

## ARBITRATION OPTIONS: TURNING A MORASS INTO A PANACEA

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### I INTRODUCTION

An issue for parties contemplating resort to international commercial arbitration is the sheer diversity of choice. Parties can choose from among scores of arbitration associations and centres that are exclusively domestic, regional, or international in focus, or have some combined orientation.<sup>1</sup> They can choose

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1 An extensive though still incomplete list of national and/or regional institutions that provide arbitration services includes: Arbitration Court of the Bulgarian Chamber of Commerce and Industry; Arbitration Institute of the Stockholm Chamber of Commerce; Belgian Centre for International Arbitration and Mediation; Australian International Commercial Arbitration Centre ('ACICA'); Cairo Regional Centre for International Commercial Arbitration; British Columbia International Commercial Arbitration Centre ('BCICAC'); Chile, Santiago Arbitration and Mediation Center; China International Economic and Trade Arbitration Commission ('CIETAC'); Permanent Arbitration Court at the Croatian Chamber of Commerce; Arbitration Court Attached to the Economic Chamber of the Czech Republic; Estonian Chamber of Commerce and Industry; Arbitration Chamber of Paris; Centre de Médiation et d'Arbitrage de Paris; German Institution of Arbitration – Deutsche Institution für Schiedsgerichtsbarkeit; Hong Kong International Arbitration Centre ('HKIAC'); Indian Council of Arbitration; Indonesian National Board of Arbitration; Iran-United States Claims Tribunal; Chamber of National and International Arbitration of Milan; Japan Commercial Arbitration Association ('JCAA'); Korean Commercial Arbitration Board ('KCAB'); Kuala Lumpur Regional Centre for Arbitration ('KLRCA'); Centro de Arbitraje de México; Netherlands Arbitration Institute; Philippine Dispute Resolution Centre ('PDRC'); Court of Arbitration at the Polish Chamber of Commerce; Centre for Commercial Arbitration, Lisbon Trade Association, Portuguese Chamber of Commerce; Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania and Bucharest; St Petersburg International Commercial Arbitration Court; Scottish Council for International Arbitration; Singapore International Arbitration Centre ('SIAC'); Arbitration Foundation of Southern Africa; Arbitration Institute of the Stockholm Chamber of Commerce ('SCC Institute'); Swiss Chambers' Court of Arbitration and Mediation; Center for Conciliation and Arbitration of Tunis; London Court of International Arbitration ('LCIA'); Chicago International Dispute Resolution Association; International Center for Dispute Resolution of the American Arbitration Association ('ICDR').

from among different types of arbitration – from institutionalised to ad hoc arbitration<sup>2</sup> and from arbitration associations with a court to govern to arbitration centres that serve primarily as ‘forums of convenience’ for parties seeking to resolve disputes other than by resort to courts of law.<sup>3</sup>

As a practical matter, the parties can craft arbitrators, arbitration clauses and proceedings entirely at their discretion, or they can rely on arbitration associations to assist them or even to decide for them. They can bestow significant authority on the appointed arbitrators, or they can restrict the authority of arbitrators to resolving very narrow factual issues.<sup>4</sup>

The wider the spectrum of choice available to the parties, the better able they are to shop for the arbitration process that most suits their needs. They can make choices based variously on the nature of their dispute, their familiarity with particular arbitration processes and the advantages they attribute to each

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2 Non-institutional arbitration is sometimes inaccurately referred to as ‘ad hoc’ arbitration. Non-institutional arbitration takes place independently of an arbitration association like the International Chamber of Commerce (‘ICC’), the American Arbitration Association (‘AAA’), or the LCIA. Ad hoc arbitration involves the adoption of arbitration at the time of a dispute, rather than in consequence of an arbitration clause in a pre-existing contract. Non-institutional and ad hoc arbitration often coincide in fact. However, they diverge, for example, when the parties submit their ad hoc dispute for resolution in accordance with the rules and procedures of a particular arbitration association. See further BCICAC, LCIA and SIAC, below n 3.

3 See, eg, the BCICAC which states directly on its website, ‘Established in 1986, the BCICAC is an organisation committed to offering businesses alternatives to litigation. Alternative dispute resolution includes mediation and arbitration which are **effective** and **cost-efficient** methods for achieving resolution of commercial disputes. Unlike litigation, these processes are also **confidential** ... The Centre is available to provide information and assist in the smooth conduct of the arbitration or mediation. As an administrator, the Centre provides Rules of Procedure, establishes timelines, and appoints independent and qualified mediators and expert arbitrators’ (emphasis in original): BCICAC <<http://www.bcicac.com/>> at 28 October 2007. Other arbitration centres provide alternative services to arbitration conducted by the centre, with limited discussion other than by stating that parties interested in these services can contact the secretariat or other administrative body of the centre. The LCIA, for example, provides an illustration of its expert determination services at LCIA, *Expert Determination Draft Rules/Clause Where the LCIA Acts as Appointing Authority Only* (undated) <[http://www.lcia.org/ADR\\_folder/documents/ExpertDetermination-appointingonly.pdf](http://www.lcia.org/ADR_folder/documents/ExpertDetermination-appointingonly.pdf)> at 28 October 2007. Interestingly, the SIAC provides two lists of cases it has administered between 2000 and 2005. The first list consists of cases administered under the SIAC’s own rules (52 cases in 2005); the second list consists of cases administered under ‘other rules’ (22 cases in 2005). One can reasonably assume that these other rules include ad hoc arbitration in which the parties use SIAC facilities but adopt, to varying degrees, their own or some other association’s rules and procedures. Both lists at SIAC <<http://www.siac.org.sg/>> at 28 October 2007.

