

CHAPTER 9

FREEDOM VERSUS SECURITY IN REGULATING ADR AND INTERNATIONAL ARBITRATION

*Dalma R Demeter**

I INTRODUCTION

The topic of overregulation in arbitration is not new¹. Those, who research the field, have all read about the romantic nostalgia of the town elder model, in which arbitration is nothing more than the simple scenario of two parties taking their dispute to a respected leader of the community who would use his wisdom and life experience to render a fair and equitable decision that is accepted by the parties, no questions asked². The theory is simple and attractive. But does it work like that in reality? Not quite. As the nature of relationships and of the disputes originating from these relationships has become much more complex with the development of

* Assistant Professor of Law, University of Canberra, Australia.

- 1 See Julian D. M. Lew "Is There a 'Global Free-standing Body of Substantive Arbitration Law'?" in Albert Jan van den Berg (ed) *International Arbitration: The Coming of a New Age?* ICCA Congress Series, Volume 17 (Kluwer Law International; Kluwer Law International, 2013) 53 – 61, s II (3); Pierre Lalive *Arbitration – the Civilised Solution* (16 ASA Bull, 1998, no. 3) at 484; Stephan Wilske Chapter 1, §1.05: "The Current State of Ethics in International Arbitration" in Günther J. Horvath and Stephan Wilske (eds) *Guerrilla Tactics in International Arbitration* International Arbitration Law Library, Volume 28 (Kluwer Law International, The Netherlands, 2013) 30–31; Christian Oetiker and Anna Masser "Ad Hoc Arbitration in Switzerland" in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, The Netherlands, 2013) 1097–1098; Dipen Sabharwal and Rebecca Zaman "Vive la difference? Convergence and Conformity in the Rules Reforms of Arbitral Institutions: The Case of the LCIA Rules 2014" (2014) 31(6) *Journal of International Arbitration* 708 – 712.
- 2 David W. Rivkin "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited" (2008) 24(3) *Arbitration International* 375 at 377.

international trade³, the town elder model no longer satisfies the need of current cross-border commercial disputes. Consequently, arbitration itself has become a much more complex process, highly regulated, mainly for the sake of procedural security and legal recognition. Under the growing influence of legal pluralism,⁴ the town elder has long been replaced by highly educated professional arbitrators navigating within a complex net of rules and laws towards rendering complicated awards, all the while also carefully observing the parties' will.

While the field still identifies the principle of party autonomy as the cornerstone of arbitration⁵, arbitration has become so strongly affected by a net of various levels of regulations that party autonomy has slowly but certainly lost its prevailing role. It is still there, but it is reduced to a lot less than the ultimate control it used to be, giving in to the various other sources of norms regulating arbitration with constantly decreasing flexibility. A reaction to the need for security and predictability, the ever-increasing tendency to regulate was soon identified by the literature as both a source of benefits and of damage⁶.

This paper adds to that literature by providing a comprehensive and comparative overview of the slightly different trends that the different sources of norms regulating arbitration manifest and the effect of these trends over the field, identifying the advantages and disadvantages of an ever-growing tendency towards overregulation. Based on the analysis made on arbitration only, the paper will then theorise on the potential impact a similar trend might have over other areas of alternative dispute resolution, especially in light of recent development initiatives on legal harmonisation in mediation⁷. Finally, the paper will offer a potential solution to counterbalance some of the negative effects of overregulation.

3 Nigel Blackaby, Martin Hunter, Constantine Partasides, Alan Redfern *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press 2009) at 38; Christian Klausegger and Peter Klein, et al (eds) *Austrian Yearbook on International Arbitration 2014* (Manz'sche Verlags- und Universitätsbuchhandlung, 2014) at 76 – 78; Part II: The Process of an Arbitration Chapter 7: "Complex Arbitration" in Jeff Waincymer *Procedure and Evidence in International Arbitration* 495 – 608.

4 Defined by Roderick A Macdonald as "different legal regimes [being] in constant interaction, mutually influencing the emergence if each other's rules, processes and institutions" in "Metaphors of multiplicity: Civil society, regimes and legal pluralism" (1998) 15 *Ariz. J. Int'l and Comp. Law* 69 at 79.

5 Gary B. Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, The Netherlands, 2014) at 83-85.

6 *Idem*.

7 See the United Nations Commission on International Trade Law, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial

II SOURCES OF NORMS REGULATING ARBITRATION

Arbitration, though party-created, does not float in a legal void, but exists within a framework set by rules, laws, conventions, general principles, and guidelines. Different combinations of these sources of norms affect different phases of arbitration such as the validity of the arbitral agreement, appointment of arbitrators, the arbitration process itself including evidentiary procedures, and finally the challenge, and the recognition and enforcement of the award.

Party autonomy, the primary source regulating arbitration⁸, gives the right to private individuals to become their own lawmakers: to create or freely choose procedural rules and to choose the procedural and substantive laws that suit their individual and their dispute's needs best⁹. One of the main manifestations of party autonomy consists in the freedom to define the procedural rules governing arbitration by either choosing pre-existing rules¹⁰ or creating new rules themselves, or even combining these two alternatives. However, 'ritual incantation of party autonomy'¹¹ disregards the complexity of the system regulated at three different levels: legislative, contractual, and institutional.

Even though this paper discusses overregulation, given the enforceable, final and binding nature of arbitration, a legal framework supporting and giving legal legitimacy to the process is needed. Statutes ensure that arbitration has legal recognition and operates within a defined legal framework. These regulations do not change very fast, at least not compared to other fields of law. The common ground for legal harmonisation is provided by the UNCITRAL Arbitration Model

conciliation/mediation, Working Group II, Sixty-second Session, New York, 2-6 February 2015, A/CN.9/WG.II/WP.187.

