

NOTE

FAIR ENOUGH? RECONCILING THE PURSUIT OF FAIRNESS AND JUSTICE WITH PRESERVING THE NATURE OF INTERNATIONAL COMMERCIAL ARBITRATION

I. INTRODUCTION

In a study co-authored by Richard W. Naimark, the Senior Vice President of the American Arbitration Association (“AAA”), and Stephanie E. Keer, certain surprises were uncovered regarding the perception of private international commercial arbitration by attorneys and business people.¹ The most noteworthy was the “overwhelming relative importance of the fairness and justice of the process” compared to other traditional key characteristics of international commercial arbitration.² In fact, the vast majority of survey participants ranked a fair and just result as the single most important attribute of the process, nearly twice as important as the closest-ranked attribute.³ The authors of

1. Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT’L BUS. LAW 203 (2002). The authors surveyed between 121 to 131 participants, including claimants, respondents, attorneys, and business persons, both prior to the first hearing and after the award. *Id.* app. at 209. Participants were then asked to rank the importance of eight factors (speed of outcome, privacy, receipt of monetary award, a fair and just outcome, cost-efficiency, finality of a decision, arbitrator expertise, and continuing relationship) from one to eight, with one being the most important. *Id.*

2. *Id.* at 203. For an overview of fairness and justice in the law, see Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 ALB. L. REV. 81, 86-90 (2004) (proposing that the notion of fairness is imbedded in Western legal systems and contains two innate attributes—a moral or ethical component and the so-called “human dimension”) and Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1303 (1998) (arguing that relaxation of rigid processes of litigation does not necessarily imply relaxation of principles of procedural fairness).

3. Naimark & Keer, *supra* note 1, at 204. Eighty-one percent of those surveyed ranked a fair and just result as most important, while only forty-one to forty-six percent ranked other attributes (receipt of monetary award, speed of outcome, cost, and arbitrator expertise) as most important. *Id.*

the study proposed that a philosophical, even idealistic, concept of justice that implies both substantive and procedural justice is of significant importance to participants in international arbitration.⁴ A natural inquiry arises as to what elements of the process communicate fairness to participants. This Note explores the different characteristics of international commercial arbitration that arguably create the perception of justice “in a grand sense,”⁵ proposing that such characteristics are present in every aspect of the process. This Note does not dispute that participants increasingly care about fairness and justice in the process⁶ and that “good client service [by arbitration counsel] includes methods for communicating the essential qualities of the process as well as the results.”⁷ In fact, it is clear that the landscape of international commercial arbitration is changing and the traditional key characteristics of the process, such as speed, cost, informality, and confidentiality, are becoming both less practical and less lucrative.⁸ It is possible that the pursuit of fairness and justice, with its increasing desirability, will guarantee continued viability of the process without interfering with the practical feasibility of arbitration.⁹ To that end, this Note discusses at length the variety of attributes that communicate the elements of fairness and justice to the arbitrating public. However, this Note further argues that the quest for fairness and justice should not come at the expense of compromising the advantages and integral

4. Naimark and Keer explain that substantive justice implies receiving the “right” result, whereas procedural justice means getting the result in the “right way.” *Id.* at 205.

5. *Id.* at 208.

6. Based on the survey findings, Naimark and Keer argue that “justice, in the larger sense of the word, matters to parties.” *Id.* at 204.

7. *Id.* at 205.

8. See Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 70 (2003) (addressing the United States’ influence on international commercial arbitration); Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 1024-25 (2001) (discussing the changing perception of confidentiality in arbitration); Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 136-37 (2003) (challenging the traditional idea that international arbitration must be confidential); Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1662-63 (1991) (discussing the increasing autonomy and liberalization of arbitration); Gu Weixia, Note, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT’L ARB. 607, 610-11 (2004) (explaining the split between “the old world” and “the new world” perception of confidentiality in arbitration) [hereinafter Gu].

9. In fact, Sever believes that the pursuit of fairness is essential to the continued viability of arbitration and argues that “[t]he walls of court authority [have] all but collapsed in many countries. . . . [Thus, there is a] possibility that arbitration will be allowed to violate basic principles of fairness.” Sever, *supra* note 8, at 1663.

characteristics of international arbitration. The search for substantive and procedural justice capable of satisfying the global perception of fairness will interfere with the very essential fabric of a private commercial process and alter the very practice and nature of international commercial arbitration.¹⁰

In Part II, this Note will discuss the changing nature of international commercial arbitration and the decreasing importance of traditional key characteristics. Specifically, it will discuss the element of confidentiality—traditionally perceived as the primary selling point of international arbitration¹¹—and its demise in light of its impracticality and arguable impossibility.¹² Instead, it is entirely possible that the fairness and justice of the process is precisely what the parties are seeking in modern international commercial arbitration.¹³ The question arises—what is fairness in arbitration? Part III will begin to discuss the manifestation of a demand for fairness in international arbitration and the resulting presence of characteristics aimed at the pursuit of such fairness and justice. This Part will posit that, as a private commercial process, international arbitration has developed sufficient rules and limitations on its participants to ensure the quality of fairness and justice suitable for the commercial public—the primary users of international commercial arbitration.¹⁴ This Part will also introduce the inherent conflict between the pursuit of fairness and justice and the maintenance of core characteristics that make arbitration a private commercial process. Part IV will continue the discussion of the proposition that international commercial arbitration procedures are capable of

10. For a discussion of a similar issue within the context of the tension between *lex mercatoria* and *amiable composition*, see Karyn S. Weinberg, Note, *Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT’L L.J. 227, 252-54 (1994). Weinberg argues that a pursuit of justice in arbitration poses a danger of a situation where arbitrators would impose their personal sense of equity and arbitrary decisions would result. *Id.* at 252-53. Additionally, it has been suggested that increasing arbitration of statutory claims would imply the necessity of an arbitration “record” fundamentally altering the nature and practice of arbitration. Stephen K. Huber & E. Wendy Trachte-Huber, *International ADR in the 1990’s: The Top Ten Developments*, 1 HOUS. BUS. & TAX. L.J. 184, 197 (2001).

11. ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 27 (4th ed. 2004).

12. Brown, *supra* note 8, at 1017-19.

13. See Naimark & Keer, *supra* note 1, at 204.

14. “Commercial parties [can] agree to virtually any procedural arrangement they want[], subject only to extreme abuses that [are] protected against at the award enforcement stage.” Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341, 343 (2007). Rogers concentrates on non-commercial parties and how they may be affected by international arbitration. See *id.* at 341-42. However, the focus of this Note is on the dealings between commercial and (reasonably) sophisticated parties.

autonomously ensuring sufficient safeguards on fairness and justice. This Part will divide the processes of international commercial arbitration into three facets: (1) procedure and substance, (2) ethics, and (3) social policy; and will discuss the procedures already in existence which ensure the fairness of arbitral proceedings. This Part will also argue that in each of these facets there are fundamental elements that, when combined, create the guarantee of optimal fairness and justice for the arbitrating public.¹⁵ This discussion then concludes with the finding that appellate review and arbitral finality are incompatible with one another, and attempts to combine these two concepts will result in compromising the nature of international commercial arbitration.

II. THE CHANGING LANDSCAPE OF INTERNATIONAL COMMERCIAL ARBITRATION

Over the past several decades, arbitration has become the preferred means for resolving international business disputes.¹⁶ Historically, several elements in various combinations have been cited as the primary characteristics that cause commercial parties to prefer arbitration over litigation. These characteristics include procedural flexibility, autonomy from national courts, greater speed of conflict resolution, lower costs, parties' choice of arbitrators and arbitral forum, neutrality, informality, and confidentiality.¹⁷ However, each characteristic naturally has drawbacks that compromise its propounded benefit. A brief survey that will be discussed in this Part serves as an illustration that the traditionally recognized advantages of international commercial

15. Naimark and Keer conclude their study with a suggestion that further study is warranted as to what aspects of arbitration communicate fairness to parties and whether there are procedures and behaviors that affect these perceptions. Naimark & Keer, *supra* note 1, at 206.

16. See KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 8 n.62 (1993) (stating that an arbitration clause is found in approximately ninety percent of international economic contracts); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 105 (1997).

17. CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS: DESIGNING PROCEDURES FOR EFFECTIVE CONFLICT MANAGEMENT* 136-39 (1996); Richard W. Naimark & Stephanie E. Keer, *Post-Award Experience in International Commercial Arbitration*, DISP. RESOL. J., Feb.-Apr. 2005, at 94, 95 [hereinafter Naimark & Keer, *Post-Award*]. For a discussion regarding confidentiality, see *Expert Report of Stephen Bond Esq. (in Esso/BHP v. Plowman)*, 11 ARB. INT'L 273, 273-74 (1995) (the former Secretary-General of the International Chamber of Commerce ("ICC") states that individuals, governments, and businesses using the services of the ICC invariably place a high value upon confidentiality as a fundamental characteristic of international commercial arbitration). Naimark and Keer, however, posit that privacy is the second-to-last most desirable factor in arbitration. Naimark & Keer, *supra* note 1, at 207; see also Brown, *supra* note 8, at 1017 ("[T]here are several arguments against a duty of confidentiality in international arbitration.").

arbitration cannot unequivocally guarantee attraction of commercial parties to arbitration.¹⁸ Instead, it is evident that the arbitrating public is increasingly pursuing fairness and justice in arbitration in addition to the desire to maintain the traditional characteristics that have shaped arbitration over the last several decades.¹⁹ Clearly, an inevitable tension must result between the pursuit of fairness and justice (as such pursuit is too reminiscent of a judicial system of dispute resolution) and the private nature of arbitration.²⁰ A subsequent balance must develop between the guarantees that attract commercial parties to arbitration and the guarantee of fairness and justice.²¹ Only this delicate balance, stricken in light of the traditional elements that make arbitration a truly private and truly alternative process, will allow arbitration to maintain its distinct character and attraction to the commercial public.

