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Court Litigation over Arbitration Agreements: Is it Time for a New Default Rule?

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Abstract

Court litigation over the existence or validity of arbitration agreements is a major threat to the efficacy of international commercial arbitration. While New York Convention Article II(3) requires a court to "refer the parties to arbitration" when faced with a valid and effective arbitration agreement, it fails to provide any guidance with respect to the process for answering that question, thus leaving the issue to national law. A recalcitrant respondent may, therefore, have a variety of options for court challenges—based on a disparate array of national laws—in seeking to delay or at least complicate any claims subject to arbitration. This paper briefly surveys the problem, as well as a few current proposed solutions, and then proposes its own novel solution in the form of a new convention making arbitration the default legal rule for resolution of international commercial disputes.

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1 INTRODUCTION

Once upon a time, arbitration was seen as a means of avoiding courts in resolving parties' contract disputes. Today, however, an arbitration agreement all too often simply leads to a second dispute over the forum for resolving the first. This often obstructive skirmish—on the border between litigation and arbitration—arguably presents the single greatest threat to the effectiveness of commercial, business-to-business arbitration today. This threat is particularly acute in the context of international commercial arbitration, where recalcitrant parties may seek to invoke the jurisdiction of a broad array of national courts, with a broad variety of views regarding the proper role of courts with respect to the arbitral process. The primary tool for dealing with the interaction between national courts and the arbitral process is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention" or "Convention").

For over 50 years, the New York Convention has served two principle purposes, each of which relates to the enforcement of agreements to arbitrate claims in lieu of bringing them in court. Article II generally requires national courts to defer to agreed upon arbitration proceedings, and Article III generally requires national courts to recognize and enforce any resulting arbitration awards. This paper will focus on the former. To what extent are national courts precluded from exercising jurisdiction over matters at least arguably subject to arbitration?

This question requires a review of the "negative" aspect of "competence-competence." While "positive" competence-competence provides an arbitral tribunal with the power to decide its own jurisdiction, the negative version goes further in precluding a court from addressing this same issue—at least as a preliminary matter. This negative version is subject to significant variation under different national arbitration laws. Thus, parties challenging the jurisdiction of arbitrators will often bring parallel challenges in court, adding to the overall cost of resolving the original dispute and reducing the efficiency of arbitral process. This potential for parallel court proceedings may also sometimes add further complexity and uncertainty to the process, such as the issuance of anti-suit injunctions and questions with respect to the preclusive effect of any given court determination on another, or on the arbitral process, itself. Concerns over these issues have only been heightened in matters involving EU parties after the *West Tankers* decision. All of this added complexity and uncertainty is seemingly at serious odds with the simple efficiency often touted as one of arbitration's most basic virtues.

A strong version of "negative competence-competence" in Article II of the New York Convention could negate much of any detrimental effect of these national variations. However, the Convention's treatment of the issue in Article II(3), as drafted, is not sufficiently clear to serve this purpose. This paper will, therefore, explore the potential for addressing this arguable shortcoming of the Convention, also noting analogous attempts to "modernize" the "writing" requirement of Article II(2). Initially, two obvious alternatives present themselves: (1) amend or replace the New York Convention; or (2) provide interpretative guidance for the current Convention language that is likely to achieve the desired result. Each is briefly explored herein. This paper will, however, suggest a third alternative—a new convention designating arbitration as the default means of resolving international commercial disputes.

A couple of years ago, in addressing the modern trend away from any formal writing requirement, I initially suggested that perhaps it was time to start thinking about a convention that recognized normative preferences for arbitration of international commercial disputes and treated arbitration as the default legal rule—subject of course to any agreement to vest jurisdiction in a specific national court.[1] Ultimately, many of the court "skirmishes" around enforcement of an agreement to arbitrate arise from the fact that national courts remain the default forum—notwithstanding the "common wisdom" that arbitration is the norm for resolving disputes arising from cross-border commercial transactions. It would, thus, seem logical that disputes over the appropriate forum would be reduced by simply recognizing the normatively preferred arbitration forum as the legal default rule.

2 LITIGATION OVER ARBITRATION AGREEMENTS AND NEGATIVE COMPETENCE-COMPETENCE

Likely the greatest single threat to modern commercial arbitration is the propensity of recalcitrant respondents to bring court proceedings in hopes of delaying the resolution of claims fairly subject to arbitration on the merits.[2] To be sure, access to courts may often be valuable as an ancillary aid to arbitration proceedings in cases, for example, requiring early interim relief or eventual state-backed enforcement of an award.[3] However, preemptive early court fights over arbitral jurisdiction are largely unnecessary and expensive dead weight, often significantly reducing the effectiveness and increasing the cost of the arbitral process.[4] The only current way to avoid this problem is through the consistent application of a strong form of negative competence-competence, by virtue of which courts in any and all potentially available jurisdictions shall refuse to exercise jurisdiction over the parties' dispute—save only to compel the parties to arbitration.[5] Unfortunately, the applicable legal doctrine governing the issue is anything but consistent.

The problem of litigation over arbitration agreements is significantly exacerbated by disparate national laws governing potential litigation of a matter arguably subject to arbitration—either before the arbitral tribunal has been seized of the matter, or in parallel to the tribunal's deliberations (Part 2.1). In particular, the issue has become a very serious one in arbitration involving EU parties, based on recent decisions by the European Court of Justice applying the Brussels I Regulation to actions requesting court determination of whether the parties agreed to arbitrate (Part 2.2). The obvious solution to such a disparity among national laws is to look to the

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[1] Jack Graves, *ICA and the Writing Requirement: Following Modern Trends towards Liberalization or Are We Stuck in 1958?* 3 BELGRADE L. REV. 36 (Int'l ed. 2009). I first heard this rather novel proposition in a talk delivered by Eugen Salpius, a former President of the Chartered Institute of Arbitrators (2005), when I invited him to speak at Stetson University School of Law in early 2005. *See id*., fn 27. Gilles Cuniberti has also made a very similar proposal. *See generally*, Gilles Cuniberti, *Beyond Contract—the Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L. J. 417 (2009). *See also generally* KARIM YOUSSEF, CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION (2009) (suggesting arbitration as a normative default in the context of challenges arising in complex, multi-party commercial disputes).

[2] *See* Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM & MARY BUS. L. REV. 227, 242 (2011).

[3] *See* W. Michael Reisman and Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. OF INT'L ARB. 5, 7 (2010).

[4] *Id*.

[5] *Id*.

New York Convention and Article II(3), which requires a court of any signatory country to "refer the parties to arbitration" if they have agreed to arbitrate, "unless it finds said agreement is null and void, inoperative or incapable of being performed. However, the scope of such inquiry is left unanswered by the Convention, thus largely leaving the issue to local national law (Part 2.3).

2.1 THE BASIC PROBLEM AND AN ARRAY OF POSSIBLE SOLUTIONS

An arbitration agreement includes an express positive promise to arbitrate any dispute within its scope. However, it also includes an implied negative promise not to go to court—except in aid of the arbitral process.[6] The doctrine of "negative" competence-competence gives effect to this implied negative promise by limiting the authority of a national court to consider a matter arguably subject to arbitration prior to the arbitral tribunal's determination of whether the parties agreed to arbitrate the dispute in question. This negative version of competence-competence is particularly important, because it often provides the only means by which the parties can enforce the benefit of their implied bargain not to go to court. The effectiveness of an anti-suit injunction is often questionable[7]—especially in civil law jurisdictions[8]—and a claim for damages for breach of the arbitration agreement is often difficult to quantify.

