

2018

What Does it Mean to be 'Pro-Arbitration'?

George A. Bermann

Columbia Law School, gbermann@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [International Law Commons](#), and the [Jurisdiction Commons](#)
Network

Logo Recommended Citation

George A. Bermann, *What Does it Mean to be 'Pro-Arbitration'?*, 34 ARB. INT'L 341 (2018).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2880

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

What does it mean to be ‘pro-arbitration’?

George A. Bermann*

ABSTRACT

International arbitration commentators commonly ask of a proposed policy or practice whether it is ‘pro-’ or ‘anti-arbitration’. Framing the question that way presupposes a shared understanding of what does or does not make a policy or practice arbitration-friendly. In truth, the ways in which policies or practices may affect international arbitration’s well-being are manifold. They may even distinctly serve international arbitration’s well-being in some respects while equally distinctly diserving it in others. It behooves those who take international; arbitration’s well-being seriously to acknowledge the multiplicity of metrics for identifying what is ‘pro-’ and what is ‘anti-arbitration’ and to seek the most appropriate trade-offs among them, in consideration of their respective importance in whatever trade-off is entailed. Also, too often a policy’s or practice’s friendliness to arbitration is examined through too narrow a lens. Society embraces values that are fundamental in ways that surpass—and properly outweigh—international arbitration’s interests narrowly conceived. Giving effect to those values and securing the legitimacy that confers may, even when doing so fails to advance a narrowly pro-arbitration agenda, be the most pro-arbitration move one may make.

1. INTRODUCTION

Those who practice international arbitration—whether as counsel, arbitrator, or expert—characteristically take an exceptional degree of interest in the health and well-being of the arbitration enterprise. They demonstrate this concern regularly and in a good many ways. The extent to which they convene to discuss developments in the field, or teach and write in it, may be unrivalled among legal practitioners. Those who practice in the field, especially at the international level, are not only heavily engaged in international arbitration, but they also are heavily engaged *by it* and very much believe *in it*. They dwell insistently on how the field is faring. How ‘good’ a particular policy or practice is for international arbitration has become a veritable professional preoccupation. This preoccupation is reflected in the tendency of participants in international arbitration, when faced with a practice or policy of relevance to arbitration practice, to ask themselves whether that practice or policy is favourable to arbitration. They ask, in short, whether it is ‘pro-arbitration’ (or ‘arbitration-friendly’) or not.

There is good reason for the international arbitration community to be so attuned to the arbitration friendliness or unfriendliness of a given policy or practice. The very

* George A. Bermann, Jean Monnet Professor of EU Law, Walter Gellhorn Professor of law, and Director, Center for International Commercial and Investor Arbitration, Columbia Law School, New York.

efficacy of arbitration depends importantly on the attitudes of other actors, most notably courts and legislatures (and of course users). If nothing else, the attitudes of those decision makers largely determine whether agreements to arbitrate will be respected and whether arbitral awards will be recognized and enforced. To perform its function, the international arbitration regime needs these other actors to take positions and adopt practices that are favourable to the arbitration enterprise.

If, for these reasons or others, arbitration-friendliness is of such concern to the international arbitration community, it behooves that community to think more deeply than it customarily does about what it means to be pro-arbitration, and to identify more concretely than it customarily does the ways in which a pro-arbitration result is achieved.

In this piece, I address three aspects of the challenge.

I first explore the wide range of meanings that the single hyphenated term 'pro-arbitration', having a distinctly facile ring to it, is meant to convey. This inquiry is very much a definitional one, albeit one that yields a multiplicity of definitions.

I then consider the extent to which pursuing a pro-arbitration path, in one sense of the term, may operate at cross-purposes with what may legitimately be considered as pro-arbitration in one or more other senses of the term. To the extent this is so, trade-offs among pro-arbitration considerations become inevitable.

Thirdly, I explore the possibility that, even if a policy or practice is decidedly pro-arbitration from an overall point of view, it may nevertheless disserve important values that are themselves extrinsic to arbitration. I conclude that if pursuing what appears to be a pro-arbitration strategy sufficiently disserves such other values, it actually discredits arbitration and ultimately operates to arbitration's detriment. For that reason, it is ultimately not pro-arbitration.

At the outset, however, two caveats. First, to invite this inquiry is by no means to question the merits of arbitration as a means of international dispute resolution. On the contrary, shortcomings notwithstanding, international arbitration has been overwhelmingly a success story. It has posited admirable international dispute resolution objectives and has succeeded remarkably in achieving them.

