

MIAC2010

The Mauritius International Arbitration Conference 2010

Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat

Papers from the joint conference of the Government of Mauritius
UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA
held in Mauritius on 13 and 14 December 2010

Edited by

The International Bureau of the
Permanent Court of Arbitration

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**FLAWS AND PRESUMPTIONS:
RETHINKING ARBITRATION LAW AND
PRACTICE IN A NEW ARBITRAL SEAT**

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Foreword

*Brooks W. Daly**

It gives me great pleasure to present this volume of papers delivered at the Mauritius International Arbitration Conference in December 2010. Unprecedented in Africa, the conference brought to the region a gathering of leading international arbitration practitioners, senior public officials and heads of major international arbitration institutions. Their purpose, reflected in the name of the conference, “Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat,” was to assess the fundamentals of international arbitration against the fresh blank canvas of a new jurisdiction.

As expounded by Dr. The Hon. Prime Minister Navinchandra Ramgoolan in his Keynote Address, Mauritius is launching itself as a new platform for international arbitration in Africa, starting with its passing of the International Arbitration Act (“IAA”) in 2008. The IAA designates the Secretary-General of the Permanent Court of Arbitration (“PCA”) as the appointing authority for arbitrations seated in Mauritius and empowers this office with important statutory functions of procedural oversight. Pursuant to the 2009 Host Country Agreement between Mauritius and the PCA, the PCA opened its first office outside of The Hague in Mauritius in 2010. From its Mauritius office, the PCA carries out case management, promotes PCA dispute resolution services in the African region, and through education and outreach builds the capacity of Mauritius as an arbitral centre.

The December 2010 conference was co-sponsored by six international organisations, namely the PCA, the United Nations Commission on International Trade Law, the International Centre for the Settlement of Investment Disputes, the International Council for Commercial Arbitration, the International Chamber of Commerce International Court of Arbitration; and the London Court of International Arbitration. This latter institution has recently launched a joint venture with the Mauritian government in creating a Mauritius International Arbitration Centre for the handling of commercial disputes in the region.

Amongst the distinguished speakers at the conference were the Prime Minister, Chief Justice, Financial Secretary and Director of Public Prosecutions of Mauritius; a former Attorney-General of Pakistan and the current Attorney-General of Singapore; judges from the International Court

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of Justice, the Supreme Court of the United Kingdom and the French *Cour de cassation*; Secretaries-General of the sponsoring arbitral institutions; and leading academics, arbitrators and practitioners from around the world. The diverse and incisive views were presented in six panel presentations at the conference, and this published volume is accordingly divided into six sections.

The first section is on rethinking *compétence-compétence* and separability, with a report by Mr. Salim Moollan considering both the positive and negative side of the *compétence-compétence* doctrine. Responding to his report are Professor Jan Paulsson, who examines the role of the courts before the commencement of arbitral proceedings, and Professor Brigitte Stern, who analyses the doctrine from the perspectives of public and private international law. Mr. Thierry Koenig offers a perspective of arbitrating in Mauritius under the new IAA.

The second section rethinks **arbitrability** in the context of company disputes, with a report by Professor Christopher Seraglini. Mr. Sundaresh Menon provides a response from a Singaporean perspective and Mr. V.V. Veeder Q.C. from an English law perspective. Mr. Milan Meetarbhan presents the subject in the context of the burgeoning global business sector in Mauritius.

The third section rethinks the **role of courts and interim measures**, with a detailed multi-jurisdictional report by Dr. Albert Henke. The Rt. Hon. Lord Phillips of Worth Matravers responds from the perspective of an appeals judge and offers a comparison of the IAA with the English Arbitration Act of 1996. Judge Jean-Pierre Ancel considers the limited role of the judge in international arbitration under French law. The Mauritian perspective on courts and interim measures was offered by Satyajit Boolell S.C.

The fourth section rethinks the **recognition and enforcement of arbitral awards**, with Mr. Ricky Diwan's report comparing how various jurisdictions approach the enforcement of awards annulled at the seat of arbitration. In response, Professor Albert Jan van den Berg brings his expertise on the New York Convention and proposes new language for a revised convention to deal with the issues raised by Mr. Diwan. Ms. Zia Mody considers arbitrating questions of public policy in India. Mr. Anwar Moollan considers potential enforcement issues under the Mauritian IAA.

The fifth section shifts the focus to **bilateral investment treaties** ("BITs") with a detailed report by Ms. Andrea Menaker on the efforts of governments to negotiate or renegotiate substantive standards in light of the interpretation by tribunals of existing treaties. In response to uncertainties in EU BITs brought about by the Lisbon Treaty, Professor Emmanuel

Gaillard offers recommendations for Mauritius to update and sign new BITs with EU Member States. Mr. Makhdoom Ali Khan provides unique and candid insights based on his experience with a State having both negotiated BITs and faced the consequences in the form of significant arbitral claims. Mr. Ali Mansoor discusses the efforts of Mauritius to avoid arbitration by creating a more transparent and business-friendly investment environment.

The final section rethinks the **substantive standards of investment protections**, with Dr. Stephan Schill's report on the level of deference granted to States in investment disputes. In response, Mr. Toby Landau Q.C. urges a reassessment of the basic foundations and purposes behind BITs to address a growing legitimacy crisis in the system. His Excellency Judge Sir Christopher Greenwood discerns the strands of international law, public law, and commercial law in investment arbitration and argues that the international law concerns must dominate. Mr. Rajsoomer Lallah explores the topic from a Mauritian perspective.

A great debt is owed to all those involved in planning the conference, especially Mr. Salim Moollan who instigated the event and ensured its success. The Mauritian Government's support was evident in the organising efforts of the Board of Investment, and has continued through to publication of this volume by the Government Printers. I would also like to thank the International Bureau of the PCA for compiling the presenters' contributions and preparing them for publication, in particular the PCA Legal Counsel and Representative in Mauritius, Ms. Judith Levine and her predecessor Mr. Matthias Kuscher; Assistant Legal Counsel Ms. Sarah Melikian and Ms. Hinda Rabkin; and the PCA's Mauritius Intern Mr. Ali Adamjee.

At the time this volume goes to press, the PCA is witnessing record levels of case activity. Of the arbitrations administered by the PCA in 2012 so far, half involve parties from Africa, Asia or the Indian Ocean. As arbitration of international disputes proliferates in these regions, Mauritius is perfectly placed geographically, culturally, and legally. This volume captures this momentum with a penetrating look at the issues confronting all those involved in dispute resolution. It is hoped that the book will provide an enriching base for future development of the field not only in this part of the world but across all boundaries.

Brooks W. Daly
Acting Secretary-General
Permanent Court of Arbitration
The Hague, March 2012

PANEL III

**RETHINKING THE ROLE OF THE COURTS IN THE
ARBITRAL PROCESS AND INTERIM MEASURES**

Introductory Remarks

*Adrian Winstanley**

I have the honour to moderate this panel on one of the hottest topics in the international commercial arbitration world – the role of state courts.

The choice of the place of the arbitration, both the legal place or seat and the physical venue for any hearings, is among the most important decisions to be taken by contracting parties, who are traditionally expected to elect for an “*arbitration friendly legal environment*”. Whilst modern procedural laws, like that now in place in Mauritius, are an essential attribute to such an environment, the attitude and track record of local courts in interpreting and applying applicable laws is of equal importance. These Courts are expected, by the international business community, to provide support for arbitration and not to obstruct; to uphold valid arbitration agreements; to respect the independence and authority of properly-appointed tribunals; to provide urgent interim or conservatory measures when the tribunal cannot (or before the tribunal is constituted); to respect the finality of an award and to enforce it; but, equally, to hear and to uphold a legitimate challenge to an award.

During the course of recent months and years, many interesting judgments concerning arbitration have been made in the courts of many jurisdictions (and we have heard this morning of the very recent decision of the Supreme Court of the United Kingdom in the *Dallah* case). Throughout this session, we shall consider a number of other cases, as well as the principles by which, and the parameters within which, courts of jurisdiction should operate.

My distinguished panel comprises of Dr. Albert Henke, who will first deliver his report to the conference, Lord Phillips of Worth Matravers and Judge Jean-Pierre Ancel, who will give responses to the report, and Mr. Satyajit Boolell, who will provide a Mauritian perspective. Dr. Henke is a Research Fellow and Lecturer at the University of Milan, where he teaches civil procedure and international arbitration. Lord Phillips is a former Master of the Rolls and former Lord Chief Justice of England and Wales, and is now President of the Supreme Court of the United Kingdom. Judge Jean-Pierre Ancel has had an illustrious career in the French judiciary and is currently *Président de Chambre Honoraire à la Cour de cassation* (Honorary President of Chamber of the *Cour de cassation*). Mr. Boolell is

* Director General, London Court of International Arbitration (LCIA).

ADRIAN WINSTANLEY

the Director of Public Prosecutions of the Republic of Mauritius and
Chairman of the Arbitration Committee of the Law Reform Commission.
I am delighted now to hand the proceedings to Dr. Henke.

Report to the Conference

*Dr. Albert Henke**

I. INTRODUCTION

Arbitration is a private dispute resolution mechanism for commercial law disputes alternative to state court proceedings. However, it is not a self-sufficient system of justice. It is established and regulated pursuant to law¹, and it necessarily bears a close relationship to a nation's court and judicial system. National courts have a critically important role to play in making the arbitration system work, as arbitration cannot do without them in order to perform its tasks and attain its goals. In fact, while arbitration's outcome (*the award*) is given in most jurisdictions the same effects as a judicial decision (being in certain situations, by virtue of the New York Convention, even more readily enforceable internationally than a national court judgment²), its main actors (*the arbitrators*) have limited powers by comparison with those vested in judges. Moreover, state courts retain a certain degree of control over an arbitral decision, in order to guarantee that proceedings are conducted and awards are rendered in accordance with the principles, rules and standard of due process.

In theory, an arbitration could proceed from beginning to end without the need for any intervention from a court, in a dimension outside the law.³ However, if something goes wrong, it may be necessary to seek and rely upon the support and assistance of a court. It may seem a paradox,

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¹ Arbitration "(...) is a system built on law and which relies upon that law to make it effective both nationally and internationally. National courts could exist without arbitration, but arbitration could not exist without the courts" (N. Blackaby and C. Partasides, *The Role of National Courts During the Proceedings*, in *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, U.K., 2009, 440).

² See R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, *Arbitration in the Next Decade: Proceedings of the International Court of Arbitration's 75th Anniversary Conference*, *Special Supplement to the ICC International Court of Arbitration Bulletin*, 1999, 35: 'As a consequence of the wide-spread acceptance of the New York Convention, binding arbitral awards issued by (...) tribunals (...) are more readily entitled to enforcement in most countries of the world than the decisions of professional judges.'

³ This expression was used by O. Young, Chairman of the Commercial Arbitration Committee of the U.S.A. Chamber of Commerce at the ICC Congress, which took place in London in 1921.

but those attributes of arbitration that are its greatest advantages when all goes smoothly, may become handicaps when problems arise. The principles of party autonomy and consent, which are the cornerstones of arbitration, come most readily to mind. When the parties are unable to agree on certain essential procedural issues (such as the appointment of arbitrators) or when there is a need for urgent, perhaps even *ex parte*, interlocutory measures or, again, when parties other than those who have signed the arbitration agreement need or seek to be involved in the proceedings (one may think of a party to a related contract, a guarantor, or a sub-contractor *etc.*), those principles might become an obstacle. The same is true when a third party seeks to join in the proceedings of its own volition, or when an order for provisional measures is to be addressed to third parties. Another peculiarity of arbitration is the fact that arbitrators are private individuals. Since they are not public officials, they have *iusdictio* but not *imperium*, and thus limited powers of compulsion to ensure, for example, that the parties comply with the terms of a tribunal's order or that witnesses appear before the tribunal. Finally, arbitrators are selected solely in relation to that particular dispute (*i.e.*, they are not a permanent body). That might become an obstacle when there is a need to obtain interim and urgent measures before the arbitral tribunal is constituted.

In all such situations, arbitration requires external support, which is usually provided for by national courts and state judges.

Traditionally, the attitude of the courts to the development of the practice of arbitration has been to resist that development. State laws and courts have shown a measure of hostility towards arbitration, inasmuch as the latter was viewed more as a way of ousting the State jurisdiction than as a viable and acceptable method of rendering justice. This phenomenon occurred, to a greater or lesser degree, in most jurisdictions.⁴

However, the general trend since the middle of the nineteenth century has been towards the enhancement of the effectiveness of arbitration as a method of private dispute resolution, and towards the

⁴ Referring to the development of arbitration in England, Lord Campbell [*Scott v. Avery* (1853) 25, L.J. Ex. 308] observed that: "(...) formerly the emoluments of the Judges depended mainly or almost entirely upon fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall...therefore they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so"; for an overview of the development of arbitration in England see J. M. H. Hunter, *Arbitration Procedure in England: Past, Present and Future*, *Arb. Int'l*, 1985, Vol. 1, N. 1, 84 ff. For an historical overview in the U.S.A., where, until the 1920s courts were inclined to view arbitration agreements as contrary to public policy [*White Eagle Laundry Co. v. Slawek*, 296 III, 240, 245 (1921)] as they were said to empower laymen to usurp the role of the courts, see R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, *cit.*, 35 ff.

recognition by legislators and the judiciary that – within certain limits dictated by public policy – the arbitration system, to maintain its effectiveness, must have a substantially autonomous existence, free from external hindrance.⁵ The process of judicial acceptance and endorsement of arbitration has followed similar patterns in many countries. The last decades of the twentieth century saw the most industrialised States engaged in a sort of competition in ensuring the best possible legal environment for arbitration within their own territories.⁶ As pointed out by some commentators,⁷ there has been a ‘(...) *gradual transition in the approach of national courts from jealously guarding their exclusive possession of the dispute resolution arena to accepting arbitration as an established alternative method of dispute resolution*’.⁸ The promulgation in 1985 of the *UNCITRAL Model Law on International Commercial Arbitration* (amended in 2006) encouraged and advanced that process. The increasing favour with which national legislators view international arbitration is confirmed by the number of States which have become parties to international arbitration conventions or which have enacted laws regarding arbitration in general or, more specifically, international arbitration.⁹ Currently, nations with well developed legal and judicial systems tend to support arbitration strongly,¹⁰

⁵ See J. M. H. Hunter, *Arbitration Procedure in England*, cit., 88; N. Blackaby and C. Partasides, *The Role of National Courts During the Proceedings*, cit., 440. See also W. W. Park, *Judicial Controls in the Arbitral Process*, *Arb. Int’l*, 1989, 276: ‘(...) *international dispute resolution will become more effective to the extent that the current trend toward less interaction between judge and arbitrator at the place of the proceedings reduces judicial meddling in the merits of a dispute*’.

⁶ That was the case in England (1979 and 1996), France (1980/1981), Switzerland (1981) and the Netherlands (1986), which set the precedent for this process, followed by other countries in all areas of the world.

⁷ M. Hwang S.C. and R. C. Muttah, *The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives*, *Arbitration*, 2002, 68, 3, 224.

⁸ R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, cit., uses an interesting metaphor describing this transition, suggesting that one consider: ‘(...) *the respective terrains of international commercial arbitration and conventional national court litigation in terms of a football field. In 1923, when the ICC Rules came into effect, play was concentrated near the penalty box in front of the arbitrator’s goal and the litigation team controlled the rest of the field. (...) The football field no longer looks as it did. The centre of play is now well past midfield and approaches the judges’ goal*’. See also Y. Derains, *State Courts and Arbitrators, Arbitration in the Next Decade*, cit., 27.

⁹ However, for reference to jurisdictions which are much less arbitration-friendly see, for Latin America, H. A. Grigera Naón, *Competing Orders Between Courts of Law and Arbitral Tribunals: Latin American Experiences, Liber Amicorum in Honour of Robert Briner*, 2005, 335.

¹⁰ See M. Ball, *The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration*, *Arb. Int’l*, 2010, Vol. 22, N. 1, 91 ff., who observes that: ‘(...) *the courts in developed legal systems typically apply a ‘pro-*

not least, because they see it as a means of relieving overcrowded court dockets and avoiding delays in dispute resolution. An effective arbitration system enhances the role of the courts in overseeing a system of justice. As observed by Chief Justice Burger: “(...) *neither the federal nor the state court systems are capable of handling all the burdens placed upon them (...) Arbitration should be an alternative that will complement the judicial systems*”.¹¹

The actual role of the courts in supporting arbitration differs from jurisdiction to jurisdiction, depending on the terms of the governing national laws. However, the principal actions that courts may or should take in relation to arbitration proceedings are much the same in all countries that have adopted modern arbitration statutes, and may be divided into two main groups:¹² the *assistance functions* (enforcing agreements to arbitrate; appointing and removing arbitrators; granting interim relief; assisting arbitral tribunals in taking evidence); and the *control functions* (deciding challenges to the jurisdiction of arbitral tribunals; setting aside domestic arbitral awards; recognising and enforcing arbitral awards¹³). The current attitude of States is to enlarge the situations in which courts may provide assistance and to restrict those in respect of which control is exercised, by even permitting the parties to opt out of such control in some cases.

The creation of a new international arbitration centre in Mauritius and especially the enactment of new arbitration legislation (The International Arbitration Act, 2008 (Act 37 of 2008) hereinafter “the Act”) is an opportunity to reconsider the role of the courts in international arbitration.

This will be done in the current Report by:

- addressing the general principles, rules and provisions on which the Act is based and which address the relationship between arbitration and the courts (and the role peculiar to the Permanent Court of Arbitration (“PCA”));

arbitration bias’ in interpreting and applying their national arbitration statutes, and in cases of doubt tend to err on the side of arbitration (...)”.

¹¹ Address to the American Bar Association, January 1982, 68 ABA J., 274 ff.

¹² See M. Ball, *The Essential Judge*, cit., 73 ff.

¹³ This classification of the courts’ functions is recognised by most commentators: see Schroeder in K. H. Bockstiegel-S. Kroll-P. Nacimiento, *Arbitration in Germany, The Model Law in Practice*, Kluwer Law International, 2008, 573.

- underlining the originality and special nature of these rules and provisions, by reference to the approaches adopted by arbitration laws (and, to a more limited extent, rules) in the prominent arbitral jurisdictions;
- setting the new Mauritian arbitration law in the context of current trends regarding the problematic relationship between the courts and arbitral tribunals, as part of a wider attempt to rethink the role of the courts in arbitration and, specifically, having regard to interim measures.

II. THE NEW MAURITIAN ARBITRATION LAW: GENERAL PRINCIPLES

As to the relationships between state courts and international arbitration, the new Mauritian legislation adopts innovative provisions, the aim of which is to provide all possible support to arbitration without affecting its autonomy. In particular:

- it vests the PCA with many (administrative) functions, that traditionally fell within the purview of the courts, thereby: (a) formalising, in the statute, the role of an institution which is neutral, multilateral, arbitration-friendly and sensitive to the needs and characteristics of arbitration and the expectations of the international arbitral community; and (b) increasing the appeal of Mauritius as a seat for international arbitration, as it bolsters confidence among foreign parties and participants that the local courts will not intervene in such matters;
- the general principles of the new Act, as they emerge in particular from the amended *Travaux Préparatoires*, leave no room for doubt that the new Act is arbitration-friendly. It fosters party autonomy. It reduces the scope for intervention by the (local) courts, the role of which, in any event, is limited to measures intended to support the arbitral process. It ensures that Mauritian international arbitration law and practice will conform with internationally recognised arbitration standards. Finally, it involves in the process a neutral, multilateral and arbitration-friendly institution, the PCA. In this regard, it is worth mentioning, in particular: a) the general statement according to which the purpose of the Act is to create a favourable environment for the development of international

arbitration;¹⁴ b) the option to create a different regime for domestic and international arbitration, in order to reduce, as far as possible, in respect of the latter, the scope for intervention of the local courts;¹⁵ c) the fact that the Act is based on the UNCITRAL Model Law,¹⁶ characterised by the principle of non-intervention by the courts and cooperation between the latter and arbitral tribunals; d) that, by applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius, regard must be had to the Model Law and to the need to promote uniformity in its application and the observance of good faith;¹⁷ e) the fact that the Act has adopted, at section 3(8), a provision that mirrors Art. 5 of the Model Law, to the effect that the courts cannot intervene in arbitral proceedings: “*except where the Act provides that they are to do so*”;¹⁸ f) the fact that many sections of the Act, dealing with the relationship between courts and arbitration, such as sections 5 (Substantive Claim before Courts), 6 (Compatibility of Interim Measures), 22 (Recognition and Enforcement of Interim Measures) and 23 (Powers of Supreme Court to Issue Interim Measures), apply also to arbitrations the seat of which is outside Mauritius;¹⁹ and g) the fact that, under section 3(1)(d) of the Act, an enactment which confers jurisdiction upon a court does not *per se* indicate that a dispute about the matter is not capable of determination by arbitration.²⁰

¹⁴ The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - Introduction - 2.

¹⁵ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (1-2).

¹⁶ The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - Introduction - 2 (a).

¹⁷ Any question concerning matters governed by the Model Law, which is not expressly settled in that law, are to be settled in conformity with the general principles on which that law is based. Recourse may be had to international writings relating to the Model Law and to its interpretation, including relevant UNCITRAL reports, commentaries, case-law from other jurisdictions, and textbooks. Finally, in applying and interpreting the Act, no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration: see the International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (9 and 10).

¹⁸ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (8).

¹⁹ The International Arbitration Act (No. 37 of 2008) - Part II - Initiation of proceedings - Art. 5, 6, 22, 23.

²⁰ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (1 - d).

III. SPECIFIC PROVISIONS OF NOTE / A COMPARATIVE ASSESSMENT

A. Introduction: Two Different Regimes For Domestic and International Arbitration

Before analysing in detail the most relevant provisions of the new Mauritian Act concerning the relationship between state courts and arbitration, it is worth emphasising the decision to adopt two different regimes for domestic and international arbitration in the Act. The purpose, expressly stated in the *Travaux Préparatoires*, is to “(...) limit the intervention of Mauritian courts in the arbitral process, save to support that process and to ensure that the essential safeguards expressly provided for in the Act are respected”.²¹

Different policy considerations apply to domestic and international arbitration. The latter has its specific needs and characteristics. Foreign parties choose a country as the seat of their arbitration to the extent they can rely on the fact that local courts will not interfere in the arbitral process.²² International awards might be written in a style with which local courts may not be familiar. Moreover, in the context of international arbitration, where parties agree to limit their rights of review in return for certainty,²³ the parties’ interest in the finality of the dispute process is very strong. Domestic arbitration, in contrast, is not incompatible with a wider intervention by state courts (for instance, to control possible errors of law by a domestic tribunal).²⁴

²¹ See The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - A. Decisions of Principle – 7 (2).

²² In Singapore, Canada and Australia, for example, the stay of court proceedings is discretionary in cases of domestic arbitration, while it is mandatory in the event of international arbitration.

²³ See W. Craig, W. W. Park and J. Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed., Paris and New York, 1990, 327.

²⁴ The Mauritian Act achieves the purpose of limiting undue interference of local courts by: a) providing that any application to the Mauritian courts, made pursuant to the Act, be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Judicial Committee of the Privy Council, so that international users have the assurance that Court applications relating to their arbitrations will be heard and disposed of swiftly by senior and highly experienced judges; and, by b) codifying the principle according to which, in applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius, no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to *domestic arbitration* (Art. 3, par. 10).

The ‘two-regimes’ option also characterises the UNCITRAL Model Law²⁵ and has been adopted by Singapore,²⁶ where the international regime provides for reduced intervention by the courts and institutionalises deference towards the arbitral process and awards. Various decisions issued in recent years²⁷ demonstrate that only rarely will allegations of procedural defects, substantive errors or breaches of due process be upheld against international awards by the courts of Singapore: setting aside international awards in that jurisdiction appears to be a near ‘Herculean task’.²⁸ The ‘two-regimes’ option has also been adopted by the laws of Australia,²⁹ Azerbaijan³⁰ and Kazakhstan.³¹

The ‘two-regimes’ option has certainly some drawbacks, such as interpretative disputes concerning the respective scope of application of the two regimes, the need for the local courts to decide among potentially overlapping provisions, and the development of different, and perhaps inconsistent, case law. However, it is probably the most advisable solution

²⁵ Chapter I – General provisions – Art. 1 – Scope of application – par. 1.

²⁶ See Section 5 of the Singapore International Arbitration Act - IAA - (Cap 143A, 2002 Ed). On January 2010 the IAA was amended by the International Arbitration (“Amendment”) Act which made three changes to the arbitration regime, namely in the areas of court-ordered interim measures in support of foreign arbitrations, the definition of an arbitration agreement, the authentication of awards made in Singapore.

²⁷ See in particular *VV v. VW* (2008) 2 SLR 929; *Soh Beng Tee & Co v. Fairmount Development Pte Ltd* (2007) 3 SLR 86; *Dongwoo Mann + Hummel Co Ltd v. Mann + Hummel GmbH* (2008) 3 SLR 871; see also, in matters of jurisdiction, *Insignia v. Alstom* (2001) 1 Lloyd’s Rep. 715.

²⁸ M. Hwang S.C. and C. Tan, *New Developments in Arbitration in Singapore, Asian Int’l Arb. Journ.*, 2010, Vol. 5. Out of all reported cases from the Singapore courts, all applications to enforce international awards have been granted and only one award from a domestic arbitration in Singapore has ever been successfully appealed against (*Ng Chin Siau & Ors v. How Kim Chuan* (2007), 4 SLR 809 (2007), SGCA 46).

²⁹ See the International Arbitration Act 1974 (Cth.) (IAA), governing international arbitrations having their seat in Australia. Domestic arbitrations are governed by the Commercial Arbitration Act (CAA) of the State or territory in which the arbitration takes place. The most significant differences between the CAAs and the IAA relate to a greater degree of judicial supervision and the possibility of limited appeals from awards under the CAAs.

³⁰ See the Law of the Republic of Azerbaijan on International Commercial Arbitration dated 18 November 1999. See G. Karimov – A. Movsumova, *The Baker & McKenzie Int’l Arb. Yearbook, Azerbaijan*, 2009, 99

³¹ The Arbitration Courts Law applies to dispute between residents of Kazakhstan. The International Commercial Arbitration Law is based on the UNCITRAL Model Law and applies to disputes where at least one party is not a resident of Kazakhstan; it also contains implementing procedures for the enforcement in Kazakhstan of foreign awards. State courts are entitled to review a foreign award on the merits if they deem that the award violates Kazakhstani public policy. See A. Kuatbekov and A. Korobeinikov, *The Baker & McKenzie Int’l Arb. Yearbook, Kazakhstan*, 2009, 198.

for jurisdictions that are not yet very familiar with international arbitration (as is the case with Mauritius³²). Experience in several countries³³ suggests that if the same rules are applied to both domestic and international arbitration, then a tension is created between the more interventionist approach that may be necessary in the domestic context and the non-interventionist approach required in the international context.³⁴

B. The Decision to Entrust the PCA with all Appointing Functions (and a number of further Administrative Functions) Traditionally Exercised by Courts

The Mauritian Act is unique in that it vests all appointing functions (and a number of further administrative functions) in the PCA.

The PCA's appointing functions are governed by Sections 12 (concerning the appointment of arbitrators), 14 (concerning the procedure for challenging arbitrators) and 15 (concerning the failure or inability to act of an arbitrator), which enact, respectively, Arts. 11, 13 and 14 of the Amended Model Law. In all cases, the authority in charge of making the ultimate determination is the PCA. Finally, Section 16, concerning the replacement of arbitrators, enacts Article 15 of the Amended Model Law. It

³² See the International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - A. Decisions of Principle – 7 (a), where it is said that: “(...) *There are on the other hand no – or very few – international arbitrations currently being conducted in Mauritius*”.

³³ Such as India, where the judiciary has recently taken wide-ranging actions in relation to the arbitral process (both domestic and international), far beyond the reasonable expectations of the international arbitration community. The interventionist approach of the Indian courts (which starts from the appointment of arbitrators and extends to the enforcement of awards), along with their interpretation of certain legal concepts (such as public policy) or the introduction, *de iure condendo*, of ambiguous concepts like *patent illegality*, has led to serious delays and inefficiencies in arbitration proceedings, conflict with other jurisdictions and disregard for fundamental rules of international arbitration (like the exclusive power of the courts of the seat of arbitration to set aside the award). Decisions such as *I.T.I. Ltd v. District Judge et al.* (1998) [A.I.R., 1998, *Allahabad Series*, 313], *Bhatia Int'l v. Bulk Trading* (2002) [A.I.R. 2002, S.C. 1432], *ONGC v. Saw Pipes* (2003) [5 Supreme Court Cases 705], *S.B.P. v. Patel Engineering* (2006) [A.I.R. 2006, S.C. 450], *Venture Global Engineering v. Satyam Computer Services* (2008) [2008 S.C.A.L.E. 214] are destabilising for the global arbitration community. If limited to domestic arbitrations, they would no doubt have caused less prejudice to the reputation of India as a seat for international arbitrations. The same can be said for similar decisions in Pakistan, like *The Hub Power Co. v. WAPDA* (2000) *Supreme Court of Pakistan*, June 20, 2000, 16 *Arb. Int'l.* 439 (2000).

