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### The Four Musketeers of Arbitral Duty (Les Devoirs De L'Arbitre: Ni Un Pour Tous, Ni Tous Pour Un)

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#### Recommended Citation

William Park, *The Four Musketeers of Arbitral Duty (Les Devoirs De L'Arbitre: Ni Un Pour Tous, Ni Tous Pour Un)*, No. 17-28 Boston University School of Law Working Paper Series, Public Law & Legal Theory (2011).

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**LES DEVOIRS DE L'ARBITRE:  
NI UN POUR TOUS, NI TOUS POUR UN**

Boston University School of Law  
Public Law & Legal Theory Paper No. 17-28

2001 CAHIERS DE L'ARBITAGE 13 (2011)

Revised 8 REVISTA DE ARBITRAGEM E MEDIAÇÃO 117 (A. Wald,  
São Paulo, 2011)

adapted *The Four Musketeers of Arbitral Duty*, in 8 ICC DOSSIERS  
25 (ICC Institute of World Business Law 2011)

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**The Four Musketeers of Arbitral Duty: Neither One for All or All for One**

**William W. Park\***

I. Introduction .....	1
II. The Three Duties, Plus One.....	2
A. Accuracy, Fairness and Efficiency .....	2
B. An Enforceable Award.....	4
III. Two Recent Cases: Stolt-Nielsen and Caribbean Niquel .....	4
A. Caribbean Niquel (Overseas Mining) .....	4
1. The Right to Comment on Legal Theories .....	4
2. Conflicting Duties .....	6
B. Stolt-Nielsen.....	7
1. Excess of Authority.....	7
2. The Political Context .....	8
3. Merits v. Jurisdiction .....	9
4. Standard of Review .....	11
IV. Enforceability Revisited .....	14
V. Conclusion.....	16

**I. Introduction**

During the past ten years, the intellectual activity of the arbitration community has been marked by an increased emphasis on guidelines, standards and codes of ‘best practices’ for the conduct of proceedings issued by groups such as the Chartered Institute of Arbitrators, the International Bar Association, the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA). For better or for worse, these have often been called the ‘soft law’ of arbitration procedure, as contrasted with the ‘hard law’ of national statutes and international treaties. Whereas ‘hard law’ offers rules directly giving effect to national norms, ‘soft law’ creates intra-practitioner directives of varying influence aimed at enhancing procedural uniformity among arbitrators and counsel from different judicial traditions.<sup>1</sup>

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\* Professor of Law, Boston University; President, London Court of International Arbitration; General Editor, *Arbitration International*. Copyright © William W. Park, 2011.

<sup>1</sup> Such soft law would normally be memorialized in guidelines and standards of professional associations such as the IBA and the CIA or included in the ‘lore’ of practice as articulated by leading members of the arbitration community. Other forms of soft law seek to expedite litigation as an alternative to binding arbitration. See, e.g., International Institute for Conflict Prevention and Resolution, *Economical Litigation Agreements for Commercial Contracts as a Means of Reducing Civil Litigation Costs – ‘The Model Civil Litigation Prenup’* (2010). See, generally, William W. Park, ‘Procedural Evolution in Business Arbitration’, in *Arbitration of International Business Disputes* (Oxford, 2006) p. 1.

Whatever the merits of the particular proposals (and not all commend themselves), the initiatives demonstrate a robust concern for greater precision in the contours of an arbitrator's duties,<sup>2</sup> whose definition remains anything but an easy task, with daunting dimensions that have caused the best of minds to sink beneath the waves of reflection.<sup>3</sup> General descriptions will always remain inadequate, given that their expression relies on words connected sequentially, while reality remains stubbornly simultaneous in nature.

## II. The Three Duties, Plus One

### A. Accuracy, Fairness and Efficiency

As a starting point for discussion, one might suggest three principal obligations of an arbitrator. As we shall see, however, the interaction of these duties will normally implicate a fourth set of responsibilities.

The first duty of an arbitrator remains the rendering of an accurate award, in the sense of fidelity to the text and the context of the relevant bargain, whether memorialized in a private contract or in the terms of a public investment treaty.<sup>4</sup> The arbitrator should aim to get as near as reasonably possible to an understanding of what actually happened between the litigants and how the pertinent legal norms apply to the controverted events. That arbitral awards are not generally reviewable for inaccuracy (mistakes of law or fact) in no way diminishes this obligation of the arbitrator to the parties. Arbitration would be a poor substitute for reliable justice if arbitrators were only held to standards constituting grounds for annulment.

The second duty relates to procedural fairness, a capacious notion that incorporates several elements, notably: (i) the responsibility to hear before deciding, often called 'due process' or 'natural' justice in the Anglo-American legal world, and *principe du contradictoire* in Francophone legal systems; (ii) an obligation to respect the contours of arbitral jurisdiction or, to put the duty in the negative, to avoid decisions which constitute an excess of authority (*excès de pouvoir*) either under the contract or by reason of some public policy constraint imposed on subject-matter arbitrability or procedure; and (iii) observation of the general duty of impartiality and independence.<sup>5</sup>

The third duty lies in an aspiration towards efficiency, in order to promote the optimum administration of justice. To the extent possible, the good arbitrator will seek to balance the

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<sup>2</sup> See Phillipe Fouchard, 'Où va l'arbitrage international?', 34(3) *McGill Law Journal* (1989) p. 435.

<sup>3</sup> The enormity of the mission brings to mind the well-known comment by General Charles de Gaulle, who upon being interrupted by a heckler who yelled, "à bas les imbéciles" ("Down with all idiots") – or something even stronger – drew the response, "Un vaste programme" (a very large project).

<sup>4</sup> See William W. Park, 'Arbitrators and Accuracy', 1 *J. Int'l Disp. Settlement* (2010) p. 25.

<sup>5</sup> Arbitrator bias, of course, presents tensions of its own. See, generally, William W. Park, 'Arbitrator Integrity: The Transient and the Permanent', 46 *San Diego L. Rev.* (2009) p. 629. Critics of arbitration often talk as if bias remains a problem unique to arbitrators. Yet in the real world judges also fall prey to unacceptable predispositions. See, e.g., Notice and Order of George H. Painter, Administrative Law Judge, Commodity Futures Trading Commission, 17 September 2010, reporting on a colleague who during nearly 20 years of service on the bench had never ruled in favour of a claimant. See also Michael Shroeder, 'If You've Got a Beef With a Future Broker, This Judge Isn't for You', *Wall Street J.*, 13 December 2000, p. A1.

first two goals, accuracy and fairness, to arrive at a counterpoise that reduces the prospect of undue cost and delay.<sup>6</sup>

In the world of statutes, treaties and court decisions, a violation of the duties of accuracy and efficiency would not normally in itself trigger intervention by a reviewing authority, whether it be a national court or an ad hoc ICSID committee.<sup>7</sup> The possibility that an arbitrator will make a mistake, or be less than efficient, remains a risk assumed by both sides.

