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Privatizing Dispute Resolution

Trends and Limits



Nomos



Max Planck Institute
LUXEMBOURG
for Procedural Law

<https://doi.org/10.5771/9783748900351>

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Nothing is for Free: The Prices to Pay for *Arbitrabilizing* Legal Disputes

Diego P. Fernández Arroyo*

1. Introduction

Let's try to have a physical representation of all available dispute settlement mechanisms (DSM) in the international arena or, more precisely, for international disputes. You can imagine it as a sphere, as a vast field ... the concrete figure is not important. Let's call it 'space.' What really matters is the fact that different DSM share the space, but the sharing is not equally arranged. Theoretically, all DSM are equal. But, as in Orwell's farm, all animals are equal, but some animals are more equal than others. In Orwell's farm those animals are the pigs. In our DSM space, it is arbitration. I mean: Arbitration occupies a quite significant part of this space. Actually, continuing the animal metaphor, arbitration holds the lion's share of the DSM space. This is not at all an arbitrary statement. Nowadays, most economically relevant commercial disputes are submitted to arbitration. The vast majority of disputes between a foreign investor and the host state have been decided by means of arbitration during the last two decades. A significant part of disputes between states –especially in the field of trade- are (at least primarily) adjudicated by panels of ad hoc arbitrators. Arbitration also takes centre court in the highly visible activity of professional sport. In order to deal with the ever-growing number of disputes, arbitration institutions proliferate all over the world and compete actively. Specialized arbitral institutions (in sport, finance, art, oil & gas, etc.) are also emerging.

The general assumption of this modest contribution is that the *arbitralization* of the space is not for free. In other words, arbitration has occupied

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up and down the length and breadth of the DSM space but only by exacting a toll (more precisely different kinds of tolls); so different that sometimes it is rather symbolic (not real). Of course, the required toll differs depending on the particular scenario in which arbitration develops its adjudicative function. Even if this paper does not deal with domestic arbitration and even though an ‘arbitral (transnational) legal order’ does exist, this order would not be unrelated to other legal orders (domestic and international) and the relations between them are unavoidably heterogeneous, particularly because states’ attitudes *vis à vis* arbitration are different and variable. Additionally, the users and the public at large may change the perception about the pros and cons of arbitration. Globally considered, public and private views of arbitration contribute to shape its level of legitimacy.

Interestingly, arbitration has so far enjoyed a rather peaceful coexistence with traditional public adjudicatory systems and remained largely shielded from growing legitimacy concerns. However, one evident exception exists to this finding. Investment arbitration has recently been exposed to a strong legitimacy crisis which today threatens its very existence. Strikingly, commercial arbitration remains shielded from similar legitimacy concerns. Their very existence is everything but questioned: established arbitration fora seek to maintain their leadership and face serious competition. In other words, the race for the arbitration-friendliest legislations in international commercial arbitration (ICA) has not been significantly affected by the legitimacy crisis of international investment arbitration (IIA)). While in many instances, commercial arbitration is not a simple alternative to public adjudication, it has still palpably become the most preferred means of dispute resolution, especially for international commercial disputes.

This quasi-exclusive jurisdiction of arbitral tribunals makes it hardly justifiable to maintain in ICA some attributes perceived as essential or necessary by some specialists, such as secrecy, disregard for precedents, and absolute immunity of arbitrators. It is only by parting ways with these attributes that international arbitration will uphold and safeguard its legitimacy. Does this, however, mean that the legitimacy of arbitration is best addressed generally by a one-size-for-all agenda? Certainly not. Quite to the contrary, each type of arbitration embroils a variety of particular features, interests and actors. Although the introduction of legitimacy standards is for sure the newest –and probably the highest- price to pay by arbitration, the progressive occupancy of the space has always been associated to different tolls. Notably, states, as general regulators, and the businesses, such as the main users, have always asked for something in exchange for their con-

tributions to arbitration. I will make a quick reference to some obvious aspects of those requirements and then deal with legitimacy issues.

2. Different reactions to the expansion of arbitration

2.1. States and arbitration

2.1.1. The general debate

Particularly since the fifties, public powers have been generally and progressively embracing arbitration. In fact, both states¹ and international organisations have given the impression that they believe in the invigorating effect that arbitration can have on commercial activities. As a result, they have been promoting these DSM for decades in different ways, especially by establishing a legal framework favourable for their development. The instruments issued by the United Nations have been, within this context, extremely significant and it is no exaggeration to say that arbitration would not have had the success it has experienced without the 1958 New York Convention, the 1976 (2010) Arbitration Rules and the 1985 (2006) Model Law on International Commercial Arbitration. In fact, the key provisions contained therein configure the essence of modern arbitration: *Kompetenz-Kompetenz*, autonomy of the arbitration clause, restriction on the intervention of state courts, large recognition of party autonomy, circulation of arbitral awards, etc. At the same time, almost every single state – with diverse celerity and depth- has modernised its own legal arbitration system and contributed to the flourishing of arbitral institutions, while state courts have evolved to diverse degrees of arbitration-friendly attitude. Most jurisdictions compete to become arbitration hubs. All in all, both collectively and individually, states have been openly promoting arbitration during recent decades.

Nevertheless, it would be a serious mistake to take the obvious fact of the proactive attitude of states in favour of arbitration as equivalent to any type of disinterest of the states on the ‘regulation’ of the effects of arbitration within state jurisdiction. There is no contradiction between promotion and regulation of arbitration. Actually, the promotion of a mechanism, which is presented as fast, specialised, and effective, should not

1 Needless to say, all references to ‘states’ are also applicable, *mutatis mutandis*, to the European Union (EU) insofar as it has the competence on a particular matter.

imply any abandonment of state prerogatives related to the regularity of the implementation of arbitral justice insofar as the jurisdiction of the state is somehow concerned (eg by means of an application for annulment before state courts).

Accordingly, notwithstanding states' strong attitudes in favour of arbitration, their authorities keep continuing their inherent tasks related to the fixation of policies (executive branch), law making (legislative branch) and adjudication (judicial branch). However, what has radically changed in a too-short period of time are the considerations about the role generally played by states in the framing of the rules on international legal relationships and, in a broader sense, the scope and effectiveness of states' powers to regulate global markets. Privatisation and liberalisation –two phenomena that have risen with globalisation- have not only reached the economy. They affect also the law and, particularly in some legal fields, in an amazing way. All the fields where party autonomy is essential are sensitive to these phenomena and arbitration is clearly one of them.

2.1.2. Expanding arbitrability (the legal perspective)

A way to test the twofold role of states regarding arbitration (as a promoter and as 'regulator') is through the never-ending expansion of arbitrability. In fact, the spectrum of disputes susceptible to be decided by mean of arbitration has not ceased to expand during the last decades, though the movement has been quite heterogeneous. Thus, legal fields formerly outside the scope of arbitration have become arbitrable, under diverse circumstances, in certain jurisdictions. Indeed, disputes involving aspects of competition law, the inside life of companies, insolvency, and even consumer law, labour law, inheritance, and family law are no longer total strangers for arbitral tribunals. Similarly, the objective limitation of arbitrability consisting in the general exclusion of 'matters affecting public policy,' which used to appear in some legal systems, has been progressively dismissed.²

The point here is that the states give more space to arbitration by reserving in exchange more control thereover. Such control can take different forms. Essentially, it may be expressly reflected in legal provisions directly

2 In Argentina such limitation had surprisingly and belatedly been introduced in the text of the Civil and Commercial Code adopted in 2014 (art 1649) although it was at odds with case law. However, the lawmaker quickly corrected such mistake with the enactment of the International Arbitration Act in 2018.

or indirectly linked with the expansion of arbitrability, on the one hand, or it may be implicitly given to state courts, on the other hand. An example – doubly larger because it refers to a supranational organisation and to ADR in general – of the former can be found in the article 10 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, which shows at the same time its openness to ADR mechanisms in this type of contract and clear mandatory conditions to put them in motion.³ Complementarily, article 11 of the same Directive, imposes the application of mandatory rules of consumer’s habitual residence. Furthermore, it may be important to notice that this caveat put the said openness between brackets due to the fact that the vast majority of rules on consumer contracts are de facto considered mandatory.

