

The Evolution and Future of International Arbitration

Edited by

Stavros Brekoulakis

Julian D.M. Lew

Loukas Mistelis



Wolters Kluwer

TABLE OF CONTENTS

Preface	xvii
Opening Speech at the SIA30 Anniversary Conference <i>Julian D M Lew</i>	xix
I. Conference Arrangements	xix
II. The Definition of International Arbitration as Different from National Arbitration	xx
III. Development of International Arbitration Instruments and Law	xxi
IV. Preference for Arbitration by International Business	xxii
V. Changes to Political and Economic Affiliations and Power	xxii
Chapter 1	
Introduction: The Evolution and Future of International Arbitration <i>Stavros Brekoulakis</i>	1
I. The Beginnings	1
II. The Evolution	5
III. Future Challenges	12
IV. Conclusion	20
Chapter 2	
Paradigmatic Changes – Uniformity, Diversity, Due Process and Good Administration of Justice: The Next Thirty Years <i>Filip De Ly</i>	21
I. Introduction	21
II. The Sources: Uniformity and Divergence	21
A. Regulatory Competition	21
B. Uncitral Model Law	22
C. Non Model Law Countries	22
D. Regionalisation of Arbitration Law?	23
E. New York Convention	24
F. Soft Law: Rules and Guidelines	25
G. Conclusion	27
III. General Principles: Due Process and Good Administration of Justice	27
A. Introduction	27
B. Statutory Developments and Expeditionousness	27
C. Arbitration Rules and Expeditionousness	29
D. Expeditionousness as a New Principle	31
E. Fair Trial as Another Emerging Principle	35
IV. Conclusions	38
Chapter 3	
Document Production, Witness Statements, and Cross-Examination: The Enduring Tensions in International Arbitration <i>Laurence Shore</i>	39
I. Introduction	39
II. Document Production	41

III. Witness Statements	41
IV. Cross-Examination	44
V. Conclusion	44
 Chapter 4	
Evolution of Case Law in International Arbitration	47
<i>Sébastien Besson</i>	
I. Introduction and Scope of the Topic	47
II. Role and Importance of Case Law in International Arbitration	47
III. Accessibility of Case Law and the Need for Restatements, Syntheses and (Over)-Simplifications	51
IV. Common Trends and Variety in Case Law from a Comparative Law Perspective – a Digression on Dallah	53
V. Concluding Remarks	56
 Chapter 5	
A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms	59
<i>Luke Nottage</i>	
I. Introduction	59
II. Back to the Future for International Arbitration	60
III. Looking East	63
IV. The Rise and Possible Fall of Investment (Treaty) Arbitration	69
V. Conclusion: Mainly Sunny, Some Clouds and Possible Thunderstorms	73
 Chapter 6	
The Concept of Seat in the New York Convention and the Autonomy of Arbitral Award	79
<i>Stefan Kröll</i>	
I. Introduction	79
II. The Enforcement Regimes for Foreign Awards	80
A. International Obligations and National Laws	80
1. Developments of the International Regime	80
2. Relationship of the International Regimes with the National Enforcement Regime	82
B. Examples from Case Law	83
1. The German Supreme Court's Refusal to Enforce an Annulled Ukrainian Award	83
2. The Amsterdam Court of Appeal's Enforcement the Annulled Yukos Award	84
3. The <i>Putrabali</i> Decisions of the French Cour de Cassation	85
C. Evaluation of the Different Views	86
1. Spectrum of Approaches	86
2. Classification of Approaches	87
D. Legal Admissibility of the Various Approaches	88
III. Necessity of Recognition of the Annulment Decision under General Rules?	89
IV. Existence of Discretion under Article V?	89
V. Advantages and Disadvantage of the Various Approaches	91
A. Strict Territorial Approach	91

