possibilities where parallel proceedings may occur in international arbitration - for instance, between an international court and an international

¹⁴⁰ Rogers, *supra* note 130 at 408-409.

¹⁴¹ *Id.*

¹⁴² Knull & Rubins, *supra* note 4 at 537, *see also* BÜHRING-UHLE ET AL., *supra* note 8 at 13; *see Karaha Bordas Co LLC (KBC) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and PT, PLN (Persero)*, Decision of 18 December 2000, 16(3) Mealey’s IAR C-2 (2001); Emmanuel Gaillard: *Reflections on the Use of Anti-Suit Injunctions* in PERSPECTIVES IN INTERNATIONAL ARBITRATION (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) at 208-211.

tribunal, a state court and an international tribunal and between two arbitral tribunals.¹⁴⁴ This is due to the fact that there is no uniform standard for dealing with parallel proceedings internationally.¹⁴⁵

Attempts have been made to prevent parallel proceedings through the application of the *lis pendens* doctrine. The doctrine of *lis pendens* (literally meaning suit pending) is a “general principle of international law”¹⁴⁶ which is invoked to prevent two judicial bodies from dealing with the same dispute at the same time. While the doctrine of *lis pendens* has been successfully applied to stall simultaneous proceedings in some cases¹⁴⁷, there are also cases where its application has been rejected.¹⁴⁸

The Brussels and Lugano Conventions

The European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (hereinafter Brussels Convention)¹⁴⁹ and the EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988

¹⁴³ Knull & Rubins, *supra* note 4 at 537

¹⁴⁴ Norah Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens : Problems and Possible Solutions in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) at 331; see *The Hub Power Company Limited v. Pakistan WAPDA and Federation of Pakistan*, 16 Arb. Int'l 439 (2000), reprinted in 15 Mealey's Int'l Arb. Rep. A-1 (2000); *Benvenuti & Bonfant v. People's Republic of Congo*, ICSID Case No. ArB/77/2, VIII YBCA 144 (1983); *Fomento de Construcciones y Contratas SA v. Colon Container Terminal SA*, Swiss Tribunal 14 May 2001, XXIX YBCA809 (2004); *Southern Bluefin Tuna Case Australia and New Zealand v. Japan*, 4 Aug 2000, para 52, available at <http://www.worldbank.org/icsid/highlights/bluefintuna/award080400.pdf>; *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909, (D.C. Cir 1984), *Donohue v. Amco Inc. and Others*, 2 Lloyd's Rep. 649 (Q.B. 1999); see BÜHRING-UHLE ET AL., *supra* note 8 at 13-15.

¹⁴⁵ Louise Ellen Teitz, *Both Sides Of The Coin: A Decade Of Parallel Proceedings And Enforcement Of Foreign Judgments In Transnational Litigation*, 10 RWULR 1,9(2004); see Nadine Balkanyi-Nordmann, *The Perils of Parallel Proceedings: Is an Arbitration Award Enforceable If the Same Case Is Pending Elsewhere?* in HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2006) at 185.

¹⁴⁶ Gallagher, *supra* note 144 at 334.

¹⁴⁷ *Id.* See in re *Fomento* *supra* note 144, *J.P. Morgan Europe Ltd. v. Primacom AG* [2005] EWHC 508

¹⁴⁸ See generally Gallagher, *supra* note 144; see in re *Benvenuti* *supra* note 144; see also the following: *SGS v Pakistan*, ICSID Case No. ARB/01/13, available at <http://www.worldbank.org/icsid/cases/awards.htm>; *Czech Republic v. CME Czech Republic BV*, Svea Court of Appeal Case no. T 8735-01, available at http://ita.law.uvic.ca/documents/CME2003-SveaCourtOfAppeal_001.pdf

(hereinafter Lugano Convention)¹⁵⁰ have addressed the issue of simultaneous proceedings in an attempt to bring uniformity among countries.¹⁵¹ The key feature of the *lis pendens doctrine*, as set forth in the conventions is to prevent parallel proceedings and conflicting results in different contracting states. Article 21 of the Brussels and Lugano Conventions¹⁵² provides that:

“Where proceedings involving the same cause of action and between the same parties are brought in courts of different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.”¹⁵³

As per the conventions, the court of the second filed action may not interfere with the court of first filed action.¹⁵⁴ In the United States, courts sometimes apply a presumption favoring the first-filed suit, and this denotes the date of filing of the plaintiff's complaint with the court clerk. There are no known cases in the United States where this is a problem.¹⁵⁵ In Europe however, the application of the “first-seized” rule is anything but conclusive.¹⁵⁶ For instance, in Sweden, the court is seized of jurisdiction when the case is filed, while in Germany, it is perceived that jurisdiction is not seized until the defendant is served. This lack of uniformity is described by the following example: “When a party sues a defendant in a German court but does not immediately perfect service of process, the defendant can quickly sue in Sweden (assuming the German plaintiff's amenability), and if the Swedish filing predates the German service of process, the Swedish case prevails and the earlier-filed German case must be dismissed”.¹⁵⁷

¹⁴⁹ Available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux.htm>.

¹⁵⁰ Available at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm>.

¹⁵¹ James P. George, *International Parallel Litigation--A Survey Of Current Conventions And Model Laws*, 37 TXILJ 499 (2002).

¹⁵² Balkanyi-Nordmann, *supra* note 145 at 191 stating : The articles are identical due to Protocol No. 2

¹⁵³ *Id.*

¹⁵⁴ George, *supra* note 151 at 531.

¹⁵⁵ *Id.*

¹⁵⁶ George, *supra* note 151 at 531.

¹⁵⁷ *Id.*

This discrepancy among countries which are party to the Brussels conventions only serves to illustrate the lack of uniformity among national laws and its direct bearing on international arbitration proceedings.¹⁵⁸

Lis pendens rules often apply only to parallel actions involving the same parties and the same claims or causes of action. It is unclear as to how “same” they must be to qualify for a stay or dismissal.¹⁵⁹ The degree of requisite “sameness” is apparently left to the discretion of the judges in the absence of any guidelines to evaluate the “sameness”.¹⁶⁰ Another key issue is that the Brussels and Lugano Conventions rules apply only to participating nations. Therefore, there are no provisions to deal with simultaneous proceedings when one of the contracting states is *not* a party to the conventions.¹⁶¹

As with other problems in international commercial arbitration today, there are no uniform measures to effectively address the issue of parallel proceedings. While the Brussels and Lugano Conventions are undoubtedly steps in the right direction¹⁶², there are still areas that have not been satisfactorily addressed, as described above.

It has been suggested that the complete harmonization of the *lis pendens* issue can be achieved by an international convention to that effect.¹⁶³ Instead, the problem of parallel proceedings and related issues of enforcement due to simultaneous proceedings in national courts or otherwise can be addressed with the same solution that has been advocated to several other problems in this thesis – the establishment of the AARB.¹⁶⁴ If parties agree through well-defined

¹⁵⁸ Balkanyi-Nordmann, *supra* note 145 at 191; George, *supra* note 151 at 531.

¹⁵⁹ George, *supra* note 151 at 510.

¹⁶⁰ *See id.*

¹⁶¹ *See* Balkanyi-Nordmann, *supra* note 145 at 197.

¹⁶² *See id* generally.

¹⁶³ *See* Balkanyi-Nordmann, *supra* note 145 at 201.

¹⁶⁴ *Infra* generally.

provisions to bring any requests for appeal to the AARB only *and* waive the right to pursue any other appeal option, the “perils”¹⁶⁵ of parallel proceedings will be eradicated.

G. Conclusion

The above-mentioned arguments clearly highlight the fact that subjecting arbitral awards to judicial review creates certain distinct problems, both to the arbitrating parties and the institution of arbitration. It is evident that by resorting to appellate review through the AARB, arbitrating parties and the institution of arbitration will be free from the problems posed by judicial review.

¹⁶⁵ Balkanyi-Nordmann, *supra* note 145 at 185.

CHAPTER 4

THE NEED FOR THE AARB

“Lack of appeal does not bring finality.”¹⁶⁶

Considering the disadvantages posed by judicial review and the merits of appellate arbitral review as detailed above, it is not unreasonable to assume that parties who are prepared to agree to international arbitration but desire some protection against arbitrary awards would prefer an arbitral review to judicial review.¹⁶⁷ Currently there is no universal extra-judicial body for dealing with appellate review of all international commercial arbitral awards.

A. Existing Avenues of Appellate Arbitral Review

As previously mentioned, the losing party in arbitration can seek an appeal of the award in national courts at the place of arbitration or enforcement¹⁶⁸ or with the institution that rendered the award. Most national statutes provide extremely limited grounds for judicial review of arbitral awards¹⁶⁹ and courts are divided on the concept of contractually expanded review.¹⁷⁰ Similarly, most major arbitral institutions provide extremely limited grounds of review for awards rendered by them. While the appeal provisions of most institutions include measures to

¹⁶⁶ Knull & Rubins, *supra* note 4 at 542.

¹⁶⁷ *Id.* at 550.