4 On the distinction between the use of an arbitration centre as a ‘forum of convenience’ and one in which the parties resolve their disputes under the auspices of an arbitration association including under its rules and procedures, see text accompanying n 3.

institution or process in relation to the others on grounds of cost and time efficiency of the processes at hand.<sup>5</sup>

Conversely, extensive choice among arbitration options can become the source of difficulty. Parties may lack sufficient understanding about the alternatives to make informed choices; they may choose based on stereotypes; their choices may be suitable for some types of commercial disputes, but not others; and they may rely on incomplete and unreliable information about the arbitration options that are available to them.<sup>6</sup> Poor choices can be costly not only for one or both parties. It can be costly for the good name and reputation of the international commercial arbitration process itself.

This article considers the issues involved in arriving at a suitable choice of arbitration. Part I reflects on the importance of party autonomy in making that choice, including the limitations associated with such autonomy. Part II considers the significance of parties making arbitration choices based on national law and related interests. Part III stresses the importance that arbitration associations and centres place on satisfying the needs of the parties. Part IV argues that the future of international commercial arbitration depends significantly on steering parties towards appropriate methods of dispute resolution – which may not be arbitration – and highlights the impact that such choices can have upon the reputation of arbitration generally.

## II PARTY AUTONOMY PER SE

The reasons that influence parties in choosing international commercial arbitration today are often subtle and operate at different levels of abstraction.

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- 5 On the alleged cost and time efficiency of arbitration, see Trakman, below n 14. A wide range of books and websites provide prospective parties with copious ‘how to’ arbitrate information, from choosing law firms to identifying the form of arbitration or other alternative to litigation to adopt. See, eg, HG.org, *Alternative Dispute Resolution (ADR)* (undated) <<http://www.hg.org/adr.html>> at 28 October 2007; interarb, *WWW Virtual Library --- Arbitration Database* (2005) <<http://interarb.com/vl>> at 28 October 2007; Lyonette Louis-Jacques, *International Commercial Arbitration: Resources in Print and Electronic Format* (2003) D’Angelo Law Library, University of Chicago Law School <<http://www2.lib.uchicago.edu/~llou/intlarb.html>> at 28 October 2007. On how to make a choice-of-forum and choice-of-law decision in arbitration, see Gary B Born, *International Arbitration and Forum Selection Agreements: Planning, Drafting and Enforcing* (1999); Peter E Nygh, *Choice of Forum and Law in International Commercial Arbitration* (1997); William W Park, *International Forum Selection* (1995).
- 6 Given the private and confidential nature of arbitration proceedings, it is difficult to assess the volume of arbitration traffic. However, arbitration associations *do* release figures about the number of cases they have heard in particular periods of time, including the substance of such disputes. The SIAC, for example, provides details of the number of cases heard before different international and regional arbitration centres from 2000 to 2005 based on self-reporting by each arbitration centre. According to the 2005 figures, the number of cases heard, in descending order, were: ICDR (580 cases); ICC (512 cases); CEITAC (421 cases); LCIA (118 cases); SCC (53 cases); KCAB (53 cases); SIAC (45 cases); JCAA (nine cases); KLRCA (seven cases); BCICAC (two cases); PDRC (zero cases); HKIAC (data not available). See further SIAC, above n 3. The website does not set out the quantum in dispute in each case, nor the kind and size of awards, nor the type of dispute in issue. Also unclear is whether each Centre provides *all* arbitration services, or only *some* services. Of note, the SIAC excludes the HKIAC from its list, above in note, alleging that the HKIAC does not differentiate between arbitration it conducts and arbitration in which it serves only as the dispute solving locale.

The first reason resides in the principle of consent, namely, that the parties *choose* to resort to arbitration.<sup>7</sup> This includes their freedom to choose the nature, form and operation of arbitration, whether that choice is ad hoc or institutional, modelled on European, English, American or some 'other' legal traditions, is predominantly oral or documentary and is governed by a multilateral or bilateral treaty, the rules of a particular international arbitration association, regional or domestic legal system, or by customary law.<sup>8</sup>

Commonplace reasons for choosing arbitration over domestic law are first, that international arbitration is independent of any one legal system.<sup>9</sup> Secondly, professional arbitrators generally have greater commercial expertise generally than courts of law.<sup>10</sup> Thirdly, international commercial arbitration is perceived to

7 This is a point of emphasis among leading international arbitration centres. For example, using the banner statement 'The choice is yours', the ICC states: 'The International Chamber of Commerce offers a full spread of dispute resolution services so that you and your business partner can make the best choice.', available at ICC, *ICC ADR – A Wise Precaution* (2008)

<<http://www.iccwbo.org/court/adr/id4592/index.html>> at 28 October 2007. Conceptually, too, it is well established that the first law of international commercial arbitration is the law chosen by the parties. See, eg, Thomas E Carbonneau, 'The Remaking of Arbitration: Design and Destiny' in Thomas E Carbonneau (ed) *Lex Mercatoria and Arbitration* (revised ed, 1999); Thomas E Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Swords* (1989); J Brian Casey, *International and Domestic Commercial Arbitration* (1993). For useful websites on materials applicable to international commercial arbitration, see Peter Winship, *International Commercial Arbitration – Peter Winship's Favorite Sites* (1999) Southern Methodist University <<http://faculty.smu.edu/pwinship/intlarb.htm>> at 28 October 2007; Richard Happ, *Happ's Arbitration Links* (2007) happlaw <<http://www.happlaw.de>> at 28 October 2007.

8 For background material on the diverse character of international commercial arbitration, see Martin Domke, Larry Edmonson and Gabriel M Wilner (eds), *Domke on Commercial Arbitration* (3<sup>rd</sup> ed, 2003); Edna A Elkouri, Frank Elkouri and Alan M Ruben (eds) *How Arbitration Works: Elkouri & Elkouri* (6<sup>th</sup> ed, 2003); Pieter Sanders, 'Arbitration' in *Martinus Nishoff Publishers, International Encyclopedia of Comparative Law* (1986); Thomas H Oehmke, *International Arbitration* (3<sup>rd</sup> ed, 2003); Stefan N Frommel and Barry A K Rider, *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (1999); Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice, A Comparative Study* (1999); W Laurence Craig, *Trends and Developments in the Laws and Practice of International Commercial Arbitration* (1995); Merton E Marks, *New Trends in Domestic and International Commercial Arbitration and Mediation* (2000) Chicago International Dispute Resolution Association <<http://www.cidra.org/articles/newtrends.htm>> at 28 October 2007; International Arbitration Institute <<http://www.iaiparis.com>> at 28 October 2007. For a useful biography of materials on international commercial arbitration, see Jean M Wenger, *Update to International Commercial Arbitration: Locating the Resources* (2004) <<http://www.llrx.com/features/arbitration2.htm#Locating%20Literature>> at 28 October 2007.