Judicial advanced scrutiny for issues involving public policy is another way for states to control arbitration. In the United States such scrutiny is known as ‘second look doctrine’ and operates as a safeguard for ensuring that the arbitral tribunal has properly addressed those issues.⁴ The explanation is easy and goes clearly in the sense expressed by this paper: arbitral tribunals are authorized to deal with public policy issues provided that state courts have the opportunity to double-check how arbitral tribunals have exercised that power.⁵ The effectiveness of such a control is not self-evident as was promptly pointed out by commentators.⁶

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- 3 The article 10 of the Directive, under the evocative heading of ‘Liberty’, provides:
(1) Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.
(2) Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.
- 4 See the seminal decision *Mitsubishi Motors v Soler Chrysler-Plymouth*, 473 US 638 (1985).
- 5 Mayer P, ‘The Second Look Doctrine: The European Perspective’, (21 ARIA, 2010).
- 6 Park W W, ‘Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration’, (1986) 12 Brook. J. Int’l L., 642.

2.2. *Competitive arbitration (the business' perspective)*

2.2.1. International arbitration nowadays

I have never found that international arbitration is in competition with domestic courts. Even less, that arbitration's function is to alleviate the overburdened situation of state courts. These are not only very old ideas but also wrong assumptions. In my opinion, arbitration is essentially competing against itself. Insofar as arbitrators, arbitral institutions, and counsel are able to offer an efficient service adapted to the changing necessities of business, arbitration will remain attractive. In this sense, the so-called arbitration epistemic community has to avoid the temptation of feeling and acting like it is the centre of the universe, without taking into account at all times, not only states' sensitivities, but also users' requirements. Under such hypothesis, in general, arbitration has worked properly, being particularly effective in jurisdictions whose courts' performance is also good. It suffices to look at the states in which international arbitration has been more successful to realize that, in those states, the efficiency of state justice does not represent a major concern.

Nevertheless, it is true that from the users' perspectives there are several (independent, distinct) options when they have to agree upon a mechanism to deal with their possible disputes. In the international commercial field, the main options are arbitration and domestic courts. Among them, for the time being, it seems clear that arbitration is largely preferred, in particular –but not only- for high-profile, sophisticated cases. However, as arbitration has impressively expanded its scope, it appears more and more that the users are becoming more exigent. Sometimes one has the impression that users are sending a warning message (almost an intimidation) to the arbitral community: be careful, if you don't comply with our requirements we will go to domestic courts (or perhaps to other options not very developed for international transactions yet).

From this perspective, thus, arbitral institutions feel compelled to permanently improve the services they offer, which implies, among other things, the adaptation of their rules to the perceived exigencies of business community. This constant revamping of rules has made apparent a sort of contest between arbitral institutions to present the best possible offer to potential users. In other words, users' demands provoke business-oriented reactions from arbitral institutions. The proliferation of arbitration has been so impressive that the number of institutions –both generalist and specialized- keeps growing. Apparently, the cake has become so big that a significant proportion of arbitral institutions have managed to get their

slice. Nonetheless, coming back to the main argument of this paper, it seems obvious that permanent adaption (apart from consequent marketing of offered services) is the price that the current proliferation of arbitration imposes on arbitral institutions.

Nonetheless, arbitral institutions are not the sole toll payers. Arbitrators are not at all exempted from having a price exacted for taking part in this activity. First of all, even if the number of international arbitrations is now infinitely bigger than twenty or thirty years ago,⁷ the number of potential arbitrators has experienced a similar, if not bigger, explosion. Second, the arbitrators' profile has also dramatically changed. It is well known that the model of a few wise famous jurists (mostly professors) dealing with a few cases does not exist anymore.⁸ That model could work when international arbitration was just an option for a few (generally big) companies from developed countries. With the 'democratization' of arbitration, it is no longer an option but the general rule, used by all-sized companies from all over the world. Logically, there are not enough expert professors to deal with the current number of disputes. Certainly, the highest-profile cases are still generally submitted to a small number of famous jurists, but those cases are nothing but the tip of the iceberg. Third, in such a context, the requirements imposed on international arbitrators are extremely demanding. In order to be regarded as potential arbitrators (*to be in the market*), they are required to be ready to cope with a variety of disputes that develop in different settings (often in different languages), under different rules, being always available to react on the spot.⁹ Arguably, arbitrators are generally pleased to pay this price because what they obtain in exchange is not negligible. However, the price is objectively high in any event.

2.2.2. Business' demands to arbitration

At the risk of excessive generalisation, one can say that arbitration users, like all 'clients,' would like to receive the best, prettiest and cheapest product. This formula –which comes from a popular Spanish saying- can be

7 It suffices to have a look at institutions' statistics to realise how amazing this shift has been.

8 On this topic see Gaillard E, 'Sociology of International Arbitration,' (2015) 31 *Arbitration International* 1.

9 See Clay T, 'L'arbitre est-il un être normal?', in : *L'exigence de justice. Mélanges Robert Badinter*, Dalloz 2016, 225; Derains Y, 'Le professionnalisme des arbitres,' (2012) 4 *Cahiers de droit de l'entreprise* 21.

translated into arbitration language as a claim for efficiency, celerity, and cheapness.

From the perspective of users, efficiency means that all the issues submitted to the arbitral tribunal must be decided in the most complete and effective manner in the shortest possible time. Accordingly, as said above, arbitrators must be highly qualified, always available, and fully reliable. Efficiency is also related to the practical outcome of arbitration proceedings, in the sense of users' expectation to receive an enforceable arbitral award. In this vein, many institutions have incorporated concrete arbitrators' duties of efficiency in their arbitration rules.

In recent years, business complaints about the length of arbitration proceedings and about the excessive cost of arbitration have become a sort of mantra. Indeed, lack of celerity and high cost are very often the object of debate.¹⁰ Arbitral institutions have responded by implementing 'fast track proceedings', reducing deadlines, and penalizing arbitrators who are not sufficiently fast. Even though these complaints are sometimes justified, celerity has also limits, particularly because of the will of the parties, which is highly paradoxical. Thus, if the parties agree to have long periods to submit their memorials or bifurcate proceedings (which can be reasonable in certain complex cases), arbitrators can do little but accept the parties' will.¹¹ You might think that a good, experienced arbitrator could take control of the situation and be able to conduct proceedings in a quick and efficient manner. But the fact is that appointing good arbitrators is a necessary condition to have a good arbitration but not a sufficient one. The complexity of the case, some particular circumstances¹² and counsel and parties' behaviour can ruin the best arbitrators' efforts and make any arbitrator's excellence ineffective.

Something similar occurs with complains about the cost of arbitration. Here the paradox consists in the fact that the same users who conclude contracts systematically including arbitral clauses therein, and knowing full well the costs of arbitration, afterwards make claims about the expensiveness of the system. Generally speaking, criticism about arbitration costs

10 See, for instance, <<https://www.lja.fr/table-ronde-celerite-arbitrage%E2%80%89de-ux-notions-reconciliables>>.

11 Fernández Arroyo D, 'Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?' in: Ferrari F (ed), *Limits to Party Autonomy in International Commercial Arbitration* (Juris 2016), 199.

12 For example, the practice shows that no arbitration involving a state, irrespectively of being IIA or ICA, can be fast. Not only are the time lapses for each procedural step normally longer; once the award is rendered, they are often challenged.

is misplaced. International arbitration is expensive fundamentally because of the need of sophisticated lawyers (and I am not talking about the arbitrators) who operate in a market which is not extremely competitive. Often those expensive counsel ask for measures that make the final invoice even heavier, such as long and complex production of documents or the appearance of an excessive number of factual and expert witnesses.