¹⁶⁸ *Infra* Chapter II.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

correct clerical or mathematical errors¹⁷¹, they do not contain any provisions to review or alter the merits of the award¹⁷², even if the decree is based on flawed reasoning, incorrect application of the law¹⁷³ or contains substantive errors¹⁷⁴. James M. Gaitis mentions several possible scenarios of misapplication of law:

“The arbitral tribunal might wrongly determine that the applicable law does not permit an award of prejudgment interest in a particular arbitration, or the tribunal might apply an incorrect statute of limitations. The tribunal might inadvertently fail to recognize that the parties’ contract mandates, and the law permits, an award of attorneys’ fees to the prevailing party, or might misinterpret the law relating to fiduciary duties. The tribunal might misapprehend the doctrine of *respondeat superior*, or incorrectly describe the force and effect of administrative regulations—for example, oil and gas regulations regarding the correlative rights of interest owners. Allusions to the law of other jurisdictions, and the ensuing reliance on the law of those jurisdictions, might be based on a misunderstanding of that law. The tribunal might incorrectly conclude dicta in a decision actually constitute a formal holding. Simple statutes and complex bilateral investment treaties might be misread, and the language of cases and statutes alike might be misquoted and misapplied”.¹⁷⁵

In addition to the above-mentioned possibilities, there is also the risk that an arbitrator “grossly misinterprets a contract or grants hugely disproportionate remedies”.¹⁷⁶ In several high profile and “untold” lower profile arbitrations, arbitrators have rendered decisions that have fallen well outside the expectations of the parties.¹⁷⁷ There may be other justifiable reasons why parties may seek to appeal an award. The appeal mechanisms of existing arbitral institutions do not provide appellate provisions that address the above-mentioned scenarios.¹⁷⁸

¹⁷¹ Knull & Rubins, *supra* note 4 at 543; James M. Gaitis, *International and Domestic Arbitration Procedure: The Need For A Limited Opportunity For Arbitral Reconsideration Of Reasoned Awards*, 15 AMRIARB 9 (2004).

¹⁷² Gaitis *supra* note 171 at 24.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 18, 19 and the cases mentioned therein.

¹⁷⁶ Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration*, 63 ALB. L. REV 241 (1999).

¹⁷⁷ *Id.* at 249-251; see *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1012 (Cal. 1994), see also *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551 (2d Cir. 1985).

B. Rules of Various Arbitration Institutions

Article 29 of the International Chamber of Commerce (1998) (hereinafter ICC) Rules of Arbitration¹⁷⁹ states that “On its own initiative, the Arbitral Tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an Award, provided such correction is submitted for approval to the Court within 30 days of the date of such Award”. There are no provisions whatsoever to alter incorrect applications of law or objective evidence.¹⁸⁰ The provisions of Article 33 of the UNCITRAL Model Law¹⁸¹ are identical to the above-mentioned provisions of ICC Article 29. The Model Law does not provide recourse to review or alter awards on any other basis.¹⁸²

The rules of other Arbitration Institutions, such as Article 27 of the London Court of International Arbitration (1998) (hereinafter LCIA)¹⁸³ and Article 66 of the World Intellectual Property Organization (hereinafter WIPO) Arbitration Rules¹⁸⁴ provide that the arbitral tribunal may correct awards containing computational, typographical or clerical errors only.¹⁸⁵ As in the case of the ICC Rules and the UNCITRAL Rules, they do not provide for other recourse to review or alter the award. However, the rules of both the LCA and the WIPO provide that a party may request the Arbitral Tribunal to make an additional award as to claims or counterclaims

¹⁷⁸ E.g., *Hyle vs. Doctor's Associates Inc.*, 198 F.3d 368 (2d Cir. 1999).

¹⁷⁹ International Chamber of Commerce Available at

http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

¹⁸⁰ Knull & Rubins, *supra* note 4 at 543.

¹⁸¹ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

¹⁸² Gaitis *supra* note 171 at 24.

¹⁸³ Available at http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf.

¹⁸⁴ Available at <http://www.sice.oas.org/dispute/comarb/wipo/WIPAR2e.asp#awards>.

¹⁸⁵ Knull & Rubins, *supra* note 4 at 543; Gaitis *supra* note 171 at 25.

presented in the arbitration but not determined in any award within thirty days of rendering the award.¹⁸⁶

Art. 37 of the Rules of Arbitration, Institute of Stockholm Chamber Of Commerce (1999)¹⁸⁷ contains similar provisions in providing that the tribunal may correct miscalculation or clerical error, provide written interpretation of award, or decide additional questions submitted but not previously decided.¹⁸⁸ The Rules of the Inter-American Commercial Arbitration Association (IACAC)¹⁸⁹ are based on the UNCITRAL Model Law provisions and contain similar provisions.¹⁹⁰

The provisions relating to appeal of awards of the International Center for Settlement of Investment Disputes (hereinafter ICSID) are contained in Chapter VII of the ICSID Rules under “Interpretation, Revision and Annulment of the Award.”¹⁹¹ Under these provisions, a losing party may request the Chairman of the ICSID’s Administrative Council to appoint a three-member panel to review an award.¹⁹² While the scope of review of awards is limited,¹⁹³ it is certainly more elaborate than any of the aforementioned rules. Article 52 of the ICSID Convention Rules provides that an award may be reversed under the following conditions: that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; or that the award has failed to state the reasons on which it is based.¹⁹⁴ It is apparent that grounds for overturning an award are narrowly

¹⁸⁶ Knull & Rubins, *supra* note 4 at 543; Gaitis *supra* note 171 at 25.

¹⁸⁷ <http://132.204.136.33/doc/html/reg/en/2003/2003jiregen3.html>.

¹⁸⁸ Knull & Rubins, *supra* note 4 at 543.

¹⁸⁹ Available at <http://www.adr.org/sp.asp?id=22093>.

¹⁹⁰ Gaitis *supra* note 171 at 24.

¹⁹¹ <http://worldbank.org/icsid/basicdoc-archive/63.htm>.

¹⁹² Knull & Rubins, *supra* note 4 at 552.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

constructed under the ICSID rules.¹⁹⁵ The ICSID does not offer expedited appeal of awards, and the appeal proceedings are similar to original proceedings in all aspects.¹⁹⁶ Article 53 of the ICSID convention states that “(t)he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”, thereby excluding the possibility of any judicial review of the award.¹⁹⁷

The Center for Public Resources (hereinafter CPR) based in New York is the first major private commercial arbitration institution to establish separate, optional rules governing appeals procedures.¹⁹⁸ The CPR’s appeal procedures are limited to arbitrations conducted in the United States.¹⁹⁹ The Appeal Procedure of the CPR provides broad grounds of appeal in comparison with the rules of other institutions.²⁰⁰ The CPR rules provide that the appeals tribunal may annul the original award and replace it with a new, binding decision.²⁰¹ Rule 8 of the CPR provides the following six grounds of appeal based on which the original award may be modified or set aside:

- (1) If the original award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis;
- (2) The award is based upon factual findings clearly unsupported by the record;
- (3) If the award was procured by corruption, fraud or undue means;
- (4) If there is evident partiality or corruption in arbitrators;
- (5) If arbitrators exceeded or imperfectly executed powers;

¹⁹⁵ Knull & Rubins, *supra* note 4 at 552.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 555.

¹⁹⁹ *Id.*

²⁰⁰ Available at <http://www.cpradr.org/Landing.asp?M=9.0>.

²⁰¹ Knull & Rubins, *supra* note 4 at 555.

(6) If the arbitrators are guilty of misconduct in refusing to postpone the hearing, or refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of a party are prejudiced.²⁰²

From the above-mentioned analysis of the rules of various institutions, it is apparent that the existing major arbitral institutions do not offer the option of an appeal procedure to parties even in cases of erroneous misapplication of law or other justifiable circumstances, leaving parties no option but to seek appeal in courts.²⁰³ Since national courts also limit the grounds of review, the party afflicted by such “maverick” arbitration awards is often left with no recourse. As an alternative, parties may opt for ad hoc arbitral tribunals to hear their appeals. However, ad hoc arbitration does not offer certain advantages to parties that are available with institutional arbitration. The advantages and disadvantages of ad hoc tribunals as compared to institutional arbitration are detailed in the following pages.

C. Ad hoc vs. Institutional Arbitration

Arbitration may be classified into two types based on the method in which the arbitral proceedings are conducted: ad hoc arbitration and institutional arbitration.²⁰⁴ Ad hoc arbitration

²⁰² Knull & Rubins, *supra* note 4 at 555.

²⁰³ *Lummus Global Amazona, S.A. v. Aguaytia Energy del Peru, S.R. LTDA.*, 256 F.Supp.2d 594 (S.D.Tex. 2002); Gaitis, *supra* note 171 at 20, mentioning the following cases: *National Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985) (ruling that an award founded on an unambiguous and undisputed mistake of fact may be vacated under 9 U.S.C § 10(d)); *Electronics Corp. v. International Union of Elec. Workers*, 492 F.2d 1255, 1257 (1st Cir. 1974) (holding that “where the ‘fact’ underlying an arbitrator’s decision is concededly a non-fact and where the parties cannot fairly be charged with [its] misapprehension, the award cannot stand”); *Broadway Cab Coop., Inc. v. Teamsters Local Union* No. 281, No. 81-1197, 1982 WL 2007 (D.Or. Mar. 11, 1982); *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 330 (3d Cir. 1991) (tribunal mistakenly concluded that losing party was holding monies in an escrow account); *Synergy Staffing, Inc. v. Westaff, Inc.*, No. B162668, 2003 WL 22391079, *1 (Cal.App. 2 Dist., Oct. 21, 2003 (tribunal, “through oversight,” failed to provide for a contractually agreed setoff valued at \$800,000) *Monscharsh v. Heily & Blase*, 3 Cal. 4th 1, 28 (Cal. 1992) (held that award will not be overturned even when an error of law appears on the face of the award).

