THE RELEVANCE OF ARBITRATION IN RESOLVING DISPUTES

by

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INTRODUCTION

Arbitration is the natural mode of resolution for international business disputes. The development of international trade and domestic economic activity in the world has led to a significant increase in the number of the cases resolved by way of arbitration. Many domestic and foreign parties perceive arbitration as the natural mode for the resolution particularly of disputes from international commercial contracts.[2]

Generally, the success of arbitration may arise from the fear of the home town advantage on concerns the ability of the national courts of most countries to decide the dispute without bias. Even if the national courts may be open to commercial customs, practices and realities, the fear is that they are likely to see the world through their cultural lenses.

Essentially, the national courts may not perceive as neutral when they decide disputes between locals and foreigners.[3] It may be coupled with the fear that the court's judgment might not be enforceable abroad. Although

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2 Anecdotal evidence suggests that international commercial arbitration arising from commercial contracts have increased tremendously with some major international arbitral institutions reported that their caseload have been growing steadily and, in some cases, have increased dramatically.

3 Gilles Cuniberti, 'Beyond Contract — The Case for Default Arbitration in International Commercial Disputes' (2008) 32 Fordham International Law Journal (2) 423-424.

arbitration may not be perfect, it offers a more workable mechanism of dispute resolution as ability to remedy shortcomings and innovate as compared to litigation.[4]

However, parties incur costs when embarking on an arbitration. In addition to legal fees, they may have to pay the fees of the arbitral tribunal, the arbitral institution's administrative fees (for institutional arbitration only) and the cost of hiring a venue, On the other hand, the parties may not have to incur the same costs when litigating in the courts.

Despite these costs, there are several reasons for parties to arbitrate instead of litigating in the courts. Arbitration offers a fairer process in that the arbitral panel is neutral and parties are put on an equal footing.[5] The essential features of the arbitral process make it the most suitable mode of dispute resolution in this context: neutrality and independence of the adjudicators, seriousness and flexibility of the process, higher prospects of enforceability of the decision in the majority of the global jurisdictions.[6]

Arbitration promises a fair trial by an impartial arbitral tribunal. The parties can keep the details of their dispute private and confidential and out of the glare of public scrutiny. Arbitral proceedings and an arbitral award are generally confidential.[7] Parties can prevent the arbitral award from being published and also, prevent the disclosure of materials arising from the arbitral proceedings to the public at large.[8]

The parties have the freedom to consensually execute arbitration agreement in line with the principle of party autonomy.[9] Party autonomy bestows certain

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4 Gary B Born, *International Commercial Arbitration, Vol 1: International Arbitration Agreements*, (2nd edn, Wolters Kluwer 2014) 73.

5 Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 409–430.

6 Andreas F Lowenfed, *Lowenfled on International Arbittration, Collected Essays over three decades* (2005) 143; Bernard Hanotiau, *Complex Arbitrations: multiparty, multicontract, multi-issue and class actions* (2005) 5; Charles N Brower, Charles H. Brower II & Jeremy K Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 ARB INT'L 415, 440; Drahozal, 'Why Arbitrate? Substantive Versus Procedural Theories of Private Judging' (2011) 22 Am Rev Int'I Arb 163.

7 Prof Dr Klaus Peter Berger, 'Principle XIII.5.1 - Confidentiality' (Trans-Lex.org) https://www.trans-lex.org/970500/_/confidentiality/.

8 Mannvir Baljit Singh, 'The evolution of the doctrine of confidentiality in arbitration and the public policy argument' [2020] 3 MLJ xli;

9 S Abdulhay, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International 2004) 159. He adds that 'party autonomy' is 'the freedom of the parties to construct their contractual relationship in the way they see fit'.

contractual freedoms upon the disputing parties.[10] They have the right to choose applicable substantive law and these laws when chosen shall govern the contractual relationship of the parties. The parties then can govern and mound the procedure of the arbitration as they deem expeditious.

Parties can choose the arbitrator(s), the procedure, applicable rules, hearing times and venue. For example, the arbitrator and the parties can select hearing or meeting venues outside of the place of arbitration. In many cases, arbitral tribunals conduct procedural case management hearings over video conference or even a teleconference.

Parties can establish their own procedural rules. Arbitrations tend to be less formal than proceedings in court. The proceedings can take place in conference rooms, without robes or wigs. It can provide a simplified process for the commencement of proceedings and service of process, neutrality and facilitate the taking of evidence. The courts play a supportive role in facilitating arbitral proceedings. *Prima facie,* it promises the possibility of relatively expedited proceedings.[11]

Arbitration may be helpful where the dispute involves extremely technical matters that require specialist knowledge, for example patent or software disputes. It may be that scientific or mechanical principles are involved, as in heavy construction or engineering disputes.[12] The parties, arbitral institution or default appointing authority can appoint arbitrators with an appropriate degree of expertise for such matters.

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10 MO Dickson, 'Party autonomy and justice in international commercial arbitration' (2018) 60 International Journal of Law and Management (1) 114.

11 Cook, *International Intellectual Property Arbitration* (2010) at para 2.4.1 suggests that 'If parties cooperate and set out a realistic yet expeditious time frames, a dispute can be resolved quickly, for instance in less than a year'. According to McIlwrath and Savage, *International Arbitration and Mediation: A Practical Guide* (2010), an arbitral tribunal tends to require one to two years to render an award in an international arbitration. Cost of arbitration along with the perceived 'lack of speed' continues to be seen as some of the worst features of arbitration. See Queen Mary University of London White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration'.

12 In *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd 'The MV Pamphilos'* [2002] 2 Lloyds' Rep 681 Colman J said '... In many cases, such as this, the arbitrators have been appointed because of their professional, legal, commercial or technical experience ...'. Technical complexity has been regarded as a defining feature of international construction arbitration by a large number of parties. See Queen Mary University of London & Pinsent Masons, 'International Arbitration Survey – Driving Efficiency in International Construction Disputes' (2019).

By their very nature, such disputes are difficult for a non-expert to understand. The arbitral process can be tailored to fit the issues, providing parties with greater confidence that the substance of their dispute is properly understood by those adjudicating its outcome.

The general preference for arbitration in certain industries and international trade has nothing to do with the advantages of speed and cost-saving, which are often emphasised in arbitration textbooks and conferences. It is rare for these factors to apply in modern commercial relationships

The main reason behind there being more arbitration clauses in commercial contracts is simply the unwillingness of the parties to litigate in court.[13] This comes with the caveat that the courts do have important supportive and supervisory roles in relation to arbitrations. Parties revert to them when absolutely essential.

Lord Mustill made out a case for arbitration when he said:

> The great advantage of arbitration is that it combines strength with flexibility. There is strength because arbitration yields enforceable decisions, and is backed by a judicial framework which, as a last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose procedures which fit the nature of the dispute and the business context in which it occurs. A system of law which comes anywhere close to achieving these aims is likely to be intellectually difficult and hard to pin down in practical terms.[14]

The role of the arbitral tribunal is judgmental. Arbitration as a dispute resolution mechanism will thus always be needed where for one reason or another, a final and enforceable outcome is necessary. There are situations where one party needs an award, a final and binding solution imposed by a third party, rather than a compromise or a consent award.

Often not just money is at stake. Sometimes, one party may go bankrupt if it does not achieve complete victory. Matters of principle or the positioning of a party in a long-term relationship may also be an issue.

In many cultures saving face may be an issue and the management of a party cannot afford to take the responsibility of being a party to a compromised

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13 For example, the language of arbitration may be chosen in arbitral proceedings, whereas in litigation, the official language of the country of the competent court will be automatically applied.

14 Lord Mustill, foreword to Cato, *Arbitration Practice and Procedure* (2nd Edn 1997).

settlement. In such cases, the party may need an official piece of paper, such as an arbitral award, before agreeing to pay money and accept some liability. The general view is that parties want an enforceable award. They are prepared to pay the costs of an experienced arbitrator for the same.

The prime concern of the parties is to get commercial justice. Parties also want a quick resolution of their disputes and for awards to be rendered within an acceptable time frame. Also, in most judicial systems, appeals on arbitral awards are limited. This maybe an advantage because it limits the duration of the dispute and any associated liability.