Secondly, one needs to put to one side in this inquiry investor-State dispute settlement (ISDS). Try as one may, it is quite impossible nowadays to separate arbitration as a foreign investment dispute resolution vehicle, on the one hand, from foreign investment law and policy, on the other. In an arena as politicized as investor-State law and arbitration have become, the terms 'pro-arbitration' and 'anti-arbitration' have an especially hollow ring to them. The focus here is accordingly on what is generally understood as international commercial arbitration.

2. PRO-ARBITRATION'S MANY MEANINGS

Viewed in abstract terms, a policy or practice is arbitration-friendly to the extent that it favours the achievement of international arbitration's purposes, whatever we take them to be. If a particular policy or practice sufficiently advances those purposes, it may be regarded as pro-arbitration and, as such, merit the support of arbitration partisans. By extension, an entire legal system may be described as pro-arbitration if the features of its arbitration regime, viewed in the aggregate, likewise sufficiently advance arbitration's purposes.

At one time, it may have been sufficient to earn the title of pro-arbitration for a regime simply to avoid hostility to arbitration. The US Federal Arbitration Act of

1925¹ was heralded as putting an end to the judicial hostility towards arbitration in the USA that had led to treating agreements to arbitrate as contrary to public policy and accordingly unenforceable²—an attitude that no longer prevails, at least among courts. But arbitration-friendliness nowadays surely requires something more.

The aim in this section is to identify with some particularity the criteria according to which a policy or practice may be thought to advance the achievement of international arbitration's purposes to such an extent as to be considered pro-arbitration. In fact, there are multiple gauges for determining a measure's pro- or anti-arbitration character. Professor Park has captured the basic goals of international arbitration in four terms: accuracy, fairness, and efficiency and an enforceable award.³ A non-exhaustive catalogue of more specific ways of gauging the character of a policy or practice in that respect might look something like this:

- to what extent does it render international arbitration economical in terms of time or cost?
- to what extent does it ensure consent to arbitrate and enhance the scope for party autonomy?
- to what extent does it effectuate the likely intentions or expectations of the parties?
- to what extent is it consistent with the *lex arbitri* or the institutional rules chosen by the parties?
- to what extent does it, consistent with party intent, enable the tribunal to exercise sound discretion and flexibility on matters of arbitral procedure?
- to what extent does it ensure the independence and impartiality of arbitrators?
- to what extent does it protect a party's right to be heard?
- to what extent does it promote accuracy in the administration of justice?
- to what extent does it minimize, to the fullest extent reasonably possible, the intervention of national courts in the arbitral process?
- to what extent does it help ensure that the resulting award will be an effective one?
- to what extent does it enable the resulting award to withstand challenges in an annulment or enforcement action?
- to what extent does it expand the categories of legal claims treated as arbitrable?

These 12 criteria represent an extremely wide range of ways by which to measure the pro-arbitration character of any given policy or practice. They may not even be exhaustive.

3. 'PRO-ARBITRATION' TRADE-OFFS

Even if incomplete, the catalogue set out above shows that assessing a measure's pro-arbitration character is by no means as straightforward as it might initially seem. A measure that advances arbitration's purposes according to one of the criteria

1 9 USC s 1ff.

2 See *Scherk v Alberto-Culver Co.*, 417 US 506, 510 (1974).

3 William W. Park, 'Arbitration and Fine Dining: Two Faces of Efficiency', in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator* (Wolters Kluwer, 2017) 251, referring to 'rival goals' and indeed 'tradeoffs':

catalogued above may plainly fail to advance arbitration's purposes in others of them. Indeed, an assessment of arbitration-friendliness may vary starkly according to the gauge that is employed.

But even this observation seriously understates the challenge of determining a measure's pro-arbitration character. It is not just that a measure may promote arbitration in some ways but not others. Rather, a policy or practice may serve arbitration's purposes according to one measure, but actually and demonstrably disserve them according to others.⁴ The fact is that the criteria for gauging the arbitration-friendliness of a policy or practice may well be in direct tension with one another, thus pointing in opposite directions. At an extreme, a policy or practice may be decidedly pro-arbitration according to one criterion and equally decidedly anti-arbitration according to another. In fact, the number and range of circumstances in which pro-arbitration considerations enter into direct competition with one another is truly remarkable.