²⁰⁴ LEW ET AL., *supra* note 1 at 3-4; RUBINO-SAMMARTANO, *supra* note 6 at 4.

may be defined as arbitration without formalized rules or procedures; that has been specifically engineered for the particular agreement or dispute²⁰⁵; it is arbitration which is not conducted or administered by any institution or according to the rules of any institution²⁰⁶. Institutional arbitration, as is evident, is arbitration administered or conducted by an existing institution, according to the rules of that institution.²⁰⁷ The rules relating to the arbitration proceedings²⁰⁸ and the extent of involvement in the administration of the arbitration varies with each institution.²⁰⁹ There are advantages and disadvantages to both these systems.

D. Advantages of Ad hoc Arbitration

The defining characteristic of ad hoc arbitration is that it is independent of any institution.²¹⁰ Ad hoc arbitration processes do not possess any procedures for conducting arbitration proceedings; parties have the freedom to choose any procedure and law that they desire.²¹¹ In cases where the parties do not choose the applicable rules, the arbitrators tend to

²⁰⁵ See www.edcostello.com.

²⁰⁶ LEW ET AL., *supra* note 1 at 3-12: “The one exception where there may be the involvement of an institution in an ad hoc arbitration is with respect to the appointment of arbitrators. On occasion, where parties are unable to agree, they can select an appointing authority which has responsibility for selecting and appointing the arbitrator. Several of the major institutions provide a service of this kind”.

²⁰⁷ RUBINO- SAMMARTANO, *supra* note 6 at 4.

²⁰⁸ LEW ET AL., *supra* note 1 at 3-18: “Every arbitration institution has its own special characteristics and rules, the rules differ in areas including the following: the number of arbitrators in the proceedings, the right of the parties to select, nominate and appoint arbitrators, the power of the arbitrators to control the proceedings, the method of determining the costs of the arbitration and the fees of the arbitrators, the degree of independence and neutrality required of the arbitrators”.

²⁰⁹ *Id* at 3-19: “For example, the ICC is heavily administered with the terms of reference, fixing of times for making the award, and scrutiny procedures being fundamental to the system. By contrast the LCIA limits its administration to dealing with challenges to the arbitrators and to interceding to agree, collect and pay the fees of the arbitrators”; see generally W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, 3 (2000).

²¹⁰ LEW ET AL., *supra* note 1 at 3-9; Gerald Asken, *Ad Hoc versus Institutional Arbitration*: The ICC International Court of Arbitration Bulletin (June 1991) at II.

²¹¹ LEW ET AL., *supra* note 1 at 3-10: “This includes how the arbitrators are to be appointed, how many arbitrators there should be, the procedure to be followed, the arrangements for the presentation of evidence and how the arbitration should be pleaded. The parties can also agree on the timetable for the arbitration and any other special

conduct the proceedings in a manner that they deem appropriate.²¹² The advantages of ad hoc arbitration are as follows:

(1) The chief advantage of ad hoc arbitration is flexibility. As described above, an ad hoc procedure can be shaped to meet the needs and requirements of the parties and the facts of the particular dispute.²¹³ Ad hoc arbitration is also a good alternative when parties cannot agree on an arbitration institution.²¹⁴

(2) Another advantage of ad hoc arbitration is that parties to the arbitration have more control over the procedure rather than be subjected to the control of the administering institution.²¹⁵

(3) Yet another advantage is significant savings in terms of costs and time for the parties. Since most arbitration institutions charge administrative fees, parties can save on such fees and other associated costs when they opt for ad hoc arbitration. Similarly, parties can save time by avoiding the internal procedures and other time periods associated with institutional arbitration.²¹⁶

The promulgation of the UNCITRAL Arbitration Rules²¹⁷ gave a major boost to ad hoc arbitration.²¹⁸ Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship; prior to the establishment of the

requirements to reflect the specific characteristics of the contract in dispute”; GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 2 (2006).

²¹² Asken, *supra* note 210 at III.

²¹³ *Id.*

²¹⁴ LEW ET AL., *supra* note 1 at 3-14.

²¹⁵ *Id.*

²¹⁶ Asken, *supra* note 210 at III: “Since most arbitral institutions charge fees for their administrative services, the parties save the administration fees when they opt for ad hoc arbitration”, however, a contrasting argument is presented by LEW ET AL., *supra* note 1 at 3-16: “A perceived but not necessarily correct advantage of ad hoc arbitration is that, because the parties control the process, it can be less expensive than institutional arbitration. In fact this depends in each case and on how the institution charges for its arbitration services”.

²¹⁷ Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

²¹⁸ Asken, *supra* note 210 at III.

rules, parties had to draft their own procedures or rely on arbitrators to provide the procedures.²¹⁹ The Rules and are widely used in many ad hoc arbitrations (as well as administered arbitrations).²²⁰ The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award²²¹ and can be regarded as a substitute for the rules of Arbitral Institutions. The rules can be readily adopted by parties.²²² Other recent alternatives for ad hoc arbitrations include the “Permanent Court of Arbitration Rules Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State” promulgated by the Permanent Court of Arbitration²²³ and the rules for non-administered international arbitrations published by the CPR Institute for Dispute Resolution.²²⁴

Ad hoc arbitration requires the complete cooperation of the parties and their legal representatives.²²⁵ In the words of Alan Redfern, “if such cooperation is forthcoming, the difference between ad hoc arbitration and institutional arbitration is like the difference between a tailor made suit and one which is bought off the peg”.²²⁶ Such cooperation is, however, difficult to achieve when parties are at odds with each other and given such a situation, parties will not reach an agreement on any issue, leave alone issues of choice of laws or administrative procedures.²²⁷

²¹⁹ Asken, *supra* note 210 at III.

²²⁰ LEW ET AL., *supra* note 1 at 2-35.

²²¹ *See id* at 2-36.

²²² Asken, *supra* note 210 at III.

²²³ Born, *supra* note 211 at 61.

²²⁴ *Id.*

²²⁵ BÜHRING-UHLE ET AL., *supra* note 8 at 39; Asken, *supra* note 210 at III; *see* Born, *supra* note 211 at 60.

²²⁶ Asken, *supra* note 210 at III.

²²⁷ BÜHRING-UHLE ET AL., *supra* note 8 at 39.

With ad hoc arbitrations there exists a dilemma in drafting the dispute resolution clauses: “Before the dispute arises, the parties lack the necessary information about the dispute to really cover all aspects that might become irrelevant-unless they cover every contingency, which, if not impossible, will be too expensive to do. And once the dispute has materialized, the parties are often too much at odds with each other-and may be too preoccupied with tactical considerations-to reach agreement about the many issues that have to be covered.”²²⁸ This dilemma does not exist in institutional arbitration in that the dispute resolution rules drafted by institutions are detailed enough to cover a wide variety of situations.²²⁹ More importantly, the institution provides for a neutral authority that can resolve procedural issues and deadlocks.²³⁰

Another disadvantage of ad hoc arbitration is that in cases where the parties do not choose the applicable rules, the arbitrators tend to conduct the proceedings in a manner that they deem appropriate.²³¹ This lends much unpredictability to the outcome of the proceedings. Most importantly, ad hoc arbitration lacks the predictability, security and administrative effectiveness that reputed established arbitration institution offer.²³²

²²⁸ BÜHRING-UHLE ET AL., *supra* note 8 at 39.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See LEW ET AL., *supra* note 1 at 3-13.

E. Advantages of Institutional Arbitration

The chief advantages of Institutional Arbitration are as follows:

- (1) In institutional arbitration, parties can “take comfort” in the well established rules and procedures of the institution. There is a sense of security and guarantee when the arbitration proceedings are handled by an institution of repute.²³³
- (2) The arbitrators appointed or suggested by institutions are well-qualified to resolve the dispute at hand. Institutions typically follow a thorough selection process when selecting arbitrators.²³⁴
- (3) Parties do not have to concern themselves with various aspects of handling the arbitration. The administration of the arbitration process is dealt with in a professional and experienced manner. The institution will provide a wide variety of services that cannot be matched by ad hoc arbitration.²³⁵

Arbitral institutions gain judicial respect by virtue of their proven track record in handling arbitration proceedings. When the institution has an established record of handling all procedural and substantive aspects of the arbitration in a meritorious and thorough manner, courts are inclined to confirm the awards rendered by that institution.²³⁶ This is a singular advantage of institutional arbitration over ad hoc arbitrations. A key benefit is the increasing recognition of arbitral institutions by national courts and the evidence of increasing judicial

²³² See LEW ET AL., *supra* note 1 at 3-21, *see also* BÜHRING-UHLE ET AL., *supra* note 8 at 36.

²³³ BÜHRING-UHLE, ET AL *supra* note 8 at 36; Asken, *supra* note 210 at IV; LEW ET AL., *supra* note 1 at 3-21, 3-22.

²³⁴ Asken, *supra* note 210 at IV.

²³⁵ *Id.*

²³⁶ Asken, *supra* note 210 at IV, explaining the deference of courts to arbitration institutions as follows: “Several institutions have enjoyed notable success due to their long and proven track records. England has accepted the reference to ICC Rules as evidencing an intent to opt out of appeals to the national courts of that country. The U.S. Supreme Court permitted the ICC and American Arbitration Association (AAA) to file amicus curiae briefs as friends of the court on the procedures of international arbitration in the most important international arbitration

deference to established arbitration institutions can be witnessed from a number of cases.²³⁷ On the other hand, the advantages of an institutional award only materialize when the award is not contradicted by a national court which vacates or refuses to enforce the award; there have been instances where awards of established institutions were rendered obsolete by national courts.²³⁸

Many international practitioners advocate institutional arbitration rather than ad hoc arbitration.²³⁹ Their recommendation is based on the enhanced predictability and regularity that institutional arbitration provides, apart from the benefits of incorporating institutional rules.²⁴⁰ Though the advantages of institutional arbitrations outweigh the advantages of ad hoc arbitration, it remains that parties do not have sufficient recourse to appeal in the existing arbitration institutions.²⁴¹ In such cases, and cases where parties do not wish to opt for ad hoc appeal, they will have no option but to choose the court system. Hence, it is imminent that we provide a source of appellate arbitral relief through a supranational institution that provides the security and guarantee of a court system within the realm of the arbitration system itself. The establishment of the AARB will undoubtedly provide the much-needed effective, predictable, secure and reputable source of appeal of arbitral awards.

decided in the U.S. in the last decade. Indeed, the Supreme Court in that case cited to the ICC's brief in expanding the range of issues resolvable in international arbitration." See BÜHRING-UHLE ET AL., *supra* note 8 at 38.

