Ius Gentium: Comparative Perspectives on Law and Justice 54

Neil Andrews

Arbitration and Contract Law

Common Law Perspectives

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For Liz, Sam, Hannah, and Ruby

Preface

Arbitration and the Three Dimensions of Consent

Arbitration and agreement are inter-linked in three respects: (i) the agreement to arbitrate is itself a contract; (ii) there is scope (subject to clear consensual exclusion) in England for monitoring the arbitral tribunal's fidelity and accuracy in applying substantive English contract law; and (iii) the subject matter of the arbitration is nearly always a 'contractual' matter. These three elements underlie this work. They appear as Part I (arbitration is founded on agreement), Part II (monitoring accuracy), and Part III (synopsis of the contractual rules frequently encountered within arbitration).

Arbitration Is a Consensual Process. **N**early all commercial arbitrations arise from an arbitration agreement voluntarily reached by both parties. Occasionally, arbitration is made available under statute and is not voluntary. Another exception is when arbitration is made available under Treaty in favour of third party corporate investors. It can be safely assumed, however, that arbitration has as one of its pillars the fundamental concept of party consent. It is hoped that the wider legal community will find interesting and useful this study of the working out within English law of the notion that arbitration arises from agreement.

Monitoring the Tribunal's Application of Contract Law. English law takes seriously (although in a balanced way) the need to maintain links between the practice of arbitral decision-making on points of English contract law and the wider interest of the legal community (a global audience) in studying progress within the substantive body of contract law. This is examined in Part II (notably Chap. 8). By contrast, as explained in Chap. 9, the enforcing court has less opportunity to monitor a foreign arbitral tribunal's compliance with contract law. Even so, various contractual issues can be examined by the enforcing court: whether the arbitration agreement is valid, what is its scope, and who are the relevant parties.

Central Contractual Doctrines. The subject matter of disputes submitted to arbitration is substantially concerned with contract law: the arbitral tribunal receiving a claim or allegation that the parties had a contract, or remain bound by one, or were

negotiating one, or that one party failed properly to negotiate one, or receiving the submission that the agreement should be interpreted in a certain way, or that one party has breached the agreement and is now liable to pay compensation or to be rendered subject to some other remedy. Chapters 10, 11, 12, 13, 14, 15, 16, and 17 provide a synopsis of English contract law. Here the aim has not been to provide an encyclopaedia of contract law. Instead these succinct chapters provide a means of navigating the detailed rules and of identifying the main doctrines likely to engage the attention of advisors and arbitrators. It is hoped that these synoptic chapters will be of help to: (1) foreign lawyers or English non-lawyers unfamiliar with the details of English contract law; (2) English lawyers who have lost their orientation because of the complexity of contract law; and (3) arbitral tribunals in search of solid ground.

Ten Leading Points Within English Arbitration Law

1. *Supervisory Court*. The Commercial Court is the main court appointed to oversee issues arising under the Arbitration Act 1996 (but some arbitration matters will come before the Mercantile Courts, and the Technology and Construction Court, or the Chancery Division, and county courts).
2. *Main Statute*. The law of arbitration in England was substantially codified by the Arbitration Act 1996, which must be read in the light of the Departmental Advisory Committee's report. Unlike many other nations, England has not adopted the UNCITRAL Model Law. The main deviation from the Model Law is section 69 of the Arbitration Act 1996 (**8.01**), which permits appeals (subject to the High Court's permission) from awards where there is alleged to have been an error of *English* law. Part 1 of the Arbitration Act 1996 applies when the 'seat' of the arbitration proceedings is in England and Wales or Northern Ireland (**3.01**). Even if the seat is not England and Wales or Northern Ireland, the 1996 Act will apply to various matters, notably: (i) the grant of a stay of legal proceedings, and (ii) enforcement of an award. The parties' consensual autonomy is a leading feature of the 1996 Act, section 1 of which states: the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. But this is qualified by the 'mandatory' provisions listed in Schedule 1 to the 1996 Act. The 1996 Act also imposes duties upon both the arbitral tribunal and the parties to ensure fairness, efficiency, and an appropriate degree of speediness (**6.25**). The 1996 Act also emphasises that English courts should not interfere excessively in the conduct of the arbitration process. However, in cases of urgency the court can provide relief for the purpose of preserving evidence or assets.
3. *Law Governing the Arbitration Agreement*. The Court of Appeal in *Sulamerica Cia Nacional de Seguros SA* v. *Enesa Engenharia SA* (2012) (**3.17**) held that the arbitration agreement will be subject to the law of the seat only if the parties have neither expressly nor impliedly nominated a different law to govern that agreement.