By contrast, violation of arbitration's basic procedural fairness does and should give rise to sanctions. Such scrutiny of procedural fairness also serves to promote accuracy by encouraging arbitrators to listen to both sides before deciding, and permits review of the calculus by which arbitrators aim for efficiency.<sup>8</sup>

The penalty for breach of an arbitrator's duty of fairness carries a certain irony, in that sanctions do not fall directly on the arbitrator who breached his or her duty. Although they may suffer a loss of reputation, offending arbitrators can benefit from immunity even for violations of basic procedural integrity.<sup>9</sup> The price of misconduct thus falls more directly on the prevailing party, which must suffer annulment of an award for breach of fundamental procedural integrity.

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<sup>6</sup> A 2010 study by the Corporate Counsel International Arbitration Group found that 100% of corporate counsel think arbitration takes too long, and 69% think it costs too much. Lucy Reed, 'More on Corporate Criticism of International Arbitration', Kluwer Arbitration Blog (16 July 2010), available at: <<http://kluwerarbitrationblog.com>> (blaming delays on the limited availability of top-tier arbitrators and their "excessive concern for due process"). Another study, co-sponsored by a major law firm and a London university, suggested that 50% of the participating respondents were dissatisfied with the performance of arbitrators in international arbitration. See *2010 International Arbitration Survey: Choices in International Arbitration*, White & Case LLP and School of International Arbitration (Queen Mary, University of London) (2010). The study follows an earlier survey sponsored by PriceWaterhouse.

<sup>7</sup> Annulment is generally only appropriate when the appealing party can show that the tribunal was not properly constituted, it exceeded its powers, there was corruption on the part of a member of the tribunal, there was a serious departure from a fundamental rule of procedure or the award failed to state the reasons on which it was based. See, e.g., Federal Arbitration Act § 10; Article 1520 of the French *Code de procédure civile*; Article 52 of the ICSID Convention of 1965.

<sup>8</sup> For contemporary debate on efficiency, see Alan Redfern, 'Stemming the Tide of Judicialisation of International Arbitration', *2 World Arb. & Med. Rev.* (2008) p. 21 at p. 37; Jean-Claude Najjar, 'A Pro Domo Pleading: Of In-House Counsel, and their Necessary Participation in International Commercial Arbitration', *25 J. Int'l Arb.* (2008) p. 623; Michael McIlwrath, 'Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices', *2 World Arb. & Med. Rev.* (2008) p. 111; Peter Morton, 'Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?', *26 Arb. Int'l* (2010) p. 103; Jean-Claude Najjar, 'Inside Out: A User's Perspective on Challenges in International Arbitration', *25 Arb. Int'l* (2009) p. 515; Jean-François Poudret and Sébastien Besson, 'Nature et efficacité des décisions prises par l'arbitre en cours de procédure au sujet des frais de l'arbitrage', in Edgar Philippin et al., eds., *Mélanges en l'honneur de François Dessemontet* (2009) p. 297.

<sup>9</sup> In one case, where a sole arbitrator failed to disclose his romantic relationship with the sister of respondent's counsel, immunity was upheld even though the award had been vacated. See *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 112 Cal. Rptr. 3d 597 (Cal. Ct. App. 2010), in which claimants argued that the arbitrator should be liable for fraudulently inducing them to approve his appointment in a case which essentially denied the claim. The reviewing court found disclosure to be an integral part of the arbitral process and thus protected by common law immunity for quasi-judicial acts.

## **B. An Enforceable Award**

These ‘three musketeers’ of arbitrator duty – accuracy, fairness and efficiency – each play an essential role in enhancing and protecting the reliability and neutrality of binding private dispute resolution. The litigants, however, may expect something more.

Fans of the original *Three Musketeers* will remember that the adventure includes a fourth young man, d’Artagnan, who hopes to become one of the King’s guards.<sup>10</sup> Along with his friends Athos, Porthos and Aramis, he aims to live by the motto ‘All for one, one for all’ (‘Tous pour un, un pour tous’). Likewise, an additional responsibility figures prominently in the catalogue of an arbitrator’s duties.

This fourth duty entails arbitrator vigilance in promoting an enforceable award. Prevailing litigants normally hope that the arbitral process will lead to something more than a piece of paper. To this end, they expect arbitrators to avoid giving reasons for annulment or non-recognition to any authority called to review the award.<sup>11</sup>

As we shall see shortly, these four duties can sometimes conflict with each other, operating in anything but the ‘one-for-all’ spirit. Notwithstanding an appearance of compatibility when viewed as abstractions, an inherent rivalry often permeates the various obligations when implemented in practice. Too much efficiency may mean too little accuracy. Overly intricate procedural safeguards can paralyze proceedings. And, in some cases, attempts to please a reviewing court can reduce the arbitrator’s fidelity to the parties’ expectations.

## **III. Two Recent Cases: Stolt-Nielsen and Caribbean Niquel**

Two judicial decisions rendered this past spring, one in France and the other in the United States, highlight the complex interactions among an arbitrator’s duties. In both, arbitral awards rendered by thoughtful and experienced tribunals were vacated for failure to balance competing duties in the manner desired by the reviewing court. By weighing the duty to treat the parties fairly and the duty to promote efficiency as they did, the tribunals were unable to succeed in rendering an enforceable award.<sup>12</sup>

### **C. Caribbean Niquel (Overseas Mining)**

#### **1. The Right to Comment on Legal Theories**

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<sup>10</sup> Alexandre Dumas, *Les Trois Mousquetaires* (1844).

<sup>11</sup> This duty of enforceability has been memorialized in institutional arbitration rules. Article 35 of the ICC Rules provides: “In all matters not expressly provided for in these Rules, the [ICC] Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.” The LCIA Rules provide in Article 32.2: “In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable.”