- 8 Julian D. M. Lew, above n 1, at 54–55; ICC case No. 10623/AER/ACS, *Salini Costruttori SpA v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, Award Regarding the Suspension of the Proceedings and Jurisdiction, (7 December 2001), ASA Bull (2003) at 128.
- 9 Gary B. Born, above n 5, at 83; UNCITRAL Model Law on International Commercial Arbitration, Articles 19 (1), 28.
- 10 These rules may be institutional, such as the ICC Rules or rules such as the UNCITRAL Arbitration Rules, which were designed specifically for use in ad hoc arbitration: UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session, U.N. Doc. A/CN.9/97, VI UNCITRAL Y.B. 163, 180 (1975).
- 11 Arthur L. Marriott "The Arbitrator's Responsibilities for the Proper Conduct of Proceedings" in Albert Jan van den Berg (ed) *International Arbitration and National Courts: The Never Ending Story* ICCA Congress Series 2000 New Delhi Volume 10 (Kluwer Law International, 2001) 80.

Law¹², currently adopted by 69 countries (99 jurisdictions)¹³. The Model Law has only been changed once¹⁴ since its creation in 1985, but with these changes, it has not become more restrictive to affect party autonomy. In addition, the 2006 amendments were adopted only by 22 of the 99 model law jurisdictions¹⁵ which reflects a relative stability in arbitration legislation, even among countries, considered to have 'modern' arbitration legislation.

Even more static is the international regulation of arbitration. The New York Convention¹⁶, created in 1958 and currently enacted in 156 jurisdictions¹⁷, is the primary convention regulating arbitration, but it has never been and is unlikely to ever be amended. It is considered to be effective in its shortness¹⁸, but there have been recommendations for amendment in order to eliminate its inconsistent interpretation and application in the various member states¹⁹. In spite of such recommendations, however, amending a convention gathering more than 75% of the globe's countries would likely lead to more disruption in the already achieved legal harmonisation than the disruptions caused by any inconsistent application of the original text.

In light of the – admittedly generalised – observation of a relative *status quo* in the statutory regulation of arbitration, one can easily conclude that arbitration laws and conventions do not change to any such extent as to raise concerns of overregulation. The field is, however, subject to more rapid changes from the

12 UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

13 As of 7 August 2015. See UNCITRAL "Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

14 See 2006 amendments at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

15 Tomás Kennedy-Grant "Interim Measures under the UNCITRAL Model Law on International Commercial Arbitration: The Impact of the 2006 Amendments" (2014) 10(1) Asian International Arbitration Journal 17 at 22. Also see Model Law status, above n 13.

16 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

17 As of 7 August 2015. See UNCITRAL "Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

18 Having only 16 articles, out of which only 6 are operative.

19 Christopher Thomas "The Evolution of the ICSID System as an Indication of What the Future Might Hold" in Albert Jan van den Berg (ed) *International Arbitration: The Coming of a New Age?* ICCA Congress Series, Volume 17 (Kluwer Law International, The Netherlands, 2013) 576-590.

perspective of contractual regulation. While this is a manifestation of party autonomy itself through party-created procedures, and as such 'the more the better' should be the desire, there is literature and observation from the arbitration profession that lawyers often tend to 'judicialise' arbitration by bringing in litigation practices in the process. There are two aspects behind this tendency.

First, business people facing cross-border disputes 'often give up and just pass them on to corporate lawyers who pass them on to specialised international law firms who pass them on to the very narrow club of international arbitrators'²⁰. The problem with handing international disputes over entirely to lawyers is that in spite of any specialisation in international arbitration, the process becomes one of 'arbitral litigation' run 'under its own rules, practices, culture and interest'²¹. Self-preserving and self-interest is in itself an issue, but from the businesses' perspective, the bigger concern is that handing control over to the legal profession entirely detaches the dispute from its primary purpose: that of eliminating obstacles from doing business. 'Relationship assets are almost inevitably destroyed by litigation' and litigation-like arbitration²², making the destructive affect to business relationships the main cost of litigation-type arbitration²³.

Second, this tendency is further aggravated by the fact that lawyers tend to make arbitration more and more similar to litigation. An arbitration "owned by the arbitration community"²⁴ will be naturally focused towards winning a case rather than maximising the overall commercial benefits of the parties beyond the monetary value of the case to be won. Practice and literature has noted the push towards more litigation-style processes overtaking arbitration; the increasing number of submissions, volume of evidence and evidence gathering techniques, all increase the time and costs of arbitration²⁵. However, 'in turning international

20 Thomas W. Walde "Efficient management of transnational disputes: Mutual gain by mediation or joint loss in litigation" (2006) 22(2) *Arbitration International* 206.

21 *Idem*, at 208.

22 *Idem*, at 207.

23 *Idem*.

24 *Idem*, at 209.

25 See Gunther J. Horvath "The judicialization of international arbitration: does the increasing introduction of litigation-style practices, regulations, norms and structures into international arbitration risk a denial of justice in international business disputes?" in Stefan Michael Kroll, Loukas A. Mistelis et al (eds) *International arbitration and international commercial law: synergy, convergence and evolution* (Kluwer Law International, The Netherlands, 2011) 259.

arbitration into a kind of supra-national judicial system, we stand to lose a lot more than we stand to gain.²⁶

Nevertheless, the 'judicialisation' of arbitration that can be observed to a varying extent in individual cases is a matter of practical application rather than 'regulation' of arbitration as such. Yet, the impact such practice has on how the field is regulated is visible in the third category of regulation, namely institutional rules and para-regulatory texts. Arbitration works 'because it is essentially self-policing'²⁷, but such self-policing is also becoming the victim of judicialisation through 'the growing tendency to regulate almost every aspect of the arbitration process.'²⁸ Institutes of arbitration frequently update and expand their rules allegedly as an answer to the needs and expectations of the market, of the arbitration profession and of the parties themselves – the institution's clientele. Ironically, however, many of the new rules introduced to contribute to greater cost and time efficiency, can just as well 'create the basis for further costly battles'²⁹.

As for the guidelines and various para-regulatory texts forming the so-called 'soft law' of arbitration, we witness an increase in both their number and in scope to the extent that there is now specialised literature comparing only these non-binding sources of norms³⁰. Being non-binding should mean by definition that soft law does not restrict arbitration as a field. However, some of these guidelines are also infiltrating into the rules of arbitral institutions, rising from the level of simple guidelines to mandatory or opt-out rules.