A well-documented example relates to access to national courts for interim relief prior to or during the pendency of arbitral proceedings. It was at one time thought, in the USA, for example, that allowing parties access to court for interim relief prior to or in the midst of arbitration was contrary to both the letter and spirit of arbitration. This assessment rested in particular on several pro-arbitration considerations, notably that the intervention of national courts in the arbitral process should be kept to a minimum. It rested similarly on the notion that tribunals are entitled, consistent with party intent, to exercise their own sound discretion on matters of arbitral procedure. It was even viewed as undesirably costly in terms of time and expense. These assessments cannot be said to have been irrational. Thus, the highest court in the state of New York once ruled that for a court to entertain requests for interim relief in arbitration would be to violate its obligation under Article II(3) of the New York Convention to 'refer the parties to arbitration'.⁵ New York courts even went so far as to treat a request to a court for interim relief in conjunction with an arbitral proceeding as a waiver of the right to arbitrate.⁶ Allowing access to a court for interim relief under these circumstances was viewed as a decidedly arbitration-unfriendly move.⁷

4 Professor Park writes:

[S]everal elements play key roles in evaluation of any arbitration: accuracy, enforceability cost and speed.1 An inevitable tension exists among these fundamentals. . . . Time and cost are portrayed as enemies, rather than trade-offs in the pursuit of a fair process leading to an accurate and enforceable result.

ibid 252.

- 5 *Cooper v Ateliers de la Motobecane*, SA, 442 NE 2d 1239, 1242 (NY 1982) ('[Article II of the New York Convention] precludes the courts from acting in any capacity except to order arbitration, and therefore an order of attachment could not be issued. To hold otherwise would defeat the purpose of the [New York] Convention.');
- 6 *Press/Breismeister Architects v Westin Hotel Co. Plaza Hotel Div.*, 86 AD 2d 844, 845 (NY App Div 1982) ('for example) [T]he bringing of a court action [for interim relief] is a waiver of the plaintiff's right to arbitration unless the claims asserted in the lawsuit are 'separate and distinct' from those to be arbitrated.') (quotation marks in original).
- 7 See, for example, *McCreary Tire & Rubber Co. v CEAT, SpA*, 501 F 2d 1032, 1038 (3rd Cir, 1974) (holding that resort to court-ordered interim measures violates the arbitration agreement, and permitting such measures is inconsistent with the New York Convention).

Positions on this matter have changed markedly over time. There is today a broad consensus favouring the availability of interim relief from a court in conjunction with arbitration, albeit only under appropriate circumstances.⁸ According to that consensus, interim relief from a court may, again in appropriate circumstances, help ensure that the resulting award will be an effective one, if only because such relief can serve to maintain the status quo pending arbitration, thereby enhancing the future effectiveness of the award.⁹ Thus, far from prejudicing arbitration, access to a national court for interim relief has come to be viewed as advancing international arbitration's purposes—and doing so even though it invites judicial intervention in arbitral proceedings, compromises the exercise of procedural discretion on a tribunal's part, and risks lengthening the time and heightening the costs of arbitration. Under this view, far from disserving arbitration's purposes, the availability of recourse to a court for interim relief in arbitration distinctly serves them.¹⁰

Other examples of policies or practices promoting arbitration in some respects and impeding it in others come readily to mind. They run a wide gamut, and indeed cover issues that are at present among the most topical within the international arbitration community.

Take the use of written witness statements in lieu of live direct testimony. Replacing direct witness testimony with written witness statements is largely viewed as pro-arbitration because it demonstrably saves time and money.¹¹ But the practice may also exact a pro-arbitration price insofar as it lessens the tribunal's opportunity to observe how the witness presents his or her position,¹² and raises a distinct risk that counsel, not the witness, composes the witness statement.¹³ To that extent,

8 See Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer, 2014) 2523 ('[T]he existence of concurrent jurisdiction, shared by arbitral tribunals and national courts [to order interim measures is] well-recognized in both national and international authorities . . .'); *Carolina Power & Light Co. v Uranex*, 451 F Supp 1044 (ND Cal 1977) (finding that art II(3) of the New York Convention does not preclude court-ordered interim relief in support of international arbitration).

9 See Born, *ibid* ('Concurrent jurisdiction [over interim measures] is essential to the efficacy of the arbitral process.').; see also *Toyo Tire Holdings of Americas Inc. v Cont'l Tire N. Am., Inc.*, 609 F 3d 975, 981 (9th Cir 2010) ('[A] district court may issue interim injunctive relief [if] necessary to preserve the status quo and the meaningfulness of the arbitration process.').