Irrespectively of how justified any complaints from business may be, arbitral institutions are in a crazy race to show which of them offers the most efficient and fast service. As to cheapness the race is less clear.

3. The impact of the legitimacy debate (the 'political' issue)

3.1. The extension of the legitimacy debate

3.1.1. The undeniable existence of concerns regarding arbitration

Undeniably, there is a wide range of concerns about general to more specific aspects of arbitration as a DSM. While the following sections outline some of those general and specific concerns, their purpose is not to address each of the concerns individually, which unfortunately exceeds the scope of this contribution, but to highlight their existence and relevance, and, again, to suggest the price they require from arbitration. It should be noted that the existence of these concerns does not necessarily mean that they are justified in the end.

In broad terms, the general concern regarding arbitration is that it empowers private persons, ie people who do not act within the framework of public institutions, to adjudicate disputes.¹³ In IIA, as is well known, this is the mother of all concerns: according to extended criticism, it should not be acceptable that private persons adjudicate disputes in which, by definition, public powers (in particular the power to regulate) are at stake, and sensitive public interests are often involved. From there, many other particular concerns about diverse aspects arise, such as the large

13 This issue is connected to the classic discussion on whether arbitration has a jurisdictional or mere contractual nature. According to the current status of the theory and practice of IA, it is well settled that, despite its contractual elements, arbitrators exercise a real jurisdiction. Born G, *International commercial arbitration* (2nd ed, Kluwer Law International 2014), 216-217; Poznanski B G, 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration' (1987) 4-3 *Journal of International Arbitration* 71.

scope of arbitrators' powers, the vagueness of treaty provisions, the risk of conflicts of interests, the lack of participation of civil society, the inconsistency of decisions, etc.

So far, concerns about IIA have not impeded the continuous success of ICA. However, they have provoked more intensive scrutiny on arbitration from people unfamiliar with this DSM –including people coming from the legal field- who do not have always the best perceptions and understanding of arbitration particularities. As a matter of fact, over recent decades arbitration has gradually gained more respect and influence. Simultaneously, arbitration has also gained more autonomy, as it is sometimes considered to operate at a transnational level.¹⁴ Such autonomy is, for instance, reflected in the greater deference given by national courts towards arbitration. While national courts still control arbitral awards (in particular by means of proceedings of annulment and exequatur),¹⁵ according to general arbitration practice, such control is becoming lighter.¹⁶ Actually, it is commonly assumed that in many jurisdictions and under normal circumstances it is easier to enforce an arbitral award (rendered, for instance, by three private persons coming from different countries) than a judgment issued by the supreme court of any state. Furthermore, arbitrators may even limit procedural party autonomy under certain (extreme) circumstances.¹⁷ While the arbitration community celebrates all these concessions in favour of arbitral tribunals,¹⁸ they create some concerns from other sectors.

14 Gaillard E, *Legal theory of international arbitration* (Martinus Nijhoff 2010). Among judicial decisions, see French *Cour de cassation, Société Ryanair Ltd et Société Airport Marketing Services Ltd v. Syndicat Mixte des Aéroports de Charente (SMAC)* (8 July 2015).

15 As is well known, in the case of ICSID arbitration, the annulment recourse has been taken away from the national courts (article 52 ICSID Convention) and the award shall be enforced 'as if it were a final judgment of a court in that State' (article 54(1) ICSID Convention), ie without exequatur.

16 Among many other examples, see US Supreme Court, *BG Group v Republic of Argentina*, 12-138 (5 March 2014); Chilean Supreme Court, *Comverse Inc. v. American Telecommunication, Inc. Chile SA*, No. 3225-2008 (8 September 2009).

17 Fernández Arroyo, note 11; *Lance Paul Larsen v. Hawaiian Kingdom*, PCA Award (5 February 2001); US CA, Second Circuit, *ReliaStar Life Insurance Company of New York v EMC National Life Company (National Travelers Life Company)* (9 April 2009); *Hrvatska v Elektroprivreda v Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008).

18 I refrain from including here the imposition of arbitration clauses on consumers or workers, which is a highly controversial feature accepted in some legal systems, which, rather than concerns, has provoked both astonishment and rejection.

This general concern escalates due to some concrete features of IA. One of those features is the appointment of arbitrators by the parties to the dispute. While this is generally seen as a positive feature (perhaps the most significant, appreciated advantage of arbitration in comparison with judicial proceedings), since it legitimates the decision towards the parties, to outside eyes it is sometimes difficult to understand, especially in IIA. Even within the arbitration community, some renowned authorities have questioned the existence of party-appointed arbitrators,¹⁹ initiating an intense debate²⁰ that continues to date.²¹

Another feature is the arbitrators' delegation of their tasks to their assistants or secretaries. While the assistance of secretaries is very well established, and this obviously implies certain delegation of (part of) tasks, the scope of such tasks should not involve the ultimate decision-making. However, given the increasing complexity of cases, it has become hard to draw the line between normal and excessive assistance. This issue has caused the reaction of arbitral institutions²² and was even taken before national courts.²³

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- 19 Paulsson J, 'Moral Hazard in International Dispute Resolution,' (2010) 25 ICSID Rev. 339; Van den Berg A J, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in: Arsanjani M H, Cogan J, Sloane R, Wiessner S (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011), § 828.
- 20 Brower Ch N and Rosenberg Ch B, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29-1 Arbitration International, 7; and the rebuttal from Van den Berg A J, 'Charles Brower's problem with 100 per cent-dissenting opinions by party-appointed arbitrators in investment arbitration,' (2015) 31-3 Arbitration International 381.
- 21 See Ross A, 'Paulsson revives debate about party-appointed arbitrators,' (2016) Global Arbitration Review (16 March 2017) *on line*. The assumption that party-appointed arbitrators are by definition not neutral (what has been recently expressed by the US Second Circuit decision in *Certain Underwriting Members of Lloyds of London v State of Florida* (7 June 2018) certainly contributes to Paulsson's scepticism.
- 22 SIAC Practice Note on the Appointment of Administrative Secretaries (2015); Young ICCA Guide on Arbitral Secretaries, The ICCA Reports No. 1 (2014); HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal (2014).
- 23 The excessive substantive role of the Secretary to the Arbitral Tribunal was one of the reasons invoked by Russia when requesting the Hague District Court to set aside the award rendered in *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL), PCA Case No. AA 227. See G. Bermann's Amicus Curiae submitted concerning this case to the US District Court for the District of Columbia, specifically §§ 79 ff., www.italaw.com/sites/default/files/case-document

In addition to the mentioned general concerns, there are also some others specifically related to certain aspects of arbitration. One concern relates to the fact that some legal instruments (and, by extension, International Commercial Law in general) are generally interpreted by arbitral tribunals and that the outcome of that interpretation is generally not accessible for the stakeholders.²⁴ In a similar vein, the head of the judiciary of England and Wales, one of the most arbitration-friendly jurisdictions, has stated that IA hinders the development of the common law because the issues needing legislation are not exposed and individuals cannot fully understand their rights and obligations.²⁵

Another concern relates to the applicability of substantive law, including whether arbitrators apply such law in the same manner than judges²⁶ and which substantive law they should apply. This, in turn, has several aspects; for instance, whether arbitrators are entitled to fill the gaps in national statutes despite their lack of public authority, and whether they can do it resorting to international (or even transnational) principles or soft law, and whether they may exercise *iuria novit curia* (which is in fact called in the field of arbitration *iura novit arbiter*).²⁷ Also related to the applicable law there is some concern about whether an excess of party autonomy undermines the application of international mandatory rules, which are intended to take precedence over any foreign law that would

s/italaw4442_1.pdf. The Swiss Federal Tribunal has approved the assistance of secretaries (see the judgment DFC 4A_709/2014 (21 May 2015), (2015) 33-4 ASA Bull. 879, comments of M. Feit and C. Terrapon Chassot), as well as the High Court in England (see the judgment 2017 EWHC 194 (Comm)).