²³⁷ Asken *supra* note 210 mentioning the following cases: *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth Inc.*, 105 S. Ct. 3346, (1985); *Arab African Energy Corp. Ltd. V. Olieprodukten Nederland B.V.*, [1983] Lloyd's Rep. 419 (Q.B.); *Appollo Computer, Inc. v. Berg.*, 886 F.2d 469, 473-74 (1st Cir. 1989); *Daiei, Inc. v. United States Shoe Corp.*, 755 F.Supp. 299, 303 (D. Haw. 1991) and *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International Ltd.*, 888 F.2d 260 (2d Cir. 1989).

²³⁸ See *S.P.P. (Middle East) Ltd. And Southern Pacific Properties Ltd. v. The Arab Republic of Egypt and the Egyptian General Organization for Tourism and Hotels*, 22 I.L.M. 752 (1983); BÜHRING-UHLE ET AL., *supra* note 8 at 37.

²³⁹ BORN, *supra* note 211 at 59: "Many international arbitration practitioners fairly decisively recommend institutional arbitration, rather than ad hoc arbitration. They do so primarily because of the enhanced predictability and regularity that institutional arbitration provides, as well as the benefits of incorporating institutional rules (e.g., provisions concerning formation of the arbitral tribunal, limitations on judicial review). Particularly at the outset of an arbitration, between sometimes inexperienced parties from different legal cultures, an institution's role in moving proceedings along can be highly constructive and efficient."

²⁴⁰ *Id.*

²⁴¹ *Infra* at pages 34-39.

F. Conclusion

Arbitration is a system of dispute resolution that has been created on the fundamental bases of “efficiency” and “finality”.²⁴² The failure of major arbitration institutions to provide an appellate review procedure can be attributed to the belief that appellate review of awards undermines the efficiency of the arbitration system in addition to toying with the finality of the award.²⁴³ However, in their quest to protect arbitration, those institutions have failed to provide an effective means for the rectification of awards that may be based on flawed reasoning or contain substantive errors or be well outside the scope of the arbitrator’s decision-making powers.²⁴⁴ Instead of adding strength to the system of arbitration, this has resulted in parties turning the other way and looking upon the judicial system to address issues that could have well been addressed within the arbitral system.²⁴⁵ As a way of ensuring fairness in the system of arbitration and balancing the best interests of the arbitrating parties with the fundamental integrity of the arbitration process, appellate review of arbitral awards must be incorporated within the system of arbitration. The establishment of the AARB arbitration will undoubtedly achieve that result.

²⁴² Gaitis, *supra* note 171 at 13.

²⁴³ *Id.*

²⁴⁴ *Infra* at pages 34-39.

²⁴⁵ *Id.* at page 39.

CHAPTER 5

RECOMMENDATIONS FOR THE AARB

The AARB must be modeled on principles of finality of the award, easy enforcement and recognition, binding decisions on member states, speedy and cost effective resolution, arbitrators with expertise, a neutral system of laws, impartial arbitrators bound by a strong moral code, equal representation of arbitrators and reasonable scope of review, all of which have been mentioned as the important advantages of arbitration.²⁴⁶ Establishing the AARB on the suggested principles will make it an ideal source of appeal for arbitral awards rendered throughout the world. Just as countries need the AARB for the regulating and unifying the appeal of arbitral awards, the AARB needs the ratification of countries in order to be established. Hence, it is

²⁴⁶ See Newman & Hill, *supra* note 62 at 416: According to the opinion of arbitration experts, the most important and valuable advantages of arbitration are the following: “neutral forum, international enforcement by treaty, confidential procedure, expertise of the tribunal, lack of appeal, limited discovery, speed, more amicable, greater degree of voluntary compliance, less costly procedure and more predictable results”; see also William S. Fiske, *Should Small And Medium-Size American Businesses “Going Global” Use International Commercial Arbitration?* 18 TRNATLAW 455 (2005) at 461-462, where the author mentions the following as reasons why arbitration is chosen over litigation: “The trend towards arbitrators, rather than judges, is increasing for a number of reasons. First, arbitration is a very private process compared to public trials that generate public records. Second, parties can agree the dispute resolution procedure will be neutral with regard to the nationality of the arbitrators, applicable law, venue, and language. Third, disputes arising from complex international agreements are best handled by arbitrators with expertise in the relevant field, rather than potentially biased and unsophisticated judges and juries. Fourth, arbitration is generally an affordable alternative to costly adjudication. Fifth, specialized types of arbitrations are available for quick and efficient arbitral procedures, which is ideal for transnational businesses that aim to keep operations running as usual. In comparison, public courts often have heavy caseloads that retard issue resolution. Sixth, arbitrators are generally interested in reaching a decision through a process that preserves the ongoing business relations between the parties. This emphasis on flexibility to the parties’ needs contrasts with a common law adversarial system that encourages “dyed-in-the-wool, hard-edge, brass knuckles U.S. litigation tactics” that often destroy business relationships. Seventh, parties are able to contract for the substantive and procedural law governing the arbitration. Their choice of law selection is overwhelmingly respected by arbitration institutions, arbitrators and courts enforcing the arbitral award. Lastly, and perhaps most importantly, contracting for arbitration restricts disputes to the arbitration forum. An institutional arbitration award ensures the arbitrator’s decision will be enforceable in many public court systems. The accelerated use of international commercial arbitration suggests its framework supplies fairness, privacy, predictability, finality, and other transborder business needs.”

important that the AARB indoctrinates features that will make it viewed upon as *the* source of arbitral appeal by countries around the world.

A. Finality of the Award: Waiver of Judicial Recourse

One of the main purposes of arbitration is to achieve a final and binding determination of a dispute. In order to ensure finality of the award, it is suggested that parties to the arbitration governed by the AARB must agree to waive or relinquish the right to judicial or any other form of recourse.²⁴⁷ This waiver of the right to judicial recourse will render the award final and binding on the parties.

Article 64(a) of the WIPO rules provides that when parties agree to arbitration under that system, they will be deemed to have waived their right to an appeal or recourse to a court or other judicial authority.²⁴⁸ However, the parties may waive their right to appeal only “to the extent that such a waiver is valid under the applicable law.”²⁴⁹

The ICSID Convention provides for complete waiver of judicial recourse, through Article 53 which states that “[T]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” Thus, appeals may not be sought in national courts. The Washington Convention binds all member states to ensure that their courts recognize and enforce ICSID awards.²⁵⁰

²⁴⁷ Knull & Rubins, *supra* note 4 at 562

²⁴⁸ Christopher Gibson, *Awards and Other Decisions*, 9 Am. Rev. Int’l Arb. 181 at 199-200, *see* exception to the rule at FN 62: “Note, however, that concerning interim measures of protection or security for claims and costs, Article 46(d) of the WIPO Rules provides in pertinent part that a request for such relief addressed to a judicial authority “shall not be deemed incompatible with the Arbitration Agreement.”

²⁴⁹ *Id* at 200: “This form of wording carries with it the implication that the waiver of all forms of appeal is not always permissible, and the impact of the law of the place of arbitration must be considered.”

²⁵⁰ Knull & Rubins, *supra* note 4 at 552.

Thus, when parties are bound by rules of a convention to waive appeals, the award rendered is indeed final and binding and the parties cannot seek further review. In order to give finality to the awards rendered by the AARB, the waiver of right to appeal must be indoctrinated in the rules relating to its establishment. The AARB must be established by an international convention which will bind on all signatory countries and the courts of participating states will also be required to recognize and enforce the awards of the appellate body.²⁵¹

Recourse in Cases of Erroneous Awards

While all care will be taken to ensure that the awards rendered by any tribunal of the AARB are meritorious and devoid of errors, there should still be sufficient recourse available in case of erroneous or flawed awards. If an award rendered by the AARB is deemed erroneous or flawed (after a thorough determination), the remedial options available include reform of the existing award, issuing a new award replacing the erroneous award or reversal of the award.²⁵²

B. Choice of Law for the AARB

The idea of establishing a permanent body of arbitral appeal comes with the question of appropriate choice of law for the arbitration proceedings. Keeping in mind the varied legal

²⁵¹ See Holtzmann, *supra* note 6 at 112; see also Schwebel, *supra* note 6 at 116 – 119; see RUBINO-SAMMARTANO, *supra* note 6 at 35.9 and Newman & Hill, *supra* note 62 at 416.

²⁵² Knull & Rubins, *supra* note 4 at 563: The scope of remedies available to an arbitral appeals panel is as important an aspect of a review system as the review itself. Should such a panel decide that an award is erroneous, there are a number of actions that it could take, and the parties should agree at the outset which of these options will be available to the appellate panel, to avoid disputes over the appeal tribunal's authority and to better reflect the parties' preferences with regard to economy and accuracy. If an award is flawed but not fatally so, an appeal tribunal could be empowered to reform the award, or to issue a new award replacing the erroneous one. Alternatively, the award could be reversed and remanded, either to the original panel or, in some rare circumstances where the original arbitrators were unavailable or somehow suspect or disqualified given the issues on appeal, to a new panel, with instructions on how errors were to be corrected. This list of components of a potential appeal option is in no way

backgrounds of the participants in international commercial arbitration proceedings, the adoption of a system of laws that does not conform to one country or region but is instead of a transnational²⁵³ or a-national²⁵⁴ nature seems a wise choice.