4. *Separability*. Section 7 of the 1996 Act, adopting the concept of 'separability' (or 'severability'), provides that the main contract's invalidity does *not necessarily* entail the invalidity of the arbitration agreement (see Lord Hoffmann in *Fiona Trust and Holding Corporation* v. *Privalov* (2007) for details, also known as *Premium Nafta Products Ltd* v. *Fili Shipping Co Ltd*) (**2.47 ff**).
5. *Religious Affiliation of Arbitrators*. In *Jivraj* v. *Hashwani* (2011) (**5.32**) the United Kingdom Supreme Court held that appointment of arbitrators is not governed by the European employment provisions prohibiting selection by reference to religion.
6. *Upholding Arbitration Agreements*. A party to an arbitration agreement ('the applicant') can apply to the court for a stay of English court proceedings if such proceedings have been brought against him (**4.02**). The Supreme Court in the *AES* case (2013) (**4.13** and **4.17**) confirmed that the English courts have power to issue anti-suit injunctions to prevent a party to an arbitration agreement from acting inconsistently with that exclusive commitment to arbitrate rather than to litigate. But the European Court of Justice's decision in *Allianz SpA* v. *West Tankers* (2009) (**4.22**) prevents the Common Law anti-suit injunction from being issued to counter breach of arbitration clauses by the commencement of inconsistent *court* litigation within the *same* European jurisdictional zone. In the *Gazprom* case (2015) (**4.24**), the European Court of Justice confirmed the central feature of the *West Tankers* case (2009): that it is incompatible with the Jurisdiction Regulation for the court of a Member State to issue a decision prohibiting the respondent from continuing, or initiating, civil or commercial proceedings covered by the Jurisdiction Regulation (2012) (effective from 10 January 2015) in another Member State.
7. *Confidentiality*. The Court of Appeal's decision in *Michael Wilson & Partners Ltd* v. *Emmott* (2008) (**7.02**) confirms that an implied obligation of confidentiality governs all documents 'prepared for', 'used', and 'disclosed during' arbitration proceedings governed by English law.
8. *Challenges to the Award*. The High Court can hear a challenge to an award where it is alleged that the tribunal lacked jurisdiction (section 67, 1996 Act), or that there has been a 'serious irregularity affecting the tribunal, the proceedings or the award' (section 68, 1996 Act). Neither section 67 nor 68 can be excluded by agreement. However, the House of Lords in the *Lesotho* case (2005) (**9.09 and 17.04 ff**) noted that a 'mere' error of fact or law within the tribunal's jurisdiction does not justify resort to section 68. Although there can be no appeal from an English award to the High Court on a point of foreign law, section 69 (**8.04**) permits an appeal to occur on a matter of English law if the court itself gives permission. Careful wording is required to exclude section 69.
9. *Res Judicata*. The Privy Council in *Associated Electric & Gas Insurance Services Ltd* v. *European Reinsurance Co of Zurich* (2003) (**7.08 ff**) held that issue estoppel can arise in arbitration, and this will be binding on a second arbitration panel seised with a matter on a related topic between the same parties.

10. *Cross-border Enforcement of Awards*. The Supreme Court in *Dallah Real Estate & Tourism Holding Co* v. *Pakistan* (2010) (**9.36**) held that a foreign award (given in Paris) could not be recognised and enforced in England (under the New York Convention (1958), enacted as section 103, Arbitration Act 1996), because the arbitral tribunal had incorrectly determined that the Pakistan Government was a party to the relevant arbitration agreement. But a French court, applying its domestic arbitration law, as distinct from the New York Convention (1958), later upheld the same award.

Cambridge, UK Neil Andrews
October 2015

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Part I
Arbitration: A Consensual Process

Chapter 1
The Landscape of International Commercial Arbitration

Abstract Chapters 1–7 cover the main features of the arbitral process from the perspective of the parties' agreement, the court's supportive function, and overarching standards or values of impartiality, fairness, efficiency and expedition.

Chapter 1 begins with examination of the reasons why parties might prefer to pursue arbitration rather than the court system for the resolution of their differences. The second section examines the 'Three Pillars' of commercial arbitration: agreement; autonomy from judicial interference (substantial, not complete); cross-border enforcement of awards.

1.1 Arbitration's Perceived Advantages

1.01 Here we will consider six main advantages associated with arbitration (as distinct from use of court proceedings): (i) neutrality, (ii) expertise, (iii) procedural flexibility, (iv) finality, (v) superior cross-border enforcement, and (vi) confidentiality. Factors (i), (ii), (iii), (iv), and (vi) are interests normally shared by claimant and defendant. But factor (v) is a claimant's interest.

1.02 But how do these factors withstand sceptical scrutiny? All things considered, factors (i) (neutrality), (ii) (expertise), (iv) (finality) and (v) (superior cross-border enforcement) seem most important.[1]

1.03 *Factor (i), Neutrality*.[2] Here the attraction is that the seat of the arbitration can be a neutral jurisdiction, for example, London, Paris, Stockholm, or Zurich, the

[1] D Wong, 'The Rise of the International Commercial Court…' (2014) 33 CJQ 205 at 205–206 identifies (i) (ii) (v) and (vi).