24 Fernández Arroyo D, 'The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration' in Micklitz H and Wechsler A (eds), *The Transformation of Enforcement European Economic Law in Global Perspective* (Hart 2016) 355, 365.

25 The Rt Hon. The Lord Thomas of Cwmgiedd Lord Chief Justice of England and Wales, *Launch of The City UK Legal Services Report* (20 July 2016). See 'Arbitration hinders development of common law – Lord Chief Justice of England and Wales', (2016) Global Arbitration Review (31 March 2016), *on line*. Lord Thomas then denied its attack to arbitration; see Ross A, 'Lord Thomas denies 'attack on arbitration'', (2016) Global Arbitration Review (6 October 2016).

26 As to the differences in how national courts and arbitral tribunals apply substantive law, see Park W, 'The Predictability Paradox Arbitrators and Applicable Law', *Dossier XI of the ICC Institute of World Business Law*, ICC Publication No. 753E 2014.

27 Abdel Wahab M, 'Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown', in: Abdel Raouf M, Leboulanger P, Ziadé N (eds), *Festschrift Ahmed Sadek El-Kosheri* (Kluwer Law International 2015), 3.

otherwise be applicable under private international law, even with extraterritorial effect²⁸ (eg competition, currency control, environment, import and export).

No less important, another current concern relates to corruption in IA, which may come from the parties (involving perhaps an arbitrator), who may use IA as a means to achieve illegal purposes.²⁹ A concrete example would be, for instance, by submitting a fake dispute to IA and requesting an award by consent. Furthermore, the arbitrability of corruption issues may involve some degree of public interest (ie the interest of prosecuting those guilty of a crime).³⁰

Arbitration is not only compatible with the key features of the rule of law, but it also has an increasingly important role to play in upholding those key features, both nationally and internationally.³¹ However, for it to continue to do so, it is necessary to deal with the criticisms received.³² Thus, due to the undeniable concerns outlined above, I argue that no type of IA can escape paying the price of preparing a discourse regarding their legitimacy. This necessary finding is best explained by the nature of international arbitration as a private DSM escaping the realm of public institutional settings and their inherent legitimacy to resolve disputes. Accordingly, there is no compelling reason to exclusively limit legitimacy concerns to IIA.

28 See Mayer P, 'Mandatory Rules of Law in International Arbitration', (1986) 2-4 *Arbitration International*, 275; Radicati di Brozolo L, 'Arbitrage commercial international et lois de police. Considérations sur les conflits de juridiction dans le commerce international', (2005) 315 *Recueil des Cours* 265; Kleinheisterkamp J, 'The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements' (2009) 3-2 *World Arbitration and Mediation Review* 91.

29 See, for example, CA Paris, *Consortium de Réalisation and others v Tapie and others* (17 February 2015).

30 See Gaillard E, 'La corruption saisie par les arbitres du commerce international' (2017) 3 *Revue de l'Arbitrage*, 805.

31 Lord Neuberger, 'Arbitration and the Rule of Law', *Hong Kong Chartered Institute of Arbitrators Centenary Celebration* (20 March 2015), <www.supremecourt.uk/docs/speech-150320.pdf>.

32 Rivkin D, 'The Impact of International Arbitration on the Rule of Law: The Clayton Utz/University of Sydney International Arbitration Lecture', (2013) 29-3 *Arbitration International* 327.

3.1.2. How to react to concerns?

Any discussion about the legitimacy of a dispute resolution mechanism necessarily requires a detailed examination of its foundations, and more particularly the source of its decision-making power. The first and decisive distinction to keep in mind in this regard differentiates between adjudication in public institutional settings and arbitration. Evidently, arbitration does not enjoy the inherent legitimacy of public adjudication.

National adjudication stands as a fundamental component of the modern state, as it is always available to everyone. Its efficiency and functioning may be closely scrutinized and harshly criticized; yet its very existence is hardly challenged even in countries whose democratic standards are rather low.³³ The adjudicative decision-making process is closely embedded in the public institutional setting of the state, and thus, its legitimacy. At the international plane, the picture is slightly different. Due to the sovereignty of states, there are no institutions (neither judicial nor of any other nature) to which they are subject. Consequently, international adjudicators face a higher legitimacy-challenge because their existence is not a given. It remains the result of the states' decision. Yet, their legitimacy straightforwardly derives from their founding instrument. Properly circumscribed by the states' will, international adjudicators' powers do not face existential legitimacy concerns. The mushrooming of international adjudicators in recent decades easily confirms the previous statement.³⁴ The fact that the members of all that panoply of international tribunals (including the ICJ, the ITLOS or the WTO Appellate Body) are selected by governments within the context of international organizations and/or in the operation of international treaties seems to be sufficient to grant the unassailability of those bodies.

International arbitration represents a different creature escaping such public institutional settings. Private in nature, the arbitral jurisdiction is brought into existence by the consent of two (or more) parties and ceases to exist with the resolution of the dispute. More importantly, one will find it difficult to compare private decision-makers to their public counterparts in many aspects. Party appointment of arbitrators remains a unique fea-

33 Admittedly, bench challenging is not uncommon, but it is precisely the *operator* who remains the objects of such challenge (and not the *institution* as whole whose constitutionally guaranteed existence remains intact).

34 Bench challenging is more common on the international plane.

ture, largely unparalleled in public institutional settings.³⁵ Private arbitration does not enjoy upfront the legitimacy which adjudication inherits by virtue of its linkage to a public institutional setting. Instead, arbitration faces upfront a greater need for legitimacy, which needs to be properly acknowledged and answered. In this regard, reference to party autonomy may perhaps explain arbitration's success in the eyes of its users, but it fails to provide any solid argument for its legitimacy. It fails to consider the broader perspective in which arbitration is not just a simple DSM for the parties.³⁶

References to the effortless enforcement of arbitration agreements and awards do not further soothe genuine legitimacy concerns. Certainly, the shift from (judicial) adjudication to (private) arbitration has been particularly relevant for the resolution of international commercial disputes.³⁷ Still, the efficiency of a system says nothing about the mechanisms' legitimacy. The legitimacy of a dispute resolution mechanism is necessarily assessed by reference to a set of (legitimising) values. For sure, these values vary in the eyes of different observers. The best option is to adopt the perspective of the greater public rather than that of arbitration users. Accordingly, arbitration's legitimacy is best assessed by reference to three fundamental benchmarks, which have become the topic of heated discussions in the context of IIA, namely (i) transparency, (ii) accountability and (iii) consistency of the system. Only by parting ways with these three elements will arbitration be able to aspire to any measure of genuine legitimacy.³⁸

35 See however the possibility of appointment of a judge ad-hoc before the International Court of Justice, under article 1(2) of the ICJ Rules (1978).

36 It represents an essential issue of global governance as will be discussed below in part III.

37 See Bermann G, 'Enforcing Legal Norms Through Private Means' in: Etcheverry Estrázulas N and Fernández Arroyo D (eds.), *Enforcement and Effectiveness of the Law* (Springer 2018), 33. This privatization of the law-enforcement has in parallel witnessed a similar privatization of the law-making process. See Fernández Arroyo D, 'La multifacética privatización de la codificación internacional del derecho comercial internacional' in: Basedow J et al. (eds), *¿Cómo se codifica hoy el derecho comercial internacional?* (La Ley and Thomson Reuters 2010), 51; see also Stephan P, 'Privatizing International Law' (2011) 97 *Virginia Law Review*, 1573.