In its strongest form, the doctrine precludes any court consideration of a question then subject to ongoing arbitration proceedings.[9] Early attempts to delay the proceedings are thereby discouraged; the parties are able to proceed in arbitration to a prompt and efficient resolution of their dispute on the merits; and any challenge to the arbitration agreement—and the resulting jurisdiction of the arbitrators—is generally fully preserved for later review by a court, if necessary.[10] However, national laws on negative competence-competence differ significantly.[11] A brief sample of the variety of disparate approaches to the issue are surveyed by reference to French law (Part 2.1.1); U.S. law (Part 2.1.2); English law (Part 2.1.3); the UNCITRAL Model Law (Part 2.1.4); and German law (Part 2.1.5).

2.1.1 A Strong Version of Negative Competence-Competence

French law provides the strongest modern statutory version of competence-competence today. Prior to the constitution of the tribunal, after which the arbitrators are deemed seized of the dispute at issue,[12] a court shall decline jurisdiction, unless "the arbitration agreement is ***manifestly*** void or ***manifestly*** not applicable."[13] If a court is presented with *prima facie* evidence

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[6] *See* Julian Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24 AM. U. INT'L L. REV. 489, 491 (2009) (explaining that a positive choice of final and binding arbitration is also a negative rejection of court adjudication).

[7] *See* MARGARET MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 92-100 (2008).

[8] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1041-43 (2009).

[9] This preclusion of court consideration during ongoing arbitral proceedings is typically subject to an exception where the tribunal has answered any jurisdictional challenge in a preliminary decision. *See, e.g.*, UNCITRAL Model Law on Int'l Commercial Arbitration, Article 16(3).

[10] A party who initially challenges jurisdiction and loses its challenge before the arbitrators, but subsequently wins on the merits of the dispute will of course be unlikely to challenge that decision later in court.

[11] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1031 (2009)

[12] French Code of Civil Procedure, Book IV, Title I, Chapter I, Article 1456.

[13] French Code of Civil Procedure, Book IV, Title I, Chapter I, Article 1448 (emphasis supplied).

of an arbitration agreement between these parties that might reasonably include the dispute within its scope, then the court must decline jurisdiction. If the arbitral tribunal is already seized of the matter, then the court must decline jurisdiction without any review of the issue at that time.[14] Notably, French law no longer requires a written arbitration agreement,[15] so this *prima facie* test for a "manifest" lack of a valid and applicable arbitration agreement may present interesting challenges in its application to a purported oral arbitration agreement, the existence of which is contested. Whatever its new challenges, however, the French approach has traditionally provided consistently strong support for arbitration and minimal opportunities for delay through court proceedings.

2.1.2 An Absolute (?) Version of Contractual Competence-Competence

The United States Federal Arbitration Act (the "FAA")[16] makes absolutely no provision for competence-competence—either positive or negative.[17] Instead, section 4 provides solely for court determination of any question as to whether the parties agreed to arbitration.[18] However, the United States Supreme Court has endorsed a contractual version of competence-competence, which arguably gives the arbitral tribunal not only the first word on jurisdiction, but also the last.[19] One might argue that this U.S. version gives rise to a stronger "negative" preclusion of court litigation than even the French approach. However, its precise contours are likely to be further litigated for some time to come.[20] Perhaps most importantly, the continuing need to resort to the courts for statutory "guidance" under the FAA[21] arguably undermines its effectiveness as a tool to give effect to the parties' implied desire to stay out of court.[22]

2.1.3 A Flexible Version of Negative Competence-Competence

The English approach provides significant autonomy to the parties and, in certain circumstances, discretion to the arbitral tribunal to allow for early court determination of whether the parties

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[14] French Code of Civil Procedure, Book IV, Title I, Chapter I, Article 1448.
[15] French Code of Civil Procedure, Book IV, Title II, Article 1507.
[16] 9 U.S.C. §§ 1-307.
[17] JACK GRAVES AND YELENA DAVYDAN, COMPETENCE-COMPETENCE—AMERICAN STYLE *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, 158 (Kroll, Mistelis, Perales and Rogers, eds. 2011).
[18] 9 U.S.C. § 4.
[19] *See* Rent-A-Center, West, Inc. v. Jackson , 130 S.Ct. 2772 (2010); JACK GRAVES AND YELENA DAVYDAN, COMPETENCE-COMPETENCE—AMERICAN STYLE *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION, 166-67 (Kroll, Mistelis, Perales and Rogers, eds. 2011) (elaborating on the broader likely effect of the *Rent-A-Center* decision).
[20] *Id.*
[21] *See generally* Margaret Moses, *Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Allied Bruce Terminix Co. v Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (explaining that the U.S. Supreme Court had long ago "abandoned all pretence of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation").
[22] See Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM & MARY BUS. L. REV. 227, 266-67 (2011).

have agreed to arbitrate a dispute. However, absent mutual consent of the parties or the consent of the arbitrators, early court consideration is barred.[23]

2.1.4 The Lack of a Clear Standard under the UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") addresses the issue in Article 8. However, Article 8(1) provides little, if any guidance on the extent of any limits on early court consideration of the parties' purported arbitration agreement. Like New York Convention Article II(3), it requires any court to "refer the parties to arbitration" if they have agreed to arbitrate, "unless it finds said agreement is null and void, inoperative or incapable of being performed." However, the scope of such inquiry is not addressed. Article 8(2) seemingly goes further in expressly providing for the potential of parallel court proceedings, inasmuch as it allows both arbitration and court consideration of the arbitration agreement concurrently. As such, Model Law Article 8 provides only for a rather weak version of negative competence-competence and is, arguably, of less value in preventing unnecessary litigation over the arbitration agreement.

2.1.5 An Option for Early Court Determination of Jurisdiction

The German approach begins with the Model Law formulation described above, but adds a significant twist.[24] While section 1032(1) German Code of Civil Procedure adopts the language of Article 8(1) of the Model Law, section 1032(2) allows either party to seek a declaratory court judgment with respect to the purported arbitration agreement—as long as the action is commenced before the tribunal is constituted.[25] Thus, a party against whom a claim is brought in arbitration will virtually always have the opportunity to institute an early court challenge, assuming it does so promptly. The French and German approaches to negative competence-competence arguably represent two ends of a diverse spectrum of approaches within Europe.[26] Whatever the previous challenges of this disparity among national laws, much worse was yet to come in the application of the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Brussels I Regulation") to court proceedings involving agreements to arbitrate.