³⁴ W. W. Park, *Judicial Controls*, *cit.*, 231, observes that “(...) *when an arbitration implicates foreigners, the judiciary of the arbitral seat might not examine the award according to the same standards applied to domestic controversies*”.

contains two new provisions dealing with the issue of truncated tribunals, granting the PCA the power ultimately to decide whether to proceed on a “truncated” basis.

Some peculiarities of these legislative choices are worth emphasising. First, the breadth of the powers granted to the PCA in this context. In any situation of failure by the parties and/or an institution to reach an agreement and/or to perform any functions entrusted to it, the PCA is entitled, upon the motion of one party, to take *any necessary measures* to find a proper solution. These measures include giving directions as to the making of any necessary appointments, revoking any appointments already made, designating any arbitrator as the presiding arbitrator and so on. Second, the PCA remains the authority in charge of *ultimately* appointing, challenging and/or replacing arbitrators, even where another arbitral institution (by reason of the choice by the parties of its arbitration rules) is somehow involved in the proceedings. Art. 8(4)(c) of the Act, for example, empowers the PCA, upon a party’s application, to take any necessary measures where a third party, *including an arbitral institution*, fails to perform any function entrusted to it under that procedure. In turn, Art. 10(3) provides that, in the event that a challenge under any procedure agreed by the parties (and therefore also a procedure involving another arbitral institution) is not successful, the PCA will ultimately decide on the challenge. Third, in order to avoid delays in the arbitral process and the use of dilatory tactics by recalcitrant parties, the Act expressly provides that all the decisions of the PCA under the Act are to be final and subject to no appeal or review. That means that any complaints by a party arising from such decisions can only be filed with the Supreme Court in the context of a recourse against the final awards (Section 19(5) of the Act).³⁵

The Act aims at resolving all the issues concerning the removal of arbitrators within a pure arbitration dimension, avoiding *in toto* the interference of the state judge, which has often proved problematic in this

³⁵ As to the PCA’s administrative functions, the most relevant ones are those related to fees adjustment and time limit extensions. As to the latter, in particular, the PCA is entitled to extend any time limits agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in the Act (including time limits for commencing an arbitral procedure or for making the award). This power undoubtedly broadens to no little extent the scope of intervention by the supervising authority in the arbitral process. However, the practical advantages of this provision outweigh the possible doubts. An arbitral process can be seriously frustrated by short time limits set by the parties in their agreement, long before a dispute has arisen, and without much thought being given to their application in practice. Any risk of undue interference in the parties’ autonomy should be minimised, considering the status of PCA as the body exercising these powers.

context, not least in terms of the duration of the proceedings.³⁶ The PCA is a neutral and multilateral institution, highly competent in arbitration matters and arbitration-friendly. It is likely to guarantee a sensitive approach to the needs and characteristics of arbitration and the expectations of the international arbitral community and to prevent narrow and parochial interpretations of the new Act. The PCA can be relied upon to fulfil its appointing and administrative functions in an independent and efficient way. Its involvement will likely increase the appeal of Mauritius as a seat for international arbitration, as it bolsters confidence among foreign parties and participants. An institution like the PCA is in fact in a better position than a state court to assess the wide variety of factual situations likely to exist in the context of international arbitration, ensuring consistency in the solutions and avoiding the risk that each challenge be dealt with in a markedly different way, depending on the favourable or unfavourable approach towards arbitration of a particular judge.³⁷ Moreover, the Act permits that a determination on all possible complaints be made at any stage of the proceedings, without necessarily waiting for the issuance of the final award. It thus prevents the risk of rendering meaningless and wasteful the entire process. Finally, by preventing any review or appeal against the decisions of the PCA, it reduces the risk of any further delay in the process. The rights of the parties are in any case safeguarded by the possibility to file any possible residual complaint with the Supreme Court of Mauritius in a recourse against the final award.

Taking into account the potential tensions and conflicts which arise in this area between the principle of party autonomy, the powers of the arbitrators, the functions of the arbitral institutions and the role of the courts, the solution adopted by the new Mauritian Act is certainly to be prized, especially as it involves an institution which is more experienced in dealing with challenges than any national court can possibly be.³⁸

That solution is *unique* in the panorama of the arbitration laws; therefore it is not possible to make a direct comparison on this precise point

³⁶ In Switzerland, for example, prior to the enactment of the 1987 Swiss PILA, the exclusive intervention by the courts in the challenge procedure had resulted in a dramatic length of arbitral procedures (between 4 and 8 years for cases where the final award was not yet rendered). In the *Westland* case, for example, the decision rejecting a challenge became final nearly 4 years after the challenge was initially submitted. See G. A. Alvarez, *The Challenge of Arbitrators*, *Arb. Int'l*, Vol. 6, N. 3, 1990, 211 ff.

³⁷ An unfavourable attitude towards arbitration has emerged in a case (referred to by G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 205), in which the Egyptian courts held they had jurisdiction over the challenge of an arbitral tribunal sitting in Cairo, *on the grounds that the arbitrators used English during a hearing*.

³⁸ G. Born, *International Commercial Arbitration - Commentary and Materials*, 3rd ed., Kluwer Law International, The Hague 2009, 1552.

between the Act and other laws. However it might be useful briefly to consider how those laws deal in this context with the issues concerning the relations between the principle of party autonomy, the prerogatives of the arbitrators, the power of the arbitral institutions and the role of the courts.

Under the UNCITRAL Model Law, in all the Model Law jurisdictions and in most countries worldwide, courts have the power to appoint arbitrators where there is no agreed procedure or where an agreed procedure fails.³⁹ There are still some jurisdictions in which the courts do not have such powers.⁴⁰ In some jurisdictions the parties may agree from the outset that arbitrators will be appointed directly by the state court.⁴¹

Most national laws also empower national judges to decide on challenges against arbitrators relating to their impartiality, independence, qualifications and/or incapacity to act and/or to fulfil their tasks, when there is no agreed procedure for such challenges or where the agreed procedure fails and the challenge made to the tribunal is unsuccessful.⁴² At the same time, as a rule, most institutions administering arbitrations provide procedures for challenging arbitrators during the proceedings.⁴³

The first issue which arises, therefore, is the identification of the authority competent to decide on the challenge.

As a matter of principle, when the parties agree to incorporate the rules of an institution in their agreement, they agree to submit to the administrative procedures of that institution, which usually include the

³⁹ See Art. 11 (5) UNCITRAL Model Law. See also, *ex multis*, Germany, where the power of the state courts in respect of the formation of an arbitral tribunal is governed by Art. 1062 (1) ZPO. See K. H. Bockstiegel-S. Kroll-P. Nacimiento, *Arbitration in Germany*, cit., 600. For Asian jurisdictions, see, *ex multis*, Art. 12 of the South Korean Act and Section 8 of the Philippines Act (L. Arroyo, *The Baker & McKenzie Int'l Arb Yearbook*, Philippines, 2009, 50 ff.).

⁴⁰ In China, for example, the relevant powers are vested in the competent arbitration commissions (see Arts. 13 and 34 to 38 of the Chinese Arbitration Act). In Singapore those powers are vested in the Chairman of the Singapore International Arbitration Centre. See also R. Krishan, *Appointment of an Arbitrator in Arbitration Proceedings under the Indian Arbitration and Conciliation Act 1996*, *Int'l A.L.R.*, 2001, 90.

⁴¹ That is the case in Germany (see *Muench. Komm. ZPO- Muench.* 2001, Art. 1062, para. 4), where the parties are free to assign the right to nominate arbitrators to other independent third parties, whether a private individual or a public body (see Schwab/Walter 2005, Chap. 10 para. 3).

⁴² For Germany see Art. 1037 (3) sent. 1 ZPO (jurisdiction of the courts for the challenge proceedings) and Art. 1038 (1) sent. 2 ZPO (jurisdiction for the removal proceedings). Similar provisions are to be found in most Model Law jurisdictions. In Asia see Section 11 of the Philippines Act; Art. 14 of the South Korean Act; Arts. 22-25 of the Indonesian Act.

⁴³ See, for example, Art. 14 of the ICC Rules; s. 17 of the AAA Rules; Art. 15 (i) of the JAMS Rules. See also T. Walsh, R. Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, *Arb. Int'l*, 2011, Vol. 27, Issue 3, 283 ff.

power of the latter to decide challenges against arbitrators. The submission of a challenge directly to a national judge by a party that has agreed to an institutional procedure would thus be a breach of the terms of the arbitration agreement.⁴⁴ Therefore many statutes respect (and enforce) the will of the parties who, by selecting a set of arbitral rules, have deferred to the remedy provided for by those rules. The decision of an institution is generally considered administrative in nature (*i.e.* non-judicial)⁴⁵ and final.

The question is whether that decision - which, being final, cannot be subject to any internal (*i.e.* within the institution) appeal or review - is subject to an immediate judicial review before the courts of the seat of arbitration or whether any complaint against that decision can only be filed with a recourse against the final award. The first approach has been adopted by the UNCITRAL Model Law and by many legislations enacted on its basis, like those of Germany⁴⁶ and Austria.⁴⁷ Other countries, such as France and the U.S.A., have opted for the second approach.

In the Model Law system there are two steps.⁴⁸ A challenge against an arbitrator is *first* made according to a specific procedure agreed upon by the parties (either by providing for a specific procedure⁴⁹ or by making reference to particular arbitration rules - accepting, in the latter case, the challenge procedure provided for under these rules -) or, failing that, directly to the arbitral tribunal. Only at a subsequent point in time, when the challenge is rejected or is not successful, an application may be made to the competent court.⁵⁰ The tribunal (including the challenged

⁴⁴ G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 204.

⁴⁵ The non-judicial nature of the ICC Court's decisions has been confirmed by French case law. For reference see G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 204.

⁴⁶ As previously stated, the German procedure for the challenge of arbitrators is regulated in Art. 1037 ZPO, which is based on Art. 13 of the Model Law. Therefore the parties are given the opportunity to agree on a specific procedure for challenging an arbitrator and, in its absence, a default procedure will apply.

⁴⁷ Under Austrian law, the procedure for challenging an arbitrator is provided for in Section 589 of the Austrian Code of Civil Procedure (*Zivilprozessordnung* - ACCP) and is similar to that under the Model Law and German law.

⁴⁸ Art. 13 of the Model Law recognises parties' autonomy and gives the parties the right to agree on a procedure for challenging an arbitrator.

⁴⁹ Which, in any case, must be in line with the principle of fairness, equal treatment and the right of the parties to be heard.

⁵⁰ If, however, the tribunal (or the arbitral institution or any other authority charged with making the decision) decides to uphold the challenge, its decision is *unappealable*. In fact, there is no legal remedy against a decision of the arbitral tribunal (or any other authority) granting the challenge and terminating the arbitrator's mandate (Stein/Jonas-Schlösser 2002, para. 1027, para. 4; B. Spiegelfeld, S. Wurzer, H. E. Preidt, *Challenge of Arbitrator: Procedural Requirements*, *Austrian Yearbook on International Arbitration*, Vienna, 2010, 49 and 53).

arbitrator), may continue the arbitration and render an award, while the challenge proceedings are pending (in order to prevent the parties from using dilatory tactics to prolong the arbitral proceedings by submitting unfounded challenge requests). The consequences of the issuance of the award on the pending challenge procedure are not always clear.⁵¹ Under the Model Law system, since the parties may have agreed on an arbitral institution's procedure, the rejection of the application by such an institution would be scrutinised by a state court, which, technically, will not review the decision of the institution, but rather make its own independent decision (being court proceedings independent of the arbitration proceedings).⁵² In any case, the supervisory role of the courts is mandatory and can never be excluded by agreement of the parties.⁵³ This system is said to balance the principle of party autonomy and the duty of the State to ensure objectivity *vis à vis* its citizens.⁵⁴ The court's decision is final and binding upon the parties. There is no legal remedy against this decision⁵⁵ and it is not possible to later dismiss the arbitrator based on the same reasons alleged as the basis for challenge. If the court grants the challenge, the mandate of the arbitrator is terminated *ex nunc* and a substitute arbitrator has to be appointed.

Under the UNCITRAL Model Law system, it is not clear whether the parties can exclude a challenge procedure before the arbitral tribunal or an arbitral institution altogether, providing for instant recourse to domestic courts.⁵⁶

In systems which are not based on the Model Law, like France and the U.S.A., the courts exercise their supervisory function not directly against the decision of the institution or the tribunal, but only against the

⁵¹ See the different views of, respectively, P. Schlosser in Stein & Jonas ZPO, 2002, Section 1037 mn. 5, P. Hartmann in A. Baumbach et al., *Zivilprozessordnung*, Section 1059, mn. 11 and J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis*, 200, 1111, 8 mn.

⁵² Zoeller-Geimer 2007, para. 1037, para. 2.

⁵³ In this sense see, for Germany, Art. 1037 (3) ZPO and for Austria, Section 589 para. 3 ACCP. A similar regime exists in some extra-European jurisdictions, such as the Philippines (see L. Arroyo, *The Baker & McKenzie Int'l Arb Yearbook*, Philippines, 2009, 51).

⁵⁴ See MuenchKommZPO-Muenh (2001), para. 1037, 1.

⁵⁵ For Germany see Section 1965 GCCP.

⁵⁶ In Germany, in favour of this possibility are P. Mankowski, *Die Ablehnung von Schiedsrichtern*, *Schieds VZ*, 304, 305 (2004); R. Geimer in R. Zoeller ZPO Section 1036 mn. 1 (2007); *contra* P. Schlosser in Stein & Jonas ZPO Section 1037 mn. 2 (2002); J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis* mn. 1090 (2008). See also *Oberlandesgericht Hamburg*, OLG Hamburg, July 12, 2005 (Docket n 9 SchH 1/05, Germany). For the debate in Austria see C. Hausmaninger, in Hans W. Fasching, ZPO IV/2 346 (2d ed. 2007) and B. Spiegelfeld and S. Wurzer, H E. Preidt, *Challenge of Arbitrator*, *cit.*, 47.

final award on the merits. If courts are seized with complaints against the decisions of arbitral institutions, they usually restrict themselves to examining whether the institution has correctly applied the Rules. This approach has been adopted, for example, by the famous French court decisions in *Raffineries de Petrole d'Homs et de Banjas v. Chambre de Commerce Internationale*,⁵⁷ which clearly stated the principle that in the context of an entirely contractual international arbitration, the French courts will not entertain an application for the annulment of an institutional decision.⁵⁸ If an arbitral institution or any third party is entitled to decide upon a challenge (according to a free choice of the parties), their decision will not be subject to any direct review by a state judge.⁵⁹ In the absence of any party agreement on the challenge procedure, the President of the *Tribunal de Grande Instance* of Paris will be entrusted with the decision,⁶⁰ which will be issued in the form of an order in summary proceedings (*référé*), against which no recourse is available.⁶¹ For the party who has unsuccessfully challenged an arbitrator, the only option available would be an application to set aside the award on the basis of Art. 1502(2) NCPC, while the failure to object to an arbitrator during the proceedings may be deemed to be a waiver of this ground.⁶²

⁵⁷ Court of Appeals, Paris, 15 May 1985, *Rev. Arb.*, 1985, 147. In this case, a decision by the ICC Court of Arbitration ordering the replacement of an arbitrator was referred *first* to the *Tribunal de Grande Instance* of Paris and, *subsequently*, to the Court of Appeals. Both judges recognised the ICC's jurisdiction to rule on the question in the application of the ICC Rules. See also the decision of the Paris Court of Appeals in *Opinter France v. Dacomex*, 7 October 1987, refusing to review the decision of the ICC Court with respect to a challenge.

⁵⁸ These principles, however, do not find uniform application in every jurisdiction. In Switzerland, for example, prior to the enactment of the Swiss PILA, courts held themselves to have exclusive jurisdiction to decide on the removal of a challenged arbitrator, with the consequence of extremely lengthy procedures.

⁵⁹ This is usually the case when a decision is rendered by a private body which does not exercise judicial functions. See M. W. Buehler & T. H. Webster, *Handbook of ICC Arbitration* 133 (2d ed., 2008).

⁶⁰ See Art. 1457 NCPC.

⁶¹ The manner in which French courts have exercised their supervisory role to assist the arbitral process reveals an attitude of respect, both for the parties' autonomy and legitimate expectations and for the arbitrator's prerogatives. See M. S. Leurent, *L'Intervention du Juge*, *Rev. Arb.*, 1992, 307 *et seq.* and Pluyette, *Intervention à la Suite du Rapport de M. S. Leurent*, *Rev. Arb.*, 1992, p. 317. An indication of the limits of the French court's cooperation are clearly indicated in the decision of 16 November 1996 in the case *Société Regimage c. Société Mitan Presse*, *Rev. Arb.*, 1995, p. 659.

⁶² Y. Derains - R. Goodman - Everard, *France in Int'l Handbook on Commercial Arbitration*, 53, P. Sanders & A. van den Berg, ed. 1988. French law does not prescribe any time limits within which a challenge must be filed.

The U.S. Federal Arbitration Act is silent about the question concerning the removal of arbitrators by the courts, while the proceedings are pending. It only mandates the *vacatur* of an arbitral award where an arbitrator is found to be biased or to have engaged in certain misconduct.⁶³ Within this legislative context, U.S. federal courts have consistently held that there is no judicial remedy against an arbitrator before the completion of the arbitration.⁶⁴ Any different conclusion was said to contrast with the Congressional intent to avoid judicial intervention at the pre-award stage.⁶⁵ When parties choose arbitration: “(...) *the role that the judiciary should aim at is to have no role at all*”.⁶⁶ U.S. courts have always maintained that post-award judicial review is sufficient to deter abuse, notwithstanding the argument that allowing an openly biased arbitrator to proceed will inevitably lead to a challenge and likely *vacatur* of a final award, thus rendering meaningless and wasteful the entire process.⁶⁷ Only exceptionally and on the basis of very severe grounds such as *manifest injustice*, *severe irreparable injury*⁶⁸ or *overt misconduct*⁶⁹ have courts been able to admit a judicial review of the institution’s decision or to intervene and order the replacement of an arbitrator.⁷⁰

In the 1996 English Arbitration Act, provision is made for a two-tier system: a decision is made based upon a procedure agreed by the parties and a subsequent application may be made to the court. In particular, while the authority of an arbitrator can be revoked only by agreement of the parties or by the action of the arbitral body vested with the relevant powers

⁶³ See Federal Arbitration Act 9, U.S.C. para. 10.

⁶⁴ See Y. Andreeva, *How Challenging is the Challenge, or can U.S. Courts Remove Arbitrators before an Arbitration has Come to an End?*, *The Am. Review of Int’l Arbitration*, 2008, Vol. 19, 127.

⁶⁵ See *Marc Rich & Co., A. G. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 388 (“if Congress had wished to authorize such review before arbitration proceedings commence, it could easily have so provided”); see also *Michaels v. Mariforum Shipping S.A.* 624 F. 2d 411, 414 n. 4 (2d Cir. 1980) and *Alter v. Englander*, 901 F. Supp. 151, 153 (S. D.N.Y. 1995).

⁶⁶ E. Tuchmann, *Removal of the Arbitrator during Proceedings*, N. Y. L. J., May 7, 1998, at 3, col. 1.

⁶⁷ See *Marc Rich & Co., A. G. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 388: “(...) a just and expeditious result with a minimum of judicial interference can best be achieved by requiring an arbitrator...to declare any possible disqualification and then to leave it to his or her sound judgement to determine whether to withdraw”.

⁶⁸ See *Aerojet v. AAA*, 478, F. 2d, 248, 25 (9th Cir. 1973); *MGMT v. O’Malley*, 965, S.W. 2d 215, 220 (mo. Ct. App. 1998); *York Hanover v. AAA* 1993 U.S. Dist Lexis, 6192 (S.D.N.Y. May 7, 1993).

⁶⁹ What is required is a very high standard: *irreparable harm, proper case, extreme case*. See *Metropolitan Property and Casualty Insurance v. J. C. Penney Cas.*, 780 Supp. 885, 893-94 (D. Conn. 1991).

⁷⁰ These interventions are possible both in *ad hoc* and institutional arbitration.

(Section 23), the English courts retain the exclusive power to remove an arbitrator on one or more of the grounds listed in Section 24 (including doubts about the arbitrator's impartiality, doubts as to his capacity to act, failure to conduct the proceedings). However, if there is already in place an arbitral (or any other) institution vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal, unless it is satisfied that the applicant has first exhausted any available recourse to that institution or person.⁷¹ Unlike the UNCITRAL Model Law, the Arbitration Act does not provide for a default challenge procedure before the arbitral tribunal. As was the case under Section 23 (1) of the 1950 Act,⁷² it seems that an application to remove an arbitrator can be made at any time during the proceedings. One of the grounds for removal listed in Section 24 (1) (d) (failure or refusal to conduct the proceedings properly or to use all dispatch in conducting the proceedings or making an award) is so broadly worded as potentially to permit a heavy interference on the part of the courts in the arbitral process.⁷³

Finally, in other jurisdictions, such as Switzerland and Sweden, mixed solutions have been adopted.⁷⁴

⁷¹ See K. Maxwell, *England, Practitioner's Handbook on Int'l Arbitration* 608 (F. Weigand ed. 2002). The court's power to review any decision rendered in a challenge procedure by an arbitral institution was confirmed by the English Court of Appeal in *AT&T Cooperation Lucent Technologies Inc. v Saudi Cable Company*, [2002] 2 Lloyd's Rep. 127.

⁷² See *Pratt v. Swanmore Builders Ltd* [1980] 2 Lloyd's Rep. 50.

⁷³ In order to prevent this risk the DAC, in its February 1996 Report paras. 105-106, provided some guidelines to set out the limits of Section 24 (1) (d), stating in particular that: "(...) *this part [of the Act] (...) should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted*".

⁷⁴ Under Art. 179 and 180 PILA, either a procedure agreed upon by the parties (concerning both the grounds for a challenge and the possible involvement of an arbitral institution) or a challenge before the state courts is possible, *but not both*. See P. A. Karrer & P. A. Straub, *Switzerland, Practitioner's Handbook on International Arbitration* (F. Weigand, ed. 2002), 1056 mn. 56; M. Blessing, *The New International Arbitration Law in Switzerland: a Significant Step Towards Liberalism*, *Journal of Int'l Arb.*, Vol. 5, n. 2 (1988) 9-44; B. Spiegelfeld - S. Wurzer - H. E. Preidt, *Challenge of Arbitrators*, *cit.*, 57. For Sweden see H. Jung, *SCC Practice: Challenge to Arbitrators*, *SCC Board Decisions 2005 - 2007*, *Stockholm Int'l Arb. Review*, 2008, 1, *Arb. Institute of the SCC*, Jurisnet, LLC, 1 ff.

C. The Options Concerning Interim Measures of Protection

The Mauritian Act contains innovative provisions also in respect of interim measures of protection issued by arbitrators and courts.

First of all, the Act follows what is now the current law in the majority of jurisdictions, entrusting arbitrators with the power to grant interim measures of protection. As for the content and scope of such powers, an arbitral tribunal under the new Act is entitled to issue only certain interim measures, expressly identified in Section 21 of the Act (which enacts Art. 17 of the Amended Model Law and contains, among others, orders to provide security for costs), subject to the agreement of the parties, who can exclude (or broaden the scope of) that power. There are some ancillary powers vested in the tribunal, in order to enable it fully to exercise its ability to make orders for interim measures: they concern the modification, suspension or termination of a measure on the application of any party or, in exceptional circumstances and on prior notice to the parties, on the tribunal's own initiative (Section 21(5)). The measures may be granted in the form of an award or in another form.⁷⁵

The principles that govern the recognition and enforcement of interim measures issued by a tribunal are the same that characterise the corresponding provisions of the Amended Model Law (*i.e.* Arts. 17H and 17J) and may be summarised as follows: a) the enforcement falls within the exclusive jurisdiction of the courts (in Mauritius, the Supreme Court); b) the enforcement is granted upon a party's application to the Supreme Court; c) the Supreme Court can also enforce measures issued by tribunals sitting abroad; d) the enforcement may be refused on the same grounds invoked for refusing recognition of arbitral awards (with some additional grounds); e) any determination made by the Supreme Court at the stage of enforcing an interim measure shall be effective only for the purposes of application to recognise and enforce the interim measure and the Court shall not, in

⁷⁵ The Act provides also for the tribunal's power to request appropriate security from the applicant party, as well as disclosure of any material change in the circumstances and for the determination of a party's liability for damages and costs unlawfully suffered by another party (Section 21(6)(7)). As emerges from the *Travaux Préparatoires*, the conditions that a tribunal is free to impose when granting an interim measure are not restricted to the power to order the payment of costs and damages (Section 21(8)). It is possible, for example, that a tribunal may require the party requesting an interim measure to give an express undertaking in damages and/or "fortify" that undertaking through the provision of an appropriate bank guarantee or other security, as a condition of granting the measure (Amended *Travaux Préparatoires*, part IV - Interim Measures - 83).

making that determination, undertake a review of the substance of the interim measure.

As to the concurrent power of the courts to issue interim measures, the Act adopts a clear arbitration-friendly approach, by limiting the Supreme Court's powers to those which support, and do not disrupt, arbitrations and only then in cases of *real urgency* or when the tribunal is itself unable to act effectively. The subordinate nature of the Supreme Court's power to issue interim measures clearly emerges from two provisions contained, respectively, in paras. 5 and 6 of Section 23. The Court shall act only if (or to the extent that) the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard has no power or is unable for the time being to act effectively (para. 5). An order made by the Supreme Court under this section shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order (para. 6). Section 23 provides that the Supreme Court shall have the power to issue interim measures, even in relation to arbitration proceedings having their seat abroad.⁷⁶

The Supreme Court is prevented from granting interim measures outside the framework of Sections 23 (3) to 23 (6), for instance pursuant to its inherent jurisdiction or to other statutory powers.⁷⁷ This conclusion is based on both Section 3(8) of the Act (which codifies the principle of non-intervention of the courts subject to the provision of the Act) and of Section 3(10) (which states the principle of non-application of domestic law principles).

The provisions of the Act on interim measures are clearly based on the UNCITRAL Amended Model Law (Art. 17 et ff.), which is a leading example of the trend towards expansive arbitral authority to grant interim relief. However, they depart from the latter on two major points. First, they omit to regulate *ex parte* interim measures issued by the tribunal (the so called *ex parte* "Preliminary Orders"⁷⁸), due to their controversial nature. Second, as to the concurrent power of the courts, unlike the Model Law which contains very little guidance as to how the courts are to exercise that power and how the latter inter-relates with the arbitral tribunal's own

⁷⁶ While in case of urgency, the Supreme Court can also act on *ex parte* application, when there is no urgency the requesting party must previously give notice to the other party or parties and to the arbitral tribunal.

⁷⁷ Accordingly Mauritian Courts should not follow the jurisprudence currently adopted in England, where the Courts have used their inherent jurisdiction and/or Section 37 of the English 1981 Supreme Court Act to grant interim measures *even* where the conditions for the grant of such measures under Section 44 had not been fulfilled.

⁷⁸ Articles 17 B and 17 C UNCITRAL Amended Model Law.

power,⁷⁹ the Act provides that the Supreme Court's power be limited so as to ensure that it will not interfere with the arbitral process, and will only intervene to support – and not disrupt – arbitrations, at times when: (i) there is real urgency and (ii) the arbitral tribunal is unable to act effectively. This has been done through the incorporation of the text derived from Section 44 of the English Arbitration Act into Sections 23(3) to 23(6) of the Act.

The topic of interim measures in international commercial arbitration has been the subject of extensive and exhaustive analysis, as shown by the number of studies and commentaries published. There remain a number of controversial issues, however, which are worth analysing here. Taking into account the limited scope of this Report, we will limit this review to the most relevant ones.

The current law in the majority of jurisdictions recognises the power of arbitrators to issue interim measures of protection (also named pre- award relief, conservatory relief, protective relief),⁸⁰ without affecting

⁷⁹ See Article 17 J of the Amended Model Law, which simply provides that: “A court shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration”.