38 Fernández Arroyo, note 24.

3.2. *Why legitimacy concerns cannot be exclusive to IIA?*

Remarkably, ICA is spared from the concerns to which IIA is still very much exposed to today. I argue that there is no valid reason to limit these concerns to IIA (even if they may ultimately call for more demanding reforms in the IIA field). In other words, it is necessary to challenge the rationale, which is usually advanced to exclusively direct expectations in terms of transparency, accountability and consistency requirements to IIA. It will be demonstrated that the genuine reasons that explain the backlash against IIA are of different content, but equal relevance in ICA.

Within this context, it is important to identify which are the elements that determine the need for a legitimacy debate: are they subjective (ie the participation of the state), or objective (the involvement of a public interest)? In either case, there is no reason to believe that such elements are always excluded from ICA. It has become quite normal to distinguish ICA and IIA by focusing on the involvement of states in the dispute as the distinctive factor. Roughly summed up, the key rationale is that the involvement of states in the dispute justifies exacting standards in terms of transparency, accountability and consistency. Accordingly, ICA should be exempted from higher standards of transparency, accountability and consistency because of the characteristic absence of states in international commercial disputes and the fact that ICA would only affect, in the end, private business. It is impossible to uphold such rationale for at least two reasons.

The first is factual in nature (not to say, obvious). It is simply incorrect to assume that all disputes submitted to ICA do not involve states. Admittedly, most ICA disputes concern private persons. Yet, states and their instrumentalities are regularly involved in commercial disputes that are submitted to the jurisdiction of ICA tribunals. Consistency would thus at least demand a reform of arbitral rules to adopt higher standards in such existing cases.³⁹

The second reason is that the underlying assumption of said rationale leads to debatable inferences. Certainly, the involvement of the state does not per se justify higher standards. The underlying assumption is that, because of the involvement of states, public interests are at stake in a dispute. This first inference is less problematic, even if the main reason for the existence of public interests in IIA lies elsewhere. Yet, and more problemat-

39 See, in this vein, the ICC Commission Report on *States, State Entities and ICC Arbitration* (2012).

ically, a reverse inference seems to be made according to which public interests are not at stake in a dispute merely because of the non-involvement of states. It seems to justify overall the incorrect conclusion that ICA primarily only concerns private interests. The point is not to say that all ICA disputes involve public interests akin to those that are at stake in IIA. Thus, transparency requirements can neither be the same nor be applied in the same manner irrespective of the (private or mixed) character of the arbitration and of the underlying contracts. Yet, public interests may be at stake even in ICA disputes where no state is involved. In any event, there exists a different and even more fundamental reason to question ICA's legitimacy with regard to fundamental notions, such as transparency, accountability and consistency. Indeed, the criticism against IIA cannot simply be explained by the mere involvement of states or public interest in the dispute. Instead, it is the quasi-exclusive jurisdiction of IIA tribunals that explains the greater concerns expressed in recent decades.

IIA is now established as the common venue for the resolution of investor-state disputes, to the detriment of the classical alternatives of national adjudication and diplomatic protection. This happened, first on the states' side, by adding arbitration to the menu of available mechanisms to resolve disputes, and second, by the wave of cases in which investors actually chose this option over all others. Most of the (over 3,000) investment treaties and other treaties including dispute settlement provisions concluded around the world provide direct consent to arbitrate international investment disputes. Exhaustion of local remedies is hardly required and remaining impediments to the jurisdiction of these tribunals are merely procedural, eg in the form of cooling-off periods, local litigation requirements. The growing opposition that it currently faces further confirms IIA's success. The recent negotiations of the Transpacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) generated violent debates about the possible inclusion of provisions on investor-state dispute settlement. Certainly, there exist specific concerns on this issue, which are peculiar to the IIA system: the rationale of substantial investment protection standards is also challenged.

A similar trend can indisputably be observed in ICA. Actually, the concerns raised by Lord Thomas confirm that arbitration enjoys some sort of

quasi-exclusivity over international commercial disputes.⁴⁰ Its success is best substantiated by the systematic inclusion of arbitration clauses in international contracts. The great number and broad types of disputes which may now be submitted to arbitration could hardly have been envisaged a few decades ago. This is not to say that there exist no genuine efforts to offer improved means to adjudicate international disputes.⁴¹ Yet, none of these efforts can afford to truly compete with the attractiveness of ICA.

One must thus acknowledge the existence of a *de facto* quasi-exclusive jurisdiction of ICA tribunals today; '*de facto*' because there is no legal basis for this, and 'quasi-exclusive' because its wide popularity. The systematic submission of international commercial disputes (including almost all the most important of them) to ICA make arbitration a true institution of global governance. IIA and ICA remain as mechanisms certainly designed for two (or more) identified disputing parties. However, the standing which these types of arbitral DSM have gained in recent decades cannot be ignored. Accordingly, ICA must be submitted to a similar discussion about its legitimacy. Nonetheless, due regard must be paid to its particularities when articulating concrete requirements in terms of transparency, accountability and consistency.

3.3. Concrete requirements to further enhance ICA's legitimacy

Once admitted that IA must face the legitimacy debate, the question arises as to how it can pass the legitimacy test. In this sense, there are concrete requirements that simply cannot be disregarded in ICA in order to respond to genuine legitimacy concerns of a key component of today's global governance. The higher standards one may legitimately advocate for in the ICA context must however respect the particularities of ICA.

40 Actually, part of his concern seemed to be related to the fact that many practitioners with a vocation to be decision makers find it more attractive to serve as arbitrators than to take the public bench. See also Tercier P, 'La légitimité de l'arbitrage' (2011) *Revue de l'arbitrage*, 653, 654.

41 See, for example, the creation of the Singapore International Commercial Court (SICC), which is presented as a court-based resolution dispute mechanism specialized in international commercial disputes with flexible procedures (Landbrecht J, 'The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?' (2016-1) 34 *ASA Bulletin*, 112, and all the more recent initiatives in the same direction undertaken by different states.

3.3.1. Transparency

Applied to arbitration, transparency entails not only the possibility of seeing what happens within the proceedings but also the possibility to take part therein. There are various reasons to encourage transparency in IIA.⁴² The critique of lacking transparency is strikingly the one, which has by far been the most acknowledged and directly addressed via diverse systemic reforms in IIA. Before turning to ICA, it is necessary to recall the key concerns expressed in this regard in the IIA context. These can be roughly summed up as follows: a system allowing private investors to challenge the state's right to regulate in the public interest must be transparent in the eyes of the greater public. In fact, a variety of characteristics are generally incorporated under the general heading of 'transparent' proceedings. This includes the idea of a default publication of documents and information related to the conduct of the proceedings (eg the composition of the arbitration tribunal, the parties' submissions and exhibits). In addition, hearings are progressively open to the public and are nowadays often easily accessible on mainstream media.⁴³ One may further subsume under the general heading of 'transparent' proceedings the idea of open proceedings. While there exists no direct right for third parties to participate in an IIA dispute, *amici curiae* can now easily file submissions to IIA tribunals even if the latter remain free to reject their communications.⁴⁴

All this is now contained in the *nec plus ultra*-codification efforts at UNCITRAL, which have led to the successful conclusion of the Mauritius Convention and the related Transparency Rules in IIA. A key feature of the Rules on Transparency is the creation of the UNCITRAL Transparency Registry, with the purpose of making information easily available to the public. The new paradigm is now being followed in other multilateral and bilateral instruments. Likewise, early in 2017, the Singapore International Arbitration Centre (SIAC) issued a set of Investment Arbitration Rules, mirroring some provisions of the UNCITRAL Rules on Transparency. A presumption of transparency has evidently been adopted in IIA, but it can still be set aside to protect confidential business information and the

42 Fernández Arroyo D, 'La transparencia como paradigma del arbitraje de inversiones' in: Tanzi A et al (eds), *International Investment Law in Latin America: Problems and Prospects* (Brill Nijhoff 2016), 244, 249-253.