[2] AH Baum, 'International Arbitration: the Path Towards Uniform Procedures', in G Aksen, et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC, Paris, 2004), 51–52; AF Lowenfeld, 'The Party-Appointed Arbitrator: Further Reflections', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 19, at 473, however, suggests that 'rooting for the home team' by a party-appointed arbitrator' is 'not much in evidence'; CA Rogers and JC Jeng, 'The Ethics of International Arbitrators', in Newman and Hill, *op cit*, chapter 7, at 191–192 ('to say that all arbitrators are equally "neutral" is mostly a triumph of rhetoric'), and 199–200; party-appointed arbitrators 'serve as an "interpreter" of language, of legal culture, and of law for the benefit of fellow adjudicators', F Gelinas, 'The Independence of

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parties being based in (for example) China and the USA. Neutrality can be reinforced, if the tribunal consist of three members, by each party appointing his own co-arbitrator (for example, a Chinese and American), and the President being neither Chinese nor American. But given that the parties could elect to have the dispute litigated in a neutral court, for example, in London or Paris, what additional benefit is secured by the nationally selected wing-arbitrators? In fact 'neutrality' is an imponderable element. Böchstiegel even predicts that technical excellence and reliability might eclipse considerations of securing local representation on the arbitral tribunal: 'parties seem less inclined to select arbitrators from their own legal background but rather…from any region of the world whom they consider best equipped to for particular case.'[3]

1.04 *Factor (ii), Expertise*. Arbitrators can be selected for their expertise in technical areas, such as engineering, economics, science, the 'customs of the sea', or commercial law.[4] This factor can be important in some technical fields. But it does not in all contexts render arbitration overwhelmingly superior. This is because courts can be informed by expert opinion. Furthermore, specialist courts develop familiarity with certain branches of commerce and even technology. But Born notes the potential for disaster: 'many national courts are distressingly inappropriate choices for resolving international commercial disputes'.[5] And the (expensive) three-member arbitral panel might be attractive: 'hardly any national courts can

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International Arbitrators and Judges: Tampered With or Well Tempered' (2011) 24 New York Int'l LR 1, 26; I Lee, 'Practice and Predicament: Nationalism, Nationality, and National-Affiliation in International Commercial Arbitration' (2007) 31 Fordham Int'l LJ 603 (also noting religious affiliation—and see end of this note); and for practice in ICSID matters, CA Rogers and JC Jeng, *ibid,* 199–200. On English arbitration's willingness to allow appointment by reference to national or religious criteria, see *Jivraj* v. *Hashwani* [2011] UKSC 40; [2011] 1 WLR 1872, on which *Andrews on Civil Processes*, vol 2, *Arbitration and Mediation* (Intersentia, Cambridge, Antwerp, Portland, 2013), 9.25 ff; and on connections between potential arbitrators and parties based on 'residence' and 'other relationships' (and not just nationality), ICC Rules (2012), Article 13(1).

[3] K-H Böchstiegel, 'Perspectives on Future Developments in International Arbitration', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 12, at 330.

[4] eg, Heidelberg Conference (2011), National Report (a series of national reports on arbitration filed with the author): Viktória Harsági (Hungary): 'Judges of state courts are (or can be) highly qualified legal experts; however, they cannot be expected to have detailed knowledge of international trade practices.' David Steward (London, Singapore, and Hong Kong): 'There is a common perception that an arbitration tribunal's decision will be more grounded in commercial considerations than that of a judge....In some commodity trade arbitrations, the tribunal may decide not to apply the law strictly and to make an award that reflects its view of what the trade would regard as fair. This is generally recognised and accepted by the parties, who submit to the judgment of others who know how the market works.' Natalie Moore (England): 'In the field of shipping, clients often prefer their dispute to be referred to "three commercial men sitting in London" (as the arbitration clause is often worded) who are familiar with shipping matters… The decision making is likely to be more rough and ready, but my clients (charterers, ship-owners, insurers etc) seem to accept that this is the traditional way of litigating shipping disputes.'

[5] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 8.

offer the breadth of resources and experience possessed by a tribunal of three experienced international arbitrators.'[6]

1.05 *Factor (iii), Procedural Flexibility*. This has ceased to be a major distinguishing feature. The practices of court proceedings within both the Common Law and other traditions have been absorbed into modern cosmopolitan arbitral practice. Common lawyers will recognise within modern arbitral practice the familiar patterns and techniques of written submissions, documentary disclosure, witness statements, expert opinions, oral examination of witnesses, including cross-examination by opposing parties, elaborately reasoned awards. The rules of institutional arbitration, much less detailed than most national procedural codes, have elastically accommodated these practices. As Jan Paulsson notes, 'modern practitioners have a adopted a cosmopolitan approach which converges in a range of shared practices' and 'remarkable procedural commonalities'.[7] And Gary Born comments: 'most developed nations have rejected the view that arbitrators sitting there must apply local judicial procedural laws', adding, however, 'there continues to be a tendency, particularly among less experienced international arbitrators, to look to local judicial procedures as their starting point in determining arbitral procedures.'[8]

