The Future of International Commercial Arbitration

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7 The Future of International Commercial Arbitration

George A. Bermann

7.1 Introduction

Although international commercial arbitration is not subject to as much criticism as investor-State arbitration, it is nonetheless facing challenges going forward. These challenges are several, and only some can be addressed in this chapter. Some relate to concerns that have been with international arbitration for a long time. These include costs, delay and excessive formality, as well as arbitrator neutrality. Others – arbitration ethics, diversity, and transparency – are not new, but are taking on greater urgency. Still others simply represent new developments more or less extrinsic to international arbitration but with which international arbitration must cope. Among these changes to the broader international arbitration landscape are the data protection movement and the rise of both settlement agreements and international commercial courts.

These are by no means the only ways in which the future of international commercial arbitration may look somewhat different from what we have come to know. At the very least, they suggest the wide range of developments to which international commercial arbitration will be called upon to respond.

This chapter does not enter into the question of the impact of remote hearings on international arbitration going forward in a post-pandemic world. That matter is the subject of countless articles and other writings and communications.

7.2 Cost, Delay, and Excessive Formality

Within international commercial arbitration circles, there is increasing concern that the arbitration process is becoming “judicialized,”¹ through complex procedural rules and greater legal intricacies, with an attendant

increase in costs and delays in a field of dispute resolution originally envisioned to be “quick, efficient, and universal.”2 The 2018 International Arbitration Survey by White & Case LLP and the Queen Mary School of International Arbitration found that, while 97 percent of respondents stated that international arbitration was their preferred method of dispute resolution, “costs” continued to be seen as its greatest weakness, followed by “lack of effective sanctions during the arbitral process,” “lack of power in relation to third parties,” and “lack of speed.”3

The problem of excessive formality is widely attributed to the following factors:4

1. the increased complexity of the procedural rules prescribed by various arbitral institutions;
2. the reluctance of arbitral tribunals to depart from strictly applying these rules, for fear of endangering the validity and enforceability of an award;
3. the greater involvement of lawyers, who tend toward being predisposed to formalized proceedings; and
4. the lack of an appeal process, which may, arguably, place additional stress on both counsel and arbitrators to ensure that the “right” result is achieved even if this costs disproportionate time and money.

On point 3, in particular, it merits specific mention that a total of 85 percent of costs associated with arbitration are estimated as being party costs, chiefly in the form of counsel and expert fees.5

The international arbitration community, urged in part by users, has taken steps to increase the efficiency of the arbitral process.

7.2.1 Arbitral Mechanisms Designed to Expedite Proceedings

Arbitral mechanisms designed to expedite proceedings have recently emerged in various forms. These include (1) institutional rules to “fast
track” or expedited proceedings, (2) the Prague Rules, as guidelines to simplify dealing with evidence, and (3) summary dispositions.

7.2.1.1 Institutional Rules for “Fast Track” or Expedited Proceedings

First, institutional rules providing for “fast track” or expedited proceedings have gained widespread acceptance. These procedures entail early case management conferences, tight timeframes accompanying each step in the process, and the possibility of dispensing with an oral hearing, that is, streamlining.

For example, the ICC’s Expedited Procedure Provisions apply where the parties expressly consent (or do not opt out, if the arbitration agreement was concluded after March 1, 2017, and the dispute is valued at US$2 million or less). Unlike the normal ICC procedure, there are no terms of reference. The process requires an early case management conference and issuance of a final award within six months of that date. Both the HKIAC and SIAC have similar provisions, albeit with a higher monetary threshold (at HK$25 million and US$6 million, respectively). However, the expedited procedure must be requested by a party; it does not apply by default. The award must be rendered within six months from the time the tribunal receives its file (HKIAC) or is constituted (SIAC).

There is in principle no reason why an award resulting from “fast track” or expedited proceedings should be any less regarded than any other, as confirmed by the Singapore High Court case of AQZ v. ARA.6

7.2.1.2 The Prague Rules

A more radical solution is embodied in the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (the “Prague Rules”) adopted in December 2018. Drafted by a Working Group consisting mainly of legal professionals from Central Europe with a continental civil law background,7 the Prague Rules seek to promote procedural efficiency through procedures more akin to a civil law inquisitorial style of taking evidence.8 They are designed to offer an alternative to the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”), which

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6 [2015] 2 SLR 972 (Singapore).
7 Prague Rules, Working Group Note, Appendix I.
some commentators perceive as being biased in favor of promoting an Anglo-American “adversarial approach” widely thought to heighten cost and delays.9

The key features of the Prague Rules include the following. The arbitral tribunal may give an indication at the case management conference of its preliminary views on the issues in dispute, the relief sought, and the evidence submitted. The arbitral tribunal is entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute. The Rules take narrow and restrictive approach to document production, with the tribunal and parties encouraged to avoid any form of document production, including e-discovery. As for experts, the preferred approach is direct appointment by the arbitral tribunal, with input and submissions from the parties. The arbitral tribunal and the parties are encouraged to seek to resolve disputes on a documents-only basis in appropriate cases. Although a party may request a hearing, it is unclear whether the tribunal retains discretion to disallow a hearing. The tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the proceedings, unless one of the parties objects. Upon the prior written consent of all parties, any arbitrator may act as a mediator to assist in the amicable settlement of the dispute. If a settlement is not achieved, the arbitrator who acted as a mediator will need the written consent of all parties to continue to act as arbitrator in the proceedings.

7.2.1.3 Rise of Summary Dispositions

Traditionally, arbitral tribunals have been more reluctant to adopt summary procedures than some courts, perhaps in part due to the lack of an appeals mechanism. However, institutions are coming around to viewing dispositive motions as an efficiency device. Thus, the SIAC rules allow for early dismissal of claims or defenses that are either “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal.”

In the United States, neither the FAA nor the Uniform Arbitration Act expressly provides for dispositive motions. However, arbitrators have long had the implicit authority to grant such motions. The AAA made that authority explicit for its arbitrators when it amended its rules in 2013. Rule 33 of the AAA Commercial Rules states, “The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party shows that the motion is likely to succeed and dispose of or narrow the issues in the case.” JAMS, FINRA, and CPR rules also allow for summary judgment. Even before Rule 33, courts assumed arbitrators’ summary disposition authority, and have upheld such awards.\(^\text{10}\)

7.2.2 Emergency Interim Relief

Although the availability of emergency relief does not render arbitral proceedings shorter and less expensive, it does tend to make arbitration more efficient by helping ensure that an eventual award is effective, much as ordinary interim relief by arbitrators does. Many arbitration rules now provide for the appointment of an “emergency arbitrator” to consider any application for interim relief on an expedited basis, before an arbitral tribunal has been constituted. See, for instance, Rule 38 of the AAA Rules and Art. 6 of the ICDR Rules. Requests for emergency relief are increasingly common and not infrequently granted.

7.2.3 Specialized International Arbitration Institutes and Tribunals

In 2012, the Panel of Recognized International Market Experts in Finance (PRIME Finance) was launched in the Hague, to create a leading panel of experts with specialist knowledge to arbitrate resolve complex financial transactions (CFTs),\(^\text{11}\) in the belief that few national judges are familiar with or confident in their ability to decide CFT disputes.\(^\text{12}\)


\(^{11}\) See Jonathan Ross, “The case for P.R.I.M.E. Finance: P.R.I.M.E. Finance cases” (2012) 7(3) CMLJ 221.

