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# Arbitrators and Accuracy

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## **ARBITRATORS AND ACCURACY**

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## **Chapter 1**

### **Truth-Seeking in International Arbitration**

*William W. Park\**

- I. A VIEW FROM THE HILLTOP**
- II. RIVALS OF AWARD ACCURACY**
- III. TOOLS FOR FACT-FINDING**
- IV. THE TRUTH ABOUT LAW**
- V. FROM ORACLE TO EVIDENCE**
- VI. EPILOGUE**

#### **ABSTRACT**

An arbitrator's primary duty remains the delivery of an accurate award, resting on a reasonably ascertainable picture of reality. Litigants wanting only quick or cheap solutions can roll dice, and have no need of lawyers. Evidentiary tools in arbitration should balance sensitivity toward cost and delay against the parties' interest in due process and correct decisions. If arbitration loses its moorings as a truth-seeking process, nostalgia for a golden age of simplicity will yield to calls for reinvention of an adjudicatory process aimed at discovering the facts, finding the law, and correctly construing contract language.

#### **I. A VIEW FROM THE HILLTOP**

Often called the first European novel, *Don Quijote de la Mancha* weaves together the idealistic quests of a slightly delusional Spanish gentleman who saw himself as a knight errant long after the age of chivalry had ended. A Moorish enchanter had recorded the Don's adventures, defeats and victories. At one point in the story, the Don objects to narratives of his defeats, arguing that heroes deserve praise, not scorn. After all, he adds, Virgil embellished the piety of Aeneas just as Homer enhanced the wisdom of Odysseus. In response, a young scholar suggests two different ways to view the world. A poet can say things as they ought to have been, whereas the historian must write things as they were.<sup>1</sup>

Like historians, arbitrators normally focus on things as they were, seeking the most reliable account of the controverted events giving rise to the claims. In deciding disputes accurately, arbitrators promote the type of promise-keeping that underpins the positive economic teamwork that marries public and private welfare.

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\* Professor of Law, Boston University; General Editor, *Arbitration International*, Copyright 2009 © William W. Park.

<sup>1</sup> Sansón the scholar says, "It is one thing to write like a poet, another like a historian. A poet can say or sing things not as they were, but as they should have been. The historian should write them down not as they should have been, but as they were, without adding or omitting anything." ("Pero uno es escribir como poeta, y otro como historiador: el poeta puede contar o cantar las cosas, no como fueron, sino como debían ser; y el historiador las ha de escribir, no como debían ser, sino como fueron, sin añadir ni quitar a la verdad cosa alguna.") MIGUEL DE CERVANTES, *DON QUIJOTE DE LA MANCHA*, Segunda Parte Del Ingenioso Caballero, Capítulo III (1605 & 1615), Edición del IV Centenario (2004) at 569.

Often underrated or misjudged, truth has dispatched more than one mind beneath the intellectual storm waves of a giant analytic sea, and anyone venturing to explore its contours must do so with fear and trembling.<sup>2</sup> Yet truth-seeking lies at the core of what arbitration is about, and cannot long be avoided in any serious discussion of the subject.

Several levels of inquiry present themselves. A panoramic perspective from 6,000 meters (20,000 feet for American alpinists) might examine reality in an abstract way. With varying degrees of sincerity, thinkers since antiquity have asked, "What is truth?"<sup>3</sup>

By contrast, lawyers in the litigation trenches consider ways that rival versions of truth influence the judges, juries and arbitrators who decide cases. This vista includes the art of advocacy and tools to persuade decision-makers that one view of the case has more merit than another. In the common law tradition such communications implicate rules of evidence intended, albeit in part, to enhance the prospect of reaching a correct conclusion.

Finally, a view from the hilltop (somewhere between the trenches and the Alpine peaks) looks at how goals other than truth-seeking enter the equation. Examining documents and listening to witness testimony will cost time and money. At some point, the additional enlightenment to be gleaned from more information will be offset by the value of finality and economy. The present essay explores this last line of inquiry, looking at how truth-seeking balances against sensitivity to speed and economy in arbitration.

Accuracy in arbitration means something other than absolute truth as it might exist in the eyes of an omniscient God. In examining the competing views of reality proposed by each side, arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants' claims and defenses. They recognize that some answers are better than others, even if perfection proves elusive.<sup>4</sup>

Such truth-seeking relies principally on documents, human recollection, and expert opinion. For complex commercial and investment cases, the process does not necessarily come quickly or cheaply. Of all the goals that compete with adjudicatory truth-seeking, few have been more challenging than speed and economy. Indeed, time and cost often appear as the enemy, interfering with efficient arbitration.

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<sup>2</sup> The 19th century Danish philosopher Søren Kierkegaard popularized the expression in *Frygt og Bæven*, the title of which was lifted from a line in Philippians 2:12 where Paul encourages his readers to "work out your salvation with fear and trembling."

<sup>3</sup> Among the more well-known examples, Pontius Pilate posed the question at the trial of Jesus, but without bothering to stay for an answer. John, Ch. 18. A quip about "jesting Pilate" served the English jurist Francis Bacon in opening his essay, *Of Truth* (1601). In *The Antichrist*, Friedrich Nietzsche called that question the only one of value in the New Testament. More recently, Andrew Lloyd Webber and Tim Rice worked the question into the rock opera, *Jesus Christ Superstar*, and country singer Johnny Cash used it as the title of a 1970 hit single. The discipline of epistemology explores truth in "correspondence theory" (asking whether a statement corresponds to reality) and "coherence theory" (asking whether one statement is coherent with others). See GEORGE PITCHER, ed., *TRUTH* (1964).

<sup>4</sup> In this connection, not all questions pose the same epistemological challenges. Determining why a marriage failed is not the same as deciding whether goods arrived, an employee received her salary, or a landlord refunded a tenant's security deposit. Moreover, the apparent relativity of truth often derives simply from imprecision in language or from different angles of perception, as when Australians say that winter starts in June while Bostonians assert that the season arrives in December. Although contradictory on their face, each statement bears some relationship to the realm of reasonably ascertainable reality.

On more mature reflection, however, time may prove the friend and patron of good arbitration rather than its enemy.<sup>5</sup> Although justice delayed can mean justice denied, a sense that truth matters remains vital to a perception that justice is being done. Arbitration becomes a lottery of inconsistent and unpredictable results without some investment of the time and money required for a rigorous search for facts and law in which litigants receive a meaningful opportunity to present their cases. Success in arbitration is not measured by a stop watch alone.

Much of the criticism of arbitration's cost and delay thus tells only half the story, often with subtexts portending a cure worse than the disease. An arbitrator's main duty lies not in dictating a peace treaty, but in delivery of an accurate award that rests on a reasonable view of what happened and what the law says. Finding that reality in a fair manner does not always run quickly or smoothly.

Although good case management values speed and economy, it does so with respect for the parties' interest in correct decisions. The parties have no less interest in correct decisions than in efficient proceedings.<sup>6</sup> An arbitrator who makes the effort to listen before deciding will enhance both the prospect of accuracy and satisfaction of the litigants' taste for fairness. In the long run, little satisfaction will come from awards that are quick and cheap at the price of being systematically wrong.

To fulfill its promise of enhancing economic cooperation, arbitration must aim at an optimum counterpoise between truth-seeing and efficiency. Just as a restaurant can fail to provide an agreeable dining experience either by serving bad food or by making customers wait too long for their meal, arbitrators fall short of their duty by neglecting procedures that promote correct awards, just as much as by failing to calibrate the expenditure of time and money.

Though not so jealous as to exclude all rivals, truth often insists on remaining first among equals. Efficiency-promoting tools must always be harnessed with an arbitral process that aims to ascertain what happened and to provide a reasonable understanding of relevant legal norms. Only with that balance can arbitrators properly connect the dots and resolve the dispute in a way which gives effect to the parties' legitimate expectations.

## II. RIVALS OF AWARD ACCURACY

### A. An Era of Disenchantment

On a small street in downtown Boston stands a shoe repair shop with a proactive approach to customer complaints. In the window, an equilateral triangle links three options: fast service, low price, high quality. "Pick any two," patrons are advised.

The price of such trade-offs may be missing from much of the current nostalgia for a bygone

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<sup>5</sup> One ancient adage holds that truth is the daughter of time: *Veritas filia temporis*. A second century Roman grammarian attributes the saying to an unnamed predecessor: "Alius quidam veterum poetarum, cuius nomen mihi nunc memoriae non est, *Veritatem Temporis filiam esse dixit*." (Another ancient poet, whose name I have forgotten, said that Truth was the daughter of Time.) Aulus Gellius, *Noctes Atticae*, XII.11.7.

<sup>6</sup> One study found litigants rated a "fair and just result" in arbitration above other considerations including cost, finality, speed, and privacy. See Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations & Perceptions of Attorneys & Business People*, in 30 *INT'L BUS. LAWYER* 203 (May 2002). The eight ranked variables included speed, privacy, receipt of monetary award, fair and just result, cost-efficiency, finality, arbitrator expertise, and continuing relationship with opposing party.

golden age of cheap and cheerful arbitration. Much is said about the business community's disenchantment with arbitration.<sup>7</sup> The critics devote less energy grappling with the dissatisfaction that would follow a shift away from truth-seeking as arbitration's principal aim. It has become commonplace to lament that the arbitral process now resembles the inheritance dispute satirized in *Bleak House*, described as "so complicated that no man alive knows what it means."<sup>8</sup> Reportedly, some lawyers call international a "monster,"<sup>9</sup> while others ridicule detailed rules.<sup>10</sup> A "scorched earth" policy is said to taint many proceedings.<sup>11</sup> Commentators urge a model that is "simpler, quicker and more basic"<sup>12</sup> to replace the unfortunate "legalism" and "judicialisation" that have allegedly infected arbitration.<sup>13</sup>

Users of international arbitration are said to be unhappy with a costly and slow process that too often ignores in-house counsel,<sup>14</sup> and has become infected with "Americanized" pre-hearing discovery.<sup>15</sup> General criticisms, both in the United States<sup>16</sup> and Europe,<sup>17</sup> tell of "company-wide

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<sup>7</sup> See generally the series of articles presented in Volume 2, No.5, of *WORLD ARB. & MED. REV.*, with an excellent introduction by Christopher R. Drahozal, *Disenchanted? Business Satisfaction with International Arbitration*, *Id.* at 1. For a thoughtful Continental view on arbitration's rival objectives, see Matthieu de Boissésou, *New Tensions Between Arbitrators and Parties in the Conduct of the Arbitral Procedure*, 2007 *INT. ARB. LAW REP.* 177 (2007). At the 2008 Congress of the International Council for Commercial Arbitration, no less an eminence than Fali Nariman spoke of the loss of arbitration's emphasis on speed and economy. ICCA Congress, Dublin, 10 June 2008, Working Group B, Current Developments. In response, another leading light, James Carter, asked whether the golden age had really been so golden.

<sup>8</sup> CHARLES DICKENS, *BLEAK HOUSE* (1853). Litigation costs in *Jarndyce v. Jarndyce* ultimately consumed the entire estate, with despair causing one legatee to blow his brains out at a Chancery Lane coffee house, while another expired in hopeless dejection.

<sup>9</sup> *World-beating arbitration hub envisaged*, *Legal Affairs*, *Australian Financial Review*, 23 October 2009, at 20, quoting Toby Landau, a London QC who had just delivered the Clayton Utz Lecture in Sydney.

<sup>10</sup> See Serge Lazareff, *Avant-propos: Le bloc-notes de Serge Lazareff*, 124 *GAZETTE DU PALAIS: CAHIERS DE L'ARBITRAGE* 3 (No. 338/339, 3 and 4 Dec. 2004). Likening procedural guidelines to a loathsome skin disease (*le prurit réglementaire*), Me Lazareff posits lawyers consulting a hypothetical Code of Arbitral Conduct that stipulates the number of bathroom breaks allowed as a function of hearing time.

<sup>11</sup> See discussion in Klaus Peter Berger, *The Need for Speed in International Arbitration*, 25(5) *J. INT'L ARB.* 595 (2008), commenting on the new DIS Supplementary Rules for Expedited Proceedings. Professor Berger goes on to note that arbitration may well be more suited than court proceedings to the resolution of complex cross-border business disputes, but that the complexity can add time and cost.

<sup>12</sup> Alan Redfern, *Stemming the Tide of Judicialisation of International Arbitration*, 2 (5) *WORLD ARB. & MED. REV.* 21 (2008), at 37.

<sup>13</sup> Gerald F. Phillips, *Is Creeping Legalisms Infecting Arbitration?*, 58 *DISPUTE. RES. J.* 37 (AAA, February-April 2003).

<sup>14</sup> See, e.g., Jean-Claude Najjar, *A Pro Domo Pleading: Of In-House Counsel, and their Necessary Participation in International Commercial Arbitration*, 25 (5) *J. INT'L ARB.* 623 (2008). A fine survey of in-house perspectives was presented by Carla Powers Herron (Shell Group, Houston, Group Counsel for Litigation) to the Institute for Transnational Arbitration, Dallas, 18 June 2009, 3 *WORLD ARB. & MED. REV.* 323 (2009).