<sup>12</sup> On the interaction between an arbitrator’s discretion to craft proceedings and the elements of due process, see, e.g., William W. Park, ‘Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure’, 23 *Arb. Int’l* (2007) p. 499.

At the end of March 2010, the Paris *Cour d'appel* decided the case of *Caribbean Niquel v. Overseas Mining*,<sup>13</sup> which considered the parties' rights to address new legal theories in a context that pitted the aim of efficiency against the goal of due process, or *principe du contradictoire*.

After a Cuban mining joint venture had gone sour, arbitrators sitting in Paris awarded the claimant USD 45 million on a theory of 'lost chance' (*perte de chance de poursuivre le projet*), even though the parties had argued a theory of quantum based on lost profits (*le gain manqué*). One can well imagine that arbitrators would not find it satisfying to apply a 'lost profits' theory with respect to a mine that had not yet become operative.<sup>14</sup>

The *Cour d'appel* vacated the award for violation of provisions in the *Code de procédure civile* related to the right to be heard (*principe de la contradiction*<sup>15</sup>) and procedural public policy (*ordre public procédural*).<sup>16</sup> Although not questioning the assumption that arbitrators know the law, often expressed as *jura novit curia*,<sup>17</sup> the *Cour d'appel* found it unacceptable that an award should rest on a method of damages calculation that counsel had not had an adequate opportunity to address.<sup>18</sup>

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<sup>13</sup> *La Société Commercial Caribbean Niquel v. La Société Overseas Mining Investments Ltd.*, Paris Court of Appeals, 1st Chamber, 08/23901, 25 March 2010.

<sup>14</sup> Indeed, the tribunal held that calculating the lost economic benefit was too uncertain, whereas calculating the value of the chance to take advantage of an economic opportunity could "undeniably" be evaluated. The tribunal therefore based the reasoning in its award on the legal theory that the party should be compensated for the economic value of the lost opportunity.

<sup>15</sup> The *principe du contradictoire* has been memorialized in the *Code de procédure civile* as the *principe de la contradiction*.

<sup>16</sup> As in force at the time of the *Cour d'appel* decision, these provisions were contained in Article 1502 of the CPC, which provided *inter alia* as follows:

"L'appel de la décision qui accorde la reconnaissance ou l'exécution n'est ouvert que dans les cas suivants:

...

4° Lorsque le principe de la contradiction n'a pas été respecté;

5° Si la reconnaissance ou l'exécution sont contraires à l'ordre public international."

In early 2011, the CPC was amended such that these two clauses are now found in Article 1520, albeit with the same formulation. See Décret no. 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage.

<sup>17</sup> For a recent decision on the judge's ability to deal with questions of law, see Judge Posner's concurrence in *Bodum USA v. La Cafetière Inc.*, 621 F.3d 624, 631-638 (7th Cir. 2010). Although Rule 44.1 of the Federal Rules of Civil Procedure allows a court to take into account any admissible evidence in understanding a rule of foreign law, including expert testimony, it does not require reliance on an expert. Federal courts in the United States regularly apply the law of all 50 states without necessarily being well versed in the intricacies of state law, and without relying on expert testimony, because 'judges are experts on law'. Party-appointed experts, however, are chosen not because of their objective expertise in a country's law but rather because his or her interpretation of that law helps the appointing party.

<sup>18</sup> Other decisions in both France and Switzerland have come to similar conclusions. In *Engel Austria v. Don Trade*, Paris Cour d'appel, 3 December 2009, the court annulled the award for having been based on "imprévision" (*Wegfall der Geschäftsgrundlage*) without giving the parties an adequate opportunity to comment on that doctrine. See Andrea Carlevaris, 'L'arbitre international entre Charybde et Scylla: le principe de la contradiction et impartialité de l'arbitre', *2 Les Cahiers de l'Arbitrage* (2002) p. 433. When faced with a similar problem, the highest court in Switzerland, the *Tribunal Fédéral* or *Bundesgericht*, annulled a decision of the *Tribunal Arbitral du Sport* for voiding an exclusivity clause in a contract on the basis of a Swiss law that

## 2. Conflicting Duties

The *Cour d'appel*'s decision is not without its problems and provides a stark example of the difficulty arbitrators face when balancing their various duties, with each alternative approach springing its own trap. Imagine that the arbitrators in *Caribbean Niquel*, in the midst of their deliberations, had re-opened the proceedings to set a briefing schedule on the new legal theory of lost chance. There would have been moaning all around about added expense and delay. More significantly, in raising the new theory with the parties to provide counsel an opportunity to comment, the tribunal might have been perceived as lacking even-handedness and impartiality. The respondent would likely have said, with some justification: "Hey! You arbitrators are acting as counsellors for claimant, sending a not-so-subtle signal that its chances of success will be greater with an amended pleading that includes a new method of damages calculation."

Finally, it would have been equally problematic for the arbitrators to decide the case without any consideration of the 'lost chance' measure of damages. The arbitrators would have been faced with the unattractive choice between granting recovery simply for lost profits, which would not necessarily have yielded a correct amount, or denying recovery entirely, which would have penalized an otherwise meritorious claim. Although arbitrators normally hesitate to look beyond the relief requested, they should also be timid about rejecting claims simply on the basis of nuances in related legal theories that may not have been apparent to counsel.<sup>19</sup>

To complicate matters further, the concepts of fairness, accuracy, efficiency and enforceability are not monolithic. Each notion includes multiple obligations. Tensions thus exist not only among fairness, accuracy, efficiency and enforceability, but also within the various diverse components of each duty. Procedural fairness in particular encompasses a variety of distinct yet related obligations that in practice often compete against each other. The opportunity to address a new legal theory promotes the parties' right to be heard. However, suggesting a new theory in the first place potentially exposes arbitrators to a charge of being biased.

The scenario evoked in *Caribbean Niquel* demonstrates how an arbitrator's attempt to improve proceedings from one perspective can make things worse from another angle. Enhancing efficiency can reduce fairness and accuracy. And promoting one element of fairness can diminish realization of another. In the words of an old American adage, arbitrators can be 'damned if they do and damned if they don't'.

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the parties had no chance to discuss. See *José Urquijo Goitia c/ Liedson Da Silva Muñiz*, Tribunal fédéral, 9 February 2009. However, the trend is not universal. See Supreme Court of Finland, *Werfen Austria GmbH c/ Polar Electro Europe B.V.*, Zug Branch, 2 July 2008.