2.2 THE BASIC PROBLEM—JURISDICTION BRUSSELS I STYLE

The Brussels I Regulation provides for a *lis pendens* rule giving sole jurisdiction to the court first seized.[27] Whatever the pros or cons of this approach to jurisdiction in litigation, generally, the Brussels I Regulation further provides that it "shall not apply to arbitration."[28] However, in the

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[23] English Arbitration Act (1996), Article 32; KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 10 (Muller and Rigozzi, eds. 2010).
[24] *See* German Code of Civil Procedure of 1998 ("ZPO"), section 1032.
[25] KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 8 (Muller and Rigozzi, eds. 2010).
[26] *Id*. at 14-15.
[27] Council Regulation (EC) No. 44/2001, Articles 27-29.
[28] Council Regulation (EC) No. 44/2001, Article 2(d).

much discussed (and largely maligned—at least within the arbitration community) *West Tankers* decision, the Court of Justice of the European Communities held that an injunction issued by the English High Court barring litigation of the arbitration agreement in a previously commenced Italian court action was incompatible with the Brussels I Regulation—notwithstanding the fact that England was the seat of arbitration.[29]

While the European Court of Justice agreed that the arbitration proceedings giving rise to the anti-suit injunction were outside of the scope of Brussels I, it further suggested that Brussels I may nevertheless preclude proceedings that "have consequences which undermine its effectiveness."[30] The Court went on to find that the previously filed Italian court action was subject to the exclusivity protection provided by Brussels I, and the English injunction would undermine that protection.[31] Thus, the injunction was incompatible with the Brussels I Regulation.

The *West Tankers* case left open a further troubling question. Could the courts of the seat of arbitration be deprived of jurisdiction to decide whether the parties had agreed to arbitrate if another court decided the issue first? This question was answered in the affirmative in *National Navigation Co. v. Endesa Generacion SA*.[32] A Spanish court's determination that the parties had not incorporated into their contract an agreement providing for arbitration seated in England precluded any English Court from taking up the question and required dismissal of the arbitration proceedings.[33]

Predictably, *West Tankers* and its progeny have led to numerous calls to amend the Brussels I Regulation.[34] However, reaching agreement on the nature of such an amendment has been more difficult and subject to significant divergence in approaches. Most proposals seem to fall into two basic categories: (1) within the Brussels I Regulation, grant the courts of the seat the sole authority to determine whether the parties agreed to arbitrate; or (2) clarify the unequivocal inapplicability of Brussels I to any matter in any way related to a matter subject to arbitration. Unfortunately, neither is without its challenges.

Soon after the *West Tankers* decision, the EU Commission published a "green paper" on the review of the Brussels I Regulation.[35] The green paper had been well underway prior to *West Tankers* and, *inter alia*, addressed "[t]he interface between the Regulation and arbitration," based on a series of recommendations contained in the earlier 2007 Heidelberg Report.[36] The green

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[29] West Tankers, Inc. v. Allianz SpA, Case C-185/07, Court of Justice of the European Communities (10 Feb. 2009).
[30] *Id.* at 1156-57.
[31] *Id.* at 1157.
[32] English Court of Appeal, 2 C.L.C. 1004 (2009).
[33] *See id*. Such a result was, of course, fully predictable based on the rationale of *West Tankers*. *See* KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 20 (Muller and Rigozzi, eds. 2010).
[34] *See, e.g., generally* Guido Carducci, *Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention*, 27 ARBITRATION INT'L 171 (2011).
[35] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175.
[36] KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 2-3 (Muller and Rigozzi, eds. 2010).

paper proposed to expand, selectively, the applicability of Brussels I to the extent its application would enhance and improve the efficacy of various court proceedings in support of arbitration.[37] It further proposed to grant priority to courts of the seat in determining whether the parties had agreed to arbitrate the dispute in question,[38] a provision that would have likely avoided the *West Tankers* problem. However, the proposals contained in the green paper were protested by much of the international arbitration community. They were also firmly rejected in the report of the Legal Affairs Committee of the European Parliament, which took the position that the whole matter of arbitration should be excluded from the scope of the Regulation.[39]

In the EU Commission's proposal to amend the Regulation, published in December 2010, the only change related to arbitration was the addition of a new Article 29(4).[40] This provision would require any court before which jurisdiction is contested on the basis of a purported arbitration agreement to stay jurisdiction in favor of court or arbitral proceedings in the seat of arbitration and to decline jurisdiction where the existence, validity, and effect of the arbitration agreement have been established.[41] This proposal, essentially, took direct aim at the *West Tankers* decision and its potential to create "incentives for abusive litigation tactics" and thereby undermine the efficacy of the arbitral process.[42] The divergence of views as to the desirability of ***any*** interface between arbitration and the Regulation was also recognized.[43] However, the proposal ultimately provided this limited interface in hopes that it would "enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate incentive for abusive litigation tactics."[44] Strongly divergent views nevertheless remain,[45] and a brief exploration of a few of the issues is useful.

The arbitration community is strongly protective of the New York Convention and will resist anything that might be seen as potentially undermining its effectiveness. To the extent that the Brussels I Regulation applies, in any way, to arbitration, the potential for conflict with the Convention naturally increases. For example, to the extent that the Regulation gives priority to a determination of the seat with respect to arbitral jurisdiction, would the application of the Regulation preclude the French practice of sometimes recognizing an award set aside in the seat

[37] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175, at 8-9, para. 7. Such proceedings might include provisional measures, which would be vested exclusively in the seat of arbitration. Additionally, a judgment merging an arbitration award might be given effect under the Regulation.
[38] *Id.*
[39] KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 23 (Muller and Rigozzi, eds. 2010).
[40] European Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM (2010) 748. The proposal would also amend Article 2 to provide for the applicability of the Regulation to arbitration solely as reflected in Article 29(4), as well as the accompanying provision of Article 33(3) defining when a tribunal is first seized of a matter.
[41] *Id.* at 36, Article 29(4).
[42] *Id.* at 4.
[43] *Id.* at 5.
[44] *Id.* at 9, para. 3.1.4.
[45] *See* Draft Report of the European Parliament on the Regulation (recast) COM (2010) 748, dated 28 June, 2011 (continuing to reject any application of the Regulation to proceedings subject to arbitration).

of arbitration?[46] The New York Convention certainly allows this, but the proposed amendment to the Brussels I Regulation might not. After *West Tankers*, the potential for unexpected consequences of the application of Brussels I to arbitration are of course only heightened.

The focus on giving priority to the arbitral seat is also subject to a potential flaw in that it assumes one can easily and immediately identify the seat. To the extent that the seat is clearly designated in the parties' agreement, this assumption is reasonable—but what if it is not? What if the parties fail to designate a seat or leave some ambiguity as to their choice? Typically, in such circumstances, the arbitrators will determine the seat,[47] and one might not necessarily be able to determine the seat prior to that time. Thus, any approach that focuses on the seat in attempting to prevent abusive early litigation will necessarily sometimes fail.

In contrast, an approach clarifying that the whole matter of arbitration is excluded from the scope of the Brussels I Regulation would entail complete reliance on national law and the New York Convention. We've already discussed, above, the divergence in national laws with respect to the negative doctrine of competence-competence, so this brings us to a more thorough examination of the issue under the Convention.

2.3 THE NEW YORK CONVENTION AND ARTICLE II(3)

The New York Convention has, without a doubt, formed the bedrock foundation upon which modern arbitration has been built. No one would seriously question its value in making arbitration awards broadly enforceable across national borders in most countries around the globe. Article III of the Convention provides for recognition and enforcement of an award, subject to simplified procedures contained in Article IV and a very narrow set of exceptions contained in Article V. This "enforcement" mechanism, operating in concert with the perceived neutrality of the process, is absolutely essential for effective international commercial arbitration.