9 This is qualified by two observations. First, states may have domestic arbitration associations for the resolution primarily of domestic commercial disputes. Secondly, states may have domestic arbitration associations that are also directed at international commercial disputes. This latter category includes two subsets of domestic arbitration associations. The first subset includes domestic arbitration associations that focus on international disputes between private parties, such as the services provided by the Swiss Arbitration Centre and centres like CEITAC, which provides services for resolving disputes between foreign companies, individuals and state enterprises within China. On the array of domestic arbitration centres, see above n 1. On CEITAC and the Swiss Arbitration Centre respectively, see below nn 28 and 30.

10 On identifying the credentials and expertise of prospective arbitrators, see, eg, Martindale-Hubbell, *The Martindale-Hubbell International Dispute Resolution Directory* (2008)

have rules and procedures that are attuned to the practice of international arbitration, and not shackled by the rules and procedures of any one domestic legal system.<sup>11</sup> Fourthly, arbitration is presented as having lower costs, being more efficient and more ‘party sensitive’ than resort to courts of law.<sup>12</sup> Fifthly, it is conceived as avoiding the biases that inhere in the choice of domestic law and legal proceedings.<sup>13</sup>

These reasons for resorting to international commercial arbitration, however echoed they may be as bases for resorting to arbitration, may sometimes be misplaced.<sup>14</sup> For one thing, arbitrators appointed to resolve commercial disputes are not necessarily experienced in the particular field, or parties may simply choose them unwisely. For another, some arbitrators may be less experienced than domestic judges who have commercial expertise, notably in jurisdictions with a distinctive commercial bench.<sup>15</sup>

Even the rationale that arbitration is low cost and more efficient than adjudication before domestic courts of law is a phenomenon worthy of ongoing scrutiny rather than blind acceptance. Despite the marketing of international arbitration as a modern, widely used, low cost and efficient alternative to litigation and the difficulty of disproving such evidence in an essentially ‘private’ procedure, such founding postulations may well require substantiation in fact.<sup>16</sup> Evidence that supports the efficient use of arbitration includes employing arbitration to resolve complex disputes that take time to unfold and that are better

<[http://www.martindale.com/xp/legal/About\\_Martindale/Products\\_and\\_Services/Martindale/martindale.xml](http://www.martindale.com/xp/legal/About_Martindale/Products_and_Services/Martindale/martindale.xml)> at 28 October 2007; ICC, *Expertise – Dispute Resolution Services* (2008)

<[http://www.iccwbo.org/drs/english/expertise/all\\_topics.asp](http://www.iccwbo.org/drs/english/expertise/all_topics.asp)> at 28 October 2007. See also Vratislav Pechota and Hans Smit (eds), *Roster of International Arbitrators (Guide to International Arbitrators)* (3<sup>rd</sup> ed, 2003).

- 11 For a chart on the rules and procedures adopted by different international arbitration associations, see Vratislav Pechota and Hans Smit (eds), *A Chart Comparing International Commercial Arbitration Rules* (1998). See also John J Barceló, Arthur T Von Mehren and Tibor Várady, *International Commercial Arbitration: A Transnational Perspective* (3<sup>rd</sup> ed, 2006).
- 12 On the time and cost efficiency imputed to arbitration, see Trakman, below n 14.
- 13 The argument that international commercial arbitration is independent of ‘domestication’ is frequently used in marketing arbitration services. For example, ‘The great strength of the arbitration process lies in its independence from any particular legal culture’ is used to advertise the book of Frommel and Rider, above n 8.
- 14 Domestic, regional and international arbitration associations repeatedly refer to the cost and time efficiency of arbitration as one of their selling features: see above n 1. On this widely held belief among judges and commercial lawyers in Canada in a study conducted under the auspices of the Canadian Bar Association, see Leon E Trakman, ‘The Efficient Resolution of Business Disputes’ (1998) 30 *Canadian Journal of Business Law* 321 (a questionnaire and interview study into perceptions of federal court judges and commercial lawyers in Canada on the efficient resolution of business disputes, conducted as a consultant to the Canadian Bar Association).
- 15 This conception of an experienced ‘commercial bench’ is evident in NSW, Australia.
- 16 Even the prestigious Permanent Court of Arbitration (‘PCA’) aggressively markets its international commercial arbitration services as ‘modern’, based on the ‘highly regarded’ and ‘widely used’ United Nations Commission on International Trade Law Arbitration (‘UNCITRAL’) Rules. The PCA adds that it ‘administers arbitration, conciliation and fact finding in disputes involving various combinations of states, private parties, state entities and intergovernmental organisations. International commercial arbitration can also be conducted under PCA auspices’ at PCA (2007) <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1028](http://www.pca-cpa.org/showpage.asp?pag_id=1028)> at 28 October 2007.

dealt with through carefully tailored arbitration than national courts.<sup>17</sup> Some of the evidence, however, may establish that arbitration proceedings are at times unduly formalistic; arbitration procedures are protracted for reasons that are not necessarily attributed to the complexities of each case; and arbitrators may not do well in imposing deadlines, managing hearings and ultimately, managing the parties themselves.<sup>18</sup>

Noteworthy, too, is the prospect of arbitral hearings that are beset with delays arising from the disparate location of arbitrators, parties and witnesses, issues which courts often deal with summarily and by judicial order. Equally noteworthy is the sometimes spiralling cost of arbitration, reflecting significant fees charged by arbitrators, arbitration associations and expert witnesses.<sup>19</sup>