<sup>15</sup> See Roger Alford, *The American Influence on International Arbitration*, 19 *Ohio State J. Disp. Resolution* 69 (2003); Bernard Audit, *L'Américanisation du droit*, 45 *Arch. philosophie du droit* 7 (2001).

<sup>16</sup> The Academic Director of the Straus Institute for Dispute Resolution at Pepperdine University, wrote that "criticism of American arbitration is at a crescendo" due to extensive discovery and highly contentious advocacy. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 *DEPAUL BUS. & COM. L. J.* 383, 384 (2009).

<sup>17</sup> See Paul Hobeck, Volker Mahnken, Max Koebeke, *Time for Woolf Reforms in International Construction Arbitration*, [2008] *Intl A.L.R.* 84, asserting that "a growing chorus of critics has begun to question the role of arbitration in plant construction" and suggesting an equivalent of the 1999 civil procedure reforms in England, including more intensive ("front loaded") pleadings at an earlier stage and more aggressive case management by arbitrators.

bans on arbitration clauses,<sup>18</sup> related to the business community's "growing chorus of discontent" with the process.<sup>19</sup> One commentator urges that arbitration must be repaired "by whatever means necessary."<sup>20</sup> Another suggests that empirical studies showing business satisfaction with arbitration<sup>21</sup> have been reached only by turning a "blind eye to reality."<sup>22</sup> Even good friends of arbitration suggest that it is "generally admitted" that arbitration has become more and more expensive.<sup>23</sup>

Suggested remedies include interim or advance rulings on costs,<sup>24</sup> or a "town elder" model harking back to simpler days.<sup>25</sup> Others propose expedited proceedings,<sup>26</sup> a sole arbitrator rather than a three-member tribunal,<sup>27</sup> or more attention to dispute resolution in contract drafting.<sup>28</sup>

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<sup>18</sup> Michael McIlwrath, *Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices*, 2 (5) WORLD ARB. & MED. REV. 111 (2008).

<sup>19</sup> Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 26(1) ARB. INT'L 103, 104 (2010). The author admits that the desired rapidity will require the "buy-in" of all parties. Some observers may see the noun at the middle of that phrase ("all") as holding the key to why quick proceedings can be problematic.

<sup>20</sup> Jean-Claude Najjar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25(4) ARB. INT'L 515, 527 (2009).

<sup>21</sup> One widely discussed study, co-sponsored by a major accounting firm and a London university, suggested that 86% of the participating corporate counsel are "satisfied" with international arbitration. See *International Arbitration: A Study into Corporate Attitudes and Practices* (2008), PriceWaterhouseCoopers & School of International Arbitration (Queen Mary, University of London) (2008), with commentary by Loukas Mistelis & Crina Mihaela Baltag, *Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations*, 2 (5) WORLD ARB. & MED. REV. 83 (2008). The full statistical report is available at 20(1) ICC Bulletin (2009).

<sup>22</sup> Michael McIlwrath, *Ignoring the elephant in the room: International Arbitration: Corporate Attitudes and Practices*, 2 (5) WORLD ARB. & MED. REV. 111 (2008), at 113, focusing particular concern on the methodology of the PriceWaterhouseCoopers study. Mr. McIlwrath also facilitated discussion of similar ideas in the CPR-sponsored "IDN" (International Dispute Resolution) podcast of 21 November 2008, where he interviewed Mr. Volker Mahnken, senior counsel of Siemens A.G., with respect to his views on the perceived dissatisfaction among consumers of international construction arbitration services.

<sup>23</sup> Two eminent Swiss scholars recently wrote, "Alors que l'arbitrage a été longtemps considéré comme un mode économique de règlement des litiges commerciaux, il est aujourd'hui généralement admis qu'il devient de plus en plus dispendieux." See Jean-François Poudret & Sébastien Besson, *Nature et efficacité des décisions prises par l'arbitre en cours de procédure au sujet des frais de l'arbitrage*, MELANGES EN L'HONNEUR DE FRANÇOIS DESSEMONTET 297 (Edgar Philippin, Philippe Gilliéron, Pierre-François Vulliemin, Jean-Tristan Michel, eds. 2009).

<sup>24</sup> Poudret & Besson, *Id.* at 297; Michael Schneider, *Lean Arbitration: Cost Control and Efficiency through Progressive Identification of Issues and Separate Pricing of Arbitration Services*, 10 ARB. INT. 119 (1994).

<sup>25</sup> See also David W. Rivkin, *Towards a New Paradigm in International Arbitration – The Town Elder Model Revisited*, 24 ARB. INT'L 375 (2008). Mr. Rivkin suggests a return to basics in which an arbitrator would "simply listen to both sides of the dispute and then issue his decision", asking for additional information "only as necessary." *Id.* at 375. The devil in the detail, of course, lies in the "as necessary" caveat in the Town Elder formula, given that few arbitrators see themselves as requesting "unnecessary" items of information.

<sup>26</sup> See Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 25 ARB. INT'L 103, 104-105 (2010). Compare Michael McIlwrath & Roland Schroeder, *International Arbitration: In Dire Need of early Resolution*, 74 Arb. 3 (2008).

<sup>27</sup> See Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26(3) J. Int'l Arb 337 (2009), arguing that three arbitrators may not add enough to the legitimacy of international arbitration to outweigh what the author of the article perceives as the added inefficiency.

<sup>28</sup> See Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L. J. 383, 389 (2009), to some extent echoing suggestions made earlier in the 2002 Freshfields Lecture. See William W. Park, *Arbitration's Protean Nature*, 19 ARB. INT'L 279 (2003), reprinted with a progress report in ARBITRATION INSIGHTS 331 & 360 (J. Lew & L. Mistelis, eds. 2007).

Institutional guidelines outline ways to accommodate the rival elements inherent in the proper conduct of business arbitration.<sup>29</sup>

## B. The “Peace Treaty” Subtext

On their face, many comments on arbitration’s cost take the ring of general exhortations to try diplomacy before claims are filed or to demonstrate proportionality in document production orders. Most thoughtful professionals can only applaud consideration of such cost-saving measures. Indeed, arbitration’s contractual nature invites procedural innovation aimed at reconciling truth-seeking with other litigation goals such as efficiency.

Some critiques, however, travel with a subtext that downgrades the type of truth-seeking that has long served to promote both predictability and fairness in economic relationships. One camp of commentators posits that commercial litigants seek principally an end to hostilities so they can get on with their business. A recent listing of arbitral virtues omits any mention of correct awards,<sup>30</sup> while other commentaries seem to down-play the need for arbitrator access to information.<sup>31</sup> The story runs that the parties want not so much an accurate decision, but simply a decision, full stop, made by someone who dictates a peace treaty rather than pronounces the true state of the world.<sup>32</sup>

To test the hypothesis that peace-making is what litigants want, one might imagine a corporate counsel telling her boss how a joint venture partner has breached its agreement, resulting in a hundred million Euros in lost profits. “We have a good case on the law and the facts,” she says. Moreover, she suspects that board minutes of the joint venture entity (now controlled by the other side) prove manipulation of that company’s trading practices.

When arbitration claims are filed, the proceedings went forward with great speed. The tribunal denied most pre-trial information exchange, including the joint venture’s minute book. Apparently the arbitrators had heard the general counsel give a speech about the downside of too much information. The arbitrators spent their deliberations cracking jokes and playing video games, rather than studying testimony and legal authorities. The award rejected recovery and bid everyone good luck in the future.

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<sup>29</sup> See ICC Commission, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (2007). See also UNCITRAL Notes on Organizing Arbitral Proceedings (1996); COLLEGE OF COMMERCIAL ARBITRATORS, *Guide to Best Practices in Commercial Arbitration* (October 2005), prepared by the American College of Commercial Arbitrators from a prior draft presented to the CCA Meeting in Washington, D.C., on 30 October 2004.

<sup>30</sup> See, e.g., Jean-Claude Najar, *Inside Out: A User’s Perspective on Challenges in International Arbitration*, *supra*. After cataloguing the perceived defects of international arbitration today, the author concludes, “By whatever means necessary, arbitration needs to be repaired, to be returned to its simple foundations—speed, cost efficiency, and user-friendliness.” In his introduction, Mr. Najar defines the “purpose” of international arbitration as “cost efficiency, speed, and user-friendliness.” Reference to a factually accurate or legally correct award seems notably absent from the catalogue of arbitration’s objectives or goals. At one arbitration symposium, a speaker garnered considerable applause by declaring that what in-house counsel want is simply for arbitrators “to impose a solution that will get the parties out of their mess,” full stop. *The Search for Truth in Arbitration*, Swiss Arbitration Symposium, Zürich, February 2009.

<sup>31</sup> See discussion of “thin-slicing” in Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. Ill L. Rev. 1 (January 2010), at 27-38.

<sup>32</sup> See discussion *supra* of Swiss Arbitration Association proceedings of 6 February 2009. For a thoughtful consideration of the contrast between truth-seeking and peace-making, see generally, MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986), at 122-23, suggesting that a legal process aimed at maximizing dispute resolution as such cannot simultaneously aspire to maximize accurate fact-finding.

A career adjustment for the general counsel soon followed. It seems that her boss did not want an end to hostilities at the expense of defeat, at least not when the company has a good case.<sup>33</sup> The rougher form of justice might do if the case were less certain.

Like humanity in general, lawyers react against their last bad experience, forgetting the specters of other unattractive alternatives. On some occasions counsel chafe that victory escaped them because arbitrators refused to order production of that extra document that would have provided the critical evidence. At other times, lawyers fulminate against the injustice and burden of having to scour their files for irrelevant pieces of paper.<sup>34</sup>

In this connection, one irony of the current debate is that the same lips that complain of legalized arbitration often lament aberrational or “split the difference” awards,<sup>35</sup> reminiscent of King Solomon’s interim ruling between the proverbial Jerusalem mothers.<sup>36</sup> Some literature even suggests that arbitrators make unprincipled decisions to attract business,<sup>37</sup> although no empirical data based on either “win rates”<sup>38</sup> or size of damages<sup>39</sup> supports such conclusions.

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<sup>33</sup> Indeed, one constant of international arbitration practice lies in the basic profile of individuals sought-after as arbitrators, which inevitably focuses on intelligence and integrity, both of which matter significantly if truth-seeking remains the goal. Never has a lawyer called the author to ask for recommendation of arbitrators who were dullards unable to look past smoke and mirrors designed to hide poor arguments and weak positions.

<sup>34</sup> Likewise, a winning award might be upset by a court challenge, causing the victor’s counsel to lament the lack of finality in arbitration. In another case, a disappointing award might be met with realization that full appeal on the legal merits does not generally exist in arbitration.

<sup>35</sup> For analysis of the real impact of “knucklehead awards” see Christoher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 Hofstra LAW REV. 71 (2008), finding little evidence that franchisors in fact use arbitration less. See also Christopher R. Drahozal, *Busting Arbitration Myths*, 56 U. KANSAS L. REV. 663 (2008); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility*, 41 J. LAW REFORM 813 (2008).

<sup>36</sup> In the Biblical child custody dispute, one woman accused another of stealing her baby. The king called for a sword so the child might be divided, half for each litigant. When one woman abandoned her claim in order to save the infant, Solomon recognized the real mother and granted her custody, leaving “all Israel in awe of the king’s wisdom.” See I Kings 3:23-28.

<sup>37</sup> See Richard Posner, HOW JUDGES THINK 128-29 (2008), citing *Armendariz v. Foundation Health Psychare Services*, 6 P3d 669, 693 (Cal 2000), where a California court asserted that courts and juries are “more likely to adhere to the law and less likely than arbitrators to ‘split the difference’ between the two sides thereby lowering damages.” For similar skepticism about arbitrator accuracy, see Alon Klement & Kvika Neeman, *Does Private Selection Improve the Accuracy of Arbitrators’ Decisions*, Law and Economics Workshop (University of California, Berkeley), Paper 19, Spring 2009; Alon Klement & Daphna Kapeliuk, *Contractualizing Procedure* (Available on SSRN, Version of 31 December 2008).

<sup>38</sup> A claimant awarded \$100 on a \$5 million claim “wins” in the sense of receiving something. However, the respondent would likely be the happier of the two parties. One study of investment awards, finding that investors brought treaty-based claims for \$343 million on the average, but collected only \$10 million on the average. Susan Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 NORTH CAROLINA L. REV. 1 (2007) at 49-50, 64.

<sup>39</sup> Employment and consumer controversies present concerns different from those present in business-to-business cases. It may be that the cost of legal counsel for court cases precludes the less wealthy from starting litigation except if attorneys take matters on a contingency fee. See Theodore Eisenberg & Elizabeth Hill, *Arbitration & Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RES. J. 44 (ABA, Nov 2003-Jan 2004), looking at state and federal court trials as compared with AAA arbitrations. In non-civil rights disputes, higher paid employees (earning over \$60 thousand per year) generally prevailed at greater rates (64%) in arbitration than in state court (56%). For lower paid employees the win rate was 39%. However, the size of the mean award was greater in court cases, at \$462 thousand for courts compared with \$211 for higher paid employees in arbitration and \$30 thousand for lower paid employees in arbitration. Looking to the median (rather than mean) award, the higher paid employees actually received more in arbitration (\$94 thousand) than in court litigation (\$68 thousand).