However, effective international commercial arbitration ***also*** requires a legal framework in which courts in ***any and all*** potentially available jurisdictions will predictably and consistently refuse to exercise jurisdiction over the parties' dispute—save only to compel the parties to arbitration.[48] The broad applicability of the New York Convention would seem to make it an ideal candidate for this role. Unfortunately, Article II(3) of the Convention is not particularly effective in this respect.[49] In fact, it is worth noting here that the European Court of Justice, in *West Tankers*, had little problem in stating that its decision in support of the Italian Court's jurisdiction to consider

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[46] KLAUS SACHS AND NILS SCHMIDT-AHRENDTS, DIVERGING CONCEPTS OF THE PRINCIPLE OF COMPETENCE-COMPETENCE? *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 18-19 (Muller and Rigozzi, eds. 2010).

[47] *See, e.g.*, UNCITRAL Model Law (2006), Article 20; UNCITRAL Arbitration Rules (2010), Article 18.

[48] *See* W. Michael Reisman and Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. OF INT'L ARB. 5, 7 (2010).

[49] *See* Guido Carducci, *Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention*, 27 ARBITRATION INT'L 171, 174 (2011) (in addressing European reliance on the New York Convention to address the *West Tankers* issue, noting that the Convention has been far more effective in terms of enforcement of arbitration awards and far less so in terms of avoiding parallel national court jurisdiction).

fully the existence, validity and scope of the arbitration agreement was fully consistent with Article II(3) of the Convention.[50]

Article II(3) is crystal clear in requiring a court to refer the parties to arbitration in a proper case. However, it provides no guidance as to the appropriate methodology or extent of any inquiry by the court.[51] Should a court refuse to consider any case in which the arbitrators are seized of the matter? And what does it mean for the arbitrators to be "seized of the dispute"? Does this occur only after the tribunal has been fully constituted, as provided by French law?[52] Or does it occur as soon as the process of constituting the tribunal has begun, as provided by the proposed amendment to the Brussels I Regulation?[53] Or might a tribunal even be deemed seized upon "commencement" of arbitration proceedings? The question becomes even more problematic if court litigation is commenced before an arbitral tribunal is seized of the matter (however "seized" or "seised" might be defined).

Where a party seeks dismissal of a court action arguing that the dispute is subject to an arbitration agreement, what is the proper level of court inquiry at this time? Should the court make a full determination of the issue, or should it simply conduct a *prima facie* review, staying or declining jurisdiction unless the lack of an effective arbitration agreement is "manifest." This standard of review is particularly important in cases like *West Tankers*, where the court in question is ***not*** a court of the seat of arbitration. While one might reasonably argue in favor an early court determination by a court of the seat, as provided for under German law, there is rarely any redeeming basis for early review by any other court. In the vast majority of cases, another court may solely address the arbitration agreement in the context of an enforcement proceeding. However, the availability of court litigation outside of the seat provides ample opportunity for mischief and abuse in efforts to delay proper arbitration proceedings.

While a discussion of global comparative court jurisdiction is far beyond the scope of this article, it can safely be said that, absent an arbitration agreement, any given commercial dispute will typically be subject to the jurisdiction of ***at least*** two different courts.[54] A recalcitrant respondent, therefore, need only choose the "least expeditious" court from among those with potential jurisdiction and then contest the existence, validity, or scope of the arbitration agreement before that court—potentially delaying the ultimate resolution of the dispute for an indeterminate period

[50] *See* West Tankers, Inc. v. Allianz SpA, Case C-185/07, Court of Justice of the European Communities, 1158 (10 Feb. 2009).
[51] SCHRAMM, GEISINGER, PINSOLLE *in* HERBERT KRONKE (ED.), RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, 109-10 (2010).
[52] *See* French Code of Civil Procedure, Book IV, Title I, Chapter I, Article 1456 (providing that a tribunal is seized "upon the arbitrators' acceptance of their mandate").
[53] *See* European Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM (2010) 748, Article 33(3) (providing that "an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution").
[54] *Cf.* Guido Carducci, *Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention*, 27 ARBITRATION INT'L 171, 176 (2011) (addressing the potential in Europe where two options are generally available).

of time.[55] The New York Convention, as drafted, provides little, if any, assistance in preventing this particular problem.

There is also a relatively new—and particularly thorny—issue that is worth noting at this juncture. Even if a court is willing to limit its review under Article II(3) to a *prima facie* inquiry, what is the nature of a *prima facie* review of a purported oral agreement to arbitrate? Modern arbitration law increasingly recognizes such oral arbitration agreements.[56] However, resolving a factual dispute over what was said between the parties would seemingly require a far deeper inquiry than simply reviewing the language of a purported written agreement. Even more importantly, the New York Convention does not recognize oral agreements to arbitrate under Article II(2), so Article II(3) would not be available to a party challenging court proceedings over a matter subject to an oral arbitration agreement. In fact, Articles II(2) and II(3) arguably present the strongest basis for any suggestion that it may be time to consider amending the New York Convention.

3 ADDRESSING THE PROBLEM THROUGH ARTICLE II(3) OF THE NEW YORK CONVENTION

To the extent we wish to provide for a uniform and consistent solution to the problem of court litigation over arbitration agreements, the New York Convention seemingly provides the ideal vehicle in terms of its extraordinarily broad application. However, in attempting to resolve the issue through the Convention, we face two significant challenges. First, how do we specifically propose to solve the problem (Part 3.1)? Second, how do we bring about the selected approach under the Convention (Part 3.2)?

3.1 POSSIBLE SOLUTIONS TO THE PROBLEM

To some degree, the range of potential solutions under the New York Convention mirrors some of those being considered with respect to the *West Tankers* issue under Brussels I. Should a court be limited to a *prima facie* review? Should a court be required to conduct any review of the arbitration agreement under the law of the arbitral seat? Should exclusive jurisdiction be vested in the courts of the seat?

At the ICCA International Arbitration Conference in 2008, Albert Jan van den Berg proposed, on the fiftieth birthday of the New York Convention, that the time had come for its "modernization."[57] The very first issue he raised was the revision of Articles II(3).[58] His hypothetical draft revision would require any court to refer the parties to arbitration, absent proof that "there is *prima facie* no valid arbitration agreement under the law of the country where the

[55] As William Gladstone reminded us over 100 years ago, "justice delayed, is justice denied."
[56] *See* French Code of Civil Procedure, Book IV, Title II, Article 1507; UNCITRAL Model Law, Article 7 Option 1 (requiring a "record" of content, but allowing for oral consent) or Option 2 (no form requirement of any kind). *See also* Jack Graves, *ICA and the Writing Requirement: Following Modern Trends towards Liberalization or Are We Stuck in 1958?* 3 BELGRADE L. REV. 36 (Int'l ed. 2009) (more fully addressing the revisions of Model Law Article 7).
[57] *See generally* Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, ICCA CONGRESS SERIES NO. 14, 649 (van den Berg, ed. 2009).
[58] *Id.* at 649. The second issue raised was the modernization of the writing requirement in Article II(2).

award will be made."[59] There is certainly some merit to this "choice of law" approach, inasmuch as any subsequent enforcement proceedings would necessarily address any challenge to the arbitration agreement under the law of the place in which the award was made.[60] However, it also raises a number of difficult issues.