<sup>19</sup> Although an arbitrator must hear the parties' arguments on any legal theory, it is not always easy to draw a line between legal reasoning (which is properly presented in the arbitral award) and the legal theories on which the award is based (on which the parties must be allowed to comment). Fear of stepping over the line cautions arbitrators away from suggesting new legal theories, and potentially appearing to favour one side or the other. *La Semaine Juridique Ed. G*, No. 23, 7 June 2010, pp. 1202-03, obs. Christophe Seraglini.



## D. Stolt-Nielsen

### 1. Excess of Authority

Approximately a month after the *Cour d'appel* decision in *Caribbean Niquel*, the United States Supreme Court decided *Stolt-Nielsen v. AnimalFeeds*.<sup>20</sup> The case arose from multiple actions for price fixing filed against several shipowners by customers who had chartered vessels, commonly known as 'parcel tankers', to transport liquids such as food oils and chemicals. The customers alleged that the owners had engaged in anti-competitive practices.<sup>21</sup> All of the charter parties included similar arbitration clauses.

The customers requested a single consolidated proceeding to address their combined claims, which in the United States is often called 'class action arbitration', borrowing a term from American court procedures.<sup>22</sup> They may have felt that consolidation would permit them to muster more significant legal firepower or reduce costs to the level of making the litigation worthwhile.<sup>23</sup> Not surprisingly, the shipowners opposed consolidation, preferring a 'divide and conquer' litigation strategy.

In 2005, after a district court had ordered consolidation of the related court actions,<sup>24</sup> the parties agreed to constitute a tribunal pursuant to the American Arbitration Association's

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<sup>20</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). The charter parties included arbitration agreements referring "any dispute arising from [their] making, performance or termination" of arbitration in New York in accordance with the Federal Arbitration Act. Although initially the cases implicated both the Vegoilvoy and Asbatankvoy charter parties, the US Supreme Court ultimately addressed only disputes under the former.

<sup>21</sup> In a companion criminal case, Stolt-Nielsen itself had admitted to engaging in an illegal cartel. In exchange, the Department of Justice granted amnesty. In 2003, however, the Department of Justice attempted to renegotiate the deal, claiming that Stolt-Nielsen had failed to take corrective action. In 2007, the Eastern District of Pennsylvania held that the Department of Justice could not withdraw its bargain once Stolt-Nielsen executives had relinquished their Fifth Amendment right against self-incrimination. *United States v. Stolt-Nielsen, S.A.*, 524 F.Supp. 2d 586 (E.D. Pa. 2007).

<sup>22</sup> Although slightly misleading in the context of arbitration, the term 'class action arbitration' is now widely used to describe consolidated arbitration proceedings. In a true class action, under Rule 23 of the Federal Rules of Civil Procedure, a small number of claimants is 'certified' to represent a larger class of claimants which have substantially similar claims, whether they know it or not. In *Stolt-Nielsen*, by contrast, there was no attempt to join parties which had not signed arbitration agreements with each other. In essence, the term is used as another way to describe consolidation of related claims and counterclaims that implicate different parties, all of which have agreed to arbitration with each other on a bilateral basis, if not necessarily in a group proceeding.

<sup>23</sup> During the arbitration proceeding, counsel for claimant argued that the claims against Stolt-Nielsen were 'negative value' claims that would cost more to litigate than could be recovered in case of a victory. Transcript of *Stolt-Nielsen* arbitration, at 82a-83a. Rightly or wrongly, Justice Ginsburg in her dissent suggested that "only a lunatic or a fanatic sues for \$30". See *Stolt-Nielsen*, 130 S.Ct. at 1783. One can only speculate on the effect of this 'negative value' on the settlement reached between Stolt-Nielsen and AnimalFeeds on 26 October 2010, when the US District Court for the District of Connecticut approved AnimalFeeds' voluntary dismissal of its claim.

<sup>24</sup> The district court ordered consolidation of the various related anti-trust proceedings pending before it. See *In re Parcel Tanker Shipping Services Antitrust Litigation*, 296 F.Supp. 2d 1370 (JPML 2003).

Supplementary Rules for Class Arbitrations (AAA Rules for Class Arbitrations) to address whether the arbitrations could and should be consolidated.<sup>25</sup> To make a long story a bit shorter, the arbitrators rendered a partial award construing the arbitration clause to permit a class arbitration to proceed if certain prerequisites were met, such as common questions of law and fact among the class members. That path must have seemed likely to yield a more efficient process, providing savings in time and cost by permitting similar and related claims to be grouped into a single streamlined proceeding.

The shipowners were not impressed and sought to vacate the award for excess of authority under the Federal Arbitration Act.<sup>26</sup> Ultimately, a majority of the US Supreme Court<sup>27</sup> held that the arbitrators had exceeded their authority by imposing personal views of sound arbitration policy rather than deciding pursuant to applicable law as it existed.<sup>28</sup> The Court based its conclusion on a somewhat unusual feature of the case, which was a post-dispute stipulation concluded by the parties confirming that their contracts were silent on the matter of class action arbitrations, in the sense that ‘no agreement’ had been reached. In this context, it is significant that the Court did not say that the parties had to agree explicitly to class arbitration but that in the case at bar there was no agreement at all, whether explicit or implicit.<sup>29</sup>

In the view of the majority, the shipowners’ procedural right *not* to be subject to a class arbitration to which they had not consented trumped the arbitrators’ ability to craft a more efficient proceeding. The Court chose procedural fairness, in the sense of giving effect to the original agreement of the parties, rather than efficiency in the sense of avoiding costs that would likely discourage pursuit of the claim.

## 2. The Political Context

The decision divided the Court sharply along political lines. A vigorous dissent by three Court members argued that the arbitrators were simply doing what the parties had asked of

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<sup>25</sup> AnimalFeeds brought the claim on behalf of itself and all others similarly situated in a putative class action under FRCP Rule 23 against Stolt-Nielsen, Odfjell, Jo Tankers and Tokyo Marine.

<sup>26</sup> FAA § 10(a)(4) “arbitrators exceeded their powers”.