The profession – at least in part – seems to welcome these frequent changes as reflecting a convergence of international practice³¹ and as such, serving arbitration. However, the tendency to regulate more and more details under the noble aim of bridging cultural gaps and ensuring uniform and fair process in disputes involving parties, counsel and arbitrators from different legal, cultural and legal backgrounds, can lead to an undesired side-effect: that of losing flexibility and ultimately party autonomy as well. However, before analysing the rationale and the concerns of

26 *Idem*, at 252.

27 V.V. Veeder "The 2001 Goff lecture: The lawyers' duty to arbitrate in good faith" (2002) 18(4) *Arbitration international* 439.

28 Gunther J. Horvath, above n 25, at 261.

29 Nicolas Ulmer "The cost conundrum" (2010) 26(2) *Arbitration International* 228.

30 See for example Lawrence W. Newman and Michael J. Radine (eds) *Soft law in international arbitration* (Juris, 2014).

31 Michael J Bond "A geography of international arbitration" (2005) 21(1) *Arbitration International* 102.

increasing regulation, it is worth having a short look at the main areas of arbitration that are most exposed to this trend.

III MAIN AREAS SUBJECT TO INCREASING REGULATION

The areas of arbitration that are subject to ever growing regulation appear to be exactly those that are subject to significant influence from the participants' socio-cultural and/or legal background; hence those that are (or rather would be, if permitted) reflective of the variety so characteristic of international dealings.

A The Participants

Impartiality and independence has become a universal requirement from arbitrators, but it has not always been³². How the current independence and impartiality requirement translates into factual circumstances and practical behavioural expectations, however, depends on what is acceptable in legal practice in different cultures. As recounted from an author's personal experience³³, a Brazilian lawyer would have a private chat over coffee with a judge about the case when delivering a brief to the judge personally, while a British lawyer would lose his/her licence to practice and even face prosecution for the same. Even though characteristic of and regulated for the purposes of court proceedings, those lawyers are likely to approach international arbitration with the same differing perceptions. Accordingly, such differences can become at the minimum a source of plain misunderstanding in arbitration, but can also turn into a ground for challenging the arbitrator and/or counsel involved.

Nevertheless, these details are usually left unregulated at legislative level. While state law may regulate arbitrators in more detail than simply stating a general requirement for independence and impartiality, it rarely goes beyond a definition to these concepts³⁴. It is not common for arbitration acts to list disqualifying scenarios or provide cross-reference to state law regulating other professions that are incompatible with the role of arbitrator³⁵. State law may also regulate arbitrators'

32 Not so long ago arbitrators in the USA were expected to pay more attention to the interests of the party who appointed them, acting more like advocates rather than neutral decision-makers – see the 1977, and to some extent also the 2004 version of the *Code of Ethics for Arbitrators in Commercial Disputes* of the American Arbitration Association.

33 See Michael J Bond, above n 31, at 102.

34 For example, Romania defines the specific circumstances that qualify as grounds for challenge in Article 562 of the Romanian Civil Procedure Code.

35 In some jurisdictions, a person may not simultaneously act as a judge and arbitrator. This disqualification exists in Turkey (Law No. 657), China (Supreme People's Court's Notice on Prohibiting Current Judges from Acting as Arbitrators, 13 July 2004), and Argentina (Civil Procedure Code, section 765).

liability for misconduct³⁶. All such state regulation, however, even if primarily focusing on international arbitration, will be influenced by domestic practices and local perceptions over professional liability and ethical obligations. Perhaps less affected by local culture are the arbitration rules of arbitral institutions specialised in international cases³⁷. Most such rules, however, acknowledging the different expectations of parties involved in cross-cultural disputes, do not regulate in much detail the requirements for arbitrators³⁸.

To fill this gap and to create uniformity and predictability across the global field of arbitration, rules and guidelines on ethics in arbitration emerged. The IBA Guidelines on Conflicts of Interest in International Arbitration³⁹ is the result of such an attempt to provide common ground. Fourteen States from both common and civil law jurisdictions were represented in the Working Group⁴⁰, necessitating compromise on issues where the different States had different legal standards⁴¹. Despite their non-binding character, these guidelines serve a wider international regulatory function, as a breach of the IBA Guidelines can be used as a ground for challenge even in the absence of party agreement making them applicable to a case⁴². Their interpretive function of the often loosely defined terms of 'impartiality' and 'independence' may serve as a transnational code of conduct in jurisdictions that lack concrete definitions of these terms⁴³.

36 For example, German law provides a right to claim compensation for breach of confidentiality by an arbitrator (Zivilprozessordnung (ZPO) s 136, 138; OLG Frankfurt a.M., BeckRS 2008, 13980).

37 For example, the ICC, SCC, CIETAC, HKIAC, SIAC, etc.

38 The SCC Rules Art 14 only requires impartiality and independence; the CIETRAC Rules do not provide any specific requirements; and the UNCITRAL Rules Article 11 only requires disclosure of circumstances that give rise to justifiable doubts to their independence.

39 Created in 2004 and last revised in 2014. Available at <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

40 Canada, England, United States, France, Mexico, Belgium, Singapore, Australia, Switzerland, Sweden, Germany, New Zealand, South Africa, and the Netherlands.

41 For example, a solely objective 'reasonable third person' test was determined to apply to the appearance of bias, despite the use of a partially subjective test in some of the represented States – see Otto L.O. De Witt Wijnen, Nathalie Voser and Neomi Rao, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration", (2004) 5(3) Business Law International 433 at 442-443.

42 *OLG Frankfurt* 04.10.2007, SchiedsVZ 2008, 96 (101).

43 For example, the guidelines' status as a transnational code of conduct has been accepted in Germany; see Patricia Nacimiento, Amelie Abt, et al., "Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter III: Constitution of the Arbitral Tribunal, § 1036 – Challenge of an Arbitrator", *Arbitration in Germany: The Model Law in Practice* (Second Edition, Kluwer Law International, 2015) 182 – 183.