At the same 2008 conference, Emmanuel Gaillard put forth the opposing view that the New York Convention should be left in its current form.[61] He further suggested that, even if one were to revise the Convention, any focus on the "law of the seat" was ill advised.[62] As explained earlier in addressing EU proposals to limit jurisdiction to the courts of the seat, the seat of any arbitration may not yet be known at the time of any court consideration.[63] Moreover, the application of what will likely be foreign law is often difficult and may require lengthy hearings, perhaps including experts, to determine its content.[64] Finally, the recent *Dallah* decision reminds us that two different courts may reach inconsistent results, even when purporting to apply the same body of law.[65]

While agreeing with the *prima facie* standard of review proposed by van den Berg, Gaillard suggested a "simple assessment on the basis of generally accepted practices," in lieu of a potentially more challenging and lengthy attempt to apply a specific national law.[66] There is indeed much to be said for such a simple, generic approach to a *prima facie* review. However, it fails to address at least one major issue—that of oral agreements to arbitrate.

It is doubtful that the recognition and validation of ***oral*** arbitration agreements is yet a "generally accepted practice." Thus, a German court, for example, might find an arbitration agreement formally invalid in its *prima facie* review—notwithstanding the fact that a court in the French seat of the arbitration would not impose any form requirement.[67] Admittedly, the German court might then go on to evaluate the purported arbitration agreement in greater detail, assuming it

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[59] *Id.* at 667.
[60] *See* New York Convention, Article V.1.(a).
[61] *See generally* Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, ICCA CONGRESS SERIES NO. 14, 689 (van den Berg, ed. 2009). Typical reasons for resistance to revision are that (1) the Convention is currently very effective; (2) change will be difficult, at best; and (3) the costs of any changes may exceed any gains.
[62] *Id.* at 693-94.
[63] Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, ICCA CONGRESS SERIES NO. 14, 689, 694 (van den Berg, ed. 2009).
[64] *Id.* A perfect example of Gaillard's concerns can be found in *Filanto v. Chilewich*, 789 F.Supp. 1229 (S.D.N.Y. 1992), in which an Italian seller and a New York buyer disputed the existence of an arbitration agreement that clearly provided for a seat in Moscow, Russia. The court struggled mightily with the issue under the CISG, federal common law (whatever that might be), and the New York Convention, and it likely got to the right result, sending the parties to arbitration. However, it never once mentioned Russian national arbitration law—likely because neither of the parties ever suggested its application, thereby requiring proof as to its content.
[65] *See, e.g,* Gary Born, *Dallah and the New York Convention*, Kluwer Arbitration Blog (7 April 2011). In the *Dallah* case, the UK Supreme Court refused to enforce a French award against the government of Pakistan, having determined that Pakistan was not a party to the arbitration agreement, while the Paris Court of Appeals reached a contrary decision applying the same French law of the arbitral seat. In theory, the focus on the law of the seat under New York Convention Article V(1)(a) should preclude differing outcomes on the question of whether the parties agreed to arbitrate. In this case, however, it did not. *Id*.
[66] *Id.* 694.
[67] As suggested earlier, the nature of a *prima facie* review of an oral agreement to arbitrate is not entirely clear.

could determine the seat and apply its law to any full determination. However, this "simple" approach to a *prima facie* review is not necessarily as "simple" as it might first appear.

Alternatively, instead of focusing on the standard of review, the Convention could be amended to grant exclusive jurisdiction to the courts of the seat of arbitration,[68] effectively providing for an anti-suit injunction barring any other courts from addressing the issue.[69] This approach avoids any problems associated with choice of law or standard of review. It doesn't necessarily preclude early resort to the courts on the issue of arbitral jurisdiction, as in the case of a German seat, but that is a choice within the control of the parties when they choose a seat. Early court resolution—in that instance—therefore seems more consistent with the parties' agreement.

This exclusive jurisdiction approach, however, remains subject to problems when the seat is not yet known. Moreover, the exclusive jurisdiction approach may bar a court from addressing the arbitration agreement[70]—even if it involves a local citizen and a matter of fundamental public policy that would invalidate the arbitration agreement.[71] Presumably, such a jurisdictional bar would be subject to a reasonable array of exceptions. However, the contours of such exceptions may be very difficult to define in a manner that doesn't simply reopen the door for mischievous "torpedoes."

In short, there is no single, easy answer to the question of how to remedy the current deficiencies of Article II(3). However, even if agreement can be reached regarding desirable changes, one must yet determine how to bring about these changes.

3.2 MEANS FOR BRINGING ANY SOLUTION ABOUT

Any proposal for actual modification of the existing language of the New York Convention is typically met with strong resistance. When UNCITRAL revised the writing requirement of Model Law, Article 7, in 2006, some suggested that the writing requirement of Article II(2) of the New York Convention ought to be modified in order to bring it in line with modern trends, as reflected in revised Article 7—at least as to Option I.[72] However, amending the actual language

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[68] *See* Guido Carducci, *Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention*, 27 ARBITRATION INT'L 171, 186 (2011).

[69] *See* Margaret Moses, *Barring the Courthouse Door? Anti-Suit Injunctions in International Arbitration* (in progress—unpublished manuscript on file with author).

[70] SCHRAMM, GEISINGER, PINSOLLE *in* HERBERT KRONKE (ED.), RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION, 109 (2010).

[71] For example, under most national laws, an insolvent party has no capacity to conclude an arbitration agreement. Would a court be precluded from addressing this issue simply because the arbitration agreement designated a different seat? Arguably, it should not be. Notably, in his hypothetical revised New York Convention, Albert Jan van den Berg proposed to add public policy as a basis for non-recognition of an arbitration agreement. Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, ICCA CONGRESS SERIES NO. 14, 667 (van den Berg, ed. 2009). This is of course fully consistent with the existing public policy exception of New York Convention Article V, but would allow a court to invalidate an arbitration agreement offensive to such public policy, even in the absence of local enforcement proceedings.

[72] Option 1 retains a requirement of a record of "content," but relaxes the requirement for a record of "consent," while Option II goes further and eliminates any requirement as to form. Jack Graves, *ICA and the Writing Requirement: Following Modern Trends towards Liberalization or Are We Stuck in 1958?* 3 BELGRADE L. REV. 36, 39 (Int'l ed. 2009).

of the Convention was deemed too difficult at the time. Instead, along with the revision of Article 7, UNCITRAL included a resolution recommending an interpretation of the existing language of Article II(2) of the Convention in a manner that might, essentially, be more consistent with revised Article 7 of the Model Law.[73] Perhaps, a similar approach might be taken with respect to Article II(3) of the Convention.

A resolution promulgated by UNCITRAL could certainly stipulate, for example, a *prima facie* standard of review, which might be equally useful with respect to the analogous language in Article 8(1) of the Model Law. The actual language of Article II(3) of the Convention would not require any change, and the challenge of amending a Convention with more than 140 signatories would be avoided. The problem, of course, with this proposed solution is the questionable effect of a simple interpretive resolution. To the extent that one seeks to use Article II(3) to bar abusive litigation as a delaying tactic, adding further uncertainty to the process seems unwise.

Arguably, any effective change in the treatment of the issues addressed (or not addressed) by Article II(3) of the Convention will likely have to come through amendment, as recently suggested by Albert Jan van den Berg. However, if one is going to attempt to overcome all of the near certain difficulties of revising this 50+ year old foundation of international commercial arbitration, perhaps one should "think big" in hopes of finding an approach that might take us through at least the next 50 years.