In Naimark and Keer's survey, many of the traditional characteristics of arbitration ranked lower than did achieving a fair and just result.²² Among these were cost, speed, arbitrator expertise, and privacy.²³ While arbitration has the potential to provide for greater speed than litigation, this potential is hardly always a certainty due to party autonomy, a myriad of dilatory tactics, and potential problems in obtaining evidence, which may be prohibitive to a speedy resolution.²⁴ Moreover, the ability to obtain a summary judgment in a courtroom setting often makes litigation a significantly faster dispute resolution method.²⁵ Costs, which may be lower in arbitration, may also as easily become excessive due to arbitrators' fees, administrative costs, and the cost of travel to the place of arbitration.²⁶

18. See *infra* notes 22-27 and accompanying text.

19. Naimark & Keer, *supra* note 1, at 203.

20. See Jessica L. Gelernder, Comment, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 626-27 (1997); Weinberg, *supra* note 10, at 247.

21. "Many practitioners believe arbitration is the sole acceptable dispute resolution process The apparent neutrality of the forum, divorced from the sovereign influences of a nation's judiciary, offers perhaps the primary motivation for recourse to arbitration." Weinberg, *supra* note 10, at 227. Precisely this divorce from the constraints of a national judiciary creates the danger of neglecting considerations of fairness. *Id.* at 252-53; see also Sever, *supra* note 8, at 1663 (arguing that privatizing arbitration will lead to violations of fairness).

22. Naimark & Keer, *supra* note 1, at 203.

23. Cost ranked second out of eight, and speed, arbitrator expertise, and privacy ranked fifth, sixth, and seventh, respectively. *Id.* at 206.

24. See RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 12 (2000).

25. *Id.*

26. *Id.* at 13.

The pivotal role of arbitrators to the process and outcome of arbitration is undisputed, and Naimark and Keer's survey supports that finding.²⁷ However, changes in the norms of arbitration have raised questions about the role of the arbitrator, such as the extent to which an arbitrator's personal sense of justice may influence the outcome,²⁸ as well as the issue of constraints placed upon arbitrators' neutrality by arbitral institutions, rules, and conventions.²⁹

As a representative example of the changing nature of arbitration, a detailed discussion of the confidentiality issue follows. Confidentiality and privacy have long been held to be the main attractions and the primary distinguishing characteristics of international arbitration.³⁰ While confidentiality is certainly important in instances where highly sensitive financial and technological information is involved, it is important to realize that confidentiality often gives way to considerations of national policies advocating openness and transparency.³¹ In fact, courts increasingly recognize that no blanket requirement of confidentiality can or should exist in international commercial arbitration,³² and that such requirement is not implied or clearly mandated by any law or principle.³³ Contrary to what an inexperienced party may be led to believe, information that is already in

27. Naimark & Keer, *supra* note 1, at 206.

28. Weinberg, *supra* note 10, at 252-54.

29. See *infra* Part III.

30. REDFERN ET AL., *supra* note 11, at 27. Scholars distinguish between the concept of "confidentiality" and "privacy." See Gu, *supra* note 8, at 609. "Simply speaking, privacy refers to excluding strangers from taking part in the arbitration hearing, while confidentiality refers to the non-disclosure relationship among the arbitration participants." *Id.* (internal citation omitted). For the purposes of this Note, the term "confidentiality" will refer to a non-disclosure relationship and, unless otherwise noted, proceedings that take place in the absence of third parties. As Gu notes, "even to the extent that an arbitration is private and the public are not admitted, it does not necessarily follow that documents produced for and as a result of that hearing are confidential, nor are those present at the hearing necessarily bound by terms of confidentiality." *Id.*

31. See, e.g., *Esso Austl. Res. Ltd. v. Plowman* (1995) 183 C.L.R. 10, 29 (a decision from the High Court of Australia created a public interest exception to the duty of confidentiality in arbitration); see also Sever, *supra* note 8, at 1663 ("Arbitrability and public policy overlap in arbitration practice; indeed, a violation of public policy, in some countries, may render an agreement inarbitrable.").

32. See Monique Pongracic-Speier, *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, 3 J. WORLD INVESTMENT 231, 232 (2002) (while a number of courts still affirm "confidentiality as a legal feature of commercial arbitration . . . [T]hese confirmations of confidentiality are counterbalanced by a building body of opinion in favour of restricting, or even denying, confidentiality in arbitration.").

33. *A.I. Trade award Upheld, Swedish Supreme Court Affirms Court of Appeal*, 15-11 MEALEY'S INT'L ARB. REP. 3 (Nov. 2000) (Court rejected the principle that a duty of confidentiality is implied-in-law).

the public domain cannot be rendered confidential by arbitration.³⁴ Moreover, awards are often made known to authorities such as auditors, creditors, shareholders, and insurance companies.³⁵

From a functional standpoint, blanket confidentiality prevents the standardization of the arbitration processes, dissemination of details of rulings and proceedings, and establishment of a body of principles, leading to repetitive dispute resolution and inability to apply prior experience to resolution of difficult disputes.³⁶ Subsequently, this confidentiality can jeopardize such useful elements as low cost and speedy resolution, not to mention the need for a body of precedent and principles in light of the fast growth of the use of arbitration.³⁷ Moreover, the need for transparency and setting of precedent along with the overriding policy considerations allegedly make complete confidentiality an illusion.³⁸ Critics of confidentiality in arbitration argue that given potentially undesirable implications both for individual parties and for the arbitration process as a whole, a confidentiality obligation may not be the socio-economic good it is often presumed to be.³⁹

Policy considerations aside, confidentiality is not as clear a concept as it may seem. In fact, it is a fairly distorted notion in different arbitrating systems. For instance, the International Chamber of Commerce's Rules of Arbitration mandate that "persons not involved in the proceedings shall not be admitted," but no general provisions for

34. GARNETT ET AL., *supra* note 24, at 14; Claude R. Thomson & Annie M. K. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!*, DISP. RESOL. J., May-July 2007, at 75, 75-76 ("Most parties to arbitration assume that the private nature of the process will ensure that the evidence, the proceedings and the award will be kept private and confidential . . . [These parties] would be surprised to learn that the assumption of confidentiality may not always be valid.")

35. Gu, *supra* note 8, at 617.

36. GARNETT ET AL., *supra* note 24, at 14 n.31.

37. See, e.g., Jeffrey T. Cook, Comment, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 PEPP. L. REV. 1085, 1100-01 (2007).

38. Brown, *supra* note 8, at 1019 (arguing that the realities of the current system make protection of confidentiality a "wasted effort"); Gu, *supra* note 8, at 617. "[C]onfidentiality will never be absolute: a small circle of people will be aware of the award, and that circle will grow[,] [especially] if the award gives rise to litigation before the courts and thereby becomes public." FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 188 (Emmanuel Gaillard & John Savage eds., 1999).

39. Brown, *supra* note 8, at 1017-19 (listing arguments against the duty of confidentiality, such as danger of inconsistent awards and duplicative efforts of lawyers and arbitrators, not to mention the tremendous importance of predictability and certainty to efficient conducting of business). However, it is possible that "[t]he cure [of publishing arbitral awards] may be worse than the disease." Delissa A. Ridgway, *International Arbitration: The Next Growth Industry*, DISP. RESOL. J., Feb. 1999, at 50, 52.

confidentiality during the proceedings exist.⁴⁰ Similarly, the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”) require that “[h]earings should be held *in camera*” but give the tribunal wide discretion to exclude witnesses from the proceedings during the testimony of other witnesses.⁴¹ Likewise, the United States Federal Arbitration Act (“FAA”)⁴² does not contain any provisions requiring parties or arbitrators to keep secret the arbitration proceedings in which they are involved.⁴³ However, the International Dispute Resolution Procedures of the AAA and the International Centre for Dispute Resolution (“ICDR”) provide unusually strict institutional rules preventing disclosure of the awards or the identities of the parties.⁴⁴ Similarly, under the International Centre for Settlement of Investment Disputes (“ICSID”) Rules, an award can only be made public with the consent of the parties.⁴⁵ Still opposite to ICSID, arbitral awards by the World Trade Organization are published practically without exception upon request of a member of the tribunal.⁴⁶ The Swiss Rules of International Arbitration, however, contain a provision for

40. ICC Rules of Arbitration art. 21 (1998) [hereinafter ICC Rules of Arbitration], available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. A provision for confidentiality is stipulated only for the internal proceedings of the ICC International Court of Arbitration. *Id.* at app. II, art. 1.

41. UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 25.4, U.N. GAOR, 31st Session, Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976) [hereinafter UNCITRAL Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

42. 9 U.S.C. §§ 1-16 (2000).

43. *See id.* It follows that, unless contracted otherwise, participants are not actually required under United States law to keep confidential the arbitration proceedings. *See Industrotech Constructors Inc. v. Duke Univ.*, 314 S.E.2d 272, 274 (N.C. Ct. App. 1984).

44. International Dispute Resolution Procedures art. 34 (2008), available at <http://www.adr.org/sp.asp?id=33994&printable=true>. Under these Procedures, parties are bound by Article 34, which states that “[c]onfidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.” *Id.* Article 27(8), in turn, states that “[u]nless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.” *Id.* at art. 27(8).

45. ICSID Convention, Regulations and Rules R. 48(4) (2006), available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

46. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 art. 18(2), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

confidentiality of an award and materials submitted in the course of proceedings unless there is a duty to disclose.⁴⁷

In addition, arbitrating parties may fail to distinguish between confidentiality at the proceedings stage and at the enforcement stage.⁴⁸ While parties are free to demand privacy and confidentiality as long as the proceedings and institutional rules allow them to do so, confidentiality is compromised to a certain extent because the enforcement of awards occurs in national courts.⁴⁹ It is true that courts rarely, if ever, engage in substantive review of a dispute and rather focus primarily on the compliance of the proceedings with the New York Convention.⁵⁰ Nevertheless, once an award is taken to the enforcement stage, the precedent, with some reasoning and disclosure of facts, is invariably created regardless of the parties' initial agreement as to the confidentiality of the proceeding.⁵¹

While the above caveats are necessary, lightly doing away with confidentiality is nevertheless not a solution.⁵² Regardless of the changing nature of the core elements of international arbitration, confidentiality is still expected and desired (as are the other traditional elements).⁵³ It is only natural that in arbitration, which is purely a creature of contract, the guarantee of confidentiality should also be contractually delineated and as such remain one of the most attractive characteristics of arbitration for commercial parties seeking to keep sensitive business information out of the public eye.⁵⁴ As the following Parts discuss, dramatically altering the nature of arbitration in the name

47. Swiss Rules of International Arbitration art. 43 (2006), available at <http://www.swissarbitration.ch/rules.php>.

48. While awards are rendered in private arbitration proceedings, post-award compliance can take place in a multitude of ways: voluntary compliance, renegotiation, settlement, or court action (in which case a nation's judicial system becomes involved in the process). Naimark & Keer, *Post-Award*, *supra* note 17, at 96.

49. See Brown, *supra* note 8, at 1019.

50. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention, adopted in 1958, is the most widely adopted convention on arbitration. Molly Zohn, *Filling the Void: International Legal Structures and Political Risk in Investment*, 31 FORDHAM INT'L L.J. 230, 255 (2007).

51. Brown, *supra* note 8, at 1019.

52. See Thomson & Finn, *supra* note 34, at 78. "A fundamental basis for agreeing to arbitration rather than to litigation in public courts is to preserve privacy and confidentiality to the greatest extent possible." *Id.*

53. See *id.*

54. "Arbitration is a private dispute resolution process in which the arbitrators and rules are selected by the parties. In principle, there is no reason why business people should not be able to resolve their commercial disputes in a private and confidential matter." *Id.*

of fairness, justice, predictability, or public policy poses the risk of forcing judicial standards on arbitration to such extent that the mechanism that has instilled confidence in commercial parties for decades will cease to exist.

III. IS INTERNATIONAL COMMERCIAL ARBITRATION FAIR ENOUGH?

The demand for fairness and justice deserves recognition. As some researchers argue, it is the single most important core element that participants value in international commercial arbitration.⁵⁵ The fairness and justice of the process is not equivalent to a winning result—in fact, fairness and justice invariably ranked higher than a winning result in Naimark and Keer’s survey.⁵⁶ They argue that “[e]ven for the cynic who believes that parties want only to win the case, winning would be included in the concept of substantive justice, whereas procedural justice (getting a result in the ‘right way’) provides a whole other dimension to the goal of the parties.”⁵⁷ Simply winning is unlikely to place fairness and justice overwhelmingly on top of the list of desired characteristics. Had it been the primary attraction, “winning” would be listed as the top factor. Getting the result in the “right way” speaks more strongly to the participants in international arbitrations and, save the understanding of just and fair result as simply winning, such result may be understood as an award reached through adherence to just and fair procedures.⁵⁸

The requirement of fairness is not foreign to model laws and countries’ legislations. Article 18 of the UNCITRAL Model Law states directly that all “parties shall be treated with equality.”⁵⁹ This requirement may be interpreted as an opportunity to determine and implement a procedure that will give each party equal opportunity to arrive at a result that all parties, winners and losers, consider the most just possible result under the circumstances. More realistically, however, the requirement may mean simply that all parties are given equal chance for a hearing.⁶⁰

Principles of International Commercial Contracts (“Principles”), promulgated by the International Institute for the Unification of Private Law (“UNIDROIT”), are also clear on the requirement of fairness in

55. Naimark & Keer, *supra* note 1, at 203.

56. *Id.* at 205.

57. *Id.*

58. *Id.*

59. UNCITRAL Model Law on International Commercial Arbitration art. 18 (1994).

60. See MATTI S. KURKELA, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 448 (2005).

arbitration proceedings.⁶¹ Article 1.7 states in section one that “[e]ach party must act in accordance with good faith and fair dealing in international trade” and adds in section two that “parties may not exclude or limit duty.”⁶² However, the private nature of arbitration cannot be lightly subjected to the pursuit of fairness based on the Principles, when all that the Principles in fact require is a duty of good faith.

Internationally recognized principles of human rights naturally have a significant influence on the processes and awards in international commercial arbitration proceedings. The concept of a “fair . . . hearing” is codified in Article 6 of the European Convention on Human Rights (“ECHR”)⁶³ and is virtually identical in various regional and universal instruments.⁶⁴ In essence, these provisions guarantee not only access to a hearing, but also justice that includes such qualities as: compliance with requirements of impartiality, independence, and ending the matter within a reasonable time frame.⁶⁵ Thus, by agreeing to arbitration, parties do not forgo their right to court access and do not subject themselves to a violation of human rights in giving up a right to request a hearing in which the ECHR principles are implied.⁶⁶ On the contrary, parties to arbitration substitute their right to a hearing in court with a right to a hearing in a different forum, and they do so through carefully negotiated contract terms in the interest of business necessity.⁶⁷

A significant concern of critics and supporters of arbitration alike is the autonomy that arbitrators exercise in rendering non-reviewable, non-

61. For a discussion of the UNIDROIT Principles, see Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Arbitration*, 46 AM. J. COMP. L. 129, 149 (1998) (suggesting that UNIDROIT Principles “have furnished arbitrators with a perfect and eminently practical tool for their comparative decision-making”).

62. UNIDROIT Principles of International Commercial Contracts art. 1.7 (2004), available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

63. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

64. See e.g., African Charter on Human and Peoples’ Rights art. 7(1), June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: Pact of San José, Costa Rica art. 8(1), Nov. 22, 1969, 1144 U.N.T.S. 144.

65. GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 111 (2004).

66. See *id.* at 112-14.

67. See Juan Eduardo Figueroa Valdés, *The Principle of Kompetenz-Kompetenz in International Commercial Arbitration*, MEALEY’S INT’L ARB. RPT., May 2007, at 29, 29.

appealable decisions.⁶⁸ However, by virtue of well-established arbitration processes, fairness is already served sufficiently by the imposition of a variety of duties and limitations on arbitrators.⁶⁹ The specificity of these duties, which are easy to understand even for those arbitrators who are merely “commercial men,”⁷⁰ with little or no exposure to the practice of law, ensures that sufficient attention is paid to the integrity of the process from within and that it is safeguarded from abuse by an arbitrator.⁷¹

Alternative dispute resolution, and particularly arbitration, is arguably a far better-suited forum for achievement of procedural justice than is litigation, since arbitration is primarily concerned with dispute resolution, “peace-keeping,” consensus-building, and preservation of the contractual relationship.⁷² The importance of fairness and justice may be significantly lessened in the adversarial system of litigation where winning at any cost, even the cost of a continuing relationship, is a primary goal of the parties involved.⁷³ From this, there seems to be a logical progression to the understanding that a less rigorous safeguarding of fairness in arbitration that involves parties with equal bargaining power who are dealing at arms-length⁷⁴ will achieve superior results in comparison to the mechanisms of appeal, review, and transparency rendered in litigation.⁷⁵

68. See generally Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213 (2005) (discussing the various implications of arbitrator autonomy and the steps that have been taken to remedy such problems as arbitrator partiality).

69. Moreover, ascertaining the fairness and justice of an award in arbitration is as much a duty of arbitrators as it is a duty of juries and judges in litigation. Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19, 38 (2004).