⁸⁰ Historically only national courts were empowered to grant interim or conservatory measures. The powers of arbitral tribunals to order provisional relief, if any, were subject to significant limits or prohibition (see the situation in Germany until the new law based on the Model Law was enacted in 1998 (Art. 1036 German ZPO); in Austria until 2005 (Art. 593 Austrian ZPO); in Greece until 1999 (Art. 685 Greek Code of Civil Procedure); in Spain until 2003 (Art. 23 Spanish Arbitration Act). Arbitral tribunals, in turn, were reluctant to exercise even those limited powers that they possibly did possess (the reticence on the part of arbitrators to grant provisional relief is clearly shown by the Report of the Secretary General of the ICC Court of Arbitration (1992), according to which, between 1977 and 1992, *only* 25 ICC cases had addressed the subject of interim measures; in contrast, a review of ICC awards between 1985 and 2000 identified some 75 cases in which some form of provisional measures were requested). The rationale of those limitations was the traditional precept that arbitrators may not issue *coercive measures* and that granting interim power to arbitrators would in this respect constitute a breach of public policy. This rationale was (and still is, when referred to in jurisdictions, like Italy, which still prevent arbitrators from granting interim measures) clearly unsatisfactory. On the one hand, the power to grant interim measure is no more an exercise of coercive powers than the making of a final award on the merits, which grants a relief directing a party to take, or not to take, specified actions. What the tribunal lacks is only the power directly to require compliance with its orders or to sanction non compliance. By agreeing to arbitrate, in addition, the parties presumptively wished to have their disputes resolved in a single procedure before a neutral tribunal. Prohibiting arbitrators from granting interim powers would thus appear inconsistent with the terms of most international arbitration agreements.

the concurrent power of the courts to issue interim measures.⁸¹

As regards the power of arbitrators, the latter are given default power to issue interim measures in nearly all Model Law countries and in the majority of European and extra-European jurisdictions.⁸² However, there are still some notable exceptions, including Italy,⁸³ China,⁸⁴ Quebec,⁸⁵ Argentina⁸⁶ and Thailand.⁸⁷ In addition, most international arbitration conventions do not expressly deal with the authority of arbitrators to order provisional measures.⁸⁸ As regards the concurrent power of the court, it has

⁸¹ On the topic of interim measures in international arbitration see G. Born, *International Commercial Arbitration*, cit., Chapter 16, *Provisional Measures in International Arbitration*, 1941 ff., esp. nt. 1; A. Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, *ICC Int'l Ct. Arb. Bull.*, 2000, 11 (1), 31 ff.; D. F. Donovan, *Le pouvoir des arbitres de rendre des ordonnances de procédure, notamment des mesures conservatoires, et leur force obligatoire à l'égard des parties*, *ICC Int'l Ct. Arb. Bull.*, 1999, Vol. 10 N° 1, 59 ff. J. D. M. Lew, *The Case for the Publication of Arbitration Awards*, *The Art of Arbitration: Essays on International Arbitration: Liber Amicorum Pieter Sanders, 12 September 1912-1982*, editors, J. C. Schultz, A. Jan van den Berg, Deventer 1982, 223; H. A. Grigera Naón, *Editorial* (1988) 5,2 *J. Int'l Arb.* 5; K. P. Berger, *International Economic Arbitration*, Deventer, 1993 at 509-525.

⁸² Just to mention only a few (for further reference see *infra*), consider, for example, in Europe, Art. 25 (4) Swedish Arbitration Act (1999) and Art. 183 (1) Swiss PILA; for extra-European jurisdictions see Art. 26 of the Venezuelan Commercial Arbitration Law (1998); Art. 32 Columbia Decree N. 2279 (1989); Art. 52 (1) Costa Rica Law for Alternative Resolution of Disputes and the Promotion of Social Peace; Art. 9 of the Ecuador Law on Arbitration and Mediation (1997); Art. 24 (1) Panama Decree Law 5 (1999); Art. 492 Uruguayan Code of Civil Procedure (1990).

⁸³ See Art. 818 of the Italian Code of Civil Procedure.

⁸⁴ See Art. 28, 46 and 68 of the Chinese Arbitration Law. Under the latter provisions, only the competent People's Court has the power to grant or deny an application for interim relief. Accordingly, parties have first to apply to the relevant Arbitration Commission for preservation of property (and also for the preservation of evidence). Such applications will then be submitted to the relevant People's Court by the Arbitration Commission. The preservation of property will be dealt with according to the relevant provisions of the Chinese Law of Civil Procedure.

⁸⁵ See Art. 940 (4) of the Quebec Code of Civil Procedure.

⁸⁶ See Art. 753 of the Argentinean Code of Civil and Commercial Procedure.

⁸⁷ See Section 18 of the Thai Act.

⁸⁸ The Geneva Protocol and the Geneva Convention did not contain any express provision on interim measures, nor do the New York Convention and the Inter-American Convention. The European Convention on International Commercial Arbitration of 1961 (Geneva 21 April 1961) only provides, at Art. VI (4), that: '*a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court*', without specifically addressing the issue whether or when an arbitral tribunal may itself grant provisional measures or the relationship between applications for tribunal ordered and court ordered provisional measures. The 1965 ICSID Convention, on the contrary, allows (at Art. 47) ICSID tribunals to '*recommend*' that a party adhere to '*any provisional measures which should be taken to*

been codified in most arbitration laws⁸⁹ and rules,⁹⁰ is well recognised both by national and international authorities and is generally considered implied, even in the absence of an express provision.⁹¹

preserve the respective rights of either party'. These recommendations are increasingly treated as *binding* by arbitral awards: see *Occidental Petroleum Corp. v. Republic of Ecuador* case N. Arb/06/11 (decision on interim measures 17 August 2007); *Tokios Tokeles v. Ukraine* Case N. Arb/02/18 (procedural order N. 2, 28 October 1999). On this topic see Y. Derains et E. A. Schwartz, *A Guide to the New ICC Rules of Arbitration*, The Hague, 1998, 272.

⁸⁹ The UNCITRAL Model Law is a prime example of legislation authorising *concurrent judicial and arbitral jurisdiction* to grant provisional measures. See Article 17 of the 1985 (and Art. 17 J of the 2006) Model Law. Many arbitration legislations contain similar provisions. See Art. 183 of the Swiss PILA (S. Besson, *Arbitrage International et Mesures Provisoires*, cit., 192; G. Walter, J. Broennimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1991, 144). The same can be said for Belgium (see Arts. 1696 (1) and 1679 (2) Belgian Judicial Code); the Netherlands (Art. 1022 (2) Code of Civil Procedure); Germany (Section 1041 ZPO) (for a commentary of the German relevant provisions see J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis* 2852 et seq. (3d ed. 2008); K. H. Schwab, G. Walter, *Schiedsgerichtsbarkeit* ch. 17a 1 et seq. (7th ed. 2005); P. Schlosser in Stein-Jonas (eds.) *Kommentar zur Zivilprozessordnung*, Art. 1041 1 et seq. (22nd ed. 2002); England (see Art. 44); Japan (see Art. 15 Japan Arbitration Law); India (Art. 9 Indian Arbitration and Conciliation Act). See also Section 14 of the Philippines Act; Section 12 (6) of the Singapore Act; Art. 18 of the South Korean Act; Art. 9 Greek Arbitration Law.

⁹⁰ See, *ex multis*, Art. 26 (3) of the UNCITRAL Rules, according to which: '*A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement*'; Art. 21 (3) ICDR Rules; Art. 32 (2) SCC Rules; Art. 21.3 AAA Rules; Section 20.2 DIS Rules; Art. 24.3 Hong Kong Rules; Art. 36, para. 4 ICA Court at the Russian Federation Chamber of Commerce and Industry; Art. 25.2 and 25.3 LCIA Rules; Articles 38 and 42 NAI Rules; Rule 1.1 SIAC Rules.

⁹¹ Even in jurisdictions where the legislation does not expressly provide for concurrent jurisdiction to order provisional measures, national courts have reached this result. In the U.S.A. for example, the text of the F.A.A. only grants federal courts the express power to order provisional measures with regard to a narrow category of maritime disputes (U.S. F.A.A. 9 U.S.C. Art. 8). Nonetheless, outside the context of the New York Convention, the overwhelming weight of U.S. judicial authority under the F.A.A. concludes that federal courts has jurisdiction to issue provisional measures (absent contrary agreement by the parties) to protect the parties and the arbitral process. See *Discount Trophy & Co. v. Plastic Dress-Up Co.*, 2004 WL 350477 at 8 (D. Conn. 2004); *American Express Fin Advisors v. Thorley* 147 F. 3d 46 (8th Cir. 1994). For comments see E. Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: a Perspective from Contract Law* 54 U. Chi. L. Rev., 1987, 1373; G. D. Pilke, *The Federal Arbitration Act: a Threat to Injunctive Relief*, 21 *Willam. L. Rev.*, 1985, 674. Likewise, also in the absence of statutory guidance, French courts have concluded that an agreement to arbitrate does not ordinarily preclude court-ordered provisional measures: see Judgment of 27 October 1995, Paris Court of Appeal, *Rev. Arb.*, 1996, 274; *Fouchard Gaillard Goldman on*

Both the arbitrators' and the courts' powers to issue interim measures raise a number of issues, which will be addressed here below.

As to the arbitrators' power, at present its content, scope and limits differ quite substantially from country to country. In some jurisdictions (like Switzerland), arbitrators have a general power to issue interim measures, subject to the contrary agreement of the parties.⁹² In other jurisdictions (like England) (as well as under the UNCITRAL Model Law and most laws enacted on its basis), arbitrators have the power to grant certain specific measures, subject to an agreement of the parties which can broaden that power.⁹³ From a practical point of view the difference is not so significant, since in both cases the precise identification of the scope of the arbitrators' power depends (directly or indirectly) on the will of the parties. However, the second option (*i.e.* a descriptive provision, pointing to some broadly defined (non-exhaustive) categories of measures, which the tribunal can grant, subject to a different agreement of the parties, who can exclude, reduce or broaden the tribunal's power) is to be preferred. It enhances the certainty as to the ambit of the arbitrators' power, it fosters its acceptability by the courts, which are later requested to enforce those measures and it still allows a certain degree of flexibility.

In other jurisdictions, such as France and the U.S.A., there are no express provisions conferring upon arbitrators the power to issue interim measures. However, that power is considered an inherent prerogative of the arbitrators, implied in the stipulation of the arbitration agreement. In the U.S.A., the F.A.A. and the majority of U.S. state statutes governing arbitration are silent on the power of arbitrators to grant interim measures. Nevertheless, there is no doubt about the existence of such a power. While early U.S. court decisions frequently held that arbitrators lacked the authority to issue provisional relief (generally relying on a narrow reading

International Commercial Arbitration, cit., 1306-09, 132; J. F. Poudret, S. Besson, *Comparative Law of International Arbitration, cit.*, 611.

⁹² Art. 183 of the Swiss PILA now provides that: '(...) unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures'. Under this provision, Swiss authorities now recognise a broad power (absent contrary agreement) on the part of international tribunals seated in Switzerland to grant interim relief (*see* S. Berti, in S. Berti *et al.*, eds, *International Arbitration in Switzerland*, Art. 183 (2000); W. Habscheid, *Einstweiliger Rechtsschutz durch Schiedsgerichte nach dem Schweizerischen Gesetz ueber das International Privatrecht IPRG*, para. 134 *et seq.* 1989).

⁹³ *See* Section 38 and 39 of the English Arbitration Act. *See also* T. Oyre, *The Power of an Arbitrator to Grant Interim Relief under the Arbitration Act 1996*, *Arbitration* 1999, 113 ss.

of the parties' arbitration agreement),⁹⁴ at present the overwhelming majority of U.S. courts recognise that arbitrators have a broad power to grant interim relief (in the absence of any agreement to the contrary⁹⁵). The commentary on the Revised Uniform Arbitration Act ("RUAA"), which contains a summary of the state of U.S. law in this field, reports that: "*The case law, commentators, rules of arbitration, organizations and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief, including interim awards, in order to make a fair determination of an arbitral matter*".⁹⁶

Most arbitration rules, in turn, recognise the power of arbitrators to order interim relief.⁹⁷ Even where those rules do not contain express provisions on this matter, national courts and arbitral tribunals have often interpreted them as to authorise such action.⁹⁸ For example, the 1988 ICC Rules did not expressly authorise tribunal-ordered provisional measures: nevertheless, arbitral tribunals concluded that they had authority to grant provisional relief.⁹⁹

⁹⁴ See *Swift Indus., Inc., v. Botany Indus., Inc.* 466 F. 2d, 1125, 1134 (3d cir. 1972); *Recyclers Ins. Group Ltd v. Ins. Co. of Am.*, 1992 WI 150662, E.D. Pa. 1992.

⁹⁵ See *Banco de Seguro del Estado v. Mut. Marine Office, Inc.*, 344, F. 3d 255 (2d cir. 2003); *Charles Constr. Co. v. Derderian* 586 N.e. 2d 992 (Mass. 1992); *Pacific Reins Mgt. Corp. v. Ohio Reins Cor.*, 935 F. 2d 1019, 1022-1023 (9th Cir. 1991); *Island Creek Coal Sales Co. v. City of Gainesville* 729, f. 2d 1046, 1049 (6th Cir. 1984); *Konkar Maritime Enter, SA v. Compagnie Belge d'Affretement*, 668 F. Supp. 267 (S.D.N.Y. 1987); *Certain Underwriter at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 837 (N.D. Cal. 2003). Most U.S. commentators also conclude that arbitral tribunals presumptively have the power to order provisional relief (unless otherwise agreed) (see M. F. Hoellering, *The Practices and Experience of the American Arbitration Association*, in *ICC Conservatory and Provisional Measures in International Arbitration* 31, 1993; C. C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 *Tulane L. Rev.* 1991, 1535-36).

⁹⁶ See RUAA, par. 8, comment 4, 2000.

⁹⁷ See Art. 26 UNCITRAL Rules; Arts. 21.1 and 27.7 AAA Rules; Art. 20.1 DIS Rules; Art. 28 ICC Rules, which allows the tribunal to grant any interim or conservatory measures it deems appropriate, absent contrary agreement by the parties; Art. 25 LCIA Rules. In contrast, the CIETAC Rules provide that where any party applies for the preservation of property or evidence, CIETAC shall forward the party's application to the competent court at the place where the property/ evidence is located for a ruling (see Arts. 26 and 28).

⁹⁸ See *Rockwell Int'l System Inc. v. Islamic Republic of Iran*, award, N. Itm. 20-430-1 (6 June 1983), 2 Iran U.S. C.T.R. 369, 371, 1983.

⁹⁹ Where the parties did not empower the tribunal to grant interim measures expressly in their agreement or in the terms of reference, certain ICC arbitral tribunals have retained jurisdiction on the basis of an *implied power* deriving from Article 8(5) of the 1988 Rules (see first interim award (1988) in case 5835 in 8, 1 *ICC Arb. Bull.* (1997) 67), sometimes in conjunction with Article 11 or 24 of the Rules (see second interim award (1996) in

The power of arbitrators in this area is subject to some limitations, possibly deriving from: a) the particular nature of the individual measure to be adopted; b) the need to respect the principle of equal treatment of the parties, which underlies arbitration; and c) the possible conflicts between the different legal sources which converge to regulate the power of the tribunal to issue interim measures. These may include, the agreement of the parties, any arbitration rules referred to in the agreement, the applicable arbitration law and the general principles and praxis of international arbitration.

As to the issue under a), a possible example is the order for security for costs (also referred to as *caution pour les frais* or *cautio judicatum solvi*).¹⁰⁰ It is not settled yet whether it can be granted by arbitrators or by the courts only and, in any event, to which regime it is subject. Security for costs is a measure whereby a responding party seeks to compel the party bringing the complaint to put up money to cover any eventual award of legal fees assessed against the claimant by the arbitral tribunal. This measure can take various forms, among them the payment of an escrow account, bonds, bank guarantees, liens on property and so on.¹⁰¹ There might be a broad range of possible arrangements in respect of the allocation of power between national courts and arbitrators, including the complete lack of regulation by the applicable law and arbitral rules, exclusive jurisdiction to order security on the part of either the state court or

case 7544 and interim award (1993) in case 6632). See also award in ICC case N. 7589, 11, 1 *ICC Ct. Bull.* 60, 61 2000.

¹⁰⁰ Most authorities take as given that security for costs is a form of interim or conservatory relief. See Lord Mustill's opinion in *SA Coppée Lavalin Nv v. Ken – Ren Chemicals and Fertilizers* [1994] 2 Lloyd's Rep. 109 at 116 (HL). Security for costs orders differ from other interim measures in that the former can be implemented directly, without State assistance in enforcement, since the standard enforcement tool is the stay of arbitral proceedings, rather than the seizure of assets or compulsion to take some action. On security for costs in international arbitration see N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, *Am. Rev. of Int'l Arb.*, 2000, Vol. 11, 312, 313; B. Berger, *Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, *ASA Bulletin* 1/2010, 7 ff.; W. Gu, *Security for Costs in International Commercial Arbitration*, *J. of Int'l Arb.*, 22 (3), 167-206, 2005, 167 ff.; M. O'Reilly, *Costs in Arbitration Proceedings: a Handbook* 79-96, 1995. For an informative survey of national arbitration statutes governing security for costs in international arbitration, see O. Sandrock, *The Cautio Judicatum Solvi in Arbitration Proceedings*, 14 *J. Int'l Arb.* 17 (1997). The ICC held a Colloquium in 2000 addressing the issues concerning costs of arbitration entitled '*Costs of arbitration – payments, role of arbitrators, security for costs allocation of costs: in house costs?*' available at <http://www.iccwbo.org/home/businessLaw/conference_reports/costs.asp>.

¹⁰¹ P. Bowsher, *Security for Costs*, *cit.*, at 40.

the arbitral tribunal, or shared authority to do so.¹⁰² The general trend is to discourage orders for security for costs in modern international commercial arbitration. Indeed, against this measure stand several arguments, among which: the fact that, in many civil law jurisdictions, it is perceived as a common law peculiarity,¹⁰³ which is potentially in conflict with each party's right to be heard; when the courts are involved, there is always a risk that the speed, efficiency and confidentiality of the arbitration procedure might be affected. If on the contrary, arbitrators are granted (and make use of their) exclusive power to issue security for costs, they run the risk of being perceived as prejudging the merits of the case and are thus not impartial (by imposing on one party to the dispute financial commitments that it might not meet).

As to the issue referred to above under b) (the need to comply with the principle of equal treatment of the parties), a possible limitation to the power of the tribunal to issue interim measures is related to the so called *ex parte* interim measures. The power of the arbitrators to issue *ex parte* interim measures is rather unknown within most arbitration laws and rules (with some limited exceptions: see the TAS Rules (Art. R3783) and the WIPO Emergency Relief Rules). Some institutional rules go further and

¹⁰² In England, until 1994, English courts had *exclusive and fully discretionary power* to order security for costs in arbitral proceedings when the parties had not expressly agreed beforehand on such interim measures (para. 12 (6), 1950 Arbitration Act). See SA *Coppée Lavalin NV v. Ken – Ren Chemicals and Fertilizers* [1994] 2 W.L.R. 631; D. Sarre, *Caution Pour Les Frais et Honoraries d'un Arbitrage de la CCI en Angleterre: Les Affaires Ken – Ren, L'arbitrage Commercial International en Europe: Supplement Special du Bulletin de la Cour International d'Arbitrage de la CCI* 60 1994. Under the 1996 English Arbitration Act that power was expressly removed from the courts. It now lies exclusively in the hands of the arbitral tribunal (see Section 38(3)). In the U.S.A. the situation is much less clear (see R. Hulbert, *The American Law Perspective in Conservatory and Provisional Measures, Int'l Arb.* 1993, 92; D. Rivkin-D. F. Donovan-F. Kelner, *United States, in Peaceful Solutions: Int'l Guide to Commercial Arbitration*, 1993, 41, 45). As to Switzerland, of all the European jurisdictions it presents perhaps the highest level of hostility towards security for costs. Many Swiss commentators and judges (following the renowned scholar's Ernst Rixler's opinion in 1947, condemning *cautio judicatum solvi*) agree that, *absent explicit agreement*, a respondent should never be allowed to demand security from his opponent in arbitral process, regardless of whether such an order would originate from the tribunal or a Swiss court. Other Swiss commentators have objected to security as a violation of the neutrality principle, as such orders favour the respondent over the claimant. In Austria, Greece, Italy and some Scandinavian countries, arbitrating parties may be required to turn to the courts for security orders. This seems to be the norm also in developing countries.

¹⁰³ In fact, while orders for security for costs are part of everyday life in common law litigation and arbitration, they are still rather resisted in civil law countries, where they are perceived to interfere with the right of the aggrieved party to be heard.

expressly forbid *ex parte* provisional relief.¹⁰⁴ The UNCITRAL Model Law is the most notable exception in this respect: after a long debate it has been finally modified to include this mechanism (on an opt-out basis).¹⁰⁵

Considerable doubts and scepticisms surround *ex parte* measures issued by arbitrators. They essentially relate to the enforcement of such measures (in case a party does not spontaneously comply with them), which may take the form of an *ex parte* enforcement of an *ex parte* measure - in which case there might be a duplication of procedures both bypassing the adversarial principle, with possible delays and inefficiencies compared with the alternative of direct recourse to the competent state court. The measure may consist of an *inter partes* enforcement of an *ex parte* measure - in which case one of the key advantages of *ex parte* measures (*i.e.* no advance notice) might vanish. In addition, *ex parte* measures might be difficult to enforce in a number of legal systems, as they might appear in violation of public policy or local constitutional rules. There might also be confidentiality issues, especially in respect of the position of the co-arbitrators. If the measure is granted, the arbitrator appointed by the party requesting the measure risks being perceived as siding with that party. In turn, the arbitrator appointed by the other side may lose the trust of that party, if one of the first things he does is to be seen to have heard the other party behinds his party's back. Finally, there might be an issue of liability for the arbitrators, especially in cases where the effects of the *ex parte* measures turn out to be irreversible.¹⁰⁶ However, probably the most relevant objection is that an *ex parte* measure issued by arbitrators will rarely be a practical expedient or accomplish any effective purpose.¹⁰⁷ As it emerges from the arbitration praxis, in the vast majority of cases the role and position of arbitrators (as the final judges on the merits) will suffice to foster compliance with their orders.¹⁰⁸

In light of the foregoing, the view of some commentators that, at least at present, *ex parte* measures are beyond the power of arbitral tribunals

¹⁰⁴ See ICSID arbitration rules (Rule 39.4).

¹⁰⁵ See Arts. 17 B and 17 C of 2006 version of the UNCITRAL Model Law.

¹⁰⁶ In general, on the debate concerning the admissibility and opportunity of *ex parte* interim measures issued by arbitrators, see H. van Houtte, *Ten Reasons Against: Proposal for ex parte Interim Measures of Protection in Arbitration*, 2004, 20 *Arb. Int'l*; J. Fry, *Interim Measures of Protection: Recent Developments and the Way Ahead*, 2003 *Int. Arb. L. Rev.* 153 at 155.

¹⁰⁷ See G. Born, *International Commercial Arbitration*, *cit.*, 2017.

¹⁰⁸ E. A. Schwartz, *The practices and experience of the ICC Court*, in *Conservatory and Provisional Measures in International Arbitration*, ICC Publication N. 519 (1993): '*Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims*'.

is likely to be favoured.¹⁰⁹ In any event, it is our view that the inclusion of such measures in arbitration laws appears advisable only for jurisdictions which are already quite familiar with international arbitration law and practice, and provided parties are given certain flexibility as to their operativeness (*i.e.* by means of opt-out/opt-in mechanisms). Provisions regarding *ex parte* interim measures, in fact, introduce a level of complexity which is not easy to handle, making extremely problematic their acceptability in jurisdictions with little or no tradition of international arbitration.

As to the third type of limits to the power of an arbitral tribunal to issue interim measures (referred to above under (c)), the conflicts between the legal sources which converge to regulate that power (and relating, for example, to the requirements for issuing an interim relief, the power of the arbitrator to modify it) can arise not only between sources of different categories (*i.e.* the agreement of the parties, the arbitration rules, the arbitration laws, the international conventions, the praxis and usages *etc.*), but also between sources of the same category belonging to different jurisdictions, every time the granting and enforcement of a specific interim measure involves more than one legal system. The need to have regard to the provisions of the *lex arbitri* and those of the law of the place where the enforcement is sought cannot be overlooked.

In order to determine whether it has jurisdiction to grant interim measures, a tribunal usually examines the parties' agreement (which rarely contains express provisions on interim measures), any arbitration rules referred to in the agreement and the governing arbitration law,¹¹⁰ which usually is the law of the place of arbitration. As a matter of principle, it is likely that a tribunal will not issue any measure, unless it is satisfied that the law applicable to the arbitral proceedings¹¹¹ allows it to do so¹¹² (in order to

¹⁰⁹ See Z. Stalev, *Interim Measures of Protection in the Context of Arbitration*, in A. J. van den Berg (ed.), *International Arbitration in a Changing World* 111 (ICCA Congress Series N. 6, 1994); D. Caron, L. Caplan, M. Pellonpaa, *The UNCITRAL Arbitration Rules. A Commentary*, New York, 2006, 543.

¹¹⁰ See, *e.g.*, first interim award (1988) in case 5835, in 8,1 *ICC Ct. Bull.* (1997) 67, and award (1980) in case 3540, in 108 *J.D.I.* (1981) 914; 7 *Y.B. Comm. Arb.* (1982) 124, at 129130; S. Jarvin & Y. Derains, *Collection of Arbitral Awards 1974-1985* (1990) 105 and 399; interim award (1997) in case 9301; interim award (1998) in case 8879.

¹¹¹ See the interim award (1996) in case 8786 and final award (1997) in case 8879.

¹¹² See G. Petrochilos, *Procedural Law in International Arbitration*, 2004, 209, according to whom: '(...) arbitrators invariably rule that if the law of the seat prohibit them to order interim protection (...) they have no such jurisdiction'. See also final award in ICC case N. 7895, 11, 1 *ICC Ct. Bull.* 64 (2000); partial award in ICC case N. 8113, 11, 1 *ICC Ct. Bull.* 65 (2000); interim award in ICC case N. 8879, 11 1 *ICC Ct. Bull.*, 84 (2000).

prevent the future award from being set aside).¹¹³ However a practice has emerged internationally, according to which arbitrators often and increasingly determine the issue of whether or not to grant interim reliefs without reference to any national law.¹¹⁴ Some courts and commentators have even stated that the agreement of the parties (whether or not expressed by reference to a liberal set of arbitral rules), which contemplates the power of arbitrators to grant interim measures, will in any event prevail over the possibly more restrictive law of the seat, which, to the extent it denies effect to that agreement, should be considered in breach of the New York Convention's requirement that contracting States recognise international arbitration agreements.¹¹⁵ This assertion is probably too radical a conclusion, characterised by an excessive emphasis on the principle of party autonomy as a foundation (*rectius* dogma) of the arbitral process, which may cause some practical problems (among them the almost certain setting aside of the future arbitration award by a judge of the seat). The point is unquestionably a dilemma for the arbitrators. The compliance, by all means and in any event, with the will and/or agreement of the parties (*i.e.* whether or not it is in conflict with the *lex fori*), will almost certainly lead to the setting aside of the award for breach of mandatory provisions (and possibly public policy) of the law of the seat. However, disregarding any agreement of the parties might lead to the subsequent refusal of the recognition and enforcement of the award on the basis of Art. V (1) (d) New York Convention ('*the arbitral procedure was not in accordance with the agreement of the parties*'). Finally, the question whether the parties have the power to contract out of the law of the arbitral seat, with regard to the denial of arbitrators' power to award provisional relief, has generally received a negative answer.¹¹⁶

¹¹³ See the interim award (1996) in case 8786 and final award (1997) in case 8879.

¹¹⁴ See partial award (1995) in case 8113. In several awards the arbitrators have resorted *directly* to the facts to decide whether or not to grant the relief sought. There has been little discussion as to whether they have authority to grant the measures other than by reference to the ICC Rules. See the final award (1994) in case 7589 and the final award (1994) in case 7210.

¹¹⁵ See *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 59-63 (1995), according to which the choice of law clause was deemed to encompass the substantive principles that the New York courts would apply, but not to include arbitration law, with the consequence that procedural provisions which would affect and limit arbitration were deemed not to apply; *Preston v. Ferrer* 128 St. Ct. 978, 988-989, U.S. S. Ct. 2008. See also G. Born, *International Commercial Arbitration*, *cit.*, 1952 and E. A. Schwartz, *The practices and experience of the ICC Court*, *cit.*, 44 ff., reporting a case in which the tribunal concluded that it was entitled to order interim measures, notwithstanding the contrary provisions of the Swiss Cantonal Concordat.

¹¹⁶ See C. Huntley, *The Scope of Article 17: Interim Measures under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 72 (2005); *Dermajaya Properties Sdn. Bhd. v. Premium*

An agreement to arbitrate in accordance with institutional rules which do not expressly vest in the arbitral tribunal the power to order provisional relief, should not be treated as an exclusion of such power, nor should that conclusion be inferred from an agreement to arbitrate which omits to include, among a list of powers, the power of the arbitrators to issue interim measures. Similarly, the parties' agreement to arbitrate in a jurisdiction that does not expressly grant the arbitral tribunal the power to order provisional measures (like France or the U.S.A.), or an agreement according to which a particular national court will have the power to order provisional relief, does not necessarily imply an intention of the parties to withhold such power from the arbitrators.

The parties are free to withhold or limit the arbitrators' power to grant provisional relief provided in the arbitration rules or law, even to the point of channelling all requests for provisional measures to the courts.¹¹⁷ As to the concurrent power of state courts to issue interim measures,¹¹⁸ it raises a number of issues: should the power of the courts or the arbitrators be subject to the agreement of the parties, and, in that case, on the basis of which mechanism (opt in/opt out)? What is the scope of the respective authority? Are the courts and the arbitrators entitled to issue the same types of measures or does the power of one of the two bodies have a broader scope? Is a body entitled to review, modify or revoke the measure issued by the other body?

To begin with, no obstacle to the concurrent power of state courts can be derived from the New York Convention, and in particular from its Art. II¹¹⁹ (notwithstanding the well known, and subsequently abandoned,

Properties Sdn. Bhd. [2002] 2 Sing. L. R. 164 (Singapore High Court) ('parties may not agree to institutional arbitration rules that alter a tribunal's power to award interim measures under Singapore's version of the UNCITRAL Model Law').

¹¹⁷ Leading arbitration laws (such as Art. 17 UNCITRAL Model Law; Art. 183 (1) Swiss PILA; Art. 38 (1) English Arbitration Act 1996) and most arbitration rules (ICC and LCIA among them) give effect to agreements withholding the power to grant provisional measures from the arbitral tribunal.