<sup>27</sup> The majority opinion of the Supreme Court was authored by Justice Alito, joined by Justices Scalia, Thomas, Kennedy and Chief Justice Roberts. Justice Ginsburg wrote a dissent, joined by Justices Breyer and Stevens. Prior to reaching the Supreme Court, the District Court for the Southern District of New York had vacated the award, and the Second Circuit Court of Appeals reversed. The Supreme Court granted certiorari on 15 June 2009, but Justice Sotomayor took no part in the Supreme Court’s decision, having been on the Second Circuit when the case was on appeal. She did, however, agree with Justices Stevens, Ginsburg and Breyer on 21 June 2010 by joining in Justice Stevens’s dissent in *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

<sup>28</sup> Justice Alito wrote: “It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator ‘exceeded [his] powers,’ for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.” *Stolt-Nielsen* at 1767-1768.

<sup>29</sup> See *Stolt-Nielsen*, at n. 10: “We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”

them in the supplemental arbitration agreement invoking the AAA Rules for Class Arbitrations.<sup>30</sup>

In this connection, the political dimensions of the case are interesting. Arbitration generally finds favour with justices on the right, who view the process as favourable to freedom of contract. In the United States, this means avoiding the civil jury, which would in some instances be suspected of having an ‘anti-business’ bias.

Preferences get reversed, however, with respect to ‘class action’ arbitration, which tends to be seen as an anti-business litigation tool used by consumers and the so-called ‘plaintiffs’ bar’, which often takes such cases on a contingency fee basis. Consolidation through class action arbitration appears to the left-leaning judges as a ‘pro-consumer’ mechanism permitting litigants with small claims to group together and engage more high-powered legal teams than would otherwise be possible.<sup>31</sup>

### 3. Merits v. Jurisdiction

The chief mischief of *Stolt-Nielsen* lies in its potential to decrease the finality of arbitration by making it easier for courts to vacate awards. Few would argue with the proposition that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy”.<sup>32</sup> The difficulty lies in the way the Court used that general proposition to create a new path for annulment of an award simply because the arbitrators got it wrong on the substantive merits of the question submitted to them for determination.

In its zeal to send a signal of the admittedly problematic nature of class action arbitration, the majority conflated two distinct questions. The first relates to the limits of an arbitrator’s jurisdiction, which falls within the province of a national court’s review. The second concerns the merits of an arbitrator’s substantive decision, which courts would not normally second-guess.<sup>33</sup>

Not without reason, the opinion by Justice Alito rested on the fact that both sides had stipulated that the contract was silent in the sense of there being ‘no agreement’ as to a class action arbitration. However, the parties had provided that the panel would decide the question of class arbitration according to Rules 3 through 7 of the AAA Rules for Class Arbitrations. Rule 3 of these procedures, titled ‘Construction of the Arbitration Clause’, provides the arbitrators with an explicit grant of jurisdiction, as follows:

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<sup>30</sup> The dissent pointed out that the parties had executed a supplementary agreement providing that the question of whether class action arbitrations were allowed was to be decided pursuant to the AAA Rules for Class Arbitrations. Rule 3 of these rules explicitly grants the arbitrators the jurisdiction to determine whether or not the arbitration can proceed on behalf of a class.

<sup>31</sup> Protecting consumers from arbitration is currently in vogue in the United States, with both the Dodd-Frank Act of 21 July 2010 and the pending Arbitration Fairness Act invalidating pre-dispute agreements to arbitrate in cases with seeming imbalances in bargaining power and legal sophistication between the two contracting parties. See also Department of Defense Regulation Restricting the Use of Mandatory Arbitration Agreements, 48 C.F.R. §§ 212, 222 and 252 (19 May 2010).

<sup>32</sup> *Stolt-Nielsen* majority opinion at 1768, continuing that the award must be vacated because the tribunal simply “impose[d] its own view of sound policy regarding class arbitration”.

<sup>33</sup> See, generally, William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, ICCA Series No. 13 (2007).

“Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the ‘Clause Construction Award’).”<sup>34</sup>

These prerequisites are set forth in Rule 4, which provides that the arbitrator shall permit one or more members of a class to act as representatives only if each of the following conditions is met:

- “(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.”

For those concerned about the reciprocal nature of arbitration’s consensual underpinning, clause six as drafted contains a troubling ambiguity, and the analogy to class actions in court may not be appropriate. Clause six says only that “each class member” must agree to arbitration, not that the respondent must also agree with the claimant class member. At least two possibilities present themselves.

One scenario posits arbitrators directing class proceedings between shipowners and customers on the basis of prior contracts that already contain arbitration clauses or on the basis of bilateral post-dispute arbitration agreements. Clause six, however, seems to leave open the prospect that someone who never had an arbitration agreement with the owners might gain entrance to the proceedings merely by signing a unilateral commitment to arbitrate, without reciprocal acceptance by the owners. The latter scenario is far more problematic than the former. Like marriage, an agreement to arbitration does not exist in the abstract, but with respect to a designated person.

One consequence of adopting AAA procedures is that the question addressed by the majority – “What did the parties agree?” – became a matter submitted to the arbitral tribunal for determination. The arbitrators were explicitly empowered by the parties to address whether

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<sup>34</sup> Moreover, Rule 3 recognizes that such a determination will be considered an award subject to review pursuant to the normal grounds for vacatur, but no more, as provided in the Federal Arbitration Act. The Rule continues: “The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.” The point of Rule 3 is to construe the contract, as a threshold matter, to determine whether the parties agreed to submit their dispute to class arbitration at all. The AAA Rules go on in Rule 4 to describe the criteria for certification of a class (assuming Rule 3 is satisfied), according to factors that largely parallel those set forth in Rule 23(a) of the Federal Rules of Civil Procedure.

the arbitration clause permits the case to proceed on behalf of, or against, a class.<sup>35</sup> In essence, the parties moved the matter from the realm of jurisdiction to that of the substantive merits of the case.

Thus, the majority gave the right answer to the wrong question. One can accept the majority's view that the better construction of the parties' stipulation precludes class action arbitration. However, that question had been given to the arbitrators, not the courts, by the parties' subsequent agreement to apply the AAA Rules for Class Arbitrations. Consequently, a reviewing court should have overturned the award only on a finding of grounds for vacatur as provided in Section 10 of the Federal Arbitration Act, which include matters such as bias or lack of due process, but not a simple mistake in a finding of fact or law.

#### 4. Standard of Review

In finding that the award should be vacated, the majority invoked excess of authority, one of the grounds for vacatur listed in the Federal Arbitration Act.<sup>36</sup> Under the facts of the case, however, the Court may well have blurred the distinction between excess of jurisdiction and a simple mistake of law.