4 ARBITRATION AS A DEFAULT IN INTERNATIONAL COMMERCE

The commencement of court litigation of a matter subject to arbitration is often characterized as a "torpedo" intended to "sink" or at least complicate and delay the arbitration proceedings.[74] Guido Carducci explains in a recent article addressing, *inter alia*, the problem of such "torpedoes."

> Preventing the 'torpedoing' of international arbitration should be supported. However, it is a fact that preventing 'torpedoes' which operate by selected court proceedings finds in its way the principle of judicial protection for ***regularly filed claims***, which opposes any 'torpedo net.'[75]

In short, this "torpedo" is often effective in thwarting international commercial arbitration proceedings because the applicable legal framework fails to recognize arbitration as the default mechanism for such "regularly filed claims" Instead, the current default jurisdictional rule for "regularly filed claims" involving international commercial transactions is national courts—a default that is fully inconsistent with normative practices. Instead of attempting to weave an ever tighter torpedo net against a contrary default mechanism for resolving international commercial disputes in court, why not simply recognize the obvious and make arbitration the default? With a default rule providing for arbitration, a court would have no basis for exercising jurisdiction absent an affirmative agreement of the parties. Thus, the effectiveness of court actions as a

[73] *Id*. at 38.
[74] *See, e.g.*, Guido Carducci, *Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention*, 27 ARBITRATION INT'L 171, 176-77 (2011).
[75] *Id*. at 177 (emphasis supplied).

means to delay or obstruct arbitration proceedings would be substantially diminished, if not largely eliminated.

Arbitration is almost certainly the normative method for resolving disputes in the majority of international commercial transactions.[76] As such, this normative reality should be recognized through a default legal rule providing for arbitration in the absence of any agreement to the contrary (Part 4.1). While such a change of the default rule from national courts to arbitration would certainly be significant, the change could arguably be accomplished with a few relatively small steps beyond the status quo (Part 4.2).

4.1 ARBITRATION AS THE DEFAULT

"[I]nternational arbitration is the natural and preferred means of resolving international business disputes."[77] Arbitration is uniquely suited to cross border commercial transactions in that it provides for neutral resolution of disputes and effective enforcement of resulting awards. It also "typically produces efficient, expert resolution" of these disputes.[78] Thus, "there are serious reasons to presume, as a general matter and absent contrary indications, that commercial parties are predisposed to enter into international arbitration agreements, in order to obtain the benefits that such agreements provide."[79]

The quotations in the foregoing paragraph are drawn from Gary Born's spirited defense of a "presumption" in favor of arbitration, in lieu of a more "neutral" approach, such as that applied to the issue of consent in contracts, generally.[80] Born makes clear, however, that "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,' and that pro-arbitration policies cannot substitute for the parties' consent."[81] Or can they? Or, more to the point, could consent be defined more broadly than one might initially intuit?

Consent might be found in a variety of contexts. Parties to a particular contract may be deemed to have impliedly consented to certain majoritarian normative terms. Consent may also be triggered by a positive rule of law. Each of these bases of consent is more fully explored below.

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[76] *See, e.g.*, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 653 (2009); *but see* Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction"*, 21 AM. REV. OF INT'L ARB. 47, 161 n. 294 (2010) (citing an empirical study disputing the existence of a preference for arbitration in international commerce—Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335 (2007)). However, the Eisenberg & Miller study was fundamentally flawed, as applied to international commercial transactions broadly, in that it focused solely on contracts disclosed in SEC filings by public companies. Such contracts are far from representative and, by their nature, far more likely to give rise to a preference for court adjudication. *See generally* Christopher Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO ST. J. DISP. RESOL. 433 (2010) (explaining why any inferences drawn from the Eisenberg & Miller study should be narrowly limited to its specific context). To the extent they also likely had court forum selection provisions, as this sort of contract generally would, the instant proposal would have no effect.

[77] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 653 (2009).

[78] *Id.*

[79] *Id.*

[80] *See id.* at 653-54.

[81] *Id.* at 654 (quoting the U.S. Supreme Court in *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

4.2 A SMALL, THOUGH SIGNIFICANT, STEP BEYOND THE STATUS QUO

A knowledgeable observer of U.S. jurisprudence interpreting and applying the Federal Arbitration Act might reasonably argue that, as a practical matter, the courts have already left consent far behind in deciding issues of arbitral jurisdiction.[82] For example, a party who chooses institutional arbitration seated in the United States under the ICDR Rules is deemed to have "clearly and unmistakably consented" to delegate any jurisdictional decision to the arbitrators—and arguably has given up any right to ever raise the issue in court—solely by virtue of a provision within the chosen institutional rules.[83] U.S. Consumers are often deemed to have "consented" to arbitration agreements that are largely unread, generally misunderstood, and often provided after the consumer's agreement to take and pay for the goods or services in question.[84] Nor is the U.S. approach particularly out of the mainstream, with respect to business-to-business commercial arbitration. Under all modern national arbitration laws, a party whose contractual consent is induced by fraud is deemed to have "consented" to the arbitration clause within the main contract.[85] Perhaps even more remarkably, a compulsory application by an athlete to compete in his or her chosen sport binds the athlete to arbitration of any related disputes before the Court of Arbitration for Sport.[86] In short, real "consent" arguably ceased to be the touchstone of arbitration law some time ago.[87]

Any general "pro-arbitration" presumption of consent is likely even stronger in the case of international commercial arbitration. Thus, it would seem to be a relatively small step from the current presumption to a fully independent presumption of "consent" to arbitration of an international commercial dispute, in the absence of any agreement to the contrary (Part 4.2.1). Moreover, the basic outlines of a possible template for a default legal regime can be found in the existing Panama Convention (Part 4.2.2).

4.2.1 A Significant, and Perhaps Controversial, Presumption of "Consent"

Any suggestion for treatment of arbitration as a "default rule" for dispute resolution raises obvious and significant questions regarding "consent." It is often repeated that consent is the cornerstone of arbitration, and this same "consent" mantra was recently invoked by Professor Alan Scott Rau in seemingly dismissing the idea of a rule making arbitration the default means

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[82] U.S. courts call this the "arbitrability" question, though the term has a much narrowing meaning globally.

[83] *See* Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM & MARY BUS. L. REV. 227, 281 (2011).

[84] *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). Admittedly, the U.S. approach to consumer and employee arbitration is anomalous, and this article solely focuses on international business-to-business arbitration. However, this line of cases raises significant questions as to the continuing importance of real consent in sending parties to arbitration.

[85] *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration, Article 16(1) (providing that an arbitration clause within a broader contract is separable from, and therefore unaffected by, the invalidity of the contract within which it is contained; *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (reading the doctrine of "severability" into the U.S. Federal Arbitration Act).

[86] Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISPUTE SETTLEMENT 217, 243-44 (2010).

[87] *See* KARIM YOUSSEF, CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION, 8 (2009) (suggesting that the "freely consenting party is a legal fiction").

of international commercial dispute resolution as a proposal "displaying analytical confusion."[88] However, "consent" comes in many forms.