10 See *Carolina Power* (n 8) 1052 ('[T]he availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate.').; *Channel Tunnel Group Ltd v Balfour Beatty Constr. Ltd.* [1993] AC 334, 354 (House of Lords) ('[W]hen properly used[,] [interim] measures serve to reinforce the agreed method [of arbitration], not to bypass it.').

Significantly, French law names a court at the place of arbitration the *juge d'appui*, or 'assisting judge', suggesting that judicial intervention, at least by a local court, should not be viewed as unfavourable to arbitration. See 'Part II, Chapter 4: Institution of Arbitral Proceedings', in Jean Rouche and others (eds), *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, 2009) 81.

11 See Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) 899 ('There are likely to be significant cost savings with written witness statements as opposed to oral testimony.').

12 See *ibid* 899.

13 See VV Veeder, 'Introduction', in Laurent Lévy and VV Veeder (eds), *Arbitration and Oral Evidence* (ICC Publications, 2004) 7–8 ('Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than special pleading, usually expressed at considerable length.'). (cited in Born (n 8) 2259–60).

written witness statements may actually undermine accuracy in the administration of justice.¹⁴ Deciding whether the use of written witness statements is in fact arbitration-friendly remains a difficult balancing act.

Another topical issue subject to competing pro-arbitration assessments entails the use of tribunal secretaries. Delineating the proper role of tribunal secretaries likewise entails a balancing act potentially pitting economy in the conduct of arbitration against effectuation of the intentions of the parties. For example, allowing tribunal secretaries to compose a first draft of the award on the merits plainly introduces important economies and may even enable the tribunal to focus on substantive decision making rather than drafting.¹⁵ But it may well also disappoint a legitimate party expectation that it is the arbitrators themselves, not others, who put pen to paper even at the earliest stages of drafting. This is not of course to say that tribunals could not strike compromises that mitigate the conflict between pro-arbitration considerations, for example, by allowing the tribunal secretary to compose the factual history of the dispute or the proceeding (but nothing more) or by providing the tribunal secretary with a detailed outline as the basis for an initial draft. Whether such solutions, or others like it, strike a sound balance remains a matter of discussion and debate. But even conducting that exercise requires acknowledging that competing pro-arbitration considerations have come into play.

One of the most pressing concerns in contemporary arbitration practice entails reconciling ensuring economy in time and cost with protecting an award from challenge on due process grounds. When counsel makes questionable procedural requests—an extension of a filing deadline, an additional round of briefing, or extensive discovery—the tribunal must weigh its obligation to proceed with speed and economy,¹⁶ on the one hand, against its obligation to avoid annulment of the eventual award on due process grounds,¹⁷ on the other. This represents a classic confrontation between pro-arbitration values.¹⁸

14 See Piet Sanders, *Quo Vadis Arbitration?* (Kluwer International, 1999) 262 ('[T]he Witness Statements preceding the hearings of the witnesses in person are not in accordance with the expectations of many parties in an international arbitration.') [cited in Born (n 8) 2259–60].

15 See Michael Polkinghorne and Charles B Rosenberg, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' (2014) 8 *Disp Resol Int'l* 107 <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=987d1cfc-3bc2-48d3-959e-e18d7935f542>> accessed 28 August 2018. ('Advocates for broad responsibilities contend that tribunal secretaries increase the efficiency of the arbitration proceeding, allow the arbitrators to focus on deliberating on the merits, and enable tribunals to render awards faster.')

16 See Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016), 32 *Arb Int'l* 415, 419–20.

17 See *ibid.*

18 Professor Park puts the tension this way:

Granting an opportunity for more testimony, or additional document production, might enhance procedural fairness, perhaps also furthering substantive accuracy by providing the arbitrator supplemental information on which to base a decision. Yet the potential benefit comes at a cost: delay and extra expense. In turn, any attempt to economize by denying more testimony or document production could lead to challenge of the award by the aggrieved party.

...

[C]ompeting directives provide convenient hooks for counsel to hang procedural arguments, either for or against applications to bifurcate, to compel disclosure, or to move deadlines. However, they contain little inherent guidance on how the arbitrator should weigh competing

How a tribunal responds depends on the relative weight it chooses under the circumstances to give to the competing considerations. Were the tribunal driven by one consideration to the exclusion of the other, the choice would be easy. But tribunals are rightly concerned with both.