As the ethical concerns for arbitrators have a second (and third) side to the story, the increased regulation of arbitrators has started to target counsel and tribunal secretaries as well. Concerns regarding the behaviour of counsel in arbitration probably started with the ICSID cases of *Hrvatska Elektroprivreda, dd v The Republic of Slovenia*⁴⁴ and *Rompetrol Group N.V. v Romania*⁴⁵, where the tribunal had to decide whether counsel, not an arbitrator, can be challenged and should be removed for potentially inducing bias in the arbitral tribunal. Since the rights and obligations, and the professional and ethical duties of lawyers traditionally were left for their own professional organisations to regulate, with the corresponding difference in standards between jurisdictions, this became a blurry area for international dispute resolution. Consequently, the issue has recently been formally addressed through a new set of IBA guidelines regulating counsel behaviour in international arbitration⁴⁶.

A similarly grey area, that of the tribunal secretaries, has also been put in the spotlight recently, not so much because of inconsistent regulation in different jurisdictions, but due to the lack of any regulation. While originally only 'regulated' directly by arbitral tribunals allocating tasks to a secretary as needed in each case separately, the need for more comprehensive regulation was generated by alleged instances of abuse. Accusations emerged⁴⁷ that tribunal secretaries often act as 'fourth arbitrators', participating in the decision-making process and by this not only exceeding their initial function, but also contributing to a breach of the arbitrators' obligations, and of the parties' vested trust in the arbitral tribunal – and consequently in arbitration in general. With the secretaries' duties more and more expressly regulated by arbitral institutions⁴⁸, the next issue will soon become one of inconsistency across the field. Recommendations from the profession for a uniform

44 ICSID Case Number: ARB/05/24.

45 ICSID Case Number: ARB/06/3, 2010.

46 IBA Guidelines on Party Representation in International Arbitration (2013) available at <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

47 See for example the writs filed on January 28, 2015 by the Russian Federation to the District Court in The Hague, seeking annulment of three arbitral awards rendered under the Energy Charter Treaty in favour of the former majority shareholders of the OAO Yukos Oil Company.

48 See the ICC's Note on the Appointment, Duties and Remuneration of Administrative Secretaries, the Arbitration Institute of the Finland Chamber of Commerce's Guidelines for Using a Secretary in FCC Arbitration, the ICSID Arbitration Rules, the JAMS Guidelines for Use of Clerks in Arbitrations, and the LCIA's position on the appointment of Secretaries to Tribunals expressed through the Frequently Asked Questions section.

international standard have already been expressed⁴⁹, showing an overall tendency towards more strict and enforceable regulation⁵⁰ over yet another category of participants in international arbitration.

B The Case

In addition to the participants, the case itself is also subject to increasing regulation. From the statement of claim to the taking of evidence, what a party has to provide or can expect, are some of the most controversial aspects of international arbitration, as these suffer to the greatest extent from the difference between common law and civil law expectations. Rules of evidence are among the primary sources of great controversies, when imported from litigation into arbitration. Document discovery, for example, taken for granted by American lawyers, is not only uncommon, but possibly even unheard of in many European jurisdictions⁵¹. Having infiltrated from common law participants over the last few decades, into the previously primarily civil law controlled area of international arbitration, the concept of discovery still divides the profession⁵². In an attempt to satisfy both civil law and common law sides, while primarily following efficiency, hybrid solutions like the so-called 'Redfern schedule'⁵³ emerged in practice with no particular origin or reflection in formal regulation.

A similar element of the evidentiary process causing controversy is the examination of witnesses. While civil law lawyers would normally limit their intervention to suggesting questions to the judge/arbitrator directly 'interrogating' the witness, common law lawyers would hardly give up their right to question a

49 See Michael Polkinghorne "Different Strokes for Different Folks? The Role of the Tribunal Secretary" Kluwerarbitration blog entry of 17 May 2014, available at <<http://kluwerarbitrationblog.com/blog/2014/05/17/different-strokes-for-different-folks-the-role-of-the-tribunal-secretary-2/>>.

50 Elliot Geisinger, president of the Swiss Arbitration Association (ASA), expressed in a conference at the Queen Mary Institute for Regulation and Ethics on 16 Sept. 2014, that there is need for a 'truly transnational body' to oversee ethical standards <www.arbitration-ch.org/pages/en/asa/news-&-projects/details/979.asa-proposes-global-arbitration-ethics-counsel-to-apply-and-enforce-ethical-principles.html>. A significant shift from the perspective of Michael Schneider, immediate past president of ASA, who was very critical of excessive ethics regulation, considering the IBA Guidelines on party representation 'yet another opportunity to waste time and money on procedural skirmishes' (President's message of August 2013, available at <www.arbitration-ch.org/dl/7a4cd0a8c79562b053a60b06d6894045/PresMsg3-13.pdf>).

51 For more on this see Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law – Civil Law Divide in Arbitration" (2002) 18(1) *Arbitration International* 59-65.

52 Martin Hunter, one of the leading authors in the field, for example even jokingly refuses to use the term in his teaching and practice, only referring to it as 'the D word'.

53 A collaborative document delimiting the scope of disclosure in arbitration, designed by Alan Redfern – see Alan Redfern et al, above n 3, at 394.

witness directly⁵⁴. As for cross-examination, the observation that "it is rarely wise to use the term 'cross-examination' around a civil lawyer unless one is attempting to make him lose his composure"⁵⁵ says it all. Yet another example of significant differences can be found in the code of conduct for party-appointed experts and evidentiary privileges⁵⁶. Unlike in judicial practice, party-appointed experts are not subject to a universal code of conduct in arbitration⁵⁷, leaving room for uncertainty even where rules otherwise regulate tribunal-appointed experts. Some authors, however, consider that 'leaving such issues to arbitral decision-making during the proceedings leads to the 'dark side of [arbitral] discretion'⁵⁸, creating a strong incentive towards standardised best practice rules⁵⁹.

Similarly to regulating arbitrators and counsel, para-regulatory norms were created to soften the discrepancies between common law and civil law expectations with regard to the evidentiary process as well. Attempts to bridge the gap between the often divergent norms counsel and arbitrators from different backgrounds bring to the table, are well reflected by the IBA Evidence Rules⁶⁰ labelled as a welcome 'middle ground' between civil law and common law rules of evidence. The CIArb Protocol on party-appointed experts⁶¹ is a similar attempt to harmonise the regulation of a narrow, but grey area, which, however, does not go beyond the perspective of its origins rooted in English judicial practice⁶². On the other hand, the IBA Evidence Rules, developed by a group of lawyers representing both systems, create a standard that 'may sound too restrictive to the American ear, and simply reasonable to an English lawyer, but is far broader than any Continental

54 See Siegfried H. Elsing and John M. Townsend, above n 51, at 62.

55 *Idem*, at 63.