In summary, the Singapore Court of Appeal in *Tjong Very Sumito v Antig Investment Pte Ltd*[15] set out the reasons why commercial parties prefer arbitration:

> There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation ... [A]n arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on the tiresome ladder of appeals. It is meant to be the first and only step.

However, there are delays which are exclusive to arbitration. For example, delays may occur as a result of the procedures in appointing the arbitral tribunal. Despite the positive duty on parties to co-operate and not obstruct or delay the proceedings,[16] arbitration remains vulnerable to delays, a problem arising at least partly out of the limited coercive powers of the arbitral tribunal.[17] It is much more difficult to deliberately delay court proceedings in bad faith.

When the statutory and other loopholes allow a party to delay the enforcement of an award through court action, it would not be an overstatement to say that arbitration may become a precursor to litigation. In such situations, applications for the enforcement of arbitral awards languished

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15 [2009] 4 SLR(R) 732 at [29].

16 *Paal Wilson & Co AS v Partenreederei Hannah Blumenthal* [1983] 1 AC 854.

17 Under the Arbitration Act 2005, arbitrators have the power to order interim measures under s 17, but if a party does not comply, the only recourse is to apply to the High Court for the enforcement of the order.

in courts for several years, rendering the parties' recourse to arbitration almost futile. Only the right statutory framework and the court's firm stance is steering arbitration will be the step in the right direction.

ADVANTAGES OF ARBITRATION AGAINST LITIGATION

The advantages of arbitration are best highlighted when compared to litigation. Litigation, unlike arbitration, does not require the consensus of the parties. It is the right of any citizen to bring an action in the courts for breach of contract or a tortious wrong.

Many jurisdictions especially those in emerging countries, are strained with overwhelming caseload for several years. The judicial overload of cases together with the appeal procedures results in delay. In turn, parties are pushed to use alternative dispute resolution to settle and resolve their disputes.

At present, arbitration may be considered one of the default mechanisms for resolution of commercial disputes in many emerging countries. Arbitration was initially preferred arising from the reluctance of foreign investors to submit disputes to local courts. However, now, arbitration is generally perceived as the simpler and quicker way of resolving disputes with international enforceability.

Language

Although English is the preferred language for the conduct of proceedings before the Indian courts, due to the vast diversity and number of languages spoken in India, different courts have their own unofficial processes. While the occurrence of oral arguments being made in a language other than English is extremely low in the superior courts, lower courts do have a tendency to allow proceedings to be conducted in the relevant regional language. As such, parties may also have to bear in mind the language skills of its legal counsel, depending on the court before which the matter may be placed.

English is generally the *lingua fraca* of international commerce for contracts between parties who use different languages in their everyday life. English is the common language of the parties in international commercial arbitration.

Arbitration does away with such difficulties of logistics by allowing the parties to choose the language or languages in which the proceedings are to be conducted. In jurisdictions where English is not the language of the courts, arbitration, which allows the parties to choose the language of the proceedings, is generally preferred by foreign parties

The choice of language/languages is particularly significant in international commercial arbitration where parties maybe of different nationalities and speak different languages. The objective will be to avoid problems of communication between the parties and arbitral tribunal and allow the smooth reception of evidence.

Party autonomy allows parties to enter into arbitration agreements expressly provide for the language to be used in the arbitration in which the arbitral procedure is conducted, the procedural orders and award will be issued. The language provision that applies to the contract as a whole which in the absence of a specific language provision for arbitration, in turn applies to the arbitration.

The choice of language in arbitration becomes a relevant issue for parties, the arbitral tribunal, the annulment and enforcement courts.[18] Language of the arbitration affects parties when they want to engage their representation, select an arbitrator,[19] make their written submissions, submit documentary evidence, have witnesses testify and make oral arguments.

Language becomes a relevant issue for the arbitral tribunal when conducting the hearing, receiving the parties' submissions, deliberating on arbitral matters and rendering the award. For the annulment and enforcement courts, language becomes an issue whenever the language of the arbitration is not identical to the language of the courts requiring translations to be done.

The New York Convention requires a foreign arbitral award to be accompanied with an officially certified translation into the language of the jurisdiction (which is not the language of the award) in which recognition or enforcement of the award is sought.[20]

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18 Thomas H. Webster and Michael W. Buhler, *Handbook of ICC Arbitration: Commentary and materials*, (4th edn, Sweet & Maxwell 2014) paras 20.9-20.10, 317–318.

19 Castineira and Petsche, *The language of the arbitration: Reflections on the selection of arbitrators and procedural efficiency* [2006] ICCC ICArb. Bull Vol 1, No 1, 33.

20 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Art IV(2).

If the applicable language/languages in arbitration proceedings is an issue, the arbitral tribunal would normally determine the language of the arbitration soon after its appointment at or shortly after the preliminary meeting or case management conference.[21]

The arbitral tribunal may take a practical approach in arriving at its determination. It may consider the language of the arbitration clause in the contract documents,[22] the language used in the parties' correspondences, the parties' language capabilities, the costs arising for translations of hearing transcripts and written submissions.

The determination of the language or languages may affect the party's position in the proceedings, the expediency and costs of the arbitration. The translation of the entire arbitration proceedings can be a costly affair. It may even adversely affect the party's ability who requires it to defend itself.

As a legal issue, the arbitral tribunal has to consider that the determination of the language in which the factual background of the case and relevant legal arguments when presented to it affects parties' fundamental right to be heard and to be treated equally.[23]

On the other hand, the arbitral tribunal is bound by the parties' determination of the language to be used in the arbitration. The parties' agreement on language prevail. Generally, the parties are not bound by any mandatory provisions at the seat of the arbitration which that proceedings in the domestic courts must be conducted in the prescribed language of that country. However, there still remains a diminishing list of countries which require or presume that the indigenous language will be used in arbitration seated in those countries.[24]

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21 For example, UNCITRAL Arbitration Rules Art 17(1) provide that the arbitral tribunal shall determine the language of the arbitration 'promptly after its appointment'; ICC Arbitration Rules 2017 Art 20 provides: 'In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.'

22 Blackaby and Partasides with Redfern and Hunter, *Redfern & Hunter on International Commercial Arbitration* (6th Edn, 2015) at para 2.86, 100.

23 *Blow Pack v Windmoller et Holscher KG* , Paris Court of Appeal, 1e Ch.2 April 2013, No 11/18244, (2013) Rev Arb No 2, 538.

24 Law No. 27 for 1994 of Egypt Art 29 provides for the presumption of use of Arabic unless agreement of the parties or decision to the contrary by the arbitral tribunal. See also of the Procedural Civil Law of the UAE Art 21296).

Expertise of Arbitral Tribunal

The ability to select arbitrators with expertise as one of the important reasons why parties chose arbitration over litigation for the resolution of their disputes. The selection of arbitrators with the prerequisite expertise is therefore one of the most important activities in arbitration.

It is the first major procedural step in any arbitration. It is a strategic decision which has a continuing impact, for better or for worse, on the proceedings, from commencement through to a final award and even enforcement. The party in deciding who should be the arbitrator may draw up a short list of potential arbitrators.

Such a short list may enumerate the potential arbitrators' professional backgrounds, their legal training and their expertise from formal and publicly available information websites, from published materials and other public sources. Information about the arbitrator's case management skills and experience usually is obtained only though ad hoc individualised person-to-person like dispute resolution experts, lawyers and parties.[25]

Detailed information about how arbitrators actually decide cases is not readily available. Arbitration awards typically are confidential and not publicly available (or if they are made public, the names of the arbitrators have most often been removed). However, some arbitral institutions have recently started to publish more data about the cases they handle in response to growing user demand for transparency.[26]

For example, starting from 2016, the International Chamber of Commerce ('ICC') published on its website the names of the arbitrators appointed to ICC

25 Catherine A. Rogers, 'A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests' (2015) 46 Victoria U Wellington L Rev 1179, 1180.