There is an emerging trend towards the codification and adoption of transnational laws or *lex mercatoria*²⁵⁵ in international trade and commercial disputes.²⁵⁶ The terms “lex mercatoria” and “transnational laws” are used synonymously with the terms “transnational commercial law”, “principles common to several legal systems” and international trade usages”.²⁵⁷ In the words of Emmanuel Gaillard, “[T]he validity of choosing general principles of law - also frequently referred to as transnational rules or *lex mercatoria*- to govern an international contract is widely accepted in international commercial arbitration today”.²⁵⁸ The increasing acceptance of transnational rules can be witnessed from recent decisions of arbitration institutions²⁵⁹ and national courts²⁶⁰.

exclusive and additional research and discussion among practitioners and corporate counsel will be required to draft effective clause language and evaluate the practical results of all options.

²⁵³ See generally Arthur T. von Mehren, *The Rise of Transnational Legal Practice and The Task of Comparative Law*, 75 Tul. L. Rev. 1215 (2001) and Hans Smit, *A-National Arbitration*, 63 Tul. L. Rev. 629 (1989); see also RUBINO-SAMMARTANO, *supra* note 6 at 35.10

²⁵⁴ *Id.*

²⁵⁵ *Lex Mercatoria* has been defined as “A body of principles and regulations applied to commercial transactions and deriving from the established customs of merchants and traders rather than the jurisprudence of a particular nation or state” by www.answers.com. www.wikipedia.com defines *Lex Mercatoria* as follows: “The Law Merchant, or Lex Mercatoria, was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. It originated from the problem that civil law was not responsive enough to the growing demands of commerce: there was a need for quick and effective jurisdiction, administered by specialized courts”.

²⁵⁶ Stephen Jagusch, *Recent Codification Efforts: An Assessment*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO.3. TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? (Anne Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005) and see generally all other authors in the same book.

²⁵⁷ LEW ET AL., *supra* note 1 at pages 18-46.

²⁵⁸ Jagusch, *supra* note 256 at 65.

²⁵⁹ Matthias Scherer, *The Recognition of Transnational Substantive Rules by Courts in Arbitral Matters*, in IAI SERIES ON INTERNATIONAL ARBITRATION NO.3. TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? (Anne Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005) at 95-100 mentioning the following cases: See Sept. 1, 1988 Partial award in ICC Case No. 5953, *Compañía Valenciana de Cementos Portland SA (Spain) v. Primary Coal Inc. (US)*, 1990 Rev. ARB. 701, Oct 26; 1979 Award in ICC Case No. 3131, *Pabalk Ticaret Limited Sirketi v. Norsolor*, 1983 REV. ARB.525; Final Award in ICC Case No. 3572, *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH. v. Government of the State of R'as Al Khaimah (UAE) & the*

Goldman's definition of *lex mercatoria* is particularly relevant to the context of international commercial arbitration: "Lex mercatoria would thus, irrespective of its origin and the nature of these sources, be the law proper to international economic (commercial) relations. One would encompass not only transnational customary law, whether it is codified or not (and in the latter case revealed and clarified by arbitral awards) but also law of an interstate, or indeed State, which relates to international trade."²⁶¹ Goldman's definition goes on to mention that the Hague Conventions of 1964²⁶², the Vienna Convention of 1980²⁶³, the Conventions establishing Uniform Laws for the International Sale of Goods²⁶⁴ and national laws that specifically dealt with international trade would all be part of *lex mercatoria*.²⁶⁵

The UNIDROIT Principles of International Commercial Contracts (hereinafter the UNIDROIT Principles)²⁶⁶, the Principles of European Contracts²⁶⁷ and the CENTRAL List of Lex Mercatoria Principles, Rules and Standards (hereinafter CENTRAL List)²⁶⁸ constitute efforts at the codification of transnational laws relating to international commercial disputes,

R'as Al Khaimah Oil Co. (Rakoil), XIV Y.B. COM. ARB. 111 (1989); May 5, 1997 Final Award in ICC Case No. 7365.

²⁶⁰ *Id* mentioning the following cases: CA Paris, July 13, 1989, *Compañía Valenciana de Cementos Portland v. Primary Coal*, 1990 REV. ARB. 663; Cass. Le civ., Oct.22 1991, *Compañía Valenciana de Cementos Portland v. Primary Coal Inc.*, 1992 REV. CRIT. DIP. 113; Austrian Sup. Ct (Oberster Gerichtshof), Nov. 18, 1992, *Norsolor v. Pabalk*, 1983 REV. ARB. 516(1983), 110 J.D.I. 645 (1983); CA Paris, Dec. 15, 1981, *Norsolor v. Pabalk Ticaret Sirketi*, 1983 REV. ARB. 465; Court of Appeal, Mar. 24, 1987, *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH. v. R'as Al Khaimah Oil Co. (Rakoil)*, [1987] 2 Lloyd's Rep.246, [1987] All E.R. 769; House of Lords, June 23, 1998 [1998] 3 W.L.R. 230, 27 I.L.M. 1032 (1998), 3 (7) INT'L ARB. REP 3 and AI (1998) (The House of Lords reversed the Court of Appeal's decision on other grounds but did not contradict the reasoning relating to the application of "internationally accepted principles of law"); United States District Court, Southern District of California, Dec7 1998, *Ministry of Defence and Support for the Armed forces of the Islamic Republic of Iran v. Cubic Defense Systems*, 29 F. Supp.2d 1168(S.D. Cal 1998); LEW ET AL., *supra* note at 18-50, 18-51; CRAIG ET AL., *supra* note 190 at § 5.05, 5.06.

²⁶¹ LEW ET AL., *supra* note 1 at 18-47.

²⁶² Convention Relating to a Uniform Law on the International Sale of Goods, (1964), (ULIS), Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, (1964) (ULF).

²⁶³ The U.N. Convention on Contracts for the International Sale of Goods, 1980 (Vienna Sales Convention, 1980).

²⁶⁴ United Nations Convention on Contracts for the International Sale of Goods, (Apr. 1980) (CISG).

²⁶⁵ LEW ET AL., *supra* note 1 at 18-47.

²⁶⁶ UNIDROIT (or the International Institute for Unification of Private Law) available at <http://www.unidroit.org/english/home.htm>.

²⁶⁷ Available at <http://cisgw3.law.pace.edu/cisg/text/textef.html>.

given that there is an increasing number of commercial relationships that would benefit from the application of transnational laws as opposed to a single national law.²⁶⁹ Each of these three principles has its own advantages and disadvantages.²⁷⁰ While the Central List represents a more contemporary approach to the codification of transnational law, the UNIDROIT principles and principles of European Contracts have evolved over time.²⁷¹ In consideration of which of these codes is the “favorite”, it appears that the UNIDROIT principles are preferred over the other two.²⁷²

Any of these principles may serve the purposes of the AARB or the AARB may create its own code of transnational principles. In creating such code, national laws that deal with international trade, customary practice, relevant international conventions and the laws of arbitral institutions may all be sources of inspiration.²⁷³ In creating a code for the appellate institution, we should bear in mind that the code should be acceptable to participants from varied national backgrounds.

C. Framework of the AARB

The main rationale behind the AARB is to create an institution of appeal whose decisions have a binding effect. Since the rules of supranational bodies or conventions have binding effect

²⁶⁸ Available at http://tldb.uni-koeln.de/php/pub_show_toc.php.

²⁶⁹ Jagusch, *supra* note 256 at 64-66.

²⁷⁰ *Id* at 73-90.

²⁷¹ *Id* at 85.

²⁷² Jagsuch, *supra* note 256 at 89.

²⁷³ See LEW ET AL., *supra* note 1 at 18-47; see also Marc Henry, *The Contribution of Arbitral Case law and National Laws in IAI SERIES ON INTERNATIONAL ARBITRATION NO.3. TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW?* (Anne Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005).

on the member states,²⁷⁴ it stands to reason that the AARB will be a supranational body created by an international convention. All countries that are signatories to the convention must treat the awards rendered by the AARB as final. There will be uniform recognition and enforcement of those awards in all the member states, with no interference from national courts.²⁷⁵

Even with an international convention, it is still possible that the argument of immunity may be raised by states (when a state is a party to the proceeding or in some way can establish a link to the arbitration) in order to avoid an unfavorable decision,²⁷⁶ as the *Benvenuti & Bonfant v. Congo*²⁷⁷, *SOABI (Seutin) v. Senegal*²⁷⁸ and the *Liberian Eastern Timber Corp. (LETCO) v. Government of Republic of Liberia*²⁷⁹ cases illustrate. It is also important that the states waive immunity in relation to the enforcement and execution of awards rendered by the AARB.²⁸⁰ Hence arbitration agreements drafted by the AARB must include a clause to expressly waive any claims to immunity.²⁸¹ The ICSID suggests a model for waiver of immunity clause which stipulates as follows:

“The [name of contracting state] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.”²⁸²

²⁷⁴ See for example, the New York Convention and the ICSID Convention.

²⁷⁵ See RUBINO-SAMMARTANO, *supra* note 6 at 35.9; see also Newman & Hill, *supra* note 62 at 416, Holtzmann, *supra* note 6 at 112 and Schwebel, *supra* note 6 at 116 – 119.