56 Eg whether evidentiary privilege is a procedural or a substantive matter. See Klaus Peter Berger "Evidentiary privileges: Best practice standard versus/arbitral discretion" (2006) 22(4) *Arbitration International* 507.

57 Mark Kantor "A code of conduct for party-appointed experts in international arbitration, Can one be found?" (2010) 26(3) *Arbitration International* 324.

58 Klaus Peter Berger, above n 56, at 513, referencing W.W. Park "Arbitration's protean nature: The value of rules and the risks of discretion" (2003) 19 *Arbitration International* 279 at 286.

59 *Idem* Berger only.

60 IBA Rules on the Taking of Evidence in International Arbitration (2010) available at <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

61 The Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration - available at <www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/the-use-of-party-appointed-experts.pdf>.

62 Mark Kantor, above n 57, at 374.

civil law system uses'⁶³. When the starting expectation is one of two opposite extremes – an American counsel expecting liberal discovery, when for a civil law counsel the mere concept 'resonates with all of the positive associations of bubonic plague'⁶⁴ – the question arises: is a 'middle ground' really a solution or just a 'splitting the baby'⁶⁵ type answer?

Unlike the international standards created for arbitrators and counsel, regulating evidence in a one-size-fits-all manner is less acceptable. Even though the IBA Evidence Rules were described as 'well received and commonly used'⁶⁶, there is no statistical data to confirm their widespread acceptance, and their universal benefit is questionable. Whether an issue of document finding, expert reports or cross-examination, these will – at times collectively – affect not only the procedural steps, but also the ultimate fate of an arbitration. Evidence being a sensitive issue so closely connected to the outcome of a dispute, rigid rules would be perceived as directly interfering with the decision-making process itself.

IV THE RATIONALE AND CONCERNS SURROUNDING INCREASED REGULATION

There is a legal theory explanation to the trend of increasing regulation. According to it, formal and informal dispute resolution methods regularly alternate in history, always starting from an informal becoming subject to more and more regulation until the same rules that were created to ensure predictability and efficiency, end up crippling the process. At which moment dispute resolution shifts to some other, yet informal process, only for history to repeat itself and to later overregulate that as well⁶⁷. While waiting for the process to take its natural course and reinvent less formalised dispute resolution mechanisms, supporters and critics

63 Siegfried H. Elsing and John M. Townsend, above n 51, at 61.

64 *Idem*.

65 An expression used in arbitration to describe a no-win decision where the parties' requests are both half accepted-half refused, creating the false impression of at least a partial success. In urban interpretation, unlike in arbitration, the term is understood as wisdom in judgment, rather than a compromise – the original expression refers to a story from the Holy Bible 1 Kings 3, 16-28 in which King Solomon of Israel when faced with two women's claim to be the mother of a child, ordered that the baby to be split in half; the true mother's surrender to the claim for the sake of the child's life then revealed the truth, enabling a fair decision.

66 See the Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, by the 1999 IBA Working Party and the 2010 IBA Rules of Evidence Review Subcommittee, available at <www.scribd.com/doc/185523309/Commentary-IBA-Rules-on-the-Taking-of-Evidence#scribd>.

67 See Gabrielle-Kaufmann-Kohler "When arbitrators facilitate settlement: towards a transnational standard" (2009) 25(2) *Arbitration International* 203.

provide plenty of pro and contra arguments for the increasing regulation of international arbitration.

The fast development of guidelines and institutional rules briefly mentioned above reflect the interlegality referred to earlier. Increased legalism of arbitration is – quite rightfully – justified by the undisputed increased complexity of the underlying transactions⁶⁸, for arbitration is only one of the facets of the 'new choreography of governance' that became the characteristic of the 'porous legality' or 'legal porosity' of 'interlegality'⁶⁹ – an intersection of 'multiple networks of legal orders forcing us to constant transitions and trespassing'⁷⁰. The differences in legal and socio-cultural backgrounds, creating considerable gaps between the parties', their counsel's and the arbitrators' approach to international arbitration, beg for solutions that make cross-cultural dispute resolution manageable, efficient, or even just possible. The noble flag of procedural fairness also puts a strong case in favour of regulation⁷¹, but triggers the question whether equal restrictions are in fact the same as equal rights.

The rationale for regulation extends from the need for security, stability, transparency and predictability in the procedure - the need for gap-bridging tools between disputing parties, having different presumptions and/or expectations of a common process - to the need for finality for an expensive dispute resolution exercise, and to the intention to eliminate the possibility of abuse of all those rights that parties and their counsel have. The latter implicitly indicating that overregulation is in fact fear-driven, rather than result-oriented⁷². Fear and lack of trust also explain the perception that 'mere reliance on a tribunal's practical expertise and instinct [...] comes close to the dark side of arbitral discretion' warranting either transnational best practice standards or generally accepted procedural principles⁷³.

68 See S.I. Strong "Increasing legalism in international commercial arbitration: a new theory of causes, a new approach to cures" (2013) 1 World Arbitration and Mediation Review 117-130.

69 Michael J Bond, above n 31, at 99, referring to the concept created by Bonaventura de Sousa Santos "Law: A map of misreading: Toward a postmodern conception of law" (1987) 14(3) Journal of Law and Society 279.

70 Idem.

71 V.V. Veeder, above n 27, at 435.

72 Similarly to changes in the regulation of investor-state-arbitration are often based on fear from public pressure caused by lack of understanding of the process – see for example Thilini Perera and Dalma Demeter "A Balancing Act: Retaining Investor-State Dispute Settlement Provisions in Investment Agreements and Balancing Stakeholder Interests" (2013) 31 Australian Year Book of International Law 75-117 on the change in the Australian policy on ISDS.