26 Queen Mary University of London and White & Case, '2015 International Arbitration Survey: Improvements and Innovations' (2015) 22 http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf accessed 1 March 2021.

cases, their nationality, their role within the tribunal, as well as whether the appointment was made by the International Court of Arbitration of the ICC or by the parties.[27]

In the typical arbitration involving a three-member panel arbitral tribunal, each party appoints an arbitrator. The two so-called party appointed arbitrators select together, in one manner or another, the presiding arbitrator. In the event, they are unable to agreement, the presiding arbitrator may be appointed by a designated appointing authority.

Legal culture emphasises the lawyer's role as a promoter of conflict and maximiser of parties' interests. Lawyers are incentivised to perhaps exaggerate the facts and arguments that favour their client. In such situations, both parties' original predisposition may be on the extreme side as it suits their interests.[28]

Against such a background, the arbitral tribunal is called upon to determine the parties' respective legal rights based on the facts and law. Redfern and Hunter state that the task of presiding over the conduct of arbitration 'is no less skilled than that of a surgeon conducting an operation or a pilot flying an aircraft. It should not be entrusted to someone with no practical experience of it'.[29]

Only a person with the necessary education, training, skill and practical experience to deal with the subject-matter of the arbitration should be appointed as an arbitrator. Sir Michael Kerr has opined:

> The calibre, experience and industry of the tribunal, and the nature and quality of the procedure employed in individual cases, are of paramount importance.[30]

As such, parties and their lawyers or representatives must discuss the pros and cons of selecting arbitrators for their dispute. While judges are appointed only after they have gained extensive experience as lawyers in practice or in the

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27 See 'ICC Arbitral Tribunal' (International Chamber of Commerce) https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/ accessed 7 July 2020. Other institutions are London Court of International Arbitration (the 'LCIA'), he Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC'), the Singapore International Arbitration Centre (SIAC).

28 Andre de A. Cavalvanti Abdud, 'Criticism of Arbitration: How to use it' (Kluwer Arbitration Blog, 20 December 2016) http://arbitrationblog.kluwerarbitration.com/2016/12/20/criticism-of-arbitration-how-to-use-it/.

29 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, 2015) para 4.33.

30 Sir Michael Kerr in the introduction to Bernstein and Wood's, *Handbook of Arbitration* (2nd Edn, 1993) 5.

judicial service, there are no formal requirements on the experience or qualifications of an arbitrator. As a result, arbitrators without the requisite qualities can be, and sometimes are, inappropriately appointed by the parties or an appointing authority.

Some professional bodies regard the role of appointment arbitrators in disputes involving members as a matter of right. In such circumstances, the choice of arbitrator often appears to be as a *sinecure* and a reward for past service or in regard of his current relationship with the appointing party.

It may miss the point that the basis for the choice of arbitrator should be the appropriateness of the person to decide the dispute and his ability to provide a high-quality service to the parties. This may not necessarily be ensured on the sole basis of past service or present relationship to the professional body. Most reputable arbitration institutions in the region, such as ICC, AIAC, SIAC, SCC, KCAB, CIETEC, HKIAC and LCIA have high standards for admission of arbitrators on their lists.

There is no requirement for arbitrators to be qualified lawyers or judges.[31] While technical arbitrators may be unschooled in arbitration law and procedure, the reverse, a legally-qualified arbitrator have may experience in many aspects of the law; but not be trained in matters involving technical issues. He may be baffled by the technical content of the dispute, is equally dangerous to the efficacy of the arbitration process. Both situations may be unsatisfactory.

When the appointment of arbitrators is done right, it can dramatically improve the conduct of the arbitration. There are now many arbitrators with both technical/industry and legal experience. This can help to narrow the issues in dispute, rein in expert witnesses and reduce the need for evidence on industry practice. In multi-arbitrator arbitrations, a balanced arbitral tribunal consisting of technical, legal and industrial expertise can be assembled.

Frequently, disputes arising from building and engineering contracts relate to delays and extension of time, non-completion, late issue of drawings, variations etc. Thus, construction disputes are often technical in nature. As such, an experienced architect/engineer would be well placed to understand

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31 *Paramjeet Singh Patheja v ICDS Ltd* (2006) 13 SCC 322; 2006 (4) Arb LR 202, 222-223 (SC); AIR 2007 SC 168; 2006 (11) SCALE 459 cited in Indu Malhorta, *Commentary on the Law of Arbitration* (4th edn, Wolters Kluwer 2020) 43.

and rule on such points. Hearings can be quicker because the technical knowledge of the arbitrator necessitates less explanation.

Goff LJ has summarised that arbitration is appropriate in the following circumstances and for the following reasons:

> Where the parties are from different countries and neither wish to submit to the jurisdiction of some foreign court; because the parties can exercise some degree of control over the constitution of the tribunal; because the tribunal can be expert in the relevant trade; because the matter is private and awards are not as a general rule published; because there is or can be some degree of informality (and, hopefully, of expedition).[32]

Bingham J in *Farid v MacKinnon Mackenzie & Co Ltd, The Sheba and Shamsan*[33] opined:

> In electing to have disputes tried by the process of arbitration, litigants achieve various obvious advantages. For example, they invest themselves with the luxury of choosing their own tribunal and no doubt take advantage of that opportunity in order to select a tribunal fitted by experience and knowledge to solve the dispute in question. They can also protect themselves against the risk of a tribunal whose judgment is liable to be perverted by excessive legalism.

The arbitral tribunal's legal and technical expertise in arriving at its award is crucial to achieving a cost-effective arbitration. Such expertise includes familiarity with industry and cultural nuances. This includes familiarity with the relevant law and/or main legal traditions, the specific types of contracts and their interpretation, how disputes evolve and how they are best resolved. Such expertise becomes more relevant when the subject matter of the dispute involves complex issues.

While there is no need for each arbitrator to be a technical specialist, it is useful for arbitrators to be cross-functional professionals possessing the ability to grasp, and willingness to understand, both technical and legal issues. An arbitral tribunal with the appropriate legal and technical expertise, skills and experience will ensure that the dispute is resolved by way of an enforceable award.

For example, while experts can be appointed for technical expertise and experience in giving evidence in litigation, there is a real danger that an

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32 Goff LJ, 'Arbitration Today', (1987) 57 Journal of the Chartered Institute of Arbitrators 111–112.

33 [1983] 2 Lloyd's Rep 500.

arbitrator without the requisite legal and technical expertise and experience may be influenced more by the confidence of the expert in his opinion, and the expert's powers of persuasion than by the actual technical merits of the evidence.

An arbitral tribunal with proven expertise and experience is able to carry through an arbitration from beginning to end. It will possess strong case management skills with sufficient familiarity with computers so as to manage materials, such as submissions, documents and other evidence, bundles and transcripts, which are stored and accessed electronically.

The arbitral tribunal's case and counsel management skill together with its willingness to make difficult decisions on procedural issues dealing with party tactics and with large amounts of evidence will have a significant impact on the efficiency of an arbitration. It will have act decisively to overcome any 'due process paranoia' (ie the reluctance to act decisively in certain situations for fear of the final award being challenged on the grounds of a party not having had the opportunity to fully present its case).

The arbitral tribunal that applies a proactive and lawful approach will be able to issue an award within a reasonable time. It may even explore in its first case management conference agenda of possible settlement discussions and sealed offer procedures, if applicable, to facilitate settlement of the dispute.

This is normally achieved by having a balanced tribunal, such that the arbitrators possess, at least between them, all the core qualities identified. Towards this end, parties are encouraged to appoint a technical expert as an arbitrator if the tribunal comprised three arbitrators or in order to balance other lawyers serving on the tribunal.

As it stands in most jurisdictions, an arbitrator does not need to be licensed to practise. Most of the legal systems recognises that foreign qualified lawyers, technical professionals and others can be appointed as arbitrators. Parties can agree on the arbitrators to be appointed to their arbitration and are free to determine their qualifications and nationality arising from party autonomy.

Arbitrator Intelligence ('AI'), a platform established in 2015, enables parties and counsel involved in arbitration proceedings to anonymously take an objective survey in order to enable AI to create a database on arbitrator

profiles.[34] The creation of this database is aimed at allowing parties and their legal counsel an opportunity to have full visibility on the profile, strengths and expertise of an arbitrator. Its ultimate aim is to assist parties in selecting arbitrators. The availability of a database of arbitrators may be helpful to the parties in the long run.