\(^{12}\) See id.
This panel has developed its own arbitration and mediation rules, based closely on the UNCITRAL Arbitration Rules, with some important procedural differences to enable PRIME Finance to act as an administering institution. For instance, it intends to publish awards and advisory opinions (where appropriate, when agreed with the relevant parties, and if necessary on an anonymized basis), to create a corpus of case law governing CFTs. The premise is that the more expert an arbitral body, the more efficient the procedure.

This is only one illustration of what may become a trend. There exist other specialist arbitration bodies in various fields, including intellectual property (WIPO Arbitration and Mediation Centre), marine and salvage (LMAA, GMAA, and TMAC), commodities (NGFA Arbitration System), and insurance (ARIAS).

7.2.4 Hybrid Dispute Resolution Mechanisms

Mediation has palpably emerged as a nonadversarial alternative to international commercial arbitration, often surpassing it in terms of time and cost efficacy. In the US, over 66 percent of AAA commercial cases settle. FINRA’s statistics exceed this, with an 83 percent settlement rate (57 percent by direct negotiations of the parties and an additional 12 percent settled with the assistance of a mediator). In other institutions, settlement rates are equally high. In the United Kingdom, the current size of the civil and commercial mediation market is estimated at in the order of 12,000 cases per annum, that is, 20 percent more than the 10,000 cases estimated in 2016. In Singapore, of the more than 1,700 disputants who took part in the mediations held at SMC’s offices at the Supreme Court, more than 84 percent reported saving costs while more than 88 percent said they saved time.

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13 See id.


16 Centre for Effective Dispute Resolution (CEDR), The Eighth Mediation Audit (July 10, 2018), www.cedr.com/docslib/The_Eighth_Mediation_Audit_2018.pdf.

However, it is not always easy to bring parties to the mediation table. This may explain the proliferation of multitier dispute resolution mechanisms in today’s commercial market. Notwithstanding initial skepticism as to the enforceability of “good faith” requirements to negotiate or mediate, such obligations have been held to bind parties across multiple jurisdictions.\textsuperscript{18}

With the signing of the Singapore Mediation Convention to enforce the settlement agreements resulting from mediation, hybrid dispute resolution mechanisms will be on the rise. The most popular of these is Mediation-Arbitration (or “Med-Arb”), in which the same neutral person acts first, as mediator, and then as arbitrator, if mediation fails. There are other variations, like Arbitration-Mediation-Arbitration (or “Arb-Med-Arb”), starting with arbitration before moving on to mediation, and eventually returning to arbitration, if need be. In Singapore, the latter gained recognition with the announcement of the SIAC-SIMC Arb-Med-Arb Protocol on November 5, 2014.\textsuperscript{19} While the SIMC generally encourages appointing different individuals as mediator and arbitrator to maintain the integrity and confidentiality of both processes and comply with natural justice rules,\textsuperscript{20} the Protocol allows parties to agree otherwise. The Protocol also proposes fixed time lines, to avoid abuse of the process by delays.

7.2.5 Technology Assisted Review

At the same time, software programs may help to reduce time and costs in arbitration through such mechanisms as e-filing\textsuperscript{21} or streamlining document review through “predictive coding,” which entails using software to


\textsuperscript{21} See Opus 2 Magnum, which is “an online platform that facilitates communication and procedural understanding between parties in arbitration.”
determine whether documents are relevant or privileged.\footnote{22} In the case of \textit{Rio Tinto v. Vale},\footnote{23} the US District Court for the Southern District of New York gave parties approval to use predictive coding. It is estimated that parties’ costs may be reduced by up to 86 percent.\footnote{24}

Procedural hearings of various kinds may also be conducted virtually via video-conference. With the quality of video facilities rapidly improving, it is likely that physical hearings, with all parties at the same premises, will diminish, resulting in faster and less costly hearings.

Other tools may also help to establish forecasts or probabilities of success or failure based on an analysis of case law and findings by individual arbitrators.\footnote{25} Artificial intelligence (AI) could potentially predict costs and duration, and, perhaps more controversially, at the express request of the parties, propose settlement ranges based on arbitrations of similar size and complexity, thus nudging parties toward settlement.\footnote{26}

Given the sensitivity of information exchanged between parties, institutions and arbitrators, cybersecurity is increasingly becoming an issue in international arbitration. The ICC Commission on Arbitration’s 2017 Report on the Use of Information Technology in International Arbitration urges counsel and arbitrators to comply with strict information security requirements and adopt guidelines for the secure transmission of matter-related information. Under the 2018 HKIAC Rules, governing arbitrations commenced on or after November 1, 2018, technology is to be utilized more effectively, with document delivery via a secure online platform.

There is no reason why these emerging trends should not take hold, as have previous innovations. They can only help raising confidence in the system among users.

\footnote{23} No 14 Civ 3042 (SDNY, March 2, 2015).
\footnote{24} See RAND Report, supra note 22, 68.
\footnote{25} See Arbitrator Intelligence, which aims to “to increase transparency, accountability, and diversity in arbitrator selection by making key information about arbitrators’ past decision-making more generally available through publication of AI Reports.”
7.3 Arbitration Ethics

Consciousness of ethics in international arbitration has been constantly on the rise, made all the more salient with the dramatic widening of the pool of arbitrators. In a 2011 survey, 68 percent of respondents reported experiencing ethical misconduct, including the deployment of so-called guerrilla tactics, in international arbitration.\(^{27}\)

Even with the best of good faith, practitioners face serious uncertainty over the ethical norms to which they are subject. The situation is exacerbated by the disparities in cultural norms and assumptions across jurisdictions.

7.3.1 Illustrative Issues

There are a large number of practices, the following among them, that illustrate the problem.

7.3.1.1 Communicating Directly with Adverse Parties

Different rules govern the interviewing of employees of an adverse corporate party known to be represented. While this is permissible in the United Kingdom,\(^{28}\) it is strictly forbidden in the United States,\(^{29}\) as it is in Germany.\(^{30}\) An incidental result is the potential inequality in the abilities of lawyers across different jurisdictions to access evidence or information.

7.3.1.2 Preparing Witnesses for Testimony

In the United States, it is common practice for counsel to rehearse or “coach” witnesses in anticipation of direct and cross-examination in detail, although the witness is not to be influenced to adopt testimony he or she would not otherwise give.\(^{31}\) In stark contrast, civil law systems


\(^{29}\) See id.

\(^{30}\) See id.

traditionally permit little if any contact with witnesses prior to trial, and the same may be said of the United Kingdom.

7.3.1.3 Counsel’s Duty to Disclose Damaging Precedents
In the United States, the United Kingdom, and other common law jurisdictions, advocates owe independent duties to the tribunal and must, accordingly, disclose any relevant such authorities they come across, however damaging to their case they may be. In a large number of jurisdictions, including in Germany and elsewhere in the civil law world, no obligation exists.

7.3.1.4 Rules Applicable to Discovery
Lawyers from the United States are accustomed to the practice of discovery whereby counsel for one side may ask opposing counsel to produce any and all documents meeting a particular description that are claimed to be relevant and material. However, civil law practice is different. Counsel are required to produce all documents on which they intend to rely as well as any documents whose production the tribunal may require. Civil law practitioners commonly view extensive discovery requests as a costly “fishing expedition” or abuse of process.

These ethical inconsistencies, which riddle international commercial arbitration, have provoked deep concern among leading judicial figures and practitioners. If left unchecked, they may, among other things,

34 See Benson, supra note 28; Handbook, supra note 33, Rule C25.3 (UK).
35 See Benson, supra note 28.
36 See Civil Procedure Rules (CPR), Rule 31 (UK); Practice Directions 31A and 31B (UK).
37 See Benson, supra note 28, 84.
imperil the finality of awards, and there has in fact been a palpable increase in the number of challenges in recent years.40

7.3.2 Recent Movements in Arbitration Ethics

To address these issues, while at the same time maintaining a system of self-regulation, the international arbitration community has begun taking action.41 The easiest place to start is with individual arbitral institutions, but broader strategies are under consideration.