Balanced against these costs of arbitration is the realisation that domestic courts of law sometimes resort to fast track procedures, such as through the appointment of special masters to arrive at factual determinations, and to court ordered mediation directed at arriving at expeditious decisions with the involvement of the parties.<sup>20</sup>

Even concern that domestic courts may be infected by national bias is variously deflected by rules of evidence and procedure and substantive law that purports to constrain such biases. Nevertheless, these rules do not necessarily constrain the inclination of some courts to take account of national interests that may be negatively affected by their decisions, such as in relation to sensitive

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17 There are few objective studies that report on such data. But see, eg, Stephanie E Keer and Richard W Naimark, 'Post-Award Experience in International Commercial Arbitration' (2005) 60(1) *Dispute Resolution Journal* 94. Even here, the authors acknowledge limitations in their questionnaire study, in particular that their sample was 'non-random' and included only data for those parties to arbitrations who agreed to answer their questionnaire. For a questionnaire on the recognition and enforcement of foreign judgements in Russia, see Legas Legal Solutions Transnational Litigation Practice Group, *Questionnaire for ILN Transnational Litigation Practice Group* (2006) <[http://www.iln.com/articles/pub\\_267.pdf](http://www.iln.com/articles/pub_267.pdf)> at 28 October 2007.

18 Authorities on international commercial arbitrators are often cautious not to overstate the virtues of arbitration, nor to present it as a one-size-fits-all method of resolving commercial disputes. What they often suggest, rather, is that a sound understanding of how arbitration works, and can be made to work, is essential to using it effectively. See, eg, Carbonneau, above n 7.

19 Arbitration associations tend not to provide detailed information about the costs of arbitration in specific cases, for obvious reasons. However, they do provide information on the costs of using the services of the association (usually determined by the quantum in dispute), sometimes including arbitrators' fees (significantly influenced by the number of arbitrators appointed to arbitrate a dispute), as well as the average length of a dispute (though usually with little qualifying data). Using arithmetic methods one can calculate roughly the cost of the average arbitration, bearing in mind that the average case may include fast track arbitration as well as ad hoc arbitration conducted at the applicable centre as distinct from institutional arbitration. On information on the costs of arbitration provided on various arbitration sites, see above n 1 and Trakman, above n 14.

20 Fast track arbitration is ordinarily associated with expedited arbitration, including: shorter time lines between the date that an arbitration claim is notified and the date it is concluded; arbitration procedures tend to be truncated when requirements for filing documents are reduced; oral testimony is restricted or eliminated; and arbitration awards are expedited. Discussion on 'fast track' dispute resolution sometimes concentrates more on the spectrum of alternatives to litigation, including mediation, than on 'fast track' commercial arbitration itself. See, eg, Peter Grove, *Fast Track Alternative to Litigation for the Business Community* (undated) BCICAC <[http://www.bcicac.com/bcicac\\_adr\\_articles\\_2.php](http://www.bcicac.com/bcicac_adr_articles_2.php)> at 28 October 2007.

domestic industries. However, judicial review can also be a powerful weapon in addressing allegations of jurisdictional error, along with mistakes of law or fact.<sup>21</sup>

Nor should one assume that international arbitration is necessarily insulated from national law biases. The instruments governing international commercial arbitration may well reflect the cultural influence of national law in the formulation, treaties, conventions and rules of law and in applying arbitral procedures that favour parties from particular jurisdictions or legal systems. Consider, for example, the stark contrast between the oral tradition of an inquisitorial civil law tradition and a documentary tradition associated with common law forms of action. At extremes, American lawyers may well be advantaged in engaging in a 'battle of the forms' in international commercial arbitration before the American Arbitration Association ('AAA'), while civilian lawyers may benefit from resort to oral argument before the International Arbitration Association located in Paris, France.<sup>22</sup> However they are conceived, arbitration rules and procedures may favour those parties who are trained in and conversation with one or another legal tradition.<sup>23</sup>

The final and most important difficulty with the supposed perfection of a consensual based arbitration model is that the choice of international commercial arbitration is made not by a single party, but by multiple parties who must agree to it. In reaching such agreements, compromises are often necessary, and the result may ultimately serve the interests of one party more than another.<sup>24</sup>

What can be exposited, at this stage, is that the expectation that parties to international commercial arbitration can make suitable choices of arbitration involves assumptions that are subject to factual analysis and ultimately, verification. What cannot be assumed is that their basis for making choices will in all cases be appropriately informed and ultimately capable of delivering expeditious and efficient results. Such determinations necessarily depend on the dynamics involved in each case: the parties, the dispute, the timing, the place and the parties' wisdom in choosing arbitration with the benefit of hindsight.<sup>25</sup>

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21 These concerns are most apparent in state sponsored arbitration, such as under Chapter 11 of NAFTA dealing with investment disputes. See further Leon E Trakman, 'Arbitrating Investment Disputes Under Chapter 11 of the NAFTA' (2001) 18 *Journal of International Arbitration* 385.

22 On the differentiation between the common law and civil law traditions, see Damaska, below n 41.

23 See Leon E Trakman, "'Legal Traditions" and International Commercial Arbitration' (2006) 17 *American Review of International Arbitration* 1.

24 In a winner-take-all philosophy, the victor presumably would praise the arbitration, while the loser would not. In a practical sense, however, both parties may question the cost, duration and process of arbitration, whether they 'won' or not.