70. *W.K. Webster & Co. v. Am. President Lines, Ltd.*, 32 F.3d 665, 668 (2d Cir. 1994) (discussing the definition of the term and allowing consideration of attorneys as “commercial men”).

71. GARNETT ET AL., *supra* note 24, at 81-89 (discussing arbitrators' duties of competency and impartiality, duty to render a decision, duty to uphold the integrity and fairness of the proceeding, duty of disclosure, duty to communicate, duty to act professionally, and duty to act in a fiduciary manner); REDFERN ET AL., *supra* note 11, at 238-48 (discussing duties imposed by the law, duties imposed by parties, and ethical duties, as well as duty of care, duty to act with diligence, and duty to act judicially); Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 456-67 (2005).

72. Carrie Menkel-Meadow, *Practicing “In the Interests of Justice” in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1763-64 (2002).

73. See e.g., Alford, *supra* note 8, at 82-83; Menkel-Meadow, *supra* note 72, at 1763-64.

74. See Rogers, *supra* note 14, at 341; Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 7 (2007).

75. See KURKELA, *supra* note 60, at 7; Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1257 (2006) (“[A]rbitration policy [must] steer a middle path, one that respects both the justice system's need for relevant evidence and the need of parties in arbitration to a reliable level of confidentiality.”).

Arbitration has long been the preferred method of dispute resolution for the business community, aimed at minimizing the involvement with the judicial system and its procedural roadblocks and maintaining contractual relationships in order to do what the business community does best—conduct business—instead of spending money and resources litigating in court.⁷⁶ For that reason, arbitral institutions, conventions, and model laws have developed a vast body of procedural rules and limitations designed to assure the business public that they would be receiving an award of certain quality—one achieved in compliance with definitive rules and rendered by experienced persons deeply familiar with a subject matter and the interests of the arbitrating parties.⁷⁷ Assuming that such existing rules and limitations provide sufficiently satisfactory quality of justice and fairness in arbitration, further imposition by the legal community of judicial standards of fairness on arbitration may provide a debilitating disservice to the business community for whose needs arbitration was developed. Part IV will discuss the presence of safeguards to fairness and justice in all aspects of arbitration and will conclude that additional extraneous restrictions seeking to achieve the transparent justice of judicial quality is unsuitable and detrimental to the practice of international commercial arbitration.

IV. IMPOSITION OF EXTRANEOUS STANDARDS OF FAIRNESS IS NEITHER POSSIBLE NOR NECESSARY IN INTERNATIONAL COMMERCIAL ARBITRATION

Between the critics and proponents of “privatiz[ing] justice”⁷⁸ through international commercial arbitration, the answer to several simple questions would probably settle the issue. First, is the pursuit of justice in the grand sense, in a way modeled after the judicial system and complete with a system of review, appeal, and transparency fit for arbitration? In the unlikely event that the private nature of arbitration and the public nature of fairness can somehow be reconciled, the next question arises. Is such a pursuit even necessary, or can the well established processes in arbitration guarantee a sufficient degree of fairness capable of satisfying participating parties? The discussion that

76. See William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time for an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 537 (2000).

77. See *infra* notes 124-25 and accompanying text.

78. Amy J. Schmitz, *Dangers of Deference to Form Arbitration Agreements*, 8 NEV. L.J. 37, 38 (2007).

follows attempts to shed light on arbitration as a process that, without additional intervention, ensures fair and just arbitral procedures. This Part concludes by answering in the negative both of the above questions.

One example to illustrate the tension is in order. Treatment of challenges by the ICC raises debate as to the fact that the ICC does not provide reasoning for overturning or upholding challenged awards.⁷⁹ However, it is the firm position of the ICC that its procedures are sufficient to ensure fair review and to render a just decision without providing parties with reasons for the decision, because discussion continues until a consensus is reached and a vote is rarely required.⁸⁰ Thus, a decision is not based on one line of reasoning but on many that eventually result in a consensus.⁸¹ The ICC believes that giving reasons for its decision would provide a “straight road to state court” because a party would be able to raise a challenge concerning “something the ICC did not consider, such as bad faith or dilatory tactics.”⁸² The policy of the ICC with respect to challenges is an excellent example of a situation where the existing procedures in an arbitral institution serve their intended purpose without the need to be shaped by parallel standards applicable in litigation. Such examples lead to the conclusion that the imposition of judicial standards of fairness on arbitral procedures will dilute its appeal and compromise its benefits to the business community.

Another example serves to show that arbitral procedures evolve in response to demands of the arbitrating public and are thus continuously viable and attractive to commercial parties. There are no set and established rules of evidence in arbitration that are of the magnitude of those available in litigation.⁸³ However, “nothing is further from fairness than for a party to be right but being unable to prove it due to the lack of evidentiary procedures.”⁸⁴ To alleviate this danger, arbitral practice is rich with evidentiary norms suitable for the nature of arbitration.⁸⁵ Such norms include “obligation of cooperation,”⁸⁶ negative inferences,⁸⁷ and

79. Katherine Gonzalez Arrocha, Director, ICC Dispute Resolution Services, Latin America, Welcoming Remarks at International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 5, 2007) (on file with author).

80. *Id.*

81. *Id.*

82. *Id.*

83. Me. Jean Robert, *Administration of Evidence in International Commercial Arbitration*, 1 Y.B. Com. Arb. 221, 221 (1976).

84. Fernando Mantilla-Serrano, Evidence in International Arbitration, International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 5, 2007) (on file with author).

85. *Id.*

86. *Id.*

arbitrator authority (arbitrator's ability to request, *sua sponte*, documents if parties did not refer to them, and did not include them in affidavits).⁸⁸ Additionally, several years ago it would be very unusual for a tribunal to compel a party to produce a document that was harmful to their case.⁸⁹ This is changing in the name of efficiency and fairness. Now, if the requesting party can make an argument that the other party is in the possession of the document, the arbitral tribunal can request production.⁹⁰

Fairness and justice are present in the international commercial arbitration process as a combination of many elements that developed in response to the demands and needs of the arbitrating public for fair and enforceable awards.⁹¹ But for the perception that arbitration is an optimal, fair, and effective process of dispute resolution in the business setting, arbitration would have been unable to achieve such wide and growing "buy-in."⁹² The following sub-Parts discuss the trends and elements in various aspects of arbitration that demonstrate the abundant pursuit of fairness embedded in arbitration-specific processes.

A. *The Procedural and Substantive Justice in Arbitration*

In litigation, the judicial system reviews decisions on both procedural and substantive grounds, depending on the posture of the case. On the contrary, arbitration awards are rarely, if ever, challenged and reviewed on substantive grounds and when they are set aside, it is almost exclusively on procedural grounds.⁹³ For instance, grounds upon which an award may be vacated under the FAA all have to do with

87. If one party refuses to submit sufficient evidence, the tribunal may make inferences against the recalcitrant party. *Id.*; Kathleen Paisley, *Commencement of the Arbitration and Conduct of the Arbitration*, 9 AM. REV. INT'L ARB. 107, 137 (1998) (Where a party fails to produce documents without good cause, a tribunal will likely infer that the documents provided information against that party's interest.).

88. Mantilla-Serrano, *supra* note 84.

89. *Id.*

90. Gilberto Giusti, Remarks on Issues on Documentary Evidence in International Arbitration, at International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 4, 2007) (on file with author). As arbitrators only expect parties to disclose written materials that support their case, there is very limited use of presumption and/or adverse inferences as decisive tools. To request documents in the possession of the other party, it is necessary to specify the documents sought and prove that the other party has the documents. *Id.*

91. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 371-72 (2007).

92. *Id.* (discussing "buy-in" in the foreign investment context as the attraction and reliance of commercial parties on international arbitration).

93. Indeed, appellate arbitral review on the merits is rare. See Knull & Rubins, *supra* note 76, at 531.

misconduct, misbehavior, and partiality of arbitrators, or unethical behavior by the parties.⁹⁴ In addition to the statutory grounds that require very specific conduct by the arbitrators or the parties,⁹⁵ case law allows for substantive review and vacatur of an award only when arbitrators manifestly disregarded the law in reaching the decision.⁹⁶ Even while the standard of manifest disregard of the law perhaps lends itself to more in-depth review than the available statutory grounds, the permitted judicial review is still very limited to such obvious mistakes that it does not warrant in-depth exploration of the grounds upon which the decision was reached.⁹⁷ Thus, the just and fair result in arbitration can be seen as largely based upon the recognition by the parties and the arbitrators of the importance and characteristics of just procedures and adherence to these procedures.

Such an obvious difference is certain to raise questions among critics of arbitration as to the ability to truly guarantee fairness of the process without an avenue for substantive review and only a limited avenue for procedural review by the judiciary (or an appellate arbitral body). However, the examples that follow demonstrate that the existing procedures for ensuring procedural fairness are not only comprehensive and effective, but are successful in achieving the degree and quality of justice suited for the private, business-oriented nature of international commercial arbitration. Given that arbitration aims at speed and efficiency, substantive review is unsuitable for an arbitration award and the limited judicial review of compliance with established procedures reflects the desire of the arbitrating public to settle disputes “efficiently

94. The FAA sets out the bases upon which an award may be vacated as follows:

(a)

(1) where the award was procured by corruption, fraud, or undue means.