### C. The Arbitrator's Mission

No one should be surprised that arbitration implicates goals other than accuracy, or that these aims require limits on testimony and discovery requests. Nothing new resides in balancing truth-seeking against values that further public goals rather than adjudicatory precision. Classic trade-offs include professional secrecy, evidentiary exclusion rules, and the civil jury system.<sup>40</sup>

What remains at stake in the debate are the shades of gray in balancing truth-seeking against added time and expense. Any account of international arbitration remains inadequate if it denigrates the aspiration to accuracy, or shifts an arbitrator's aim from a correct award to splitting the baby or dictating quick peace treaties.

Particularly for international transactions, arbitration often justifies itself by reference to a more level playing fields, not speed and economy.<sup>41</sup> In a stubbornly heterogeneous world lacking a supra-national judiciary with mandatory jurisdiction, arbitration enhances a relative measure of adjudicatory neutrality, which in turn promotes respect for shared *ex ante* expectations at the time of a contract or investment.<sup>42</sup> A desire for confidentiality and expertise also play a role, as do apprehensions about xenophobia<sup>43</sup> and civil juries.<sup>44</sup>

Litigants are obviously free to choose a mode of dispute resolution that ignores accuracy based on recourse to testimony and documents. They may draw straws, flip coins, roll dice, fight a duel or consult entrails of a disemboweled chicken. If not inclined toward augury, chance or combat, the parties can give someone a blank check to decide "in equity" without reference to law. No lawyers are needed, whether external or in-house.

Litigants might also take responsibility for their own fate by agreeing to settle. Mediation can

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<sup>40</sup> A perceived lack of reliability in the American jury system lies behind much of the domestic arbitration movement in the United States. Legal trustworthiness, however, may not be a jury's main goal. One classic commentary on American society suggests that the function of the civil jury was public education rather than truth-seeking. ALEXIS DE TOCQUEVILLE, *DE LA DEMOCRATIE EN AMERIQUE* (1835 & 1840), Livre I, Deuxième Partie, Ch. VIII, *Du jury aux Etats-Unis considéré comme institution politique*. De Tocqueville writes, "Je ne sais si le jury est utile à ceux qui ont des procès, mais je suis sûr qu'il est très utile à ceux qui les jugent. Je le regarde comme l'un des moyens les plus efficaces dont puisse se servir la société pour l'éducation du peuple." ("I do not know if the jury is useful for those who have lawsuits, but I am sure it is very useful for those who decide them. I see it as one of the most efficient means by which society can educate the people.") Derived from visits to the United States in 1835 and 1840, these observations speak to early American exceptionalism. See also Oscar Chase, *American Exceptionalism and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002).

<sup>41</sup> Perception may be more significant than reality. One study found that in federal civil actions in the United States, foreigners actually fare better than domestic parties. See Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. LAW REV. 1122 (1996). An explanation for this counter-intuitive finding lies in the fear of litigation bias that leads foreign litigants to settle rather than continue to judgment unless they have particularly strong cases.

<sup>42</sup> An exaggerated articulation of this perspective (intentional, for entertainment perhaps) was presented in Jan Paulsson, *International Arbitration is not Arbitration*, 2 Stockholm Int'l Arb. Rev. (2008), adapted from Brierley Memorial Lecture, Montréal, 28 May 2008, suggesting that international arbitration is to arbitration what sea elephants are to land elephants.

<sup>43</sup> One arbitration followed a \$500 million Mississippi verdict against a Canadian company for breach of \$980 thousand in burial insurance contracts and an exchange of funeral homes valued at \$2.5 million. After a trial with xenophobic comments to inflame jurors and an appeal thwarted by a \$625 million bond requirement, the investor alleged discrimination and unfair treatment. *Loewen Group & Raymond Loewen v. U.S.A.*, ICSID Case No. ARB (AF)/98/3, Award 26 June 2003. See generally, Jonathan Harr, *The Burial*, *The New Yorker*, 1 November 1999, at 70.

<sup>44</sup> Concern is often expressed that civil juries show undue sympathy to the "little guy" (consumer or employee) against the "big guy" (manufacturer, bank or boss).

facilitate settlement, particularly if arbitral or judicial backstops supply baselines from which to evaluate each side's positions. Yet mediation, like negotiation, succeeds only if both sides agree to bury differences.<sup>45</sup> If each side clings to peace on its own terms, reference to what the parties (plural) want will be meaningless.

Arbitration, by contrast, imposes a binding decision when harmony proves impossible, and thus implicates a more rigorous process for finding facts and law based on weighing testimony and documents. When differences are deep and complex, the process takes time.

In some instances, the parties may tailor the procedural calculus to reflect protocols different from those by which national law balances speed and economy against the interest in accuracy. However, in disputes with a serious impact on corporate or national welfare, intelligent litigants usually craft their rules with deference to the adage that one person's delay is another's due process.<sup>46</sup>

An agreement to end hostilities may cost less than arbitration, just as a train trip from London to Paris is cheaper and quicker than a flight from London to Hong Kong. However, if the parties cannot agree to the shorter trip, they may have no option but to accompany each other on the longer and more costly voyage. In such instance, both will want a pilot who cares about taking the best route to the correct destination.<sup>47</sup>

### III. TOOLS FOR FACT-FINDING

#### A. The Impact of Legal Culture

Although differences in national procedure do exist,<sup>48</sup> most modern legal systems show a core reliance on witness testimony, documentary exhibits, and expert opinion.<sup>49</sup> However, this does not mean that they agree on how to use these truth-seeking tools. Variations often derive from

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<sup>45</sup> Noting that a decision to arbitrate shifts responsibility to a third party, Judge Schwebel speculates that mediation is rare for investor-state disputes because bureaucracies tend to shift rather than assume responsibility. Stepehn M. Schwebel, *Is Mediation of Foreign Investment Disputes Plausible?*, 22 (No. 2) ICSID REVIEW/ FOREIGN INVESTMENT LAW J. 237 (Fall 2007).

<sup>46</sup> The phrase has been attributed to James Landis (former Dean of Harvard Law School) in his Address to the Administrative Law Section, American Bar Association in St. Louis (7 August 1961); typescript in Harvard Law School Library. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992), at 244.

<sup>47</sup> A more controversial analogy might compare mediation to a dinner date and arbitration to a marriage. The casual date carries no commitment, with the couple free to go separate ways if the chemistry lacks, just as disputants can ignore a mediator's suggestion. By contrast, deeper consequences attach to wedding vows and arbitration agreements, notwithstanding that subsequent annulment requests are possible in each case. Of course, arbitral awards usually look more like divorce decrees than marriage certificates but both carry a degree of somber finality.

<sup>48</sup> See, e.g., Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L 59 (2002); Pierre A. Karrer, *The Civil Law and Common Law Divide*, 63 DISPUTE RESOLUTION J. 72 (ABA, February/April 2008); Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. J. INT'L LEGAL STUDIES 163 (1985); Luc Demeyere, *Different Approaches to Procedures under Common Law and Civil Law*, 6 SCHIEDS VZ 279 (Zeitschrift für Schiedsverfahren) (Nov/Dec. 2008).

<sup>49</sup> See *Truth and its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 (No. 3) HASTINGS L.J. 49 (1998), in particular Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, Id. at 545; RICHARD M. MOSK, *THE ROLE OF FACTS IN INTERNATIONAL DISPUTE RESOLUTION* (2004), 304 *Recueil des cours* (Hague Academy of International Law); John Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes*, in *THE FUTURE OF INVESTMENT ARBITRATION* (Catherine Rogers & Roger Alford, eds. 2009); TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, *ANALYSIS OF EVIDENCE* (2d ed. 2005), 289-314 (principles of proof and their exceptions).

wrinkles of historical accident or different cost-benefit analysis in weighing truth-seeking against other considerations.<sup>50</sup> Even radical differences in practice sometimes present themselves as divergent paths to the same end.<sup>51</sup>

Under the Anglo-American model, lawyers do the heavy lifting in gathering and marshalling elements of proof, as well as questioning witnesses. Truth reveals itself in the crucible of vigorous exchanges among those with competing perspectives. This so-called “adversarial” system contrasts with the “inquisitorial” paradigm in which judges or arbitrators take a more proactive role in finding out what happened.

Much international arbitration implicates some combination of the two approaches.<sup>52</sup> Fact-finding is enhanced by self-interested litigants motivated to ferret out information. Notwithstanding that work falls on those with incentives to ignore some aspects of the story, it would be hard to imagine anyone other than counsel marshalling evidence for arbitration on a global basis.

Yet a more inquisitorial style may commend itself during oral hearings, after party briefs memorialize points of law and evidence. Rather than sitting passively while lawyers perform, arbitrators who engage in robust and direct dialogue with witnesses and counsel can stimulate the mental juices that help connect analytic dots, at least if they avoid seeming to have pre-judged the case, or revealing a failure to read the papers.

What starts as a culture clash might, after adjudicatory skirmishing, end up as legal cross-pollination, evolving into common litigation practice among arbitration practitioners.<sup>53</sup> Much of such intellectual cross-pollination implicates legal practitioners and scholars who serve as worker bees, buzzing from symposium to symposium and from case to case, sharing views on how to

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<sup>50</sup> Such variations should not be surprising, given that different approaches to fact-finding appear even within relatively homogeneous legal systems. See Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions*, 58 B.U. LAW REV. 527 (1978), comparing presumptions that control permissibility of inferences. A legal presumption (stamped letters put into mailboxes arrive in due course) might be rebutted by the alleged recipient’s testimony that he never received the letter. And a logical inference tracking the presumption about letters and mailboxes might support a finding that the letter arrived. See Rule 301, U.S. Federal Rules of Evidence, distinguishing between burden of coming forward with evidence and burden of persuasion.

<sup>51</sup> In Islamic law, the “debt verse” in *Qur’an*, ch. 2:282 provides, “If there are not two men [as witnesses in a debt dispute] let there be a man and two women . . . . If one of those women should mistake, the other of them will cause her to recollect.” Some scholars suggest that the rule, understandably perceived today as suggesting inferiority in female testimony, derives from concern for testimonial accuracy in 7th century Arabia, when women were not involved in financial affairs. See generally, ASGHAR ALI ENGINEER, *RIGHTS OF WOMEN IN ISLAM* 73-83 (2d ed. 2004); RONAK HUSNI & DANIEL L. NEWMAN, *MUSLIM WOMEN IN LAW & SOCIETY* 37-39 (2007); Urfan Khaliq, *Beyond the Veil?: An Analysis of Provisions of Women’s Convention in the Law as Stipulated in Shari’ah*, 2 BUFF. J. INT’L L. 1, 27-28 (1995-96).

<sup>52</sup> In some instances, the procedural framework takes on the nature of a juridical language. Juxtaposing two ways to say “language” in French, Yves Derains makes this point forcefully in *Langue et langages de l’arbitrage*, MÉLANGES EN L’HONNEUR DE PIERRE TERCIER 789 (P. Guach, F. Werro, & P. Pichonnaz, eds., 2008). French might be the tongue (*la langue*) for communication in an arbitration built on a procedural language (*le langage*) drawn from American practice, such as party-dominated document production and a trial with testimony presented all at once. Words such as “witness” and “*témoin*” may prove false friends if evidence is presented by a party’s employee, who might lack the capacity to testify under French legal notions of what it means to present testimony.

<sup>53</sup> For a divergent perspective that castes cross-fertilization in economic matters as cultural domination by norm-setting experts from developed countries, see Catherine Kessedjian, *Culture et droit, L’influence de la culture sur le droit international et ses développements*, in *CULTURE AND INTERNATIONAL LAW* (Paul Meerts ed. 2008): “Qui dit concurrence, dit un vainqueur et un vaincu: donc une domination.” (“So, whoever says competition says victor and vanquished: thus domination.”).

resolve disputes, or set standards for testimony, document production and ethics. Notable examples include the work of UNCITRAL on both arbitration rules and a Model Arbitration Law,<sup>54</sup> as well as the International Bar Association instruments on conflicts-of-interest<sup>55</sup> and evidence,<sup>56</sup> and the American College of Commercial Arbitrators compendium of “Best Practices” for arbitral proceedings.<sup>57</sup> Built on arbitral lore memorialized in treatises and learned papers, the “soft law” of procedure operates in tandem with the firmer norms imposed by statutes, treaties and institutional rules.

Although nothing prevents litigants from overriding these principles, they usually produce far-reaching effects for the simple reason that post-dispute party agreement proves difficult or impossible. Rightly or wrongly, the guidelines enter the canon of sacred instruments to be cited *faute de mieux*, to fill gaps in institutional rules and national statutes.<sup>58</sup>

Cross-pollination is not always a happy matter, however. In particular, Continental lawyers are often frustrated with wrangling over privilege, pre-hearing oral depositions, and objections to evidence.<sup>59</sup> Not all American legal traditions have spurned controversy, however. International arbitration now generally admits the practice, long favored in the United States,<sup>60</sup> of lawyers preparing witnesses by discussing the case in pre-hearing interviews.<sup>61</sup> Indeed, the Swiss Rules of

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<sup>54</sup> The United Nations Commission on International Trade Law promulgated its Arbitration Rules appeared in 1976, while the Model Law on International Commercial Arbitration dates from 1985, and was amended in 2006.