True enough, any error of law might be cast as a disregard of arbitral jurisdiction, in the sense that the litigants do not expressly empower an arbitrator to make a mistake. Such a stretch, however, ignores that the parties asked an arbitrator, not a judge, to decide the case, thereby assuming the risk that the arbitrator might get it wrong.

In this context, one may recall a case handed down by the United States Supreme Court a century and a half ago. After a series of oppressive lawsuits filed by a New York merchant against an Illinois store owner, the two businessmen agreed to arbitrate their differences before arbitrators, who ultimately awarded damages to the ill-treated storekeeper. When the New Yorker succeeded in having the award set aside, the Supreme Court reversed with the following reasoning:

“If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judges chosen by the parties [the arbitrators], and would make an award the commencement, not the end, of litigation.”<sup>37</sup>

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<sup>35</sup> The applicability of these AAA procedures was explicitly recognized by the majority. See *Stolt-Nielsen*, 130 S. Ct. at 1765.

<sup>36</sup> In this context, it is disappointing that the Court failed to address the much vexed matter of whether ‘manifest disregard of the law’, as an independent ground for review separate from excess of authority, survived the 2008 Supreme Court decision in *Hall Street v. Mattel*, 552 US 576. Footnote 3 of the *Stolt-Nielsen* majority opinion avoided any confrontation with that question, holding that, if such a standard existed, it was satisfied. More recently, the Supreme Court denied certiorari of a case implicating further evaluation of the manifest disregard standard. See *Certain Underwriters at Lloyd’s, London v. Lagstein*, 607 F.3d 634 (9th Cir. 2010), *petition for cert. denied* (No. 10-534).

<sup>37</sup> *Burchell v. Marsh*, 58 US 344, 349 (1855).

To extend jurisdictional analysis further would permit any unhappy loser in a fair proceeding to renege on the bargain to arbitrate.

Nothing odd or unusual lurks in saying that a question of jurisdiction becomes an issue of substantive merits of an arbitration if the parties conclude a clear agreement to that effect following commencement of their dispute. A forged signature on an arbitration clause would normally vitiate consent, giving rise to a jurisdictional objection. Yet it would always be up to the person alleging forgery to agree to arbitrate the matter.<sup>38</sup>

Any thoughtful observer must give serious consideration to the majority's view that an excess of authority occurred through alleged policy-making attempts by the arbitrators.<sup>39</sup> Such an argument would have had more force, however, had the parties not concluded their second arbitration agreement referring to the AAA Rules for Class Arbitrations, which explicitly gave the arbitrators the task of construing the arbitration clause in question.

At some point, of course, an arbitral tribunal might decide a matter by simply inventing a legal standard informed only by its members' personal policy preferences. It would not be surprising if such behaviour merited characterization as excess of authority. The facts of *Stolt-Nielsen*, however, do not lend themselves to painting the arbitrators as such wild cards, particularly in light of the confused state of existing federal arbitration law on the matter.<sup>40</sup>

With respect to public policy, it may well be that arbitration is ill suited to American-style class actions. Arbitration proceedings that would go so far as to join non-signatories might violate the fundamental principle that arbitration is consensual, contractual and private.<sup>41</sup>

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<sup>38</sup> Such delegation of jurisdictional authority in a separate agreement is exactly what happened in *Astro Valiente Compania Naviera v. Pakistan Ministry of Food and Agriculture (The Emmanuel Colocotronis No. 2)*, [1982] 1 All E.R. 823. Buyers of wheat refused to arbitrate a dispute with the shipper on the theory that the arbitration clause in the charter party had not been incorporated in the bill of lading. The parties submitted to ad hoc arbitration the question of whether the arbitration clause was incorporated into the bill of lading, and were held to be bound by an award which found that buyers had agreed to arbitrate based on language in the bill of lading providing "All other conditions ... as per ... charter party".

<sup>39</sup> The sting in the majority's vacatur of the award lies in the line: "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." *Stolt-Nielsen* at 1767-1768.

<sup>40</sup> The law on consolidation was anything but clear following a decision seven years earlier in which a plurality of the US Supreme Court had given arbitrators a right to determine whether class action was permitted. See *Green Tree v. Bazzle*, 539 US 444 (2003).

<sup>41</sup> In some instances, of course, non-signatories may be brought into a proceeding on the basis of findings of agency or facts that justify piercing the corporate veil. See generally, William W. Park, 'Non-Signatories and International Contract: An Arbitrator's Dilemma', in *Multiple Party Actions in International Arbitration* (Permanent Court of Arbitration, 2009) p. 3. For a recent decision of the British Supreme Court (as it now styles itself), see *Dallah Real Estate and Tourism Holding Co. v. Government of Pakistan*, [2010] UKSC 46 (3 November 2010). Although the British court held that there no justification to join the government of Pakistan, an analogous decision by the Paris *Cour d'appel* came to the opposite conclusion and dismissed the action by Pakistan to set aside an award against the state. See *Cour d'appel de Paris*, 17 February 2011, No. d'inscription 09/28533, *Gouvernement du Pakistan v. Société Dallah*. The US Supreme Court, of course, is well aware of the various theories on which non-signatories might be joined in arbitration. See *Arthur Andersen v. Carlisle*, 129 S.Ct. 1896 (2009), addressing notions of third-party beneficiaries.

Under the particular facts of *Stolt-Nielsen*, however, the arbitrators simply provided for consolidation among parties that had all signed arbitration agreements. No attempt was made to include non-signatories. Rather, the issue was whether the parties had intended such a group proceeding.<sup>42</sup>

The majority of the Supreme Court may have skewed analysis in order to make the otherwise legitimate point about the possible risks inherent in class arbitrations. Of course, some who favour judicial restraint might consider the matter more appropriate for policy-making legislators rather than judges deciding a particular case or controversy.

The dissent may have fared somewhat better in construing the various agreements together: the stipulation, the original arbitration clause and the subsequent adoption of the AAA Rules. The opinion by Justice Ginsburg acknowledged the effect of the supplemental agreement to apply the AAA Rules, although it also invoked an argument that the award was not yet “ripe” for final review.<sup>43</sup>

Before leaving *Stolt-Nielsen*, it may be well to ask what effect the case will have on the future of arbitration in the United States, apart from possibly making it easier for courts to vacate awards when the judge and the arbitrator disagree. On its narrow facts, the case may have little precedential value because its holding rests on an explicit stipulation about what had been agreed, a state of affairs not likely to be repeated if the side asserting class action arbitration is represented by competent counsel.<sup>44</sup> Nevertheless, the case creates at least four areas to watch.