1.06 *Factor (iv): Finality*. There is (in general) no appeal from arbitral awards (furthermore, respondents to a 2006 poll strongly opposed intra-arbitral appeals).[9] Arbitration is an escape from judicial appeals. Given the baroque and entrenched appellate arrangements in many legal systems, the arbitration community's decision to walk away from appeals is plainly sound. Arbitration can involve high stakes. No doubt, errors of fact are beyond further scrutiny. But what if the tribunal has misapplied the applicable law? As Jan Paulsson says, 'To give [an arbitral tribunal] the power to make a final and unreviewable decision may be a frightening thing'.[10] But he dismisses the idea of appeal to national courts[11] and he notes how difficult and expensive ('daunting') an intra-arbitral 'appeal' by a large arbitral panel would be.[12] In fact arbitral 'finality' is a highly contestable 'advantage'. Born notes the tactical see-saw nature of arbitral finality: one party's final victory is the opponent's irreversible defeat.[13] The arbitration community, and users of that system, are opposed to squandering the advantage of insulation from the national court process by admitting appeals on the merits from arbitral decisions to courts. The price that is

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[6] *ibid,* 9.

[7] J Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), 179.

[8] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 70.

[9] Queen Mary College (London) Survey of Arbitration Users (2006): 'International Arbitration: Corporate Attitudes and Practices <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>, p 15 (over 90 % opposed; poll of 103 counsel, mostly internal, concerned with arbitration).

[10] J Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), 291.

[11] *ibid*.

[12] *ibid*. at 292–293.

[13] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 5 to 6.

paid for such insulation is that arbitral awards are virtually final, subject only to restricted grounds of review (**8.01**), which are aimed at ensuring the jurisdictional validity of the arbitration submission, the correct appointment of the tribunal, and compliance with the applicable procedure, and stop far short of permitting appellate re-examination of the award's substantive or factual merits.

1.07 *Factor (v): Superior Cross-border Enforcement*. Taking a global perspective, foreign awards are more easily enforced than foreign judgments.[14] Born comments: 'there are significant obstacles to obtaining effective enforcement of foreign court judgments in many cases'.[15] But this point is losing strength or it might even have become a non-point within the European Union and between well-established major trading nations who have bilateral arrangements[16] (admittedly in the wider world enforcement of foreign judgments is underdeveloped).[17] Certainly, the New York Convention (1958) is not the fast-route to enforcement which some had supposed (for examples of problematic enforcement under the NYC (1958), see **9.36** on the *Dallah* litigation and **9.31** on the *Yukos* saga). Furthermore, Jan Paulsson (2014) gave this verdict on the New York Convention (1958): 'Some of the largest countries in the world have signed the New York Convention but are incapable of demonstrating an acceptable record of judicial compliance with its terms.'[18] He adds[19]: 'Enforcement of foreign arbitral awards may be described as routine only in countries that have well-established institutional traditions and mature legal orders.' Were it otherwise, why would there be an established practice of award-holders settling for significant percentage reductions of the amount of award?[20]

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[14] Identified as the weakest feature of the arrangements for the Singapore International Commercial Court, D Wong, 'The Rise of the International Commercial Court…' (2014) 33 CJQ 205,226; see also Singapore International Commercial Court Committee (2013): <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>), paras 42 ff.

[15] BORN (2013), 152, and generally chapter 6; and see pp 10–11.

[16] C Bühring-Uhle, *Arbitration and Mediation in International Business* (2nd edn, Kluwer, The Hague, 2006), 60, 66, 68.

[17] On the Hague Convention on Choice of Court Agreements (2005), Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 24. Hence the exhortation in *American Law Institute/UNIDROIT'S Principles of Transnational Civil Procedure* (Cambridge University Press, 2006), Principle 30: '*Recognition: A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms.* Comment: P-30B …a judgment given in a proceeding substantially compatible with these Principles ordinarily should have the same effect as judgments rendered after a proceeding under the laws of the recognizing state. Principle 30 is therefore a principle of equal treatment… Only the limited exception for non-recognition based on substantive public policy is allowed when the foreign proceedings were conducted in substantial accordance with these principles.'

[18] J Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), 264.

[19] *ibid.*

[20] Queen Mary College (London) Survey of Arbitration Users (2008): 'Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards' <http://www.arbitration.qmul.ac.uk/

1.08 *Factor (vi): Confidentiality.*[21] Although England has endorsed arbitral confidentiality,[22] not all legal systems have promoted that feature[23] (further on this factor see chapter 7). Globally, it has been said that arbitral confidentiality has 'suffered considerable damage'.[24] A 2006 poll of 53 leading arbitration practitioners records that confidentiality was third in the list of perceived advantages (after neutrality of the forum and cross-border enforcement of awards).[25] Born (2014)

docs/123294.pdf>: p 9 ('54 % of the corporations surveyed negotiated a settlement amounting to over 50 % of the award; 35 % settled for an amount in excess of 75 % of the award.'