<sup>55</sup> International Bar Association Guidelines on Conflicts of Interest in International Commercial Arbitration, approved by the IBA Council on 22 May 2004, published in 9 (No. 2) ARBITRATION & ADR (IBA) 7 (October 2004). The IBA Guidelines present concrete enumerations of fact patterns that may give rise to justifiable doubts on arbitrator independence or impartiality, and thus disqualify arbitrators. The non-waivable red list includes a financial interest in the outcome of the case, while other fact patterns (such as a relationship with counsel) may be ignored by mutual consent. The orange list covers past service as counsel for a party, which the parties are deemed to have accepted if no objection is made after timely disclosure. The green list enumerates cases such as membership in the same professional organization that require no disclosure. See also Markham Ball, *Probity Deconstructed – How Helpful, Really are the New IBA Guidelines on Conflicts of Interest in International Arbitration*, 15 WORLD ARB. & MED. REV. 333 (Nov. 2004); Jan Paulsson, *Ethics and Codes of Conduct for a Multi-Disciplinary Institute*, 70 ARBITRATION 193 (2004), at 198-99.

<sup>56</sup> See IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, [2000] BUS. LAW INT'L. (Issue 2) 14. See also Michael Bühler & Carroll Dorgan, *Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration*, 17 J. INT'L ARB. 3 (No. 1) 2000.

<sup>57</sup> College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration* (October 2005).

<sup>58</sup> See William W. Park, *Three Studies in Change*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 45 (2006); William W. Park, *Arbitration's Protean Nature*, 19 ARB. INT'L 279 (2003).

<sup>59</sup> Not all Continental lawyers, however, necessarily disapprove of American practices. In a provocative article exploring why civil law arbitrators sometimes apply common law procedures, an eminent Zürich attorney suggested reasons to appreciate Anglo-American litigation techniques such as cross examination and document production. See Markus Wirth, *Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, 1 Schieds VZ (Zeitschrift für Schiedsverfahren/ German Arbitration Journal) (Jan.-Feb. 2003). One Continental lawyer offers three explanations for the differences between procedure in common law and civil law: (i) the role of oral evidence in common law; (ii) the inductive nature of legal reasoning in common law, and (iii) pre-trial discovery in the common law. See Luc Demeyere, *Different Approaches to Procedures under Common Law and Civil Law*, 6 SCHIEDS VZ 279 (Zeitschrift für Schiedsverfahren/ German Arbitration Journal) (Nov/Dec. 2008).

<sup>60</sup> American lawyers would be considered lacking in diligence if they failed to rehearse their witnesses about the type of questions to be asked, seen as a way to keep the witness from being misled or surprised, arguably making the testimony more accurate. See, e.g., *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998). See Wigmore on Evidence (3rd ed.), § 788; Thomas A. Mauet, *Pretrial* (4th ed., 1999).

<sup>61</sup> See generally George von Segesser, *Witness Preparation*, 20 ASA Bull. 222 (2002). The normal Swiss practice would be to the contrary. See e.g., Article 13, *Geneva Us et coutumes de l'ordres des avocats*: “L'avocat doit s'interdire de discuter avec un témoin de sa déposition future et de l'influencer de quelque manière que ce soit.” (The attorney must abstain

International Arbitration now explicitly bless the practice.<sup>62</sup>

Just as international arbitration has been “Americanized,” arbitration in the United States has to some extent begun to reflect the European emphasis on written testimony and reasoned awards.<sup>63</sup> Perhaps the most striking examples can be found in the new American standard for arbitrator ethics.<sup>64</sup> Traditionally, party-nominated arbitrators in the United States were considered partisan and thus permitted *ex parte* communications with their appointers.<sup>65</sup> Ultimately, however, American arbitration came into line with global standards,<sup>66</sup> imposing a presumption of independence for all arbitrators, regardless of how they were selected.<sup>67</sup>

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from discussing with a witness his future testimony and from influencing him in any way.) German lawyers are likewise prohibited from interviewing witnesses out of court except in special circumstances. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 Chicago L. Rev. 823 (1985) at 834; John H. Langbein, *Trashing The German Advantage*, 82 Nw. L. Rev. 763 (1988).

<sup>62</sup> Swiss Rules of International Arbitration, adopted in 2004 by the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, and Zürich. Article 25(6), provide that it shall “not be improper for a party, its officers, employees, legal advisors or counsel to interview witnesses, potential witnesses or expert witnesses.” This rule tracks Article 4(3) of the 1999 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence). See also Nathalie Voser, *Best Practices: What has been achieved and what remains to be done*, in BEST PRACTICES IN INTERNATIONAL ARBITRATION 1, ASA Bulletin, Special Series No. 26 (2006, Markus Wirth, ed.). Dr. Voser writes, “It is traditionally a violation of ethical rules for an attorney to contact a witness beyond establishing whether or not a person should be nominated as witness.” *Id.* at 2. Nevertheless, she concludes that in the interest of equal treatment, it is generally accepted today that lawyers will have previous contact with their witnesses before arbitration begins, at least “to a certain extent.”

<sup>63</sup> The American Arbitration Association traditionally discouraged reasoned awards, on the assumption that reasons provided a hook on which an unhappy loser might challenge an award. As late as 1987, the President of the American Arbitration Association suggested to arbitrators that “[w]ritten opinions can be dangerous because they identify targets for the losing party to attack.” Robert Coulson, *Business Arbitration: What You Need to Know* (3rd ed., 1987), at 29. By contrast, reasoned awards have been the norm for international arbitration. The mandate for reasoned awards can be found not only in the rules of international institutions (e.g., ICSID Convention Article 52(1)(e), ICC Rules Article 25(2), and LCIA Rules Article 26.1), but also in the public law tradition elaborated a century ago, reflected in Article 52 of the 1899 Convention for the Pacific Settlement of International Disputes and Article 79 of the 1907 Convention for the Pacific Settlement of International Disputes. See Dev Krishan, *Reasoning in International Adjudication* (Forthcoming 2011). Even in the United States, however, the absence of reasons has not always been an unalloyed good. In one case, a federal court stated that an arbitrator’s failure to give reasons might reinforce suspicions of “manifest disregard of the law.” *Halligan v. Piper Jaffray*, 148 F. 3d 197 (2nd Cir. 1998), cert. denied 119 S. Ct. 1286 (1999).

<sup>64</sup> See generally Ben Sheppard, *A New Era of Arbitrator Ethics in the United States*, 21 ARB. INT’L 91 (2005); Paul D. Friedland & John M. Townsend, *Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association*, 58 DISPUTE RESOLUTION J. 8 (Nov. 2003-Jan. 2004). Paul D. Friedland & John M. Townsend, *Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association*, 58 Disp. Res. J. 8 (Nov. 2003-Jan. 2004); David Branson, *American Party-Appointed Partisan Arbitrators – Not The Three Monkeys*, 30 U. Dayton Law Rev. 1 (2004).

<sup>65</sup> In domestic (rather than international) arbitration, it was presumed that arbitrators nominated by one of the parties were partisan unless explicitly agreed otherwise. See Canon VII, 1977 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.

<sup>66</sup> The general alignment of American and global standards does not mean that all peculiarities in ethical practices cease to exist, either among institutions or among states. See, e.g. *Crédit Suisse First Boston Corp. v. Grunwald*, 400 F. 3d 1119 (9th Cir. 2005), involving the broad and controversial California Ethical Standards for Neutral Arbitrators. In the case at bar, arising under the rules of the National Association of Securities Dealers, the California standards were found to be preempted by the 1934 Securities Exchange Act.

<sup>67</sup> Under the 2004 Arbitral Code of Ethics, adopted jointly by the American Bar Association and the American Arbitration Association, a party-nominated arbitrator may be non-neutral only if so provided by the parties’ agreement, the arbitration rules or applicable law. See Preamble (“Note on Neutrality”) and Canon X, 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. Moreover, the American Arbitration Association domestic commercial arbitration rules, effective July 2003, established a presumption of neutrality for all arbitrators. Rule 18 (applicable unless there has been agreement otherwise) prohibits *ex parte* communication with an arbitrator except (i) to advise a

## B. Conflict, Convergence and Proportionality

Seeking an illustration of how cultural baselines affect truth-seeking, it would be difficult to find one better than the oft-maligned American style of discovery.<sup>68</sup> Likewise, one would be hard-pressed to suggest a more forceful example of procedural cross-pollination than the compromise reached in guidelines that balance risks and benefits of document requests.

In many countries, lawyers simply provide opposing counsel with advance copies of exhibits on which they intend to rely. Such exchange aims to avoid undue surprise. Conversely, practice in the United States<sup>69</sup> and England<sup>70</sup> has evolved to require parties to produce, either spontaneously or upon request, broad categories of dispute-related material that may be adverse to their own case.<sup>71</sup> Like a vacuum cleaner, document production often sucks up bits of paper that may yield information reasonably calculated to lead to the discovery of admissible evidence.<sup>72</sup>

In this regard, American lawyers often appear to their foreign colleagues as asserting a right to shoot first and aim later, asking how they are to prove a claim without the other side's documents. Continental lawyers reply that evidence should be collected before claims are filed, unless of course they themselves want information to benefit a client, at which point American legal imperialism becomes the "emerging trend" in arbitration.

A rule that requires the other side to produce documents adverse to its case provides a perspective of the relative strengths and weaknesses of each side's position. This may lead to settlement, sharper definition of issues, and of course enhanced chances that the arbitrator will

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party-nominated candidate of the nature of the controversy or (ii) to discuss selection of a presiding arbitrator. Rule 12(b) requires party-nominated arbitrators to meet general standards of impartiality and independence absent agreement otherwise.

<sup>68</sup> See, e.g. Robert H. Smit & Tyler B. Robinson, *E-Disclosure in International Arbitration*, 24 *ARB. INT'L* 105 (2008); Klaus Sachs, *Use of Documents and Document Discovery: "Fishing Expeditions" versus Transparency and Burden of Proof*, 1 *Schieds VZ (Zeitschrift für Schiedsverfahren/German Arbitration J.)* 193 (2003). See also Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much is Too Much?*, 2 *SCHIEDSVZ (ZEITSCHRIFT FÜR SCHIEDSVERFAHREN/GERMAN ARBITRATION J.)* 13 (2004); Peter Griffin, *Recent Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings*, 17 *J. INT'L ARB.* 19 (No. 2, 2000); George A. Lehner, *The Discovery Process in International Arbitration*, 16 *MEALEYS INT'L ARB. REP.* 1 (January 2001). For comparative studies of the alleged costs and benefits of discovery, see JULIUS LEVINE, *DISCOVERY* (1982) (England and the United States); ARIELLE ELAN VISSON, *DROIT À LA PRODUCTION DE PIÈCES ET DISCOVERY* (1997) (England and Switzerland).

<sup>69</sup> See Federal Rules of Civil Procedure, Rules 26-37 & 45, in particular Rule 26(b)(1). Sanctions for non-compliance (Rule 37) include preclusion of introduction of the evidence, striking pleadings and fines for contempt. For litigation in the United States, as well as some American arbitration, case preparation also implicates oral pre-trial depositions of the other side's witnesses. See generally, Thomas Mauet, *PRETRIAL* (4th ed. 1999); John Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 *MINN. L. REV.* 505 (2000).

<sup>70</sup> See Part 31, *Disclosure and Inspection of Documents*, 1998 English Civil Procedure Rules, which requires automatic production of certain categories of documents including (in Section 31.6 (1) of the CPR) both documents on which a party relies and "documents which adversely affect [its] own case or support another party's case".

<sup>71</sup> While discovery requests usually implicate the opposing party, they may also aim at non-parties with information relevant to the dispute. See Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of Third Parties*, 19 *AM. REV. INT'L ARB.* 1 (2008).

<sup>72</sup> The origins of this approach derive from the so-called "Peruvian Guano Test" which fixed the universe of potentially discoverable documents to include whatever might lead to a "train of inquiry" to advance the party's own case or damage the case of the adversary. *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, 11 *QBD* 55 (1882). The so-called *Woof Reforms* that came into effect in 1999 curtail some of the entitlement to documents simply because they lead to a "train of inquiry" toward evidence.

learn what truly happened.<sup>73</sup>

Document production comes at greater expense, however. Some equilibrium must exist between accuracy furthered by document production and the need for sensitivity to its cost in time and money. On a net basis, more exchange is not necessarily better.