¹¹⁸ On the issue of court ordered provisional measures, see C. N. Brower and A. M. Tupman, *Court Ordered Provisional Measures under the New York Convention*, 1986, 80 *Am. J. Int'l L.* 24; S. Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to be Introduced by a Revision of the Convention?* 6,1, *J. Int'l Arb.*, 1989, 171; A. Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide about to Turn?*, 1992, 30 *Tex Int'l L. J.*, 72; L. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 *Int'l Tax*, 1986 6 Bus La. 368. See also the Note by the UNCITRAL Secretariat (30 January 2002 A/CN.9/WG.II/WP.119) on *Interim Measures Issued by Courts and Arbitral Tribunals*.

¹¹⁹ This is the prevailing view. See A. J. van den Berg, *The New York Arbitration Convention of 1958*, 139-140 (1981); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard*

contrary view within the American case law),¹²⁰ nor from any other international conventions in the field of international arbitration (some of which, on the contrary, expressly provide for that compatibility¹²¹). This conclusion is based not only on the fact that none of these conventions deal with interim measures (but mostly with topics such as the recognition and enforcement of arbitral agreements and awards) but, most of all, on the fact that a proper use of that power by state courts, far from disrupting the autonomy of arbitration,¹²² fosters its efficiency. There are in fact a series of instances when a tribunal cannot operate: before it is constituted; when the measure is addressed to third persons who have not signed the arbitration agreement; when it is necessary to proceed *ex parte*, but the law of the seat forbids arbitrators to issue such measures; and because of the particular measure requested, which for some reason does not fall within the arbitrators' powers.

In all these cases, the only option available for the parties is to refer to the competent state courts.¹²³

Goldman on International Commercial Arbitration, (Kluwer Law International 1999, 1307; Judgment of 12 May 1977, *Scherk Enter. AG v. Soci t  des Grandes Marques*, IV Y.B. Comm. Arb. 286; *The Rena K.* [1979] QB 377; see also Lord Mustill's statements in *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334 at 354 (HL)).

¹²⁰ A view dating back to the leading cases *McCreary Tire & Rubber Co. v. Ceat S.p.A.* (501 F. 2d 1032 (3d cir 1974)) and, partially, to *Cooper v. Ateliers de la Motobecane S.A.* (442 N.E. 2d 1239 (N.Y. 1982)), and confirmed by subsequent decisions, such as *McDonnell Douglas Corp. v. Kingdom of Denmark* 607 F Supp. 1016 (E.D. Mo. 1985), *Shah v. Eastern Silk Indus Ltd* 493 N.Y. S. 2d 150 (N.Y. App. Div. 1985), *Drexel Burnham Lambert Inc. v. Ruebsamen*, 531 N.Y.S. 2d 547 (N.Y. App. Div. 1988). See, in general, C. N. Brower & A. M. Tupman, *Court Ordered Provisional Measures*, *cit.*, 27; D. A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Pre-emption Concerns* 22 N. C. J. Int'l L. & Comm. Reg. 705 at 768 (1997); L. F. Ebb, *Flight of Assets from the Jurisdiction 'in the Twinkling of a Telex': Pre- and Post-Award Conservatory Relief in International Commercial Arbitration* 7, 1 J. Int'l Arb. 9 (1990); J. D. Becker, *Attachments in Aid of International Arbitration – the American Position*, 1 Arb. Int'l 40 (1985).

¹²¹ The 1961 European Convention, for example, at Art. VI (4), provides that an application for interim measures submitted to the court is not incompatible with the existence of an arbitration agreement. See D. Hascher, *European Convention on International Commercial Arbitration of 1961 – Commentary* XX Y.B. Comm. Arb. (1995).

¹²² As could appear *prima facie* on the basis of a superficial reading of Art. 5 of the UNCITRAL Model law, a cornerstone provision as far as the relationships between state courts and arbitrators are concerned.

¹²³ It is to be noted, however, that some arbitral rules (ACICA Rules, AAA Rules, SIAC Rules, SCC Rules, the new ICC Rules) provide for the mechanism of the *emergency arbitrator*, i.e. a temporary solution for the parties that require immediate relief, prior to the formation of the arbitral tribunal. Usually the order of the emergency arbitrator, even

The regime of the concurrent power of state courts to issue interim measures varies from jurisdiction to jurisdiction. There is a ‘free-choice’ model, in which the parties have a free choice to apply to either courts or tribunals, which, in principle, have the same powers to grant the same types of measures. There is also a ‘court-subsiary’ model, in which the power of courts is subsidiary to that of the tribunal and can be exercised only in support of the arbitrators’ power (in case of urgency, or when the tribunal is not yet constituted, or when it is for some reason unable to perform its task, or when the measures are addressed to third parties).¹²⁴ The first model has been adopted, for example, by the UNCITRAL Model Law,¹²⁵ Germany,¹²⁶ Switzerland,¹²⁷ Singapore.¹²⁸ The second model has been adopted by England,¹²⁹ Hong Kong,¹³⁰ the USA¹³¹ (and, within the latter, Ohio¹³²) and, to a certain extent, France.¹³³

if binding on the parties, is not binding on the arbitral tribunal which can modify or annul the order.

¹²⁴ On this topic see D. F. Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, in A. J. van den Berg, *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series N. 12, Deventer, 2005, 206. See Jarvin, *Is Exclusion of Concurrent Courts’ Jurisdiction over Conservatory Measures to be Introduced by a Revision of the Convention?* 6, 1 *J. Int’l Arb.*, 1989, 171; P. Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II *Y.B. Comm. Arb.*, 1977, 172 at 197; D. Caron, *Interim Measures of Protection: Theory and Practice in light of the Iran - U.S. Claims Tribunal*, 46 *Zeit. fuer Ausl. Oeffentl. Recht und Voelk.*, 1986, 465.

¹²⁵ See Art. 17 J of the UNCITRAL Model Law (as amended in 2006).

¹²⁶ See Art. 1033 and 1041 (1) German ZPO. Although some authors argue that parties can opt-out of the court power, most contend that courts must always be able to order interim measures, in order to meet the German constitutional law requirement that the State guarantees the availability of effective legal protection to its citizens. German law does not create a clear priority between the two bodies.

¹²⁷ See Art. 183, 1 Swiss PILA.

¹²⁸ See Section 12 (6), Singapore Act. See M. Hwang S.C. and R. C. Muttah, *The Role of Courts in the Course of Arbitral Proceedings*, *cit.*, 234.

¹²⁹ See Art. 44 (2) English Arbitration Act 1996. The Act clearly provides that the power of the courts to order interim measures will be subsidiary to that of an arbitral tribunal. The purpose behind this model is to ‘(...) leave the control of the arbitral process in the hands of the tribunal so far as possible’ (B. Harris, *et al.*, *The Arbitration Act 1996: A Commentary*, 2nd ed., Oxford, 2006, 218). See D. Brawn, *The Court’s Power to Intervene in Arbitration Matters in England and Wales, with Particular Reference to the Court’s Inherent and Residual Discretion*, *Arbitration*, 2010, Vol. 76, N. 2, 221.

¹³⁰ One of the most important features of the new Hong Kong Arbitration Ordinance is the minimal court intervention in the area of interim measures, vesting as much power as possible with arbitral tribunals. Section 45 of the Ordinance empowers the Hong Kong courts to grant certain interim measures in support of arbitral proceedings – whether seated in Hong Kong or not – albeit that the courts may decline to grant such relief, if it is considered more appropriate for the interim measure sought to be granted by the arbitral

A number of reasons suggests that this second model is to be preferred. By entering into an arbitration agreement, the parties have agreed that their disputes will be resolved in arbitration, with the exclusion, in principle, of any role of state courts. Every involvement of the latter would then appear as a potential violation of the intention expressed by the parties, especially when (and to the extent that) such involvement overlaps the powers and competencies of the arbitrators, *de facto* replacing their function. Moreover, every time a court decides on an application for interim measures, it inevitably intervenes, to a greater or lesser extent, into the merits of the dispute, in order correctly to assess (albeit on a provisional basis) the facts and the law of the case: an analysis that, by virtue of the stipulation of the arbitration agreement, the parties intended to reserve to the arbitrators and which cannot but affect (or at least influence) the subsequent decision which the arbitrators have to take on the merits. In other words, the requested relief of interim measures might become an attempt to obtain, by the back door, judicial resolution of the merits of the parties' underlying dispute. In certain jurisdictions, the power of the courts to issue interim measures may be subject to certain constraints, even though expressly provided for by the law (or otherwise impliedly recognised),

tribunal. Furthermore, the Hong Kong courts may only grant interim measures in support of proceedings seated outside of Hong Kong, if: a) the arbitral proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong; and b) the interim measure sought belongs to a type or description of interim measure which may be granted in Hong Kong.

¹³¹ National courts have emphasised that, where an arbitral tribunal has been constituted and is in a position to grant provisional measures, judicial relief should be granted sparingly (*Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd.* [1998] 4 H.K. Court of First Instance, High Court 347). See also *Merrill Lynch v. Salvano* 999, F. 2d , 211 (7th Cir. 1993) (issuing provisional measures '(...) only until the arbitration panel is able to address whether the relief should remain in effect. Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo'). See also the *Revised Uniform Arbitration Act*, Art. 8(b) (2000).

¹³² The State of Ohio, for example, adopts Article 17 of the Model Law (S. 2712.36 of the Ohio Code, *International Commercial Arbitration*), adding that while a party may also request interim measures directly from the court, the court should not grant this request, unless: '(...) the party shows that an application to the arbitral tribunal for the measure of protection would prejudice the party's rights and that an interim measure of protection from the court is necessary to protect those rights' (Art. 2712.36 Ohio Rev. Code Ann.).

¹³³ The situation is less clear in other jurisdictions (e.g. Argentina, Brazil, Chile). See D. F. Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals*, cit., 221 ff.

In England, for example, a court, as shown in the *Channel Tunnel* case,¹³⁴ may be reluctant to make a decision on an application for interim measures that would risk prejudicing the outcome of the arbitration.¹³⁵ In France, the pro-arbitration courts are reluctant in taking measures (such as *constat*, *expertise*, *référé provision*) which, by their nature, tend heavily to interfere with the arbitral process and the determination on the merits of the dispute. Those measures can be issued only when there is a situation of urgency and the tribunal has yet to be constituted.¹³⁶ The ECJ, in the *Van Uden* case,¹³⁷ has ruled out the application of the interim measure available in the Netherlands (*'kort geding'*), issued in that particular case by a state judge in respect of a dispute referred to arbitrators: in particular the ECJ held that, since that measure directly affected the merits of the dispute other than in a merely provisional manner, the state judge was not entitled to grant it and should have rejected the party's application. Even in countries like Italy, in which courts always had, and still have, an exclusive power to issue interim measures, their jurisdiction was denied in several instances, on the basis of the alleged *not-entirely provisional* nature of the measure

¹³⁴ See *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334 at 367-8, where it was stated: '(...) there is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits, in order to decide whether the plaintiff's claim is strong enough to merit protection and, on the other, the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail ... if the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.'

¹³⁵ See also *Elais Nordik Inc. v. S. Marine Sers Ltd* 24 F.t.r., 256 (Fed. Ct. of Canada 1988); ICC interim award in ICC case 10973 XXX Y.B. *Comm. Arb.* 83 (2005); *Oberlandesgericht Hamm* 29 November 1991, 1992 NJW – RR 640; *Worldsource Coil Coating Inc. v. Mcgraw Const. Co. Inc.* 846 F. 2d 473 (6th Cir. 1991); *Shainin II, LLC v. Allen* 2006 WL 2473495 /W.D. Wash. 2006. Partial award in ICC case 5896, 11,1 *ICC Ct. Bull.* 37 (2000); *China Nat'l Metal Prods Imp. / Exp. Co. v. Apex Digita Inc.*, 155 F Supp. 2d 1174, 1179 (C.D. Cal. 2001) ('complaint ... seeks to bypass the agreed upon method of settling disputes, which is prohibited by the convention if one party to the agreement objects').

¹³⁶ See *Cour de Cass.* 14.03.1984, *République Islamique d'Iran v. Commissariat de l'Energie Atomique*, *Rev. Arb.*, 1985; *Cour de Cass.* 20.03.1984 A.S.C. *Cairo v. Iptrade International*, *Rev. Arb.* 1989, nt. Couchez; *Cour de Cass.* 6.03.1990 *Société Horeva v. C. S.*, *Rev. Arb.* 1990, 633, nt. H. Gaudemet Tallon; *Cour de Cass.* 9.07.1979 *La Lagune c. S.a.r.l. Sercif*, *Rev. Arb.*, 1980.

¹³⁷ *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another* [Case C-391/95].

concerned, which had the potential to affect the decision on the merits of the dispute.¹³⁸

In addition, local courts are often ill-prepared to consider at an interim stage the foreign law governing the merits of the dispute, and might have problems in dealing with the language of the dispute and the contract.¹³⁹ Moreover, if the chosen court is located at the place of enforcement of the measures, that might give rise to a less objective analysis of the request, if the measures sought are either against a State entity or a local entity in that jurisdiction in favour of a foreign corporation.¹⁴⁰

In conclusion, a legal system which intends to give effect to the parties' intention to the fullest extent in this area should seek to minimise the role of the courts. A way to achieve that goal might be: a) to allow the courts to grant interim measures only when the tribunal cannot, for any possible reason, act (or act effectively); b) to recognise the freedom of the parties to agree on granting, extending or waiving the interim power of the courts; c) to allow tribunals to modify, adapt or revoke measures issued (before its constitution or in cases of particular urgency) by the courts. Most jurisdictions authorise court ordered provisional measures in aid of arbitration, provided that the parties have not agreed otherwise.¹⁴¹ National courts will virtually always apply their own law to the availability and form of court ordered provisional measures. In particular, the relief requested in

¹³⁸ As was the case for the so called '*provvedimenti di istruzione preventiva*'. See Cass. 85/5049; Cass. 92/9380; Cass. 09/22236. However, see the decision of the Constitutional Court 10/26, which has restated the interim nature inherent in '*istruzione preventiva*'.

¹³⁹ N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, cit., 450.

¹⁴⁰ N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, cit., *ibid.*

¹⁴¹ For the most part, this caveat is not reflected in express statutory language, but is the result of judicial decisions giving effect to principles of party autonomy. If parties wish to exclude recourse to national courts for provisional measures, they are generally permitted to do so: French *Cour de Cassation* Civ. 1e), 18 November 1986, *Société Atlantic Triton v. République Populaire Revolutionnaire de Guinée et Société Soguipeche*, *Rev. Arb.*, 1987, 315; English Court of Appeal, *Mantovani v. Capparelli Spa* [1980] 1 Lloyd's Rep. 375; W. P. Mills, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 *Int'l L. J.*, 1989-1990, 604; Fouchard Gaillard *Goldman on International Commercial Arbitration*, cit., 1319. There may be circumstances in which a party's agreement not to seek court ordered provisional measures will be unenforceable. Some decisions (*Anaconda v. American Sugar Refining Co.* 322 U.S. 42 U.S. S. Ct. 1944) and commentators (T. Hausmaninger, *The ICC Rules for a Pre-Arbitral Referee Procedure: a Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration* 7, *ICSID Rev. for Inv. L. J.* 82 (1992)) have concluded that agreements not to seek court ordered provisional measures will not be given effect when no relief is available via the arbitral process.

aid of arbitration must be a category of relief recognised and available under the law of the judicial forum.¹⁴²

A question may arise as to whether an agreement to exclude the concurrent jurisdiction of the courts extends to judicial actions to enforce tribunal ordered provisional measures. The better view is that, save where express and precise language is used which excludes judicial enforcement of provisional measures, parties should not be held to have agreed to such a result, which would render tribunal ordered provisional measures unenforceable and thus the whole process ineffective.

Whether or not the parties have agreed upon a contractual forum for court ordered provisional measures, national law will be decisive in determining what forum(s) will or will not issue such relief. There is relatively little uniformity among different legislative regimes in this field. In most States, courts are entitled to issue interim measures only in support of arbitration which take place within their national territory. However, since this might turn out to be inefficient in respect of certain disputes, parties and assets,¹⁴³ in many jurisdictions, even in the absence of an explicit legislative provision, national courts have concluded that they have the power to order provisional relief in connection with a foreign arbitration: that is the case of the U.S.A.,¹⁴⁴ England,¹⁴⁵ Hong Kong¹⁴⁶ and Singapore.¹⁴⁷ In the latter case, there are strong reasons for suggesting that

¹⁴² The foregoing conclusion is made explicit in Art. 183, 2 of the Swiss PILA, which provides that '(...) *the court shall apply its own law to requests for court ordered provisional measure*'. See also *Commerce and Indus. Ins. Co. of Canada v. Certain Underwriters at Lloyd's of London* [2002] 1 WLR 1323 (QB); *French Cour de Cassation civ. 1e*, 28.06.1989, *Eurodif v. Islamic Republic of Iran*, *Rev. Arb.*, 1989, 653; *Paris Cour d'Appel*, 27.10.1995, *Rev. Arb.*, 1996, 274; K. P. Berger, F. Kellerhals, *Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz*, Ber, 2006, 1163, 1175.

¹⁴³ That is because security measures often have only territorial effect; even when they purport to apply extra territorially, enforcement may be impossible or difficult.

¹⁴⁴ For a recent decision granting pre-award attachment in aid of a foreign international arbitration see *Sojitz Corp. v. Prithvi Information Solutions Ltd.*, 2011 N.Y. Slip Op., 1741, 2011 N.Y. App. Div. Lexis 1709. See also, for further references, G. Born, *International Commercial Arbitration*, *cit.*, 2059, nt. 549.

¹⁴⁵ See G. Born, *International Commercial Arbitration*, *cit.*, 2059, nt. 550.

¹⁴⁶ In the past Hong Kong courts have affirmed their inherent authority to issue provisional measures in aid of foreign arbitrations. However, they have demonstrated a tendency to refuse to grant interim measures, if the applicant party had not first obtained the approval of the arbitral tribunal, unless the court as satisfied that the justice of the case required the grant of such relief. See G. Born, *International Commercial Arbitration*, *cit.*, 2059, nt. 552. Now Section 45 of the new Hong Kong Arbitration Ordinance expressly codifies that authority.

¹⁴⁷ The changes introduced by the "Amendment" (January 2010) codify the principle according to which the court can issue interim measure in support of a foreign arbitration proceedings; in particular, the court can exercise these new powers only when the arbitral

such authority be exercised with caution, in order to avoid a double interference with the arbitral proceedings and with the (greater or lesser) supervisory jurisdiction of the courts in the arbitral seat.¹⁴⁸

Turning now to the issue of enforcement of interim measures, despite a strong historical tendency towards voluntary compliance with arbitral awards and orders, there are still many cases in which tribunal ordered provisional measures are not complied with.¹⁴⁹ Nearly all national arbitration legislations acknowledge the fact that enforcement of interim measures is a matter for courts alone, since arbitrators do not dispose of the direct coercive power to enforce the interim measures issued.¹⁵⁰ However, there are certain sanctions which arbitrators might impose on a recalcitrant party, failing which the only solution is to seek the intervention of the state judge.¹⁵¹

First of all: '(...) *the arbitrators' greatest source of coercive power lies in their position as arbiters of the merits of the dispute between the parties.*'¹⁵² Second, arbitrators might order a party that damages incurred

tribunal or arbitral institution has no power to act or is unable to act for the time being *effectively*: ultimately, the court will need to exercise its discretion in deciding whether a court order is appropriate. The scope of the court's power does not extend to procedural or evidentiary matters dealing with the conduct of the arbitration: therefore, interim injunctions to preserve assets are within the courts' purview, but matters relating to discovery, interrogatories or security of costs are not. *See also* C. T. Tan, T. Cooke, K. Kek, *The Baker & McKenzie Int'l Arb. Yearbook*, Singapore, 2009, 74.

¹⁴⁸ An example of a national court's caution in this regard was the decision of the House of Lords in the case *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd and Others* [1993] 2 WLR 262; [1993] 1 All ER 664, in which it stated: '(...) *the Belgian court must surely be the natural court for the source of interim relief. (...) Apparently no application for interim relief has been made to the court in Bruxelles; (...) to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration*' [1993] AC at 368). A similar caution is reflected in *Borden Inc. v. Meiji Milk Products Co.* (919 F. 2s 822, 2d Cir. 1990).

¹⁴⁹ *See* G. Born, *International Commercial Arbitration, cit.*, 2019.

¹⁵⁰ On the topic of enforcement see T. Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief – How Final is Provisional?*, *J. Int'l Arb.*, 2001, 512; S. Besson, *Arbitrage International et Mesures Provisoires*, Zurich, 1998, 315; P. Karrer, *Arbitral Interim Measures Issued by Tribunals and the Courts: Less Theory, Please!*, in A. J. van den Berg, *Int'l Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series N. 10, Deventer, 2001, 103.

¹⁵¹ *See* A. Carlevaris, *The Enforcement of Interim Measures Ordered by International Arbitrators: Different Legislative Approaches and Recent Developments in the Amendment of the UNCITRAL Model Law, Interim Measures in Int'l. Comm. Arb.*, AIA, 2005, 15 ff.

¹⁵² E. A. Schwartz, *The practices and experience of the ICC Court, cit.*, 'Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary

by another, be compensated by the former with the terms of its order as a consequence of its non-compliance. This sanction is connected to the contractual nature of the interim measures (which, in itself, derives from the contractual power conferred by the parties to the arbitrators through the arbitration agreement). However, in many circumstances, such a sanction would amount to an unsatisfactory *post-facto* indemnification for an irreversible harm already suffered by a party. Third, arbitrators can draw adverse inferences on the merits of the dispute against the non-compliant party.¹⁵³ However, it is controversial whether, and to what extent, a conduct which breaches a procedural order can (albeit partially) affect the final determination of the substance of the dispute. Fourth, arbitrators can sanction a party, taking into account its conduct in any future decision on costs.¹⁵⁴ Finally, arbitrators, under the laws of certain jurisdictions, are entitled to issue *astreintes*, or penalties, for non-compliance (*i.e.* ancillary orders for interim payment of a pre-determined amount payable for every day the original decision is not complied with).¹⁵⁵ However, not many jurisdictions delegate such a power to arbitrators. In addition, this remedy amounts to a duplication of the original interim measure, which also needs the support of the courts, in case of persistent non-compliance by the party in breach of the original order.

For a long period of time, the issue of the enforcement of interim measures issued by arbitrators in the context of international arbitration had not been raised in national legislations. As pointed out by an author: '*[t]he problem is the cross-border enforcement of an interim measure made by an arbitration tribunal or state court against a party situated in a different jurisdiction: the lack of a universal regime for cross-border enforcement is a curious gap in the modern system of international commercial*

would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims'.

¹⁵³ See F. Tommaseo, *Lex fori e tutela cautelare nell'arbitrato commerciale internazionale*, *Riv. Arb.*, 1999, 28.

¹⁵⁴ See F. Poudret – S. Besson, *Comparative Law of International Arbitration*, London, 2007, 540.

¹⁵⁵ The Netherlands Code of Civil Procedure authorises arbitral tribunals to impose penalties for non compliance with their orders (Art. 1056); see final award in ICC case 7895, 11, 1 *ICC Ct. Bull.* 64, 65, 2000, imposing penalties for each product sold in violation of tribunal's provisional measures. See C. Jarrosson, *Réflexions sur l'Imperium, Etudes offertes à Pierre Bellet*, Paris, 1991, 269. In the final award (1998) in case 9154, the claimant sought interim relief and an order that, if the defendant failed fully to comply with the tribunal's award, a sanction of US\$1 million per day be imposed.

arbitration'.¹⁵⁶ That situation was (and still is) due to the inherent difficulties in developing a universal system and regime governing the matter, given different legal traditions regarding interim measures made in support of the arbitral process and, more significantly, '*the extreme variety of interim measures ordered by different state courts under their own national procedural laws*'.¹⁵⁷

Recently UNCITRAL,¹⁵⁸ on the occasion of the revision of its Model Law, introduced provisions specifically designed to deal with the enforcement of interim measures issued by arbitral tribunals, with particular reference to their enforcement abroad.¹⁵⁹ Some legislations have followed the path set down by UNCITRAL and adopted similar provisions. Many others, instead, continue to regulate the matter in a more parochial way.¹⁶⁰

Two issues, in particular, are worth mentioning in respect of the enforcement (especially abroad) of interim measures issued by arbitrators. These are: the extension of the applicability of the New York Convention and the judicial mechanism whereby that enforcement takes place.

The debate surrounding the controversial applicability of the New York Convention - originally conceived for awards on the merits which are final and binding - also to the enforcement of measures which are provisional in nature (thus possibly binding, but certainly not final),¹⁶¹ is well known. As the Convention neither deals with the topic of interim

¹⁵⁶ V. V. Veeder Q.C., *The Need for Cross – Border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process*, in A. J. van den Berg, *New Horizons for International Commercial Arbitration And Beyond*, ICCA Congress Series No. 12, 2005, 242 ff.

¹⁵⁷ V. V. Veeder Q.C., *The Need for Cross-Border Enforcement*, *cit.*, *ibid*. The author points also to the fact that the subject matter is juridically complicated, technical and controversial; that the cross border enforcement of certain interim measures made by an arbitral tribunal requires strict safeguards to avoid the risk of forum shopping, oppression and injustice; that there is no international court imposing a uniform interpretation of a possible non legislative text or treaty.

¹⁵⁸ C. Huntley, *The Scope of Article 17: Interim Measures under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 92 – 95 (2005), who states that all States that have adopted the Model Law have included language permitting enforcement of provisional measures.

¹⁵⁹ See Art. 1041 (2) German ZPO; Art. 42 (1) and Art. 44 English Arbitration Act 1996; Art. 9 Ontario International Commercial Arbitration Act.

¹⁶⁰ For an overview of the different regime of enforcement of interim measures issued by arbitrators in England, Scotland, Germany, France and Switzerland see V. V. Veeder Q.C., *The Need for Cross-border Enforcement*, *cit*.

¹⁶¹ See *Michaels v. Mariforum Shipping SA* 624 F. 2d 411 (2d cir. 1980); *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.* 43 N.Y. 2d 276 N.Y. 1977; Judgment of 22 May 1957 - 1958 ZJP 427 (*German Bundesgerichtshof*); *Resort Condominiums Int'l Inc. v. Bolwell XX Y.B. Comm. Arb.* 628 (Queensland S. Ct. 1993) (1995); *Hart Surgical Inc. v. Ultracision, Inc.* 244 f. 3d 231, 233 (1st Cir. 2001); *Publicis Comm. v. True North Comm.* 206 F. 3d, 725, 728-29 (7th Cir. 2000)).

measures of protection, nor contains any definition of the term award, the prevailing view is that it only applies to awards that finally determine matters submitted to arbitration.¹⁶² In addition, it appears rather contradictory to assume that the Convention governs interim measures only in the context of provisions relating to the recognition and enforcement of awards, while remaining irrelevant in respect of the part concerning the arbitration agreement. A systematic application of the Convention, would lead to the conclusion that, on the basis of its Art. II, only arbitrators have jurisdiction to issue those measures, with the exclusion of the concurrent power of state judges. Moreover, the Convention does not contain any provision concerning the possible modification or revocation of interim measures. Finally, many of the provisions concerning the recognition and enforcement of an award do not appear consistent with the content and form of interim measures (the pre-requisite of ascertaining the existence and validity of an arbitration agreement is inconsistent with the need to proceed on an urgent basis; the grounds for refusing recognition, for example, Art. V 1(1) (b) of the New York Convention is incompatible with *ex parte* interim measures of protection¹⁶³) and so on.¹⁶⁴

The new provisions of the UNCITRAL Model Law (Art. 17 H and 17 I) seem to reflect the view, supported by authorities in many jurisdictions,¹⁶⁵ that interim measures are *final* in the sense that they *finally*

¹⁶² See Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, UN Doc. A/CN. 9/460, 121, UNCITRAL Y.B. 395, 410 (1999) ('the prevailing view, confirmed ... by case law in some states, appears to be that the Convention does not apply to interim awards'); *Pilkington Brothers Plc v. AFG Indus. Inc.* 581 F. Supp 1039 (D. del 1984) ('provisional injunctive relief issued by an English court in aid of international arbitration sited in London is not an 'award' entitled to recognition under New York Convention or FAA'). See J. Lew, L. Mistelis, S. Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International The Hague, 2003, 585 ff.; K. P. Berger, *International Economic Arbitration*, cit., 343; M. Pryles, *Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell 10 Arb. Int'l*, 1994, 385-394.

¹⁶³ See, for a summary of the debate, A. Carlevaris, *The Enforcement of Interim Measures*, *Int'l. Comm. Arb.*, AIA, 2005, 21 ff.

¹⁶⁴ See C. B. Lamm – F. Spoorenberg, *The Enforcement of Foreign Arbitral Awards under the New York Convention, Recent Developments*, *Stock. Arb. Rep.*, 2001, n. 2, 1 ff.; P. Bernardini, *Il Nuovo Regolamento di Arbitrato della CCI*, *Dir. Comm. Int.*, 1998, 131.