43 See the recent example of *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, in which there was a public hearing; available at: <www.youtube.com/watch?v=7Sv81ebnxAc&t=3004s>.

44 Fernández Arroyo, note 42, 250-251.

integrity of the proceedings.⁴⁵ The efforts at UNCITRAL confirmed the existence of powers which a variety of IIA tribunals had previously already exercised by reference to their general power to conduct the proceedings.⁴⁶ Simply put, while IIA tribunals had to properly determine whether they could adapt the proceedings to satisfy the growing demand of transparency, the IIA legal framework is now well equipped with a presumption favouring a higher standard of accessibility and transparency. Of course, transparency in IIA cannot be absolute,⁴⁷ since it is a double-edged sword which, if badly used, may undermine the regime it is supposed to strengthen. Yet, the fruits of these impressive and unequalled reforms will have to be critically examined in the coming years.

From the outset, it needs to be clarified that no case will be made here to request a similar degree of transparency in ICA. The quasi-exclusive jurisdiction of ICA tribunals to settle international commercial disputes however plainly justifies basic concerns of transparency in a system where information about ongoing procedures remains a regrettable exception.⁴⁸ Under many arbitration rules, for example the ICC Arbitration Rules (2017) in its article 22(3), confidentiality only applies upon request of the parties. In this sense, the small number of published decisions demonstrates that many times the parties still prefer the proceedings to be confi-

45 See article 7 UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (2014).

46 See eg *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (15 January 2001); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Procedural Order (19 May 2005), 24; *United Parcel Service of Am., Inc. v. Canada*, NAFTA, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001. In *AES Summit Generation Ltd. and AES-Tisza Er6mil Kft. V Republic of Hungary*, ICSID Case No. ARB/07/22 (2010), the European Commission (Commission) has gained *amicus curiae* status to represent the European Community's (EC or Community) interest in enforcing competition law.

47 See a deeper analysis in Fernández Arroyo D, note 42, 260. See *Glamis Gold Ltd. v United States of America* (UNCITRAL), Award (8 June 2009), 286, where the arbitral tribunal stated that the admission of *amicus* briefs should not disrupt the proceedings. See also *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (UNCITRAL), PCA Case No. 2009-23, Procedural Order No. 8 (18 April 2011), 17-20, where the tribunal denied an *amicus* request since the petitioner intended to question jurisdictional matters already decided by the tribunal.

48 See Rogers C, 'Transparency in International Commercial Arbitration' (2006) 54 U. Kan. L. Rev 1301.

dential. Actually, the ICC has a policy to publish its awards; awards are not published while parties are still litigating and a reasonable amount of time should elapse after the award was rendered; typically, a minimum period of three years.⁴⁹ Of course, as a general rule, the parties may agree otherwise.⁵⁰

I have elsewhere criticized the schism of sorts, which took place after the first attacks on IIA's lack of transparency: I believe it was a big mistake to limit the debate on the lack of transparency to IIA. Quite fortunately, a growing number of arbitral-friendly jurisdictions have since then acknowledged the need to push for at least a presumption of transparency in ICA. In this vein, the International Law Association's Committee on ICA has openly confirmed that the assumption that ICA is inherently confidential 'is not warranted because many national laws and arbitral rules do not currently provide for confidentiality and those that do vary in their approach and scope (including the persons affected, the duration and the remedies).'⁵¹ Parties expressing specific wishes of confidentiality will regularly address the matter a priori at the time of the drafting of the arbitration agreement.

Would ICA benefit from the establishment of a publicly available database like those which already exist in IIA? I believe it would and so do many distinguished colleagues. As of today, various arbitral institutions only publish extracts or offer summaries of a limited number of cases. The names of the parties do not necessarily need to be identified in such a registry, but at least the identity of the arbitrators should be disclosed. The sharing of such information would greatly contribute to ICA's legitimacy in the long run via the creation of a 'virtuous' control. This control would be distinct from the public control which is occasionally operated by

49 Mourre A, 'Precedent and Confidentiality in International Commercial Arbitration. The Case for the Publication of Arbitral Awards,' in Gaillard E and Banifatemi Y (eds), *Precedent in International Arbitration* (Juris 2007), 60; Berger K, 'The International Arbitrators' Application of Precedents,' (2008-3) *Transnational Dispute Management*, 19.

50 This is expressly stated in article 43(3) of the Swiss Rules of International Arbitration, which states that: '[...] an award may be published [...] [if] no party objects [...]': The UNCITRAL Arbitration Rules take an inverse approach, stating in article 32(5) that: 'An award may be made public with the consent of all parties [...]'. For its part, article 30(1) of the LCIA Arbitration Rules states that the parties: '[...] undertake as a general principle to keep confidential all awards.'

51 See Report on *Confidentiality in International Commercial Arbitration*, adopted in 2010 by the Committee on International Commercial Arbitration of the International Law Association (>www.ila-hq.org/en/committees/index.cfm/cid/19>.).

national jurisdictions at the stages of enforcement and annulment proceedings. Essentially private in nature, this virtuous control would enhance the selection of arbitrators, the prevention of conflict of interests and the scrutiny of the awards. It would also help to assess their availability, experience, and other aspects related to their function.

Such a virtuous control could be easily implemented at the institutional level. The ICC, for instance, adopted a new policy to publish the names and certain details of arbitrators sitting in ICC cases registered after 1 January 2016.⁵² The rationale behind the policy is in the long run to allow parties to assess the availability of arbitrators (based on their current load of ICC arbitrations, to incentivize greater diversity of arbitral tribunals, obtain data on frequency and trends in appointments). The ICC expects the policy to help assuage concerns about the transparency of IA. The policy remains an 'opt-out' one, allowing parties to ultimately forbid any publication of the information. Parties are however equally free to publish additional information such as the names of the parties and counsel. While this is certainly an improvement, it is not enough to tackle the concerns since it only applies to ICC cases.

Admittedly, similar reforms will be harder to achieve outside of institutional settings. Yet, it should be the task of ad hoc arbitrators to push for greater transparency with the help of willing parties. Interestingly, leading associations of arbitrators regularly advocate for greater transparency in the international arbitration community. In this vein, several websites contain the profiles and activities of international arbitrators,⁵³ which already count on the support of a great part of the arbitration community. Albeit not exhaustive, this type of initiative should be encouraged and strengthened since it provides a solution at the global level. In other words, institutional sharing of information may be quickly achieved but only a global sharing of information would enable the full benefits of the gained transparency to be realised. Global reforms in ICA are more likely to be achieved via soft law instruments. There is no reason to doubt that, if properly conceived, guidelines on transparency practice could rapidly gain influence in ICA, as has been the case for other soft law instruments.

Despite the theoretical analysis of the issue, from a practical standpoint, it should also be noted that implementing transparency might entail addi-

52 See ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, section III.B.

53 See, for instance, the International Arbitration Institute (<www.iaiparis.com>), and Arbitrator Intelligence (<www.arbitratorintelligence.org>).

tional costs, both in IIA and ICA.⁵⁴ Encouragingly, only a minority of states has displayed a clear reluctance to support these costs during the discussions at UNCITRAL, which paved the way for the Mauritius Convention. Still, almost all information concerning the IIA proceedings may be now publicly available on different platforms. There exists no convincing reason to accept these costs in IIA, but not in ICA. Arbitral institutions already function with certain databases, which are simply not accessible to the public. All in all, it appears that transparency in IIA is now mainly a matter of implementation. While the same standards cannot be transposed *tels quels* to the ICA field, notably regarding the arbitral process' openness to *amici curiae*, the trend for the systematic sharing of basic information should be encouraged.