B. ‘Westphalian Approach’	92
C. Internationalist View	92
VI. Guidelines for Exercising the Discretion	93
VII. Conclusion for the Question of an Autonomous Concept	95
Chapter 7	
The Use of Investor-State Arbitration as a De Facto Enforcement Mechanism for Arbitral Awards	97
<i>Andrea K. Bjorklund</i>	
I. Introduction	97
II. The Legal Characterization of an Award	98
A. The Reception of the Notion of Awards as Investments by Investment Tribunals – or – Can Awards Qualify as Investments?	99
1. Saipem v. Bangladesh	99
2. ATA v. Jordan	102
3. Frontier Petroleum v. Czech Republic	104
4. White Industries v. India	105
5. GEA Group Aktiengesellschaft v. Ukraine	106
6. Romak SA v. Republic of Uzbekistan	108
III. The Assessment of the Existing Case Law on the Qualification of an Award as an Investment – or – How Awards Can Qualify as Investments	109
A. The Holistic Nature of Investments	109
B. The Autonomous Award	111
IV. The Political Impact of Qualifying an Award as an Investment – or – Should Awards Qualify as Investments?	113
V. Conclusion	117
Chapter 8	
Parties in International Arbitration: Consent v. Commercial Reality	119
<i>Stavros Brekoulakis</i>	
I. Introduction	119
II. Non-signatory Theories in International Arbitration	122
A. Assignment	122
B. Third Party Beneficiary	125
C. Apparent or Ostensible Authority	127
D. Equitable Estoppel in Arbitration	129
E. The Intertwined Version of Equitable Estoppel in Arbitration	131
F. The “Group of Companies” Doctrine or Implied Consent	133
1. Legal Basis of the Doctrine	134
a. The Existence of a Close Group Structure	137
b. The Active Role of the Non-signatory Company in the Negotiations, Performance, or Termination of the Contract	139
c. Common Intention of the Parties to Arbitrate	141
G. Alter Ego and Lifting the Corporate Veil	142
III. Arbitral Consent and Non-signatory Theories	143
IV. A Different Approach to Non-signatories in International Arbitration	150
V. Conclusions	159

Chapter 9

The Swiss Perspective on Parties in Arbitration: “Traditional Approach With a Twist regarding Abuse of Rights” or “Consent Theory Plus”

Nathalie Voser

I.	Introduction	161
II.	Extension of an Arbitration Agreement to Non-signatories when the Seat of the Arbitral Tribunal Is in Switzerland	162
A.	Introduction	162
B.	The Basis: Article 178 SPILA	162
C.	Consent to Arbitrate and Interpretation of Arbitration Agreements under Swiss Law	163
1.	The Principles of Consent and Interpretation under Swiss Law	163
2.	Application to the Arbitration Agreement	164
3.	Supplementary Standards Applied by the Supreme Court	165
4.	Application of these Principles to Non-Signatory Parties	167
i.	Formal Validity	167
ii.	Substantive Validity	168
D.	Practice of the Supreme Court	168
1.	Group of Companies	168
	“Butec Case”	168
2.	Participation in Conclusion and/or Performance of the Contract	169
	“Lebanese Case”	170
	Bank as Financing Entity (“Czech Beer Case”)	170
	“Parent Guarantee”	171
	“Employment Contract and Rated Sales Contract for Shares of Company”	171
3.	Piercing the Corporate Veil	172
4.	Confusion about Spheres of Activity between Parent Company and Subsidiary	173
E.	Summary and Conclusion from Supreme Court’s Case Law	175
1.	Formal “Transfer” of Arbitration Agreement	175
2.	Implied or Constructive Consent	175
3.	Abuse of Rights/Principle of Good Faith and Principle of Reliance (“ <i>Rechtsscheinhaftung</i> ”)	175
F.	Has the Supreme Court Gone beyond the Consent Theory?	176
III.	Six Reasons Why We Should Not Depart from Standard Consent-based Theories	178
A.	Consent Is the Fundament of Arbitration and the Main Distinguishing Feature from State Court Proceedings	178
B.	Consent Theories Are Adequate and Sufficiently Flexible to Capture Situations Where Fairness Calls for the Inclusion of a Non-Signatory Party Even if There Are Differences in Various Jurisdictions	179
C.	The Scope of an Arbitration Agreement Is Not Relevant	180
D.	Users Want Simple Proceedings and Certainty	180
E.	Parties Are Usually Responsible and Sophisticated Entities	181
F.	Abuse of Rights Theories Can Take Care of Situations Where Consent Theories Cannot Assist and/or Need Adaptation	181
IV.	Conclusion	181