7.3.2.1 Recent Institution-Specific Ethical Regulations

In the United States, the AAA has, in conjunction with the ABA, produced a Code of Ethics for Arbitrators in Commercial Disputes, the most recent version of which sets out 10 canons to formalize the standards of arbitrators’ conduct, including special duties on party-nominated arbitrators.42 This led the way to the AAA’s devising “due process protocols” for different types of arbitration, intended in part to control overreaching by parties who hold superior bargaining power over their counterparts.43 While Jan Paulsson acknowledges that this requirement “may be valuable in the course of parties’ due diligence,” he suggests that this remains insufficient.44

The latest LCIA Rules introduce ethical norms, such as barring the making of false statements, relying on false evidence, or concealing documents.45 They also prohibit counsel from engaging in so-guerrilla tactics, enjoining them to “not engage in activities intended unfairly to obstruct

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43 See Jan Paulsson, Universal Arbitration What We Gain, What We Lose, Chartered Institute of Arbitrators (CIArb) Alexander Lecture (November 29, 2012).
44 Id.
45 See LCIA Rules, Annex at paras. 3–5.
the arbitration or to jeopardize the finality of any award.”

46 The LCIA Rules, as amended, now empower tribunals to impose sanctions on non-compliant counsel.

47 In 2008, the Singapore Institute of Arbitrators (SIArb) published “Guidelines on Party-Representative Ethics,” which are nonbinding and comprise only three very broad guidelines, namely, that

1. a party representative should respect the integrity of international proceedings, including the independence of the tribunal, the tribunal’s members, and any potential arbitrators;

2. a party representative should act honestly and with integrity in all of his or her dealings with the tribunal and parties involved in the arbitration proceedings; and

3. a party representative should treat the tribunal and other parties with respect and act with the highest degree of professionalism.

7.3.2.2 IBA Guidelines on Party Representation

In May 2013, the IBA launched its Guidelines on Party Representation in International Arbitration, “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.”

49 Subject to applicable national laws, the IBA Guidelines provide guidance on some of the matters discussed above. Thus, the IBA Guidelines provide that, before seeking any information from a potential witness or expert, lawyers

46 Id. para. 2 provides that: “A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator’s appointment or to the jurisdiction or authority of the Arbitral Tribunal known to be unfounded by that legal representative.”

47 Id. Annex at para. 7 read with Arts. 18.5 and 18.6.


49 IBA Guidelines on Party Representation in Intl. Arbitration (“IBA Guidelines”), pmbl. at 2: “The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to present such Party’s case to the Arbitral Tribunal.”
should identify themselves, their clients, and the reason for which the information is sought.\textsuperscript{50} They should also inform such persons of their rights to inform their own counsel about the contact and, if they so wish, discontinue their communications.\textsuperscript{51}

The IBA Guidelines permits the interviewing of witnesses for the purpose of preparing witness statements or giving oral testimony, subject to such mandatory rules as may be applicable.\textsuperscript{52} In regard to document production, the Guidelines require party representatives to inform their clients of the necessity to preserve potentially relevant documents, not to use discovery to “harass or cause unnecessary delay,” to conduct a reasonable search to produce relevant documents, and not to conceal such documents.

Though the IBA Guidelines only apply to the extent that parties or tribunals elect to adopt them,\textsuperscript{53} solely focus on counsel, rather than arbitrator, conduct, and favor brevity over depth, they are a good starting point for a genuine transnational code of ethics.

7.3.2.3 Toward a Universally Accepted Transnational Code of Ethics

In recent years, the idea of a universally accepted transnational code of ethics for arbitration has become increasingly popular.\textsuperscript{54} As Singapore’s Chief Justice has put it, “with signs of the emergence of a global international law of arbitration despite national differences, why shouldn’t the same apply in relation to arbitrator standards?”\textsuperscript{55} To be

\textsuperscript{50} See IBA Guidelines, Guideline 18.

\textsuperscript{51} See id., Guideline 19.

\textsuperscript{52} See id., Guidelines 20 to 25; LCIA Rules, Art. 20.5.

\textsuperscript{53} See IBA Guidelines, Guideline 1.


\textsuperscript{55} See Menon, supra note 39.
truly effective in standardizing the ethical behavior of counsel and arbitrators across the board, such a code must deal with the contentious ethical issues subject to cultural divergences across multiple jurisdictions on matters such as those discussed earlier. At the same time, the code should also have enough flexibility to meet the ever evolving demands of international commercial arbitration, while aligning well with such institutional or ad hoc rules as exist.

These initiatives should produce a code of ethics that will, eventually if not immediately, come to be recognized as “universally accepted” practice, to be applied irrespective of the particular jurisdiction or arbitral institution before which a particular matter arises. To ensure consistency in ad hoc international commercial arbitrations, one possibility would be to incorporate the code directly into the governing rules on arbitration (such as, for instance, the UNCITRAL Arbitration Rules), to hold the key players in such proceedings to the same ethical standards.\(^{56}\) Arbitral institutions could coordinate their efforts with a view to producing an international system of accreditation, imposing sanctions from an internationally approved list, as set out within the code, and even performing a supervisory role in reviewing cost awards.\(^{57}\) To the same end, the Swiss Arbitration Association has recently floated the idea of a “Global Arbitration Ethics Council.”\(^{58}\)

Once adopted, a transnational code of ethics of the sort envisaged must be enforced. The annulment of awards is obviously not the answer, given that arbitral awards are only set aside in the most egregious of circumstances and that its deterrent effect may be minimal.\(^{59}\)

Arbitral institutions can regulate the profession, in a manner akin to bar associations, by implementing an international system of accreditation, by which arbitrators are recognized, imposing sanctions from an internationally approved list, as set out within the code, and, possibly, performing a supervisory role in reviewing costs award.\(^{60}\)

\(^{56}\) See Menon, supra note 39.
\(^{57}\) See Menon, supra note 39.
\(^{59}\) See Menon, supra note 39.
\(^{60}\) See Menon, supra note 39.
7.4 Data Protection and Arbitration

Data protection is one of the major challenges that international commercial arbitration is facing. The European Union’s General Data Protection Regulation (GDPR), which came into force on May 25, 2018, imposes serious obligations on persons or entities processing personal data and provides rights to individuals about whom data are being processed. Although data protection regulation in the EU context is anything but new, its vast reach and high sanctions have given data protection a whole new significance with which international arbitration must cope.