²⁷⁶ See LEW ET AL., *supra* note 1 at 8-46; see also RUBINO-SAMMARTANO, *supra* note 6 at 35.10. Susan Choi, *Judicial Enforcement of Arbitration Awards Under The ICSID And New York Conventions*, 28 NYUJILP 175, 181-184 (1996), mentioning the cases quoted herewith.

²⁷⁷ Judgment of Dec. 23, 1980 (*Benvenuti & Bonfant S.A.R.L. v. Government of the People's Republic of Congo*), Trib. gr. inst., Paris, 108 Journal du Droit International 365 (1981); 1982 Revue de l'Arbitrage 204, reprinted in 1 ICSID Reports 368 (R. Rayfuse ed., 1993).

²⁷⁸ *État du Sénégal v. Seutin es qualité de liquidateur amiable de la SOABI*, Judgment of Dec. 5, 1989, Cour d'appel, 117 Journal du Droit International 141 (1990); 1990 R. Arb. 164, reprinted in 29 I.L.M. 1341 (1990); 5 ICSID Rev. Foreign Investment L.J. 135 (1990).

²⁷⁹ 650 F. Supp. 73, 74-75 (S.D.N.Y. 1986) aff'd, 854 F.2d 1314 (2d Cir. 1987).

²⁸⁰ See RUBINO-SAMMARTANO, *supra* note 6 at 35.9.

²⁸¹ See LEW ET AL., *supra* note 1 at 8-46, see also RUBINO-SAMMARTANO, *supra* note 6 at 35.10.

²⁸² Choi, *supra* note 276 at 214.

The AARB should include a model clause which runs on the lines of the ICSID clause. Including such a provision will undoubtedly ensure that the decisions of the AARB are truly binding and easily enforceable in all the member countries.

D. Appointment of the Arbitrators

Number of Arbitrators

Generally, most arbitration tribunals are composed of a three-member panel or a single arbitrator.²⁸³ If the parties to the arbitration do not agree on the number of arbitrators, the rules of a number of institutions provide for the appointment of three arbitrators,²⁸⁴ while others provide for a solo arbitrator.²⁸⁵ The main advantage of a three-member panel is that there may be improved quality of the award with three arbitrators discussing the case.²⁸⁶ There is also lesser possibility that the award rendered is erratic or erroneous.²⁸⁷ With a three-member panel, parties will have the services of technical *and* legal experts to decide the issue. On the other hand, three-member panels tend to be more expensive than solo arbitrators.²⁸⁸ There is also the possibility that the arbitrators may have conflicting schedules that makes it difficult for them to be present simultaneously.²⁸⁹ There may also be problems within the tribunal if one of the arbitrators acts in

²⁸³ LEW ET AL *supra* note 1 at 10-10. The authors also mention that, generally, three member panels are preferred in civil law countries while solo arbitrators are preferred in common law countries.

²⁸⁴ *Id* at 10-18 to 10-20 mentioning UNCITRAL Rules Article 5; China International Economic and Trade Arbitration. Commission (CIETAC) Rules Article 24; German Institution of Arbitration (hereinafter DIS) Rules section 3 (1); Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules Rule 5.

²⁸⁵ *Id* at 10-13 mentioning Article 8(2) of the ICC rules which states as follows: “Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators”; *id* at 10-15 quoting Article 15 (3) of the English Arbitration Act which provides that: “If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator”.

²⁸⁶ *See* BORN, *supra* note 211 at 68; LEW ET AL., *supra* note 1 at 10-18.

²⁸⁷ LEW ET AL., *supra* note 1 at 10-19.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

a way that is detrimental to the interests of the arbitration.²⁹⁰ Given all these factors, it still remains that the proposition of three-member panels to deal with the arbitration proceedings seems a viable idea²⁹¹, with the arbitration proceedings administered by the AARB.²⁹²

Method of Appointment of Arbitrators

Since party autonomy is of primary importance, the selection of the arbitrators is left to the choice of the parties.²⁹³ The parties to the arbitration proceeding must be given equal opportunity to each select an arbitrator of their choice²⁹⁴ and the third member of the panel, who will act as the chairman of the panel will be chosen by mutual agreement of the parties or the arbitrators.²⁹⁵ In instances where the arbitrators do not agree on the choice of the third arbitrator/chairman by a stipulated time limit²⁹⁶, or specifically request (with the consent of the parties) that the chairman be appointed, such appointment will then be instituted by the AARB.

Section 809 of the Italian Rules of Civil Procedure states that:

“Where the number of arbitrators is not indicated and where the parties do not agree thereon, there shall be three arbitrators and, failing their appointment, the president of the tribunal shall proceed therewith in the manner specified in Article 810, unless the parties have provided otherwise.”²⁹⁷

Article 38 of the ICSID Convention, Regulation and Rules provides that

“If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph 3 of Art.36, or such other period as the parties may agree, the Chairman shall, at the request of either party, and after consulting both

²⁹⁰ LEW ET AL., *supra* note 1 at 10-19.

²⁹¹ RUBINO-SAMMARTANO, *supra* note 6 at 35.9.

²⁹² *See id.*

²⁹³ LEW ET AL., *supra* note 1 at 10-45

²⁹⁴ *Id* at 10-81

²⁹⁵ *Id* at 10-90.

²⁹⁶ *Id* at 10-92 to 10-95 mentioning the following: Article 8(4) of the ICC Rules, Article 7(3) of the UNCITRAL Rules, CPR Arbitration Rules Rule 5 (2), DIS Rules Section 12 (2) Grain and Free trade Association (hereinafter GAFTA) Rule 3:2 (d).

²⁹⁷ Available at <http://www.camera-arbitrale.com/show.jsp?page=169949>.

parties as far as possible, appoint the arbitrator or arbitrators not yet appointed...”²⁹⁸

Similarly, the AARB will appoint arbitrators under the following circumstances: (1) if the parties fail to reach an agreement on the appointment of the arbitrators by a reasonable time limit or (2) either party to the proceeding fails to choose an arbitrator or (3) if the selection is left to the discretion of the AARB. The reason behind this provision is that the arbitration should not be discourage parties from engaging in delaying tactics²⁹⁹ and to bring a speedy resolution to the dispute at hand.

E. Code of Ethics for the Arbitrators

The conduct of the arbitrators is of prime importance in conducting a fair and just arbitration. Arbitration laws, ethical codes and the rules of various arbitration institutions and conventions set forth the requirements regarding confidentiality³⁰⁰, disclosure³⁰¹ and impartiality and independence³⁰² that arbitrators must adhere to. Henry Gabriel and Anjanette H. Raymond present a synthesized format,³⁰³ drawn from the general rules of major arbitral institutions, the specific ethical rules of arbitral institutions as well as the laws that govern arbitration. The ten-point synthesis provides as follows:

²⁹⁸ Available at <http://worldbank.int/icsid/basicdoc/partA-chap04.htm>.

²⁹⁹ See LEW ET AL., *supra* note 1 at 10-86.

³⁰⁰ LEW ET AL *supra* note 1 at 12-20: For example, LCIA Article 30(2), AAA International Center for Dispute Resolution (ICDR) Rules Article 34, International Bar Association (IBA) Rules of Ethics Rule 9; *see generally* TIBOR VÁRADY, JOHN J. BARCELÓ & ARTHUR T. VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* 2 (2003) at 252-261.

³⁰¹ LEW ET AL *supra* note 1 at 11-30: Model Law Article 12, Sweden Arbitration Act Section 9, France NCPC Article 1452, UNCITRAL Rules Article 9, ICC Rules Article 7 (2), DIS rules Section 16 and LCIA Article 5 (3).

³⁰² LEW ET AL *supra* note at 11-6 to 11-10 mentioning Article 5(2) of the LCIA Rules, Article 22 (a) of the WIPO Rules, UNCITRAL Rules Article 9 and IBA Rules of Ethics Rules 1 and 3-1.

³⁰³ Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYLR 453 (2005).

(1) Duty of Competency (2) Duty of Independence and Impartiality (3) Duty to Uphold the Integrity and Fairness of the Proceeding (4) Duty of Disclosure (5) Duty to Communicate (6) Duty to Act Professionally (7) Duty to Render a Decision (8) Duty to Act in a Fiduciary Manner (9) Compensation and (10) Duty of Non-Neutral Arbitrator. This 10-point synthesis may serve as a model in drafting the ethical code for the AARB.

F. Qualifications of the Arbitrators

Much has been said about the specialized knowledge and experience that is sought from international arbitrators.³⁰⁴ An important criterion in the selection process of an arbitrator is the professional background of the arbitrator; for instance, disputes from the textile industry would require completely different experience and knowledge than disputes from the software industry.³⁰⁵ For this reason, the AARB should maintain an exhaustive list of experts with different technical backgrounds.³⁰⁶ Equally important is the selection of legal experts.³⁰⁷ Even simple disputes in international commercial arbitration may lead to complex procedures or conflict of laws; such problems will require to be handled by a lawyer or arbitrator with thorough knowledge about international arbitration law and practice.³⁰⁸ Hence the AARB's roster should contain a combination of eminent technical *and* legal experts.

It is also important for the AARB to select arbitrators who possess relevant awareness of different cultural and legal backgrounds because such awareness will be helpful in gaining the

³⁰⁴ *Infra* at Chapter III, page 17-18.

³⁰⁵ LEW ET AL., *supra* note 1 at 10-38; *see* VÁRADY ET AL *supra* note 300 at 278.

³⁰⁶ *See* Knull & Rubins, *supra* note 4 at 540; *see also* Newman & Hill *supra* note 62 and Fiske, *supra* note 246.