A particularly daunting example of the conflict between the goals of arbitration concerns the much-debated extension of arbitration agreements to non-signatories. As a defendant in national court, a non-signatory to a contract ordinarily has the right to argue before the court that it should not be considered an alter ego of a signatory, or for any other reason be treated as a signatory even though it was not.¹⁹ But should the contract contain an arbitration clause, some legal systems will allow a court to entertain the non-signatory's jurisdictional challenge before compelling arbitration,²⁰ while other legal systems largely require that, notwithstanding its protestations, the non-signatory have its status first determined not by a court but by the tribunal to whose jurisdiction the non-signatory maintains it never acceded.²¹ A court's entertaining the objection at the outset of the arbitration undoubtedly entails delays and complications that may be detrimental to the economy of the arbitral proceeding, but its doing so importantly vindicates the principle of consent on which arbitration is based. Both positions are arguably pro-arbitration, depending on which goal of arbitration is given priority.

Not only tribunals, but also courts face the challenge of choosing, or finding a compromise, between two pro-arbitration values. Suppose a tribunal finds in favour of the claimant in a dispute falling well within the scope of the arbitration agreement, but proceeds to order a form of relief that the parties had expressly excluded in their contract. A reviewing court might well consider that annulling the award on excess of authority grounds²² would give effect to the probable intentions of the parties, but at the same time it may worry about appearing to inject itself into the merits of the dispute, which in principle is off-limits to a reviewing court.²³ Again, different pro-arbitration considerations point in opposite directions.

aims, a nuanced task which generally benefits from an experience level sufficient to guide the tribunal on shared expectations of fairness in the community of arbitration users. Promoting an optimum administration of justice often proves to be an art more than a science, with a delicate counterpoise among aims such as speed, economy, accuracy, fairness and enforceability.

Park (n 3) 254–55.

- 19 See Restatement of the US Law of International Commercial and Investor–State Arbitration, s 2–3, reporter's note g ('[A] Court decides whether a non-signatory is bound [by] an arbitration agreement'.) [citing George A Bermann, 'The "Gateway for example)" Problem in International Commercial Arbitration' (2012) 37 Yale J Int'l L 1, 32].
- 20 See *ibid* ('Courts have routinely found that these issues involve threshold or gateway issues that must first be decided by a court.') (citing *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 944 (1995)).
- 21 See Born (n 8) 1501 ('French courts have concluded . . . that arbitral tribunals have the competence to decide *initially* what parties are bound by an arbitration agreement; the arbitrator's jurisdictional award is subject to subsequent *de novo* judicial review by French courts'.) (emphasis added).
- 22 See, for example, UNCITRAL Model Law on International Commercial Arbitration (2006), art 34(2)(a)(iii); Federal Arbitration Act, 9 USC, s 11(b).
- 23 See Restatement of the US Law of International Commercial and Investor–State Arbitration, s 4–14, cmt c.

By way of final example, in the Supreme Court case of *AT&T Mobility LLC v Concepcion*,²⁴ both the majority and the dissent justified their opinions on the validity of class action waivers on pro-arbitration grounds. According to the majority, the pro-arbitration move was to enforce a consumer's contractual waiver of the right to bring class arbitration because the principle of party consent upon which arbitration rests so required.²⁵ The minority thought that the waiver should be denied enforcement because the *lex arbitri*—the Federal Arbitration Act (FAA)—subjected the enforceability of an arbitration agreement to the relevant state contract law principles, including unconscionability as applied to consumer contracts.²⁶ This resulted in a single court, hearing and deciding a single case, split nearly evenly, with each side asserting its pro-arbitration credentials to reach opposite results.

What emerges from this discussion is a recognition that privileging a particular pro-arbitration value may easily prejudice one or more others, with the result that what appears to be pro-arbitration when viewed through one lens may be quite arbitration unfriendly when viewed through another. If a policy or practice that is pro-arbitration when viewed in isolation is prejudicial enough to one or more other pro-arbitration values, then it may ultimately not be pro-arbitration at all, or at least a great deal less pro-arbitration than initially thought.

What further emerges is the necessity of managing the trade-offs that competing pro-arbitration considerations entail.²⁷ For at least two reasons, the notion of establishing general priorities among pro-arbitration considerations is not a promising one. First, a consensus over priorities among the values pursued by arbitration is almost certainly beyond reach. But, even more important, the stakes for any particular arbitration value will vary starkly with the policy or practice under consideration.