The GDPR applies to the processing of personal data of persons within the EU by a “controller” or “processor,” whether or not it is located in the EU or the processing takes place in the EU. “Controller” means any natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data, whereas “processor” means a natural or legal person, public authority, agency or other body, which processes personal data on behalf of the controller. In the context of arbitration, this implies that basically every participant in an arbitral proceeding – the parties, counsel, experts, arbitral institutions and arbitrators – are likely to be considered data controllers both because such control is inherent in their function and because, as a matter of fact, they determine the purpose and means by which personal data are processed in order to perform their functions. Counsel, institutions, and tribunals are also very likely to be also considered as processor when they are transmitting files or evidence to one another on behalf of a controller. As a matter of fact, even if only one of

63 The GDPR permits maximum fines up to €20 million, or 4 percent of annual worldwide turnover, whichever is greater, see Art. 83 of the GDPR.
64 See Art. 4 (7) of the GDPR.
65 See Art. 4 (8) of the GDPR.
66 Kathleen Paisley, “It’s All about the Data: The Impact of the EU General Data Protection Regulation on International Arbitration” (2018) 41 Fordham Int. L. J 841, 870.
67 Id., 864–865.
the arbitrators or one of the parties is to be bound by the GDPR, it is more than likely that the whole proceeding will somehow be affected by the rules and the application of the GDPR.68

7.4.1 Material Scope of the GDPR

The GDPR encompasses the processing of personal data wholly or partly by automated means and to the processing, other than by automated means, of personal data that form part of a filing system or is intended to form part of a filing system.69 The term personal data signifies any information relating to an identified or identifiable natural person (data subject). In this regard, an “identifiable natural person” is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.70 Processing refers to any operation on personal data, such as collecting, recording, organizing, storing, adapting, retrieving, consulting, indexing, combining, blocking, disseminating and deleting personal data.71 Each controller and processor incurs legal liability for failure to comply with their duties as outlined in the GDPR.72

The material scope of the GDPR, on the other hand, encompasses the processing of personal data wholly or partly by automated means and to the processing, other than by automated means, of personal data that form part of a filing system or is intended to form part of a filing system.73 Due to the apparently broad definition of personal data, all business-related information exchanged during a typical arbitral proceeding that contains information by which an individual is, or can be, identified will be considered personal data as defined by the GDPR.74 These include

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69 See Art. 2 (1) of the GDPR.
70 See Art. 4 (1) of the GDPR.
71 See Art. 4 (2) of the GDPR.
72 See Paisley, supra note 66, 864–865.
73 See Art. 2 (1) of the GDPR.
74 See id.
memorials, witness statements, expert reports, and the award itself.\textsuperscript{75} Processing covers a wide range of activities, including document retention, document review, document transfer, disclosure of materials during the arbitral process, tribunal-ordered disclosure of materials, exchange and issuance of an award, taking notes at a hearing and document destruction.\textsuperscript{76} Additionally, since it is irrelevant to application of the GDPR whether personal information is contained in a business-related document or not,\textsuperscript{77} the playing field of the GDPR is practically without boundaries.

### 7.4.2 Lawfulness of Processing Personal Data

The question then arises of when and to what extent the processing of personal data is lawful under the GDPR. According to Article 6(1) of the GDPR, processing personal data is, inter alia, lawful if and to the extent that at least one of the following exceptions applies: (1) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (2) processing is necessary for compliance with a legal obligation to which the controller is subject; and (3) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.\textsuperscript{78}

The problem with relying on Article 6(1)(a) (“consent”) is that obtaining consent may be cumbersome and consent can be revoked at any time.\textsuperscript{79} Relying on Article 6(1)(c) (“necessity for compliance with legal obligation”) comes along with the problem that the need to comply with a legal obligation only legalizes data processing where the legal obligation is created under Member State law, not third country law.\textsuperscript{80} This would not cover a tribunal order to produce documents.\textsuperscript{81} The processing of personal data will most likely be lawful under Article 6(1)(f) GDPR (“legitimate

\textsuperscript{75} See id.
\textsuperscript{76} See Paisley, supra note 66, 864–865.
\textsuperscript{77} Paisley, supra note 66, 847.
\textsuperscript{78} See Art. 6 (1) of the GDPR.
\textsuperscript{79} See Art. 7 (3) of the GDPR.
\textsuperscript{80} Paisley, supra note 66, 875.
\textsuperscript{81} Id.
interest”), although this exception requires a careful weighing of interests in each individual case, by considering what type of data are being processed (e.g., if they are especially sensitive), the volume involved, and possible safeguards that can be adopted, such as redacting the relevant documents.  

This will require carefully limiting document production to the extent necessary. 

The GDPR also provides that the transfer of data to a third country must be lawful under EU law. A distinction is drawn between secure and unsecure third countries, the former representing those that the European Commission has determined through an “adequacy decision” to have a suitable level of data protection, that is, comparable to those of EU law. That there is no adequacy decision for a country does not necessarily foreclose the transfer of data to that country. Rather, the controller must ensure in some other way that the personal data will be sufficiently protected by the recipient. On the other hand, Article 46 of the GDPR expressly allows transfers that are necessary for the establishment, exercise, or defense of a legal claim, which would likely also apply to certain aspects of arbitration. The standard of necessity is however high, and adequate steps must be taken to ensure that only relevant documents are transferred. Since engaging external counsel as well as correspondence with the tribunal will require a transfer of personal data possibly across EU borders, it might be wise to raise data protection issues in a data protection protocol early in the proceedings.

83 See id; Paisley, supra note 66, 876.
84 See generally chapter V of the GDPR. At the time that the General Data Protection Regulation became applicable, the third countries which ensure an adequate level of protection were: Andorra, Argentina, Canada (only commercial organizations), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay, Japan and USA (if the recipient belongs to the Privacy Shield), see https://gdpr-info.eu/issues/third-countries.
85 See https://gdpr-info.eu/issues/third-countries.
86 See Paisley, supra note 66, 881.
87 Borianski, supra note 83.
88 See id.
89 See id.
7.4.3 Obligations in the Processing of Personal Data

Under the GDPR, personal data must be (1) processed lawfully, fairly and in a transparent manner in relation to the data subject; (2) collected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes; (3) relevant and limited to what is necessary in relation to the purposes for which data are processed; (4) kept up to date with every reasonable step taken to ensure that any inaccurate personal data are erased or corrected without delay; (5) kept in a form that permits the identification of data subjects for no longer than is necessary for the purposes for which the data are processed; and (6) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate administrative and technical means.90

In the context of arbitration, the GDPR thus mandates that parties, counsel, tribunals, and arbitral institutions implement Cyber Security measures regarding personal data,91 make efforts to minimize the risks of retaining personal data, which may include data scrubbing and eliminating sensitive data, even before the data are processed for use in an arbitration, and anonymizing of the relevant data where feasible.92

At the time data are collected from a data subject, the latter must be provided with detailed information on the manner and means by which the data will be processed.93 In a complex arbitration, this could mean that data controllers are required to send multiple data privacy notices to potentially hundreds of individual data subjects named in the evidence.94 Similar rights attach when the controller did not collect the data in the first place, which often is the case in international arbitration.95 For example, the law firms and arbitrators may not have

90 See Art. 5 (1) of the GDPR.
91 This probably led to arbitral institutions starting to take their first steps toward regulating cyber security in arbitral proceedings. For instance, see the ICCA/NY Bar/CPR Draft Cybersecurity Protocol for International Arbitration was subsequently released for consultation in 2018, www.arbitrationicca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf.
92 See Paisley, supra note 66, 903.
93 Id.
94 Id.
95 Id.
originally collected the data that it controls after a party transfers data to it for use in arbitration.\footnote{Id.}

Another burden imposed by the GDPR is the so-called right to be forgotten. Article 17 of the GDPR provides that under certain circumstances, the data subject has the right to request erasure of his or her personal data at any time. However, the right to be forgotten, which would be problematic to apply in the context of international arbitration, contains an exemption for processing that is “necessary for the establishment, exercise or defense of legal claims.”\footnote{See Paisley, supra note 66, 906.} Just as above in context with the third country restrictions, the question will be what is deemed “necessary.”

All data controllers and processors must demonstrate that they are compliant with the law at all times.\footnote{See Art. 39 of the GDPR.} Such measures include, among others, adequate documentation on what personal data are being processed, as well as how, to what purpose, and how long.\footnote{See https://edps.europa.eu/data-protection/our-work/subjects/accountability_en.} For this purpose, Article 37 of the GDPR mandates that controllers and processors designate a data protection officer responsible for compliance.