³⁰⁷ LEW ET AL., *supra* note 1 at 10-38 to 10-40.

³⁰⁸ *Id.*; Knull & Rubins, *supra* note 4 at 540

acceptance of parties from different backgrounds.³⁰⁹ Since it is generally advocated that international arbitrators possess command of the language of the arbitration proceedings rather than require the services of a translators³¹⁰, it would be additionally useful if AARB provided the services of arbitrators from varied linguistic backgrounds or who possess command of different languages. While contemplating the set up of the AARB, it has to kept in mind that there should be a comparable number of arbitrators from different countries so as to provide as equal a representation as possible.

G. Scope of Review

“[T]he more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error. But often at a heavy price.”³¹¹

One of the primary considerations in establishing an appellate body of arbitral review is to provide for a speedy process of appeals. But a thorough review of merits³¹² should not to be compromised for the ends of an expedited appeals system.³¹³ The AARB is, therefore, faced with the daunting task of balancing a thorough system of review with speed and expediency. It is also important to take into consideration the needs and expectations of the parties. Existing rules of arbitration provide a wide gamut of choices ranging from minimal standards of review³¹⁴ to broad “de novo” standards of review³¹⁵.

³⁰⁹ LEW ET AL., *supra* note 1 at 10-41.

³¹⁰ *Id* at 10-42.

³¹¹ Knull & Rubins, *supra* note 4 at 563, quoting Lord Justice Dyson, *Finality in Arbitration and Adjudication: The Eversheds Lecture 2000*, 66 ARBITRATION 288 (2000).

³¹² See RUBINO-SAMMARTANO, *supra* note 6 at 35.9.

³¹³ LEW ET AL., *supra* note 1 at 21-88.

³¹⁴ Knull & Rubins, *supra* note 4 at 560; New York Convention Rules, UNCITRAL Rules

³¹⁵ See Grain And Feed Trade Association (GAFTA) Arbitration Rules, Rule 10; Coffee Trade Federation (CTF) Arbitration Rules, Rule 40 mentioned by Knull & Rubins, *supra* note 4 at 557: “Generally speaking, commodities appeal boards entertain appeals completely *de novo*, accepting all manner of new evidence and arguments.

It is advocated that the choice of a broad or narrow standard of review should be a matter of decision for the parties to the arbitration. The AARB can offer optional review processes that the parties can choose from, based on their preferences and the needs of the dispute at hand.³¹⁶

Provisions to Discourage Frivolous Appeals

In order to discourage frivolous or non-meritorious appeals, the AARB can use legal ethics or sanctions, in a manner similar to national courts,³¹⁷ against the appealing party or the party's counsel if the request for review is found to have no legitimate or reasonable basis.³¹⁸ This procedure is called "Cost shifting" because in situations where an appellate panel affirms the arbitration award, the party instituting a frivolous arbitral appeal would be responsible for his opponent's reasonable legal costs and other reasonable out-of-pocket expenses that have been incurred as a result of the appeal.³¹⁹

The rules of the CPR include two similar provisions.³²⁰ The first rule states that in cases where the Appeal Tribunal affirms the original award, the appellant is obliged under Rule 12 to reimburse the other party for attorneys' fees and other out-of-pocket expenses related to the appeal. The tribunal also has the discretion to allocate costs as it sees fit if the original award is modified or set aside. The second rule provides that parties to the appeal procedure must undertake under Rule 14 to reimburse opponents for costs associated with any unsuccessful

According to one English commentator, "nowadays, whatever the original arbitration award might say, an appeal involves a new hearing, so that the Board is entitled to look at the matter afresh and not pay over much attention to the original award."

³¹⁶ Knull & Rubins, *supra* note 4 at 560.

³¹⁷ Marisa Marinelli & Christelette Hoey, *As Judicial Tolerance for Appeals Wanes, Litigants Are Risking Sanctions When Seeking To Vacate Awards*, 25 ALTHCL 51 (2007) and the cases mentioned therein; *Sanctions For Frivolous Appeal Against An Arbitral Award*, 11 WAMREP 296 (2000); see *B.L. Harbert International LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006), *SEC v. Recile*, 10 F.3d 1093, 1098-99 (5th Cir. 1993), *Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986), *Acevedo v. Immigration & Naturalization Service*, 538 F.2d 918, 921 (2d Cir. 1976) and *Peirotti v. Torian*, No. A086713, 2000 WL 696052 (Cal.App. 1 Dist., May 31, 2000).

³¹⁸ Knull & Rubins, *supra* note 4 at 561, see Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?* 61-JAN DRJ 16 (November, 2006-January, 2007) at 24-25.

³¹⁹ Knull & Rubins, *supra* note 4 at 562.

subsequent court actions aimed at challenging the original or appellate award.³²¹ The AARB may model its provisions along the lines of the above-mentioned examples.

H. Accelerated Appeals Procedure

One of the chief advantages of arbitration as compared to litigation is its time effectiveness.³²² However, when parties subject an arbitral award to judicial review, it ultimately becomes a time-consuming affair. Hence when the AARB is suggested as an alternative to judicial review, it is important to include an expedited appeals procedure, which will “appeal” to the parties.

The CPR maintains an appeals procedure with expedited briefing, which is considered to be a “useful tool to minimize the time and cost involved in pursuing an appeal”. The CPR procedure provide that the initiator of the appeal is to be allowed one opening brief and one response, while the appellee can submit only one brief, unless he initiates a cross appeal, and that oral arguments may be available at the request of either party. Additional evidence may be submitted *but the entire appeals process must be completed within six months* after the composition of the tribunal.³²³

Sammartano advocates a full hearing on merits and a more detailed appeals procedure for an appellate body³²⁴, while Knull and Rubins suggest an expedited appeals procedure, along the lines of some institutions such as the AAA³²⁵, WIPO³²⁶ or CAMCA³²⁷, to name a few, which

³²⁰ Knull & Rubins, *supra* note 4 at 556 mentioning Rules 12 & 14 of the CPR Arbitration Appeal Procedure.

³²¹ *Id.*

³²² See generally *infra* Chapter III.

³²³ Knull & Rubins, *supra* note 4 at 559-560.

³²⁴ *Infra* Chapter VI at FN 291.

³²⁵ AAA Expedited Procedures, Art. E-1 to E-10.

³²⁶ WIPO Expedited Rules 1994.

provide for “fast-track arbitration” procedures when the parties agree to shorten the time limits that would otherwise apply for conducting the arbitration proceeding. They suggest that an appeals mechanism may adopt such a similar fast track procedure to decide appeals without compromising on accuracy and quality.³²⁸ A similar provision may be incorporated in the AARB rules to accommodate the needs of parties who desire a quick resolution to their issue. On the other hand, if parties so desire and time is not a constraint, a more elaborate appeal mechanism may be drafted to accommodate specific needs. The AARB must inculcate a flexible mechanism that is designed to accommodate varying requisites of parties.³²⁹

I. Reasonable Costs

One of the main reasons that parties enter into arbitral agreements is to avoid the cost of litigating a controversy in a national court.³³⁰ Therefore, expensive, drawn-out litigation at the award enforcement stage would counter any benefits conferred by the “initial choice of arbitration as an alternative dispute resolution technique”.³³¹ If, after a successful arbitration, such parties still are faced with costly award enforcement litigation in a foreign court, the

³²⁷ Commercial Arbitration And Mediation Center Of The Americas (CAMCA) Arbitration Rules 1996.

³²⁸ Knull & Rubins, *supra* note 4 at 559: “The desirability of expediency and cost reduction in resolving any dispute suggests that the process should, wherever possible consistent with its principal objectives, simplify and accelerate the appeals process. If the parties choose to restrict or exclude new evidence at the appeals stage, a significantly shortened time frame may be possible relative to the time needed if more evidence is to be permitted. Proposals as to how procedures can be accelerated without sacrificing too much accuracy can be gleaned in part from existing fast track arbitration rules, published by such organizations as the AAA, WIPO, LCIA, and CAMCA. “Fast track” mechanisms could include time limits on initial submissions and subsequent briefs, accelerated tribunal formation or standing appeal panels, caps on the length of oral hearings, and short deadlines for the rendering of an award.”

³²⁹ See *id.* at 560.

³³⁰ Curtin, *supra* note 2 at 357-358; McCartney, *supra* note 43 at 156,157; Davis v. Chevy Chase Financial Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981): “Where parties have selected arbitration as a means of dispute resolution, they presumably have done so in recognition of the speed and inexpensiveness of the arbitral process; federal courts ill serve these aims and that of the facilitation of commercial intercourse by engaging in any more rigorous review than is necessary to ensure compliance with [the FAA’s] statutory standards.”

³³¹ Curtin, *supra* note 2 at 357-358.

benefits of arbitration would be destroyed.³³² The Supreme Court decisions in *Green Tree Financial Corp. v. Randolph*³³³ *Circuit City Stores, Inc. v. Adams*³³⁴ and *Allied-Bruce Terminix Cos. v. Dobson*³³⁵ illustrate the reluctance of courts to permit expanded judicial review quoting the costs involved to parties as a major reason.³³⁶

It is imperative that the AARB incorporates an appeals system that is cost-effective, among other things. The costs involved in bringing an appeal should be significantly lesser than the comparative costs to bring the same dispute to judicial review, to make it beneficial for the parties.

J. Precedent

The AARB may look to prior arbitral awards for guidance and choose to follow the decisions set forth earlier. This raises the question of whether arbitral decisions have the value of precedent. Often, the publication of arbitral decisions is limited, mostly for reasons of

³³² Curtin, *supra* note 2 at 357-358.