An international commercial transaction is always based on consent, as a matter of universal contract law. The vast majority of contract regimes provide a broad array of default terms, typically based on normative business behavior.[89] In one respect, an agreement to arbitrate disputes arising under the parties' main contract is no more than a typical majoritarian default contract term provided in a variety of contractual contexts.[90] Admittedly, this is arguably inconsistent with the doctrine of separability, but that doctrine would be rendered largely unnecessary if arbitration were the default.[91]

Moreover, tacit "consent" may be found in the parties' failure to contract around an established default legal rule, provided (1) the parties had reason to know of the default rule; and (2) the cost of contracting around the default rule is not prohibitive.[92] Any effective default rule providing for international commercial would almost certainly have to take the form of a well promoted and publicized convention, so international business people would seemingly have reason to know of its existence. While negotiating a dispute resolution provision can sometimes have higher than normal transaction costs, the availability of the Hague Convention of Choice of Court Agreement, providing a well-structured legal regime for agreeing on court adjudication instead of arbitration, would seem to reduce such costs, at least to some degree.

In fact, parties could indeed opt out of arbitration in favor of court adjudication, as long as they chose a specific court. Assuming broad support of the Hague Convention on Choice of Courts, the parties' choice would be fully effective. Thus, contracts fully addressing issues of dispute resolution would be unaffected by this change in the default rule. The change in default would apply only to parties who fail to provide for a dispute resolution forum in their agreement. One might reasonably ask if this effect will fall disproportionately on smaller, less sophisticated parties. If so, a default rule providing for arbitration is even more essential.

Large multinational corporations typically have a significant presence in many of the countries in which they do business—including a legal team. Thus, they are much more likely to be able to take advantage of a contracting partner's own local courts in the event litigation arises. Moreover, the large multinational corporation, as a defendant, is more likely to have significant

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[88] Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction"*, 21 AM. REV. OF INT'L ARB. 47, 161 (2010) (commenting on Gilles Cuniberti, *Beyond Contract—the Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L. J. 417 (2009)).

[89] *See generally, e.g.*, The U.S. Uniform Commercial Code; The United Nations Convention on International Contracts for the Sale of Goods (the "CISG").

[90] In effect, the current "default" of national courts, is arguably a "penalty" default in the context of an international transaction. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989). A penalty default is undesirable in the context of arbitration inasmuch as there is often a particularly high relational cost in negotiating such a term. *See* Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM & MARY BUS. L. REV. 227, 240-41 (2011).

[91] Though it would remain necessary in addressing a choice of court agreement.

[92] *See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consen*t, 78 VIRGINIA L. REV. 821, 826, 866 (1992); Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM & MARY BUS. L. REV. 227, 243 (2011).

assets in multiple jurisdictions, thus providing a potential plaintiff with a variety of possible options from which to choose. While arbitration remains the normative preference, a large multi-national corporation is somewhat less affected when required to resort to national courts in the absence of an effective dispute resolution agreement.

In contrast, the small to mid-sized business will likely prefer to rely on its local legal team, and it will likely have assets only in its home country. This small to mid-sized business is precisely the sort of party that finds itself between the proverbial "rock and a hard place" in the event a dispute arises in the absence of an effective arbitration agreement. Does the plaintiff bring suit at home and then try to collect? Or, conversely, does the plaintiff—often at considerable expense—sue in the defendant's home courts and just hope to be treated in a fair and unbiased manner? In many cases, neither option will provide a particularly viable choice, and a party may end up abandoning its claim entirely. It is this small to mid-size business that will almost certainly benefit the most from a default rule providing for arbitration.[93] Thus, we may reasonably find elements of "consent" to arbitration of international commercial disputes based on traditional contract principles applicable to majoritarian default rules, generally.

Moreover, a convention providing for arbitration as a default rule and ratified by each contracting state would provide a positive legal rule, through which one might reasonably find implied "consent." By way of analogy, a U.S. court addressing personal jurisdiction based on the principle of "consent," may employ a "legal fiction" in finding such "consent" on the theory that a foreign corporation "consents" to submit to jurisdiction in consequence of doing local business."[94] In a similar manner, a party engaging in a transaction within the scope of the proposed convention would be deemed to have "consented" to its application and, thereby, "consented" to arbitrate any disputes arising thereunder.

In fact, one might reasonably suggest that an implication of consent to a default arbitration regime in an international commercial transaction is far more reasonable than an implication that parties impliedly consent to substantive international law under similar circumstances. And yet, we bind parties buying or selling goods across national borders to the substantive default rules of the United Nations Convention on the International Sale of Goods (the "CISG"), and presumably believe they are better off for it.

Finally, any proposal that would deprive parties of their right to court access must address the European Convention on Human Rights, which guarantees such access.[95] One might reasonably question whether a default rule providing for arbitration of international commercial disputes, in the absence of traditional notions of express consent, could reasonably be reconciled with this convention. A thorough examination of the potential application of the convention is beyond the

[93] In fact, this is often the case with majoritarian default rules, inasmuch as the smaller business is typically less likely to invest in drafting a fully complete contract.

[94] JAMES FLEMING, ET AL, CIVIL PROCEDURE, § 2.9 (5th ed. 2001).

[95] *See* World Bank, Law and Justice Institutions, Right to Court Access, a topic brief by Vessela Terzieva, Legal Officer, Public Interest Law Initiative, Columbia University, at http://go.worldbank.org/MUH3624BU0 (noting court decisional authority providing that Article 6 "secures to everyone the right to have any claim related to his civil rights and obligations brought before a court or tribunal").

scope of this article. However, the Swiss Supreme Court's treatment of "consent" to arbitration by the Court of Arbitration for Sport ("CAS") may provide a path to such reconciliation.

An athlete may be bound to CAS arbitration based on completion of a compulsory application to compete—even as a matter of incorporation by reference where the arbitration agreement is embodied in the rules of the athletes sport, to which the athlete agrees as a pre-requisite to participation in that sport.[96] This apparent departure from more traditional notions of consent is justified in the context of sports matters because CAS arbitration is aimed at "favouring the prompt settlement of disputes, particularly in sports-related matters, by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality."[97] In a similar manner, one might reasonably suggest that arbitration favors prompt settlement of international commercial disputes by tribunals specializing in such commercial matters and providing for sufficient guarantees of independence and impartiality. In fact, one might reasonably suggest that, in the context of a cross-border transaction, an arbitral tribunal is more likely to insure such expeditious, specialized, impartial resolution of any such dispute. Moreover, national courts would retain the authority to review any arbitral award based on due process or public policy concerns, much as in the case of the New York Convention today. Thus, in the same manner that an athlete's decision to compete gives rise to an obligation to arbitrate disputes—without running afoul of the European Convention on Human Rights—a commercial party's decision to conduct business across national borders would give rise to an obligation to arbitrate all related disputes, absent an agreement to the contrary.

Ultimately, whether we find consent through contract principles addressing normative default rules, imply consent from the parties' actions in engaging in a transaction governed by a positive default rule of law, or both, it cannot reasonably be said that a default legal regime providing for arbitration of international commercial disputes would be wholly lacking in any form of "consent." Of course, as with many new ideas, the devil is in the details. Fortunately, a few ideas for these details can be found in an existing convention.