Arbitral Institutions as Appointing Authorities

Arbitration is characterised by *ad hoc* selection of arbitrators in each case. The identity of the arbitrators and in particular, the sole or presiding arbitrator are seen as key elements in arbitration cases. An advantage which arbitration has over litigation comes from the unique and crucial role played by arbitration institution as appointing authorities in moulding the arbitral process based from the arbitration legislation and their arbitration rules.

Disputing parties may negotiate over selection of the arbitrators when constituting the arbitral tribunal. Their failure to achieve agreement may lead to the so-called BATNA (best alternative to a negotiated agreement) as follows:

> [R]elative bargaining power stems entirely from the negotiator's ability to, explicitly or implicitly, make a single threat credibly: 'I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand'. The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement, often referred to as a 'BATNA' [Best Alternative to a Negotiated Agreement]. ... In litigation bargaining, a plaintiff and defendant who fail to reach agreement do not have the option of settling with different parties. Instead, both have the BATNA of submitting to adjudication of the dispute. Bargaining power depends on whether that BATNA is more desirable for the plaintiff or the defendant.[35]

In the polarised environment of dispute or difference, each party harbours suspicion about anyone suggested by the other side as arbitrator, the direct appointing authority role in selecting arbitrators has increased in recent years. Against this background, arbitration institutions as appointing authorities are in fierce competition to make themselves attractive for arbitration cases.

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34 Catherine A Rogers, 'Arbitrator's Intelligence: The basics' (Kluwer Arbitration Blog, 27 February 2018) http://arbitrationblog.kluwerarbitration.com/2018/02/27/ai-3/.

35 Russell Korobkin, 'Symposium: Bargaining Power as Threat of Impasse' (2004) 87 Marquette Law Rev 867, 867–869.

Appointing authorities particularly commercial arbitration institutions, play an important role in constituting an impartial, independent and qualified arbitral tribunal (and in doing so, revoke any appointment already made and appoint or reappoint any of the arbitrators). Once a claim is filed arbitration and each disputing party has chosen its co-arbitrator, the first major issue of negotiation between the parties is often over the chair of the tribunal.

The chair is generally chosen by the disputing parties if they reach an agreement and by the appointing authority if they do not. An appointing authority may also determine whether a party may be deprived of its right to appoint a substitute arbitrator. They may authorise a truncated arbitral tribunal to proceed to issue an award and revise with binding effect, a tribunal decision on its fees.[36]

As a general matter, where an appointing authority is asked to appoint a chair, it provides the parties with some form of list of potential candidates. The appointing authority generally has broad discretion in selecting candidates for their lists. In most cases, appointing authorities appoint from their panel of arbitrators.

Lord Goldsmith, an arbitration practitioner and former Attorney-General in the UK explains:

> The [arbitration] institutions operate in a competitive market place and therefore all seek to accommodate the parties' and their counsels' preferences.[37]

There is intense competition between arbitration institutions for commercial arbitration cases. They have expanded their staff to handle the increased case load. They are engaged in more outreach in seeking to expand their share of arbitration cases. Arbitration institutions closely follow the size, nature and value of their caseloads.

Arbitration institutions are also responding to the expanding number of arbitration cases and market pressures. They attend and sponsor arbitration events where their staff present recent developments to an audience of arbitration professionals and others. Their actions can resemble the marketing activity of law and commercial firms.

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36 Sarah Grimmer, 'The expanded role of the appointing authority under the UNCITRAL Arbitration Rules 2010' (2011) 28 J Int'l Arb 501.

37 Lord Goldsmith, 'The Privatisation of Law: Has a World Court finally been created by modern international arbitration?' (transcript of speech on 27 June 2013) https://www.gresham.ac.uk.

They appeal to contracting parties, their counsels, future claimants and future respondents. When parties enact an arbitration agreement in their contract, they can be expected to share a common interest that the arbitrators appointed are knowledgeable about both the procedure and substantive law.

They may also agree to an appointing authority. However, it is normal for neither party to know at the time the appointing authority is selected in a contract on whether in a future dispute, it may be the claimant or the respondent or both.

At the later time when a claimant wants to file a claim, it may not have a choice of appointing authority as this choice been made earlier in the arbitration agreement. When the dispute arises, the choice of appointing authority has generally already been made.

Arbitral institutions as appointing authorities are adopting arbitration rules designed to attract cases. They have introduced various innovative procedural features their institutional arbitration rules, such as emergency arbitrators, expedited arbitration, summary procedures consolidation and joinder procedures which are designed to increase efficiency of arbitral proceedings.

Arbitral institutions now offer tools to assist parties and arbitrators to customise their arbitration agreements and also, make appropriate case management decisions. Their institutional rules contain provisions designed to ensure a proportionate arbitration procedure. All these are reinforcing the relevance of arbitration as an important dispute resolution mechanism over litigation.

Neutrality of the Arbitral Tribunal

One of the key selling-points of arbitration as an alternative to litigation is the ability of the parties to select a neutral arbitral tribunal.[38] Arbitration offers a neutral forum detached from the parties and state authorities.[39] Parties expect the neutral arbitral tribunal to manage a fair process and ensure a just outcome. The neutrality, independence and impartiality of the arbitral tribunal achieves fairness and justice.

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38 Mason, 'The Corporate Counsel's view: International Commercial Arbitration' (1994) 49 Disp Res J 22.

39 Gary B Born, *International Commercial Arbitration, Vol 1: International Arbitration Agreements* (2nd edn, Wolters Kluwer 2014) 74.

However, the neutrality of the arbitral tribunal goes beyond its independence and impartiality.[40] Impartiality and independence reflect the unbiased quality that arbitrators are expected to possess.[41] Impartiality is assessed subjectively while independence is tested objectively.[42] Neutrality is the status of the arbitral tribunal assessed objectively of being intermediate and equidistant in thought and action throughout the arbitral process.[43]

When parties are doing business in a jurisdiction that may not have a reputation for an impartial and independent judiciary, they may have doubts about whether or not litigation will produce a fair result. The local courts may be perceived to be subject to political, media or other pressures especially that the judge owes his or her appointment to the home environment.[44]

This is particularly applicable when one of the parties to the contract is a state or government-linked entity in wanting the forum to be the courts in the party's principal area of business. It is normal for each party to look for the most favourable forum to resolve dispute in a familiar and convenient manner. It is likely for the counter party may be wary of the other's most favourable forum as it may not see it in the same perspective.[45]

It should not be assumed that such problems are limited to the developing world, as characteristics with the perceived bias, quality, speed and cost of obtaining redress that make European and the United States courts unattractive to counter-parties.[46] Parties normally do not agree to resolve their disputes in local courts.

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40 Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989) 10 Mich J Int'l L. 39; Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration', in *Recueil De Travaux Suisses Sur L'Arbitrage International* (1984) 24.

41 Ronán Feehily, 'Neutrality, independence and impartiality in international commercial arbitration, A fine balance in the quest for arbitral justice' (2019) 7 Penn State Journal of Law & International Affairs 1 90.

42 Leon Trakman, 'The impartiality and independence of arbitrators reconsidered' (2007) 10 Int'l Arb L Rev 999, 1007–1008.

43 Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989)10 Mich J Int'l L 39.

44 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, 2015) at 28, para 1.99; Clermont and Eisenberg, 'Xenophilia in American Courts (1995) 109 Harv L Rev 1120.

45 Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, (4th edn, Wolthers Kluwer 2013) chap 5.

46 The EU countries include Greece, Italy and Spain. See, Tackaberry, Marriott and Bernstein, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, (4th Edn, 2003) para 2-017.

The power of the parties to an arbitration agreement to draw their arbitrators from the four corners of the world enables the parties to avoid any national, political, religious, financial or racial partiality that might be a concern. Therefore, neutrality in international commercial arbitration has two facets.[47] The first is that parties choose arbitration as it offers a neutral forum, with neither party having the advantage of their domestic court.[48] The second relates to the nationality of the arbitrator.