¹⁶⁵ See *Arrowhead Global Solutions Inc., v. Datapath Inc.*, 166 Fed Appx 39, 41 (4th Cir. 2006); *Publicis Comm. v. True North Comm., Inc.*, 206 F. 3d 725 (7th Cir. 2000); *Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.* 37, F. 3d, 345 (7th Cir. 1994); *Pacific Reins Mgt. Corp v. Ohio Reins Corp.* 935 F. 2d 1019 (9th Cir 1991); *Banco de Seguros del Estado v. Mutual Marine Offices Inc.* 230 F. Supp 2d 362 (S.D.N.Y. 2002) Aff'd 344 F 3d 255 (2d Cir. 2003). See A. T. von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*, 9 *Yale J. World Pub. Order*, 1983, 343, 362-63 and J. M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities*

dispose of a request for relief pending the conclusion of the arbitration. In effect, orders granting provisional relief, which are meant to be complied with (and to be enforceable) outside the arbitral process, cannot be treated as equivalent to interlocutory arbitral decisions that merely decide certain procedural and/or organisational issues. Those provisions provide in particular that the enforcement of interim measures (possible also in a jurisdiction other than that of the seat) can be barred on the basis of the same exceptions which can be raised against an award (with the addition of special grounds dependent on the peculiar provisional nature of the measure to be enforced).¹⁶⁶

Such a regime is welcome, as, on one hand, it helps to overcome the ambiguities concerning the applicability of the New York Convention and, on the other hand, it provides a certain (and, in case of widespread adoption, *uniform*) regime for rendering effective and predictable a key step of the arbitration procedure. If this possibility did not exist, the parties would be able, and significantly *more likely and willing*, to refuse to comply with orders for provisional relief, resulting in precisely the serious harm provisional measures were meant to foreclose.

Finally, as to the mechanisms whereby judicial enforcement of interim measures takes place, two main approaches have been adopted. Under the first, and most common, one, courts limit their intervention to the granting of the *exequatur*, *i.e.* a mere formal assessment of the existence and validity of certain requirements, without interfering with the merits of the measure and without issuing any additional measure.¹⁶⁷ Under the second approach, state courts issue an autonomous, self-standing, order, which to some extent and under certain conditions can even integrate, modify or adapt the measure issued by the arbitrators.¹⁶⁸ In this second

Relating to the Issuance of Interim and Partial Final Awards in Domestic and International Arbitration, 16 *Am. Rev. Int'l Arb.* 2006, 1-135; U.S. FAA 9 USC Art. 16, 1. For France and Germany see Paris Court of Appeal, 1 July 1999, *Brasoil v. Gmra XXIVa Y.B. Comm. Arb.* 296; P. Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* 776 (2d ed. 1989); K. H. Schwab & G. Walter, *Schiedsgerichtsbarkeit*, 30, 12, 7 ed. 2005.

¹⁶⁶ As to the principles on which the UNCITRAL Model Law provisions on recognition and enforcement of interim measures are based, see A/CN.9/524, para. 20.

¹⁶⁷ This approach has been adopted by most Model Law countries. See P. Binder, *International Commercial Arbitration and Conciliation*, *cit.*, 154. In England the court may sanction the failure of a party to comply with its order to comply with a 'peremptory order' for interim measures issued by the arbitrators with the contempt of court.

¹⁶⁸ That is the case in Germany, where the court has certain discretion in enforcing an interim measure issued by the arbitrators. It is allowed to verify the validity of the arbitration agreement and to refuse interim measures which have a disproportionate

case, the measure eventually enforced will be a combination of an arbitral and a judicial decision.¹⁶⁹ Needless to say, the latter approach might be more effective in adapting the arbitral measure to the peculiarities of a particular legal system (especially when the measure has been issued by arbitrators who are not familiar with the principles and rules of the State in which that measure is to be enforced). However, where not properly implemented, it may represent a serious interference in the autonomy of the arbitrators' power and discretion.

D. The Provisions Concerning Supreme Court Assistance in Taking Evidence

Section 29 of the Mauritian Act deals with Supreme Court assistance in taking evidence. It enacts Art. 27 of the Amended Model Law, with no substantive modification. The Supreme Court is entitled to execute a request made by a party with the approval of the tribunal or directly by the tribunal. It will do so within its competence and according to its rules on the taking of evidence. Section 29(2) specifies (without limitation) two of the powers available to the Supreme Court under Section 29(1): *e.g.* issuing a witness summons, to compel the attendance of any person before a tribunal to give evidence or produce documents or other material; and ordering any witness to submit to examination on oath.

Section 29 of the Act codifies one of the most typical court functions in support of arbitration and is the consequence of the lack of coercive powers of arbitrators. The two (non-exhaustive) examples contained in Section 29(2) are a classic manifestation of *imperium*, which becomes essential when a tribunal's orders addressed to parties or third persons are not complied with voluntarily.

character. Section 1041(2) allows the court to recast an order for interim measures, if necessary, for the purpose of enforcing that measure. This reflects the conflict between the flexibility of interim relief available to arbitration tribunals and the limited class of measures available to German courts. Finally, a German court may, upon request by one party, in accordance with Section 1041(3) ZPO, cancel or amend a decision on enforcement.

¹⁶⁹ Some jurisdictions have adopted a somehow mixed approach. See, for example, German law, which adopts the *exequatur* model, but also authorises the court, if necessary, to re-qualify the order to adapt it to the types of measures available under German procedural law (see Section 1041, para. 2, ZPO). See K. P. Berger, *The New German Arbitration Law in International Perspective*, 26 *Forum Internationale*, 1, 10-11 (2000); J. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Compared* 2.2 *Eur. J. Comp. L.* 1998.

While Section 29 covers (or might cover) disclosure orders (*'to produce documents or other material'*), it is silent on its possible application to assistance in respect of evidence to be used in foreign arbitration proceedings. However, arguing *a contrario* from the silence of Section 3(1)(c)(ii) (which lists the Sections of the Act which apply regardless of the location of the seat of the arbitration proceedings), the conclusion must be drawn that the Supreme Court is entitled to give assistance only to proceedings taking place in Mauritius.

The rules and procedures governing the taking of evidence vary greatly from country to country.¹⁷⁰ In the context of international arbitration,¹⁷¹ even when arbitration rules give arbitrators the power to order the production of documentary evidence and the attendance of witnesses, the courts have nevertheless an essential role (expressly provided for - or impliedly allowed - by the arbitration legislation of most developed jurisdictions),¹⁷² to the extent that only they can enforce any order to ensure

¹⁷⁰ Obtaining evidence usually depends on the law of the place where the arbitral hearings are held, which usually is the seat of arbitration. For such hearings, therefore, the relevant law is the law of the seat (*e.g.* the *lex arbitri*). However, it may be necessary or helpful for the tribunal to hold hearings in a country (or several countries), other than that of the seat of the arbitration. In these cases the 'law of the hearings' (to which all the activities related to obtaining of evidence are necessarily subject) may be different from the law of the seat.

¹⁷¹ On the issue of taking of evidence in international commercial arbitration, see also, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (adopted on June 1, 1999), the purpose of which is to serve as a: '(...) *resource to parties and to arbitrators in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner*'. The IBA Council adopted the revised *IBA Rules on the Taking of Evidence in International Arbitration* on 29 May 2010. For the analysis of other relevant Arbitration Rules (ICC, ICDR, LCIA) which deal with taking of evidence in international commercial arbitration, see P. J. Martínez – Fraga, *The American Influence on International Commercial Arbitration – The New Unorthodox Conception of Common Law Discovery in International Arbitration*, *cit.*, 67 ss.

¹⁷² To mention only a few see (also *infra*, for further reference) Art. 27 of the *UNCITRAL Model Law*, the legislative history of which clarifies the purpose of the provision by explaining that a court '(...) *may take the evidence itself (...) or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion*' (*Report of the Secretary – General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/264, Art. 27, 96 XVI Y.B. UNCITRAL 104, 132, 1985). See, also, Art. 184 of the Swiss Law on Private International Law; Art. 26 of the Swedish Arbitration Act; Art. 1969 (2) of the Belgian Judicial Code; Art. 1041 (2) of the Dutch Code of Civil Procedure; Art. 1050 of the German ZPO; Art. 35 of the Japanese Arbitration Law.

compliance¹⁷³ and only they have the power to issue orders aimed at (or which should be extended to) third parties.¹⁷⁴ In general, enforceable measures which might require the assistance of the courts include, for example, orders for the examination of witnesses within or outside the jurisdiction of the courts, orders for the production of documents or the conservation of evidence, the taking of samples out of a party's property, providing access to premises and so on.

Traditionally, obtaining or compelling evidence in the context of international arbitration, especially when the seat of arbitration is in a jurisdiction other than the place where the evidence is located¹⁷⁵ and when it is necessary to obtain evidence from third persons (e.g. persons not bound by the arbitration agreement),¹⁷⁶ has proved very difficult. State court mechanisms, in fact, has not always (at least, not on a regular basis) been available to provide assistance. The increased complexity and amounts in dispute in international arbitration have rendered such a lack of assistance a matter of serious frustration in a growing number of cases.¹⁷⁷ However, in the last few decades, most jurisdictions have shown a clear policy favouring

¹⁷³ See, *ex multis* (also *infra*, for further reference), Art. 7 of the U.S. F.A.A. 9 U.S.C., which authorises a tribunal to seek judicial assistance in compelling compliance. Many state legislations in the U.S.A. have adopted similar provisions. See also the *Revised Uniform Arbitration Act*, para. 17 (2000); N.Y. C.P.L.R. para. 7505, which permits arbitrators to require the attendance of third parties as witnesses at hearings. See also *In Re Minerals & Chem. Philipp Corp. v. Pan-American Commodities, SA*, 224, N.S. 2d, 763 (N.Y. App. Div. 1962), *appeal dismissed*, 230 N.Y.S. 2d, 732 (N.Y. 1962); *In Re Anne Mfg. Corp.* 149, N.Y.S. 2d 161 (Sup. Ct. N.Y. Co. 1955).

¹⁷⁴ Under German law a third party, the subject of an order of a tribunal under Section 142 ZPO, can refuse the production of documents *only* to the extent such production is *unreasonable*. The scope of such right of refusal has not been clearly established yet. See the *Recommended Resolution and Report of the Legal Committee for the Civil Procedure Reform Act*, B. T. Drucks 14/6036, p. 120; G. Wagner, *Urkunden Edition durch Prozeßparteien, Auskunftsspflicht und Weigerungsrechte*, 2007 *Jur. Zeitung*, 706, 712. A third party can refuse to produce documents, if such production would facilitate raising claims against that party (*Bundesgerichtshof*, 2007, *Neue Jur. Woch.*, 155).

¹⁷⁵ See R. Wolff, *Judicial Assistance by German Courts in Aid of International Arbitration*, *Am. Rev. Int'l Arb.*, 2008, vol. 19, 145: '(...) accessing evidence abroad is usually highly complicated and may delay the proceedings substantially. This obstacle especially affects international arbitration, since the seat of the tribunal is often chosen in light of its neutrality so that evidence frequently is located abroad'.

¹⁷⁶ See, again, R. Wolff, *Judicial Assistance by German Courts*, *cit.*, 145: '(...) frequently the client's only knowledgeable employees have left the firm by the time the proceeding is initiated (...). Winning or losing a case may then depend on whether the witnesses can and will effectively be forced to give testimony or whether those in possession of the documents can actually be forced to release them as evidence'.

¹⁷⁷ See L. Shore, *State Courts and Document Production*, in *Dossier of the ICC Institute of World Business Law: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, 2009, 57 ff.

arbitration, by providing for a more extensive assistance by a competent court.¹⁷⁸

As a matter of principle, unless specifically authorized by law, an arbitral tribunal cannot order persons, *who are not parties to the arbitration*, to attend arbitral hearings or provide information. However, the tribunal (or, when entitled to do so, the parties themselves) can ask the courts at the seat of arbitration, where the third person is resident (or physically present), to issue *subpoenas*.¹⁷⁹ Earlier drafts of Article 27 of the Model Law (a law which does not make any specific reference to the production of documents, but which, according to the Analytical Commentary on the draft text, covers with the phrase *taking of evidence*, both the production of documents and evidence obtained from examining witnesses),¹⁸⁰ show that provision was initially made for the arbitral tribunal or a party to be able to request the state court to compel a third person to provide evidence. The subsequent deletion of the reference to third persons suggests that there was no consensus among the drafters as to whether a third person could be compelled to provide evidence (either as a witness or by producing documents) in arbitral proceedings.¹⁸¹

Article 27 of the Model Law, in its final wording, does not expressly refer to the taking of evidence held by persons outside the proceedings. In practice however, Article 27 has often been referred to in different jurisdictions as a legal basis for obtaining evidence from third persons too, as the case law shows.¹⁸² The same can be said for similar

¹⁷⁸ It is quite controversial whether the parties can fully exclude any court assistance at all. See, for Germany, Stein / Jonas-Schlösser 2002 Art. 1050 para. 1.

¹⁷⁹ Indeed, a number of jurisdictions provide that writs of *subpoena* may be issued to compel a witness to appear before an arbitral tribunal or to produce documents. On *subpoenas* in arbitration see E. A. Brecher, *Use of Subpoenas in Arbitration*, N.Y.L.J., 18 July 1996, 1. It is widely accepted that the court in the jurisdiction of which the witness is resident or the documents to be produced or the objects to be submitted for inspection are located, is competent to issue those writs. See J. Bredow, I. Mulder, *Court Assistance in Arbitral Proceedings from the Perspective of Article 27 of the UNCITRAL Model Law*, in *Liber Amicorum in Honour of Robert Briner*, 2005, 143.

¹⁸⁰ See the *Report of the Secretary General, Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration*, UNCITRAL, 18th Session, Vienna, 3-21 June 1985, p. 60.

¹⁸¹ See H. M. Holtzmann & J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration [Legislative History and Commentary]*, T.M.C. Asser Institut / Kluwer, Deventer 1989, 742 and 745. The reference to third persons was last included in the third draft of July 1983, which provided: '*The court shall execute such request ... by ordering a party or third person to give evidence to the arbitral tribunal*'.

¹⁸² See the relevant references in *Vibroflotation A.G. v. Express Builders Co. Ltd.*, High Court of Hong Kong, 15 August 1994 (in CLOUT database, www.uncitral.org, case N. 77) and in *Delphi Petroleum Inc. v. Derin Shipping and Training Ltd.*, Federal Court of

provisions patterned after Article 27 of the Model Law, such as Art. 1050 of the German ZPO, which likewise contains no specific reference to evidence held by a person, who is not a party to the arbitral proceedings.¹⁸³ In the U.S.A., the power of a tribunal to obtain judicial assistance when seeking discovery from third parties is rather undisputed. However, the controversy remains regarding whether discovery can be obtained also before the hearings or only during the hearings.¹⁸⁴

The *subpoena* mechanism and, in general, the assistance of courts to arbitral tribunals, appear particularly problematic when it is necessary to compel the attendance of witnesses located abroad,¹⁸⁵ or to obtain the production of documents in their possession.¹⁸⁶

At present, the majority of arbitration laws allow courts to provide assistance in taking evidence only to tribunals, the seat of which is within their jurisdiction and, when that assistance is exceptionally extended to foreign arbitral proceedings, the adopted approach is rather narrow. One possible explanation is that the principal legislation in this respect, the UNCITRAL Model Law, in both the 1985 and 2006 versions, does not cover judicial assistance for arbitration proceedings taking place abroad. According to its Art. 27, in fact: ‘*the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.*’ There was an attempt, within the Working Group entrusted with the revision of the Model Law, to redraft the provision so as to include assistance in aid of foreign arbitrations, by virtue of the cooperation between States based on the principle of reciprocity. However, that attempt failed. The Model Law approach is also rather narrow, to the extent that it grants state courts a *discretionary power* as to whether and how to provide assistance to an arbitral tribunal.

Canada, Trial Division, 3 December 1993 (in CLOUT database, www.uncitral.org, case N. 68.).

¹⁸³ See D. Leipold in E. Schilken, G. Kreft, G. Wagner & D. Eckhardt (eds.), *Festschrift für Walter Gerhardt*, Cologne, 2004, 570; M. Wirth, U. Hoffman-Nowotny, *Rechtshilfe Deutscher Gerichte Zugunsten Ausländischer Schiedsgerichte bei der Beweisaufnahme – ein Erfahrungsbericht*, 2005 *German Arb. J.* at 67.

¹⁸⁴ See G. Born, *International Commercial Arbitration*, cit., 1926 ff.

¹⁸⁵ In arbitration, in fact, absent a general duty incumbent on third persons to appear as witnesses before arbitral tribunals, as a matter of principle a witness cannot be compelled to appear in any location *other than* the place where he or she is resident: see J. Münch in *Münchener Kommentar zur Zivilprozessordnung*, 2d ed. (Munich, 2001) Art. 1050, No. 1.

¹⁸⁶ See J. M. H. Hunter- A. Panov, *Taking Evidence Abroad in International Arbitration in the 21st Century*, in K. Hober, A. Magnusson, *Between East and West: Essays in Honour of Ulf Franke*, Juris, Huntington, 2010, 213 ff.

German and Austrian laws constitute a relevant exception in this context, to the extent they provide for the assistance of national courts in taking evidence, *even when the relevant arbitral proceedings are abroad*.¹⁸⁷ The same solution has been adopted by Sections 26, 44 and 50 of the 1999 Swedish Arbitration Act; Art. 45 of the 2008 Peruvian Arbitration Act and Art. 1(2) and 31 of the 2008 Slovenian Law on Arbitration. In Germany,¹⁸⁸ in particular, Art. 1050 ZPO¹⁸⁹ broadens the scope of Art. 27 of the UNCITRAL Model Law, not only by extending the judicial assistance of German courts to foreign arbitral proceedings, but also by providing court assistance in the performance of other judicial acts (such as the service of process pursuant to Arts. 199 *et seq.* ZPO, applications to government authorities for permission for a civil servant to testify, requests for a preliminary reference to the ECJ pursuant to Art. 234 of the EC Treaty)¹⁹⁰ which the arbitral tribunal is not empowered to carry out. Each of these measures must be admissible under the state court's procedural rules and inadmissible in the arbitral proceedings.¹⁹¹

Since Art. 27 of the Model Law has been adopted in a number of countries including Bulgaria, Cyprus, Greece, Hungary, Lithuania and Malta, the national arbitration laws of these jurisdictions limit the court's direct judicial assistance to domestic tribunals and proceedings.¹⁹² Swiss

¹⁸⁷ See Art. 1050 of the German ZPO; for a commentary see K. H. Bockstiegel-S. Kroll-P. Nacimiento (eds.), *Arbitration in Germany: The Model Law in Practice*, cit., 342. See also Art. 602 of the Austrian ZPO, which is applicable also if the place of arbitration has not yet been determined.

¹⁸⁸ According to V. Fischer-Zemin & A. Junker, *Between Scylla and Charybdis: Fact Gathering in German Arbitration* 4, 2 J. Int'l Arb., 9, 28 (1987), German state courts lent their judicial assistance to foreign tribunals even pre-reform.

¹⁸⁹ The provision is not frequently invoked and no substantial case law has been published since its adoption. As assistance by the courts is intended to help parties to the arbitration proceedings, they are free to modify the applicability of this provision and the scope of court assistance (*MuenchKommZPO-Muench* 2001, Art. 1050, para. 7); a different issue is whether the courts will accept an extension of their duties under Art. 1050 ZPO by the parties.

¹⁹⁰ See *Muench KommZPO-Muench*, 2001, Art. 1050, para. 6; Stein-Schlosser 2002 Art. 1050 para. 4; T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG fuer Schiedsverfahren*, 2006, *German Arb. J.*, 5, 11; H. Raeshke - Kessler - K. P. Berger, *Recht und Praxis des Schiedsverfahrens* 768, 3d ed. 1999; R. A. Schuetze, *Die Vorlageberechtigung von Schiedsgerichten an den EuGH* 2007, *German Arb. J.* 121, 124.

¹⁹¹ The same requirements are to be found in Swiss and Austrian Law (*see, respectively*, Art. 184, 2 Swiss Law on Private International Law and Art. 602, Sect. 3 of the Austrian ZPO in conjunction with Art. 39, para. 2 of the Austrian Exercise of Jurisdiction Act). In Switzerland, however, foreign procedural practices can be applied or considered, if necessary to enforce a claim abroad, unless there are important reasons pertaining to the affected party not to do so (*see* Art. 11 (2) PILA).

¹⁹² See R. Wolff, *Judicial Assistance by German Courts*, cit., 148.

Law provides for the assistance of national courts only when the seat of arbitration is within the jurisdiction of the courts.¹⁹³ In France, the law is silent regarding that issue, but it is widely acknowledged that, while assistance may be granted by French courts in aid of domestic arbitrations, it will not be achievable in respect of foreign arbitral tribunals.¹⁹⁴ In addition, although the power of the courts to order document production against third parties is recognised in the legal literature, other means of court support, such as orders against a party to produce documents or to appear, are deemed by most authors not to be within the courts' jurisdiction.¹⁹⁵ These uncertainties, originated by the lack of legal regulation, are perceived as a disadvantage of French arbitration law.

The situation in England and in the U.S.A. is more complex. In particular Section 43 of the 1996 English Arbitration Act (which empowers the court to '(...) *secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents*') is applicable only if arbitral proceedings are '(...) *being conducted in England*'. It is not quite clear whether an evidentiary hearing held in England suffices to constitute proceedings being conducted in England. However, the answer should be positive, considering that under the vast majority of modern arbitration laws and rules, hearings can be held in locations different from the actual seat of arbitration. Section 44(2)(a), in turn, provides for the direct examination of a witness by an English court, the testimony of whom will subsequently be used in an arbitration taking place abroad. The court's action under these Sections (as it is the case for most European jurisdictions¹⁹⁶) is subject to the rules and principles governing the taking of evidence in England. Therefore an English court is neither entitled to order a third party to make general disclosure of documents, nor an American-style pre-trial discovery from a third person. Moreover, the courts have discretion not to grant judicial assistance if, in their opinion, the foreign seat of arbitration makes it inappropriate to grant any such measure. English courts have declined to provide assistance in a number of instances.¹⁹⁷

¹⁹³ See Art. 184 (2) of the Swiss PILA.

¹⁹⁴ See *Fouchard-Gaillard-Goldman on International Commercial Arbitration*, cit., 1338; J. F. Poudret, S. Besson, *Comparative Law*, cit., 670.

¹⁹⁵ See J. F. Poudret, S. Besson, *Comparative Law*, cit., *ibid.*; E. Gaillard- J. A. Edelstein, *Practitioners Handbook, France* (Wiegand ed. 2002) part 4 C, 129.

¹⁹⁶ In Germany, for example, the court must (without discretion) refuse to provide assistance if the requested measure is inadmissible under German procedural law (*Bill of the Arbitration Law Reform Act*, B. T. Drucks 3/5274, p. 51).

¹⁹⁷ For example, in *Assimina Maritime v. Pakistan Shipping*, [2004] EWHC 3005 (Comm.) - [2005] 1 Lloyd's Rep. 525 on *Arbitration Act 1996*, s. 44, Colman J. made clear that Section 44 does: '*not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration. ... Accordingly, it is only where it can be shown*

In the U.S.A., there has been a long debate about the applicability of 28 U.S.C. s. 1782 to foreign arbitration proceedings.¹⁹⁸ The relevant part of the provision reads: ‘*The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal (...)*’. The prevailing interpretation until 2006, expressed in cases like *NBC v. Bear Stearns & Co.*, 165 F. 3d 184 (2d Cir. 1999)¹⁹⁹ and *Republic of Kazakhstan v. Biedermann International* 168 F. 3d 880 (5th Cir. 1999), was that Section 1782 applied only to State-authorized tribunals, to the exclusion of private tribunals.²⁰⁰ A broad interpretation of

that a question arises in relation to a particular document or documents of a non-party which need to be inspected or photocopied [see the other provisions of Section 44] that an order under this section can be made.’ In *Commerce and Industry Insurance Co. of Canada v. Lloyd’s Underwriters* [2002] 1 Lloyd’s Rep. 219 (see also R. Merkin, *Arbitration Act 1996*, 3rd ed., London 2005, p. 117), in turn, the Court explained that Section 44(2)(a) could not be used to support an arbitration seated in the United States, where the purpose of the application was not to obtain specific evidence, but instead to take a U.S.-style discovery deposition. In *Viking Insurance Co. v. Rossdale* [2002] 1 Lloyd’s Rep. 219, the court, asked to examine two witnesses in England on a number of questions and to order documentary discovery in aid of a New York arbitration, held that: first, English civil procedural law did not allow for discovery of witness testimony before the trial and, secondly, that the request for documentary disclosure was deemed too broad as it primarily served to fish for evidence. It was an application merely to find out whether the witness had information which might assist in advancing the applicant’s claim; thus it had to be rejected. Finally, in *Chunnel Tunnel Group Ltd. v. Balfour Beatty Construct. Ltd* [1993] AC 334, 358-59 (HL), the House of Lords denied aid because the court order would conflict with the law (and the court powers and authority) of the arbitral seat. A court would also reject an application to have evidence taken in England, if the applicant is not able to justify the relevance of the evidence the witness could give (which, for example, calls for the physical presence of some witnesses in England).

¹⁹⁸ On this issue see T. H. Webster, *Obtaining Evidence from Third Parties in International Arbitration*, 17 *Arb. Int’l* 143, 154 – 7 (2001); H. Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 *Syracuse J. Int’l Law & Co.*, 1, 5 (1998); W. H. Stahr, *Discovery under 28 U.S.C. Section 1782 for Foreign and International Proceedings*, 30 *VA J. Int’l L.* 597, 619 (1990).

¹⁹⁹ The NBC’s reading of the legislative history of Section 1782 was that the revisers of Section 1782 ‘*had in mind only governmental authorities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state*’. The popularity of arbitration is due in large part to its asserted efficiency and it would be at odds with broad-ranging discovery.

²⁰⁰ It must be observed that, before its complete revision in 1964, Section 1782 referred to ‘*any judicial proceedings pending in any court in a foreign country*’. The replacement with the current wording ‘*in proceedings in a foreign or international tribunal*’ was intended, according to one of the draftsmen, to broaden the provision’s scope to encompass, *inter alia*, international arbitral tribunals: see H. Smit, *International Litigation under the U.S. Code*, 65 *Colum. L. Rev.*, 1965, 1015; ID., *American Judicial Assistance to International Arbitral Tribunals*, 8 *Am. Rev. Int’l Arb.*, 1997, 153; ID., *The*

Section 1782 so as to encompass foreign arbitration proceedings was said to affect the efficiency and cost effectiveness of arbitration and to encourage the entering of the American concept and practice of discovery into arbitrations conducted in foreign countries,²⁰¹ the approach of which to evidentiary matters may differ from that in the U.S. Further concerns related to the fact that the application of Section 1782 to foreign private arbitration proceedings might lead to a procedural disparity, not only between U.S. parties and non-U.S. parties (since for U.S. parties, access to information and evidence in foreign countries is usually much more limited than in the U.S.), but also between international tribunals and domestic tribunals under Art. 7 of the F.A.A. regarding the competent courts and who is entitled to file the motion.²⁰² The *NBC* and *Republic of Kazakhstan* line of reasoning appeared to conflict with the well-established pro-arbitration policy underlining U.S. arbitration law, because it *de facto* precluded state court support in international arbitration. In addition, it was based on a rather distorted perception of foreign legal systems: even if they do not offer U.S. style discovery, many countries worldwide provide cross border judicial assistance to foreign private arbitrations. Therefore the *NBC* interpretation would often lead to exactly the same kind of non reciprocal discovery it seeks to prevent, the difference being that it puts non U.S. parties at a disadvantage to U.S. parties.

The U.S. Supreme Court finally stated, in *Intel Corp. v. Advanced Micro Devices Inc.*,²⁰³ that Section 1782 should be interpreted broadly and that an application under that Section in respect to a foreign tribunal could not be rejected as a matter of principle. In *Intel* the U.S. Supreme Court rejected the historical analysis of the Second Circuit in *NBC* and adopted the view that the term *tribunal* in Section 1782 included arbitral tribunals. The Supreme Court clarified that Section 1782 applications should not simply be granted on a nod, but on the basis of a discretionary assessment

Supreme Court Rules on the Proper Interpretation of Section 1782: its Potential Significance for International Arbitration, 14 *Am. Rev. Int'l Arb.*, 2003, 295, 304.

²⁰¹ Most arbitration rules are silent on the relation between discovery and international arbitration. Therefore, the decision whether to order discovery (save when otherwise agreed upon by the parties) is largely left to the tribunal's discretion, which exercises it depending on a variety of factors, such as the arbitrator's legal culture and the peculiar features of the case.

²⁰² See *Re Application of Medway Power Ltd.*, 985 F. Supp. at 404-05.