Chapter 10	
Third Party Non-Signatories in English Arbitration Law	183
<i>Audley Sheppard</i>	
I. Introduction	183
II. Statutory Context	184
A. English Arbitration Act 1996	184
B. Human Rights Act 1998	185
III. Accepted Contractual and Other Doctrines	185
A. Agency	186
B. Novation	187
C. Assignment	188
D. Operation of Law	189
E. Merger and Succession	189
F. Third Party Beneficiaries	190
IV. Rejected Approaches	192
A. Piercing the Corporate Veil and the Alter Ego Theory	193
B. Group of Companies	193
C. Implied Consent and Common Intention	194
D. Equitable Estoppel	195
E. Abuse of Rights	197
F. Shared Liability	197
V. Professor Brekoulakis's Thesis	197
Chapter 11	
Comments on Parties in International Arbitration: Consent v. Commercial Reality by Professor Stavros Brekoulakis	199
<i>John Fellas</i>	
I. Introduction	199
II. Current Non-signatory Theories	199
III. Shifting from Consent to Scope of the Dispute	204
IV. Conclusion	207
Chapter 12	
A French View On The Application of The Arbitration Agreement to Non-Signatories	209
<i>Philippe Pinsolle</i>	
I. Introduction	209
II. The Importance of the (Lack of) Formal Requirements for the Arbitration Agreement	210
III. What Is the Default Mechanism for Resolving Disputes in International Matters: State Courts or Arbitration?	212
IV. The Non-signatory's Involvement in the Performance or Termination of the Arbitration Agreement Is Generally Sufficient	213
V. Knowledge of the Arbitration Agreement, Actual or Imputed, Is Generally not Required	216

Chapter 13	
Parallel Proceedings Involving Objections to Arbitral Jurisdictions: A Closer Look at the Presumed Intention of the Parties	219
<i>Frédéric Bachand</i>	
I. Introduction	219
II. Jurisdictional Objections That Do Not Call into Question the Existence or Validity of the Arbitration Agreement	221
III. Jurisdictional Objections That Call into Question the Existence or Validity of the Arbitration Agreement	223
IV. Conclusion	230
Chapter 14	
Preclusion and the New York Convention: Article V(1)(e) and Converse-Article V(1)(e)	231
<i>Donald Francis Donovan</i>	
I. Introduction	231
II. The Effect of Decisions Annulling Arbitration Awards by Courts at the Juridical Seat	232
A. The Territorialist Approach	235
B. The Delocalized Approach	241
III. The Effect of Decisions Refusing Annulment or Confirming the Award at the Arbitral Seat	243
IV. Conclusion	249
Chapter 15	
Anti-Suit Injunctions and Other Means of Indirect Enforcement of an Arbitration Agreement	251
<i>Crina Baltag</i>	
I. Introduction	251
II. Anti-Suit Injunctions and Arbitration Agreements: Common Law v. Civil Law	252
III. <i>West Tankers</i> : The Fall of Anti-Suit Injunctions in Support of Arbitration	255
IV. Recast Brussels I Regulation: The Salvation of Anti-Suit Injunctions?	257
V. Alternatives to Anti-Suit Injunctions: Protecting the Arbitration Agreement	264
VI. Conclusion	267
Chapter 16	
National Court Review of Arbitration Awards: Where Do We Go From Here?	269
<i>Roman Khodykin</i>	
I. Introduction	269
II. Full Recourse against Awards	269
III. No Recourse to National Courts	270
IV. Challenging an Award in the Course of Enforcement	273
A. Option One: Exclusive Judicial Review by the Court of the Seat	274
B. Option Two: Exclusive Judicial Review by the Courts in the Country of Enforcement	274
C. Option Three: Review by an Independent International Body	275
D. Concluding Remarks	276
V. Challenge of an Award on a Limited Number of Grounds – Happy Medium?	276
A. Exhaust All Remedies against Award	277

B. Jurisdiction of Courts	277
VI. Party Autonomy	278
A. Parties' Ability to Exclude Grounds for Review	279
B. Parties' Ability to Expand Grounds for Review	283
C. Concluding Thoughts on Party Autonomy	285
Chapter 17	
Geography of International Arbitration – Where Does the Power Lie?	287
<i>Fidelis Oditah</i>	
I. Introduction	287
II. Developed Arbitral Centres	288
III. Emerging Arbitral Centres	289
A. Asia	289
B. Middle East and North Africa	291
C. Latin America	291
D. Sub-Saharan Africa	291
IV. Where Does the Power Lie?	292
V. Complaints of Emerging Economies	296
VI. New Areas of Growth	298
Chapter 18	
Expansion of Arbitral Subject Matter: New Topics and New Areas of Law	299
<i>Fan Kun</i>	
I. Introduction	299
II. Expansion of Arbitral Subject Matter and New Areas of Law	300
A. Human Rights to Water	300
1. Residents v. Polluting Corporations	303
2. Corporations v. States	306
B. Public Health	310
III. Potential Challenges Raised by the Expansion of Arbitral Subject Matter	311
A. Confidentiality v. Transparency	312
B. Private Interests v. Public Interests	314
C. Political Accountability	316
IV. Prospects	318
Chapter 19	
Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law	321
<i>Mohamed Abdel Raouf</i>	
I. Introduction	321
II. Diversification of the Available Arbitral Fora	322
A. Accessibility	322
B. Affordability	323
C. Familiarity	324
III. Promotion of Best Arbitral Practices	325
A. Efficiency	326
B. Cooperation	327
C. Innovation	329
IV. Conclusion	330