Nationality neutrality is to avoid actual or perceived bias arising from the arbitrator's predisposition towards a party personally or to the party's position.[49] This predisposition has generally been accepted as resulting from the nationality, culture the arbitrator's common interests with a party of his nationality.[50] There are fears that a party-appointed arbitrator may be influenced by the particular appointing party's desired outcome.[51]

The link between neutrality and nationality is predicated on the assumption that an arbitrator who shares the same nationality, culture and language as one of the parties will be susceptible or sympathetic to that party and to their position in the arbitration. This raises concerns for both the fairness of the process and ultimate award.[52]

This is an assumption which may not be the practice in most cases. However, such concerns of bias, or the perception of bias, has led to the selection of sole arbitrators and presiding arbitrators that possess nationalities that are different from the nationalities of the parties to the arbitration.[53]

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47 Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989) 10 MICH J INT'L L 39, 40.

48 Margeret L Moses, *The Principles and Practices of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 140-141.

49 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th Edn, 2015) 254; See William W. Park, 'Neutrality, Predictability and Economic Co-operation' (1995) 12 J Int'L Arb 99, 103; Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' in *Recueil De Travaux Suisses Sur L'Arbitrage International* (1984) 24-25.

50 Ilhyung Lee, 'Practice and Predicament: The Nationality of The International Arbitrator (With Survey Results)' (2007) 31 Fordham Int'l LJ 603, 613.

51 Hans Smit, 'Quo Vadis Arbitration? Sixty Years of Arbitration Practice, by Pieter Sanders' (2000) 11 Am Rev Int'l Arb 429, 429; M. Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) 9 J Int'l Arb 31, 39; Doak Bishop & Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arb Int'l 395.

52 M Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) 9 J Int'l Arb 31, 32.

53 Gary G Born, *International Arbitration Law: Law and Practice 1-2*, (2nd edn, 2016) 8.

Neutrality with nationality may not be an issue as any arbitrator who is neutral regardless of nationality, should be sufficiently competent to adjudicate the case in favour of the party that makes the better case.[54] Neutrality seems connected with nationality with independence and impartiality.[55] But neutrality is the perception of bias rather than actual bias. It adopts a subjective test.[56] Consequently, it is different from impartiality that relates to actual bias.

Various international arbitration rules reflect the requirement that an arbitrator's nationality be different from that of the parties.[57] The UNCITRAL Model Law on International Commercial Arbitration ('Model Law') takes a different approach. Parties cannot preclude an arbitrator on the basis of nationality unless it is agreed mutually by them.[58] On the other hand, the Model Law requires nationality should be considered where there is a sole or presiding arbitrator.[59]

All these considerations in the selection of a neutral arbitral tribunal reinforces arbitration as a viable alternative to litigation. It contributes to relevance of arbitration in resolving disputes in international commerce.

Choice of Representatives

Many jurisdictions are silent on the issue of who could be appointed as a representative of a party to an arbitration. The modern consensus in order to

54 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, 2015) 250.

55 Murray L. Smith, 'Impartiality of the party-appointed arbitrator' (1992) 58 Arb 30, 31–32.

56 Bruno Manzanares Bastida, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' (2007) 6 Revista E-Mercatoria 1; Stephen Bond, 'The Selection of ICC Arbitrators and the Requirement of Independence' (1988) 4 Arb. Int' L 300. While an explicit impartiality requirement was absent, arbitrators were still required to be impartial. See Stephen Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) 12 NW J Int'l. L & Bus 1, 12.

57 M Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) 9 J. Int'l Arb. 31, 39; UNCITRAL Arbitration Rules (Dec. 16, 2013) art 6.7; American Arbitration Association, International Arbitration Rules, art 12.4 (2014); London Court of International Arbitration, LCIA Arbitration Rules, art 6 (2014); International Chamber of Commerce, Arbitration Rules, art 13.5 (2017); World Intellectual Property Organisation, Arbitration Rules, art 20 (2014);

58 UNCITRAL Model Law (1985) Art 11.1.

59 UNCITRAL Model Law (1985) Art 11.5.

achieve safe seat status is for arbitration proceeding may be represented by any person or represent themselves (*pro se* parties) for smaller construction and specialized commodity disputes.[60]

The authors of *Redfern & Hunter*[61] have commented:

> *A party to an arbitration may, in theory, be represented by his plumber, dentist or anyone else of his choosing although the choice usually falls on a lawyer or specialist claims consultant in the relevant industry.*

Such representatives are not limited to those who are qualified legal practitioners.[62] Such flexibility is necessary for commercial arbitrations.

However, many jurisdictions have enacted provisions in their national arbitration laws to allow parties the right to choose their representation in arbitration proceedings.[63] Most national arbitration legislations and institutional arbitration rules based on party autonomy and good practice, allow the parties to select representatives of their choice. This right to choose its representation is considered as one of the advantages of arbitration over litigation.

In most jurisdictions only local lawyers have rights of audience, meaning international parties must hire and work with unfamiliar counsel who do not have the same degree of familiarity with the client's business that the client's regular panel of lawyers may have.

There are many reasons for parties to be unwilling to engage local lawyers. These reasons may not necessarily be based on quality. A common reason is to avoid conflict of interest because in a jurisdiction with a relatively small pool of legal professionals, there is a strong likelihood that the top-ranked counsel[64] will have represented the resident respondent in some capacity.

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60 *Pro se* legal representation comes from Latin *pro se*, meaning 'for oneself' or 'on behalf of themselves', which in modern law means to argue on one's own behalf in a legal proceeding as a defendant or plaintiff in civil cases or a defendant in criminal cases.

61 Alan Redfern, et al, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 318.

62 The Chartered Institute of Arbitrators, 'London Centenary Principles' https://ciarb.org/media/4357/london-centenary-principles.pdf accessed 7 July 2020.

63 See Austrian ZPO, s 594(3); English Arbitration Act 1996, s 36; United States Revised Uniform Arbitration Act, s 16; German ZPO, s 1042; Netherlands Code of Civil Procedure, art 1038(1)–(2); Hong Kong Arbitration Ordinance, s 63; Australian International Arbitration Act 1974, s 29(2); New Zealand Arbitration Act 1996, s 24(4); Brazilian Arbitration Act, art 21(3)..

64 Or more accurately, the firm at which they practice.

Therefore, such counsel would be off-limits due to a conflict of interest. However, over the years, parties have resorted to the practice of engaging 'co-counsel' in their matters. The co-counsel generally comprises the party's general counsel along with an identified local counsel who fronts the party's case before local courts.

By contrast, in arbitration the parties can select counsel from anywhere in the world[65] and therefore have a much greater pool of expertise to choose from. For a foreign litigant, pursuing arbitration instead of court litigation in India helps avoid the uncertainties, and technicalities of foreign litigation with potential enforcement problems overseas. Parties can even engage persons who are not qualified in law, but who possess technical or scientific knowledge, skill, training and experience relevant to a case.

Finality

One of the great advantages of an arbitral award as compared to litigation, is its finality. An arbitral tribunal's award is final and binding on the parties. It is enforceable against the party against whom it is made.

A final award effectively terminates the arbitration. It extinguishes the original cause of action. Finality is fundamental to the overarching nature of arbitration, in which the arbitral tribunal's award will be final and legally binding and enforceable between the parties.

Bingham J in *Farid v MacKinnon Mackenzie & Co Ltd, The Sheba and Shamsan*[66] explained how arbitration provides a degree of finality that is not available in court litigation:

> There are other advantages such as speed and the saving of expenses which may or may not be achieved depending upon the will of the parties and the arrangements which they choose to make. But those are additional advantages which are certainly capable of achievement as a result of the arbitration process. Those advantages are brought at a price and most obvious price which a litigant

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65 In India, foreign counsel can only 'advise' a foreign client on foreign law on a fly in and fly out basis. However, foreign counsel cannot represent a foreign entity in arbitration proceedings being conducted in India— *Bar Council of India v AK Balaji* (2018) 5 SCC 379 [42]. This is in stark difference with the position in other common law jurisdictions. For example, in Singapore, the Legal Profession Act (Ordinance 57 of 1966) specifically excludes the application of certain provisions of the Act that prevent an unauthorized person from acting as a solicitor or advocate in proceedings in Singapore, from applying to arbitration proceedings.