First, the majority decision sows confusion on the difference between the substantive merits of a dispute (within the arbitrator’s jurisdiction to decide) and a genuine excess of power (reviewable by a court). The resulting decrease in award finality within the United States will do few favours to the integrity of the arbitral process. By ignoring the litigants’ agreement to submit the question of class arbitration to the arbitrators, pursuant to the AAA Rules for Class Arbitrations, the Court created a new path for annulling awards when the reviewing judge thinks the arbitrators got it wrong.

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<sup>42</sup> Court-ordered consolidation has been allowed under some arbitration statutes. See, e.g., Massachusetts Gen. Laws, c. 251, § 2A, allowing consolidation as provided in the Massachusetts Rules of Civil Procedure, which in Rule 42 permits joinder of actions “involving a common question of law or fact”. The provision was applied in *New England Energy v. Keystone Shipping*, 855 F.2d 1 (1st Cir. 1988), which held that a federal district court could grant consolidation pursuant to Massachusetts state law where the parties’ agreement was silent on such matter. See also Mass. Gen. Laws ch. 90 § 7N1/2, requiring non-voluntary arbitration of claims over allegedly defective vehicles. Compare California Code of Civil Procedure, § 1281.3, which permits consolidation of arbitration proceedings that involve a “common issue or issues of law or fact” but requires that “separate arbitration agreements or proceedings exist between the same parties; or that one party is a party to a separate arbitration agreement or proceeding with a third party”. Compare *Government of the United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993), limiting a court’s discretion to grant consolidation of arbitration proceedings arising from separate agreements “absent the parties’ agreement to allow such consolidation”.

<sup>43</sup> “The parties’ supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.” *Stolt-Nielsen*, 130 S.Ct. at 1780.

<sup>44</sup> The agreement to adhere to the AAA Rules for Class Arbitrations will also likely not reoccur if the party wanting to avoid class arbitration has competent counsel.

Second, the dispute will doubtlessly focus the attention of practitioners on drafting arbitration clauses, whether within the framework of consumer transactions or business-to-business contracts.<sup>45</sup> Justice Ginsburg's dissent noted that the parties in *Stolt-Nielsen* were sophisticated businesses with sufficient resources and experience to bargain, rather than parties subject to contracts of adhesion. Whether this argument cuts in favour or against a presumption to allow class action arbitration remains an open question.<sup>46</sup>

Third, the problematic nature of class action arbitration will likely serve to further politicize discussions of arbitration in the United States. The matter is complicated by the fact that the United States has no general national statute to protect consumers and employees against abusive arbitration agreements, coupled with another American idiosyncrasy, the role of the civil jury in deciding contract claims. The business manager often tends to view arbitration as a way to avoid the more unreasonable aspects of court litigation, perceived (rightly or wrongly) as biased in favour of the consumer or employee and against the manufacturers or employers.<sup>47</sup>

Finally, the case raises a question about whether courts outside the United States will stay legal actions arguably conflicting with class action proceedings. From the perspective of a French court, for example, class action proceedings against a French company may, quite understandably, appear to be an excess of arbitral jurisdiction. In all of these matters, *Stolt-Nielsen* highlights the way in which tensions among the arbitrator's various duties resist facile analysis.

#### **IV. Enforceability Revisited**

Of all the arbitrators' duties, the most persistently problematic may well be the obligation to seek an enforceable award. This obligation implicates not only tensions among the various duties themselves, but also conflicts between norms at the arbitral seat and the law of the enforcement forum.

To illustrate how the duty to enhance fidelity to the parties' agreement may conflict with procedural norms at the arbitral situs, few examples serve as well as Section 60 of the English Arbitration Act. This provision invalidates pre-dispute agreements to allocate arbitration

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<sup>45</sup> *Stolt-Nielsen*, 130 S.Ct. at 1783. See also Paul Friedland and Michael Ottolenghi, 'Drafting Class Action Clauses After *Stolt-Nielsen*', 65 *Dispute Res. J.* (May-October 2010) p. 22, who suggest explicitly addressing the question of class action arbitration in the arbitration clause to avoid any confusion resulting from how future courts will interpret *Stolt-Nielsen*.

<sup>46</sup> The effectiveness of waivers drafted to preclude recourse to class action arbitration is currently before the US Supreme Court in *AT&T Mobility LLC v. Concepcion* (No. 09-893). Oral arguments heard on 9 November 2010 explored whether the Federal Arbitration Act preempts reliance on state law related to unconscionability principles that strike down such waivers.

<sup>47</sup> The US Congress, however, can and has passed legislation limiting arbitration on behalf of special interest groups. See the Motor Vehicle Franchise Contract Act of 2002, § 11028, Pub. L. No. 107-273, 116 Stat. 1758, 1835-36 (codified at 15 U.S.C. § 1226 (2000)), sometimes known as the Bono Bill in recognition of its original sponsor, the late Sonny Bono. Recently, Senators Jeff Sessions and Russell Feingold proposed legislation intended to provide broad protection of consumer interests, albeit perhaps of an over-inclusive nature that sacrifices vital elements of party autonomy and efficient dispute resolution. See Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007).



costs “in any event”.<sup>48</sup> In advance of the dispute, parties may not by contract forbid an arbitrator from taking into account who won and who lost when allocating costs.<sup>49</sup> The provision casts a wide net, serving not only as an anti-abuse mechanism to prevent ‘you-pay-in-any-event’ clauses from discouraging claims by weaker parties, but also catches otherwise reasonable arrangements among sophisticated business managers to split arbitrator compensation on a 50/50 basis and to mandate that each side cover its own legal expenses.

Of course, promoting award enforceability remains a two-edged sword in an international case. Although flouting clear contract language on cost allocation would please an English judge,<sup>50</sup> the disregard of the parties’ *ex ante* expectations may appear as excess of authority to a New York court called to enforce an award of legal costs out of line with the agreement.<sup>51</sup>

The US Supreme Court decision in the well-known *Mitsubishi* case presents another example of this dilemma, albeit with respect to substantive norms rather than procedure.<sup>52</sup> An agreement involving a Japanese auto manufacturer and an American distributor provided for application of Swiss law by arbitrators sitting in Japan.<sup>53</sup> Ordering arbitration, the Court nevertheless warned that American antitrust law must be considered by the arbitrators in connection with any antitrust counterclaim, despite the contractual choice-of-law clause.<sup>54</sup>

The *Mitsubishi* pronouncements on United States competition law, like the English rule on cost allocation, place arbitrators between the Scylla and the Charybdis of inconsistent requirements. An arbitrator must satisfy norms both at the arbitral seat, where proceedings take place, and at the recognition forum, where the winner goes to attach assets.