25 See Judd Epstein, Henry Gabriel, Richard Garnett and Jeff Waincymer, *A Practical Guide to International Commercial Arbitration* (2000); Paul Friedland, *Arbitration Clauses for International Contracts* (2000); Jan Paulsson, *The Freshfields Guide to Arbitration and Alternative Dispute Resolution: Clauses in International Contracts* (2<sup>nd</sup> revised ed, 1999); Lovells LLP, *International Arbitration Guide* (2008)

<<http://www.lovells.com/Lovells/OnlineServices/InternationalArbitrationGuide/international+arbitration+guide.htm>> at 28 October 2007; PCA, *Court Model Clauses* (2007)

<[http://www.pca-cpa.org/showpage.asp?pag\\_id=1189](http://www.pca-cpa.org/showpage.asp?pag_id=1189)> at 28 October 2007; John G Merrills, *International Dispute Settlement* (revised 3<sup>rd</sup> ed, 1998).

The purpose now is to further explore the arguments behind the choice of arbitration, including by resort to particular forms of commercial arbitration.

### III OPTING FOR THE FAMILIAR

One reason why parties may opt for a particular form of international commercial arbitration is to accommodate a known international alternative to national courts. In issue is less the inclination of parties to avoid domestic courts than their desire to choose a form of arbitration that suits their perceived needs. A regional arbitration association may simply be more accessible and less costly, and its procedures and substantive rules more familiar. French and German parties may prefer to arbitrate before the International Chamber of Commerce ('ICC').<sup>26</sup> French and English parties may vie over whether to choose the ICC or the LCIA. American parties may likewise tout for arbitration before the AAA,<sup>27</sup> while Chinese parties may prefer to resort to CEITAC.<sup>28</sup>

What is important, at this stage, is to recognise that parties may well prefer a specific arbitral forum for reasons of familiarity and convenience, along with the perception that its rules and procedures may be sympathetic to those parties' interests, or at least not alien to them. Returning to the French and German parties, who may prefer to choose a European-centric model of international commercial arbitration, such as that of the ICC. In part, a reason – or better still, motive – for so choosing may be because that model more closely resembles civil law traditions, even though it is international and does not replicate the proceedings followed by the courts in any one civil law jurisdiction.<sup>29</sup>

Alternatively, another party may choose the model of the LCIA, or even a state sponsored arbitration centre such as the Swiss Arbitration Association ('ASA'), the Australian Centre for International Commercial Arbitration, or

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26 One need merely examine European conventions to see the influence of Europe on the evolution of modern international commercial arbitration. See, eg, *European Convention on International Commercial Arbitration*, opened for signature 28 October 2007, 484 UNTS 364 (entered into force 21 April 1961); *Agreement Relating to Application of the European Convention on International Commercial Arbitration*, opened for signature 17 December 1962, 523 UNTS 93 (entered into force 25 January 1965); *European Convention Providing a Uniform Law on Arbitration*, opened for signature 1 January 1966, CETS No. 056 (not entered into force).

27 On arbitration before the ICDR, see ICDR, *Commercial Rules – International* (2007) AAA <<http://www.adr.org/sp.asp?id=28819>> at 28 October 2007. On regional models, see, eg, The Commercial Arbitration and Mediation Center for the Americas (directed at providing commercial parties involved in the NAFTA free trade area with a forum for the resolution of their private commercial disputes); European Court of Arbitration (a private association with its situs in Strasbourg, but with national and local divisions across Europe); The Inter-American Commercial Arbitration Commission (directed at settling international commercial disputes through conciliation and arbitration).

28 On CEITAC, see CEITAC <[http://www.cietac.org.cn/index\\_english.asp](http://www.cietac.org.cn/index_english.asp)> at 28 October 2007. See also Priscilla Leung Mei-Fun and Wang Sheng-Chang (eds), *Selected Works of China International Economic and Trade Arbitration Commission Awards, Volume 2* (1998); Charles D Paglee, 'China Consolidates Arbitration Law, Amends CEITAC Rules and Joins I.C.C.' (Paper presented at the Institute for Transnational Arbitration's News and Notes, Southern Methodist University (USA) School of Law, January 1995).

29 On ICC arbitration, see below n 40.

China's CEITAC for comparable reasons.<sup>30</sup> Even more so, parties may also choose to 'domesticate' their choice of arbitration, such as through the adoption of domestic law to govern that arbitration.<sup>31</sup>

None of this is to suggest that parties to disputes inevitably wish to gain the best from all worlds: the choice of an 'international' regime of commercial arbitration that is grounded on a distinctively 'domesticated' model of dispute resolution.<sup>32</sup> What is suggested is that international arbitration, however seemingly grounded in a self-standing – spontaneous – international law merchant, is more truly rooted in one or another particular legal tradition.<sup>33</sup>

American lawyers may be naturally, or deliberately, more inclined to follow the tradition of the AAA in which decision making is more piecemeal and ad hoc, where there is no unifying influence of an ICC-like Court, and where inductive reasoning from particular facts to general rules predominates in arbitral jurisprudence.<sup>34</sup> In contrast, civil lawyers may expect to rely more on oral testimony before arbitral tribunals like the ICC than before an association like the AAA in which the examination and cross-examination of witnesses, including experts, is often extensive.<sup>35</sup>

In further contrast, parties from jurisdictions that rely upon hybrid civil law-common law jurisdictions or civil law-customary law may explore an even

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30 On the Swiss Arbitration Association ('ASA') see ASA <<http://www.arbitration-ch.org>> at 28 October 2007. On the ACICA, see ACICA <<http://www.acica.org.au>> at 28 October 2007. On Australian law in relation to commercial arbitration, in particular in NSW, see Justice Keith Mason, 'Changing Attitudes in the Common Law's Response to International Commercial Arbitration' (Keynote address delivered at the International Conference on International Commercial Arbitration, Sydney, 9 March 1999) <[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_mason\\_090399](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_090399)> at 28 October 2007. On CEITAC, see above n 28.

31 See further Leon E Trakman, 'Appropriate Conflict Management' (2001) *Wisconsin Law Review* 919.

32 For argument in favour of delocalising arbitration from the place in which the award happened to be rendered, see Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *International and Comparative Law Quarterly* 53. See generally Siegfried H Elsing and John M Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18 *Arbitration International* 59.