[21] *Andrews on Civil Processes*, vol 2, *Arbitration and Mediation* (Intersentia, Cambridge, Antwerp, Portland, 2013), chapter 8; M Pryles, 'Confidentiality', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 5; noting, at 110 n 2, another's conclusion that confidentiality was in fact the most important factor: H Bagner, 'Confidentiality- A Fundamental Principle in Commercial Arbitration' (2001) 18 Jo of Int'l Arbitration 243; generally, I Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer, Deventer, 2011).

[22] *Andrews*, *ibid*.

[23] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 11–12; M Pryles, 'Confidentiality', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 5; UNCITRAL's *Notes on Organizing Arbitral Proceedings* (2012 edn), paragraph 31; CA Rogers and JC Jeng, 'The Ethics of International Arbitrators', in Newman and Hill, *op cit*, chapter 7, at 203; *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015), 2.161 ff, noting *Esso Australia Resources Ltd* v. *Plowman* (1995) 193 CLR 10, H Ct Aust (criticised P Neill, 'Confidentiality in Arbitration' (1996) 12 Arb Int 287; and considered by Pryles, *op cit*. at 111–122); *Commonwealth of Australia* v. *Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662; on US decisions, *Redfern and Hunter*, *op cit*, at 2.173 ff and M Pryles, 'Confidentiality', in Newman and Hill, *op cit*, chapter 5, at 137–140; on Swedish law, *Redfern and Hunter*, *op cit*, 2.176 and Pryles, *op cit*, at 140–142; French law, *Redfern and Hunter*, *op cit*, 2.182 and Pryles, *op cit*., at 142; ICSID decisions, *Redfern and Hunter*, *op cit*, 2.184 ff; World Intellectual Property Organization decisions, *Redfern and Hunter*, *op cit*, 2.193 to 2.195 and on other institutional rules 2.190 to 2.192, Pryles, *op cit*, 150–151. And for the NZ Arbitration Act, 1996, section 14, Pryles, *op cit*., at 143. For analysis of institutional rules, Pryles, *op cit*, at 147 ff. And on the movement towards 'transparency' in certain spheres of arbitration, see the new Article 1(4) on transparency in UNCITRAL Arbitration Rules (2013) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> more generally on transparency, K-H Böchstiegel, 'Perspectives on Future Developments in International Arbitration', in Newman and Hill, *op cit*, chapter 12, at 327; and A Malatesta and R Sali (eds), *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitration Awards* (Juris, New York, 2013) (also containing surveys of systems and institutional rules by various contributors); earlier, concerning publication of anonymous awards, J Lew, 'The Case for the Publication of Arbitration Awards', in JC Schultz and A van den Berg (eds), *The Article of Arbitration: Essays on International Arbitration, Liber Amicorum Pieter Sanders* (Kluwer, Deventer, 1982), 223.

[24] M Hunter and A Phillips, 'The Duties of an Arbitrator', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 20, at 486.

[25] C Bühring-Uhle, *Arbitration and Mediation in International Business* (2nd edn, Kluwer, The Hague, 2006), 107–109.

summarises the position by noting 'empirical'[26] and 'anecdotal'[27] support for 'confidentiality' as having 'substantial value'; but he also notes[28] that 'different jurisdictions have arrived at materially different salutations…and institutional rules continue to provide divergent treatments of the subject of confidentiality.' The Queen Mary College (2010) report found that 65 % of respondents did not regard the absence of confidentiality in court proceedings as a 'principal' reason for choosing arbitration.[29] Some foreign court systems might be prepared to display flexibility. For example, in Singapore the International Commercial Court might be prepared to hold some hearings *in camera*.[30] Born also notes that court proceedings are more likely to attract media attention than confidential arbitral proceedings: media bias in favour of local parties might become significant.[31] Conversely, disclosure of a local party's embarrassing malpractices might engender local hostility.[32]

1.2 The Three Pillars of International Commercial Arbitration

1.09 (i) *Agreement.*[33] Nearly all commercial arbitration presupposes an arbitration agreement (exceptions arise where arbitration is mandatory, that is, to the exclusion of other forms of dispute resolution, according to national statute, or where the opportunity for arbitration is created under Treaty). Therefore, this is the first fundamental element of arbitration. This might involve an *ex ante* arbitration agreement, following by a reference to arbitration. Or it might involve an 'after-the-event' arbitration reference. The agreement defines the scope of the arbitral tribunal's powers. The notion of consensus is especially prominent in the Arbitration Act 1996 (section 1(b), *the parties should be free to agree how their disputes are resolved,*

[26] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer, Netherlands, 2014) (3 vols), 2781 n 6 (adopting the preceding note's findings and Queen Mary College (London) Survey of Arbitration Users (2006): 'International Arbitration: Corporate Attitudes and Practices <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>: p 6 (54 %, citing 'privacy') (wrongly citing Queen Mary College 2008) and Queen Mary College (London) Survey of Arbitration Users (2010): 'Choices in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> chart 25 p 29 (62 % saying 'very important').