But other techniques for managing the inevitable trade-offs between competing pro-arbitration considerations offer better prospects. One way to ascertain whether a given policy is on the whole pro-arbitration is to proceed in cost–benefit terms, by weighing how far a given policy or practice may both serve and disserve arbitration's interests. This would entail assessing whether the contribution of a policy or practice to one pro-arbitration value is greater or lesser than the disservice it does to another. A closely related way may be to conduct a comparative impairment analysis, that is, to compare the extent to which favouring a given policy or practice prejudices a pro-arbitration value with the extent to which disfavouring that policy or practice prejudices another. When it comes to mediating between competing considerations by seeking some form of compromise, one may readily employ something along the lines of the principle of proportionality, requiring that a measure not, in pursuit of one pro-arbitration consideration, be excessively or unnecessarily detrimental to one or more others. A less drastic policy or practice in pursuit of one arbitration value

24 *AT&T Mobility LLC v Concepcion*, 563 US 333, 344–46 (2011).

25 *ibid* 344.

26 *ibid* 359–62 (dissenting opinion).

27 See Park (n 3) 253:

In the best of all possible worlds, experienced arbitrators will find ways to meet all goals with equal robustness. Yet the best of all words frequently eludes us, thus requiring occasional compromise and concession.

may manage to leave other arbitration values largely intact. There is of course no guarantee that any of these devices will yield an outcome in which the arbitrator or judge has perfect confidence²⁸ but they at least hold out some hope.

4. ARBITRATION-FRIENDLINESS AND EXTRINSIC CONSIDERATIONS

The discussion thus far has been confined to the trade-offs among pro-arbitration considerations to be made when, in contemplating a given policy or practice relating to international arbitration, those considerations come into conflict and operate at cross purposes. But international arbitration does not live in a vacuum. A moment's reflection tells us that a policy or practice that appears to be pro-arbitration in one respect may not only have arbitration-unfriendly consequences in other arbitration-related respects, but also in respect of considerations having nothing specifically to do with arbitration. Put differently, a policy or practice may disproportionately favour a pro-arbitration consideration at the expense not only of other pro-arbitration considerations but also at the expense of considerations that are largely extrinsic to arbitration, but nevertheless of considerable social value or utility.

To its credit, the international arbitration community has commonly rejected policies and practices that would appear to be pro-arbitration in one sense or another when they also appear to prejudice important values that are largely external to international arbitration itself. The examples are many and quite obvious. Consider the International Bar Association (IBA) Guidelines on Conflicts of Interest.²⁹ Compliance with those guidelines, including the conduct of onerous conflicts checks, undoubtedly delays and complicates arbitral practice,³⁰ but is widely regarded as justified in the interest of fundamental fairness, a broader legal norm, and societal value.³¹ Other soft law instruments, such as the IBA Guidelines on Party Representation, subject the procedural autonomy positively associated with arbitration to limitations in the form of a commitment to professional ethics and professionalism more broadly.³²

28 Professor Park observes:

In some instances, one course of conduct commends itself over alternatives. In other cases, rivalry among various goals may prove more troublesome, with competing options neither better nor worse than one another, just different.

Park (n 3) 267.

29 According to the Queen Mary survey, after the IBA Rules on the Taking of Evidence, the IBA Guidelines on Conflicts of Interest were considered the second most effective instrument of 'soft law'. '2015 Survey: Improvements and Innovation in International Arbitration', Queen Mary University of London and White & Case LLP, 36 (2015).

30 Gary Born, *International Commercial Arbitration*, s 12.05(J)(c)(2014) ('The cumulative impact of these various delays and costs degrades the efficacy of the arbitral process, undermining some of the key objectives of the process.').

31 See 'The IBA Guidelines on Conflicts of Interest in International Arbitration' (International Bar Association, 2014) 4 ('A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator.').

32 *ibid* ('The IBA Guidelines. . . are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.').

Perhaps, the best example is the introduction of considerable transparency, particularly into ISDS. The impetus for this development, as reflected in the 2014 UNCITRAL Transparency Rules³³ or the EU-Canada Comprehensive Economic and Trade Agreement (CETA) agreement incorporating them,³⁴ does not stem directly from values narrowly associated with arbitration. It stems from other considerations, notably the public's right to know of matters of legitimate public interest.³⁵