33 In encompassing the legal traditions of merchants, the Medieval Law Merchant included norms, principles and rules of behaviour that governed particular kinds of merchant classes, as distinct from the local populace. In that sense, it transcended the influences of local princes and kingdoms, while also being associated with particular trades located at market towns and trade fairs. See further Leon E Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983) 7–37.

34 On United States laws relating to arbitration, as well as arbitration laws procedures, see Laura F Brown (ed), *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (revised 4<sup>th</sup> ed, 1993).

35 While international arbitrators subscribe to differing degrees to this view, it is difficult to establish the extent to which arbitration proceedings in either Centre are conducted orally or in writing. Neither Centre, understandably, subscribes expressly to an oral or written tradition in part because both appeal to an international legal community that includes civil and common law traditions. The admission of oral and written testimony under the rules of both Centres is governed by the presiding arbitrator(s) who may rule varyingly in different cases and according to the influence of the practice of counsel on proceedings, including the documents they file and the manner in which they present their cases. Moreover, given the confidentiality of arbitration proceedings, establishing the exact mix of written and oral evidence before particular arbitrators is difficult. See text immediately below. See also Leon E Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18 *Arbitration International* 1.

greater array of options.<sup>36</sup> In conducting arbitration in China before CEITAC, a blend between domestic and international rules and procedures and the influence of local custom on the enforcement of arbitral awards may well be yet another option, at least for one party.<sup>37</sup>

Given that commercial law, arbitrators and the regulation of commercial disputes since the late sixteenth century have evolved against the background of national law, it is hardly surprising that much of international commercial arbitration is grounded in such domestic influences.<sup>38</sup> Nor is it surprising that parties to international commercial disputes would want to harness processes for dispute resolution which they believe are tried and tested and which they can assess prior to adopting them.<sup>39</sup>

As a practical matter too, parties may prefer to choose a process of international commercial arbitration with which their lawyers are most comfortable. The semblance of court-like hierarchy and a scientific and deductive method of arbitral reasoning may appeal to some civil law parties to international commercial arbitration, not simply because it is grounded in domestic law. They may be comfortably deferring to quasi-legislative courts that determine arbitral policy and procedure as well as delineate applicable ethical standards. They may be trained to reason deductively and they may prefer to perpetuate those values in their arbitral practice. For example, the parties and especially their lawyers may be comfortable with an ICC Court that determines the form, content and authority of each ICC award as the embodiment of an authoritative and hierarchical process of decision making.<sup>40</sup> The parties may opt for an imbedded ethical approach in which decisions are grounded in ethical standards. They may reach principled decisions based on deductive methods of reasoning. They may

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36 On hybrid common law-civil law legal systems, see, eg, H Patrick Glenn, *On Common Laws* (2006); Nir Kedar, 'Civil Codification, Law and Culture in a Mixed Legal System' (Working Paper No 07-04, Bar-Ilan University Public Law and Legal Theory, 2007) <<http://ssrn.com/abstract=957592>> at 28 October 2007. On the relationship between Roman Dutch Law in South Africa and international commercial arbitration, see David Butler and Eyvind Finsen, *Arbitration in South Africa: Law and Practice* (1993).

37 The rules governing CIETAC arbitration have been continuously revised in 1989, 1994, 1995, 1998, 2000 and 2004 in order to comply with international standards. The most recent version of the CIETAC Arbitration Rules became effective on 1 May 2005. On CEITAC, see above n 28.

38 See Leon E Trakman, 'The Evolution of the Law Merchant: Our Commercial Heritage' (1980) 12 *Journal of Maritime Law and Commerce* 1.

39 On how parties may select particular forms of arbitration based on their perceived time and cost efficiencies, see above n 5.

40 On the ICC court, see ICC <<http://www.iccwbo.org/court/>> at 28 October 2007. On its home page, the ICC Court is described as 'a truly international arbitration institution with an outstanding record for resolving cross-border business disputes'. On ICC arbitration, see W L Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> ed, 2000). The London Court also 'presides over' the LCIA. However, its jurisdiction is limited compared to the jurisdiction of the ICC Court. For example, the LCIA provides: 'The LCIA Court is the final authority for the proper application of the LCIA Rules.'. It adds: 'Its key functions are appointing tribunals, determining challenges to arbitrators, and controlling costs.' See LCIA, above n 3.

also seek to arrive at the sustainable and efficient resolution of commercial disputes.<sup>41</sup>

Nonetheless, this is not to purport that parties will inevitably resort to arbitration that is familiar, or otherwise within their normal comfort zone. Differences between parties over their respective choices may result in their opting for a third choice, including an institutional method of arbitration that suits their international aspirations more than their respective domestic legal backgrounds or cultural values.

#### IV SATISFYING THE CUSTOMER

A salient consideration in the choice of international commercial arbitration is the manner in which arbitration forums and associations cater to customer demands. Arbitration institutions, processes and laws differ significantly, not only according to national or regional law influences, nor even predominantly according to commercial traditions and laws.<sup>42</sup> Arbitral procedures and rules of application also vary according to changing customer demands. These include accommodating specialised arbitration in such diverse fields as maritime law, intellectual property and sports disputes.<sup>43</sup> It also includes providing parties with 'forums of convenience' in permitting them to choose ad hoc arbitration within the loose fabric of a particular arbitration association, or expedited hearings such as through fast-track arbitration.<sup>44</sup>

As the LCIA's website crisply states, '[c]hanges in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, by the international business community.'<sup>45</sup>

#### V LOOKING AHEAD

Despite its diffuse nature, form and expression, international commercial arbitration has demonstrated remarkable resilience. It has been able to model itself on the stable public image of such respected tribunals as the Permanent

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41 For an excellent article on the differences between deductive civil law and inductive common law reasoning, see Mirjan Damaska, 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment' (1968) 116 *University of Pennsylvania Law Review* 1363, 1369–76. See also Leon E Trakman, 'The Need for Legal Training in International, Comparative and Foreign Law: Foreign Lawyers at American Law Schools' (1976) 27 *Journal of Legal Education* 509.