[27] Gary Born, *op cit*, 2781 n 7.

[28] *ibid*, 2783.

[29] Queen Mary College (London) Survey of Arbitration Users (2010): 'Choices in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> Chart 28 p 30 (136 respondents, mostly 'counsel', international or external).

[30] Singapore International Commercial Court Committee (2013), paras 32 and 33 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>.

[31] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th edn, Kluwer, Netherlands, 2013), 5.

[32] *ibid*.

[33] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012).

subject only to such safeguards as are necessary in the public interest). But that statute also makes clear that there are matters beyond the pale of party control. These are the 'non-negotiable' *mandatory* norms listed in Schedule 1 to the Arbitration Act 1996. Notable examples of arbitral norms or mechanisms which cannot be excluded by party agreement are:

section 9 (the English court's duty to stay English court proceedings, unless the arbitration agreement is 'null and void, inoperative, or incapable of being performed': **4.02**);
section 24 (power to apply to the court to remove an arbitrator, on specified statutory grounds);
section 29 (general civil immunity of arbitrator acting without bad faith: **5.27**); and
sections 67 and 68 (respectively supervision, on party application, of the jurisdiction of the tribunal and of the procedural regularity of the process: **8.01**).

Conversely, the parties are at liberty to exclude section 69 of the Arbitration Act 1996, provided clear language is used: **8.21**.

1.10 Agreement enables the parties to select arbitrators, and generally to determine how the process will be conducted. Therefore agreement underpins these leading features (already mentioned) of arbitration:

(a) *neutrality*: parties are especially attracted to arbitration because it offers the chance to reduce or eliminate the national advantage of 'home territory' enjoyed by a resident litigant when conducting a case in court; thus, when agreeing arrangements for arbitration, the seat can be chosen in a neutral jurisdiction, or at least non-local arbitral tribunal members can be selected to achieve a balance; in short, 'neutrality' (national, regional, political, and cultural) is a leading reason for choosing arbitration (**1.03**);
(b) *flexible process*: arbitration offers the prospect of flexible procedural arrangements (**1.05**);
(c) *confidentiality*: arbitral procedures are presumed to be confidential (**7.01** and **1.08**); but this can be varied by party consensus; in English law the basis of confidentiality is an implied term of the arbitration agreement.

1.11 The parties' 'freedom of contract'(see also, in the context of English contract law, principle 1 at **10.04**) is a leading feature of the Arbitration Act 1996 (as noted in section 1 of: *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*). This freedom enables them to determine, or at least influence, how the repertoire of procedural measures should be applied in their particular case. Parties to arbitration can shape their 'alternative' to ordinary court procedure.[34]

1.12 However, the parties' autonomy is qualified by the Arbitration Act 1996s 'mandatory' provisions, that is, matters which cannot be consensually excluded

[34] That the parties' agreement takes priority over the arbitrator's regulation of the proceedings is emphasised, and elaborated, by the Departmental Advisory Committee Report (1996), at [154] to [162], and [173] to [175]; generally on this topic, GA Bermann and LA Mistelis (eds), *Mandatory Rules in International Arbitration* (Juris, New York, 2011).

(conversely, *Russell* supplies a helpful checklist of non-mandatory issues which can be modified by party agreement).[35] The mandatory matters include the fundamental values of impartiality and a reasonable opportunity to participate in the proceedings (*audi alteram partem*).[36] Such core elements of protection ensure that the parties are recipients of civilised justice. Furthermore, an award will be enforceable transnationally only if basic standards of procedural fairness have been respected.[37] Schedule 1 specifies the relevant 'mandatory' provisions.[38] At first sight, these mandatory provisions might appear to be completely miscellaneous. However, they can be grouped under six headings, namely provisions which: (i) enable the English courts to enforce arbitration agreements[39]; (ii) concern matters of timing[40]; (iii) enable the court to preserve the integrity of the arbitral process[41]; (iv) enable the court to provide support for that process[42]; (v) prescribe the core responsibilities of the arbitral participants[43]; (vi) confer immunity upon arbitrators[44]; or (vii) otherwise protect the arbitrator from unfairness.[45]

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[35] *Russell on Arbitration* (24th edn, London, 2015), 2.066.

[36] On impartiality, **6.01**.

[37] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V1(b).