These examples notwithstanding, it is not always obvious when and how far a pro-arbitration consideration should be subordinated to values extrinsic to arbitration. The difficulty has arisen conspicuously in connection with the question of the arbitrability of competition law claims. Both the US Supreme Court³⁶ and the European Court of Justice,³⁷ in what are widely viewed as pro-arbitration moves, treat competition law claims as arbitrable. Yet, both Courts have compensated for doing so by inviting, indeed requiring, courts to exercise a degree of merits review of the resulting award that is not ordinarily allowed in arbitration—all in recognition of antitrust law's paramount public importance.³⁸ It is on that basis, and that basis only, that the Supreme Court accordingly attached to the arbitrability of antitrust claims a 'second look doctrine', under which courts may decide, after the fact, whether an award did such violence to the policies underlying that body of law as to warrant denying it recognition. Ironically, some critics question whether treating competition law claims as arbitrable is in fact a pro-arbitration move if it comes at so high a price in terms of arbitration's finality.³⁹ Significantly, the USA and the European Union

33 GA Res 68/109, UNCITRAL Arbitration Rules (2013) ('Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations, Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance. . .').

34 Consolidated Text, Comprehensive Economic, and Trade Agreement between Canada and the European Union (2016), art 8.36 (2016) (adopting the UNCITRAL 2014 Transparency Rules for all CETA tribunals, making relevant documents available to the public, allowing for third-party submissions, and mandating public access to hearings in the absence of confidentiality concerns).

35 See, for example, *Saluka Investments B.V. v The Czech Republic*, ICGJ 368 (PCA 2006), para 305 (17 March 2006) ('No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.').

36 *Mitsubishi Motors Corp. v Soler Chrysler Plymouth*, 473 US 614 (1985).

37 *Eco Swiss China Time Ltd. v Benetton International NV*, Case C-126/97 (ECJ decision of 1 June 1999).

38 Diederik de Groot, 'Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators', in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Wolters Kluwer, 2011) 567–625, 585 ('The result is not unlike the "doctrine of second look" that was introduced by the US Supreme Court in *Mitsubishi*. This may be the main similarity between the two decisions. As a result of *Mitsubishi*, US courts are required to exercise control (more particularly at the enforcement stage) over the work carried out by arbitrators insofar as US antitrust issues are involved. As a result of *Eco Swiss*, national courts of the EU Member States are required to exercise control at any possible stage (Nordsee) over the work carried out by arbitrators insofar as European competition law is involved.').

39 See generally, Alexis Mourre, 'Dissenting Opinion on a Dangerous Project', in Gordon Blanke (ed), *European Business Law Review Special Edition - Arbitrating Competition Law Issues*, vol 19 (Wolters Kluwer, 2008).

(EU) do, however, differ with regard to the arbitrability of consumer contract disputes. The Arbitration Fairness Act, which has been languishing of late in successive sessions of the US Congress,⁴⁰ would override Supreme Court precedent sustaining mandatory arbitration clauses in consumer contracts.⁴¹ It appears to stand little chance of adoption. By contrast, the EU's Directive 93/13 on Unfair Terms in Consumer Contracts presumes consumer arbitration clauses to be invalid.⁴² These are distinctly different trade-offs in action.

A matter in which the tension between pro-arbitration considerations and extrinsic values comes prominently into play is arbitral immunity. The basic rationale for arbitral immunity, as for judicial immunity, is the decision-maker's independence of mind. There can be no doubt that exposure to litigation and liability has the potential to affect that independence adversely.⁴³ However, accountability considerations may point in the other direction.⁴⁴ Thus, arbitral immunity likewise presents a clear trade-off between the pro-arbitration value of ensuring that arbitrators operate without fear of reprisals, on the one hand, and the extrinsic value of accountability, on the other. Jurisdictions that adopt a doctrine of qualified arbitrator immunity will have performed a familiar balancing exercise.

A challenge of this sort also arises whenever there is a dispute pending before an arbitral tribunal, a dispute whose outcome will depend at least in part on a determination that is to be made by some other governmental entity. For example, the respondent in a patent infringement case may raise patent invalidity as a defense that

40 Arbitration Fairness Act of 2017; HR 1374, S 537 (115th Congress).

41 *AT&T Mobility* (n 24).

For similar reasons, in 2017, the US Consumer Financial Protection Bureau (CFPB) issued a ruling with new protections for consumers against mandatory arbitration, on the basis that mandatory arbitration disproportionately benefits companies, deprives plaintiffs of their day in court, and does little to deter future bad conduct on the part of financial institutions. 'CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court', US Consumer Financial Protection Bureau (10 July 2017) <<https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/>> accessed 28 August 2018. Under the new regulations, companies may not preclude consumers from joining group arbitration, and companies are required to submit certain information about the arbitral process to the CFPB 12 CFR Part 1040 2017).