In short, data protection regulation may have wide-ranging effects on basically every stage and nearly every activity in the arbitral lifecycle, starting from the arbitration agreement up until a long time after the arbitral award has been rendered. Data protection issues should therefore be discussed as early as the drafting of the arbitration clause, especially when they are subject to different data protection laws. Compliance is not only a challenge from a process management point of view, but also from a cost point of view, always an issue in contemplating international commercial arbitration’s future.

\section*{7.5 Neutrality of Arbitrators}

Unlike other issues traced in this chapter, arbitrator neutrality has been with us for a long while. This is because one of the main reasons for choosing arbitration over litigation is that parties to an international
contract wish to avoid resolving disputes through the local courts of the other party, for fear of favoritism. Arbitration promises a neutral dispute resolution system. One of the primary sources of legitimacy for international arbitration is actual and perceived independence and impartiality.100

There are data to support the view that party-appointed arbitrators are less than perfectly neutral. The ICC's 2018 statistics showed in 41 of the 296 awards rendered were accompanied by dissenting opinions,101 of which 36 were written by the party that had appointed him or her.102

Real or perceived lack of neutrality can of course result from personal relations and financial stakes. But there is always the reality that familiarity with a discipline often comes at the expense of complete impartiality or neutrality. An arbitrator may have formed strong views on certain topics and published on them. The international arbitration world is quite small, so that key members know each other and work with one another in different capacities,103 and yet such expertise and familiarity is one of the reasons that parties choose arbitration over litigation. The challenge is to strike the proper balance between having the most qualified arbitrators and ensuring that arbitrators are and appear to be neutral.

Before the issue of arbitrator neutrality is further tackled, it should first be clarified what can be understood by neutrality and to what extent it is actually legally required.

7.5.1 General Definition of Neutrality

Neutrality relates to the arbitrator’s potential predisposition toward a party personally or a party’s position.104 An international arbitrator should be

102 See id.
103 Morelite Construction v. New York City District Council Carpenters, 748 F.2d 79, 83 (2d Cir. 1984).
neutral not only as between the parties specifically, but also as to nationality and political and legal systems, thus possessing a high degree of “international-mindedness.” That a sole arbitrator must be neutral is self-evident. However, according to the prevailing view, party-appointed arbitrators should be as well, unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable law provides otherwise.

7.5.2 Legislative Approaches to Neutrality

Most modern arbitration laws require independence and impartiality on the part of arbitrators. The UNCITRAL Model Law does not use the term neutrality but provides that if circumstances exist that gives rise to justifiable doubts regarding the independence or impartiality of an arbitrator, he or she may be challenged on that basis. The justifiable doubts standard is objective and does not require evidence of certainty or likelihood of partiality or dependence.

While the Federal Arbitration Act provides that “evident partiality” by the arbitrator is a basis upon which an arbitral award may be vacated, it does not directly address the standards of neutrality and impartiality required of arbitrators. Unfortunately, US courts have not yet agreed on a common definition of “evident partiality”. The leading case in the United States remains Commonwealth Coatings Corporation v. Continental Casualty Company, in which the Supreme Court set aside an award based on the principle of “evident partiality” as the presiding arbitrator failed to disclose a four to five-year consulting relationship with a party to the arbitration. However, the Court failed to provide a clear standard of impartiality and independence. Some courts have followed Justice Black’s plurality opinion

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105 Feehiyl, supra note 101, 92.
108 See Feehiyl, supra note 101, 89 (citing UNCITRAL Model Law Art 12 (2)).
109 See Feehiyl, supra note 101, 98
110 See 9 USC § 10(a)(2).
111 Feehiyl, supra note 101, 99.
113 Feehiyl, supra note 101, 101.
according to which arbitrators are held to at least the same standard as judges in order to safeguard their impartiality and arbitration’s legitimacy. Awards have been vacated based on an appearance of bias or partiality.  

Other courts have followed Justice White’s concurring opinion according to which are not necessarily to be held to the same standards as judges, and have vacated awards only where “a reasonable person . . . would have to conclude that an arbitrator was partial to one side.” The trend in recent years has been a move away from equating standards of impartiality of international arbitrators to those of national court judges.

The English Arbitration Act 1996 also does not use the term neutrality but provides in Section 24(1)(a) that an arbitrator may be removed where “circumstances exist that give rise to justifiable doubts as to his impartiality.” Furthermore, Section 33(1)(a) relating to the general duty of the arbitral body, imposes the requirement that it “act fairly and impartially as between the parties.”

7.5.3 Approaches by Selected Arbitral Institutions

Virtually all arbitral institutions likewise demand independence and neutrality of arbitrators, but likewise are not particularly instructive in this regard.

The AAA Code of Ethics for Arbitrators in Commercial Disputes stipulate that in international disputes all arbitrators including party-appointed arbitrators are to be neutral, providing for disqualification “whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Other institutional rules do as well. Thus, the ICC Rules provide for disqualification on grounds of “lack of

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117 See Feehiyl, supra note 101, 98.
impartiality,”120 while the LCIA Rules do so when “circumstances exist that give rise to justifiable doubts as to that arbitrator’s impartiality or independence.”121 The UNCITRAL Arbitration Rules are to the same effect. As a further precaution, not only the AAA Code of Ethics,122 but also the International Chamber of Commerce Arbitration Rules,123 require that the nationality of a sole or presiding arbitrator must be different from that of the parties.

In the future, arbitrators will continue to be guided by the IBA Guidelines on Conflicts of Interest revised as recently as 2014 in the hope of harmonizing the standards of disclosure and setting best practices at the international level.124 They present not only General Standards but also concrete and practical examples of how those standards are to be applied. They are generally speaking more demanding, and certainly more precise, than most national laws and institutional rules.125

## 7.6 International Commercial Courts

A prominent feature of the landscape facing international commercial arbitration is competition from a new generation of international commercial courts. Specialized commercial courts within a national judiciary are nothing new. They have for a long time been an integral component of court systems in a large number of jurisdictions, notably civil law jurisdictions.126 However, the phenomenon of international commercial courts is a relatively new one. So far, China, several European States,127 Qatar, Singapore and the

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121 London Court of International Arbitration, Arbitration Rules, Art. 10(3) (2014).
122 United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules (as revised in 2010), Art. 6(7).
124 Blackaby and Partasides, supra note 105, 477.
125 Born, supra note 117, 1857.
126 See, e.g., the French Code de commerce de 1807 (Commercial Code of 1807) Art. 615 bis; in general, see The Courts and the Development of Commercial Law (Vito Piergiovanni ed., 1987); as to the history of commercial courts in Germany and Austria, see 300 Jahre staatliche Handelsgerechtsbarkeit (Sonja Bydlinski & Maria Wittman-Tiwald eds., 2018).
127 Among those states are Belgium (Brussels International Business Court), France (Paris Commercial Court and Court of Appeal), Germany (special chambers at regional courts in Frankfurt and Hamburg), the Netherlands (Netherlands Commercial Court), Switzerland.
United Arab Emirates have all undertaken efforts to either establish new courts “particularly attuned to the needs and realities of international commerce”\textsuperscript{128} or to adapt special procedural rules for international cases in existing commercial courts. No comparable steps have been taken within the United States.

Asian and Middle Eastern initiatives in particular involve using English as the language of the proceedings, foreign-trained judges and elements of the common law tradition on both the substantive and procedural level.\textsuperscript{129} Continental European initiatives have been fueled in by the prospect of Brexit, and the possibility that London will become a less attractive forum for resolving international disputes than it has been in the past.\textsuperscript{130}

International commercial courts are designed to place adjudicatory authority over international disputes in more expert hands than if they went to the ordinary courts, even the ordinary commercial courts. They are also expected to proceed with their task in a highly cost-efficient manner. Recurring features include, among others, the possibility of party representation by foreign lawyers, expedited proceedings, and dispositive motions.