3.3.2. Accountability

The concept of accountability has been addressed in a variety of contexts not limited to international dispute resolution mechanisms. Increasing emphasis is notably being put on the accountability of all types of transnational actors. Defining accountability is not an easy task despite the existence of a scholarship exclusively dedicated to the topic. Accordingly, for some, accountability should be seen as a process to achieve democratic aims, ie a process which implies that someone is responsible to someone else for something.⁵⁵ It is regularly understood as a necessarily corollary to the use of public powers.⁵⁶ In my view, the concept is closely linked to the idea of governance. In other words, a certain responsibility (and potential liability) exists for bodies or individuals who exercise such powers. Although the topic has more recently been prioritized in the context of IIA, it is of equal relevance in the context of ICA.

It should be recalled that the key discussion concerning accountability in IIA turns to the need for greater accountability of arbitrators, not only towards the disputing parties, but also towards the treaty parties and the

54 Fernández Arroyo D, note 42, 253-255. In *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), Procedural Order No. 3, 31, the arbitral tribunal reserved the prerogative to order *amici* to pay for costs that their submissions may cause to the parties.

55 See Kaufmann-Kohler G, 'Accountability in International Investment Arbitration' (2016) 3 *Cahiers de l'arbitrage*, 581.

56 Kamto M, *Droit international de la gouvernance* (Pedone 2013), 34–35, 53–56.

greater public which is affected by the outcome of the dispute. Evidence suggests that for certain critics, arbitration is ill suited to resolve investment disputes, notably because of the lack of accountability of party-appointed arbitrators. The recent negotiations of the TPP, TTIP and CETA highlight radically different responses to this accountability crisis. While the TPP largely upholds the existing party-appointed arbitrator system with certain codes of conducts, the CETA departs from said model quite evidently. Indeed, The CETA creates a court system for the resolution of investment disputes. The extent to which this court system with an appellate mechanism shares certain attributes of arbitration is currently debated. Working Group III of UNCITRAL is also trying to answer these questions.

This being said, what degree of accountability may one reasonably expect from ICA's actors? Bluntly put, the question is to what extent arbitrators and institutions can free themselves from any liability for their actions merely because they operate outside of the realm of public institutional settings. There is however no convincing reason why they should not be (at least) as accountable as their public counterparts. At least two reasons support this conclusion.

The first one relates to basic concerns of corruption. Arbitration would become a farce if it would allow private parties to circumvent public adjudication and remain shielded from any control in that regard. Overall, cases of corruption in ICA remain exceptional in practice. This fortunate finding does not justify lower accountability standards. Corruption cases are, however, not the only reason to advocate for a certain accountability of arbitrators. Indeed, the conduct of arbitrators during proceedings may also be a source of legitimate concerns. As such, it cannot escape any scrutiny and control. A quick comparative survey of national laws demonstrates the increasing willingness to hold arbitrators accountable.⁵⁷ The terms of

57 See eg article 32 of the 2008 Peruvian Arbitration Decree no 1071 (which represents to this day the most advanced arbitration national legal order in Latin America): '[A]cceptance binds arbitrators and, where applicable, the arbitral institution, to comply with their duties, making them liable, if they fail to do so, for any loss or damage due to wilful misconduct or gross negligence'. See also with more detail, article 813-ter (Responsibility of arbitrators) of the Italian Code of Civil Procedure (resulting from the reform introduced by the Legislative Decree of 2 February 2006, no 40), stating that '[T]he arbitrator shall be liable for damages caused to the parties if he or she: (1) has fraudulently or with gross negligence omitted or delayed acts that he or she was bound to carry out and has been removed for this reason, or has renounced the office without a justified reason; (2) has fraudulently or with gross negligence omitted or prevented the rendering of the award within the time limit fixed according to articles 820 or 826.'

appointments are likely to include a non-liability clause, but a variety of national legal systems explicitly regulating the duties of arbitrators will still provide at least a limited liability for gross negligence or wilful misconduct during the procedure. Remarkably, the Italian Code of Civil Procedure will exceptionally provide for an application by analogy of the Act on Responsibility of Judges. In addition to the idea of accountability, the issue of corruption also relates to the question of which role should arbitrators play in the decision-making process, eg should they act as truth seekers or only address issues presented by the parties.⁵⁸

Admittedly, orders of damages on the basis of similar legislation remain to this day exceptional. Yet, the Spanish Supreme Court has recently found two arbitrators liable for the setting aside of their award, further ordering them to reimburse 750,000 EUR in fees each plus interest and costs.⁵⁹ The Court found that the arbitrators had ‘palpably violated the arbitration rules’ by excluding the third arbitrator from deliberations, ultimately resulting in the setting aside of the award.

Despite this partial recognition of the need for greater accountability in ICA, the arbitral community overall remains attached to the principle of arbitral immunity. Fortunately, distinguished arbitrators have expressed their concerns on this matter and pushed for greater accountability.⁶⁰ The point here is not to advocate for a liability for the substantive content of arbitrators’ decisions. The point is to acknowledge that ICA’s role in today’s global governance plainly justifies a liability for its decision-makers in cases of intentional wrongdoing and denial of justice. Critics will say that unsatisfied parties are likely to systematically challenge the arbitrators’ liability. Yet here again, this risk does not represent a real impediment that cannot be overcome. One could think of various admissibility filters to avoid such problems; a challenge to the arbitrators’ liability could, for instance, be conditional on the annulment of the award.

58 See Pereira de Souza Fleury R, ‘Do Arbitrators have an ex officio duty/right to self-investigate corruption?’, Kluwer Arbitration Blog (25 November 2015).

59 *Tribunal Supremo*, First Chamber (15 February 2017).

60 Lalive P, ‘Sur l’irresponsabilité arbitrale’ in: *Études de procédure et d’arbitrage en l’honneur de J-F Poudret*, Faculté de Droit de l’Université de Lausanne 1999, 419–35.

3.3.3. Consistency

Consistency is, *prima facie*, one of the fundamental attributes of a rule-of-law system.⁶¹ It basically requires a certain harmony between legal decisions of a given system. As such, it goes hand in hand with the expectation of some degree of legal certainty or predictability. Certainly, absolute expectations of consistency can never be satisfied, but this holds true for virtually every legal system. Arbitration and adjudication stand on equal footing in this regard. Nevertheless, national legal systems effortlessly accommodate and entertain this objective of consistency, despite obvious differences which subsist between civil law and common law. Both types of systems embrace the existence of a jurisprudence which may evolve over time. Concerns for consistency of IIA awards have been expressed long ago and largely been addressed in practice. Strikingly, concerns about a possible lack of consistency of ICA awards are rarely manifested in scholarship, let alone in practice. Once raised, any concerns of this kind are quickly dismissed as being impossible to satisfy, or more problematically, irrelevant in the peculiar context of ICA.

The ‘use of precedent’ is generally described as the tool to achieve harmony. Yet, as is often the case, the term ‘precedent’ is used for a variety of – sometimes conflicting – meanings. It is commonly understood as the building unit of ‘jurisprudence’ or ‘case law’. In the context of IA, one must first acknowledge upfront that there exists no doctrine of precedent (*stare decisis*), pursuant to which arbitrators would have to take into account previous arbitral decisions when deciding a dispute. This is because there is no structure linking different arbitral tribunals. Thus, strictly speaking there are no precedents for arbitral tribunals to follow. This holds true in the context of IA generally, regardless of the particular type of arbitration (sports, commercial, investment etc.). In the case of ICA, the lack of transparency in the publication of decisions is another barrier to the use of such decisions as precedent.

61 Certainly, one may not expect a strong interest in consistency when parties to an arbitration agreement expressly opt out from the application of law to solve their dispute. They may clearly do so by opting for a resolution of their dispute *ex aequo et bono*, thereby allowing arbitrators to act as *amiable compositeur*. In such cases, the arbitrators are most likely to disregard previous decisions. Yet, this possibility – which is explicitly offered to parties in a majority of national laws and arbitral rules and notably the ICSID Convention – is hardly endorsed in practice where parties generally favour the application of law. This further evidence of their desire for a certain consistency and predictability.