In international arbitration, the different cultural starting points have produced an accommodation in which truth-seeking will be tempered against the objectives of speed and economy. The 1999 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence) adopt a compromise that might be seen as “rifle shot” rather than “scatter gun” approach. Requests must identify either a single document or a narrow and specific category of documents, coupled with a description of their relevance and materiality to the outcome of the case.<sup>74</sup> The American Arbitration Association has memorialized an analogous approach with information exchange guidelines that apply in all international cases administered by its affiliate, the International Centre for Dispute Resolution.<sup>75</sup>

Admittedly, assumptions about what discovery is “normal” will affect the cost/benefit calculation in determining what is relevant or material. Yet the wind has definitely blown away from both the minimalist and the expansionist approaches, with notions of proportionality informing choices on when burdens of production bear a reasonable relationship to the degree of expected enlightenment.

### C. The Role of Complexity

The more complicated a dispute, the more challenging the task of fixing the right case management tools. If Jill claims that Jack sold her a defective automobile, the calculus of truth-seeking rests on testimony from individuals who helped Jill get the car started. But few international disputes pose a single issue with such pristine purity.

So let us imagine a more realistic scenario. The owner of an American fishing fleet claims for lost profits and injury to crew members due to explosion of ship engines purchased from a European manufacturer. As the arbitrator begins to decorticate the controversy, one obvious issue is whether engine failure resulted from poor European workmanship or sloppy American maintenance. What law should determine whether the tribunal has jurisdiction to hear claims for bodily injury? Should hearings be bifurcated to address the jurisdictional question first? Does contractual limitation of liability cover some claims but not others? What theory determines quantum of damages? How does the arbitrator respond to disagreement on whether briefs should be simultaneous or sequential? How much pretrial document production should be ordered?

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<sup>73</sup> For arguments in favor of American discovery practices in arbitration, see PEDRO J. MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION* (2009); See Paul B. Klaas, *Depositions: An Apologia*, 25(4) *ARB. INT'L* 553, 555-57 (2009).

<sup>74</sup> IBA Rules of Evidence (1999 Version), Section 3(a) & (b).

<sup>75</sup> See American Arbitration Association (International Centre for Dispute Resolution), *Guidelines for Information Exchanges in International Arbitration*, issued 8 May 2008, making clear that arbitrators have “the authority, the responsibility and in certain jurisdictions, the mandatory duty” to manage proceedings so as provide simpler and less expensive justice. See generally, John Beechey, *The ICDR Guidelines for Information Exchange in International Arbitration*, *Dispute Resolution Journal* 85 (August/October 2008). In January 2009, the CPR (formerly Center for Public Resources) issued its own list of precepts for information exchange, which apply to all commercial arbitration, not just international cases. CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

Should oral depositions be directed for crew members, or subpoenas issued to third parties with information on maintenance? Do claims of attorney-client privilege shield some communications from production? Does privilege depend on whether the document was created in the United States (where communications with in-house counsel may be privileged) or in Switzerland (where such communications are not)? Should experts in areas such as engineering, accounting or damages be heard examined together or separately?<sup>76</sup>

In such arbitrations, proper case management requires closer sensitivity to the counterpoise between finding the truth about liability and damages, and avoiding undue cost and delay. The framework for truth-seeking in arbitration must be flexible enough to adapt to a myriad number of problems. Since things that go without saying often will go better having been said, it may be well at this point to mark the point by listing a few real world situations that illustrate why arbitral truth-seeking is not always a simple matter.

- An owner accuses a building contractor of deviating from good practice in 48 matters, ranging from silicon in the cement mix to termite protection for cables. What truth lies there in these claims? Do they give rise to the contractor's liability?
- In a corporate acquisition, the seller allegedly misrepresented the transferred entity's income by causing repairs to be capitalized over several years, instead of taken as expenses during the year incurred, thus arguably overstating the entity's Earnings Before Interest Taxes Depreciation and Amortization. Was the accounting irregular, and if so do buyer have a right to rescind?
- Pursuant to a long-term supply contract, one side says that the other must adjust the price to account for changed circumstances. Learned professors differ about what the applicable law requires. Which legal expert's report is more accurate?
- The purchaser of a bank, after taking possession, claims that the loan portfolio is not of the quality promised, and that deposits were less than expected. Is a rebate justified due to impairment of the assets and/or liabilities?
- An insurance company fails to reimburse a manufacturer for third party liabilities incurred in American tort litigation, suggesting that the company "knew or expected" that the insured product would cause injury. What did the policy-holder know?
- A host state expropriates assets of an American oil company. What is the value of the confiscated property? How should quantum of loss be calculated?
- A buyer of natural gas argues that events of *force majeure* allow an escape from purchase obligations. What legal standard determines duty to perform?

In arbitrations with an international element, controversy also can arise over the procedurally right way to decide these complex matters.<sup>77</sup> Even if parties agree in the abstract on what standards

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<sup>76</sup> Almost any job description might become the subject of expert testimony. In one case involving power plant construction in a developing country, each side called military officers and social workers (including a padre who testified for both sides) to opine on how the contractor should have reacted to guerilla activity that was interfering with work site progress.

<sup>77</sup> For an overview of such questions, see THE CIVIL LITIGATION PROCESS (Janet Walker ed. 6th ed. 2005); William W. Park,

apply (for example, adopting the IBA Rules of Evidence), varying ideas of what is “reasonable” may divide those of different backgrounds on matters such as the relationship between oral and written testimony,<sup>78</sup> document production,<sup>79</sup> electronic discovery<sup>80</sup> or available remedies and damage calculations.<sup>81</sup>

#### IV. THE TRUTH ABOUT LAW

##### A. Jura Novit Curia

Many trees have been felled to make paper for articles on how to find facts, looking at topics from presentation of testimony to the role of depositions and discovery. Less attention has been paid to the arbitrator’s truth-seeking function with respect to legal norms.<sup>82</sup>

This gap is surprising on several counts. First, arbitral awards are not usually subject to review for legal error in the same way that lower court judgments are scrutinized in a hierarchical national legal system. The New York Arbitration Convention lists nothing like mistake of law as a ground for non-recognition. And the ICSID Convention contains no right to seek annulment for substantive legal error as such.<sup>83</sup> Thus arbitrators bear a heavy burden to “get it right” on the law, since their mistakes cannot be corrected in an appellate chain.<sup>84</sup>

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*Three Studies in Change*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 3 (2006). See also 2009 AUSTRIAN ARBITRATION YEARBOOK 482 (C. Klausegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, J. Power, I. Welser & G. Zeiler eds., 2009), including Michael Kramer, Guido Urbach & Reto Jenny, *Equal Treatment in Multi-Party Arbitrations and Specific Issue of Appointment of Arbitrators*, id. at 149; Laurence Shore & Delyan Dimitrov, *The Public Interest in Private Dispute Resolution*, id. at 163; Michael Molitoris & Amelie Abt, *Oral Hearings and the Taking of Evidence in International Arbitration* id. at 175; Klaus Oblin, *Hearsay and International Arbitration*, id. at 201; Stavros Brekoulakis, *The Negative Effect of Compétence-Compétence: The Verdict has to be Negative*, id. at 237.

<sup>78</sup> ARBITRATION AND ORAL EVIDENCE (L. Lévy & V. V. Veeder, eds., 2005), Dossiers ICC Institute World Business Law, ICC Pub. 689.

<sup>79</sup> Document Production in International Arbitration, 2006 Supplement, ICC Bulletin, ICC Pub. 676E.

<sup>80</sup> Robert H. Smit & Tyler B. Robinson, E-Disclosure in International Arbitration, 24 Arbitration 105 (2008); Electronic Disclosure in International Arbitration (David Howell, ed.2008); DAVID J. HOWELL, ELECTRONIC DISCLOSURE IN INTERNATIONAL ARBITRATION (2009).

<sup>81</sup> See John Y. Gotanda, *Damages in Private International Law*, 326 RECUEIL DES COURS 73 (2007); MARK KANTOR, VALUATION FOR ARBITRATION (2008); William W. Park, *Framing the Case on Quantum*, in DAMAGES IN INTERNATIONAL ARBITRATION, 2 WORLD ARB. & MED. REV. 59 (2009); INTEREST, AUXILIARY AND ALTERNATIVE REMEDIES IN INTERNATIONAL ARBITRATION (Filip De Ly & Laurent Lévy, eds. 2008), Dossiers ICC Institute World Business Law, ICC Pub. 684; EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION (Yves Derains & Richard H. Kreindler eds. 2006), Dossiers ICC Institute World Business Law 2006 ICC Pub. 668.

<sup>82</sup> The International Law Association performed yeoman service on the topic in its *Report on Ascertaining the Content of the Applicable Law in International Commercial Arbitration*, 73rd Conference, Rio de Janeiro (August 2008) 851-882 (Filip De Ly, Chair; Mark Feldman & Luca Radicati di Brozolo, Rapporteurs; Janet Walker, Observer) (“ILA Report on Applicable Law”).

<sup>83</sup> New York Convention Article V; ICSID Convention Article 52. Although allegations of “excess of authority” sometimes mask claims of mistake, most reviewing panels remain sensitive to the distinction. On second-guessing arbitrators, see generally, William W. Park, *Why Courts Review Arbitral Awards*, in LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL 595 (Briner, Fortier, Berger & Bredow, eds., 2001); *Jurisdiction to Determine Jurisdiction*, in 13 ICCA CONGRESS SERIES 55 (PCA, The Hague, 2007). On analogous issues in public law arbitration, see W. MICHAEL REISMAN, NULLITY AND REVISION (1971). For investor-state arbitration, see Thomas W. Walsh, *Substantive Review of ICSID Awards*, 24 BERKELEY J. INT. L. 444 (2006).

<sup>84</sup> Some statutes provide waivable appeal on points of law (e.g., 1996 English Arbitration Act, § 69), but as the exception rather than the rule. In the United States, parties may not even stipulate to appeal. *Hall Street v. Mattel*, 552 U.S. --, 128

Second, the starting point for determining the applicable law may be problematic for arbitrators. National courts seek authority in choice-of-law principles of their own jurisdiction. By contrast, the genesis of adjudicatory power for international arbitration derives not from any single legal system, but from the parties' decision that a dispute *not* be decided by national courts. Consequently, if the parties have left lacunae, arbitrators may need to examine transnational norms elaborated in other arbitrations or in cases from several jurisdictions.

Finally, arbitrators in international cases are prone to listen to testimony from legal experts offered by the parties themselves. Such a practice imposes itself if tribunals include members not trained in the contractually designed law, as well as non-jurists such as engineers, accountants or underwriters.

Even after an applicable law has been determined, the calculus of duty may differ between judge and arbitrator. Judges bear direct obligations to the appointing citizenry, and thus respond to significant societal values that may trump private choices. Although responsible judges (like good scholars) will master existing authority before taking new directions, many traditions allow appellate judges to overrule precedent.

No similar social engineering normally falls to arbitrators. As creatures of consent, arbitrators are law-appliers rather than law-makers, and must show special fidelity to the litigants' shared *ex ante* expectations as expressed in contract or treaty.<sup>85</sup> Although sensitive to public values,<sup>86</sup> rejecting complicity with illicit schemes<sup>87</sup> and abusive procedures,<sup>88</sup> arbitrators fix their eyes on existing legal norms in determining what the parties had a right to expect.<sup>89</sup>

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S.Ct. 1396 (2008).

<sup>85</sup> In purely commercial arbitration, the parties' agreement sets expectations. By contrast, for investor-state arbitration expectations derive from treaty commitments to balance investor confidence and host state welfare, with private contracts playing a role through "umbrella clauses" requiring observance of undertakings. In state-to state arbitration, expectations spring from inter-governmental accords, such as the recent Swiss-Libyan Agreement to resolve tensions from arrest of a Libyan diplomat in Geneva, which instructs arbitrators to apply "relevant national laws, international conventions, international custom, as well as evidence of general practices accepted as law and the general principles of law and courtesy recognized by civilized nations." Each side designates a third-country arbitrator, the two of whom chose a chair in default of which the International Court of Justice makes the selection. Agreement between Switzerland and Libyan Arab Jamahiriya, Tripoli, 20 August 2009.

<sup>86</sup> One recalls the dictum in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), at 638, warning arbitrators to address "the legitimate interest" in enforcement of public law at the place of enforcement. The contract was governed by Swiss law, but the counterclaim implicated American statutory unfair competition counterclaims.

<sup>87</sup> Money laundering presents special temptations. A corrupt official might contract with a foreign entity controlled by accomplices, allowing contract default to lead to an "award" against the government followed by transfer of money into a bank account abroad. Careful arbitrators look for warning signs of fake arbitrations, including entities not in existence at contract signature. See *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*, 512 F.3d 742 (5th Cir. 2008); Thomas Walsh, *Collateral Attacks and Secondary Jurisdiction in International Arbitration*, 25 ARB. INT'L 133 (2009).

<sup>88</sup> In one recent California case, a settlement of sexual harassment claims involved payment to the employee who accepted sham arbitration with an "award" in the company's favor. *Nelson v. American Apparel, Inc.* (Cal. App. 2d. Dist. 28 October 2008, No. B205937).

<sup>89</sup> While arbitrators may have less margin to maneuver than appellate courts to abandon substantive precedent as outmoded, in procedural matters arbitrators may possess greater options for innovation. With respect to strict rules of evidence or document production, the parties may well want less procedural formality than in court. Such reduced formalism does not mean lack of fundamental fairness, but rather that the arbitrator can provide a measure of bespoke procedural tailoring in response to the litigants' request for a more streamlined process.