42 ECJ, Case C-168/05, *Mostaza Claro v Movil Mileniun SL* (2006)

Decision 26 October 2006. ('This is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them Moreover, as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory.')

43 'Chapter 12 Rights and Duties of Arbitrators and Parties', in Julian DM Lew and others (eds), *Comparative International Commercial Arbitration* (Kluwer International, 2008) 288 ('It is feared that without immunity arbitrators could be harassed by actions of dissatisfied parties which might affect the arbitrator's independence in so far as the likelihood of being sued may influence the decision. Furthermore, concerns have been voiced that without immunity from suit the number of available skilled arbitrators would diminish affecting arbitration in general.')

44 Although it is worth noting that exposure to litigation and liability is the only means of promoting arbitrator accountability. For example, the arbitrator selection process, exceptions to arbitrator immunity, etc might serve as an effective check on arbitrator behaviour in many situations.

an arbitral tribunal would of course ordinarily entertain.⁴⁵ But the patent's validity or invalidity may at the same time be the subject of a proceeding before the relevant jurisdiction's patent office. A pro-arbitration response might well be for the tribunal to proceed with the case, including the patent invalidity defence, lest it be seen as abdicating its adjudicatory responsibility. Arguably, however, the tribunal should suspend proceedings out of deference to the patent office, thus allowing that body's presumed expertise to run its course and in the process promoting uniformity in patent validity determinations. How a tribunal reacts in this circumstance may depend on a range of considerations, such as length of time that the office may be expected to take before issuing a ruling or even the frequency with which that office's determinations are reversed in court.

The need to reconcile arbitration-friendliness with concerns external to arbitration has figured among the challenges of drafting a Restatement of the US Law of International Commercial and Investor–State Arbitration.⁴⁶ That enterprise is designed largely to ensure that the judicial role in connection with international arbitration is a constructive and supportive one. But courts cannot be expected to unflinchingly promote arbitration's efficacy at the expense of broader considerations or show complete indifference as to whether their treatment of arbitration agreements, arbitral proceedings, and arbitral awards comports with the values that govern their treatment under law of comparable undertakings.⁴⁷ The point is that the international arbitration community must strive to ensure that, in addressing the concerns and pursuing the values most closely associated with arbitration practice and its efficacy, it does not fall seriously out of step with extrinsic values to which the legal system as a whole attaches fundamental importance.

The examples given in this section demonstrate that it may actually be in international arbitration's best interests to advance values that are themselves extrinsic to arbitration even if doing so comes at some price to the interests of arbitration narrowly conceived. More specifically, if a policy or practice sufficiently enhances arbitration's legitimacy, or at least avoids discrediting it, that policy or practice may legitimately be regarded as in itself decidedly arbitration-friendly, notwithstanding the fact that it makes arbitration somewhat more costly, curtails party autonomy, invites judicial intervention, removes a category of claims from the universe of arbitrable disputes, or sacrifices in some other way what we traditionally associate with arbitration-friendliness. What this all adds up to is expanding the catalogue of pro-arbitration criteria, so as to ask, in addition to the dozen questions enumerated earlier, 'to what extent does a given policy or practice enhance international arbitration's legitimacy overall'.

5. CONCLUSION

Plainly, the labels pro- and anti-arbitration do not do justice to the complexities associated with determining where international arbitration's best interests lie. There are at least a dozen different ways to measure the impact of a given policy or practice on

45 *Microsoft Corp. v i4i Ltd. P'ship*, 564 US 91 (2011).

46 George A Bermann, 'Arbitrability Trouble' (2012) 23 *Am Rev Int'l Arb* 367.

47 Bermann (n 19) 3.

international arbitration's well-being. That impact cannot accurately be gauged when attention is focused exclusively on only one or two ways of gauging arbitration-friendliness. When a given policy or practice may be pro-arbitration in some respects, but anti-arbitration in others, a trade-off of some sort is required—a trade-off that the international arbitration community and those actors whose policies implicate international arbitration actually have within their means to manage more or less well.

Too often missing from the criteria for determining whether a policy or practice is or is not pro-arbitration is consideration of values that are largely extrinsic to arbitration itself. In fact, acknowledging legitimacy—measured in terms of extrinsic values—as in itself a pro-arbitration attribute may be among the most arbitration-friendly moves one can make. The present time, in which the arbitration enterprise, rightly or wrongly, is coming under attack as just about never before, is an especially apt moment for expanding our notion of what is and what is not pro-arbitration.