42 For example, treaties that provide for arbitration devise a framework in which such arbitration is to function, including in light of the domestic law of one or another treaty party. For an example of this in resolving investment disputes under Chapter 11 of the NAFTA, see Trakman, above n 21.

43 On maritime law arbitration, see Society of Maritime Arbitrators, Inc <<http://www.smany.org/>> at 28 October 2007. On intellectual property arbitration, see especially The World Intellectual Property Organization Arbitration and Mediation Center <[http://www.wipo.int/sme/en/ip\\_business/ip\\_dispute/arbitration.htm](http://www.wipo.int/sme/en/ip_business/ip_dispute/arbitration.htm)> at 28 October 2007. On sports arbitration, see Court of Arbitration for Sport <<http://www.tas-cas.org/default.htm>> at 28 October 2007.

44 On such 'fast track' arbitration, see above n 20.

45 See LCIA, *Introduction* (undated) <<http://www.lcia-arbitration.com>> at 28 October 2007.

Court of Arbitration ('PCA').<sup>46</sup> It has benefited from the prestige of the widely recognised New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.<sup>47</sup> Finally, it has adapted to changing market forces, most notably by crafting modified arbitration services to meet the needs of diverse end users.<sup>48</sup>

Some level of parochialism is hardly surprising in the field of international commercial arbitration. Parties to such disputes often wear two or more hats as individuals or companies that are incorporated in particular jurisdictions. Lawyers representing the parties inevitably have diverse legal backgrounds and experiences in both litigation and arbitration.

Furthermore, international arbitration associations are influenced by local market forces. International commercial arbitration in New York will unavoidably reflect, at some level, American style adversarial practice, not unlike the legal practices of Wall Street lawyers who happen also to litigate before New York courts.<sup>49</sup> In similar vein, one would be likely to encounter a distinctly civilian flavour in arbitrations held in European or South American countries in which parties with civil law backgrounds rely less upon oral testimony than upon written pleadings.<sup>50</sup>

46 See PCA, *PCA Model Clauses* (2007) <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1189](http://www.pca-cpa.org/showpage.asp?pag_id=1189)> at 28 October 2007.

47 See *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted by diplomatic conference 10 June 1958) 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention'). See also UNCITRAL, *UNCITRAL – Status of UNCITRAL Conventions and Model Laws* (2007) <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> at 28 October 2007 for a list of signatories to the New York Convention. See generally Isaak I Dore, *Arbitration and Conciliation Under the UNCITRAL Rules: A Textual Analysis* (1986); Jacomijn J Van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (1992); Aron Broches, *Commentary on the UNCITRAL Model Law of International Commercial Arbitration* (1990); Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary* (1989).

48 See *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301 (entered into force 25 July 1929).

49 On the 'judicialisation' of arbitration, see Charles N Brower and Richard B Lillich (eds), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity* (1994). See generally Albert J van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (2003); Albert J van den Berg, *International Arbitration in a Changing World* (1993); Vratislav Pechota and Hans Smit (eds), *International Commercial Arbitration and the Courts* (revised 3rd ed, 2002); John Fellas, *Parallel Proceedings in PLI Course Handbook: International Commercial Litigation* (February, 1999); Joseph M Lookofsky, *Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American, European, and International Law* (1992). But see Herbert M Kritzer, 'Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases' (1991) 18(4) *Journal of Law and Society* 400.

50 For a report of the litigiousness of United States lawyers in arbitration, see, eg, Richard D Wilkins, 'Arbitrate or Out' *Central New York Business Journal* (5 February 1996). On a challenge to the so-called litigation 'crisis' in the United States, see Marc Galanter, 'The Day After the Litigation Explosion' (1986) 46 *Maryland Law Review* 3; Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4. However, an adjudicative process should be distinguished from an adversarial one; disputes can be adjudicated with different kinds and degrees of adversarialism. See, eg, Jonnette W Hamilton, 'Adjudicative Processes' in Julie McFarlane (ed) *Dispute Resolution Readings and Case Studies* (1999) 523–82.

It would also be unrealistic to expect that political and economic systems in particular regions are unlikely to impact upon the manner in which an arbitration association functions within the region. The fact is that CEITAC does inevitably function within the frame of the domestic political and legal system of China. At the same time, CEITAC has modified its rules and procedures specifically in order to comply with international arbitration standards.<sup>51</sup> Not unlike the influence which local – and international – businesses have had upon international commercial arbitration, different governments, arbitration centres and individuals have impacted upon arbitration traditions.<sup>52</sup>

Finally, one cannot expect international commercial arbitration to avoid the vagaries of forum shopping for a sympathetic arbitral forum. The risk of an arbitration award, upheld in one jurisdiction, being struck down in another, is a hazard of doing business. Just as some domestic courts of law assiduously avoid reviewing arbitration awards, others tenaciously do the opposite.<sup>53</sup>

The point is *not* that international commercial arbitration should strive for uniformity – giving rise to a truly universal international Law Merchant – any more than it should replicate any one domestic legal regime. The point *is* that, inasmuch as international arbitration proceedings transcend proceedings before national courts, they should be differentiated from those national law systems.<sup>54</sup>

Nor should international arbitration associations lose the right to market their varied arbitration services to an increasingly diverse customer base;<sup>55</sup> rather, the parties to commercial disputes should be made aware of the different arbitration options that are available to them; they should be given the opportunity to use

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51 For example, CIETAC has confirmed party autonomy in and confidentiality of arbitration proceedings, as well as the independence of arbitrators from the Chinese State. CIETAC has also revised its arbitration rules to redress conflicts of interest among arbitrators. It has also subscribed to the New York Convention governing the recognition and enforcement of foreign arbitral awards. See generally CIETAC, *Introduction* (2004) <[http://www.cietac.org.cn/english/introduction/intro\\_1.htm](http://www.cietac.org.cn/english/introduction/intro_1.htm)> at 28 October 2007.