73 Klaus Peter Berger, above n 56, at 515.

However, do these expanding regulations really counterbalance abuse or misuse of party (or rather counsel) autonomy? Do they really help against the so-called 'guerrilla tactics' in arbitration⁷⁴? Or do they, in fact, support the practices of a preferred majority, while taking away the cultural sensitivity of arbitration through a one-size-fits-all approach imposing uniformity? Are we witnessing a shift in focus from solving substance towards a process-driven, process-oriented approach, where regulation and procedure become more important than the purpose these procedures were supposed to serve?

Criticisms against the 'thicket of continuously growing density' of regulation⁷⁵ raise concerns that range from the 'fragmentation' between the different rules⁷⁶ to the parties' fear of arbitration becoming 'as complicated, costly and time-consuming as transnational litigation'⁷⁷. If we accept that 'it is not the fact that international arbitration is so appealing that leads to choose it to resolve disputes, but rather that the alternatives are so much less appealing'⁷⁸, with the emergence of alternatives like mediation, arbitration has a lot to lose from overregulation.

While well intended and aiming to create common ground for the arbitrating community coming from different socio-cultural and legal backgrounds, excessive regulation in fact eliminates the exact characteristics that make arbitration an attractive alternative to litigation, namely flexibility and control⁷⁹. With the legal profession taking control of the process and disregarding business efficiency rationale when adopting adversarial courtroom-style approaches (and at times even abusing the procedural flexibility for dilatory tactics), arbitration is no longer the parties' dispute resolution⁸⁰, and the increase in regulation these practices trigger

74 Defined broadly as behaviour 'ranging from blatantly illegal, unethical conduct to more subtle, underhand manoeuvres' to hinder arbitral proceedings - for more on this topic see Stephan Wilske and Günther J. Horvath (eds) *Guerrilla Tactics in International Arbitration* (Kluwer Law International, The Netherlands, 2013).

75 Michael Schneider *The sense and non-sense of 'para-regulatory texts' in international arbitration* (President's message of May 2010) available at <www.arbitration-ch.org/dl/5e0b3268aa6777a561de41d11d9f7a51/ASAB2010020.pdf>.

76 See Elliot Geisinger presentation, above n 50, referred to at <www.out-law.com/en/articles/2014/september/truly-transnational-independent-body-needed-to-enforce-ethical-standards-in-arbitration-says-asa/> (original text unavailable).

77 Gunther J. Horvath, above n 25, at 262.

78 *Idem*, at 256

79 Time and cost efficiency are no longer perceived as a main characteristic or advantage of arbitration - See Thomas J. Stipanovich "Arbitration: The new litigation" (2010) 2010(1) *University of Illinois Law Review* 1-59.

80 See Thomas W. Walde, above n 20, at 209

become self-sabotaging. The more extensive the regulatory framework, the less room it leaves for flexibility and input from parties' favoured practices⁸¹. When these 'favoured practices' need to find a common compromise, a readily available regulation is, indeed, an easy source at hand for a compromise.

However, the 2013 Survey on 'Corporate choices in International Arbitration'⁸² identified concerns over the "judicialisation" of arbitration, the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings. This trend is potentially damaging to the attractiveness of arbitration. In-house counsel value the features of the arbitration process that distinguish it from litigation.⁸³ However, the mere availability of soft law can – and inevitably will – harden up arbitration until from a party-driven flexible private dispute resolution method it becomes a one-size-fits-all quasi-litigation, causing arbitration to suffer from a genuine *rigor mortis*.

While arbitration remains to this day popular, this popularity is not caused by ever improving practices, but partly also because of a strong pro-arbitration culture developed both by courts and through legal education. A 'pro-arbitration bias' combined with international events like the Vis Moot⁸⁴ ensure that young generations of law graduates continue to support and perpetuate the system. There is nothing farther from the mind of this author than to argue that such support is not laudable; however, promoting a romantic image of arbitration only reinforces practitioners' false expectations, instead of raising awareness of the aspects that need to be improved at times when 'international arbitration is looking more like transnational litigation than ever before'⁸⁵.

V RELEVANCE FOR THE BROADER FIELD

Why is flagging overregulation relevant today, when both the literature and the profession have been debating this topic for decades? Because the trend extends beyond the limits of international arbitration over areas of dispute resolution that could, otherwise, still be saved from the negative side effects of overregulation. A

81 Kimberly R. Wagner "The perfect circle: arbitrations' favours become its flaws in an era of nationalization and regulation" (2012) 12 Pepperdine Dispute Resolution Law Journal 178.

82 Available at <www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>

83 Summary of the survey results available at <www.pwc.com/gx/en/arbitration-dispute-resolution/>.

84 The Willem C. Vis International Commercial Arbitration Moot Court Competition in both Vienna and Hong Kong.

85 Gunther J. Horvath, above n 25, at 252.

look into a respected author's 'crystal ball' almost 15 years ago already predicted a shift from the need for 'dispute resolution' experts towards an increasing demand for 'dispute management' specialists⁸⁶. While slower than expected, that trend is confirmed through the undisputed success of mediation, occupying more and more space in the commercial dispute resolution arena. Commercial mediation is the main dispute resolution mechanism that is currently still perceived as business-oriented and business-friendly, not (yet) having taken over the clients' true interests⁸⁷. It focuses on deal making, rather than strict processes, and can afford to forgo predictable and safety-inducing procedures precisely because it is entirely dependent on cooperation and mutual agreement of the parties involved, but also because control is not handed over to the legal profession, as it apparently is in arbitration.

In spite of mediation's success and in spite of the criticisms revealing that overregulation is affecting exactly the characteristics of arbitration that make mediation effective and preferred, now when on one hand we witness the circle of overregulation slowly closing in on arbitration, we also witness the early steps of a regulatory framework emerging in mediation⁸⁸. The US proposal on developing 'a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation'⁸⁹, while a sound idea, does ring some alarm bells in light of the concerns raised by excessive regulation in arbitration. As the UNCITRAL has very recently decided 'to work on the topic of enforcement of settlement agreements' and the possible solutions include the development 'of a convention, model provisions or guidance texts'⁹⁰, this analysis and the recommendations to follow become very topical.

Rightfully or not, even the New York Convention⁹¹ can be subject to criticism, for the certainty it is meant to bring in the judicial review of arbitral awards being

86 See Martin Hunter "International commercial dispute resolution: The challenge of the twenty-first century" (2000) 16(4) *Arbitration International* 379.