²⁰³ 542 U.S. 241 (2004). In this case the interpretation of tribunal was extended to encompass requests made by the *Directorate-General of Competition for the Commission of the European Union*.

which has to take into account several factors.²⁰⁴ Following *Intel*, the decision in *In re Roz Trading Ltd.* confirmed that an international arbitral tribunal is a ‘foreign or international tribunal’ within the meaning of Section 1782.²⁰⁵ This conclusion has been confirmed by many other U.S. decisions.²⁰⁶ Finally, the decision in *In Re: Patrizio Clerici*²⁰⁷ expanded the type of proceedings where Section 1782 discovery is obtainable, to include (*lato sensu*) enforcement procedure.²⁰⁸

As emerges from the foregoing analysis, many issues are still controversial in the area of the taking of evidence. In any event, any approach (whether based on international conventions, state legislation, case law or *communis opinio*) that wishes to foster efficiency in this area, without disrupting the autonomy of the arbitration proceedings and tribunals, should aim:

- to provide the courts with the power to offer assistance even to tribunals sitting abroad. At present, no uniform principles and rules seem to have emerged in this respect,²⁰⁹ but the rigid and narrow approach adopted by the UNCITRAL Model Law appears unreasonable. Assisting a tribunal in performing well and rapidly

²⁰⁴ Such as whether discovery is sought from parties versus third parties (being the latter case more justifiable, given that the foreign tribunal already had the parties under its jurisdictional reach); whether there is evidence to suggest that the foreign tribunal will not be receptive to the evidence; whether it appears that the application is being made in an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; whether the evidence requests are *unduly intrusive or burdensome*, in which case they could be rejected or trimmed. See J. Wessal, *A Tribunal by Any Other Name: U.S. Discovery in Aid of Non-US Arbitration*, 2005, *Int'l Arb. L. R.* 139. See, also, N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, *cit.*, 456 and R. Wolff, *Judicial Assistance by German Courts*, *cit.*, 152.

²⁰⁵ 469 F. Supp. 2d (N. D. Ga 2006). The case concerned an arbitral procedure pending before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

²⁰⁶ See, *ex multis*, the District Court of Minnesota, *In Re Hallmark Capital Corporation* 534 F. Supp. 2d 951, D. Minn. June 1, 2007; the Federal District Court of Colorado, *Re Application of Michael Wilson & Partners Ltd.* 2007, WL 2221438 t 2-4, D. Colo, July 27, 2007; the District Court of Massachusetts, *Re Application of Babcock Borsig AG*, 2008 WL 4748208, D. Mass Oct. 30, 2008.

²⁰⁷ *In re Clerici* 481 F 3d, 1324 (11th Cir. 2007).

²⁰⁸ P. J. Martinez – Fraga, *The American Influence on International Commercial Arbitration – Doctrinal Developments and Discovery Methods*, *cit.*, 61. The Author observes that with this decision the 11th Circuit extended Section 1782 far beyond its intended purpose (which is to be in support of a pending or imminent proceedings), to the extent it applied the provision to a procedure (post-judgment execution proceedings) that had already come to an end, with no possibility of any future adjudication on the merits.

²⁰⁹ G. Petrochilos, *Procedural Law in International Arbitration*, *cit.*, 104.

its tasks is a means to foster international arbitration rather than a way to interfere with its autonomy. It appears also contradictory to admit provisional relief in aid of foreign proceedings, but to deny the same assistance in taking evidence;

- to preclude a review of the jurisdiction of the tribunal by a court, or to limit its power so that it does so, only to the extent necessary to establish that the matter is before a real and credible tribunal.²¹⁰ The main reason why the latter view should be supported lies in the fact that, when a party wants to challenge the validity of the arbitration agreement, it can avail itself of an exclusive mechanism (which is provided for by most jurisdictions), which usually consists of submitting the complaint first, before the arbitral tribunal and then, by way of (immediate or postponed) review, before the courts at the seat of arbitration. If the validity of the arbitration agreement were to be subject, in the context of a request of assistance in the taking of evidence, to an additional (even though preliminary and limited) review by a court other than the one competent for the judicial review, there would be a duplication of procedures, with possible conflicting rulings and consequent problems of reciprocal coordination;²¹¹

²¹⁰ In Germany, for example, one view argues that in this context the competent court may undertake a *full review* of the arbitration agreement (*see* Schwab/Walter 2005, Chap. 17, para. 10; W. J. Habscheid, *Aus der Hoehstrichterlichen Rechtsprechung zur Schiedsgerichtbarkeit* 1958, in *Konkurs, Treuhand und Schiedsgerichtswesen* 177, 179; A. Schoenke – R. Pohle, in *Kommentar zur Zivilprozessordnung* para. 1036, Remark II n. 4). According to another view, the court should refuse assistance only if it is evident and obvious that the arbitration agreement is invalid (*see* Musielak-Voit, 2007, Art. 1050, para. 5 ZPO; Stein/Jonas-Schlosser 2002, Art. 1050 para. 7; U. Has, *Die Gerichtliche Kontrolle der Schiedsgerichtlichen Entscheidungszustaendigkeit*, in *Festschrift fuer W. H. Reehberger zum 60 Geburtstag* 187, 192; with particular reference to the old law, *see* OLG Stuttgart 15.11.1957, NJW 1958, 1048). Another view, finally, denies any court competence whatsoever in this regard (*see* Higher Regional Court Berlin (*Kammergericht*) 1919, *Leipziger Zeitschrift fuer Deutsches Recht* 215; Higher Regional Court (*Oberlandesgericht*) Hamburg 42 *Zeitschrift fuer Zivilprozess* 1912, 200; *MuenchKommZPO-Muench* 2001, Art. 1050, para. 11 ZPO; Zoeller-Geimer 2007, Art. 1050, para. 6 ZPO; Weigan-Wagner 2002, Germany, para. 312).

²¹¹ However, a counter-argument might be that the prejudicial impact of the opposite solution would be diminished if only the rulings of the court in charge of the final judicial review – unlike the rulings of the court involved in the assistance in the taking of evidence (which, in some countries, such as Germany for example, are two different courts) – had final and binding effect on the issue of (in)validity of the agreement.

- to provide for a certain degree of uniformity in the different regimes governing the powers of the court requested to give assistance (at least as far as both the law of the seat of arbitration and the law where the court requested to assist the foreign arbitral proceedings has its seat are concerned), in order to avoid situations of unfair treatment of the parties. This might happen, for example, as already mentioned above, when an American party and a European party are involved in an international arbitration procedure. The European party is entitled to obtain extensive access to documents of the American party and a complete disclosure/discovery, availing itself of Section 1782, while the American party may find its right of access much more restricted;²¹²
- to entrust the arbitral tribunal with the direct power to request assistance from foreign courts or, in alternative, (at least pre-emptively)²¹³ to authorise a request made by the parties and, in the latter case, to give the tribunal the power to adapt the request to the real need of the dispute, taking into account all the circumstances. In Germany, Austria and England, for example, the parties are entitled to make a direct request to the courts for obtaining assistance in the taking of evidence, but the prior consent of the tribunal is always necessary.²¹⁴ The situation in the U.S.A. is less clear.

A further problem is represented by the identification of the body (court or tribunal) entitled to determine the legitimacy and scope of the evidence to be produced, save of course the exclusive power of the tribunal finally to determine the consequences, if a certain fact is not proven. In many jurisdictions, state courts are usually not entitled to review whether the requested measure (*e.g.* the taking of witness evidence) is necessary for the decision of the dispute pending in arbitration,²¹⁵ even though they may adjust a request, if they deem this appropriate in light of all the

²¹² See J. Fellas, *Using U.S. Court in Aid of Arbitration Proceedings in Other Countries*, 2008, *Int'l Arb. L. R.* 3; see also P. J. Martinez-Fraga, *Application and Avoidance of para. 28 U.S.C. para. 1782 Discovery in International Commercial Arbitration*, *cit.*, 3.

²¹³ In order to prevent completely ill-founded or irrational requests, not relevant for the decision of the dispute.

²¹⁴ See, for Germany, Stein/Jonas-Schlösser 2002, Art. 1050, para. 7 ZPO; Schwab/Walter 2005, Chap. 17, para 7.

²¹⁵ See, for Germany, Stein/Jonas-Schlösser 2002, Art. 1050, para. 7 ZPO; Schwab/Walter 2005, Chap. 17 para. 8; *MuenchKommZPO-Muench*, 2001, Art. 1050 para. 13 ZPO.

circumstances (denying, for example, the need of an oral deposition of a witness, when the submission of a written witness statement in replacement appears to suffice). The courts may also exercise a certain degree of control with regard to whether the arbitral tribunal itself would be able to undertake the requested measure, and may refuse the assistance if it is manifest that this is the case. A court might also reject a party's application of assistance if the specific type of evidence requested has been previously waived: if for example the parties have agreed that no witness testimony is to be given under oath and the application is for a *subpoena* to take an oath.²¹⁶

In conclusion, notwithstanding that judicial assistance in taking evidence (especially in its more invasive form as it may be said to be represented in the U.S.) might be perceived as an undue interference in arbitration, potentially reducing arbitral tribunal's autonomy over a key aspect of the arbitral process, when properly used, it fosters the efficiency of the whole process, remedying the occasional (objective) limited scope of the intervention of arbitrators. In addition, it still remains a useful and powerful instrument, in comparison with other instruments like the drawing of adverse inferences against the non-cooperative party, which might be problematic, at least when these inferences affect a party that cannot be held responsible for the unavailability of evidence. Finally, the mere fact that an easily accessible path to judicial assistance is available, will facilitate voluntary compliance with the tribunal's orders and thereby render the need for supportive intervention by state courts probably unnecessary in many cases.

E. The Option to Leave to the Parties, Through An Opt-In Mechanism, The Choice Whether or Not to Appeal Awards on Questions of Law

Among the provisions contained in the First-Schedule of the Mauritian Act, which are relevant in connection with the topic of the relation between courts and arbitration, Section 3(2), which gives the parties the possibility to lodge an appeal against an award on any question of Mauritian law, is in particular worth analysing.²¹⁷

²¹⁶ In Germany, see Sachs/Loercher in K. H. Bockstiegel- S. Kroll- P. Nacimiento (eds.), *Arbitration in Germany, cit.*, 343.

²¹⁷ The provision is not directly applicable to international arbitration proceedings taking place in Mauritius, unless the parties so decide (*opt-in mechanism*). As explained in the *Travaux Préparatoires* (The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - B. Structure of the Act - 19(a)(ii)), along with the other provisions of the

The provision derives from Section 5 of the Second Schedule of the New Zealand Act. The right to appeal is subject to obtaining leave from the Supreme Court, which needs to be satisfied that the determination of the question of Mauritian law could substantially affect the rights of one or more of the parties. If the appeal is upheld, the Supreme Court may vary or set aside the award (in the former case, the award as varied shall have effect as if it was the award of the arbitral tribunal) or remit it for reconsideration to the tribunal (or for new consideration to a different tribunal). Section 3(2) contains further provisions which are intended to conform the appellate proceedings with the provisions of the New York Convention.

The option adopted in Section 3(2) of the Mauritian Act does not have any equivalent in the UNCITRAL Model Law and in most Model Law²¹⁸ (and also non-Model Law²¹⁹) countries.²²⁰ Most jurisdictions

First-Schedule, this provision is at present too controversial for inclusion in a normal regime of a law governing international arbitration in Mauritius. Unlike other types of court intervention provided for by the Act (appointing functions, assistance in the taking of evidence, interim measures), which are essentially in support of the arbitral process, the provision on the right of appeal, by providing a review by the court of the arbitrator's decision on the merits (Section 3(2)), implies a substantial involvement of the judiciary in the most essential phase of the arbitral process (the *iusdictio*), which might be perceived by international users as being in contradiction with the general principles underlying the Act (*in primis* that of non intervention of the courts codified in Section 3(8)). Both Sections are in fact introduced by the phrase '*Notwithstanding Section 3(8) (...) of the Act*'.

²¹⁸ See Germany (Art. 1059 ZPO), Austria (Art. 611 ZPO) and Japan (Art. 44 JAL). The fact that in Model Law jurisdictions awards are not subject to judicial review on the merits is underlined by a number of courts' decisions and commentators. See, for example, *Canada (Attorney General) v. S.D. Myers Inc.*, (2004) 3 FC 368 (Fed. Ct. of Canada), according to which: '*It is noteworthy that Article 34 of the Code [equivalent to Article 34 of the Model Law] does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal.*' For commentary see H. Hausmaninger, in H. Fasching, *Zivilprozessgesetze* para. 611, 3 (2d ed. 2007).

²¹⁹ That is the case in Switzerland (but see *infra*, for further details about the different applicable regimes), France (Arts. 1502 and 1504 NCCP), Sweden (Art. 34 SAA), Belgium (Art. 1704 (2) Belgian Judicial Code), The Netherlands (Art. 1065 NCCP). On the issue see M. Rubino-Sammartano, *Errori di diritto e riesame della decisione arbitrale (in Europa e oltre Oceano)*, *Il Foro Padano*, 2009, 1, II, 29; Hon. Justice E. Torgbor, *The Right of Appeal and Judicial Scrutiny of Arbitral Decisions and Awards*, *Arbitration*, 2010, 2, 229 ff.

²²⁰ Many national courts' decisions in these countries underlie the fact that judicial review of the merits of the arbitrator's award and reasoning is not permitted. For reference see T. Webster, *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, *Arb. Int'l.*, 2006, n. 3; G. Born, *International Commercial Arbitration*, *cit.*, 2649 ff.; P. Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, *19 J. Int'l Arb.*, 81, 2002.

usually provide limited grounds for setting aside awards,²²¹ most of which correspond to the grounds contained in the New York Convention for refusing recognition and enforcement of foreign awards (*i.e.* mistakes of (fact and) law or errors of interpretation are generally excluded).

Historically finality (*e.g.* the lack of appeal on the merits)²²² has been counted among the advantages of private dispute resolution over court litigation.²²³ For a long time, parties selected arbitration because they considered that an award offered an effective and early end to the dispute, in a way that litigation, leading to a court judgment, did not.²²⁴ In this respect, an unrestricted right of appeal from arbitral awards was seen not only as implying a substantial replacement, by state courts, of the arbitrators' role and function (*i.e.* their *iusdictio*), but also as a cause of long and expensive procedures, characterised by public hearings before national courts (in contrast with the parties' intention of keeping the whole dispute confidential) and the unpredictability of the outcome, depending on the greater or lesser friendly attitude towards arbitration of the local judges.²²⁵

²²¹ As to Roman law see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996, 529.

²²² In the U.S. the courts have consistently recognised that the standards governing their review of arbitral awards are amongst: '(...) *the narrowest standards of judicial review in all of American jurisprudence*': *Lettimer-Stevens Co. v. United Steelworkers*, 913 F. 2d 1166, 1169 (6th Cir. 1990).

²²³ See W. H. Knull, III and N. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, *Am. L. R. Int'l Arb.*, Vol. 11, 532, 2000; A. Mourre, L. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, *J. Int'l Arb.*, 23 (2), 2006, 171.

²²⁴ See P. Mayer & A. Sheppard, *Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Awards, Recommendation 18 (a)*, 19 *Arb. Int'l*, 2003, 249, 250, according to which: *'The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances'*. Indeed, a survey conducted on annulment or setting aside proceedings in a number of countries shows that *only a very limited percentage of annulment applications succeed*. In Switzerland, in the period 1989 - 2006, between 5% and 7%; in France only 2 awards out of 46 challenges; in England less than 5% in the period 2002 - 2004; in the U.S.A. only 4 cases out of 48 applications. See G. Born, *International Commercial Arbitration*, *cit.*, 2561.

²²⁵ The policy underlying finality has been clearly explained by the ECJ in the famous decision *Eco Swiss China Time Ltd v. Benetton Int'l NV (C-126/97 [1999] E.C.R. I-3055 (ECJ))*, in the sense that: *'(...) it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'*. The same principle has been expressed by many national courts' decisions, such as the U.S. courts in respect of the provisions of the F.A.A., which repeatedly came to the conclusion that: *'the purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. Accordingly, it is a well-settled proposition that judicial review of an arbitration award*

However, the overall justice of the current system has been recently put into question.²²⁶ Emphasising the disadvantages of a system in which an arbitral tribunal might render a decision that is completely at odds with the law or in any event excessive or irrational, yet which is nonetheless unreviewable, some commentators (as well as some categories of stockholders)²²⁷ have come to support the introduction of judicial review of the merits of awards (e.g. essentially for errors of law), which would safeguard against arbitrary or fundamentally unjust awards, thus increasing the integrity, quality and overall reliability of arbitration.²²⁸ Moreover, recent regional surveys of corporate lawyers from large corporations reveal that one of the reasons why those lawyers choose not to opt for arbitration is exactly the difficulty of appealing awards.²²⁹ Indeed, the amount and complexity of major transnational disputes have changed the perception towards the so called *one-shot* adjudication. It nowadays appears a risk rather than an advantage to have just one ruling on the merits, especially when the losing party is faced with awards containing ostensibly patent errors of law or awards which are patently unjust, arbitrary, biased,

should be, and is, very narrowly limited. See Diapulse Corp. of Am. v. Carba Ltd. 626 F. 2d 1108 (2d cir. 1980); *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F. 3d 133 (2d Cir. 2007); *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. C.*, 2005 U.S. Dist. Lexis 9774 (S.D.N.Y. 2005).

²²⁶ See, in general, J. M. Gaitis, *International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, *Trans. Disp. Man.*, 2006, vol. 3, issue 5; H. Smit, *Correcting Arbitral Mistakes*, 10 *Am. Rev. Int'l Arb.*, 2001, 225, 228.

²²⁷ For example, in the maritime and commodity markets, see D. B. Lipsky Y. & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 26 (1998); see also C. R. Drahozal, *Unfair Arbitration Clauses*, 2001 *U. Ill. L. Rev.* 695, 731.

²²⁸ See F. A. Mann, *Private Arbitration and Public Policy*, *Civil Justice Quarterly*, 1985, 257; P. J. McConaughay, *The Risks and Virtues of Lawlessness*, *cit.*, 453; M. Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 *Int'l & Comp. L. Q.* 1, 1985, 15. See also The Rt. Hon. The Lord Mayor of the City of London, Alderman Robert Finch, ICMA XV, in *The Cedric Barclay Lectures*, 2006, 113: 'I shall encourage the view that there should be more appeals from arbitrations to the Courts not less'. Contra J. Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 *Int'l & Comp. L. Q.* 1983, 53, 59; *Idem.*, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 *Int'l & Comp. L. Q.*, 1981, 358, 373; K. P. Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 *Ford. Int'l L.J.*, 1989, 605; S. Shackleton, *Challenging Arbitral Awards: Part III – Appeals on Questions of Law*, *New Law J.*, 2002, 1834.

²²⁹ See D. B. Lipsky & R. L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, *Cornell/PERC Institute on Conflict Resolution*. available at <www.ilr.cornell.edu/icr/research.html>, 26, 2000.

determined by sheer incompetence and so on.²³⁰ There are also public policy concerns, such as the need that the law be certain²³¹ and the need to ensure consistency of decisions, whenever the same or similar points come before different tribunals, each one of which is independent of the other.²³² Unlike other approaches in the past, the proposals to introduce an at least partial revision of the merits do not originate from a mistrust of the arbitral process, but from the proposition that the existence of judicial review represents an incentive for arbitrators to do their job properly. Nevertheless, scholars, practitioners and the business community are not always consistent in identifying the best solution in order to cope with the lack of a (general) remedy against 'mistaken' awards.²³³ Some suggest introducing in national arbitration laws an autonomous appeal on points of law or, within the already existing setting aside proceedings, an additional ground for errors of law. Some others suggest providing a second arbitral instance or internal appeal (patterned after the ICSID Appellate structure,²³⁴ or the internal review mechanisms typical of many commodity arbitrations rules²³⁵).²³⁶ Some others suggest allowing the parties contractually to

²³⁰ According to Sir M. Kerr, *Arbitration and the Courts: the UNCITRAL Model Law*, cit., 34, 15: 'No one having the power to make legally binding decisions in this country [England] should be altogether outside and immune from this system'.

²³¹ Considerations which do not come into question in case of mistakes of fact, which can only affect the parties involved in that particular proceedings. That is the reason why almost all states with developed arbitration laws refuse to allow appeals from arbitral tribunals *on issue of facts*. There are few exceptions, though: in Switzerland, for example, parties to an international arbitration may contract out to the Concordat, and thus be entitled to challenge the award as *arbitrary*, if *manifestly unsupported or unsupported* on the facts.

²³² See N. Blackaby and C. Partasides, *Challenge of Arbitral Awards*, in *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, U.K., 2009, 607. See also H. Dundas, *Appeals on Questions of Law: Section 69 Revitalised*, *Trans. Disp. Man.*, 2004.

²³³ See E. Gaillard, *The Review of International Arbitral Awards*, IAI Forum, Dijon 12-14 September 2008, *Int'l. Arb. Inst.*, 2010; M. Rubino-Sammartano, *Errori di diritto e riesame della decisione arbitrale* cit., 29 ff.; Hon. Justice E. Torgbor, *The Right of Appeal and Judicial Scrutiny of Arbitral Decisions and Awards*, *Arbitration* 2010, 76, 2 229 ff.; W. Craig, *Uses and Abuses of Appeal from Awards* (1988) 4 *Arb. Int'l* 174, at 214.

²³⁴ See M. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 *ICSID Rev., Foreign Investment L. J.* 85, 1987.

²³⁵ An appeal option is also provided for by the Rules of the CPR Institute for Dispute Resolution Private Organisation in New York, which contain provisions permitting the tribunal 'to interpret' the award or to 'make an additional awards as to claims or counterclaims presented in the arbitration, but not determined in the award' (Rule 14.5).

²³⁶ Some rules, in effect, particularly in domestic arbitrations, provide for private appellate review of arbitral awards via arbitral appeals panels. Critical to this solution is J. M. Gaitis, *International and Domestic Arbitration Procedure*: cit., 29. See also G. Zekos,

expand the scope of judicial review.²³⁷ Others, finally, suggest limiting the setting aside of an award for errors of law only when those errors amount to a manifest disregard of law.

At present, the extent of the judicial review of arbitral awards by state courts varies quite significantly from country to country. On one side there are countries such as France, which exercises a minimum control over international arbitral awards, and Switzerland, which allows non-Swiss parties to contract out of controls altogether²³⁸ and where courts (under the setting aside regime of the PILA) have stated that an award cannot be reviewed merely on the basis that: ‘(...) *the evidence [is] improperly weighed, that a factual finding [is] manifestly false, that a contractual clause [has not been] correctly interpreted or applied or that an applicable principle of law has been clearly breached*’.²³⁹ In the middle of the scale are grouped a considerable number of States that have adopted (either in full

Court's Intervention in Commercial and Maritime Arbitration under U.S. Law, 14 *J. Int'l Arb.*, 1997, 124.

²³⁷ See A. S. Rau, *Contracting Out of the Arbitration Act*, *Am. Rev. Int'l Arb.* 8, 1997, 225, 227 n. 11; H. Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, A Postscript 8, *Am. Rev. Int'l Arb.* 1997, 273; *Idem.*, *Hall Street Associates v. Mattel: a Critical Comment*, *Am Rev. Int'l Arb.* 2007, 17, 4, 513.

²³⁸ Indeed, the situation in Switzerland is more complex. The parties to an international arbitration which takes place in Switzerland might choose among three options: 1) a *broad and extensive* judicial review of the award, on the basis of nine grounds provided for by the 1969 Intercantonal Convention of Arbitration (generally known as the *Concordat*) which, under grounds for setting aside the award such as arbitrariness, includes manifest unacceptability, lack of any objective reason, and serious violation of clear and undisputed legal norms or principles (see P. Jolidon, *Commentaire du Concordat Suisse sur l'Arbitrage*, Berne, 1984, 518 ff.; J. F. Poudret, C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, 212 ff.); 2) a complete autonomy if all parties are non-Swiss (*i.e.* none of whom has its domicile, habitual residence or business establishment in Switzerland) and have concluded an explicit agreement (*declaration expresse*) to exclude court challenge entirely (Art. 192 PILA) or to limit such proceedings to one or more of the grounds listed in the Act. Because waiver of the right to judicial review of the award must be explicit, reference to institutional arbitration rules containing renunciation of appeal provisions will not be sufficient to exclude review; 3) a limited court review for breaches of procedural fairness (Art. 190, 2 PILA), which contemplates five grounds for challenge of awards. However, in the case *LV Finance Group Limited v. IPOCI International Growth Fund Limited (Bermuda)* 4P.102 (2006) (1st Div SFT), the Swiss Federal Tribunal held that an ICC Tribunal's failure to consider facts which later became available, would be a ground to set aside the award; the Federal Tribunal was of the view that the ICC Tribunal would have come to a different judgment if those facts had been available in the proceedings.

²³⁹ See Swiss Federal Tribunal, 8 April 2005, DFT 4P. 253/2004; see also Swiss Federal Tribunal, 22 February 1999, 17 *ASA Bull.* 537 (1999). Similar statements can also be found in many French and German courts' decisions: for reference see G. Born, *International Commercial Arbitration*, *cit.*, 2650.

or with some minor modifications) the grounds of recourse laid down in the Model Law (such as Germany, Spain, Austria), which do not contemplate any revision of the award based on alleged errors of law. At the other end of the spectrum there are countries, such as England, which operate a range of controls, including a limited right of appeal on questions of law, that the parties may agree to waive.²⁴⁰ The express provision on a point of (*only* English) law is contained in Section 69 of the English Arbitration Act,²⁴¹ which requires very stringent conditions for an appeal to be considered admissible and to be upheld.²⁴² As a matter of fact, the court rarely grants leave to appeal on a question of law.²⁴³ English courts have adopted a narrow interpretation of those conditions, deprecating any attempt to dress

²⁴⁰ Traditionally English law provided for expansive judicial review of the substance of arbitral awards. Prior to the 1996 Act, English law forbid pre-dispute waivers of the right to appeal on points of law in ‘special category’ cases of admiralty, commodities and insurance contracts governed by English law. English courts have emphasised that ‘*a major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process*’: see *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (HL); *ABB Attorney General v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm.).

²⁴¹ During consultation on the July 1995 Arbitration Bill in England, there were many suggestions made to the DAC that the right of appeal on point of law should be abolished in its entirety, as: ‘(...) *by going to arbitration the parties had agreed to abide by the ruling of the arbitrators and not to treat it as a preliminary step to judicial proceedings*’ (see R. Merkin and L. Flannery, *Arbitration Act 1996, cit.*, 164). The DAC rejected these suggestions, on the ground that a limited right of appeal was not inconsistent with an agreement to arbitrate, and the parties may well: ‘(...) *have intended that the result is to comply with established legal principles, for example where they have specifically chosen the law applicable to their substantive agreement*’ (DAC Report, para. 285).

²⁴² First of all, the agreement of all the parties involved or the leave of the court is required. The latter is granted only if the court determines that the following cumulative conditions have been satisfied: that the determination of the question will substantially affect the rights of one or more of the parties; that the question is one that the tribunal was asked to determine; that on the basis of the findings of fact in the award: (i) the decision of the tribunal on the question was obviously wrong or (ii) the question is of general public importance; that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. The point of law which has been appealed must have been raised in the proceedings and dealt with in the award. The aim of Section 69(3)(b) is to estop parties from seeking permission to appeal a point which they did not argue before the arbitrators. See D. Sutton, J. Gill and M. Gearing (eds.), *Russell on Arbitration* 23rd ed., London, 2007, paras 8-119-8-161; see also P. Clifford & O. Browner, *England – Scope of Challenges Following an Alleged Error of Foreign Law, Int’l Arb. L. R.*, 2010, 4, N-31.

²⁴³ As was held in *ABB Attorney General v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm.), the approach which courts should follow in revising an arbitral award is to: ‘(...) *read [it] in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it*’. In *Egmatra AG v. Marco Trading Corp.* [1999] 1 Lloyd’s Rep. 862, 865 (QB) it was stated that Art. 69 should be exercised sparingly, so as to ‘*respect the decision of the parties’ choice*’.

up mere factual findings²⁴⁴ (including findings based upon a law other than English law) or procedural errors²⁴⁵ as errors of law. In any case, the parties may contract out of the right to appeal:²⁴⁶ a) by incorporating institutional rules, such as ICC and LCIA Rules, that limit the right of appeal to the extent permitted by law;²⁴⁷ b) by agreeing that the arbitrator does not have to give reasons with the award (which under Section 69(1) has the effect of excluding an appeal on a point of law); and, c) by agreeing under Section 46(1)(b) that the arbitrator may decide the dispute other than in accordance with substantive law.²⁴⁸ Section 69(2) requires that any internal appeal or other arbitral procedure be exhausted before applying to the court. A distinction is also drawn between a point of general public importance, where the test is whether the conclusion is open to serious doubt and other (one-off) cases, where the test is whether the tribunal is obviously wrong.²⁴⁹

In Italy, on the basis of the new arbitration law introduced by Legislative Decree N. 40/2006, an award can be set aside for errors of law, but only if the parties had opted in to this ground in their agreement (or when this ground is mandatorily provided for by the law).²⁵⁰ Other

²⁴⁴ See *Torch Offshore LLC v. Cable Shipping Inc.* [2004] 2 Lloyd's Rep. 446; *Mowlem Plc v. PHI Group Ltd* [2004] BLR 421.

²⁴⁵ See *Petroships Pte. Ltd. of Singapore v. Etec Trading & Investment Corporation* [2001] 2 Lloyd's Rep. 348; *Lesotho Highlands Developments Authority v. Impregilo SpA* [2003] 2 Lloyd's Rep 497.

²⁴⁶ See *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896. The agreement of the parties must be in writing. However, the provision contained in standard form rules of arbitration to the effect that the award shall be final and binding, has been held to constitute a valid agreement to waive the right of appeal: see *S. Olyesters Ltd. v. The International Investor (KCFC)* [2001] 1 Lloyd's Rep. 480.