Future questions concerning international commercial courts include the enforcement of the parties’ forum selection clause in favor of an international commercial court and enforcement of the resulting judgments.\textsuperscript{131} Neither should be a problem. Forum selection clauses designating international commercial courts should be as widely respected as

\textsuperscript{128} This is the description of international commercial courts as employed by Chief Justice of Singapore, Sundaresh Menon, and as relied upon by Andrew Godwin et al., “International Commercial Courts: The Singapore Experience” (2017) 18 Melbourne J. Int’l L. 219, 220.


\textsuperscript{131} Indeed, once the United Kingdom will be a third state from the perspective of the European Union, the recognition and enforcement of judgments obtained in the London Commercial Court could be hampered in the remaining 27 member states as the Brussels I Regulation will no longer command recognition and enforcement. See Regulation No. 1215/2012 of December 12, 2012, of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), arts. 36, 39, 2012 O.J. (L 351) 1, 14 (EU) (“A judgment given in a Member State . . . “).
forum selection clauses are generally. Their utility will only increase with future ratifications of the Hague Choice of Court Convention,\textsuperscript{132} which entered into force on October 1, 2015.\textsuperscript{133} The European Union (acting on behalf of all Member States except Denmark), Mexico, Montenegro, Singapore and the United Kingdom are all parties to the Convention. China, Ukraine and the United States have signed the Convention, but not yet ratified it. Subject to certain narrow exceptions, forum selection clauses will be honored without further question by Contracting States.\textsuperscript{134} Perhaps most importantly, judgments by a chosen court must be recognized in all States where the Convention is applicable.\textsuperscript{135} This ensures the mobility of judgments in a way similar to the mobility of awards under the New York Convention. Judgments of the new international commercial courts will be able to “travel” across borders more easily, much as international arbitral awards do.

Despite the Hague Convention’s limited number of ratifications, its existence, coupled with the rise of international commercial courts, may be viewed as posing something of a threat to international commercial arbitration. Arbitral tribunals and international commercial courts will attract the same kinds of disputes. On the other hand, some have argued that “these two dispute resolution forums will most likely complement one another.”\textsuperscript{136} Proponents of international commercial courts advance that these constitute but one component of dispute resolution hubs at large.\textsuperscript{137} International commercial courts have their own limitations. Issues of accessibility, jurisdictional limitations, applicable law, procedural features, as well as extrinsic factors such as general economic and political stability, might all weigh in parties’ choice between international arbitration and international

\textsuperscript{132} Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

\textsuperscript{133} For the status with respect to each Contracting State, see Hague Conference on Private International Law, Status Table, Conventions, Protocols and Principles, 37: Convention of 30 June 2005 on Choice of Court Agreements, www.hcch.net/en/instruments/conventions/status-table/?cid=98.

\textsuperscript{134} Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294. Art. 6(c).

\textsuperscript{135} Id. Art. 8.


In addition, arbitration will retain a good number of its traditional advantages – confidentiality, neutrality, and potentially costs, among others. Arbitration has also benefited from the frequency with which institutional rules are amended to bring them fully up to date.

The fact remains that international commercial courts will compete with arbitration for the same kind of cases. That competition is likely to encourage international arbitration to make even greater efforts at user-friendliness than it is already making.

### 7.7 Achieving Diversity

The challenge of achieving and managing diversity in international commercial arbitration and in international dispute resolution overall has of late become an issue throughout the world. There can be no question that international arbitration’s preoccupation with diversity will continue well into the future.

While the idea of diversity extends potentially to age, race, nationality, region, disability and religion, among other factors, the lack of gender parity in particular received the greatest attention in recent years. This is not surprising, as statistics show a striking lack of female representation in the pool of international arbitrators. Of all arbitrators at the ICC nominated or appointed by parties, co-arbitrators or the Court in 2017, 16.7 percent were women, while the increase from the year before amounted to only 1.9 percent. At the LCIA, a self-described “leader in gender diversity,” 24 percent of appointees in 2017 were female. Typically, arbitral institutions appoint a significantly

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138 See, in more detail, Requejo Isidro, *supra* note 130, 29–32.
higher percentage of women than parties do, and a much higher percentage than co-arbitrators do, who, in ICC arbitrations in 2017, appointed women in as few as 13.7 percent of cases. On the other hand, parties selected female arbitrators 17 percent of the time in LCIA arbitrations in 2017, which constituted a fourfold increase from the year before. Since 2017 further progress has clearly been made, but a very substantial gender gap remains.

Detailed studies of social scientists have revealed that the median international arbitrator is a 53-year-old male from a developed country who has been appointed in 10 arbitrations, while the median counsel is a 46-year-old male citizen of a developed State having served in 15 arbitrations. An author has gone so far as to speak of an “Invisible College” of international arbitrators.

The lack of female representation on arbitral tribunals is widely perceived as undesirable within the arbitration community, and so is the geographical imbalance in favor of Western Europe and North America. Yet when it comes to finding possible causes and solutions, opinions differ.

Many have advanced the view that the lack of female representation is a corollary of the lack of female visibility among appointing authorities. Limited visibility is often a consequence of an extensive information asymmetry as to the availability of underrepresented groups among decision-makers. At the same time, 92 percent of respondents in Bryan Cave Leighton Paisner’s arbitration survey said that they would welcome more information about new and less well-known candidates.

A number of concrete steps have been taken in recent years to accelerate progress. Upon the initiative of members of the international arbitration

144 ICC, supra note 142.
146 Id., 432 (with reference to “The Invisible College of International Lawyers” as devised by Oscar Schachter in 1977).
147 Carol Mulcahy, “International Arbitration Survey: Diversity on Arbitral Tribunals – Are We Getting There?,” 6. www.bclplaw.com/images/content/1/5/v1/150194/FINAL-Arbitration_Survey_Report.pdf (in a survey conducted by international law firm Berwin Leighton Paisner, 84 percent of respondents felt too many men were serving as arbitrators).
149 Mulcahy, supra note 148, 6.
community, a highly successful pledge has been launched “in recognition of the under-representation of women” and with the “ultimate goal of full parity” in arbitrator appointments.\(^{150}\) This political process has been advanced in numerous other arenas, and has led to declarations such as Resolution 105 of the ABA Dispute Resolution Section.\(^{151}\) Second, arbitral institutions have made a concerted effort to start approaching parity in the appointment of women. Third, “arbitrator Intelligence,” a global attempt to collect, analyze and publicize data on arbitrators, based on parties’ voluntary submission of information,\(^{152}\) stands to bring greater transparency to the appointment process and introduce new names into the mix. Such steps do not necessarily limit the parties’ freedom to select their arbitrators, a prerogative that the parties would retain. They may also lead to fewer repeat appointments of a given arbitrator thereby reducing the number of challenges on that basis, while helping to prevent overcommitment by busy arbitrators.

Surely, attention has been drawn to asymmetries in arbitrator appointments. But greater efforts will be forthcoming in the future, not only in terms of gender balance, but also in terms of the other disparities that have been identified. Contributing to this development will also be an awareness that international arbitration must exploit every opportunity to enhance its legitimacy.

### 7.8 Transparency

Transparency or the lack thereof has been a long-standing preoccupation in the field of international commercial arbitration,\(^{153}\) and like diversity, it is unlikely to abate. The apparent dichotomy between confidentiality and transparency implicates due process concerns, the

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150 Equal Representation in Arbitration, [www.arbitrationpledge.com](http://www.arbitrationpledge.com).