(2) where there was evident partiality or corruption in the arbitrators, or either of them.

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (2000 & Supp. II 2002).

95. *See id.*

96. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

97. *See supra* Part III.

and avoid long and expensive litigation.”⁹⁸ That goal fails if extensive substantive review is undertaken and arbitration becomes “merely the first step in lengthy litigation.”⁹⁹

1. Due Process Safeguards

A widely discussed topic in modern international arbitration is the tension between due process rights and the private nature of arbitration.¹⁰⁰ Critics of arbitral autonomy would posit that, while arguably a private process, arbitration still has to be subject to some extent of due process protection.¹⁰¹ However, the involvement of public courts at the enforcement stage guarantees that an award is reviewed with due process requirements.¹⁰² But what about the awards that are either voluntarily complied with or settled without judicial enforcement?¹⁰³ And even beyond that, are there processes inherent in international commercial arbitration which can provide a guarantee of due process comparable to that of domestic constitutional guarantees present in the judicial system but suited for the unique nature of international arbitration?

The New York Convention provides some answers with its explicit due process guidelines. Specifically, Article V(1)(b) allows for refusal of enforcement of an award on the grounds that a party “was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present [its] case.”¹⁰⁴ This is an opportunity for a party to be heard when it was denied a fair hearing or due process, when, for instance, the tribunal failed to treat the parties equally.¹⁰⁵ These defenses are intended precisely to safeguard the parties against injustice and to serve a function similar to that of due process guarantees in litigation.¹⁰⁶ However, there is little reason to understand

98. *Folkways*, 989 F.2d at 111.

99. *Nat'l Bulk Carriers, Inc. v. Princess Mgmt. Co.*, 597 F.2d 819, 825 (2d Cir. 1979).

100. KURKELA, *supra* note 60, at 7, 35-64.

101. *See id.* at 36.

102. *See Reuben, supra* note 75, at 1282.

103. *See Phillip J. McConaughay, The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 456 (1999); Naimark & Keer, *Post Award, supra* note 17, at 96.

104. New York Convention, *supra* note 50, at art. V(1)(b).

105. GARNETT ET AL., *supra* note 24, at 104; William W. (Rusty) Park, *Award Enforcement Under the New York Convention*, in 1 INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 573, 587 (2003) (“[This] first group of defenses includes an invalid arbitration agreement, lack of opportunity to present one’s case, arbitrator excess of jurisdiction and irregular composition of the arbitral tribunal.”).

106. *See id.* at 587.

these functions as an invitation to import judicial or constitutional standards of due process.¹⁰⁷

Additionally, a current trend in international arbitration is toward multi-party arbitration, encouraging the inclusion of all parties involved in the transaction in the full hearing by the tribunal.¹⁰⁸ As courts traditionally may be restrictive toward inclusion of third parties, multi-contract arbitration leads to efficiency, inclusion of all relevant parties and facts, subsequent improvement in consideration of due process and, ultimately, more fairness in arbitral proceedings.¹⁰⁹ While multi-party arbitration can create and complicate due process issues by introducing additional parties and evidence, it is still one of the important trends in modern international commercial arbitration that serves the needs of the commercial public by creating arbitration-specific procedures and maintaining the viability of the process.¹¹⁰

2. Role of Arbitrators

Arbitrator impartiality and independence are the cornerstones of procedural justice in arbitration due to, among other things, the autonomy that the parties enjoy in choosing the arbitrator and the very limited review to which arbitrators' decisions may be subjected.¹¹¹ Thus, a multitude of rules and restrictions exist in arbitration, guaranteeing that arbitrators entrusted with rendering a virtually final award are impartial and independent. Impartiality certainly does not stem from an arbitrator's lack of familiarity with the industry, the subject matter, or even the parties' business.¹¹² In fact, arbitrators are often chosen for their exposure to and expert knowledge of the specific area of industry and trade out of which the dispute arises.¹¹³ Rather, impartiality and independence are a state of mind that allow the arbitrator to conduct proceedings even-handedly and to reach a judgment solely on the basis

107. *See id.* at 587-88.

108. Jose Ricardo Feris, Counsel, Secretariat of the International Court of Arbitration, "International Arbitration: Current Trends" panel at International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 5, 2007) (on file with author).

109. *Id.*

110. Fabiola Medina Garnes, ICC International Court of Arbitration, *Tendencias del Arbitraje Internacional en los países del DR-CAFTA* at International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 5, 2007) (on file with author).

111. *See* Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 504-12 (2006).

112. *See* PETROCHILOS, *supra* note 65, at 131-32.

113. *Id.* at 132.

of relevant facts and law without preference or bias to either party¹¹⁴—precisely what is required of the arbitrator in achieving the result that is both procedurally and, more likely than not, substantively just. In achieving such a just award, an effective system of selection of neutral arbitrators decreases undue delays, challenges, and the setting aside of the awards.¹¹⁵

To that end, and despite the fact that arbitration is clearly distinct from litigation, arbitrators are under a duty to act judicially.¹¹⁶ This is a clear but careful import of judicial standards into the process of arbitration, conducted with care so as not to compromise the nature of arbitration. The arbitrator's duty to act judicially includes, for example, the duty to respect the rules of due process—an obligation more binding than a mere norm of morality.¹¹⁷ This duty extends to all aspects of the proceedings and is acknowledged by the UNCITRAL Model Law¹¹⁸ and the ICC Rules.¹¹⁹

In addition to the duty to act judicially, arbitrators may be bound by duties imposed by parties.¹²⁰ This opportunity is especially valuable to a party concerned with arbitrator autonomy and uncertain that an arbitrator will be sufficiently impartial and just. Parties may stipulate specific duties they wish to impose upon an arbitrator in their arbitration

114. *Id.*; see also TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 265-66 (3d ed. 2006) (Explaining that neutrality and impartiality are not synonymous, but rather neutrality is a sign or indication of likely impartiality. Neutrality is often discussed in two aspects: personal, supposing the absence of family or business ties to the dispute, and general, relating to group affiliation, such as nationality, religion, or ethnic background. Parties are usually sensitive to both aspects of neutrality in assessing an arbitrator's impartiality.).

115. See Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 65 (1995).

116. REDFERN ET AL., *supra* note 11, at 245-46.

117. *Id.* at 245.

118. UNCITRAL Rules at Article 15 delineates familiar norms of due process and imposes them as an affirmative duty upon arbitrators:

1) Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2) If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

UNCITRAL Rules, *supra* note 41, at art. 15.

119. ICC Rules of Arbitration, *supra* note 40, at art. 15(2).

120. REDFERN ET AL., *supra* note 11, at 238-39.

agreement at the contracting stage, and may indicate requirements such as rendering an award within a certain time frame, adhering to certain institutional rules, or requiring inspection of a subject of arbitration (especially relevant in disputes relating to construction contracts).¹²¹ Moreover, arbitrators may be liable to parties for failure to fulfill duties stipulated in the arbitration agreement.¹²²

Good faith is also required of arbitrators in international commercial arbitration. In contract law, good faith is a well-established principle¹²³ and is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”¹²⁴ Indeed, the ICC has recognized the importance of implying the duty of good faith in its arbitration proceedings in order to not only create the perception of fairness and justice of the institution but also achieve the goal providing just procedure.¹²⁵ For instance, Professor William Tetley argues that good faith is essential for effective arbitration process and award enforcement.¹²⁶ He defines good faith as “just and honest conduct” and argues that a clear link exists between good faith conduct and a just result to the extent that “[a]rbitration without good faith is not a viable alternative to proceeding before the courts.”¹²⁷

Another duty essential to the guarantee of a just process is the duty of loyalty that compels parties to act in a way to preserve the viability of

121. *Id.* (In discussing the ability of parties to impose a wide variety of duties upon arbitrators, the authors indicate that arbitrators must familiarize themselves with an arbitration agreement prior to accepting an appointment in order to ensure their ability to comply with all party imposed duties.)

122. *Id.* at 240. The duty is strong in Argentina, where arbitrators may be held liable for costs and damages in case of non-performance of their duties, whereas in England liability may be imposed only through a finding of bad faith. *Id.* at 241.

123. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 205 (1979).

124. U.C.C. § 1-201(20) (2005). For further discussion of good faith in contract law, see Steven J. Burton, *Good Faith in Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, 3 (1981) (arguing that a party that goes after opportunities forgone by entering into the contract in question acts in bad faith) and Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 820 (1982) (suggesting that a definition of good faith is best determined by conduct that is excluded rather than through a structured definition).

125. ICC Rules of Arbitration, *supra* note 40, at art. 15(2).

126. William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering*, 35 J. MAR. L. & COM. 561, 561 (2004) (“Viable arbitration requires that each party be in good faith; otherwise multiple proceedings, the questioning of every point of law, unnecessary procedures and appeals, inordinate delays and the resulting high costs only result in failure to arrive at a just solution in a reasonable time.”).