Although the realms of fact and law intertwine,<sup>90</sup> distinction remains of profound significance. Controverted facts can remain stubbornly particular, requiring recourse to witnesses and exhibits, while the law by its nature possesses a generality that permits instruction by reading statutes and cases.<sup>91</sup>

This difference between law and fact plays itself out in the maxim *jura novit curia*: the judge knows the law.<sup>92</sup> When applied by analogy to arbitrators,<sup>93</sup> the principle facilitates discovery of norms to connect specific events with general theories for relief, at least if arbitrators look beyond their prejudices.<sup>94</sup> Of course, the fact that arbitrators may engage in direct study of legal authorities does not mean their award should contain surprises. Providing an opportunity for the litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties' sense of being treated justly.<sup>95</sup>

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<sup>90</sup> In *Vargas v. Insurance Co. of North America*, 651 F.2d 838 (2d Cir. 1981), an aviation policy covered accidents "within the United States of America." The insured died while traveling between two points of the United States (New York and Puerto Rico), invoking a canon of construction requiring ambiguities to be resolved against the drafters (*contra proferentem*) that has since been excluded in many liability policies. See also Gerald Leonard, *Rape, Murder, and Formalism: What Happens When We Define Mistake of Law?*, 72 U. COLO. LAW REV. 507 (2001), commenting on the English rape case *Regina v. Morgan* where a defendant's incorrect belief that a woman consented would be a defense, but not an incorrect understanding of the law.

<sup>91</sup> In a sense, we cannot say what the law is for a given dispute until first knowing what law is in general. One working definition articulates law as an authoritative dispute resolution process that includes principles for substantive conduct as well as procedures for deciding cases. Francophone jurists distinguish between "*loi*" and "*droit*" both of which are "law" for the Anglophone. A tyrant's statute ("*loi*") might be law in the sense of an enactment, while contrary to authoritative norms ("*droit*") recognized from a more legitimate vantage point. English King George III may have made such a distinction for laws of his rebellious American colonies, as did the colonists for some British taxes before 1776.

<sup>92</sup> Not all systems see scope for things in precisely the same way, of course. In England, foreign law will normally be proved as fact (Rule 18, Dicey, Morris & Collins, *The Conflict of Laws* (Lawrence Collins, Gen. Ed., 14th ed. 2006), Chapter 9 pages 255 et seq.) while in the United States Rule 44.1 of the U.S. Federal Rules of Civil Procedure provides that courts in determining foreign law "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." For a case where the principle became relevant, see *Ecuador v. ChevronTexaco Corporation*, 296 Fed. Appx. 124 (2d Cir. 2008) where an alleged arbitration commitment with a predecessor entity required consideration of Ecuadorian law. Similar state law principles include New York CPLR § 4511 and Massachusetts GL Ch. 233, § 70, directing courts to take judicial notice of foreign law.

<sup>93</sup> See Gabrielle Kaufmann-Kohler, *Iura Novit Arbitrator: Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l'arbitre international*, in *De Lege Ferenda: ETUDES POUR LE PROFESSEUR ALAIN HIRSCH* 71 (A. Héritier Lachat & L. Hirsch, eds., 2004); Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law*, 21 ARB. INT'L 631 (2005); Julian D. M. Lew, *Proof of Applicable Law in International Commercial Arbitration*, in *FESTSCHRIFT FÜR OTTO SANDROCK* 581 (K. P. Berger, W. F. Ebke, S. Elsing, B. Grossfeld, & G. Kühne, eds., 2000).

<sup>94</sup> Instances where eminent judges and arbitrators simply presume a conclusion are not hard to find. See *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, 1 INT'L & COMP. L.Q. 247 (1952), where Lord Asquith of Bishopstone admitted that the applicable system of law was *prima facie* that of Abu Dhabi, then added, "But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." See generally, Ibrahim Fadlallah, *Arbitration Facing Conflicts of Culture*, 25 ARB. INT. 303 (2009).

<sup>95</sup> The rule that parties must have a chance to comment on applicable law was accepted by the Swiss Tribunal fédéral in *Urquijo Goitia v. Da Silva Muñoz*, (No. 4A 400/2008, Ire Cour de droit civil, 9 February 2009). A fee claim by a soccer player's agent was rejected by the Fédération Internationale de Football Association (FIFA) in a decision upheld by the Court of Arbitration for Sport in Lausanne. On the need for exclusive agents to show a causal link between their activity and the player's employment, the tribunal relied on a law that neither side had mentioned. The award was vacated for violation of the right to be heard, Article 190(2)(d), Swiss LDIP.

## B. Transnational Norms

### 1. Between Substance and Procedure

On the substantive merits of a dispute, arbitrators in commercial disputes usually apply a legal system chosen by the parties.<sup>96</sup> A privately-negotiated commercial loan agreement will recite that it is to be construed according to the law of England, or an insurance policy might state that it shall be interpreted under New York law. By contrast, an expropriation claim will be decided under the terms of a bilateral investment treaty in addition to whatever other principles of international law might be found relevant.<sup>97</sup>

For matters of pure procedure such as briefing schedules or time allocation at hearings, arbitrators are generally expected to exercise wide discretion.<sup>98</sup> Aside from treating the parties fairly, arbitrators usually fill procedural interstices by recourse to their experience and guidelines gleaned from general practice.<sup>99</sup>

With respect to a third category, questions that contain elements of both substance and procedure, arbitrators often look to transnational norms of a less flexible sort, synthesized from various cases and awards. Even if no single fixed legal system applies, the parties expect discretion to play a lesser role. Such hybrid matters, where firmer norms apply, include rates of interest, currency for awards, standards for determining arbitrator bias,<sup>100</sup> the propriety of dissenting opinions,<sup>101</sup> notions of issue preclusion, *res judicata* and *lis pendens*,<sup>102</sup> and even the process for

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<sup>96</sup> If the parties fail to select an applicable law, few general rules tell arbitrators how to go about the task. Approaches include (a) conflicts principles they consider “applicable” (English Arbitration Act § 46 and UNCITRAL Model Law Article 28), (b) rules they deem “appropriate” (“règles que [le tribunal] estime appropriées”) (French NCPC Article 1496), or (c) the law “most closely connected” with the action (“les liens les plus étroits”) (Swiss LDIP Article 187).

<sup>97</sup> Article 42 of the ICSID Convention provides for decision pursuant to such rules of law as may be agreed by the parties, in the absence of which the tribunal must apply “the law of the Contracting State party to the dispute...and such rules of international law as may be applicable.” See W. Michel Reisman, *The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold*, in ESSAYS IN HONOR OF IBRAHIM SHIHATA, 15 (No. 2) ICSID REVIEW/FOREIGN INVESTMENT L. J. 362 (Fall 2000); Emmanuel Gaillard, *The Extent of the Applicable Law in Investment Treaty Arbitration*, in ANNULMENT OF ICSID AWARDS 223 (E. Gaillard & Y. Banifatemi, eds, 2004). State-to-state arbitrations will normally implicate principles of public international law, which might also even be relevant to private law subjects such as insurance. See India-U.S. Investment Incentive Agreement (19 November 1997), providing arbitration of international law claims triggered by political risk insurance payments of the U.S. Overseas Private Investment Corporation.

<sup>98</sup> This is not to say that parties never provide specific guidance on procedural matters. Indeed, both French and Swiss statutes explicitly allow choice of procedural law (French NCPC, Article 1494, Swiss LDIP Article 182) as does UNCITRAL Model Article 19. Moreover, it is increasingly common to see contracts make reference to the 1999 IBA Rules of Evidence.

<sup>99</sup> Notions of fairness may differ, of course. In one London arbitration the arbitrator refused a right of reply to the claimant, which then challenged the award for procedural irregularity. The judge upheld the award on the basis that nothing in the arbitration’s procedural framework said who got to speak last, and the English rule, giving final word to claimants bearing the burden of proof, did not apply in arbitration. After punting the question to the arbitrator, the judge also noted that international arbitration normally follows a right to make an *equal* number of submissions, which thus created an established practice that accorded with the arbitrator’s ruling. *Margulead Ltd. v. Exide Technologies*, High Court of Justice (QB, Commercial Court), 16 February [2004] EWHC 1019 (Comm.) (Colman, J.).

<sup>100</sup> See William W. Park, *The Transient and the Permanent in Arbitrator Integrity*, 43 (3) SAN DIEGO LAW REV. 629, 640 (2009). Particularly in ICSID challenges, subject to no judicial review, the skeleton of broad treaty notions (someone who may be “relied upon to exercise independent judgment”) often requires the flesh of detail, usually supplied by parties invoking specific normative standards from other sources.

<sup>101</sup> Harm Peter Westermann, *Das dissenting vote im Schiedsgerichtsverfahren*, 7 Schieds VZ 102 (März/April 2009); Laurent Lévy, *Dissenting Opinions in Switzerland*, 5 ARB. INT’L 35 (1989).

determining applicable law.<sup>103</sup>

## 2. The Arbitrator as Synthesizer

In the juridical twilight between procedure and substance, two problems illustrate why and how arbitrators engage in legal synthesis. One relates to joinder of non-signatories, as when a parent corporation is alleged to have agreed to arbitrate through the agency of a subsidiary. The other implicates claims of lawyer/client privilege in the face of document production requests. In each instance, arbitrators who care about accuracy and fairness may need to synthesize transnational norms from several legal systems that inform their decision.

### a) Non-Signatories and Implied Consent

Sometimes a claimant seeks the deeper financial resources of the respondent's parent company, even though the shareholder never signed the arbitration clause. For example, a French company might allege that the shareholder of its American counterparty had implicitly agreed to arbitrate through behavior evidencing the agency of its subsidiary. Or, a respondent parent might invoke an arbitration clause signed by its subsidiary to avoid an alternate forum perceived as unfavorable.

When arguments for joinder rest on implied consent, the arbitrator's job of determining an applicable law to decide the matter may not be simple.<sup>104</sup> While judges understandably start from the law of whatever forum pays their salary, arbitrators find the genesis of their power in private decisions.

Traditional approaches include the law of the contract and the law of the arbitral situs.<sup>105</sup> Yet both may involve a circular exercise that presumes its conclusion when identification of who agreed to arbitrate constitutes the very question to be decided. The contract's applicable law, and the law of the arbitral seat, will be foreign to an entity that remained a stranger to the transaction. The arbitrator thus confronts a dilemma not unlike that of the proverbial chicken and egg, and must be wary of starting with a law derived solely from one side's version of the disputed facts.

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<sup>102</sup> International Law Association, Final Report on *Lis Pendens* and *Res Judicata*, with introduction by Filip De Ly & Audley Sheppard, 25 *ARB. INT'L* 1 (2009). Recommendation 2 states that the conclusive and preclusive effects of arbitral awards in further arbitral proceedings "need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration."

<sup>103</sup> Although the chosen law relates to the substantive merits of the dispute, the decision to apply a given legal system would normally take the form of a ruling on procedure. See e.g. §34(2)(g), 1996 English Arbitration Act. Finding applicable law might implicate multiple systems either as a matter of *dépeçage* among various issues, or because several contracts intertwine. See, e.g., *Forsikringsaktieselskapet Vesta v. JNE Butcher*, [1989] AC 852 (HL).

<sup>104</sup> Apart from implied consent, the gateway to arbitration may also rest on disregard of a corporate veil. While this approach lends itself to easier analysis, with the starting point in the subsidiary's law of incorporation, even that rule may not always provide firm answers. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 613 (1983), the U.S. Supreme Court addressed Cuba's attempt to collect money from an American bank whose assets it had just confiscated, and applied equitable principles "common to international law and federal common law" to permit the value of expropriated assets to be credited against sums due under a letter of credit.

<sup>105</sup> Rule 57, *DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS* (Lawrence Collins, Gen. Ed., 14th edition, 2006) speaks of the "material validity, scope and interpretation" of an arbitration agreement as being governed by its applicable law. In the absence of explicit choice, this is said to be the law most closely associated with the arbitration agreement, generally the law of the arbitral seat.

For these reasons, arbitrators often seek guidance in transnational norms articulated by scholars and in published awards. Such norms address the circumstances under which an arbitration clause might be extended to a non-signatory, for example, by virtue of the parent company's behavior in negotiations and contract formation, or performance of related contracts which form part of a single contract scheme constituted by multiple agreements.<sup>106</sup> Such transnational norms often serve as the best indicator of the reasonable expectations of litigants from diverse legal cultures. They apply for want of any better way to promote fair dispute resolution in a global community where not all accept one national law.