152 Arbitrator Intelligence, [www.arbitratorintelligence.org/](http://www.arbitratorintelligence.org/).

legitimate expectations and needs of parties, as well as possible public interests, thus again affecting the perceived legitimacy of arbitration on the whole. The subject achieved unprecedented salience with the advent of investor-State arbitration, with its powerful public interest and public policy dimension.  

7.8.1 Institutional Initiatives

Arbitral institutions are among the arenas in which transparency has made its greatest strides. Many institutions have adopted rules allowing for the publication of awards, although most require party consent to publication. However, under the 2018 Vienna Rules, the presumption is somewhat different. The Board and Secretary-General reserve the right to publish anonymized summaries or extracts of awards as long as none of the parties objects within 30 days of issuance of the award. Similarly, starting with awards issued after January 1, 2019, the ICC may also publish any award, except if a party objects or demands anonymization, or if a confidentiality provides otherwise. If the parties consent, proceedings themselves can be fully public, including hearings and all decisions. This policy is announced not in the ICC’s Rules, but in a Note on the Conduct of the Arbitration. Needless to say, the parties can override whatever rules exist by way of a confidentiality agreement.

In the future, transparency will probably go well beyond the publication of awards in one form or another. Overall, the ICC seems to have taken the

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154 The demands for a higher level of transparency in investment arbitration and the tremendous amount of criticism from all corners of society, especially in Europe, have mainly been due to the typically extensive involvement of public interests in such proceedings. See, e.g., Nick Dearden, “Think TTIP Is a Threat to Democracy? There’s Another Trade Deal That’s Already Signed” The Guardian (May 30, 2016), www.theguardian.com/commentisfree/2016/may/30/ttip-trade-deal-agreements-ceta-eu-canada.

155 See, e.g., LCIA Rules, Art. 30 (requiring the parties’ consent to be written); SIAC Rules, Art. 32(12) (requiring the tribunal’s consent in addition to the parties’).


158 ICC, supra note 142, paras. 40–46.

159 Id. at paras. 43–44.
lead among institutions in respect to the promotion of transparency. The ICC has also taken steps to heighten organizational transparency. Since June 2016, the ICC has continuously published relevant information as to the composition of tribunals in arbitrations administered by the Court. The information published includes the identity of the arbitrators as well as their nationality, whether the parties or the Court appointed the arbitrator, and the capacity of each arbitrator on the tribunal (e.g., function as President, sole arbitrator or party-appointed arbitrator).  

Moreover, requests for the communication of reasons for certain decisions taken by the Court (e.g., appointment and challenges or removal) no longer need to be requested jointly by both parties. A request by any party suffices for the Court to do so under the 2017 Rules. However, a decision whether to comply with a party’s request remains at the “full discretion” of the Court. The institutions have also been careful over recent years to report a variety of data as to the demographics of appointed arbitrators overall. These efforts toward greater transparency are linked to concerns over lack of diversity.


Since June 2016, the ICC publishes, among other information, the names of appointed arbitrators and their nationality, as well as if the appointment was made by the court or by the parties, and whether each arbitrator is the president, a sole arbitrator or party-appointed arbitrator. ICC, “ICC Begins Publishing Arbitrator Information in Drive for Improved Transparency” (June 27, 2016) https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-for-improved-transparency/ (“The decision to make information available was taken as a direct response to increasing demand for transparency in international arbitration.”).


163 Id. at paras. 14–17.


7.8.2 Transparency versus Confidentiality

The counterpart of transparency is confidentiality, which Born defines as referring “to the obligation not to disclose information concerning the arbitration to third parties.”\footnote{See Born, supra note 117, distinguishing between confidentiality and privacy.} Absent an express agreement on confidentiality by the parties, arbitral proceedings or at least parts of them may have to be kept confidential on the basis of the rules of international arbitral institutions, national arbitration law, or implied terms in an agreement to arbitrate. Traditionally, confidentiality has been seen as one of the “most compelling” reasons for parties to choose to arbitrate.\footnote{Kyriaki Noussia, Confidentiality in International Commercial Arbitration – A Comparative Analysis of the Position under English, US, German and French Law (Springer, 2010), 1.}

Arbitral institutions continue to handle confidentiality in a great variety of ways. The arbitral rules of the Singapore International Arbitration Centre, for instance, include a strong presumption of confidentiality. Parties, arbitrators, experts and virtually all other persons involved in the proceedings are required to “treat all matters relating to the proceedings and the [a]ward as confidential.”\footnote{Singapore International Arbitration Centre Rules 2016, Art. 39(1), www.siac.org.sg/our-rules/siac-rules-2016.} Disclosure is only permitted in an exclusively enumerated set of circumstances,\footnote{Id. Art. 39(2).} though parties may always consent to abandon confidentiality by agreement. Similarly, the rules of the Deutsche Institution für Schiedsgerichtsbarkeit (the German Arbitration Institution) permits overcoming the general presumption of confidentiality only to the extent required by law or for purposes of the recognition and enforcement or annulment of an award.\footnote{Deutsche Institution für Schiedsgerichtsbarkeit Arbitration Rules 2018, Art. 44(1–2), www.disarb.org/en/16/rules/-id38.} The rules of the LCIA as well as the Swiss Rules contain comparable confidentiality regimes,\footnote{London Court of International Arbitration Rules 2014, Art. 30, www.lcia.org/Dispute-Resolution_Services/lcia-arbitration-rules-2014.aspx; Swiss Chambers’ Arbitration Institution Rules of International Arbitration 2017, Art. 44, www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf.} whereas the latter allow the publication of anonymized awards not only by way of the parties’ consent, but upon any request for publication addressed to the Secretariat as long as no party objects to the publication within a time limit set by the Secretariat.\footnote{Id. Art. 44(3).} The rules of the
Arbitration Institute of the Stockholm Chamber of Commerce also stipulate a presumption of confidentiality.173

But there are exceptions. The Vienna Rules contain no presumption of confidentiality. They merely require that the arbitrators keep confidential “all information acquired in the course of their duties.”174 Interestingly, no provision addresses whether the parties are bound by an equivalent duty. Similarly, the rules of the International Centre for Dispute Resolution (ICDR) prohibit only arbitrators and the Administrator from disclosure of the parties’ confidential information.175 Still, unless the parties agree otherwise, an arbitral tribunal may make any orders it deems necessary to protect trade secrets and other confidential information.176 The ICC Arbitration Rules contain a provision almost identical to the ICDR’s allowing for protective orders. UNCITRAL Working Group II produced a set of UNCITRAL Transparency Rules applicable to investment treaties concluded on or after April 1, 2014 and was followed in turn by the Mauritius Convention which extended the treaty’s scope of application to all such agreements regardless of the date of their entry into effect.177

7.8.3 Recent Criticisms of Confidentiality

The balance between transparency and confidentiality has shifted of late with transparency coming to be valued almost “as an end in itself” in today’s arbitration world.178 Critics have identified a series of drawbacks to confidentiality:

1. the unavailability of arbitral awards which hampers the development of a body of case law and eventual precedent on matters of arbitration and arbitral procedure;179

174 Supra note 157, Art. 16(2).
176 Id. Art. 37(2).
178 Blackaby and Partasides, supra note 105, 197.
2. lack of access by the public even in cases in which the public has a legitimate interest;\(^{180}\)
3. failure to provide incentives to arbitrators and counsel to act properly, and in compliance; and
4. with general moral and ethical/professional expectations good faith.\(^{181}\)

The latter concern has gained, and will continue to gain, salience with the international arbitration community’s increasing concern over corruption and its prevention.\(^{182}\)

Transparency, along with a corresponding retreat from confidentiality, has become a salient characteristic of investor-State arbitration. There was always a greater impulse toward transparency in investor-State arbitration,\(^{183}\) but that tendency has accelerated, with many States undertaking to bring a measurably greater degree of transparency to this genre of arbitration.\(^{184}\) It has been questioned – and perhaps rightly so – whether the stakes with respect to transparency really so much lesser in commercial arbitration than in investment arbitration.\(^{185}\)

The future will necessarily bring further thought and initiatives to improve the balance between the values of confidentiality and transparency.