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<sup>48</sup> Section 60, Arbitration Act of 1996: “An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.” Section 61 goes on to set forth the general principle that “costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs”. This standard, however, is made subject to the parties’ agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen.

<sup>49</sup> To be clear, the statute does not impose the English ‘costs follow the event’ rule, but simply invalidates pre-dispute attempts to eliminate the arbitrator’s discretion to consider who won and who lost in fixing obligations for items such as attorneys’ fees and amounts paid to the arbitrators and the arbitral institution.

<sup>50</sup> Presumably, Section 68 of the 1996 Act (“serious irregularity causing substantial injustice”) would permit judicial intervention with respect to an arbitrator’s failure to respect Section 60.

<sup>51</sup> Not infrequently, contracts between American policyholders and British insurers provide for London arbitration but subject to New York substantive law. These so-called ‘Bermuda Form’ arbitrations have been discussed in Richard Jacobs, Lorelie S. Masters and Paul Stanley, *Liability Insurance in International Arbitration* (2004).

<sup>52</sup> *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 US 614 (1985).

<sup>53</sup> This particular choice of law explains itself by the fact that a Swiss affiliate of the American company Chrysler was also involved in the contractual arrangement with the distributor and the manufacturer.

<sup>54</sup> *Mitsubishi* footnote 19 suggests a ‘prospective waiver’ doctrine that would invalidate choice-of-law agreements that operated to waive a right to pursue American remedies. Moreover, the so-called ‘second look’ doctrine warned that American courts would exercise their power at the award enforcement stage to “ensure that the legitimate interest in the enforcement of the antitrust laws [of the United States] had been addressed”.

Another such conflict was presented in *Accentuate Ltd. v. Asigra Inc.*,<sup>55</sup> involving an English distributor of software products under licence from a Canadian company. The contract called for application of Ontario law and arbitration in Toronto. After the Canadian company attempted to terminate the agreement and filed an arbitration in Toronto, an arbitral tribunal found for the distributor on its counterclaim for breach of contract.

The problem, however, arose in connection with the distributor's parallel request for damages under EU regulations concerning commercial agents, which the tribunal had decided were not covered by Ontario law. In a competing court action brought by the distributor in England, the Canadian company argued that the Toronto award barred claims related to the EU regulations. The High Court held that a determination had to be made on whether the regulations permitted the distributor to file an action independent of Ontario law.<sup>56</sup> If the regulations did allow such a claim, the English court proceeding would not be stayed, and the award would have no *res judicata* effect on that matter.<sup>57</sup>

In essence, the English court raised the prospect that the EU regulations might constitute mandatory norms (not unlike the antitrust counterclaims in *Mitsubishi*) from which the parties could not derogate. If so, then the award could not defeat the claim brought before the English court, given that the arbitrators had never addressed the matter, apparently considering the dispute governed solely by Ontario law.<sup>58</sup>

Such cases raise the vexed matter of divergence between an arbitrator's duties and the perspectives of courts called to intervene in the arbitral process. Whatever the obligation of judges reviewing awards, arbitrators themselves normally aim for fidelity to the parties' bargain and thus hesitate to ignore explicit contract language, whether it be on applicable law or cost allocation. Judges are answerable to the citizenry as a whole, while arbitrators remain in large measure creatures of contract.<sup>59</sup>

## V. Conclusion

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<sup>55</sup> [2009] EWHC 2655 (QB).

<sup>56</sup> The High Court also expressed the view that if the EU regulations did apply, a claim for compensation would be governed by English law. *Id.*, at para. 92.

<sup>57</sup> The award was tested not in an application to refuse recognition, but rather in the collateral context of Section 9 of the English Arbitration Act, which permits a stay of legal proceedings connected to matters governed by an arbitration agreement, as long as that agreement does not fail for being null, void or inoperative. According to the High Court, the district judge "fell into error" by failing to determine whether a binding arbitration clause applied to the claims under the EU regulations, in the absence of which no award could be recognized on that point. Opinion of Justice Tugendhat, paragraph 95.

<sup>58</sup> In this connection, it is important to note that the effect of the award was challenged in the context of a competing legal claim brought in an English court. It may well be that the award would nevertheless retain its vigour under Article III of the New York Convention in some other recognition forum. However, the peculiar facts of this case make it unlikely for the Canadian company to rely on the award except as a bar to a rival judicial action. Although the arbitral tribunal held for the distributor under Ontario law, the amount of quantum presumably was far less than that available under the EU regulations.

<sup>59</sup> Of course, faithfulness to the agreement would not justify violation of international public policy in matters such as bribery, corruption or money laundering. However, on most matters within the bargaining rights of sophisticated parties (such as applicable law, costs and limitation on damages), arbitrators will normally strive to let the chips fall where they may notwithstanding idiosyncratic local rules.

The tensions among the arbitrator's various duties often resist facile analysis or easy resolution. Hearing additional witnesses may promote fairness and accuracy, but at the expense of adding time and cost. Suggesting that counsel consider some new legal theory may promote fairness, in providing a fuller right to be heard, but at the risk of enhancing the prospect of award vacatur by creating a perception that arbitrators favour one side or the other.

But, in some instances, rivalry among the arbitrator's duties may end up being more troublesome in theory than in practice. An experienced arbitrator will often find it possible to exercise procedural discretion in a way that avoids conflict. Other tensions, however, may not be resolved in such a straightforward manner, particularly when a contract stipulates an applicable law at odds with mandatory norms of a relatively foreseeable enforcement forum.

In all events, open recognition of the relevant tensions and rivalries will promote an optimum accommodation among the various duties. Compromise, not dogma or ideology, will normally remain the touchstone for achieving an appropriate counterpoise among accuracy, fairness, efficiency and enforceability. Although Scripture warns us that no one can serve two masters, such divided loyalty may remain the fate of a good arbitrator.<sup>60</sup>

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<sup>60</sup> See Matthew 6:24 and Luke 16:13.