³³³ 531 U.S. 79 (2000).

³³⁴ 532 U.S. 105 (2001).

³³⁵ 513 U.S. 265, 270-72 (1995).

³³⁶ Sullivan, *supra* note 43 at 530: “In *Green Tree Financial Corp.*, a party attempted to have an arbitration agreement silent on the issue of costs invalidated due to the prohibitive expense of the arbitration. The Court rejected the party’s argument because the party failed to show why the arbitration was expensive and held that such an invalidation of an agreement based on costs goes against the federal policy of encouraging arbitration. This precedent is important in illustrating that the Court will look to economic factors in interpreting an arbitration agreement. Therefore, it might not be outside the realm of reality for the Supreme Court to weigh the economic detriment that parties would suffer in submitting awards to heightened judicial review with the advantages of contractual freedom”, “The *Circuit City* case addressed whether employment contracts are beyond the grasp of the FAA. After finding that the FAA applied to all employment contracts except those for transportation workers, the Supreme Court stated: Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship. With this pronouncement, it could be difficult for the Court not to take into consideration the economic burden on parties and the docket burden on the courts if parties were allowed to expand judicial review beyond what is set forth in the FAA”.

confidentiality.³³⁷ Since arbitral decisions are not published, they are not considered to have the value of legal precedent and hence, do not bind on arbitrators.³³⁸ Unlike a judge “who feels bound by a previous decision, is under the obligation to defer to the precedent even though he disagrees with the stated solution”³³⁹, an international arbitrator is not bound by prior decisions.

However, the importance of arbitral case law is not to be undermined. As stated in the ICC Award No. 4131³⁴⁰: “The decisions of these tribunals progressively create case-law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond”.³⁴¹

The arbitrators of the AARB can be guided by the valuable decisions and reasonings of the existing arbitral institutions from around the world without the rigors of being bound by those decisions they do not agree with. In the absence of detailed published decisions, excerpts of the legal rules applied by the tribunals and other relevant information may be taken into consideration.³⁴²

There are several international arbitration institutions around the world. For purposes of classification, we may divide arbitration institutions into the following categories:³⁴³

³³⁷ See Pierre Duprey, *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished in this Regard from Arbitration Based on Investment Treaties?* in IAI SERIES ON INTERNATIONAL ARBITRATION NO.3. TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? (Anne Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005).

³³⁸ Duprey, *supra* note 337 at 266.

³³⁹ *Id.*

³⁴⁰ *Isover St. Gobain v. Dow Chemical France et al.*; ICC Case 4131/1982, I ICC AWARDS 146, 465, 1984 REV. ARB. 137, IX YEARBOOK 131 (1984).

³⁴¹ Duprey, *supra* note 337 at 259; see generally CRAIG ET AL., *supra* note 209 at § 35.02, see also Marc Henry, *The Contribution of Arbitral Case law and National Laws* in IAI SERIES ON INTERNATIONAL ARBITRATION NO.3. TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? (Anne Veronique Schlaepfer, Philippe Pinsolle & Louis Degos eds., 2005).

³⁴² See Article 485 of the ICSID Convention: [t]he Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal”; see also Duprey *supra* note 337 at 275.

³⁴³ LEW ET AL., *supra* note 1 at 3-25.

Institutions Established by Private International Law

The ICC International Court of Arbitration, the London Court of International Arbitration (LCIA), the Arbitration Institution of the Stockholm Chamber of Commerce the American Arbitration Association, the Hong Kong International Arbitration Center (HKIAC), the Singapore International Arbitration Center (SIAC), the World Intellectual Property Organization(WIPO) Arbitration and Mediation Centre, the Cairo Regional Center for International Commercial Arbitration, the China International Economic Trade Arbitration Commission (CIETAC), the American Arbitration Association (AAA), The Stockholm Chamber of Commerce (SCC), The Quebec Arbitration Centre, the Korean Commercial Board and the Japan Commercial Arbitration association are some of the leading arbitration institutions created by private law.³⁴⁴

Institutions Established by Public International Law

The Permanent Court of Arbitration (PCA), the International Center for Settlement of investment Disputes (ICSID), the Organization for Security and Co-operation in Europe (OSCE) Court of Conciliation and Arbitration, Inter-American Commercial Arbitration Commission (IACAC), Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (OHADA) are some institutions established by public international law.³⁴⁵

Industry-specific /Commodity Institutions

Grain and Feed Trade Association (GAFTA), Coffee Trade Federation (CTF), London Rice Brokers' Association (LRBA), Refined Sugar Association (RSA), Federation of Oils. Seeds

³⁴⁴ LEW ET AL., *supra* note 1 at 3-26 to 3-34.

and Fats Association (FOSFA), the Japan Shipping Exchange, the Hamburg Freundliche Arbitrage and the Bremen Cotton Exchange in Germany (Baumwollbörse) are some arbitration institutions that are industry-specific.³⁴⁶

Special Purpose Institutions

The Iran – US Claims Tribunal, the United Nations Compensation Commission (UNCC), the Claims Resolution for Dormant Accounts in Switzerland (CRT) and the International Commission on Holocaust Reinsurance Claims (ICHEIC) are some special-purpose tribunals established to handle claims arising out of revolutions, war or other events that affect a large number of people in the same way.³⁴⁷

The list of arbitration institutions provided here is not comprehensive.³⁴⁸ As is evident from the list above, there are a plethora of arbitration institutions that have dealt with a vast number of cases. There are also decisions of ad hoc arbitrations. The AARB may look to any or all relevant arbitral decisions for guidance.

It is said that in order for arbitral case law to be implemented, it is imperative to have a “distinctly organized structure that, by the specificity of its functioning, ensures coherence in the establishment of arbitration case law”.³⁴⁹ The establishment of the AARB will provide precisely such a structure for the appellate review of arbitral awards. To date, the decisions of arbitrators are not part of any national order, so “the awards do not have a natural tendency to constitute

³⁴⁵ LEW ET AL., *supra* note 1 at 3-36 to 3-38.

³⁴⁶ *Id* at 3-35 to 3-36.

³⁴⁷ *Id* at 3-39 to 3-58.

³⁴⁸ For a more comprehensive list, see http://www.arbitration-icca.org/directory_of_arbitration_website.htm.

³⁴⁹ Duprey *supra* note 337 at 271.

established case law”³⁵⁰. The establishment of the AARB will, undoubtedly, contribute to the establishment of arbitral case law.

K. Conclusion

The AARB will be modeled on the principles detailed above. While the above-mentioned principles are illustrative, they are certainly not exhaustive. They may serve as starting points for the consideration of the establishment of the AARB. As more scholars, arbitrators and others contemplate the idea, more useful suggestions and ideas will undoubtedly arise which will pave the way for the AARB to become a practical reality.

³⁵⁰ Duprey *supra* note 337 at 257, 258.

CHAPTER 6

CONCLUSION

“It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”³⁵¹

The idea of establishing a permanent body for arbitration has been advocated time and again by scholars and experts.³⁵² Several commentators have alluded to the benefits of a single transnational source of appeal for arbitral awards.³⁵³ However, it is disheartening to note that no significant progress has been made towards the achievement of this objective. Admittedly, there are several practical hurdles in achieving such an objective³⁵⁴ and it is a task of no easy magnitude, but the benefits outweigh the hardships.

As illustrated in the previous chapters, the establishment of the AARB will be a solution to several problems rampant in international commercial arbitration and bring about a much-needed uniform system of review of arbitral awards. The contemplated idea probably involves several years of consolidated effort and international cooperation. This is all the more reason why immediate efforts should be taken towards the achievement of this task.

³⁵¹ RUBINO-SAMMARTANO, *supra* note 6 at 35.12, quoting Justice Oliver Wendell Holmes’ comment in *Hyde v. United States*, 225 U.S. 347,391(1912).

³⁵² *Infra* Chapter I.

³⁵³ *Id* ; see Sarles, *supra* note 67 at 4 ; see also BÜHRING-UHLE, *supra* note 8 at 60; Mauro Rubino-Sammartano, The Fall of a Taboo: Review of the Merits of an Award by an Appellate Arbitration Panel and a Proposal for an International Appellate Court *Journal of International Arbitration* 20(4): 387–392, 2003.

³⁵⁴ See Martin Hunter, “The Impossible Dream” in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE (Martin Hunter, Arthur Marriott & V.V.Veeder eds., 1995) at 157.

While critics may view this as an “impossible and infeasible” proposition,³⁵⁵ it is wise to bring to their attention the words of Judge Holtzmann:

“Let us pause for a minute to consider whether many of the developments in international arbitration that seem ordinary today would have been thought to be impossible dreams 100 years ago when the predecessor of the London Court of International arbitration first opened its doors to serve the business community. If, for example, someone had predicted in 1893 at a celebration of the inauguration of the London Chamber of Arbitration that within the coming century 90 nations would enter into a multilateral treaty binding themselves to procedures requiring the recognition and enforcement of foreign arbitral awards such as appear in the New York Convention, would that not have been viewed as an impossible dream? Yet, today, we recognise that the New York Convention is an indispensable element in the structure of commercial arbitration.”³⁵⁶

The establishment of an AARB can well be achieved given significant international effort and cooperation. The arrival of the AARB will signify the true “internationalization”³⁵⁷ of international commercial arbitration.

³⁵⁵ See RUBINO-SAMMARTANO *supra* note 6 at 35.9.

³⁵⁶ Holtzmann, *supra* note 6 at 109-110.

³⁵⁷ THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE (Martin Hunter, Arthur Marriott & V.V. Veeder eds., 1995)

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