127. *Id.* at 563, 615.

the contract.¹²⁸ Lastly, the duty to uphold the integrity and fairness of the proceeding speaks directly to arbitrators' strong obligation to ensure the fairness of the arbitral proceeding and produce an award in compliance with requisite fairness.¹²⁹

This sampling of arbitrator duties demonstrates that the arbitral process has developed safeguards against arbitrator abuse of discretion and lack of care.¹³⁰ The contention of the critics that these safeguards are not sufficient when pitted against arbitrator immunity is certainly worth considering.¹³¹ However, this may be precisely the situation where the considerations specific to the commercial and private nature of arbitration are evidence that "controlled immunity" of arbitrators is maintained, instead of exposing arbitrators to liability beyond mere non-compliance with explicit duties. Indeed, one of the primary benefits of arbitration—finality of the award—would be completely compromised if the losing party to the arbitration could sue the arbitrator on a host of non-compliance or lack of care causes of action.¹³² Additionally, few arbitrators would be willing to take up the responsibility of arbitrating a dispute if their exercise of professional expertise and arbitral skill could easily expose them to liability.¹³³ Ironically, immunity (albeit, partial) may be one of the elements borrowed from the judicial system that is fit for application in international arbitration. However, as discussed above, while serving necessary practical needs, the immunity is severely limited by duties and safeguards imposed by parties, institutions, and the law.¹³⁴

3. The Substantively "Fair Result"

In arbitration, disputes are generally heard and determined with the assumption that the parties' primary goal is preservation of the

128. Larry A. Dimatteo et al., *An Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 316-17 (2004).

129. Gabriel & Raymond, *supra* note 71, at 458-59. Specifically, arbitrators are under a duty to prevent delaying tactics, harassment of the parties, and other disruptions. *Id.* More importantly, arbitrators must maintain impartiality and appearance thereof by avoiding any financial, business, professional, family, or social relationship with interested parties or their counsels. *Id.*

130. Duty of care is essentially implied in the duty of competency and ability to devote the requisite time and resources to arbitration. *Id.* at 457.

131. Knull & Rubins, *supra* note 76, at 533, 564; McConnaughay, *supra* note 103, at 453.

132. REDFERN ET AL., *supra* note 11, at 242.

133. *Id.* at 241.

134. Additional and more self-explanatory duties, beyond the ones discussed in the text, are the duty of competency, duty of independence and impartiality, duty of disclosure, duty to communicate, duty to act professionally, duty to render a decision, and duty to act in a fiduciary manner. GARNETT, *supra* note 24, at 81-89; Gabriel & Raymond, *supra* note 71, at 457-65.

relationship and contract continuation.¹³⁵ Substantive “correctness” is rarely discussed even at non-confidential stages (such as enforcement) in a traditional international commercial arbitration.¹³⁶ It is widely recognized that substantive review of an award is less critical to ensuring the validity of such award and the focus is largely on procedural fairness.¹³⁷ Indeed, many arbitrating parties and attorneys may incorrectly believe that arbitration is to be resolved in accordance with principles of substantive law.¹³⁸ Enforcement involves procedural review even though it ensures that the award becomes public.¹³⁹

However, even in the regime where review is primarily focused on procedural issues, substantive review is not a black hole into which fairness may be lost. In some extreme cases, although not universally, an arbitral award may be overturned if the enforcing court finds a “manifest disregard of the law.”¹⁴⁰ Thus, the situations of egregious behavior that are not corrected by the many procedural safeguards will be corrected at the enforcement stage through a substantive review for manifest disregard of the law. Critics of the theory of manifest disregard argue that it has little place in arbitration and, due to its non-statutory nature and vague origins, has become a “repository for all sorts of outlandish theories of arbitral misconduct, devised with but one aim in mind: the application of standards of appellate review to the arbitration process, and ultimately, to *vacatur* of a particular arbitral award.”¹⁴¹ While manifest disregard may not be a precise concept, its presence in arbitration combined with the narrow grounds of its application provides for an additional safeguard against arbitrator abuse—if all else fails—without completely subjecting arbitral awards to judicial review.

Lastly, the segregation of the substantive and the procedural law applicable to the dispute is a widely recognized cardinal element of international arbitration and is itself a safeguard against abuse of justice

135. Menkel-Meadow, *supra* note 72, at 1763.

136. *See supra* notes 95-99 and accompanying text.

137. Levin, *supra* note 16, at 108.

138. *Id.* at 107.

139. *See* McConaughay, *supra* note 103, at 468-69.

140. Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 235 (2007). “A party seeking to establish manifest disregard of the law sufficient to warrant setting aside an arbitral award must demonstrate that the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it.” *Id.* (citing *Cytec Corp. v. Deka Prods. Ltd.*, 439 F.3d 27, 35 (1st Cir. 2006)).

141. Marta B. Varela, *Arbitration and the Doctrine of Manifest Disregard*, DISP. RESOL. J., June 1994, at 64, 65.

in arbitral proceedings.¹⁴² This insulation illuminates the fact that the arbitral process is independent of the system of law that regulates the rights and obligations of the parties in regard to their substantive agreement.¹⁴³ This allows for the arbitrators applying the law that parties chose to govern the procedure of their dispute to focus solely upon the proper, just, and fair application of the rules, independent of the factual substance of the dispute.¹⁴⁴

4. The Appearance of Fairness

Arbitrators' established duty to uphold the integrity and fairness of the proceeding¹⁴⁵ is not merely a duty to arbitrate fairly but also to give the appearance of doing so.¹⁴⁶ While an arbitrator is naturally required to exercise his authority completely and to comply with all the provisions of the agreement and the institutional rules, it is also essential that no "appearance of bias," impropriety, or partiality is created.¹⁴⁷

As the IBA rules indicate, the appearance that fairness and justice is vigorously pursued by arbitrating authorities is no less important to the spread and legitimacy of international arbitration than the pursuit itself. Thus, a functional system needs to have a thorough understanding of what spells out fairness and justice for the participants. Perhaps the fact that parties participate in international commercial arbitration at an

142. *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation* [1970] A.C. 572, 573 (H.L.) (U.K.) (Although the parties agreed that the arbitration would be governed by English law, French law governed the substance of the dispute due to the fact that it was more closely connected with the contract.); see GARNETT ET AL., *supra* note 24, at 5.

143. OKEZIE CHUKWUMERIJE, *CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 77 (1994). An international commercial arbitration dispute can potentially involve four levels of law:

(1) the law applicable to the arbitration agreement . . . (2) the law applicable to the reference, which governs the individual reference to arbitration; (3) the law applicable to the arbitration proceedings, which regulates the conduct of the arbitration proceedings; and (4) the law applicable to the substance of the dispute, which determines the rights and obligations of the parties in relation to their substantive contract.

Id. at 77.

144. See GARNETT ET AL., *supra* note 24, at 4-5.

145. *Id.* at 83.

146. International Bar Association Rules of Ethics for International Arbitrators R. 2-3 (1986), available at http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf [hereinafter IBA Rules of Ethics]; GARNETT ET AL., *supra* note 24, at 83.

147.

Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure.

IBA Rules of Ethics, *supra* note 146, at R. 3.2.

increasing rate means that they perceive fairness and justice is present. Is it safe to assume that the increasing popularity of commercial arbitration is a sign that fairness is being achieved? Can we further assume it is what the parties want and the trends discussed above as evidence of fairness and justice are indeed working?

These trends are only the few examples of where a careful balance between arbitral idiosyncrasies and the pursuit of fairness and justice has been worked out by years of practice. Such examples abound and the increasing popularity and appeal of international arbitration to commercial actors is clear evidence that this method of dispute resolution is serving the needs of the arbitrating public well. The following Part builds upon the importance of imposing duties on arbitrators which contribute tremendously to the guarantee of fairness in arbitration.

B. *Ethics of Arbitration*

In addition to specific duties imposed on arbitrators by the parties or by the law, arbitrators are bound by certain moral and ethical obligations.¹⁴⁸ This is an additional safeguard against arbitrator abuse of discretion and an additional assurance to a skeptical party that the arbitral process is conducted with integrity and accountability. One of these duties, as mentioned above, is preemptive in that arbitrators may not accept a nomination if they lack expertise or requisite time and resources necessary to conduct the arbitration properly.¹⁴⁹

Commentators have argued about consolidation of various ethical obligations in different arbitrating forums into some form of an internationally accepted "code of conduct."¹⁵⁰ This was achieved in the United States where the American Arbitration Association/American Bar Association ("AAA/ABA") Code of Ethics for Arbitrators in Commercial Disputes¹⁵¹ was introduced in 1977 and modified in

148. REDFERN ET AL., *supra* note 11, at 246; Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 951 (2002).

149. Gabriel & Raymond, *supra* note 71, at 457.

150. REDFERN ET AL., *supra* note 11, at 246.

151. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at http://www.abanet.org/dispute/commercial_disputes/pdf; Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained*, DISP. RESOL. J., Feb.-Apr. 2004, at 10, 11.