66 [1983] 2 Lloyd's Rep 500.

> pay is that he loses the extensive powers of review which the appellate Courts enjoy over the factual and legal decisions of Judges sitting at first instance. I say that the avoidance of that review, which may be protracted and in itself expensive, is no doubt sometimes exactly what litigants are anxious to achieve. Be that as it may, the fact is that the Court's powers of review in respect of arbitration proceedings are extremely limited.

However, the finality of the award is subject to statute and any applicable arbitration rules, which empower the arbitral tribunal to correct and interpret the award.[67] The arbitral tribunal is further empowered to make an additional award as to the claims presented in the arbitration proceedings but omitted from the award.

The rights of the successful party no longer lie in the original cause of action but in the right to enforce the award in its terms. A failure to enforce the award does not resurrect the original cause of action.[68] The doctrine goes as far as covering the disputes which the arbitral tribunal was asked to decide as well as such matters which are clearly part of the subject matter. It would be an abuse of process to allow new proceedings to be commenced in respect of them.[69]

The unsuccessful party on the same cause of action cannot commence fresh court proceedings or arbitration.[70] In such instances, the court would exercise its jurisdiction to strike out such a claim as an abuse of process or restrain the party from referring the matter to arbitration.[71]

The decision is final, giving rise to issue estoppel with regard to the matters it has dealt with. It prevents a party from raising a defence, set-off or otherwise asserting or denying their existence or non-existence against the other party in subsequent proceedings. The concept of issue estoppel prevents a re-opening of the state of law or fact, which had earlier been established.[72]

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67 See Sundra Rajoo, *Law, Practice and Procedure of Arbitration*, (2nd edn, LexisNexis 2016) 634.

68 David St John Sutton, et al, *Russell on Arbitration*, (24th edn, Butterworths 2015) [6-179].

69 *Excomm Ltd v Guan Guan Shipping (Pte) Ltd, The Golden Bear* [1987] 1 Lloyd's Rep 330.

70 Blackaby, et al, *Redfern and Hunter on International Arbitration*, (6th edn, Oxford University Press 2015) 501–568.

71 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630,; [1965] 2 All ER 4; , [1965] 1 Lloyd's Rep 223, CA (Eng); *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581,; [1975] 2 WLR 690, PC; *Dallal v Bank Mellat* [1986] QB 441,; [1986] 1 All ER 239; *Arnold v National Westminster Bank Plc* [1991] 3 All ER 41,; [1991] 2 WLR 1177, HL.

72 See Sundra Rajoo, *Law, Practice and Procedure of Arbitration* (2nd edn, LexisNexis 2016) 639.

Such an award is also binding in the sense that it imposes on the party mandatory legal obligations, which are potentially recognisable in jurisdictions where enforcement is sought.[73] Therefore, the scope for a party to challenge an arbitral award was limited that under the applicable *lex arbitri*. The finality of arbitral award as compared to litigation still remains an advantage in most developed arbitral jurisdictions.

Universal Enforceability

An arbitral award is not enforceable until it is registered and accepted as a judgment by leave of the High Court. Unlike an order of judgment of a court, an arbitral award does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or order of the court. Only then can a successful party levy execution.[74]

An arbitration award extinguishes the cause of action in respect of which the arbitration proceedings were commenced.[75] Enforcing courts play a major role in the process. One of the strongest features of arbitration compared to litigation, particularly in cross-border disputes, is that an award can be enforced internationally by foreign courts using the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

Signatories to the New York Convention observe the principal objective of the New York Convention to provide uniform procedures for the recognition and enforcement of arbitral awards in one Convention State which had been made in another Convention State. It is a treaty obligation of each Convention State to provide the machinery for the enforcement of its treaty obligations through its own domestic legislation.

The 164 contracting countries have been obliged to implement legislation to give effect to this convention, making it considerably easier to enforce a

73 See David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules — A Commentary* (2nd edn, Oxford University Press 2013) 797.
74 See Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths 1989) 416.
75 *Pitcher v Rigby* (1821) 9 Price 79.

foreign arbitral award.[76] The comparative ease of enforcement of an arbitral award as against a court judgment cannot be overstated.[77] An arbitral award rendered can be enforced in each of the contracting New York Convention states subject to the reservations made under the Convention by the contracting states.

Control over procedure

The flexibility offered to parties to tailor the procedure of arbitral proceedings, in consultation with an arbitral tribunal is one of the most attractive features of arbitration. Conversely, litigation proceedings are mainly governed by the inflexible procedural rules which must be adhered in order for the matter to be heard and resolved by the courts.

Party control in arbitration depends on the choice of the relevant procedure perhaps by the incorporation of arbitration rules, on the stage in the arbitral proceedings, the distinction between small and larger disputes and categorisation of disputes based on its complexity. This flexibility allows arbitrations to take a life of their own in line with the set procedure.

It is the norm for the parties, representatives and arbitral tribunals to agree on the arbitral discretion in procedural matters and evidential matters subject only to the parties' right to agree otherwise and procedural fairness.[78] A non-exhaustive list of procedural matters includes language, the form of

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76 List of countries as of 21 January 2016, includes, Afghanistan, Algeria, Andorra, Antigua and Barbuda, Argentina, Armenia, Bahrain, Barbados, Bhutan, Bosnia and Herzegovina, Botswana, Burundi, Central African Republic, Canada, China, Comoros, Croatia, Cuba, Cyprus, Democratic Republic of Congo, Denmark, Djibouti, Ecuador, Greece, Guyana, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Jamaica, Madagascar, Malaysia, Monaco, Mongolia, Montenegro, Nepal, Nigeria, Philippines, Poland, Republic of Korea, Romania, Saint Vincent and the Grenadines, Serbia, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, United States of America, Venezuela and Vietnam. Full list of countries are available at http://www.newyorkconvention.org/countries. Many of the non-signatories are found in Africa.

77 The number of reciprocal enforcements of judgment treaties is small and usually regional; *See* the European Council Regulation No 44/2001 (formerly the Brussels and Lugano Conventions) which relates to the enforcement of judgments between EU Member States). For other examples see Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, 2015) para 1.101. See also the newly introduced Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019. The Convention is not yet in force.

78 William W. Park, 'Two faces of Progress: Fairness and Flexibility in Arbitration Procedure' (2007) 23 Arbitration International (3) 499.

written statements of claim and defence, the extent of oral submissions, questions of document disclosure, and the application of rules of evidence.

The procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case allows the proceedings and the costs associated with such proceedings are more or less predictable. It also allows a party and the tribunal to have oversight over and mould the progression of the proceedings. In addition, an arbitral tribunal is not bound by national procedural laws.

In most jurisdictions, the domestic law relating to evidence normally does not apply to arbitration. This gives a greater degree of flexibility to depart from the rigid rules of evidence, as opposed to court proceedings, where rules of evidence are applied strictly. This flexibility gives ample opportunity to the arbitrator to adopt suitable procedures to assess the evidence, particularly where the parties of different nationalities are involved and may be used to different evidential rules.

In international commercial arbitration, arbitral tribunals normally apply the IBA Rules on the Taking of Evidence in International Commercial Arbitration[79] ('IBA Rules'), with the consent of the parties. Generally, the agreement on the application of the IBA Rules is recorded in the first procedural order issued by the arbitral tribunal. Requests for production of documents are generally directed to be made in the form of a Redfern Schedule.

Parties are free to choose an arbitrator whose technical expertise and experience may resolve the dispute in its commercial context. This has the advantage that the arbitrator is already familiar with the subject matter of the dispute. With greater scope for reducing acrimony, disputing parties may be able to preserve their continuing business relationship and confine the dispute between them.

The courts hear a wide variety of cases. Judges will not generally have the technical knowledge of a technical arbitrator. On the other hand, the legal knowledge of a technical expert arbitrator can ordinarily never equal that of a judge.