Chapter 20	
The Geography of International Arbitration – Places of Arbitration: the Old Ones and the New Ones	331
<i>Andrea Carlevaris</i>	
I. Introduction	331
II. The Evolution of the Place of Arbitration in ICC Arbitration	331
III. Conservatism in the Choice of the Place of Arbitration	333
IV. The Criteria for the Choice of the Place of Arbitration	334
V. Competition between Old and New Places of Arbitration	335
VI. Competition Among Established Seats of Arbitration	338
VII. Conclusions	340
Chapter 21	
Soft Law and Power	341
<i>Paul Friedland</i>	
I. Introduction	341
II. Soft Law	341
III. Conclusion	344
Chapter 22	
A New Approach to Regulating Counsel Conduct in International Arbitration	345
<i>Michael Hwang & Jennifer Hon</i>	
I. Issues within the Current Debate	345
II. The Actual Issues	347
A. Prophylactic/Preventive Sanctions	348
B. Remedial Sanctions	348
C. Punitive Sanctions	350
D. Recommended Solution	352
Chapter 23	
Conflicts Disclosures: The IBA Guidelines and Beyond	357
<i>Alexis Mourre</i>	
Chapter 24	
The Future of Science and Technology In International Arbitration: The Next Thirty Years	365
<i>Robert H. Smit</i>	
I. Introduction	365
II. The Pace of Technological Innovation: Science or Science Fiction?	366
III. On Telepresence, FMRI Lie-Detectors, and Universal Translation	367
A. Hearings by Holography and Other Forms of Telepresence	367
B. fMRI Neuroimaging of Witnesses for Lie-Detection	370
C. Universal Translation in Multi-Lingual Arbitrations	374
IV. Predicting the Future: of Computers and Cavemen	375

Chapter 25	
The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator	379
<i>Michael E. Schneider</i>	
I. Introduction: Two Remarkable Changes in the Last Thirty Years	379
II. Good Intentions: The Proposals for More Active Arbitrators	380
III. Rules Supporting Interactive Arbitrators	384
IV. The Reality of the Hands-off Arbitrator	385
V. A Sceptical View of the Future: Mock Arbitrators Replacing Feedback from the Real Tribunal	387
VI. Role Models for Arbitrators: The Impartial Referee vs. the Dispute Solver	388
VII. Gathering Evidence and Applying the Law: What Drives the Process?	390
VIII. Conclusion	391
Chapter 26	
Report: Teaching in International Arbitration	393
<i>Norah Gallagher</i>	
I. Introduction	393
II. Aim of an International Arbitration Programme	394
III. Methodology	395
IV. Proliferation of Specialist LLM Courses	398
V. Conclusion	398
Chapter 27	
Critically Thinking: International Arbitration in Context	401
<i>Jan Kleinheisterkamp</i>	
I. Introduction	401
II. The Arbitration Courses in the Broader Spectrum of the Master's Programme	401
III. Two Steps towards Mastering International Arbitration	402
A. Understanding the Fundamentals	402
B. Discussing International Arbitration at Master's Level	403
IV. The Role of Theory and Practice	404
A. Theory	404
B. Practice	404
V. Comparative Law and Conflict of Laws	405
VI. Conclusion	406
Chapter 28	
Constructing a "Suite" of International Arbitration Courses: Sample LL.M Course Descriptions and Some Factors to Consider	407
<i>Jack J. Coe, Jr</i>	
I. Introduction	407
II. Selected Trends in US Legal Education	407
III. Locating ICA in the Curriculum – ICA as Part of Other Courses	410
IV. The Role and Structure of LL.M Programs in General	410
V. ICA as Part of an Intensive Program – Variables and Assumptions	411
A. Prerequisites?	411
B. Common Professors, Common Syllabi?	412
C. Length and Intensity of Courses	412

The Evolution and Future of International Arbitration

D. Avoiding the Idiosyncratic	412
VI. Possible Specialty ICA Courses	413
A. ICA Theory and Doctrine	413
B. ICA Practice and Procedure	413
C. ICA and the Courts	414
D. Ethical Considerations in ICA	414
E. ICA Advocacy	415
F. Investor-State Disputes	415
G. ICA Institutions	415
H. International Disputes Process Design	416
VII. Inter-state Arbitration	416
VIII. Conclusion	416