[38] Sections 9 to 11, Arbitration Act 1996 (stay of legal proceedings); section 12 (power of court to extend agreed time limits); section 13 (application of Limitation Acts); section 24 (power of court to remove arbitrator); section 26(1) (effect of death of arbitrator); section 28 (liability of parties for fees and expenses of arbitrators); section 29 (immunity of arbitrator); section 31 (objection to substantive jurisdiction of tribunal); section 33 (general duty of tribunal); section 37(2) (items to be treated as expenses of arbitrators); section 40 (general duty of parties); section 43 (securing the attendance of witnesses); section 56 (power to withhold award in case of non-payment); section 60 (effectiveness of agreement for payment of costs in any event); section 66 (enforcement of award); sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections; section 72 (saving for rights of person who takes no part in proceedings); section 73 (loss of right to object); section 74 (immunity of arbitral institutions, etc); section 75 (charge to secure payment of solicitors' costs).

[39] Sections 9 and 11, Arbitration Act 1996 (stay of legal proceedings).

[40] Section 12, *ibid* ('limitation' under general law); section 13 (time limits otherwise imposed).

[41] Section 24, *ibid* (power of court to remove arbitrator); section 31 (objection to substantive jurisdiction of tribunal); sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity).

[42] Section 43, *ibid* (securing the attendance of witnesses); section 66 (enforcement of awards).

[43] Sections 33 and 40, *ibid*.

[44] Section 29, *ibid* (immunity of arbitrators if acting otherwise than in bad faith, and subject to a qualification concerning resignation); section 74 (immunity of arbitral institutions, etc).

[45] Section 28, *ibid* (liability of parties for fees and expenses of arbitrators); section 37(2) (items to be treated as expenses of arbitrators); section 56 (power to withhold award in case of non-payment); section 26(1) (effect of death of arbitrator is made mandatory out of an abundance of caution—it is doubtful whether parties can contemplate an award from the grave (or graves)); furthermore, section 26(2) (also rendered mandatory) deals with the distinct question of the death of a person by whom an arbitrator was appointed—such an appointor's death does not revoke the appointee's authority.

1.13 (ii) *Arbitral Autonomy (Restricted Judicial Intervention).* This is the second fundamental element of arbitration: that the arbitral process should be substantially free from judicial interference.[46] The main manifestations of this principle are:

(a) (judicial support and restraint: the courts provide support for the system of arbitration, but they are not expected to intervene excessively during the process); the 'pro-arbitration' sentiment has grown; but it is too early to say that it has become the dominant judicial attitude.
(b) *Kompetenz-Kompetenz*: arbitral tribunals enjoy the capacity to make a provisional determination of the validity and scope of their (suggested) jurisdiction (**2.52**);
(c) *confidentiality*: the courts respect and give effect to the implied consensual status of confidentiality; this covers both the process, notably the parties' contentions and evidence, and the award (**7.01**);
(d) *finality*: arbitral awards are not subject to appeal on the factual merits (**8.19** and **8.20**) or on points of foreign law (**8.19**); but in England there is a restricted possibility of the High Court hearing an appeal on a point of English law (for examination of section 69 of the Arbitration Act 1996, **8.04**).

1.14 In many states, and not only England,[47] the courts support arbitration and do not regard it with suspicion.[48] Perhaps, to quote the Marriage Service within the 1549 *Book of Common Prayer* (England), we might even speak of an indissoluble contract between courts and arbitration, importing a mutual obligation '*to have and to holde from this day forwarde, for better, for wurse, for richer, for poorer, in sickenes, and in health, to love and to cherishe, til death us departe.*' The marriage between courts and arbitration is at times tempestuous (compare the *West Tankers* affair: **4.22**), at other times harmonious. But the relationship is always interesting. The marriage has not broken down: too many depend on its success. (Or, as one

[46] eg, (including rich citation of other literature), Luca Radicati di Brozolo, 'The Impact of National Law and Courts on International Commercial Arbitration': Mythology, Physiology, Pathology, Remedies and Trends' (2011) 3 *Cahiers de l'Arbitrage: Paris Jo of Int'l Arbitration* 663; and 'The Control System of Arbitral Awards' (2011) ICCA Congress Series 74; Wang Shengchang and Cao Lijun, 'The Role of National Courts and *Lex Fori* in International Commercial Arbitration', in LA Mistelis and JDM Lew (eds), *Pervasive Problems in International Arbitration* (The Hague, 2006), 155–184; H Alvarez, 'Autonomy of the International Arbitration Process', *ibid,* at 119–140; JDM Lew, 'Achieving the Dream: Autonomous Arbitration?', in JDM Lew and LA Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (The Hague, 2007), 455–484; compare, for emphasis on the fact and utility of measured national support, SC Boyd, 'The Role of National Law and National Courts in England', in JDM Lew (ed), *Contemporary Problems in International Arbitration* (London, 1986), 149–163; and JMH Hunter, 'Judicial Assistance for the Arbitrator', *ibid,* 195–206.