2004.¹⁵² The international equivalent of the AAA/ABA Rules is the IBA Rules of Ethics for International Arbitrators¹⁵³ and IBA Guidelines on Conflict of Interests.¹⁵⁴ Additionally, the FAA and The New York Convention have a universal standard for vacating an award on the basis of an ethical violation.¹⁵⁵ The ICC Rules of Arbitration also require arbitrator independence and adherence to the institutional rules.¹⁵⁶

Commentators agree that arbitration, and alternative dispute resolution in general, is an integral (albeit, distinct) part of the judicial landscape and, as ethical norms go a long way toward ensuring just and fair judicial decisions, such norms must play an equally important role in rendering arbitral awards.¹⁵⁷ A pursuit of justice through rigorous ethical rules is an effective way of ensuring the legitimacy of arbitration and propagating its autonomy.¹⁵⁸ As the use and popularity of international arbitration grows exponentially, the need for definitive ethical standards is critical for preservation of the legitimacy of the process and fairness of awards.¹⁵⁹ It is precisely for the determination of the fairness of an award that uniform ethics rules coined especially for arbitration but similar to those in a judicial system exist.¹⁶⁰

Recent United States case law on international arbitrator ethics is particularly useful to illustrate the effective and often stringent ethical norms by which arbitrators must abide. The case law draws on a vast body of laws and rules regulating the issues of arbitrator ethics.¹⁶¹ The

152. One of the main modifications did away with the purely American presumption that arbitrators are presumed non-neutral and yielded to the international and European presumption of fully neutral tribunals. Meyerson & Townsend, *supra* note 151, at 12.

153. IBA Rules of Ethics, *supra* note 146.

154. IBA Guidelines on Conflict of Interest in International Commercial Arbitration (2004), available at http://www.ibanet.org/images/downloads/Arbitration_guidelines_2007.pdf.

155. In the United States, the FAA provides a legal standard to vacate award “[w]here there was evident partiality or corruption in the arbitrators, or either of them.” 9 U.S.C. § 10(a)(2) (2000).

156. ICC Rules of Arbitration, *supra* note 40, at art. 7(1) (“Every arbitrator must be and remain independent.”). An arbitrator must disclose any such facts or circumstances as might call into question his independence in the eyes of the parties. *Id.* at art. 7(2).

157. John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U. L. REV. 907, 908 (2002).

158. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 408 (1997) (“It is almost as if we thought that anyone who would engage in ADR must of necessity be a moral, good, creative, and, of course, ethical person. That we are here today is deeply ironic and yet, also necessary, as ‘appropriate’ dispute resolution struggles to define itself and insure its legitimacy against a variety of theoretical and practical challenges.”).

159. *Id.*

160. *Id.* at 409.

161. Do United States arbitration cases matter? According to Louis B. Kimmelman, they do because of the abundance of situations where foreign parties arbitrate or, more frequently, seek to

requirement for impartiality is derived directly from the FAA, which states that a court may vacate an arbitral award upon application by any party “[w]here there was evident partiality or corruption in the arbitrators.”¹⁶² The New York Convention also provides for refusal of enforcement if the arbitral procedure is not conducted in accordance with the party agreement.¹⁶³ The ICC Rules of Arbitration also heavily influence United States arbitral decisions, especially Article 7(1), requiring arbitrator independence, and Article 7(2), requiring disclosure.¹⁶⁴ Applying the FAA, the District Court vacated an award in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.* when an arbitrator failed to disclose that at least seven years ago he had been one of the thirty-four attorneys representing Intel in a prior litigation along with an attorney representing one of the parties in the arbitration in question.¹⁶⁵ The Fifth Circuit affirmed the vacatur on the grounds that the prior relationship may have conveyed an impression of possible partiality to a reasonable person.¹⁶⁶ While the Fifth Circuit (*en banc*) then reversed the award, deeming the prior relationship “trivial,” five judges dissented from the decision.¹⁶⁷ Such a close decision is clear evidence that even such remote and arguably trivial indication of impartiality imposes a danger of vacatur on the award and encourages close to impeccable impartiality from arbitrators. The same year, a similarly trivial undisclosed relationship resulted in a vacatur of an

enforce awards in the United States. Louis B. Kimmelman, Recent Developments in Ethical Considerations in International Arbitration, at International Commercial Arbitration in Latin America: The ICC Perspective Conference (Nov. 5, 2007) (on file with author).

162. 9 U.S.C. § 10(a)(2) (2000).

163. New York Convention, *supra* note 50, at art. V(1)(d). Also relevant here is the opportunity to challenge an award and hold arbitrators liable for non-compliance with the party imposed duties. *See supra* notes 137-39 and accompanying text.

164. *See supra* Part III.

165. 476 F.3d 278, 280 (5th Cir. 2007) (*en banc*).

166. *Id.* The only United States Supreme Court case to articulate evident partiality is *Commonwealth Coatings Co. v. Continental Casualty Co.*, 393 U.S. 145, 147-50 (1968), which was decided before the United States’ ascension to the New York Convention and is the primary basis for the interpretation of subsequent cases on arbitrator partiality under the FAA. John Rooney, Historical Overview of the Arbitrator’s Duty to Disclose under United States Federal Arbitration Law 3, 24 (Nov. 4, 2007) (unpublished manuscript, on file with author). The vagueness of the United States standard for arbitrator partiality is ripe for consideration by the Supreme Court and, until then, understanding of the law developed by the lower courts is key to interpretation of the standard presented in the FAA. *Id.* at 29; *see also* *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (where, for the first time in United States case law, facts that *might* create an impression of bias were sufficient for vacatur).

167. *Positive Software Solutions*, 476 F.3d at 283, 286.

arbitral award by the Second Circuit.¹⁶⁸ In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, an arbitrator failed to investigate the negotiations his company was involved in with the parent of one of the parties to the arbitration, as the arbitrator planned not to be involved in the negotiations.¹⁶⁹ The Second Circuit found evident partiality in the potential business relationship between his company and one of the parties.¹⁷⁰ Thus, *Applied Industrial Materials* introduces a duty to investigate a potential conflict, therefore increasing arbitrator responsibility to remain impartial and independent and render decisions compliant with procedural fairness.¹⁷¹

An even higher standard for arbitrator impartiality is enunciated in a decision by the Dutch District Court of The Hague, in which an arbitrator had to resign as counsel to an unrelated party in a proceeding to annul an award that was introduced as precedent in the arbitration in question.¹⁷² Another decision that similarly indicates the high threshold arbitrators must clear to preserve their impartiality and successfully withstand challenges comes from the Swedish Supreme Court of Appeal in Stockholm.¹⁷³ Relying strongly on the international norms of arbitrator impartiality, the court decided that the chairman of the arbitral panel, who was simultaneously a consultant to the law firm that served the parent company of the one of the parties to arbitration, should have been disqualified.¹⁷⁴

If the arbitrators are considered to be the cornerstone of the arbitral process, the variety and rigor of the duties imposed upon them is to be expected. More importantly, the severe limitations on the conduct of arbitrators should be sufficient to convince the staunchest critics that, while the awards rendered may be non-appealable and colored with the arbitrator's understanding of the dispute (with which they likely have a deep familiarity), the safeguards on arbitrator conduct and ethics are

168. *Applied Indus. Materials Corp. v. Oalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 139 (2d Cir. 2007).

169. *Id.* at 135.

170. *Id.* at 137-39.

171. *Id.* at 138.

172. Vera van Houtte et al., *What's New In European Arbitration?*, DISP. RESOL. J., Feb.-Apr. 2005, at 6; see *Hague District Court Dismisses Ghana's Challenge of Arbitration*, MEALEY'S INT'L ARB. REP., Jan. 2005, at 7-8; Kluwer Law Int'l Newsletter, <http://www.kluwerarbitration.com/arbitration/Newsletter.aspx?month=december2004> (last visited Sept. 16, 2008).

173. Hans Bagner, *Arbitrator Impartiality—The End Result*, MEALEY'S INTL. ARB. REP., Nov. 2007, at 21. The rarity of such occurrences in Sweden should be noted: Between 1999 and 2007, only four decisions of the Court of Appeals have been granted the right to an appeal to the Swedish Supreme Court. *Id.*

174. *Id.* at 22.

optimal and sufficient for the international commercial arbitration setting.

C. *Social Considerations and Public Policy*

There is a bias toward enforcing awards under the New York Convention¹⁷⁵ with the effect that any defenses to enforcement provided by the Convention are construed narrowly and only accepted in specific cases.¹⁷⁶ For instance, a narrow construction of the public policy exception¹⁷⁷ to the New York Convention pro-enforcement bias is denial of enforcement of only such an award that violates the “most basic notions of morality and justice”¹⁷⁸ of the nation where enforcement is being sought. Similarly, in Argentina, for instance, all arbitral proceedings and awards, foreign or domestic, must comport with “essential principles of fairness and justice which are a part of . . . public policy.”¹⁷⁹ While rarely applied, the existence of grounds for setting aside an award based on the enforcing nation’s conception of justice speaks to the arbitrating public’s appreciation of the need for awards that satisfy the legal community and public at large.¹⁸⁰

A more frequently applied exception to enforcement of foreign awards under the New York Convention is set forth in Article V(2)(b)¹⁸¹

175. The New York Convention is the primary legal basis for enforcing awards in international commercial arbitration. GARNETT ET AL., *supra* note 24, at 101.