181 Id., 201–202.


183 Born, *supra* note 117, §10.05.


185 Partasides and Maynard, *supra* note 105, 201 (“Already we have seen the outcry against investment arbitration that finds its loudest voice in complaints about a lack of transparency. It would be naïve to presume that such complaints are not affecting the world of commercial arbitration.”).
7.9 The Rise of Settlement Agreements

At present, the frequency with which amicable settlements of disputes occur in arbitration is comparable to litigation in courts.\(^{186}\) According to one estimate, between 20 and 30 percent of the overall arbitration caseload is settled,\(^{187}\) while one study suggests that about 40 percent of all settlements occur between the initiation of arbitrations and the first hearing.\(^{188}\) However, the future promises to bring an uptick in settlement and settlement agreements.

The advantages of settlement, especially settlements recorded in awards or settlement agreements, are obvious. To the extent settlement agreements take award form, the future of international commercial arbitration is enhanced. Most institutions are prepared to issue settlement agreements in the form of an award (“consent agreements”), in which case the agreement enjoys all the advantages of an arbitral award, which are considerable, particularly as concerns enforcement.\(^{189}\) Under Article 30 of the UNCITRAL Model Law on International Commercial Arbitration,\(^{190}\) parties may obtain a final award that is directly enforceable through the New York Convention,\(^{191}\) in rendering a consent award, the arbitral tribunal incorporates the settlement reached by the parties

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\(^{186}\) But see Alison Ross, “Arbitration Settlements, and Tectonic Shifts, Occupy Other Speakers” Global Arb. Rev. (September 23, 2009), https://globalarbitrationreview.com/article/1028630/arbitration-settlements-and-tectonic-shifts-occupy-other-speakers (citing a statement by Tim Taylor, who suggested that parties are more likely to settle in litigation due to the greater influence parties have on the arbitral process and their corresponding greater willingness to engage in arbitrations).


\(^{189}\) See Consent award, D. H. Yarn (ed.) Dictionary of Conflict Resolution (Wiley, 2002) (distinguishing a consent award from an “agreed award,” which “is surreptitious and purports to have been reached by the arbitrator”).


into the award it renders. Many national arbitration laws provide for and recognize consent awards.\(^{192}\)

A settlement agreement not issued in the form of an award presents certain disadvantages. While settlement agreements are clearly final and binding, and can be raised as a defense on the merits in a later proceeding, they do not carry *res iudicata* effect. Also, a party is unable to seek execution of its rights under a settlement agreement without more. Its rights under that agreement may need to be litigated anew. A suit for breach of a settlement agreement may entail difficult determinations of jurisdiction and applicable law. Settlement agreements are less problematic in those States in which they enjoy the status of an enforceable judgment, provided that the settlement has been publicly recorded or meets certain formal requirements. In Germany, for instance, a settlement between parties to an arbitration may be declared enforceable by a notary public usually at the seat of the arbitration.\(^{193}\)

International arbitration may also benefit from the recent trend toward enforceability of settlement agreements resulting from conciliation and mediation. It must be borne in mind that arbitration agreement commonly require, as a precondition to arbitration, that parties engage in conciliation or mediation. Making the agreements that result from these procedures directly enforceable redounds to the benefit of arbitration as well. Under its mandate to further the “progressive harmonization and unification of the law of international trade,”\(^{194}\) UNCITRAL adopted the first Model Law on International Commercial Conciliation in 2002 (“Model Conciliation Law,”\(^{195}\) Article 14 of which specifically provides that a settlement agreement arrived at through conciliation is binding and enforceable.” However, Article 14 left it to the enacting State to determine the method of enforcement, inviting unlimited variation in approaches.\(^{196}\)


\(^{193}\) Zivilprozessordnung [ZPO] [Civil Procedure Code], December 5, 2005, BGBl. I at 3202, § 1052(4) (Ger.).

\(^{194}\) G.A. Res. 2205 (XXI), at 99, 100 (para. 8) (December 17, 1966).

\(^{195}\) UNCITRAL Model Conciliation Law, G.A. Res. 57/18, annex (January 24, 2003).

\(^{196}\) For an overview as to the diversity of legislative approaches, see A/CN.9/WG.II/WP.110, paras. 106–111.
the Model Law or not, numerous States have enacted legislation facilitating the enforcement of settlement agreements. Some went so far as to put settlement agreements on an equal footing with arbitral awards in terms of their status and effect.\footnote{Pieter Sanders, “UNCITRAL’s Model Law on International Commercial Conciliation” (2007) 23 Arb. Int’l 105, 137–139 (see, e.g., Section 74 of India’s Arbitration and Conciliation Act 1996: “The settlement agreement shall have the same status and effect as if it is an award on agreed terms on the substance of the dispute rendered by an arbitral tribunal”).} In 2014, the United States proposed to Working Group II that it develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation. This US initiative aimed at creating a treaty parallel to the New York Convention, which would ideally find equal acceptance thanks to a brief and simple structure.\footnote{UNCITRAL, “Planned and possible future work – Part III: Proposal by the Government of the United States of America: future work for Working Group II, Note by the Secretariat” U.N. Doc. A/CN.9/822 (June 2, 2014).}


The new Convention and the 2018 Model Law are designed to work in tandem to ensure the “stand-alone” enforceability of international settlement agreements resulting from mediation in commercial disputes, similar to the
enforcement of arbitral awards under the New York Convention.\footnote{(204)} This is achieved in two ways: enforcement of the agreement may be had without the need to file a suit for breach of contract\footnote{(205)} and any qualifying agreement enjoys \textit{res iudicata} effect, much as awards do. \footnote{(206)} In States that will implement both the Singapore Convention and the Model Law, parties to a mediation will thus be able to directly invoke international settlement agreements as either a “sword” or a “shield.”\footnote{(207)} The defenses to the enforcement of agreements under the Singapore Convention closely track the defenses to enforcement of awards under the New York Convention).\footnote{(208)} As stated in the \textit{travaux préparatoires}, these grounds are exhaustive.\footnote{(209)} In order to benefit from the Model Law or Convention, the settlement agreement must result from mediation, be in writing, and settle a commercial dispute that is international in character.\footnote{(210)} Satisfactions of these conditions should not ordinarily be difficult. It would come as no surprise if the Singapore Convention was to be adopted by a vast number of States, especially in light of almost universal acceptance of the New York Convention.\footnote{(211)}

\footnote{(204)} Note the similarity, or, rather, partial identity, between the New York Convention and the Singapore Convention in terms of wording and structure, especially as regards the main substantive provisions in Arts. 3–6.
\footnote{(205)} G.A. Res. 73/198, \textit{supra} note 185, Arts. 3(1), 5.
\footnote{(206)} \textit{Id.} Art. 3(2).
\footnote{(208)} G.A. Res. 73/198, \textit{supra} note 185, Art. 5.
\footnote{(210)} G.A. Res. 73/198, \textit{supra} note 185, Art. 1(1).