[47] J Paulsson, 'Interference by National Courts', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014), chapter 2.

[48] *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015), 7.04 ff.

arbitrator suggested,[49] 'arbitration and the courts are joined at the hip': an allusion, in particular, to the need for awards to be enforced).

1.15 However, the Arbitration Act 1996 makes clear that arbitral autonomy must be accorded respect. at the same time the Act states that there are limits to arbitral autonomy: *in matters governed by this Part the court should not intervene except as provided by this Part*. (section 1(c), 1996 Act), Ultimately the arbitration system's authority and effectiveness require judicial support. Such support can be national, for example, assistance in enforcing arbitral agreements, and provisional relief, especially before arbitral proceedings begin, appointment or removal of arbitrators, the gathering of evidence from recalcitrant witnesses. Such judicial orders are normally made available by the courts of the 'seat'. But at the enforcement stage there is also a need for international judicial co-operation and multi-state support, principally in accordance with the New York Convention (1958). Courts not only assist, they also recognise legitimate restrictions. They are responsible for the maintenance of the rule of law and compliance with the tribunal's arbitral mandate. And so courts can ensure that arbitrators do not distort their jurisdictional licence by purporting to decide matters not referred to the tribunal, or by applying legal rules not authorised by that mandate. Nor can the tribunal illegitimately treat non-parties as parties if they are not indeed true parties to the arbitration agreement. Another example of legitimate judicial intrusion upon the seclusion of arbitration is that confidentiality has its limits. For there are situations where the wider interests of justice justify, indeed require, disclosure of information ordinarily protected by arbitral confidentiality (**7.11**).

1.16 (iii) *International Enforcement*. This is the third fundamental element of arbitration. It is widely recognised that the New York Convention (1958) ('NYC (1958)') provides an invaluable mechanism for international enforcement of arbitral awards (**9.01**). That instrument also links with 'autonomy': for there are restricted grounds upon which the enforcing court is permitted to decline recognition or enforcement (Article V of the NYC (1958): **9.07**). The NYC (1958) also links with the concept of 'agreement'. For it is an obvious feature of an arbitration agreement (unless expressly qualified) that the parties have not merely agreed to pursue that form of dispute resolution to the exclusion of other available forms,[50] but the parties have further agreed that they will abide by the result and give effect to the award.[51] In the absence of spontaneous compliance with the award, the NYC (1958) strengthens the award-creditor's hand, by enabling that party to seek enforcement in a foreign state (other than the seat where the award was granted). But there is a further connection between the third fundamental element, international enforcement, and the first fundamental element, agreement. The NYC (1958) permits the enforcing court to decline recognition or enforcement if the arbitral tribunal has not respected

[49] CIArb symposium, Cambridge, July 2015.

[50] Such an exclusive undertaking is 'enforced' by stays—and the English court has no discretion in this matter, according to section 9(4), Arbitration Act 1996, **4.02**DOUBLEHYPHEN- or the exclusive undertaking can be positively enforced by other judicial remedies, notably anti-suit injunctions: **4.11**.

[51] *Mustill & Boyd, Commercial Arbitation* (2nd edn, London, 1989), 103.

the agreed limits of the arbitration reference, because that tribunal has wrongly attributed jurisdiction to itself, or it was not constituted in accordance with the parties' agreement, or a supposed party is not truly a party to the arbitration reference, or the terms of the reference have been misapplied (for example, the tribunal has applied remedies excluded by the arbitration reference, or it has based itself on a system of law which is not consistent with the parties' agreement).

1.3 Need for a Transnational 'Mentality' in the Conduct of International Arbitration

1.17 Pierre Lalive (1923–2014), drawing on extensive experience of international commercial arbitration, long ago castigated some lawyers, notably counsel, for bringing to the arbitral chamber blinkered minds and inappropriately national forensic techniques[52]:

> *'…in any important or complex international arbitration case, each side should preferably be represented by an "international" team of counsel (and/or consultants), by which I do not mean only a team composed of different nationalities or legal backgrounds, but also and foremost counsel trained in comparative and foreign law and specially trained to deal with international arbitral cases*.'

He added[53]:

> '*Many international arbitrators I know frequently note with regret the lack of "international and comparative outlook", the lack of "arbitral feeling and diplomacy" evinced by too many counsel, who merely transpose into international arbitration proceedings their traditional national recipes and the "aggressive" tactics which they use in their own courts*.'

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[52] 'International arbitration-teaching and research', in JDM Lew (ed), *Contemporary Problems in International Arbitration* (London, 1986), 16, at 17; see also JDM Lew, 'Fusion of Common Law and Civil Law Traditions in International Arbitration', in P Wautelet, T Kruger, G Coppens (eds), *The Practice of Arbitration: Essays in Honour of Hans van Houtte* (Hart, Oxford, 2012), 1 to 14.

[53] *ibid*.

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