## b) Lawyer-Client Privilege

The confidentiality of lawyer-client communications serves as another illustration of why and how arbitrators synthesize legal norms in transnational cases.<sup>107</sup> Although professional secrecy exists in many legal systems,<sup>108</sup> the lawyer-client relationship takes on a special importance in disputes that implicate "common law" procedures. If a party may be compelled to produce documents adverse to its case, privilege becomes one escape hatch from the other side's prying eyes.<sup>109</sup>

Problems arise even in disputes between litigants from closely-connected legal cultures such as those of England and the United States.<sup>110</sup> English "legal professional privilege" divides between "legal advice privilege" and "litigation privilege" in a way that presents analogues (not always perfect ones) to the American notions of "attorney-client" privilege and the "work product" doctrine.<sup>111</sup> Yet battle lines form around much narrower questions such as whether privilege has been waived by implication, whether the "common interest privilege" precludes assertion of privilege between joint clients, and whether the sender of a memo did so in her capacity as a lawyer or business manager, which in turn would implicate notions such as "preponderant purpose" or "principal purpose" depending on the case law.<sup>112</sup>

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<sup>106</sup> See generally, William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 3 (PCA 2009). Many commentaries on the subject begin with the "group of companies" doctrine as expressed in *ICC Award No. 4131 of 1982 (Dow Chemical)*. See *I Recueil des Sentences Arbitrales de la CCI: 1974-1985*, (Sigvard Jarvin and Yves Derains, 1990), at 146; *Paris Cour d'Appel*, 21 October 1983, 1984 *Rev. Arb.* 98.

<sup>107</sup> See, e.g., Richard Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration* 50 *INT. COM. L. Q.* 345 (2001); Norah Gallagher, *Legal Privileges in International Arbitration*, 6 *INT'L ARB. L. REV.* 45 (2003); Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards vs. Arbitral Discretion*, 22 *ARB. INT'L* 501 (2006); GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1910-14 (2009). One decision in the House of Lords (as it then was) referred to privilege as a "fundamental human right." *R (Morgan Grenfell Ltd.) v. Special Commissioner* [2002] *HL* 21, par. 7; [2003] 1 *AC* 563.

<sup>108</sup> In a civil law system such as Switzerland, a secrecy obligation binds the lawyer not as a matter of the law of evidence, but as a matter of professional conduct. The master of the information will normally be the lawyer rather than the client. If the document falls into the wrong hands, it could normally be considered as evidence.

<sup>109</sup> U.S. Federal Rules of Civil Procedure Rule 26(b) provides, "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . . ."

<sup>110</sup> One finds such conflict regularly in arbitration arising from so-called "Bermuda Form" insurance, where New York law governs policy interpretation while English principles apply to the many of the arbitration's procedural aspects. See RICHARD JACOBS, LORELIE S. MASTERS & PAUL STANLEY, *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION* (2004).

<sup>111</sup> See *Hickman v. Taylor*, 329 U.S. 495 (1946).

<sup>112</sup> On the scope of legal advice privilege in England, see *Three Rivers DC v. Bank of England (No. 5)*, [2003] *EWCA Civ.* 484, [2003] 3 *WLR* 667, and *Three Rivers DC v. Bank of England (No. 10)*, [2003] *EWCA* 2565 (Comm.), appeal dismissed [2004] *EWCA Civ.* 218. For American analogues, see Federal Rules of Evidence, Rule 501, which leaves

In some jurisdictions the arbitration may provide some help. For example, the English Arbitration Act says that the tribunal shall decide “all procedural and evidential matters”<sup>113</sup> and imposes no preference whatsoever for English rules. This still begs the question, of course, whether privilege should be characterized as substance or procedure, or perhaps a bit of both.

An arbitrator might contemplate applying the rules of the place where a letter or memo was created, to meet expectations held by the drafters of the communication regardless of their legal culture. Such an approach gives short shrift to the understandable anticipation of equal treatment. In countries like the United States, communications with in-house counsel may well benefit from the attorney-client privilege,<sup>114</sup> while in Europe professional secrecy attaches to lawyers who exercise an “independent” activity.<sup>115</sup> A “place of drafting” rule would protect documents written by an in-house lawyer in New York, but not advice given by an in-house counsel in Geneva.<sup>116</sup> Instinctively, good arbitrators shrink from giving one side the type of stark procedural handicaps that invite award annulment.<sup>117</sup>

Although it does not solve all problems, the most reasonable approach to privilege lies in synthesis among several systems. The arbitrator’s job will be to give fair and open-minded consideration of whatever authorities supply information about the parties’ shared expectations on the notions of privilege the parties intended to apply, or would have intended had they thought about it. Thus in practice, arbitrators might look to judicial authorities from various common law jurisdictions, including perhaps persuasive authority from Australia, New Zealand or Canada, as well as England and the United States. Such is the essence of synthesis, which like other forms of truth-seeking will inevitably require some investment in time and effort on the part of counsel and arbitrators.

### C. Prior Awards

The effect of prior awards in other cases also affects the way arbitrators seek legal accuracy. Absent *res judicata* or issue preclusion arising for the same parties and the same claims or issues,<sup>118</sup>

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attorney-client privilege to the common law. See generally THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY (Vincent Walkowiak, ed. 4th ed. 2008).

<sup>113</sup> Sections 34(1) and (2)(d), 1996 Arbitration Act, which includes in procedure a determination of what classes of documents will be disclosed.

<sup>114</sup> *NCK Organization Ltd v. Bregman*, 542 F. 2d 128, 133 (2nd Cir. 1976).

<sup>115</sup> For example, in Switzerland the notion of lawyer (*avocat / Rechtsanwalt*) depends on activity of an “independent” character. Employment as an in-house counsel thus disqualifies from lawyer status. See Article 231, *Code Pénal* and Article 13, *Loi fédérale sur la libre circulation des avocats* (23 June 2000), establishing the obligation of professional secrecy. In general, the right to represent clients is limited to practicing lawyers and university professors.

<sup>116</sup> One authority suggests that in practice both parties will be able to claim privilege in accordance with whatever rules are most restrictive on the duty to disclose. See DAVID ST. JOHN SUTTON & JUDITH GILL, *RUSSELL ON ARBITRATION*, at section 5-135.

<sup>117</sup> In judicial actions the problem will normally not arise in the same way, since courts (at least in common law traditions) generally treat privilege as within the law of evidence, and thus governed by the *lex fori* rather than the *lex causae*. See DICEY, MORRIS & COLLINS, *THE CONFLICT OF LAWS* (Lawrence Collins, Gen. Ed., 14th ed. 2006), Rule 17, § 7-015 at 184.

<sup>118</sup> While *res judicata* prevents the same parties from re-litigating the same cause of action after it has already been adjudicated in an earlier lawsuit, notions of issue preclusion come into play when a second but different lawsuit implicates questions decided in a prior action, the re-litigation of which questions is then barred. French doctrines of *force de chose jugée* and German concepts of *rechtskräftiges Urteil* play roles similar to those of *res judicata* in the common law tradition.

arbitrators do not usually deem themselves bound by rulings of other tribunals, at least not in the way judges feel constrained by decisions of superior courts in a unified and hierarchical national system.<sup>119</sup>

This does not mean that prior awards will be ignored. To the contrary, decisions of other arbitral tribunals often get taken into account as constituting a corpus of principles representing the litigants' shared expectations. While not given the status of precedent in a narrow common law sense, awards of respected arbitrators may bolster support for results in other cases,<sup>120</sup> providing information about what the relevant community considers the right approach to similar problems.<sup>121</sup> For litigants, this information can serve as a tool of persuasion. For business managers and government planners, it provides one way to predict how future disputes will be resolved.<sup>122</sup> And for the arbitrators, prior rulings can justify awards to the rest of the world and enhance the prospect that similar cases will be treated similarly.<sup>123</sup>

#### D. Amiable Composition

In some circumstances litigants authorize arbitrators to disregard the strict rigors of otherwise applicable law, and decide in a way that the arbitrators deem fair and equitable.<sup>124</sup>

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<sup>119</sup> Within a single jurisdiction, a measure of uniformity can be imposed from the top down so that one case furnishes authority for decisions in similar fact patterns with similar questions of law. In theory, Continental and "common law" traditions take different views of precedent. Article 5, French *Code civil*, forbids judges from purporting to make general rules: *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*. In practice, however, the difference between traditions may not be so great. See generally, Denis Tallon, *Précedent*, in *DICTIONNAIRE DE LA CULTURE JURIDIQUE* 1185-1187 (2003). Still, common law emphasis on the difference between "holding" and "dictum" in a case may not be shared in all traditions, with some Continental jurists reading decisions of their highest courts as if they were legislative texts.

<sup>120</sup> One authority has suggested that for international arbitration precedent exists as "decisional authority that may reasonably serve to justify the arbitrators' decision to the principal audience for that decision." Barton Legum, *Definitions of Precedent in International Arbitration*, in *PRECEDENT IN INTERNATIONAL ARBITRATION* (E. Gaillard & Y. Banifatemi, Eds. 2008) 5, at 14.

<sup>121</sup> For an illustration of the delicate ambivalence arbitrators feel about prior awards, see *AES Corporation v. the Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 13 July 2005, at paragraph 30, which asserts that each arbitral tribunal "remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem..." Following a semicolon, the sentence then adds that decisions "dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution." *Id.*, page 11.

<sup>122</sup> One ICSID ad hoc committee has suggested that arbitral tribunals bear responsibility for creating "une jurisprudence constante" (coherent and consistent body of case law) in the field of international investment law. Decision on Annulment of 19 October 2009, *MCI Power Group and New Turbine v Republic of Ecuador*, ICSID ARB 03/06 (Ad Hoc Committee: Dominique Hascher, Hans Danelius; Peter Tonka), para. 24, rejecting annulment of the award of 31 July 2007 for finding non-retroactivity of the US-Ecuador BIT. See also *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, para. 97.

<sup>123</sup> For investor-state treaty disputes, jurisdictional questions such as "most favored nation" prove fertile sources for *de facto* precedent. See Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT'L* 357 (2007); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM INT'L L. J.* 1014 (2007); Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration*, 24(2) *J. INT'L ARB* 129 (2007). Precedent is also common in "trade arbitration" (maritime, commodities and reinsurance). See Michael Marks Cohen, Letter, 10 (No. 2) *Int'l Arb Q. L. Rev* 113 (Summer 2009).

<sup>124</sup> See French NCP Article 1474, applicable in purely domestic arbitrations, and Article 1497, applicable in international cases. For international contracts, references to *amiable composition* may assume less precise contours than provided under French law, a bit as "due process" has come to be used in arbitration without necessarily drawing its significance

Drawn from French law, *amiable composition* describes a process whereby arbitrators temper legal rules whose strict application violates what seems right in the circumstances.<sup>125</sup> Common examples include adjustment of payment due to substantial completion of a project, price changes due to alternation in the fundamental economic balance between the parties, and adjustment of terms in the event of unexpected inflation or exchange rate modification.<sup>126</sup>

In stipulating to *amiable composition*, parties tell arbitrators to pursue a different sort of truth. Rather than aiming at legal accuracy, the arbitrators reach toward general notions of “right” encrusted with emotional overtones and sometimes in tension with court decisions, statutes or strict contract terms.<sup>127</sup>

A long-standing debate surrounds whether *amiable composition* amounts to the same thing as decision-making *ex aequo et bono*, according to the “right and good”.<sup>128</sup> While the two notions are often used interchangeably, they may not be coextensive in all minds. Arbitrators who decide *ex aequo et bono* normally begin and end with a private sense of justice, going directly to a personal view of the right result. With *amiable composition* another option would present itself, directing arbitrators to start at rules of law, but depart only if needed to achieve a just result.<sup>129</sup> The difference is significant, given that there is nothing inherently unjust about most norms of commercial law.

With respect to the substance of economic transactions, such as a seller’s right to be paid or the insured’s right to be reimbursed, the slim objective content of notions such as fairness (if divorced from legal norms) makes the concept problematic.<sup>130</sup> Inherently chameleon-like, changing color depending on background and perspective, *ad hoc* fairness that ignores legal rules risks

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from U.S. law.

<sup>125</sup> See Eric Loquin, *L’amiable composition en droit comparé et international: Contribution à l’étude du non-droit dans l’arbitrage commercial* (1980), juxtaposing “non-droit” (non law) and “droit comparé” (comparative law). See also, W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *ICC ARBITRATION* (3rd Edition, 2000), §§3.05 at 110-114. Only in a very limited sense does *amiable composition* overlap notions of public policy as defenses to contract claims, which have long been seen as an “unruly horse” that may carry us to unknown places. See *Richardson v. Mellish* (1824) 2 Bing. 229 at 252, where a captain sued for reinstatement as master of a ship whose command the owner had given to a nephew in contravention of policies in that day against selling command of important vessels.

<sup>126</sup> For an empirical study of decisions *ex aequo et bono* (as discussed below, a close cousin or even sister to *amiable composition*) see Martim Della Valle, *Decisões por Equidade na Arbitragem Comercial Internacional* (Doctoral Thesis, University of São Paulo, May 2009; copy on file with author), Chapter 8, at 372-402; English version, *On Decisions ex Aequo et Bono in International Commercial Arbitration*, Chapter 8 “Field Research” at 188-221.

<sup>127</sup> See MATHIEU DE BOISSÉSON, *LE DROIT FRANÇAIS DE L’ARBITRAGE* (1990), Section 371 at 315, suggesting that *équité* remains the goal (*le but*) not the means (*le moyen*) of *amiable composition*.