176. See generally ARTHUR JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981) (discussing the enforcement of arbitration awards and the various grounds for refusing enforcement).

177. New York Convention, *supra* note 50, at art. V(2)(b).

178. *Parsons & Whittemore Overseas Inc. v. Societe Generale De L’Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

179. Horacio A. Grigera Naón, *Public Policy and International Commercial Arbitration: An Argentine View*, in *COMPARATIVE ARBITRATION: PRACTICE AND PUBLIC POLICY IN ARBITRATION* 329, 329 (Pieter Sanders ed. 1987).

180. *Paklito Inv. Ltd. v. Klockner E. Asia Ltd.*, [1993] 2 H.K.L.R. 39 (H.C.) (while the court does not find counsel’s public policy relevant, it explicitly endorsed the *Parson & Whitmore* standard).

181. The New York Convention, *supra* note 50, at art. V(2)(b) (recognition and enforcement of an arbitral award may be refused if it would be “contrary to the public policy” of the country where recognition is sought). Commentators argue that the list of defenses set out in Article V is exhaustive and there is no residual discretion to refuse award where no ground under Article V is found. GARNETT ET AL., *supra* note 24, at 111. Article V refusal grounds are as follows: (a) An agreement is not valid under the law to which the parties have subjected it or under the law of the country where the award was made; (b) The party against whom the award is enforced was not provided with notice of the appointment of the arbitrator or the proceedings or was otherwise unable to present his case; (c) The award deals with an inarbitrable matter; (d) The composition of the arbitral authority or the arbitral procedure was not agreed to by the parties, or was not in compliance with the law of the country where the arbitration took place; (e) The award was set aside or

and applies when the award violates the public policy of the enforcing country.¹⁸² Grounds that have been found to satisfy this provision of the Convention range from harm to the enforcing countries' national interests or decisions "obnoxious to internationally accepted standards."¹⁸³ Such conduct is present where an award is tainted by fraud, corruption, involves criminal conduct, or some other internationally offensive act.¹⁸⁴ Absence of due process or procedural fairness is arguably the most successful basis for impeaching the award using the public policy exception, followed by lack of arbitrator impartiality.¹⁸⁵ However, in terms of arbitrator partiality, only actual bias (as opposed to the "appearance of bias") would satisfy the burden under the New York Convention.¹⁸⁶

Another important ground for refusing enforcement of an award is the inarbitrability of the subject matter in dispute, but this defense is likely to be raised at the initial stages in arbitration when parties challenge the tribunal's jurisdiction to hear a dispute on a certain subject matter.¹⁸⁷ However, the challenge to the jurisdiction of a tribunal on the grounds of inarbitrability has become less significant in recent years as national interests have given way to considerations of uniformity and international comity.¹⁸⁸ Such relaxation of the inarbitrability limitation shows the growing deference of the legal and business community to arbitration and faith in the ability of arbitration to effectively provide fair resolutions to such sensitive matters as statutory and antitrust claims.¹⁸⁹ Nevertheless, the New York Convention retains as an additional

suspended by a competent authority. Enforcement may also be refused if the award is inarbitrable under the laws of the enforcing country or is contrary to the public policy of that country. New York Convention, *supra* note 50, at art. V(1).

182. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305-06 (5th Cir. 2004).

183. However, caution is to be exercised not to confuse domestic and international public policy. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517-18 (1974). The United States Supreme Court held that, while matters arising out of domestic securities transactions may not be arbitrated, when the contract is international, such disputes are arbitrable. *Id.* at 519-20.

184. GARNETT ET AL., *supra* note 24, at 109.

185. *Id.* at 110.

186. *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F. Supp. 948, 955 (S.D. Ohio 1981) (finding the mere existence of a prior relationship between a party and an arbitrator unlikely to satisfy the New York Convention standard).

187. *See* GARNETT ET AL., *supra* note 24, at 108.

188. *Id.* It is repeatedly emphasized in United States case law that the Congressional interest in encouraging international trade and commerce through arbitration of transnational disputes, evidenced by the United States' accession to the New York Convention, is to prevail over any concern that such matters were intended to be specifically reserved for judicial resolution. *Id.*

189. Levin, *supra* note 16, at 105-06.

safeguard, grounds for refusal to enforce an award dealing with a subject matter that is deemed inappropriate for arbitral dispute resolution and should be left to national courts.¹⁹⁰

The review of the above safeguards of fairness present in the processes of international commercial arbitration clearly answered in the negative the second question presented at the beginning of this Part. Namely, arbitral processes provide sufficient procedural safeguards to guarantee a degree of fairness that is satisfactory to the primary users of international commercial arbitration and, often, the legal community and the public at large.

The first question—also answered here in the negative—is whether arbitration can be modeled after a judicial system and still retain its viability and appeal. Whether or not international commercial arbitration can be left to develop as a distinct dispute resolution method evolving in response to the needs of its commercial users or whether it has to yield to the pressure of the legal community at large and adopt grand standards of judicial fairness can be reduced to the question of whether finality in arbitration should be sacrificed to a guaranteed opportunity to appeal an arbitral award. Finality—the lack of appeal on the merits of the dispute—and corresponding speed and cost savings, is a recognized advantage of arbitration over litigation.¹⁹¹ Naturally, critics of arbitral finality argue that finality is only desirable if arbitrators never made mistakes.¹⁹² However, it is not the contention of this Note that the process of arbitration is flawless or even superior to litigation. It is merely the more suitable method of dispute resolution in the business context precisely for its inherent attributes such as finality. The compromises in judicial precision made in the interests of commercial expedience are both necessary results of decades of practical application and are also safeguarded by the multitude of duties and requirements placed upon arbitrators.¹⁹³ Indeed, the principal benefit of international commercial arbitration is its “lawlessness, its ability because of its unrestrained flexibility to accommodate the enormous procedural, presentational, and decisional standard differences that typically exist among parties to multinational [commercial] transactions.”¹⁹⁴ This is

190. New York Convention, *supra* note 50, at art. V(2)(a).

191. Knull & Rubins, *supra* note 76, at 531.

192. James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 10-11 (2004); Knull & Rubins, *supra* note 76, at 531.

193. See *supra* Part III.

194. McConnaughay, *supra* note 103, at 522.

natural in a process that is contractually established and regulated according to the rational preference of commercial parties willingly submitting future disputes to arbitration.¹⁹⁵

As an additional safeguard to integrity of arbitral awards, both the UNCITRAL and ICC Rules provide for an opportunity to correct clerical, typographical, or computational errors.¹⁹⁶ Review beyond such mechanical errors, authorizing the tribunal to alter its determination on the merits, is incompatible with the nature of international commercial arbitration.

V. CONCLUSION

Arbitration is distinct from litigation and should remain that way in order to preserve its viability and continue serving its indisputably necessary purpose. Arbitration is an alternative method of dispute resolution to legal proceedings, following different rules and serving different ends. Arbitration and litigation “are as distinct in their elementary structure as dirt is to water. Mixing the two only produces mud—not the sort of stuff we willingly tread in.”¹⁹⁷

Given the well-developed safeguards for the fairness and integrity of arbitral awards, the landscape of international arbitration is changing in response to the needs of its primary users. These changes are effective and will continue as long as “the current trend toward less interaction between judge[s] and arbitrator[s] . . . reduces judicial meddling in the legal merits of a dispute.”¹⁹⁸ These changes include improvement of arbitration—specific procedures that serve the pursuit of fairness and justice in arbitration but do not and should not include movement towards the system of mandatory arbitral appeal or towards restricting the judicial *laissez-faire* attitude toward arbitration.¹⁹⁹

While the pursuit of fairness and justice is a laudable (and perhaps, necessary) endeavor, justice as we understand it in a philosophical and

195. *Id.* at 453 (discussing international commercial arbitration as the resolution of disputes “within the contractual prerogative of the parties.”); Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 42 (1982) (International commercial arbitration is “based on contract, rather than on legal norms established by states for the creation of judicial settlement of disputes.”).

196. UNCITRAL Rules, *supra* note 41, at art. 36(1); ICC Rules of Arbitration, *supra* note 40, at art. 29(1).

197. Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co., 82 Cal. Rptr. 2d 16, 18 (Ct. App. 1999).

198. William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 705 (1989).

199. Thomas E. Carbonneau, *The Exercise of Contract Freedom in Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1193 (2003).

judicial sense is incompatible with the private nature of international commercial arbitration. Whatever steps are being taken to achieve the perception of fairness of arbitral process and awards in both the arbitrating public and the legal and commercial community at large could chip away at the privacy, flexibility, and appeal of commercial arbitration. Striking a balance between the necessary private nature of arbitration and the public nature of justice discussed and illustrated above is a difficult undertaking. However, through education of the legal community and the public at large about the specificities and benefits of arbitration, as well as through the continued pursuit of the effective safeguards already present in arbitration, such successful balance can inevitably emerge. Most importantly, utmost care must be exercised in advocating and implementing the potentially desirable changes to arbitration in order to preserve arbitration and its benefits as a process distinct from judicial dispute resolution and maintain its appeal to the worldwide business community.

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