²⁴⁷ See *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (HL) stating that parties exclude right of appeal under para. 69 by way of Article 26 (6) of the ICC Rules.

²⁴⁸ In *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm.), [2010] 1 Lloyd's Rep. 109, the arbitration took place under the UNCITRAL Rules, which do not include an express provision that there will be no right of appeal on a point of law, as LCIA Rules do. The contract provided that the award would be final conclusive and binding and the court excluded that this meant that there would be no appeal. According to Gloster J.: '*sufficiently clear wording is necessary albeit that no express reference to Section 69 is required*'. See the comments of Ramsey J. in *Essex County Council v. Premier Recycling Ltd* [2006] EWHC 3594 at paras. 24-26.

²⁴⁹ See R. Merkin and L. Flannery, *Arbitration Act 1996, cit.*, 167, who submit that a point of law is of general public importance where it raises the construction of a standard form contract or where the facts are commonly encountered. By contrast, a case is one-off if the contract is individually negotiated, or contains unusual provisions or has arisen for construction in the light of unique facts.

²⁵⁰ Under the previous regime, on the contrary, challenges for errors of law were an opt-out solution. For commentaries on the new provision see S. Boccagna, *Art. 829. Casi di nullità*, in *Le Nuove Leggi Civili Commentate*, Padova 2007, 6, 1413 ff.; M. Bove, *L'impugnazione per nullità del lodo rituale*, *Riv. Arb.*, 2009, 1, 19 ff.; E. Marinucci,

jurisdictions which provide for annulment of (usually) domestic (but sometimes also international) arbitral awards based upon review, *lato sensu*, on the merits (but not, or only exceptionally, on the facts) are China,²⁵¹ Ireland²⁵² and Australia.²⁵³ As a matter of principle, the review/appeal on the merits in these jurisdictions is usually admitted only in cases of serious errors of law. A few jurisdictions, less arbitration-friendly and with a limited experience and familiarity with international arbitrations, tend to admit judicial review on the merits of the awards on the same grounds available to first instance court decisions.²⁵⁴

In the U.S.A., where federal and state arbitration statutes usually limit as much as possible the right of judicial review of arbitration awards,²⁵⁵ the ground known as manifest disregard of the law,²⁵⁶ which is

L'impugnazione del lodo arbitrale dopo la riforma: motivi ed esito, Milano, 2009, 247 ff.; E. Zucconi Galli Fonseca, Art. 829, *Casi di nullità*, in F. Carpi (a cura di) *Arbitrato: commentario al titolo VIII del libro IV del codice di procedura civile – Arts. 806-840*, 2 ed., Bologna, 2008.

²⁵¹ On the basis of Arts. 58 (4), (5), 63, 217 (4) of the Chinese Arbitration Law, an award may be annulled if the court concludes that the evidence was insufficient or the application of law was truly incorrect. See T. Houzhi & W. Shengchang, *China* 40, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (update 1998); C. Hongda, *Judicial Supervision of Arbitration in China*, 17 (1) *J. Int'l Arb.*, 2000, 71, 75-76.

²⁵² Where it is possible to set aside an award for errors of law on the face of the award, as the Irish High Court recently did in the case *GLC Constr. Ltd. v. County Council of the County of Laois* [2005] IEHC 53.

²⁵³ In Australia, the right of appeal for errors of law (unless the parties have excluded it *per* agreement) is provided for by the Commercial Arbitration Acts only for awards that do not fall within the scope of the International Arbitration Act.

²⁵⁴ See Art. 29 (1) of the Portuguese Law on Voluntary Arbitration, which states that: 'Unless the parties have waived the right to appeal, the same appeals which are admissible regarding a judgment of the Court of First Instance may be lodged with the Court of Appeal against the arbitral award'; Art. 53 (1) of the Egyptian Arbitration Law; Art. 758 of the Argentinean National Code of Civil and Commercial Procedure. Broad grounds for review on the merits are also provided for by the Abu Dhabi Code of Civil Procedure (Art. 91 (2)(v)), the Saudi Arabian Arbitration Regulation (Art. 19) and the Libyan Code of Civil and Commercial Procedure (Art. 767). In The Netherlands, the *Proposal for the Amendment of the Dutch Arbitration Act*, submitted to the Ministry of Justice on 21 December 2006, contained recommendations for extensive alterations to the original Arbitration Act in the Dutch Civil Code of Procedure. Among other provisions it was stated that parties could limit – though not fully exclude – the grounds for setting aside an arbitral award. On 5 November 2009 the inquiries office at the Ministry of Justice advised that no work is presently being done by the Ministry regarding the Proposal and / or the amendment of the Arbitration Act. No indication has been given as to whether, or when, the Proposal would be further developed.

²⁵⁵ According to S. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, *The*

highly controversial²⁵⁷ and seldom raised as a ground for setting aside an award and even more rarely successful,²⁵⁸ represents an exception to the general exclusion of review for errors of law. It has been construed in the sense that arbitrators knew the law, but did not apply it in order to reach the result they did.²⁵⁹ The law which is alleged to have been disregarded should

George Washington Law Review, 1998, 445: ‘Nothing in Section 10 (a) or elsewhere in the F.A.A. creates a guarantee of justice or expressly authorizes the courts to engage in substantive review of the merits (...) of commercial arbitration awards. (...) protections are properly viewed as primarily procedural in nature’ and ‘[t]he scope of judicial review sanctioned by Section 10(a) of the FAA is ‘extraordinarily narrow’’. Among the express grounds provided for by Title 9 of the U.S. F.A.A. for setting aside an arbitral award, in fact, there is no express mention of mistakes of law, and U.S. courts have held that an award may not be set aside on such grounds (see *Baxter Int’l Inc. v. Abbott Labs*, 315 F3d 829, 7th Cir., 2003). For some applications of the narrow approach adopted by American courts in reviewing awards see *Lucas v. Philco-Ford Corp.* 399 F. Supp. 1184; *Miller v. Ruyon* 77 F. 3d 189; *Cobec Brazilian v. Isbrandtsen* 524 F. Supp 7; *Brown v. Rausher Pierce* 1992 796 F. Supp 496; *Sobel v. Hertz* 469, F. 2d 1211; *Merrill Lynch v. Jaros*, 70 f. 3d 418; *Jasper Cabinet Co. v. United Steel Workers of America*, 77 F. 3d 1025; *Service Employees Inter v. Local* 70 F. 3d 647. For a general overview see O. Armas – T. Pieper, *Achieving the Intended Purpose of Arbitration Agreements in the U.S. and Brazil – The Limited Scope of Judicial Review of Arbitral Awards under the U.S. Federal Arbitration Act and the Necessity of a Compromisso under the Brazilian Arbitration Law*, in *Revista Brasileira de Arbitragem*, 2008, 19, 91 ff.

²⁵⁶ Referred to for the first time in the decision *Wilko v. Swan* 346 U.S. 427, 74 S. Ct. 182 (1953). In this decision the Supreme Court stated that: ‘(...) the interpretations of the law by the arbitrators, in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation’.

²⁵⁷ Some U.S. lower courts have commented that the *Wilko dictum* is ‘ungrammatical in structure’ and ‘unnecessary to the [Wilko] decision’ (see *I/S Stavborg v. Nat’l Metal Converters, Inc.*, 500 F. 2d 424, 430 n. 13, 2d Cir. 1974). Other U.S. courts have questioned whether the manifest disregard exception serves any useful purpose (see *Baravati v. Josephthal, Lyon & Ross*, 28 F. 3d 704, 706, 7th Cir. 1994, which highly criticised the *dictum* in *Wilko*). However, the Supreme Court’s more recent observations in *First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938, 1995 seem to have reinvigorated the doctrine, stating that: ‘(...) where [a] party has agreed to arbitrate, he or she, in effect, has relinquished much of that right’s practical value. The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances (...) parties bound by arbitrator’s decision not in manifest disregard of the law’.

²⁵⁸ See *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F. 3d 383 (2d Cir. 2003); G. Born, *International Commercial Arbitration*, cit., 2639 notes that out of 48 cases in the 2nd Circuit, the awards partially or entirely vacated were only 4.

²⁵⁹ See *Sidarma Società Italiana v. Holt Industries* 515 F. Supp. 1302. On manifest disregard of the law see N. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 *Brooklyn L. R.*, 1998, 471; S. L. Hayford, *Reigning in the ‘Manifest Disregard of the Law Standard’: the Key to Restoring Order to the Law of Vacatur*, 1998 *J. Disp. Resol.*, 1998, 117, 129; N. Rubins, *Manifest Disregard of the Law*

be well defined, explicit and clearly applicable so that the error is capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The concept of *manifest disregard of law*, which has been given a narrow interpretation,²⁶⁰ is an error beyond simple misconstruction or misapplication of the law. The appellant must show that the arbitrator knew and understood the law, but deliberately chose to misapply it to the appellant's detriment. The persistent validity of this ground has been recently put into question by the U.S. Supreme Court's decision in *Hall Street Assoc. LLC v. Mattel Inc.*,²⁶¹ which affirmed that the FAA's statutory grounds for *vacatur* of an award are exclusive, apparently ruling out the possibility for invoking additional (and non-statutory) grounds, which includes that of 'manifest disregard'.

When considering the arguments in favour of reviewing arbitral decisions in order to guard against (serious) mistakes of law, it is our view that the solution can hardly be the introduction of an appeal for every possible error of law which, if provided for as a default option (e.g. applicable *de jure*, unless the parties have agreed to opt of it), always implies a full revision of the merits of the arbitral decision, thus nullifying one of the basic principles of arbitration, finality. A two tier-system, in addition, with its inevitable side effect of lengthier and more expensive proceedings, might indirectly favour better resourced participants over smaller players, who can be compelled to give up litigation to save additional costs. The situation might be even worse if the appeal is subject to no restrictive conditions (as those provided for by English law) or is to be decided by judges who are not familiar with arbitration or do not belong to specialised sections of the judiciary dealing only (or almost exclusively) with arbitration matters. Finally, a second level of dispute settlement risks undermining the authority of the first (arbitral) level decision: '(...) if first-

and the Vacatur of Arbitral Awards in the United States, 12 *Am. Rev. Int'l Arb.* 363, 377 (2001).

²⁶⁰ See *Hall Street Associates L.L.C. v. Mattel Inc.* 128 S. Ct. 1396, 2008 and *Prime Therapeutics LLC v. Omnicare, Inc.* 555 F. Supp 2d 993, 999 (D. Minn. 2008). See also J. P. Beraudo, *Egregious Error of Law as Grounds for Setting Aside an Arbitral Award*, 2006, *J. Int'l Arb.* 23 (4), 351-361.

²⁶¹ 128 S. Ct. 1396 (U.S. Ct. 2008). For some commentaries on the decision see A. Samuel, *The U.S. Supreme Court on Federal Pre-Emption and Appeals on Questions of Law by Consent – A Case Note*, 25 *Arbitration International*, 2009, 455; O. Armas, T. Pieper, *Limitations Lurking in Parties' Ability to Craft Arbitration Agreements. The Scope of Judicial Review of Arbitral Awards under the U.S. Federal Arbitration Act*, *Revista del Club Espanol del Arbitraje*, 2/2008; T. Tyler, A. Parasharami, *Finality over Choice: Hall Street Associates, L.L.C. v. Mattel, Inc.*, *Arbitration International*, Vol. 25, Issue 7, 25 *J. Int'l Arb.*, 613 (2008).

level decisions were regularly appealed, they might very well end up devalued.²⁶² It is noteworthy that those few countries (like England), which contemplate a form of appeal (see Section 69 of the English Arbitration Act), are now facing a great debate about the usefulness of an appeal on points of law and are discussing whether eventually to repeal it or not.²⁶³ For all these reasons, a reasonable compromise, *de jure condendo*, between the need to protect parties from patent mistakes (and misconducts) committed by arbitrators and the need to preserve the autonomy of arbitration (and its finality), is neither the introduction of an appeal on the merits for all possible errors of law, nor the radical exclusion of every possible revision of awards on the merits. Rather, appeals must be limited to cases of errors of law which reach a certain level of seriousness, *e.g.*, when they amount to a manifest disregard of law.²⁶⁴ In this respect, courts should be prevented from upholding applications of setting aside an award on the basis of merely questionable, incorrect or simply divergent interpretations or applications of the law by the arbitrators or to set aside an award only because arbitrators committed some factual or legal errors, or even clearly misinterpreted contractual provisions. By referring the dispute to arbitration, in fact, the parties agreed to submit to the arbitrators' view of the facts and the meaning of the contract and their construction of the law, however questionable, ambiguous or even wrong the result might be. Complaints of manifest disregard of law should be upheld only in exceptional circumstances. Indeed, manifest, as recalled by the 11th Cir.,²⁶⁵ referencing to the definition from *Black's Law Dictionary* and the *American*

²⁶² C. J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, in *Trans. Disp. Man.*, Vol. 4, Issue 5, 2007, 21, who recalls the experience of the WTO system, where a statistical analysis shows that between 1995 and 2000, 77% of WTO panel reports were appealed, so that many panel decisions seem to be little more than interim pronouncements on the long way towards a final decision.

²⁶³ It has been underlined that there have been few successful appeals over the years and a minimal experience of awards being wholly overturned; that the Section increases the cost of commerce without generating any corresponding benefit; that it decreases the attractiveness of the England as a seat for arbitration; finally, that there is no evidence that the Section has either avoided injustice or has added significant weight to the development of English commercial law and to the promotion of clarity and certainty of the latter. For this analysis see R. Holmes, M. O'Reilly, *Appeals from Arbitral Awards: Should S. 69 be Repealed?* 2003, 69 *Arbitration* 1 at p. 1. But, *contra*, see H. Dundas, *Appeals on Questions of Law*, *cit.*

²⁶⁴ See, *contra*, S. Wilske, N. Mackay, *The Myth of the 'Manifest Disregard of the Law' Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?*, *ASA Bull.*, 2006, Vol. 24, N. 1, 216 ff., for whom: '(...) the U.S. Doctrine runs contrary to the recognised principles of international arbitration'.

²⁶⁵ *Montes v. Shearson Lehman Bros. Inc.*, 128, F. 3d, 1456.

Heritage Dictionary of the English Language, means: ‘(...) *evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, visible, unmistakable, indubitable, indisputable, evident and self-evident*’. Cases of manifest disregard of law might occur, for example: when - to quote a famous U.S. court decision - ‘(...) *some egregious impropriety on the part of the arbitrators is apparent*’ and ‘*no judge or group of judges could conceivably come to the same determinations*’;²⁶⁶ when the tribunal is aware of controlling legal authority, which is clear and not vague or ambiguous, and deliberately chooses to disregard it; when the tribunal applies a different law than the one chosen by the parties; when the tribunal decides *ex aequo et bono* a dispute which the parties had expressly agreed to be governed by a certain law;²⁶⁷ when the tribunal decides on the basis of certain rules of law a dispute which the parties had expressly agreed to be decided *ex aequo et bono* (provided that, in the latter case, the tribunal erroneously thought to be bound by the rules of law or intentionally refused to decide *ex aequo et bono*);²⁶⁸ and, when a tribunal declares a contract to be binding between the parties, but then it refuses to apply to them its contractual provisions and clauses and *vice versa*. The latter example can also be characterised as irrational, illogic or contradictory decision, or even as a breach of public policy. After all, the *manifest disregard of law* ground is closer to a public policy breach rather than a pure error of law.²⁶⁹ Of all

²⁶⁶ *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F. 3d, 383 (2d Cir. 2003).

²⁶⁷ In this sense, under Italian law, E. Zucconi Galli Fonseca, *Art. 829 c.p.c.*, in F. Carpi (a cura di), *Arbitrato*, cit., 617; P. Bernardini, *Il diritto dell'arbitrato*, Roma, 1998, 115; E. Marinucci, *L'impugnazione del lodo arbitrale*, cit., 269 ff.

²⁶⁸ However, courts and commentators have not always been consistent as to the consequences of the occurrence of those mistakes. See *Alexander v. Blue Cross of Calif.* 106 Cal. Rptr. 2d 431, 438 (Cal. App. 2001), for which: ‘(...) *even where an arbitration agreement requires an arbitrator to apply a particular law or body of law, the arbitrator's failure to apply such a law is not in excess of an arbitrator's powers*’. See also S. Berti & Schnyder, in S. Berti et al. (eds.), *International Arbitration in Switzerland*, cit., Art. 190, 67, for whom: ‘*no annulment of award where arbitrators decide based on equity, rather than applicable law*’. See also G. Born, *International Commercial Arbitration* cit., 2600, who notes that in both cases [i.e. when a tribunal which is granted *amiable compositeur* or *ex aequo et bono* authority and instead applies national law or where is not granted *amiable compositeur* authority and nonetheless renders an award not based on legal principles] that: ‘(...) *it is not that the arbitrators have made a choice-of-law error or a mistake in substantive legal analysis, but they have instead adopted a fundamentally different arbitral procedure than that agreed by the parties*’.

²⁶⁹ See, in this sense, G. Born, *International Commercial Arbitration*, cit., 2641, who observes: ‘(...) *the manifest disregard standard is akin to a form of public policy analysis*’; M. Hwang S.C., A. Lai, *Do Egregious Errors Amount to a Breach of Public Policy*, 71 *Arbitration* (2005), 1, 7, who argue that: ‘(...) *awards containing fundamental*

the diverging interpretations given to the notion of manifest disregard of law in the U.S. system, the one which seems better to fit this view is that adopted by a decision of the 5th Cir. (Court of Appeals 1999, *Willias v. Cigna Fin. Advisers Inc.*),²⁷⁰ which has eliminated the motivational requirement on the part of the tribunal (deeming no more necessary that the tribunal actually intended to ignore or disregard the pertinent law),²⁷¹ only requiring that the award result in significant injustice, taking into account all of the circumstances of the case.²⁷² The requirement of the significant injustice seems to strike the best balance between the need to respect the autonomy of arbitration (such that it is not rendered just a first step in a subsequent litigation procedure) and the need to protect arbitration's reputation by preventing the circulation of patently illegal, unlawful (and thus significantly unjust) awards domestically and internationally. Significant injustice should be deemed to occur, *in re ipsa*, in many of the examples reported above, and also to cover other patent unlawfulness and/or mistakes of law. In order to prevent possible abuses, that ground might be subject to additional conditions, such as a minimum monetary threshold under which it would not be available, as well as cost shifting or

and serious errors so egregious as to undermine the public's confidence in the arbitral system conflict with 'fundamental notions and principles of justice' and therefore fall within the public policy exception in both ML Art. 34 and NYC Art. V (2)(b)'. contra, M&C Corporation v. Erwin Behr GmbH & Co., K.G., 87 F. 3d, 844 (6th Cir. 1996) 851, n. 2 for which: 'whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award'.

²⁷⁰ 197 F. 3d, 752 (5th cir. 1999), 529 U.S. 1049 (2000).

²⁷¹ See, also, N. Rubins, *Manifest Disregard of the Law, cit.*, 363, 377, for whom the elimination of the scienter requirement and the concurrent imposition of the substantial injustice limitation should be welcome as logical, clear, and appropriately deferential.

²⁷² In the U.S.A., the most common interpretation of the notion of m.d.l. adopted by the majority of the federal circuits still requires two conditions: that the law is clear and unambiguous and that the tribunal intentionally refuses or declines to apply it (in this sense see *Bowen v. Amoco Pipeline Co.*, 254 F. 3d, 925, 932 (10th Cir. 2001); *Hoffman v. Cargill Inc.*, 236 F. 3d, 458, 462 (8th Cir. 2001); *Prudential-Bache Securities Inc., v. Tanner*, 72 F. 3d, 234, 240 (1st Cir. 1995)). Another interpretation has been adopted by the Court of Appeals of the 7th Cir. in *George Watts & Son., Inc. v. Tiffany and Co.* (248, F. 3d, 577 (7th Cir. 2001)), according to which two different conditions should be met: '(...) an arbitral order requiring the parties to violate the law (...) and an arbitral order that does not adhere to the legal principles specified by contract and hence unenforceable under the FAA par 10, 4'.

sanctions for unmeritorious challenges (e.g. those which are spurious or raised only with dilatory intent).²⁷³

Special consideration in the context of judicial review of awards is to be given to agreements to narrow or expand the scope of judicial review, which are still rather controversial.²⁷⁴

It is generally accepted that parties may to some extent narrow or even exclude (directly in their agreement or by incorporating certain arbitration rules),²⁷⁵ the grounds upon which an award may be set aside by national courts.²⁷⁶ Some legislations (such as Sweden,²⁷⁷ Switzerland,²⁷⁸ Belgium²⁷⁹ and now France, with the new Art. 1522)²⁸⁰ enforce such agreements,²⁸¹ some others (like Italy,²⁸² Portugal²⁸³ and Egypt²⁸⁴) do not. Court decisions in Germany²⁸⁵ and Canada²⁸⁶ opted for the negative

²⁷³ See *B. L. Harbert International LLC v. Hercules Steel Co.*, Court of Appeal, 11th Cir. 2006. For further reference see also J. P. Duffy, *Opposing Confirmation of International Arbitration Award: Is It Worth The Sanctions?*, 17 *Am. Rev. Int'l Arb.*, 2006, 143.

²⁷⁴ On this issue see S. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitral Awards* 63 *Alb. L. Rev.*, 1999, 241-248-53. On the issue of form and interpretation of agreements expanding judicial review or, on the contrary, containing waiver of it see G. Born, *International Commercial Arbitration*, cit., 2666 ff.

²⁷⁵ See, for example, Art. 26.9 LCIA Rules, according to which: '(...) the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made'. See also Art. 27 (1) ICDR Rules.

²⁷⁶ See R. D. Fisher & R. S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 *W. M. Mitchell Rev.*, 1996, 941, 973.

²⁷⁷ See Lag om Skiljeman, s. 51 only in commercial cases.

²⁷⁸ See Art. 192 (1) of the Swiss Law on Private International Law.

²⁷⁹ See Art. 1717 (4) of the judicial code.

²⁸⁰ According to which "the parties may, by specific agreement, waive at any time their right to challenge the award".

²⁸¹ See *infra* U.S. case law.

²⁸² See Art. 829 (1) of the Italian Code of Civil Procedure, for which an application for setting aside an award is always available: '(...) notwithstanding any waiver'.

²⁸³ See Art. 28 (1) of the Portuguese Law on Voluntary Arbitration, which states that: '(...) the right to apply from setting aside of the arbitral award may not be excluded'.

²⁸⁴ See Art. 54 (1) of the Egyptian Arbitration Law, which provides that: '(...) the admissibility of the action for annulment of the arbitral award shall be prevented by the applicant's renunciation of its right to request the annulment of the award prior to the making of the award'.

²⁸⁵ The German BGH, in the decision 26 September 1985 (1986 NJW 1436), has stated that a complete waiver of judicial review of awards is not valid. Some commentators deem that a partial waiver (e.g. with respect to specific grounds of annulment, as long as these grounds do not protect public interests) is admissible. In support of this view see Geimer, in R. Zoeller (ed.), *Zivilprozessordnung*, Art. 1059, 80-82 (26th ed. 2007); A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, *Zivilprozessordnung*, Art. 1059, 3 (66th ed. 2008); K. H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* Ch. 24, 53 (7th ed. 2005).

solution.²⁸⁷ Section 69 (1) of the English Arbitration Act, on the contrary, permits exclusion clauses, by which parties waive their rights to judicial review of the substance of the arbitral award.²⁸⁸ In Belgium the legislation before 1998 abolished any rights to apply to the Belgian courts for annulment of awards made between non-Belgian parties.²⁸⁹ The 1998 amendment restored the right to seek annulment of awards made in Belgium, but left the parties (when none of them is either a natural person with a Belgian citizenship or a resident in Belgium or a legal person having its main establishment or having a branch there) the freedom to agree, through an express declaration in the arbitration agreement or through a later agreement, to exclude or limit annulment applications.²⁹⁰ Even in the absence of any incorporation of arbitration rules, some legal systems (such as Switzerland) recognise the validity of exclusion agreements, whereby the parties restrict judicial review or eliminate it altogether.²⁹¹ In other

²⁸⁶ See *Noble China Inc. v. Lei* 1998 O.T.C. Lexis 2175, 38-51 (Ontario Court of Justice), for which parties may not validly exclude annulment application under Article 34; see also *Amos Inv. Ltd v. Minou Enterp. Ltd*, 2008 B.C.S.C. 332 (British Columbia S. Ct. 2008) for which: '(...) it is clear (...) that an arbitration agreement cannot waive judicial review such as is contemplated under s. 30 of the British Columbia Commercial Arbitration Act'.

²⁸⁷ Before the enactment of the new law on arbitration (*Decret* n. 2011-48, 13 January 2011), also court decisions in France were against these agreements. See Court of Appeal of Paris, 14 November 2004, 2005 *Rev. Arb.*, 751, for which waiver of annulment rights: '(...) cannot deprive the parties not only of bringing annulment proceedings against the award, which is a matter of public policy, but also the corresponding right to invoke the general legal rights of the French New Code of Civil Procedure to seek to stop the provisional enforcement as has been ordered in this case'. For *Fouchard Gaillard Goldman on International Commercial Arbitration*, *cit.*, 1594 (1999), an agreement excluding annulment was void under French law.

²⁸⁸ However, English law does not permit broader waivers of the right to set aside an award for either jurisdictional objections or serious irregularity affecting the tribunal or the proceedings: see Art. 68, Art. 4 (1), Schedule 1. R. Merkin, *Arbitration in London*, 20.40 (2004 & update 2007) observes that: '(...) the Arbitration Act 1996 does not permit the parties to agree in advance of the occurrence of serious procedural irregularity that there is no right to apply to the court in the event of any irregularity'.

²⁸⁹ Belgian Judicial Code, Art. 1717 (4).

²⁹⁰ For an overview of the Belgian legislation see A. Vandereist, *Increasing the Appeal of Belgium as An International Arbitration Forum? – The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards*, 3 (2) *J. Int'l Arb.*, 1986, 77 and, after the 1998 amendment, B. Hanotiau & G. Block, *The Law of 19 May 1998 Amending Belgian Arbitration Legislation*, 15 *Arb. Int'l*, 1999, 99.

²⁹¹ See Art. 192 PILA, which allows waivers of all judicial review grounds where all parties are non-Swiss. In the relevant part, the provision states the possibility for non-Swiss parties to: '(...) waive fully the action for annulment or (...) limit it to one or several of the ground listed in Art. 190 (2) '.

jurisdictions, some legislative provisions either expressly provide that parties (usually foreign, *i.e.* non – resident) may waive or limit the grounds for annulling an international arbitral award (as is the case in Sweden,²⁹² Tunisia²⁹³ and Turkey²⁹⁴), or the case law has declared that waiver admissible, even in the absence of any express provision. In the U.S.A., while few courts have concluded that agreements waiving or restricting the parties' rights to seek annulment of an award are unenforceable (including with regard to actions to vacate on manifest disregard grounds),²⁹⁵ others have declared that parties are free to waive judicial review of awards in an action to vacate, provided that the waiver is clear and explicit.²⁹⁶

Our position on agreements to narrow (or even to exclude) judicial review is rather critical. Each legal system has to guarantee basic principles of fair trial, which cannot be easily written out by agreement of the parties. At the end of the day, the retention of a minimum supervisory jurisdiction by the courts may arguably be a means of ensuring that the arbitral process does not get out of hand.²⁹⁷ Nobody denies that party autonomy is the sovereign of the arbitral procedure; however, that is true only to the extent (and in so far as) it is allowed and recognised by the law governing arbitration. Arbitration, in fact, is not a phenomenon outside or detached from the law. Rather, it is a mechanism which is given by the legislator a number of advantages (such as flexibility, informality, confidentiality, the power of the parties to appoint their own arbitrators..), provided that it

²⁹² See Art. 51 of the Swedish Arbitration Act, according to which: '*[w]here none of the parties is domiciled or has its place of business in Sweden, such parties may in commercial relationships through an express agreement exclude or limit the application of the grounds for setting aside an award*'.

²⁹³ Art. 78 (6) of the Tunisian Arbitration Act, according to which: '*The parties who have neither domicile, principal residence, nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award*'.

²⁹⁴ See also Art. 15 (A)(2) of the Turkish International Arbitration Law.

²⁹⁵ See *Hoefl v. MVL Group, Inc.*, 343 F. 3d 57, 60, 66 (2d Cir. 2003), for which an agreement that an award: '*shall not be subject to any type of review or appeal whatsoever*' does not waive the right to seek *vacatur* on manifest disregard grounds; '*(...) parties seeking to enforce arbitration awards through federal court confirmation judgments may not divest the courts of their statutory and common law authority to review both the substance of the awards and the arbitral process for compliance with Art. 10 (a) and the manifest disregard standard*'. For further reference see G. Born, *International Commercial Arbitration, cit.*, 2663 ff.

²⁹⁶ See *Mactec Inc v. Gorelick* 427 F. 3d 821, 830 (10th Cir. 2005). For further reference see G. Born, *International Commercial Arbitration, cit.*, 2663 ff.