<sup>128</sup> The Arbitration Rules of the International Chamber of Commerce, which in Article 17 (3) permit *amiable composition* only if agreed by the parties, mentions both an *amiable compositeur* and *ex aequo et bono*, saying that a tribunal may (if authorized) “assume the powers of an *amiable compositeur*” or “decide *ex aequo et bono*.” The French version follows a similar structure. The disjunctive “or” leaves two distinct notions, as in “law or equity.” In some instances, however, words so joined might simply be different ways of expressing similar concepts, as when each citizen may worship according to dictates of his faith or belief system.

<sup>129</sup> See PHILIPPE FOUCARD, EMMANUEL GAILLARD, & BERTHOLD GOLDMAN, *TRAITÉ DE L’ARBITRAGE COMMERCIAL INTERNATIONAL* (1996), Section 1502 at 836-37. The authors seem to admit the option either to proceed directly to justice or first to consider the applicable law. Nevertheless, they suggest that such a nuance lacks significance (“une telle distinction ... paraît artificielle”) because the arbitrators can always do what they think justice requires.

<sup>130</sup> By contrast, in the realm of procedure the term “fairness” serves as short-hand for generally-accepted principles, such as right to be heard and equal treatment.

reducing the information with which companies and governments evaluate risks and make choices. Nor will concepts of substantive fairness long satisfy the public interest in the stable economic environment that obtains when claims and defenses in one case are treated like those advanced in similar disputes subject to similar norms.<sup>131</sup> Only an explicit mandate normally justifies an arbitrator's shift from a search for legal truth to the pursuit of subjective fairness.

## V. FROM ORACLE TO EVIDENCE

The Yale University seal bears an open book with two Hebrew words transliterated *Urim* and *Thummim*. Sometimes rendered "light and truth,"<sup>132</sup> this Biblical expression designates a truth-seeking oracle, perhaps precious stones, held in the breastplate of the High Priest in ancient Israel.<sup>133</sup> In response to questions put in binary fashion, the oracle would give one answer or the other. For example, the Priest might ask if sin during battle lay with the troops or the king, letting the oracle show *Urim* for the king and *Thummim* for the soldiers.<sup>134</sup>

Shifting forward several millennia, most legal cultures have replaced oracles with testimony from individuals with knowledge of specific events or subjects,<sup>135</sup> usually supported by documentary exhibits. While such truth-seeking tools may not yield the perfection of oracles (and in any event still require decisions about what testimony should be deemed reliable<sup>136</sup>), they do

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<sup>131</sup> Imagine an arbitrator hearing claims against a banker who wrongfully refused to return the entirety of a customer's funds. "Last month I deposited \$1,500," says the customer. "Ah, yes," replies the banker. "But today such dreary historical facts must yield to aesthetic and moral concerns for balance, symmetry and charity. Thus we have rounded your account down to \$1000 and transferred the balance to a more deserving person."

<sup>132</sup> Early English translations fixed *Urim* as "lights" and *Thummim* as "perfections" following the original plural form. Ultimately Yale augmented its seal with the Latin, *Lux et Veritas*. The Hebrew motto seems to have been in place well before 1778, when Yale's new President, Ezra Stiles, made Hebrew a required course on the assumption that educated gentlemen should be familiar with the language of Scripture. Stiles himself had learned Hebrew while a pastor in Rhode Island, studying with Isaac Touro (namesake of the Sephardic synagogue designed by New England architect Peter Harrison) and an itinerant rabbi from Hebron named Chaim Karigal, who somehow stopped in Newport amid visits to Paris, London, Prague, Vienna, Aleppo and Curacao. For a historical tour of the Yale seal, see DAN OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1985; 2d ed., 2001), Appendix I.

<sup>133</sup> The nouns together take a meaning greater than the sum of their parts, and convey a broader and more complex message than simple addition of the two components. They constitute a hendiadys (from Greek *hèn dià duoîn*, or "one through two"), as in "law and order," "sound and fury," "Sturm und Drang," "Nacht und Nebel," "croix et bannière" or "chagrin et pitié."

<sup>134</sup> In I Samuel 14:41-42 someone disobeyed a ban on eating during battle. King Saul asked, "If the fault lies with me or my son, respond with *Urim*; but if with the troops, show *Thummim*." After exonerating the troops, the oracle was consulted again and guilt fell on Jonathan who confessed to tasting honey during combat. The oracle first appears in Exodus 28:30, and again in Numbers 27:21, Deuteronomy 33:8 and I Samuel 28:6. The precise manner for its consultation has been lost. Perhaps letters would light up or protrude when the priest prayed. Some scholars suggest a process not a device. Of course, recourse to oracles did not mean absence of testimonial proof in Biblical times. See Deuteronomy 19:15 and II Corinthians 13:1.

<sup>135</sup> The day of the oracle has not completely disappeared. See OSCAR G. CHASE, *LAW, CULTURE & RITUAL* (2005), providing a comparative tour of litigation that begins with the Azande people of Central Africa. During the time a small chicken swallows fluid containing a ritual poison, the chief asks about the guilt of a couple accused of adultery. "Oracle, if they slept with each other, let the chicken die." When the animal expires, the man and woman confess. Discussing American justice later in this work, Professor Chase suggests that the oracle may be no less idiosyncratic than the American civil jury. *Id.* at 15-16, and 40-41.

<sup>136</sup> Most American litigators will be familiar with "Daubert motions" to promote reliability of expert testimony, so named from *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Fundamental questions about testimonial reliability are not new, however. During the Salem Witch Trials of 1692, New England farmers challenged the value of "spectral evidence" based on testimony about a person's spirit. John Alden, son of the famous Plymouth settler of the same name, had been charged with sorcery on return from Québec, where he had gone to ransom Englishmen imprisoned by

help arbitrators determine which side's narrative bears a closer connection to reality. Without such tools, whose application can take time, vindication of rights would be even more unpredictable than it now is, with little reason to expect that success would fall to the legitimate claimant rather than the dishonest fraudster.

A notion of proportionality lies at the heart of intelligent truth-seeking in arbitration, accommodating the interconnected pillars of due process and efficiency. Hearing both sides enhances the prospect of award outcomes that comport with reality. Yet more testimony does not always bring enough enlightenment to justify the time and expense. And some arguments prove as helpful as water to a drowning man. In international disputes, finding the right balance implicates an accommodation among different legal cultures with disparate base lines. Even if universally accepted standards remain elusive, however, some prove more workable than others.

In the search for creative case management tools, award accuracy remains the lodestar. Efficiency without accuracy will prove an empty prize. Until the world evolves to the point where people abandon attempts to vindicate rights, some market will exist for a mechanism that emphasizes deciding legal claims correctly by determining what happened, what was agreed and what the law provides. If simple peace-making were to become the norm, arbitration as a truth-seeking process would need to be reinvented.

## VI. EPILOGUE

During the two years since the conference giving rise to this volume, scholars and practitioners have continued to address the perceived tension between efficiency and accuracy which lies at the heart of any debate over truth-seeking in arbitration. Some commentators question the value of witness testimony,<sup>137</sup> while others stress the role of evidentiary hearings in reducing the subconscious biases to which all humankind risks falling prey.<sup>138</sup> One observer suggests that any premium on truth-seeking constitutes "a broad defense of the status quo" in the sense of ignoring constructive reform.<sup>139</sup>

Here as elsewhere, context matters.<sup>140</sup> According to one account of the 2009 ASA Search for Truth Symposium, four in-house counsel responsible for dispute resolution at large multi-national companies "unanimously expressed the view that the truth was not their primary concern in dispute resolution."<sup>141</sup> Against this background, those who urge an appreciation of accuracy do so

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the French. After girls collapsed in torment from his specter, Alden asked rhetorically why his spirit did not so affect the judges. Doubts later caused Increase Mather, President of Harvard, to suggest that ten suspected witches should escape rather than one innocent person be condemned on spectral evidence. See RICHARD FRANCIS, *JUDGE SEWALL'S APOLOGY* (2005) at 181-182; EVE LAPLANTE, *SALEM WITCH JUDGE* (2007) at 136-142 & 192; SALEM WITCH TRIALS READER (F. Hill, ed. 2000), at xxii and 74, with excerpt from Robert Calef, *More Wonders of the Invisible World* (1706).

<sup>137</sup> Toby Landau, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration*, Neil Kaplan Lecture, Hong Kong, 17 November 2010.

<sup>138</sup> José I. Astigarraga, *A few words on the tension between efficiency and justice*, Kluwer Arbitration Blog, originally posted 1 June 2011; re-published without editorial errors, 15 June 2011.

<sup>139</sup> Michael McIlwrath, *Anti-Arbitration: The Train Has Left the Station*, Kluwer Arbitration Blog, 14 June 2011.

<sup>140</sup> The great American judge Felix Frankfurter once observed that a page of history is worth a volume of logic. *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921), upholding federal estate tax against constitutional attack.

<sup>141</sup> Nathalie Voser, *Document Production in International Arbitration: What Does It Have to Do with Discovery?*, 3 *World Arb. & Med. Rev.* 491 (2009), at 489.

precisely so that proposed reforms may be evaluated with the type of cost-benefit analysis that underpins any lasting progress.

Downplaying the role of truth-seeking diverts attention from hard choices about finely weighted benefits and burdens in most procedural dilemmas. In this connection, consider the following illustrative questions, which often resist facile analysis and blanket responses. Even if perfect “right answers” prove elusive, some solutions may be better than others in providing a balanced accommodation between efficiency and accuracy.

**Information exchange.** Producing documents implicates time, money and energy. However, losing the case by reason of not getting a key exhibit can be much worse. Some business managers chafe that victory escaped them because the arbitrator refused to order production of critical evidence. Others fulminate against the burden of having to scour files for odd pieces of paper. The arbitrator’s dilemma, of course, lies in the fact that decisions about relevancy and materiality must be made before the case is fully understood.

**Arbitrator Bias.** Challenges for arbitrator bias prove disruptive to timetables. Even less attractive, however, would be a system with no mechanism to monitor the arbitrator’s impartiality and independence. Until a challenge has actually been heard, it will not be known whether allegations of bias are valid or simply represent procedural sabotage.

**Bifurcation.** Deciding jurisdiction as a preliminary issue adds time and cost. Even less satisfactory would be a system that forces a respondent in all events to present evidence and argument on the merits of a dispute before arbitrators who clearly lack authority. The relative costs and benefits of bifurcation vary depending on a factual analysis of whether an alleged jurisdictional defect remains so intertwined with the substantive merits of the case as to make a separate hearing duplicative.

**Applicable Law.** Deciding the applicable law takes time. Having an award vacated for refusal to apply the parties’ agreement, or otherwise applicable mandatory norms, however, may be even worse.

**Summary Judgment.** Listening to arguments about whether the tribunal should dispose of a case on summary judgment adds time. Equally unsatisfactory would be a requirement of evidentiary hearings in the absence of any genuine issue of contested fact.

**Damages.** Determining the value of an expropriated company or a lost business opportunity usually calls for sophisticated economic analysis, with written and oral testimony, using time and money. Calculating damages without the help of experts, however, would often be little more than guess work, hardly worthy of an arbitrator who was expected to direct payment of the proper quantum.

**Reasoned Awards.** It takes time to write awards explaining the decision, particularly when three arbitrators disagree on the reasoning. It can be even more unsettling, however, to receive a decision without explanation, or with a minority dissent pointing to flaws that might have been resolved in good-faith deliberations.

In addressing many of these procedural dilemmas, nothing prevents litigants from adopting any manner of time-saving mechanisms. Business agreements can be drafted to eliminate document

production, restrict time for hearings, or mandate preliminary disposition of applications on the validity of exculpatory clauses.

Rarely do such good things happen, however. Perhaps the litigants' advisers worry that time-saving procedures will backfire, having an adverse impact on their client's ability to argue its case. Or the other side to the contract may have a different perspective on efficiency.<sup>142</sup> Likewise, arbitral institutions generally limit themselves to general exhortations about time and cost, rather than defining mandatory efficiency measures that restrict arbitral flexibility and discretion in any meaningful way.<sup>143</sup>

By default, therefore, wrestling with these procedural puzzles often falls to arbitrators. In making the hard choices, compromise and common sense, not dogma or ideology, remain the touchstone for reaching toward an appropriate counterpoise among accuracy, fairness and efficiency.

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<sup>142</sup> The dynamic for choosing the arbitral tribunal presents similar dilemmas. The profile of an ideal arbitrator might include substantive knowledge, ability to write awards with clarity in the contract language, freedom from perceived procedural predispositions attaching to some national legal traditions, and experience in conducting complex proceedings. To this wish-list a claimant might add availability in the near future, while a respondent may seek an individual whose experience comes with the baggage of commitments that prevent early hearings.

<sup>143</sup> Such procedural timidity often derives from an understandable apprehension of alienating one part or another of the institution's constituency. See William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion* (The 2002 Freshfields Lecture), 19 *Arb. Int'l* 279 (2003). See also, William W. Park, *Les devoirs de l'arbitre: ni un pour tous, ni tous pour un*, 2001 *Cahiers de l'Arbitrage* 13 (2011).