87 See Thomas W. Walde, above n 20, at 205-232.

88 In the scope of the current UNCITRAL development, conciliation and mediation are used as synonyms.

89 UNCITRAL Planned and possible future work - Part III, Proposal by the Government of the United States of America: future work for Working Group II (A/CN.9/822) available at <www.uncitral.org/uncitral/en/commission/sessions/47th.html>

90 UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), available at <www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>

91 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

'ironically contrary to the ultimate idea of arbitration as a flexible institution'.⁹² The perception that 'not every party that embarks on alternate dispute resolution is seeking finality or an absolute avoidance of the courtroom'⁹³ becomes even more relevant when applied to mediation. While this author does not agree that the finality and enforceability, ensured through the New York Convention to arbitral awards, should be subject to severe criticism, applying the same treatment to the outcome of mediation would redefine mediation. Even if changes to the concept of mediation would likely create room for other, less regulated dispute resolution mechanisms, the benefit of increased global legitimacy has to be balanced against the potential deterrent of transforming mediation from the malleable tool it currently is, into something more arbitration-like.

An extensive survey has tapped into the perception of ADR users globally, revealing an overwhelming preference towards a convention making mediation and/or its outcome more readily enforceable⁹⁴. The concern raised by the demographics of this survey, however, is that it seems to be indicative of the understanding and preferences of dispute resolution professionals', but not of the businesses who are the actual users of ADR, benefitting or losing from the process⁹⁵. Nevertheless, even if the survey results are accepted to be sufficiently representative of the end users of mediation, they confirmed time and cost efficiency, 'the desire for a more satisfactory process', and the 'desire to preserve an ongoing relationship' to be the primary reasons for using mediation⁹⁶. All of which have already proved to be negatively impacted on as a result of increased regulation and judicialisation in arbitration.

One convention guaranteeing enforceability of outcome does not equal overregulation of mediation. However, mediation is currently preferred in many disputes for facilitating agreement, precisely for the absence of an imposed outcome⁹⁷. The lack of a binding decision appearing as a clear advantage, together

92 Kimberly R. Wagner, above n 81, at 179.

93 *Idem*.

94 See S.I. Strong "Use and perception of international commercial mediation and conciliation: A preliminary report on issues relating to the proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" University of Missouri School of Law Legal Studies Research Paper No. 2014-28 available at <<http://ssrn.com/abstract=2526302>>.

95 35% of the 221 respondents were from private practice, 10% were in other form of employment including for example judges, and 7% were in-house counsel, with an overall 56% having extensive experience in dispute resolution - See S.I. Strong, *Idem*, at 11.

96 For percentages and detailed presentation, see S.I. Strong, *Idem*.

97 Kimberly R. Wagner, above n 81, at 182.

with 'the ability to solve deeper, relational issues, and increased cultural sensitivity'⁹⁸, raises the question whether depriving mediation of even just one of these characteristics will diminish the others as well, and whether the change in these characteristics would, in fact, benefit mediation in general, and/or the parties using it.

While this author agrees that a guaranteed outcome is often essential in commercial disputes⁹⁹, such assurance is already available through arbitration. When the potential benefit of increased regulation and enforceability of mediation/conciliation agreements and settlements appears to be based on a parallel drawn with the success of arbitration regulation¹⁰⁰, the core of the issue seems to be in a desire to change the mere definition of mediation, rather than improving it. The declared goal is perceived 'not to turn mediated/conciliated settlement agreements into arbitral awards, but rather to elevate these settlement agreements via a convention to a status similar to that of an arbitral award under the New York Convention'¹⁰¹. Nevertheless, the need for finality does not seem to justify redefining mediation to become a second form of arbitration simply to generate a final and binding outcome, when 21% of the respondents identify 'cultural disinclination towards litigation or arbitration' as the primary reason for using mediation¹⁰².

It is early to know whether the proposed convention will ever come into existence, and any eventual disadvantages the convention may have are unlikely to severely damage its perceived advantages. Nevertheless, regulators and practitioners must be aware of the dangers of following a pattern of regulation initiatives that resemble that of arbitration, for the risk of generating an entire avalanche of further regulations. The rationale for increased regulation of mediation is just as well justified as it was – and still is – in arbitration. Yet, the literature has already flagged the concern for mediation 'to follow the path of arbitration, and to lose its effectiveness in the quagmire of misuse and

98 *Idem*, at 183.

99 Kimberly R. Wagner, above n 81, at 184.

100 See S.I. Strong, above n 94, at 42; also see UNCITRAL Planned and possible future work - Part III, Proposal by the Government of the United States of America: future work for Working Group II (A/CN.9/822) 3, available at <www.uncitral.org/uncitral/en/commission/sessions/47th.html>

101 Lorraine M. Brennan "Do We Need a New York Convention for Mediation/Conciliation?" available at <www.jamsadr.com/files/Uploads/Documents/Articles/Brennan-Lorraine-NY-Convention-Mediation-LAW-2015-02-26.pdf>

102 See S.I. Strong, above n 94, at 22.

overregulation'¹⁰³. '[T]here is just too much legal baggage taken on board the good ship of International Commercial Arbitration' that only 'continues to increase – with law, more law, legalese, and more legalese', making it to move 'slowly and ponderously'¹⁰⁴. The consequences of a similar trend over a more fragile ADR are unlikely to be better. Nevertheless, with proper alternatives to overregulation, the chances for the broader area of ADR to slowly succumb to its own regulators can still be decreased, compared to arbitration.

VI RECOMMENDATIONS

While there have been recommendations to strip arbitration 'of all but the essential rules'¹⁰⁵, this author is sceptical about such reverse of an already existing web of regulations being a feasible expectation, proposing instead to stop further regulating the field and achieve the desired outcomes through alternative means that are less restrictive. For arbitration, the threshold for a still justified level of regulation is whether arbitration is perceived as a self-standing and self-defined field with its own 'take-it-or-leave-it' set of regulation, or a flexible – and as such less definable – creature to take the shape and be adapted to each individual case. The current tendency towards overregulation gives a clear answer to this question. There is no answer, however, whether, and if so why, mediation and later possibly other ADR methods, should follow the same road.