Chapter 29

Most Effective Teaching Methodologies for International Arbitration: Traditional Teaching v. Experiential Teaching	419
<i>Christophe Seraglini</i>	

I. Introduction	419
II. Diverging and Sometimes Conflicting Methodologies for Teaching International Arbitration	419
A. The “Traditional Lecture” Methodology	420
B. The “Socratic” Method	421
C. The “Experiential Learning” Methodology	422
III. Teaching International Arbitration: An Opportunity to Reconcile Different Teaching Methodologies?	423
IV. Conclusion	424

Chapter 30

The Proliferation of Specialist LLM Programs – The Challenges They Present, The Development of Programs, Including Specialized Courses	427
<i>Patricia Shaughnessy</i>	

I. Introduction	427
II. Proliferation of Specialist LLM Programs	427
III. The Challenges of LLM Programs with Arbitration and Dispute Resolution Specialization	428
A. Standing Out in the Crowd	429
B. Costs versus Value	430
C. Increasing Income	432
D. Attracting Students	432
E. The Development of LLM Programs	433
IV. Conclusion	434

Chapter 31

International Arbitration Scholarship: Forms, Determinants, Evolution	435
<i>Thomas Schultz</i>	

I. Introduction	435
II. Types of Scholarship	436
III. Determination of Scholarship	442
IV. Pursuing Other People’s Interests	444

V. Pursuing Our Own Interests	446
VI. Conclusion	451
Chapter 32	
The State of Empirical Research on International Commercial Arbitration: 10 Years Later	453
<i>Christopher R. Drahozal</i>	
I. Introduction	453
II. Surveys and Simulations	453
III. Non-survey Empirical Research	455
A. Use of Arbitration Clauses	455
B. Court Enforcement of International Arbitration Awards	456
C. Macroeconomic Effects of International Commercial Arbitration	458
IV. Conclusion	458
Chapter 33	
Empirical Research on International Arbitrators: Benefits and Challenges	459
<i>Michael Waibel</i>	
I. Introduction	459
II. Benefits of Empirical Research on Arbitrators	459
III. Challenges in Empirical Research on Arbitrators	463
IV. Conclusion	464
Chapter 34	
Interpreting and Understanding Arbitral Awards for Purposes of Scholarly Research	465
<i>Kaj Hobér</i>	
I. Introduction	465
II. The Availability of Arbitral Awards	465
III. The Status and Value of Arbitral Awards as a Basis for Scholarly Research	466
IV. Concluding Remarks	469
Chapter 35	
The Interplay between Empirical Studies and Commercial Arbitration Practice	471
<i>Thomas J. Stipanowich & Marcio Vasconcellos</i>	
I. Backdrop: The Vis-eration of International Commercial Arbitration	471
II. Surveys as a Source of Empirical Information on Arbitration and Dispute Resolution	473
III. Challenges and Potential Benefits of Surveys	476
A. Challenges and Concerns	476
1. Availability and Busy-ness of Professional Subjects	476
2. Survey Depth and Breadth	476
3. Survey Group	476
4. Vagueness and Ambiguity	477
5. Faking Good and Perceptibly Desirable Answers	478
6. Interpretational Issues	478
B. Potential Benefits of Surveys	480
IV. Survey Insights That Suggest Areas for Further Investigation and Discussion	480
A. User Expectations, Experiences	480

The Evolution and Future of International Arbitration

B. Arbitrator Selection	481
C. Pre-hearing Process	482
D. Evolving Procedural Variants	482
E. Arbitrators and Settlement	483
F. Standards for Arbitral Decision-making	483
G. The Professional Crunch	484
V. Conclusion	484
Articles Produced as a Part of the Straus Institute Research Program	485
Chapter 36	
'Literature Review? What Literature Review?!' – the Influence of Legal Culture on Scholarship in International Arbitration	487
<i>Rémy Gerbay</i>	
I. Introduction	487
II. What Is Legal Culture, and How Can It Influence Research in Arbitration?	488
III. Arbitration Research by the Numbers: What Comparing Ten Years of French and English Doctoral Theses Tells Us?	491
A. Methodology	491
B. Findings: General Approaches to Research Methodology	493
1. Multi-disciplinary Research (and Empirical Methods)	493
2. Historical Research	495
3. Comparative Research	495
C. Findings: Choice of Topics	496
1. Commercial vs Investment Arbitration	497
2. Breadth of Topics	497
3. Themes Covered	498
IV. Conclusions	501
Appendix	
School of International Arbitration 30TH Anniversary Gala Dinner Speeches	503
Julian D M Lew	503
Albert Jan van den Berg	505
David Neuberger	507