Arbitration provides the opportunity for the best of both worlds by allowing parties to select an arbitral tribunal that has both, legal and

79 International Bar Association Rules on the Taking of Evidence in International Arbitration, 29 May 2010.

technical/industry expertise. In addition, there are now a large number of arbitrators who have both legal and technical expertise.

This flexibility calls for the parties, their representatives and arbitral tribunals' joint commitment to efficient management to achieve an effective resolution of a dispute. Without this commitment, the very flexibility of arbitration can lead to increased laxity, extended time and increased cost. As it stands, this flexibility offered to parties, representatives and arbitral tribunals to tailor the procedure of arbitral proceedings is still a great advantage over litigation. It is a flexible option only if it is used as such.

Displacing home jurisdiction advantages

The act of intentionally seeking an advantageous jurisdiction or forum shopping to file a lawsuit is a common and important practice in international commerce. Lawyers who represent businesses normally endeavour to keep the cost of potential disputes at a minimum. An important way to minimize expenses is to ensure that the party can bring a lawsuit or defend itself as close to home as possible.

Litigating in a distant and non-home forum maybe expensive and risky. Parties normally try to avoid it. However, when a lawsuit is commenced in the defendant's home jurisdiction, it may create a host of problems for the parties involved in the litigation.

In certain jurisdictions there may be concerns about the independence and impartiality of the judicial institutions and also, the process. These concerns may arise from problems of political appointments, government favours to compliant judges, funding of the court system at a time of austerity in many countries. Normally, judgments of a national court may not be enforceable in other jurisdictions unless there are reciprocal agreements to do so.

Brown and Marriot have also suggested that some uncertainties about litigating in a 'foreign' court include whether the foreign court will assume jurisdiction to hear the case, the necessity for advice and representation by lawyers of that jurisdiction, the necessity for translation of documents and

interpretation of evidence, exposure to technical and formal rules of procedure and evidence and the risk of having the dispute resolved by inexperienced and incompetent judges.[80]

A party used to its own court system may be forced to litigate in an unfamiliar jurisdiction. The semantics of court procedure and the language used in such foreign courts may be unfamiliar. The practicalities of the proceedings may be costly, for example in a dispute between a Chinese and an American party, travel time between the two countries exceeds 20 hours.

This is not to say that litigating in a home jurisdiction gives a guaranteed advantage. US litigants lament on the far-reaching and expensive document discovery process in their home jurisdiction,[81] which a foreign plaintiff could exploit to procure a settlement.

What the forum-selection process of arbitration provides, in the words of Gary Born, is 'the least unfavourable forum that the party can obtain in arm's length negotiations.'[82] Such forum selection clauses often gravitate towards arbitration in well-known safe seats. Without arbitration as an alternative dispute resolution mechanism, these factors could dissuade parties from doing business, and in the long run, stifle international trade.

THE COST FACTOR

One of arbitration's presumed advantage over traditional court litigation is its lower cost compared to litigation's tiered appeal process. However, many of those having gone through an arbitration procedure and experiencing the process of enforcing awards in difficult jurisdictions, can attest that this is a myth. Arbitration appears to involve greater initial costs than litigation as they become more multi-jurisdictional, more contentious, more culturally challenging and ultimately more costly.

The disputes and differences to be resolved especially in international arbitration may involve substantial sums. The legal and other costs expended may also be significant sums given the legal and technical complexity of the cases. It may be tempting to take these at face-value, as arbitrator and

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80 Brown and Marriot, *ADR Principles and Practice* (2nd edn, 1999) 68–-69. There are a number of local courts where the quality of judges is of international renown, such as in New York, London and Singapore, but these remain a minority.

81 Born, *International Commercial Arbitration* (2nd edn, 2014) 73.

82 Born, *International Commercial Arbitration*, (2nd edn, 2014) 74.

institutional fees can be high particularly when the arbitral tribunal consist of a panel of three arbitrators and involving a high-value claim.[83]

Arbitral tribunals are using expedited procedures for small claims and cost orders to ensure arbitration remains a financially viable and attractive alternative to litigation and also, dissuade disruptive tactics to promote time and cost efficiency.[84] Arbitration institutions have also issued guidelines to incentivised the arbitral tribunals to render their award expeditiously by lowering or increasing their fees depending on the delay or rapidity of their work.[85]

Although arbitration aims to resolve disputes with maximum speed and at minimum cost by adopting best practices for awarding costs, there may still be delays and expenses.[86] This is particularly likely in complex cases which calls the expeditiousness of arbitration into question.

The arbitrators' cost decision often becomes a significant factor in the overall outcome of a case. as parties do seek to recover the such costs as part of the total compensation Yet, a lack of uniformity as to the standards applied by arbitrators when deciding on costs impacts on predictability of the outcome and thus on the parties' faculty to make an informed choice whether to invest in litigation or to settle.

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83 Top arbitrators may command their own high fees, but even an ad valorem rate can be intimidating for the parties. Cost awards can amount to tens of millions in 'big-ticket' arbitrations. In the three parallel arbitrations brought by the former majority shareholders of Yukos Oil Company against the Russian Federation under the Energy Charter Treaty and the 1976 UNCITRAL Rules, the arbitral tribunal awarded to the claimants US$60 million as costs for legal representation and assistance out of an amount of approximately US$81.5 million claimed as costs.

84 See the ICC Commission on Arbitration and ADR's 2012 Report on 'Techniques for Controlling Time and Costs in Arbitration' and its 2014 Guide on 'Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives' at www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/; Philipp Habegger, Chapter 13, Part V: Saving Time and Costs in Arbitration', in Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2013); David W. Rivkin and Samantha J. Rowe, 'The Role of the Tribunal in Controlling Arbitral Costs, (2015) 81 Arbitration, (2) 116-130.

85 An example is seen in the ICC International Court of Arbitration's 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration', 22 February 2016, paras 43 to 46.

86 See the ICC Commission on Arbitration and ADR's 2015 Report on 'Decisions on Costs in International Arbitration' at www.iccwbo.org. Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitrations*, in *ICC Ct. Bull.*, Vol. 4 (1993) 8-23; the 'Guideline on Drafting Arbitral Awards Part II – Costs', The Chartered Institute of Arbitrators at www.ciarb.org.

It is also sometimes argued that the arbitral process has become more complex, more legalistic and more institutionalised with the attendant cost increases.[87] Part of the reason for this is the large number of legally-qualified professionals who act as counsel and arbitrators and whose professional training in local court systems can create an inclination towards a more judicial approach to arbitrations. Empirical studies suggest that the party costs accounted for more than 80 per cent of the total costs of the arbitration.[88]

The arbitral tribunal is required to conduct the arbitration proceedings in a judicial manner in accordance with the rules where such rules are applicable or in accordance with the rules of natural justice, including giving both parties an equal and reasonable opportunity to present their cases.

Most arbitration legislations expressly confer on the arbitral tribunal the power to decide on costs as to which party shall bear, and in what proportion, the procedural costs and, where claimed, the costs of the arbitration which includes party costs.[89] Success fee arrangements and third party funding have added to the complexity and created problems to the allocation of costs in jurisdictions where the *lex arbitri* and ethical rules allow such practices.

Although arbitration provides greater freedom compared to the courts of law, in the form of greater informality in the proceedings and tailoring the

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87 The conference on Costs in International Arbitration (2011) by the Chartered Institute of Arbitrators found that almost 75% of the costs in an international arbitration were made up of legal fees. See *CIArb Costs of International Arbitration Survey 2011*, available at http://aryme.com. Party costs (including lawyers' fees and expenses, expenses related to witness and expert evidence and other costs incurred by parties for the arbitration make up the bulk of the overall costs of the proceedings. These costs make up 83% of the overall arbitration costs. See the ICC Commission Report: Decisions on Costs in International Arbitration, 2015, Issue 2, available at https://iccwbo.org.

88 *See* the ICC Commission Report: Decisions on Costs in International Arbitration, 2015, Issue 2, para 2, available at https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf.