²⁹⁷ As correctly pointed out by a commentator: '*(...) the preparatory materials of the Model Law would surely discuss the possibility of exclusion agreements, had the drafters contemplated it. And the drafters did not contemplate that possibility, because in the system of the Model Law the imperative procedural provisions reflect procedural public policy*': G. Petrochilos, *Procedural Law in International Arbitration, cit.*, 86.

respects some fundamental principles (equality of the parties, *audiatur et altera pars*) and follows some basic procedural rules (application for enforcement of interim measures only to the state courts, applications for setting aside the award only to the competent court of the seat of arbitration and so on). These principles and rules are essential for this alternative mechanism of dispute resolution to be technically qualified as arbitration, and, more important, for its final outcome, the award, to be given the same final and binding effect of a judicial decision. A procedure which is conducted in disregard of those fundamental rules and principles cannot be qualified as an arbitration, and a decision which does not comply with the requirements provided for by the local law (including its being subject to scrutiny under a number of procedural grounds) cannot be qualified as an award. What is at stake, in the end, is the safeguard of the fundamental rights of the parties, as well as the reputation of arbitration. If the parties do not intend to submit to (and respect) those principles and rules, they are free to do so, by choosing another ADR mechanism (such as mediation, conciliation); however, they cannot shape the mechanism to such an extent that it completely changes its nature. As expressly stated by one commentator: ‘*No one having the power to make legally binding decisions in this country should be altogether outside and immune from this system*’.²⁹⁸ This should be true at least with respect to those grounds of annulment *lato sensu* related to public policy.²⁹⁹

As to agreements to expand the scope of judicial review of arbitral awards (in order to include errors of law or, less frequently, errors of fact), they also appear (if not even more) controversial.³⁰⁰ The rationale behind

²⁹⁸ See Sir M. Kerr, *Arbitration and the Courts: the UNCITRAL Model Law*, cit. 34, 15; see also F. A. Mann, *Private Arbitration and Public Policy*, cit., 257; W. Craig, *Uses and Abuses of Appeal from Awards*, 4 *Arb. Int'l*, 1988, 174, 198-202. *Contra* G. Born, *International Commercial Arbitration*, cit., 2663, for whom: ‘(...) where sophisticated companies freely decide that they wish to forego any review in annulment proceedings, it is difficult to see why that agreement should not be given effect, save in the most extraordinary circumstances (...)’.

²⁹⁹ See J. B. Hamlin, *Contractual Alteration of the Scope of Judicial Review*, *J. Int'l Arb.*, 1998, at 47-55, who observes: ‘Every case confronting the issue has held that the F.A.A. grounds for vacating an award may be invoked and applied notwithstanding anything to the contrary in the parties’ agreement’.

³⁰⁰ See, on this issue, L. Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards: Bargaining for the Best of Both Worlds*, 68, *U. Cin. L. R.*, 2000, 529, 530; C. R. Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16 (3) *Mealey’s Int'l Arb. Rep.*, 2001, 27; L. Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 *Am. Rev. Int'l Arb.*, 1999 215; V. Holstein, *Co-opting the Judicial Review of Arbitral Awards Through Contract*, 12 *World Arb. & Med. Rep.*, 2001, 276; H. Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 *Am. Rev. Int'l Arb.*

the expansion of the grounds for judicial review is usually a concern of the parties about the fallibility of the arbitrators and the desire for additional procedural rights and broader scope to correct mistaken awards. In the U.S.A. (the jurisdiction which has the most extensive body of authorities on this issue), courts have adopted a contradictory approach. The Tenth Circuit has generally ruled out the possibility for the parties to expand contractually the scope of judicial review, stating that these agreements are inconsistent with the finality inherent in arbitration and give private parties the power to regulate the actions of public bodies (e.g. the courts) in their activity to review awards.³⁰¹ The Seventh³⁰² and Eighth Circuits have also ruled in the same vein.³⁰³ In contrast, the Third,³⁰⁴ the Fifth³⁰⁵ and the Ninth³⁰⁶ Circuits have upheld the validity and enforceability of agreements aimed at expanding the grounds for judicial review, emphasising the

147 (1997); S. J. Ware, 'Opt-In' for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act, 8 *Am. Rev. Int'l Arb.*, 1997, 263.

³⁰¹ See *Bowen v. Amoco Py-plenco*, 254 F. 3d, 925, 936 (10th Cir. 2001): "(...) no authority clearly allows private parties to determine how federal courts review arbitration awards" and that permitting such review would destroy the fundamental character of arbitration. See also *La Pine II - e.g. Kyocera Corp. v. Prudential Bache Trade Servs.*, 299 F. 3d 769 (9th Cir. 2002) - which vacated *La Pine Technology Corporation v. Kyocera Corporation*, 130 F. 3d 884 (9th Cir. 1997), for which: '(...) Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is accordingly legally unenforceable'.

³⁰² See *Chicago Typographical Union v. Chicago Sun - Times, Inc.*, 935 F. 2d 1501, 1505 (7th Cir. 1991), which stated that parties cannot contract for judicial review of arbitral awards because '(...) federal jurisdiction cannot be created by contract', but recognised that parties 'can contract for an appellate arbitration panel to review the arbitrator's award'.

³⁰³ See *UHC Management Co. Inc v. Computer Sciences Corp.* 148 F. 3d 992, 8th Cir. 1998, where the court expressed doubt as to whether the parties could ever *expand* the courts' scope of review by agreement.

³⁰⁴ See *Roadway Package Sys., Inc. v. Kayser*, 2001, WL 694508 (3d Cir. 2001), which affirmed that the parties may privately contract for grounds of judicial review other than those mandated by the F.A.A.; however, they must clearly express that choice in the agreement to arbitrate.

³⁰⁵ See *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F. 3d 993, 996-97 (5th Cir. 1995), which upheld the contractual expansion of judicial review for errors of law, primarily on the basis that arbitration is a creature of contract and that courts must attempt to honour the parties' intentions as much as possible. See also *Harris v. Parker College of Chiopratric*, 286 F. 3d 790 (5th Cir. 2002); *Hughes Training, Inc. v. MCI Telecommunications Corp.*, 64 F. 3d 993 (5th Cir. 1995).

³⁰⁶ See *La Pine Technology Corporation v. Kyocera Corporation*, 130 F3d 884 (9th Cir 1997), in which the Court of Appeals upheld an agreement whereby the parties ' (...) contracted for heightened judicial scrutiny [for errors of fact or law] of the arbitrators' award'.

contractual freedom reflected in the FAA.³⁰⁷ The question has been recently decided in the negative in *Hall Street Associates L.L.C. v. Mattell Inc.* (25 March 2008),³⁰⁸ where the U.S. Supreme Court held that the F.A.A.'s statutory grounds for *vacatur* were exclusive and that the '(...) *statutory grounds for prompt vacatur and modification may [not] be supplemented by contract*', adding that: '(...) *Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende(r) informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process*'. In most civil law countries, such agreements are considered invalid. French court decisions, for example, have stated that the New York Convention and the Civil code absolutely forbid parties from entering into contractual agreements intended to intrude into the area of judicial review.³⁰⁹

While some arguments indeed exist in favour of admitting those agreements,³¹⁰ it is our view that more reasons stand against their admissibility. First, it is not easy to admit that private litigants are permitted contractually to define the appellate review functions of a national court. Second, these agreements risk affecting the function of arbitration as a speedy and cost-efficient alternative to litigation, increasing the likelihood of lengthy and expensive challenges to awards (especially in particularly contentious legal environments), thus reducing to nothing (in terms of time and cost efficiency) the distinction between arbitration and litigation. Third, arbitrators would be less willing to craft creative remedies, for fear of being overturned on the merits and they would be required to write heavily reasoned opinions with conclusions of law and findings of fact, further sacrificing the simplicity, expediency and cost effectiveness of arbitration. Fourth, it would be difficult or impossible, for a court, to set a standard of review and for a uniform case law to develop. Finally, those agreements fundamentally change the nature of the arbitral process, and create new and

³⁰⁷ See also *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Upp. 240 (S.D.N.Y. 1984).

³⁰⁸ 128 S. Ct. 1396 (U.S. Ct. Ct. 2008).

³⁰⁹ See Paris Court of Appeal, Dec. 12, 1989, *Société Binat Maghreb v. Soc. Screg Routes*, *Rev. Arb.*, 1990, 863; *Cour de Cassation*, 6 April 1994, *Rev. Arb.*, 1995, 263; Paris Court of Appeal, 23 May 1991, *Rev. Arb.*, 1991, 661. On the French position see also L. Franc, *Contractual Modification of Judicial Review*, *cit.* 218-219.

³¹⁰ See C. R. Drahozal, *Default Rule Theory and International Arbitration Law (with Comments on Expanded Review and Ex Parte Interim Relief)*, *Trans. Disp. Man.*, 2005, Vol. 2, issue 5, 3; G. Born *International Commercial Arbitration cit.*, 2669, who states that: '(...) *it is also difficult to see why parties should not be permitted to contract for 'ordinary' judicial review, of the sort that would apply if the arbitral award was a first instance judgment. This accord with principles of party autonomy, and does not detract from (but enhances) the parties' 'judicial' protections*'.

different obligations for the courts (by requiring review on the merits). A number of practical problems also arise in the context of enforcing an award internationally in the presence of those agreements. If, for example, a court refused to review an award in the expanded manner requested by the parties, it might feel entitled to declare the entire arbitration agreement invalid, since it might interpret the conduct of the parties as if they had only agreed to arbitrate because of the possibility of expanded judicial review: if that review is denied, there is no longer any valid consent (for an agreement) to arbitrate. In turn, the party in whose favour the award was made, might be refused recognition and enforcement of the award in another jurisdiction, on the basis of Art. V(1)(a) of the New York Convention, if the law of the seat of arbitration forbids (or is not yet settled as to the admissibility of) expanded agreements. Moreover, if a court reviews the award on the merits on the basis of the expanded agreement and vacates it, the losing party on the appeal, in whose favour the arbitration award was granted, might successfully enforce the award abroad, alleging that the award was not vacated on one of the explicit grounds provided for by the law of the seat.

In conclusion, while basic principles of arbitration, such as party autonomy and freedom of contract, seem somehow in favour of permitting, rather than refusing, expanded or narrowed judicial review, if the parties want it, public policy concerns, along with the uncertainty in most jurisdictions as to whether courts will agree to provide such review and, finally, the uncertain reception, internationally, of awards which have been reviewed on the law pursuant to an agreement of the parties to this purpose, make expanded and narrowed judicial review currently not a safe choice for parties to an international arbitration (at least from a practical point of view).

Response to the Report

*The Rt. Hon. The Lord Phillips of Worth Matravers, K.G., P.C.**

The first thing that I would like to say is what a great pleasure it is to have been invited to Mauritius to take part in this conference. A great pleasure not just because Mauritius is such a beautiful island, not just because it is extremely cold in England at the moment, not just because Mauritian hospitality is extraordinarily generous, not just because it gives me the chance to enjoy the company of friends whom I have made in Mauritius and to make new ones, but because the reason for this conference is exciting – the launch of a new centre of international arbitration on the edge of Africa. This is a venture in which I have a present stake as President of the Supreme Court of the United Kingdom, which provides the members of Her Majesty’s Privy Council to which appeals lie under the Act – and when I speak of the Act I shall be speaking of the Mauritian International Arbitration Act unless I state to the contrary. But the possibility must be that it is a venture in which I also have a future stake, because I am only two years away from the judicial retirement age when it is not impossible that I may turn my hand to arbitrating.

My brief this afternoon is to make the first response to Albert Henke’s Report. That I can do in a single phrase: “*C’est magnifique*”. He has produced a comprehensive survey on the implications that the new Mauritian Arbitration Act has for the role of the Court. He presented it to me yesterday. It is a work of very considerable scholarship, 54 pages long with 149 footnotes. I have not, alas, yet had time to read it all, but I have read enough to appreciate its quality. And in the time allotted to him, Albert has been able to do no more than to give a trailer to a work that will deservedly receive study at leisure and in depth. How can I in 15 minutes respond to such a report? What I have decided to do is to provide a little coda to it; to give you the viewpoint of a judge and, moreover, a judge who may well have to consider appeals under the Act.

At the outset I think that I ought to make a confession. Section 3 subsection 8 of the Act provides that “in matters governed by this Act, no Court shall intervene except where so provided in this Act”. That echoes precisely the wording of Article 5 of the UNCITRAL Model Law, and Section 1(c) of the English Arbitration Act 1996 is to almost identical effect. In short, the Act says “court keep your nose out unless invited in”.

* President of The Supreme Court of the United Kingdom.

And the invitation that the Act gives to the court to get involved is very limited. In particular, there is no general provision entitling the court to rule on points of law raised in an arbitration. There is a possibility of a point of law going to the court, but only in very circumscribed circumstances. The position is quite similar under the English Act.

During my early days at the Bar, appeals on points of law lay from arbitrations to the High Court, and there were lots of them. My confession is that I was rather in favour of this. Quite a lot of appeals went all the way up to the House of Lords. And appeals such as these were the source of much of the development of our common law. I believe that the fact that appeals on points of law are now so rare poses a considerable impediment to developments of commercial law that are needed to meet the changing conditions of the 21st century. The instruction to the court to keep its nose out of arbitrations carries quite a heavy penalty for our common law.

There was, of course, another reason why I was in favour of appeals from arbitrators on points of law. These produced plenty of lucrative work for the lawyers. Let me give you one example of a case which produced a lot of work for the lawyers but which also established a very important point of law. It was a case called *The Tojo Maru*¹. How many have heard of that case? It originated in a very unlikely source for an appeal on a point of law – a Lloyds salvage arbitration.

The object of such arbitrations was to determine how much professional salvors should be paid for salvaging a vessel in distress. On this occasion the vessel in distress was a Japanese tanker, on her way in ballast to pick up a cargo. She had been in a collision which had opened a huge gash in her side by way of the engine room. A firm of Dutch professional salvors, Bureau Wijsmuller, had sent a salvage tug which had done a marvellous job. They had manufactured a steel patch, to be bolted over the hole under water by a diver using an appliance called a “cox bolt gun”. The job was almost complete and the crew had a party. The diver, called Vis, did not drink, and he was first up the next morning. He thought he would give his shipmates a surprise by finishing the job of bolting on the patch. He did give them a surprise. He fired a bolt in the wrong place, into a tank that was full of gas, and blew up the ship. In the Lloyds arbitration, the Japanese ship-owners counterclaimed for damages for negligence. The salvors argued that salvors were not liable in law for negligence. The arbitrator agreed, but in those days you could appeal on a point of law. The appeal went to the Admiralty Court, then to the Court of Appeal and finally to the House of Lords, where their Lordships ruled that professional salvors

¹ [1972] AC 242 (HL)

owed a duty of care in negligence. It seems to me a very good thing that this vital issue of the law of salvage was authoritatively determined by the courts. I should perhaps add that I was on the winning side.

What is the current position in relation to appeals to a court on a point of law? The UNCITRAL Model Law makes no provision for them at all. The English Act has some rather complicated provisions. Unless the parties to an arbitration have otherwise agreed, the court can, on the application of one of the parties, determine a question of law arising in the course of arbitration proceedings provided (1) that all the other parties agree, or (2) that the arbitral tribunal agrees and the determination of the problem is likely to save a lot of costs and the application is made without delay (Section 45). None of this happens very often. Reference to an English Court of a point of law arising in the course of an arbitration is almost unknown.

In England, provided the parties have not agreed to the contrary, there can also be an appeal from an arbitral award on a point of law if all the parties agree or the court gives permission, but the court can only give permission if, *inter alia*, it thinks that the decision of the tribunal was obviously wrong, or, if the question is one of general public importance, and the decision of the tribunal is at least open to serious doubt (Section 69). Once again it is unusual for a decision to tick all the right boxes so as to give rise to an appeal to the court on a point of law after the award has been published.

The provisions of the Mauritian Act are a little different. There can be no appeal from arbitrators on a point of law unless the parties opt in to the provisions of Schedule 1 of the Act when they make their arbitration agreement. Schedule 1 gives the Supreme Court the jurisdiction to determine any question of Mauritian law that arises in the course of an arbitration provided (1) that the tribunal, or all the parties, agree and (2) that determining the point might result in a substantial saving in cost and (3) that determining the question might, having regard to all the circumstances, substantially affect the rights of one or more of the parties. Schedule 1 also gives the Supreme Court power to entertain an appeal on any question of Mauritian law arising out of an award if the Court thinks that determination of the question could substantially affect the rights of one or more of the parties.

Let me emphasise that these powers of the Court will only exist where the parties to the arbitration agreed to opt in to the provisions of Schedule 1. It will be interesting to see how often the parties do so. In my experience parties usually agree to keep the court out of their arbitration until one of them loses, at which point the losing party starts desperately

looking round for some way of setting the award aside. So I do not anticipate that the work load of the Privy Council is going to be put under pressure by a large volume of appeals on points of law from Mauritian arbitrations.

Before looking at the particular areas where the Mauritian Supreme Court and, on appeal, the Privy Council are more likely to be involved, there are one or two general points I would like to make. The task of drafting of the Mauritian Arbitration Act has been assisted by three barristers, all members of Essex Court Chambers in London (Salim Moollan, Toby Landau Q.C. and Ricky Diwan). They also prepared and published some helpful *travaux préparatoires*. These comment:

“The act provides that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court with a direct and automatic right of appeal to the Privy Council. This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.”

I do not cavil with the “eminently qualified jurists” but I question whether any one familiar with our two systems would think that an application to a panel of three judges on the Supreme Court followed by an appeal to the Privy Council was the epitome of expedition. I have been talking to your Chief Justice and agreed that we must co-operate in putting in place procedures which will ensure that any application that is made to the Court in relation to an arbitration receives the fast track that is essential if there is to be guaranteed the business efficacy that should make arbitration so attractive.

You may, none the less, be relieved to learn that it is not every application to the Supreme Court that will carry an automatic right of appeal to the Privy Council. Section 42 of the Act provides that there will be a right of appeal to the Privy Council against any *final* decision of the Supreme Court under the Act. That raises a nice conundrum as to what is meant by a “final decision”. I do not propose to go into that now, but plainly decisions in relation to interim measures will not be final decisions, so those will not be coming to the Privy Council.

The other general point that I want to make relates to the role of the Permanent Court of Arbitration. The Act breaks new ground in conferring on the Permanent Court of Arbitration, which is based in The Hague, all decision making in relation to the appointment of arbitrators and a number of other administrative functions.

Let me now turn briefly to the circumstances in which the Act provides for intervention by the Supreme Court. The more significant areas where the Supreme Court of Mauritius is likely to be involved would seem to be:

- Referring to arbitration an action which is started in court in breach of an arbitration agreement. This the Supreme Court must do unless a party shows on a *prima facie* basis that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed (Section 5(2)).
- Where there is such a probability, determining whether the arbitration is in fact null and void, inoperative or incapable of being performed (Section 5(3)).
- Resolving a challenge to the jurisdiction of an arbitral tribunal after the tribunal itself has given a ruling on the matter (Section 20 (7)).
- Responding to applications for the issue of interim measures (Section 23).
- Responding to applications to set aside an award (Section 39).

Some of these – referring to arbitration an action started in breach of an arbitration agreement and issuing interim measures amount to ancillary action taken to support the efficacy of the arbitration process. But you cannot escape the fact that, although arbitrators are given the power to rule on their own competence, the court is given a final, overriding power, to set aside an award on a number of grounds, some of them potentially far reaching. These include invalidity of the arbitration agreement under the law agreed by the parties, an award that goes beyond the scope of the arbitration agreement, an award contrary to public policy, an award induced or affected by fraud or corruption, or where substantial prejudice has been caused to a party by a breach of the rules of natural justice.

As a judge I applaud these restrictions on the autonomy of arbitration. They are examples of the preservation of the most fundamental duty of any court - the upholding of the rule of law. And so, if international arbitration takes off in Mauritius, as I hope that it will, I believe that these residual powers of the Supreme Court, backed by the right of appeal to the Privy Council, will provide reassurance to the international clientele that

will make them more, not less, happy with their chosen jurisdiction. And if that be the case, it will provide some compensation for the increase in the work load that will be likely to fall on me and my colleagues in the Privy Council.

Response to the Report: Le juge dans le droit français de l'arbitrage international

*Jean-Pierre Ancel**

L'arbitrage idéal est celui qui ne rencontre jamais le juge, puisque l'institution elle-même a pour objet principal d'éviter le juge. Cependant, aucun système d'arbitrage ne peut se passer de la justice étatique, à la condition toutefois que la fonction du juge étatique ne soit jamais de juger – cette fonction étant strictement réservée à l'arbitre.

Mon propos sera de présenter le système français de l'arbitrage international, en ce qui concerne les rapports entre le juge et l'arbitrage. Le système français repose sur l'idée que le juge ne doit jamais remplacer l'arbitre dans sa fonction de jugement, et qu'il ne peut intervenir dans l'arbitrage que de manière accessoire et ponctuelle. Et la jurisprudence française se montre ici particulièrement rigoureuse, spécialement dans l'application qu'elle fait de l'effet négatif du principe *compétence-compétence*.

Il faut donc le redire – pour la quatrième fois, je crois, depuis ce matin – : en présence d'une convention d'arbitrage, le juge étatique est incompétent. La règle est absolue : lorsqu'un tribunal est saisi d'un litige pour lequel il existe une convention d'arbitrage, le juge étatique doit se déclarer incompétent et renvoyer à l'arbitrage, sous réserve d'une seule exception : le cas où la convention d'arbitrage est *manifestement nulle ou inapplicable*. C'est le seul cas dans lequel le juge a le pouvoir d'apprécier l'existence et la validité de la convention d'arbitrage : lorsqu'elle est, *prima facie*, nulle ou inapplicable, sans que ce caractère souffre la moindre discussion ; la convention doit être, à l'évidence, nulle ou inapplicable.¹ Hors ce cas précis, le principe *compétence-compétence* s'applique : c'est à l'arbitre qu'il appartient, en priorité, de statuer sur sa propre compétence, c'est-à-dire sur la contestation relative à la convention d'arbitrage. Il s'agit là – comme l'a dit Emmanuel Gaillard – non d'une question théorique, mais

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¹ Exemples : nullité manifeste, celle d'une clause d'arbitrage en matière de divorce, ou destinée à organiser une corruption. Inapplicabilité manifeste de la clause d'arbitrage stipulée dans un contrat à un autre contrat, conclu entre les mêmes parties, mais contenant une clause attributive de juridiction à un tribunal étatique.

d'une question de pratique, favorable à l'exécution de la convention d'arbitrage.

L'on peut en conclure qu'il n'existe pas, en droit français de l'arbitrage, d'action – préalable à la procédure arbitrale – devant le juge pour contester la convention d'arbitrage. Le système ainsi mis au point apparaît très proche des dispositions de la loi mauricienne du 25 novembre 2008, selon lesquelles le juge saisi d'un litige faisant l'objet d'une convention d'arbitrage doit renvoyer les parties devant l'arbitre, sauf si la partie adverse « *démontre prima facie qu'il existe une très forte probabilité que ladite convention soit caduque, inopérante ou non susceptible d'être exécutée* ». La proximité avec le droit français a été opportunément soulignée.² Le juge ne doit donc jamais remplacer l'arbitre dans sa fonction de juge. En revanche, il peut être appelé à intervenir ponctuellement dans l'arbitrage, mais seulement, à la demande des parties ou des arbitres, soit pour apporter son assistance à l'arbitrage, soit pour contrôler la sentence arbitrale au moyen du recours en annulation.³

Le juge intervient donc selon deux modalités distinctes :

- I. Mission d'assistance et de coopération à l'arbitrage
- II. Mission de contrôle de la sentence arbitrale

I. MISSION D'ASSISTANCE ET DE COOPÉRATION À L'ARBITRAGE

Ce juge est appelé « juge d'appui »,⁴ car il intervient pour renforcer l'arbitrage, le mettre en place, le consolider, ou prêter assistance aux arbitres, en cas de difficulté.

Ainsi, ce juge va-t-il pouvoir :

- Aider à la constitution du tribunal arbitral, en procédant à des nominations d'arbitres à la place de la partie défaillante
- Statuer sur les demandes de récusation d'arbitres
- Proroger, en cas de besoin, le délai d'arbitrage

² V. Salim A. H. Moollan, « *Brève introduction à la nouvelle loi mauricienne sur l'arbitrage international* », Rev. Arb. 2009, p. 933, spécialement p. 937.

³ Nous avons volontairement laissé de côté l'intervention du juge étatique pour accorder l'exequatur de la sentence arbitrale, intervention de grande importance pratique, certes, mais qui ne pose pas de questions juridiques majeures.

⁴ Qui pourrait être traduit par « support judge ».

Le juge compétent est le président du Tribunal de grande instance de Paris, spécifiquement désigné par le code, afin de concentrer le contentieux de l'arbitrage international à Paris, juridiction considérée comme particulièrement adaptée pour répondre aux exigences de l'arbitrage international. Il faut noter ici une convergence du droit français avec la récente loi mauricienne sur l'arbitrage international. L'objectif est de désigner un « organisme neutre, réputé et expérimenté »⁵ de nature à apporter toutes garanties aux utilisateurs internationaux. C'est ainsi que la loi mauricienne du 25 novembre 2008 a, sur ce point, adopté une solution radicale et novatrice, en confiant la fonction de juge d'appui à la Cour Permanente d'Arbitrage de La Haye – du moins pour tout ce qui a trait aux nomination et récusation d'arbitres.

Le recours au juge peut également se montrer indispensable pour que soit ordonnées des mesures provisoires ou conservatoires, lorsque l'arbitre n'est pas en mesure de les prendre. Soit, il n'en a pas reçu le pouvoir des parties ou du règlement d'arbitrage, soit il n'est pas encore saisi, et une situation d'urgence se présente. Le juge est alors le recours naturel. De très longue date, la jurisprudence française a jugé que l'existence d'une convention d'arbitrage ne faisait pas obstacle à la saisine du juge étatique pour prendre de telles mesures, à la seule condition qu'il y ait *urgence*. Le juge compétent ici est le *juge des référés*⁶ – juge de l'urgence, qui prend des décisions provisoires, sans aborder le fond du litige.

Ainsi, ce juge pourra ordonner une mesure d'instruction, prendre une décision commandée par l'urgence (pour la sauvegarde d'une créance menacée, ou pour ordonner la cessation de travaux, ou d'actes de contrefaçon), ou ordonner des saisies conservatoires. Il a même le pouvoir de condamner le débiteur au paiement d'une somme à titre de *provision*, lorsque la créance ne paraît « pas sérieusement contestable ». Ce dernier pouvoir pourrait être dangereux pour l'arbitrage, et rendre quasiment inutile la procédure arbitrale, dans la mesure où le créancier aurait ainsi obtenu une satisfaction qui lui paraîtrait suffisante. Mais la pratique démontre que les juges font ici preuve de prudence, afin de sauvegarder le pouvoir de l'arbitre.

II. MISSION DE CONTRÔLE DE LA SENTENCE ARBITRALE

La seconde modalité d'intervention du juge dans l'arbitrage est l'exercice de son pouvoir de contrôle de la régularité internationale des sentences par

⁵ Expression employée par Salim A. H. Moollan, dans l'article précité.

⁶ « judge in chambers »

l'usage du recours en annulation pour les sentences internationales rendues en France, ou du recours contre la décision de reconnaissance et d'exécution en France pour les sentences rendues à l'étranger. Ici encore, il faut constater une certaine convergence avec le droit mauricien, puisque la loi mauricienne du 25 novembre 2008 (article 39) reprend le concept de la Loi-type du CNUDCI : le recours en annulation comme seul recours contre la sentence (article 34 : « La demande d'annulation comme recours exclusif contre la sentence arbitrale »).

Le recours ne tend donc pas à faire juger de nouveau le litige par le juge étatique, mais à soumettre la sentence à un contrôle tendant à vérifier que les règles essentielles d'une bonne justice ont été respectées par les arbitres. Les cas d'annulation prévus par la loi mauricienne rejoignent ceux que prévoit le droit français (article 1502 du Code de procédure civile). Cinq cas sont prévus en droit français : absence, nullité ou expiration de la convention d'arbitrage, désignation irrégulière des arbitres, méconnaissance de leur mission par les arbitres, violation du principe de la contradiction (procédure), contrariété à l'ordre public international. Ces cas d'ouverture sont très strictement interprétés ; spécialement, tout recours qui tendrait, même indirectement, à demander au juge étatique de réviser la sentence sur le fond du litige, est jugé irrecevable – et cela, même en cas d'erreur dans l'application du droit.

Il faut également noter que le droit français ne prévoit pas, parmi les causes d'annulation de la sentence internationale, le cas où une sentence rendue à l'étranger, aurait été annulée dans son pays d'origine.⁷ Le juge français en a déduit qu'une sentence annulée dans son pays d'origine pouvait être accueillie et exécutée en France, si elle répondait par ailleurs aux critères de régularité internationale prescrits par le droit français.⁸

En résumé, il est possible d'affirmer que le droit français instaure un système de non-intervention du juge dans l'arbitrage – selon l'expression de Thierry Koenig, ce matin. Dans le droit français de l'arbitrage international, le rôle du juge est strictement limité : aucun recours sur le fond du litige, une intervention ponctuelle à titre d'assistance et de coopération à l'arbitrage, et un contrôle *a posteriori* de la sentence, contrôle lui-même très strictement délimité.

⁷ Au contraire de ce que prévoit la Convention de New York (Article V(1)(e)).

⁸ Jurisprudence *Hilmarton* (1994) – *Putrabali* (2007).