Nevertheless, it has now become quite usual to label previous persuasive arbitral decisions as precedents.⁶² This is particularly true in the IIA context where it is nowadays impossible to find a single award that fails to discuss prior arbitral decisions. This goes along with the fact that almost all decisions are published, unlike ICA decisions. In such case, different precedents are discussed and used in the reasoning of the tribunal. IIA tribunals systematically highlight the absence of *stare decisis*, but emphasize the importance of referring to prior awards. Dissenting opinions will rarely be encountered on this point:

[...] the Tribunal considers that it is not bound by previous decisions of international tribunals. The majority considers, however, that, subject always to the specifics of a given treaty and to the circumstances of the actual case, it has a duty to adopt solutions established in a series of consistent similar cases, if such exist, absent compelling contrary grounds. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case purely on its own merits as argued before her, independently of any apparent jurisprudential trend.⁶³

In any case, it is probably more plausible to have a system in which precedents are not followed out of a formal obligation, but only to the extent that they are considered relevant (related to comparable cases), and persuasive (based on reasonable rationale). However, despite the obvious state of affairs in IIA, certain scholars and arbitrators remain hostile to the use of precedents in ICA. Simply put, the *Gretchenfrage* is whether in the absence of any obligation to follow precedents, there exist any impediments to do so in ICA?

Certainly, there are practical impediments, which one can obviously not underestimate.⁶⁴ In particular, discussions on the use of precedents in ICA are often paired with the related issue of confidentiality, which, even if it is no longer what it used to be, remains a considerable obstacle. As a matter of fact, the pool of publicly available ICA decisions is relatively small.

62 Kaufmann-Kohler G, 'Is Consistency a Myth?' in: Banifatemi Y (ed), *Precedent in International Arbitration*, Juris 2008, 137.

63 *Burlington Resources Inc. v République d'Equateur*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017), § 46.

64 See Kaufmann-Kohler G, 'Arbitral Precedent: Dream, Necessity or Excuse?', The 2006 Freshfields Lecture, (2007) 23-3 *Arbitration International* 357; Fernández Arroyo D, 'Les décisions arbitrales comme précédent' in: Aloupi N and Kleiner C (eds), *Le précédent en droit international* (Pedone 2016) 109.

Apart from rare integral or partial publication by arbitral institutions, ICA awards are mainly emerging from the shadows via two media: judicial decisions rendered in post-award litigation (on recognition, enforcement or annulment of the award) and scholarly work analysing/summing up awards. Most of the time, only extracts of cases are published.

Related to this, it is further argued that consistency is practically unachievable in ICA because of the size and heterogeneity of the pool of available arbitrators. In line with this argument, it is claimed that consistency is more easily achieved in IIA because of the existence of a comparatively smaller and homogeneous pool of arbitrators. These claims do not withstand reality. The community being small or big, its members are in permanent contact. Whenever a decision is published, most of the arbitration community hears about it quite quickly. Networking has become as important in ICA as in IIA. Conferences, seminars, colloquia and moot courts are just a few examples of events that take place on a weekly –if not daily- basis.⁶⁵ In fact, it has become equally impossible to keep up with such activities in ICA and IIA contexts.

Arguably, cultural differences amongst arbitrators would be greater in ICA. This is again questionable. Certainly, ICA tribunals have the extraordinary potential to bring together arbitrators with profoundly different backgrounds. Notwithstanding cultural backgrounds, a majority of these arbitrators will (perhaps regrettably) most of the time share a similar academic background. Moreover, ICA has in the recent decades undergone a noticeable transnationalisation, in which arbitrators standing at the forefront of the latter can be trusted to easily manoeuvre.

Apart from these material impediments, which may, in my opinion, be reasonably overcome or minimized, the organization of the arbitral system itself would prevent the emergence of a coherent jurisprudence. Critics point in this regard to the absence of any hierarchically superior authority that could guarantee –or at least pursue- the coherence and authority of precedents. Undoubtedly, there exists no equivalent to an arbitral supreme court or *cour de cassation*. Once rendered by arbitral tribunal, their decisions are considered final, subject to limited possibilities of reconsideration and correction, and generally not subject to any sort of appeal. It is difficult to oppose this finding. Arguably, certain arbitral institutions scrutinise awards before they are rendered. For instance, the ICC Secretariat may draw the attention of the tribunal to a certain point of law when

65 Gaillard, note 8.

reviewing the award,⁶⁶ and the Court of Arbitration for Sport may do so with regards to fundamental issues of principle.⁶⁷ In any event, the final decision remains with the arbitral tribunal. One must however question whether the absence of an hierarchically superior authority constitutes a legal impediment. Surely it does not. Every tribunal (sensitive to consistency in ICA) is thus simply entrusted with the additional task of identifying the relevant and persuasive precedents in each case, if any. Parties in IIA systematically help the tribunal to identify potentially relevant precedent among the massive amount of available decisions. Parties in ICA will regularly do the same, albeit with the fewer available decisions on the matter.

Lastly, a final argument is usually put forward to object to the use of precedents in ICA (if not in IA more generally), according to which the purpose of IA is not in itself the creation of a coherent corpus of rules since, by definition, the applied rules originate from a variety of legal systems. It should firstly be highlighted that the application of rules from a variety of legal systems is not an exclusive enterprise of arbitrators: national courts do it on a daily basis, according to their private international law rules. The IIA system is further characterized by the application of a variety of investment treaties. They all differ to a certain extent, but most of them also uphold a set of core notions, principles and concepts such as fair and equitable treatment, full protection and security. IIA tribunals regularly compare and contrast the wording of different treaty clauses by referring to precedents, even under different investment treaties.

The ICA context is in fact quite similar: while certain questions may indeed greatly depend on the solution of a particular national legislation, others regularly do not, such as common questions related to party autonomy and the arbitration agreement (e.g. those related to the separability doctrine or the extent to which non-signatories are bound by the arbitration agreement). ICA tribunals readily refer to prior decisions in such cases, sometimes on their own motion, generally based on parties' submissions.

Taking precedents into account does not only help consistency, but persuasiveness, which also enhances legitimacy. This is one of the reasons why use of precedent sometimes exceeds the realm of certain type of international tribunals, creating some sort of cross-fertilization, which ultimately leads to more solid decisions. Needless to say, the consistency to which I

66 ICC Arbitration Rules (2017), article 34.

67 CAS Procedural Rules (2017), rule 46.

refer is an attitude rather than a final outcome: its essential goal is to prevent arbitration awards from being grossly at odds with a generally accepted solution or trend, unless there is a clear and sufficient reason why such a solution or trend should be put aside, whether in general or within the particular context of a specific case.

4. Final remark: the future of arbitration

I have described some prices to pay in exchange for the expansion of arbitration. While the prices claimed by states or by users are exacted without much problem, those here characterized as related to legitimacy (which are to some extent those required for the public at large) seem more difficult to assume. However, the continuous success of arbitration as the prevalent DSM largely depends on the observation of prices due to legitimacy reasons. In the near future, arbitration will need to adapt to a new scenario, marked by features such as the emergence of state (arbitration-alike) international commercial courts, Calvo's revival in IIA or the development of techno-arbitration. Within that context, paying attention to legitimacy issues will become more and more essential if arbitration wishes to keep its current prominent position.

History teaches that solid institutions, as well as powerful empires, can suddenly disappear. Reaching the peak is sometimes no more than the prelude to the fall. Similarly, show business has plenty of famous artists who were not able to survive great success. Nevertheless, many were capable of reinventing themselves and adapting to changes. Elvis Presley or the Rolling Stones. This is the current arbitration dilemma.