4.2.2 The Panama Convention and a "Bare Bones" Arbitration Agreement—a Pre-existing Template for a Default Legal Regime

The Inter-American Convention on International Commercial Arbitration (the "Panama Convention") applies to arbitration agreements between parties from contracting states within North and South America—effectively displacing the New York Convention in those instances.[98] While unfortunately omitting any provision directly addressing parallel national court

[96] Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISPUTE SETTLEMENT 217, 243-44 (2010).
[97] *Id*. at 244; Swiss Federal Tribunal, 4P.172/2006, Cañas v. ATP Tour, part 4.3.2.3 (22 March 2007) (English translation freely available from CAS files and on file with author). In the Cañas case, the Swiss Supreme Court drew a crucial distinction between a waiver of an appeal to a court on "due process" grounds (the Court ultimately determined that Cañas had not been given a fair hearing) and a waiver of a right to have one's substantive claims heard by a court, as opposed to an arbitration tribunal. A less than express fully voluntary waiver of the former was likely inconsistent with Article 6 of the European Convention on Human Rights, while such a waiver of the latter was not. *Id*. at 4.3.2.2.-4.3.2.3.
[98] 9 U.S.C. § 305;

proceedings,[99] the Panama Convention introduces one particular innovation not found in the New York Convention.[100] It provides that, in the event the parties have not agreed upon any institutional or other arbitration rules, the rules of the Inter-American Commercial Arbitration Commission ("IACAC") will govern the arbitration.[101] These rules are virtually identical to the original UNCITRAL Arbitration Rules (1976).[102]

Thus, if the parties simply agree to final and binding arbitration of any dispute related to the instant contract, their agreement is fully effective, and they are deemed to have impliedly "consented" to *ad hoc* arbitration under a set of rules virtually identical to the original UNCITRAL Arbitration Rules. In a similar fashion, parties deemed to have chosen arbitration by default under a new convention could be further deemed to have agreed to *ad hoc* arbitration[103] under the UNCITRAL Arbitration Rules as a default set of rules to govern their dispute.[104] Of critical importance is Article 6, providing for the designation of an appointing authority by the Secretary General of the Permanent Court of Arbitration in The Hague.[105] Thus, the entire arbitral process would typically take place without any court involvement—even if the respondent refused to cooperate in that process.[106] Of course, an effective arbitration regime would continue to require a seat—irrespective of whether chosen in advance by the parties in an express arbitration agreement, or selected later by the arbitrators.[107]

With a default arbitration regime for dispute resolution, and the application of the UNCITRAL Rules in the absence of an express party agreement, the issues of *lis pendens* and the potential for parallel proceedings virtually disappear. In the case of every international commercial transaction, the parties would be bound to resolve their disputes: (1) in a mutually agreed upon national court; (2) through a mutually agreed upon arbitral process; or (3) through a default

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[99] The lack of such a provision is, however, irrelevant purposes of the instant discussion.
[100] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 104 (2009).
[101] *Id.*; Inter-American Convention on International Commercial Arbitration, Article 3; *see also* 9 U.S.C. § 306.
[102] The most significant change from the UNCITRAL Arbitration Rules is reflected in Article 6, which designates IACAC as the appointing authority instead of conferring on the parties a right to go to the Permanent Court of Arbitration for designation of an appointing authority. As of this writing, the author is not aware of any replacement of the original 1976 rules with the updated 2010 version.
[103] Admittedly, the idea if *ad hoc* arbitration is, for many, far less desirable than institutional arbitration. However, the relevant comparison is between *ad hoc* arbitration and court litigation in the absence of a forum selection clause. In evaluating that comparison, *ad hoc* arbitration arguably presents far fewer challenges than the typical jurisdictional battles in court litigation in the absence of an agreed upon forum. Moreover, parties faced with the prospects of *ad hoc* arbitration would always be free to choose an institution to administer their arbitration proceedings and might often do so.
[104] For purposes of discussion, the 2010 version of the UNCITRAL Arbitration Rules would seem most appropriate.
[105] UNCITRAL Arbitration Rules (2010), Article 6. The cost of this process is also quite reasonable in the context of an international commercial transaction. The Permanent Court of Arbitration charges a fee of only 750 Euro to designate an appointing authority, or a fee of 1,500 Euro to itself act as an appointing authority. Permanent Court of Arbitration website, PCA Services, Fees and Costs, http://www.pca-cpa.org/showpage.asp?pag_id=1060. The ICC charges a fee of US$ 3,000 to act as an appointing authority. *See* ICC Arbitration Rules, Appendix III, Article 3 (2012).
[106] Arbitration, like court adjudication, requires effective notice to any party, as a matter of due process. See, e.g., UNCITRAL Model Law, Article 18 (2006) (requiring that each party be afforded a full and fair opportunity to present its case); New York Convention (1958), Article V.1.(b) (providing the enforcement of an award may be refused for lack of adequate notice to the proceedings leading to the award).
[107] *See* UNCITRAL Model Law, Article 20(1); UNCITRAL Arbitration Rules, Article 18(1) (each providing for the choice of the seat by the arbitrators in the absence of any agreement by the parties).

arbitral process overseen, as necessary, by the Permanent Court of Arbitration where the parties are unable to agree to the contrary. The only reason for early resort to national courts would likely be for preliminary injunctive relief, which typically requires a party to seek relief in a specific court in the likely place of enforcement. Thus, the proverbial "torpedo" is largely, if not fully, defused.

As an additional benefit, a default arbitration regime would solve many of the existing challenges related to joinder of parties. Absent an agreement to the contrary, all parties to a given transaction or occurrence could effectively be joined in a single arbitration proceeding. This would arguably go a long way towards resolving a significant problem with the existing arbitration regime based solely on express consent.[108]

Admittedly, the idea of arbitration as a default rule likely conjures up prospects of significant political challenges. However, the principles contained in the New York Convention itself likely conjured up significant initial political challenges in the face of early 20th century judicial hostility towards arbitration.[109] Often, the success of this sort of "sea change" may be dependent on its timing. Today, in a global economy looking for savings in public spending, perhaps the time is right to relieve national courts of the burden of financing unplanned and often abusive litigation involving arbitration agreements, as well as unplanned litigation of international commercial disputes, generally.[110] Litigation in which the parties fail to agree in advance on the forum will almost always be more complex, protracted, and expensive. In contrast, arbitration is almost fully self-sustaining from a financial perspective, relying very little on public courts except where personal "coercion" of a party is necessary. Perhaps the time has arrived to begin to take the next step in effective resolution of international commercial disputes.

5 CONCLUSION

Albert Jan van den Berg was right. After more than 50 years, it is time for a new convention. The New York Convention has been a truly outstanding success, but the needs of modern international commercial arbitration extend beyond the Convention's extraordinarily successful provisions for recognition and enforcement of awards. The *West Tankers* case is, of course, only one of the sign posts pointing towards the need for modernization, but its challenges further illuminate the difficulty in solving today's challenges while continuing to treat international commercial arbitration as the "exception" instead of the "rule." The international business community needs to move beyond mere revisions of the New York Convention. Instead, we need a new convention that fully recognizes arbitration as the default legal rule for resolution of international commercial disputes. Admittedly, one can only guess whether the international community is ready to give serious consideration to such a rule. This article simply suggests that the time has arrived to have the discussion.

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[108] *See* KARIM YOUSSEF, CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION, 3-4 (2009) (explaining the inadequacy of traditional notions of consensual arbitration when addressing complex, multi-party disputes).

[109] *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 6-7 (1994).

[110] While national courts serve a broad array of essential functions, resolving the merits of an international commercial dispute is hardly one of the most important—unless expressly asked to do so by both parties.