52 Consider, for example, the influence over international commercial arbitration of, among others, long-time Chairman of the ICC, Dr Robert Briner, a position now held by Marcus Wallenberg. See ICC, *Liber Amicorum in Honour of Robert Briner* (2005) <<http://www.iccwbo.org/iccfbcf/index.html>> at 28 October 2007.

53 See, eg, *Chromalloy Aeroservices, Inc. v The Arab Republic of Egypt* 939 F Supp 907 (DDC 1996) reprinted in (1996) 11 *Mealey's International Arbitration Report* C-54. See also Paulsson, above n 32, 54–61.

54 For a list of arbitration rules and procedures, see Jean M Wenger, *National Law – A. Country Listing* (2004) <<http://www.llrx.com/features/arbitration2.htm#MetaResources>> at 28 October 2007; Westlaw Australia, *International Commercial Arbitration Library – Institutions* (2003) <[http://www.thomson.com.au/westlaw/WestlawInternationalCommercial\\_ArbitrationLibrary.pdf](http://www.thomson.com.au/westlaw/WestlawInternationalCommercial_ArbitrationLibrary.pdf)> at 28 October 2007.

55 Even a single arbitration association may provide a variety of arbitration clauses for adoption at the discretion of the parties. The ICC, for example, states, ‘Four alternative ICC ADR clauses are suggested. They are not model clauses, but suggestions, which parties may adapt to their needs, if required. Their enforceability under the law applicable to the contract should be evaluated’: ICC, *ICC ADR – Suggested Clauses* (2008) <<http://www.iccwbo.org/court/adr/id5346/index.html>> at 28 October 2007. Further provision is made for ‘Optional ADR’, namely, ‘The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.’

those services efficiently; and they should be realistic about the prospective value of selecting from among those services.<sup>56</sup>

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56 This is a controversial statement, in part because parties to international commercial arbitration are not invariably 'equal' in bargaining power and because it is often difficult to identify whether or not an international arbitration award has in fact been enforced. Proceedings are confidential; parties often avoid discussing failed relationships; and renegotiation by parties following an arbitration award is quite common. Nevertheless, incomplete reports suggest that, despite the somewhat spotty evidence of the enforcement of awards, rates of enforcement remain impressive. On the published decisions of selected arbitration awards, see, eg, Jean M Wenger, *Features – Update to International Commercial Arbitration: Locating the Resources* (2004) <<http://www.llrx.com/features/arbitration2.htm>> at 28 October 2007; UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT)* (2007) <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)> at 28 October 2007; M J Chapman, *Index to 'CLOUT' – Case Abstracts which Relate to Model Arbitration Law (MAL) Cases, by Reference to which Articles of the MAL the Cases Refer to* (2003) interarb <<http://www.interarb.com/vl/clout>> at 28 October 2007; UNCITRAL <<http://www.uncitral.org/uncitral/en/index.html>> at 28 October 2007. For collections of arbitration awards, see Yves Derains and Sigvard Jarvin (eds), *Collection of ICC Arbitral Awards*

International commercial arbitration that is misunderstood by parties who use it is likely to fail not only them, but arbitration itself. Understanding how parties with different cultural, political and legal backgrounds can use disparate forms of arbitration to resolve commercial conflicts is the key to the successful use of arbitration itself.

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(1990); Jean-Jacques Arnaldez, Yves Derains and Sigvard Jarvin (eds), *Collection of ICC Arbitral Awards* (1994); Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher (eds), *Collection of ICC Arbitral Awards, Vol. III (1991–1995)* (1997); Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher (eds), *Collection of ICC Arbitral Awards, Vol. IV (1996–2000)* (2003); Matthieu Reeb (ed), *Digest of CAS Awards, Vol. I (1986–1998)* (1998); Matthieu Reeb (ed), *Digest of CAS Awards, Vol. II (1998–2000)* (2002); International Centre for Settlement of Investment Disputes ('ICSID'), *ICSID – Cases* (2008) <<http://www.worldbank.org/icsid/cases/cases.htm>> at 28 October 2007; Christopher J Greenwood and Elihu Lauterpacht (eds), *International Law Reports* (1950); Diane Valk-Schwab, *Cross Reference – Iran-U.S. Claims Tribunal Reports: Awards and Decisions* (2002) Iran-U.S. States Claims Tribunal ('IUSCT') <<http://www.iusct.org/iusctr-cross-reference.pdf>> at 28 October 2007; IUCST, *Lists of Awards and Decisions* (undated) <<http://www.iusct.org/lists-eng.html>> at 28 October 2007; IUCST, *Recent Iran-United States Claims Tribunal Awards and Decisions in Intergovernmental Cases* (undated) <<http://www.iusct.org/awards-eng.html>> at 28 October 2007; Foreign Trade Information System ('SICE'), *Binational Panel Decisions and Arbitral Panel Reports Under the North American Free Trade Agreement* (2007) <<http://www.sice.oas.org/DISPUTE/nafdispe.asp>> at 28 October 2007; Center for Transnational Law, *Transnational Law Digest & Bibliography* (2008) Transnational Law Database <<http://www.tldb.net>> at 28 October 2007; Michael J Bonell *et al* (eds), *UNILEX on CISG & UNIDROIT Principles – International Case Law & Bibliography* (2002) Center for Comparative and Foreign Law Studies <<http://www.unilex.info>> at 28 October 2007; Kluwer Law International, *World Trade and Arbitration Materials (WTAM), Vol 6* (1994); World Trade Organization, *Dispute Rulings, by Country* (undated) <[http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm)> at 28 October 2007; SICE, *Dispute Settlements – Adopted Panel Reports Within the Framework of GATT 1947 (From 1948 – 1994)* (2007) <<http://www.sice.oas.org/DISPUTE/gatdispe.asp>> at 28 October 2007; Albert J van den Berg (ed), *Yearbook Commercial Arbitration, Vol I* (1976).