89 See Arbitration Act 2005 s 31A. Many international arbitration rules expressly provide for the costs of arbitration to be borne by the unsuccessful party subject to the discretion of the arbitral tribunal exercised judicially. See 2015 CIETAC Rules Art 52(2); 1998 DIS Rules Art 35.2; 2014 LCIA Rules Art 28.4; 2012 PCA Rules Art 42(1); 2010 UNCITRAL Rules Art 42(1); 2013 HKIAC Rules Art 33.2; 2012 ICC Rules Art 37(5); 2014 ICDR Rules Art 34; 2010 SCC Rules Art 44; 2016 SIAC Rules r 37; 2014 WIPO Rules Art 74 and 2012 Swiss Rules Art 40(1). The rule in the United States is different in that each party is to bear its own legal costs and its own share of the arbitration costs. The arbitral tribunal is only empowered to shift party costs if so provided by the arbitration agreement, the applicable arbitration rules or the (foreign) *lex arbitri*. See Thomas H. Webster & Michael W. Bühler, *Handbook of ICC Arbitration* (3rd edn, Sweet & Maxwell 2014) paras. 37.82 to 37.84.

procedure suited to a particular dispute or to particular parties — the costs of arbitration may not be less than those which may have been incurred in court proceedings.

A one-strike proposition

Costs and delays are exacerbated by the advocacy of opposing lawyers whose clients often have substantial stakes in the outcome of the litigation, and who may prefer to disrupt the expeditious conduct of the proceedings, rather than reaching a settled outcome.

Even where both parties are engaging with the process, there is limited scope for appealing against an award, thus leaving very little room for error. The Right Honourable Sundaresh Menon, the Chief Justice of Singapore opined that arbitration has become a one-strike proposition that has led to increased costs as 'parties inevitably chase the best arbitrators and the best lawyers to give themselves the best chance of winning their case'.[90]

Langton J in *Foresta Romana SA v Georges Mabro (Owners)*[91] lamented:

> It is no part of my duty to make any aversions on commercial arbitration, but I have had some experience of it, and the expression 'ready and willing' does not appear to me to connote that the parties must enter into dispute of this sort with any signs of pleasurable excitement. My experience of commercial arbitration is that it is seldom pleasurable, it is never exciting, it is always expensive and it is frequently disappointing.

In this context, Mustill LJ commented that arbitration has become a service industry and, referring to the English context, that 'hotel bills alone may now surpass what would then (some 30 years ago) been the entire cost of an arbitration'.[92] With international travel costs taken into account, this point remains relevant even today.

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90 Sundaresh Menon, ICCA 2012 Congress in Singapore, Keynote Address. The Chief Justice also suggested that delays can be caused when arbitrators are forced to hear protracted submissions 'on every conceivable point' in giving the parties 'full opportunity' to present their case. Available in text and video format from the International Council for Commercial Arbitration website: http://www.arbitrationicca.org/AV_Library/ICCA_Singapore2012_Sundaresh_Menon.html.

91 (1940) 66 LI L Rep 139 at 141.

92 Mustill LJ, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 43, 55.

The lack of a backlog of cases in arbitration does not always guarantee that proceedings will move along swiftly. In large and complex disputes, counsel for the parties and the arbitrators themselves, being drawn from the top strata of their professions - will have very busy professional schedules. This makes it difficult to find a hearing date when they can all be in the same room.[93]

This is bound to cause delay in the proceedings, which can in turn result in greater expense than it would in litigation. Yet, arbitration provides the promise of predictability of costs and expenses. This is particularly true in jurisdictions where the courts are congested with lawsuits reaching up to the highest appellate level over the course of several years.

It renders resolution of disputes by litigation demonstrably more expensive and slower that arbitration. Arbitration may have initial costs that equal or perhaps exceed a first-instance hearing in court. However, the lack of multiple appellate tiers provides significant savings in terms of both time and money.

THE DURABILITY OF ARBITRATION

Essentially, arbitration has not radically changed from its historic origins. In domestic proceedings the choice between arbitration and litigation may hinge on issues of confidentiality and the neutrality of the arbitral tribunal. Depending on the circumstances, a decision may be finely balanced, particularly in jurisdictions where the local courts are highly-respected.[94]

However, in international disputes, arbitration provides numerous decisive advantages that make it the preferred method to deal with commercial and technical disputes effectively. Any arbitration legislation only provides the framework for arbitration and most of its provisions act as default positions, that are applicable only in the absence of agreement by the parties.[95]

However, with the assistance of the rules provided by arbitration institutions (either incorporated by reference or specifically agreed upon), the parties can establish a comprehensive framework that makes it possible to achieve a fair and just resolution to their dispute. In the words of Mustill LJ:

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93 Williams QC and Kawharu, *Williams & Kawharu on Arbitration* (2011) para 1.15, 9.

94 Blackaby and Partasides with Redfern and Hunter, *Redfern and Hunter on International Arbitration*, (6th edn, 2015) at para 1.105.

95 However, mandatory provisions, such as Arbitration Act 2005 s 28 which requires a tribunal to decide a domestic dispute in accordance with Indian laws only, cannot be superseded by an agreement of the parties.

> Arbitration has come to occupy an influential position in the conduct of international trade. It has a great deal more to contribute, and it can and should grasp the opportunities which stand before it. But there is no room for complacency.[96]

These words have become even more compelling since the outbreak of the COVID-19 pandemic. The pandemic prompted the international arbitration community to come up with means and methods to cope with the situation.

One of the most attractive features of arbitration is the logistical and procedural advantages it offers despite the geographical placement of arbitrators, parties and their respective counsel. In the COVID-19 world, the restrictions on travel almost entirely diluted this benefit. At the same time, it pivoted a gradual shift to conducting proceedings virtually even for substantive hearings.

While virtual hearings and videoconferencing were not unusual to arbitration, the compulsive desire of parties to be able to present their case in the best way possible, often led to the efficiency of virtual hearings being overlooked. Hotel bills in the present-day arbitrations had surpassed the cost of an entire arbitration 30 years ago.

The situation post COVID-19 pandemic may certainly contribute towards rectifying this by doing away with the high international travel costs, unless it is absolutely necessary for the arbitrators, parties and their counsel to be physically present for a hearing. It is true that some cases are significantly complex, for which a virtual hearing may not be conducive.

The pandemic prompted courts to take a similar approach and devise technological means to be able to conduct hearings virtually. Unlike arbitration, videoconferencing/virtual hearings were alien to courts.[97] The national lockdown in many jurisdictions which persisted continuous for months have caused the courts to function in a manner that did away with almost any requirement of physical attendance of parties or counsel.

For instance, courts devised systems for the e-filing of petitions and applications. There is movement by registries of courts in various jurisdiction

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96 Mustill LJ, 'Arbitration: History and Background', (1989) 6 Journal of International Arbitration 43, para 56.

97 However, some courts in various jurisdictions did conduct matrimonial and child custody matters over videoconference in cases where the parties were too far placed from each other.

to do away with the requirement for notarisation of affidavits. The parties are thus able to move court facing as little hurdles as possible.

On the other hand, e-filing has always been the norm in international arbitration. Despite the advances in technology and conduct of court proceedings, it is less likely that arbitration will lose favour with parties. However, one factor to bear in mind would be that the uprooting of contractual relations in the COVID-19 world may require an act of balancing of equities.

While such a power is vested in the courts, such a power can only be exercised by arbitral tribunals when they are authorised to do so by a party. In the view of the author, this issue may not go too far in dissuading a party from arbitrating a dispute since it is not entirely impossible for an arbitral tribunal to do complete justice while remaining within the contractual limits of its jurisdiction.

Finally, arbitration may become more relevant and sought after in the post COVID-19 world due to the availability of litigation funding, which would not be available to parties, if a dispute were to be resolved in Court. Given that the pandemic has displaced the economies of almost every business, access to litigation funding may become crucial for parties.

CONCLUSION

Arbitration will remain the natural mode of resolution for international business disputes. The development of international trade and domestic economic activity in the world has led to a significant increase in the number of the cases resolved by way of arbitration. As arbitration promises a fair trial by an impartial arbitral tribunal, many domestic and foreign parties will continue to perceive arbitration as the natural mode for the resolution. They will seek safe seats to conduct their arbitrations.