The effort to harmonise the rules of arbitration has placed arbitration in the cross-fire of different legal orders. Regulation can be useful in cases involving less experienced parties, but it also diminishes control over the proceedings by both the arbitrators and the parties – a consequence that 'is problematic because it is the arbitrators who guarantee confidence in the arbitration process and who safeguard the main advantages of international arbitration, such as party autonomy and flexibility'¹⁰⁶. The need for proactive arbitrators with 'strong case management skills' has been flagged as a means towards the efficiency of arbitration¹⁰⁷, but expecting arbitration to be improved by arbitrators only, is a rather heavy

103 Kimberly R. Wagner, above n 81, at 186.

104 Fali S. Nariman "The tenth annual Goff lecture: The spirit of arbitration" (2000) 16(3) *Arbitration International* 262.

105 Gunther J. Horvath, above n 25, at 269.

106 *Idem*, at 262.

107 See the ICC Commission Report on Controlling time and costs in arbitration, available at <www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/>

burden¹⁰⁸. The expectation is also unrealistic, if arbitrators' control is weighed down by restrictive regulation.

Solutions recommended against the dissatisfaction generated by the time and cost increase in arbitration range from 'switching to ADR', through the use of multi-tier dispute resolution processes, to inserting a settlement window within the arbitration procedure¹⁰⁹. In another, more drastic approach, recommendations like limiting the parties' written submissions to 100 pages, witness statements to be replaced by interrogation by arbitrators, and prohibiting document production were considered, among others, to be the ultimate means to saving cost and time¹¹⁰ – and through this, to saving arbitration. While well-intended, and some of them giving back part of the lost control to arbitrators, these latter 'solutions' would only take further from the flexibility of arbitration overall, and through their rigidity, would significantly limit party autonomy.

Another recommended answer to the challenges arbitration faces, focused on business-oriented attitude, negotiation skills, and dispute management structures, already in 2000¹¹¹. In a similar approach, both social theorists and legal practitioners have also provided 'social theory oriented' solutions based on socio-legal analysis of arbitration, explaining the need for arbitration to become (or, in this author's opinion, return to being) 'a process aimed at understanding the differing parties' cultures and backgrounds in order to handle them properly'¹¹², and accordingly, to achieve maximum user satisfaction.

Over-regulation is in part a reaction to the field of dispute resolution being more and more dominated by the legal profession. Excessive legality attempts to compensate for the lack of interpersonal, social, business and psychological skills needed to bridge socio-cultural gaps and differences in ADR. An artistic metaphor explained how 'lawyers' training, skills and ethics are still essentially rooted in a national legal system', by saying that 'lawyers are not musicians or ballet dancers'¹¹³. Taking this metaphor one step further, lawyers are definitely not as

108 Lucy Greenwood "A window of opportunity? Building a short period of time into arbitral rules in order for parties to explore settlement" (2011) 27(2) *Arbitration International* 204.

109 See *Idem*, at 200.

110 See Joerg Risse "Ten drastic proposal for saving time and costs in arbitral proceedings" (2013) 29(3) *Arbitration International* 453-466.

111 See Martin Hunter, above n 86, at 387-391.

112 Paolo Esposito and Jacopo Martire "Arbitrating in a world of communicative reason" (2012) 28(2) *Arbitration International* 326.

113 V.V. Veeder, above n 27, at 431.

flexible as ballet dancers, while ADR, by definition, is, rendering the two categories difficult to reconcile. The conflict of cultures in international arbitration is of 'greater importance than most businesspersons and practitioners suspect, and may be a decisive factor'¹¹⁴. In light of this and the noble goal of making arbitration and mediation the most efficient dispute resolution methods for international disputes, the field should acknowledge and embrace socio-cultural differences, rather than create one-size-fits-all mechanisms that leave no room for differing preferences that would, ultimately, make a dispute resolution method personalised.

Both supporters and critics of increased regulation put forward a well-justified case for their side, but the solution should, perhaps, come from taking a different perspective, rather than from the battle of *pro* and *con* arguments. Accordingly, this author does not agree that practices and expectations brought from the participants' background should not penetrate international dispute resolution at all, but agrees that the differences should be mitigated 'without imposing the adoption of one over the others'¹¹⁵. These differences can and should be bridged by the use of methods chosen on a case-by-case basis, built on common grounds and causing the least disruption, without leading to the 'side-effect' of one-size-fits-all type of regulations inducing rigidity of the entire field. In order to assist with such case-by-case approach, however, in an apparently counterintuitive approach, yet another set of guidelines and processes could actually stop overregulation spiralling out of control and reducing party autonomy to a mere choice between pre-determined procedures, rather than freely designing and shaping them.

A potential solution could, therefore, be to further develop a dispute assessment tool¹¹⁶ that is often already used in practice, to decide the methods most suitable for a given dispute¹¹⁷. There is no need to reinvent the wheel, when all it takes is to add to it to suit the characteristics of cross-border, cross-cultural disputes¹¹⁸. Taking on board the recommendation that practitioners 'should take advantage of the businessmen' negotiating practice and apply the art of the deal to the people - ie

114 Paolo Esposito and Jacopo Martire, above n 112, at 327.

115 Idem, at 329.

116 Also called early case assessment.

117 See for example the toolkit in use at the International Institute for Conflict Prevention & Resolution, available at <www.cpradr.org/About/NewsandArticles/tabid/265/ID/624/CPR-Early-Case-Assessment-ECA-Toolkit-2010.aspx>

118 Although primarily focusing on its benefit for litigation, the potential of early case management for ADR has also been identified in John Lande "The movement toward early case handling in courts and private dispute resolution" (2008) 24 Ohio State Journal on Dispute Resolution 81 and University of Missouri School of Law Legal Studies Research Paper No. 2010-02 at 83-132.

fully investigate the contracting parties' background and feel comfortable with it for the purpose of successfully manage the deal¹¹⁹, international dispute resolution could greatly benefit from a tool assisting in this investigation.

In a more generalised, readily accessible form this tool could take the form of a complex questionnaire to be filled by the parties and their counsel, to identify – in addition to the already used business organisational and industry characteristics, operations and interests – also the potential legal, socio-cultural and/or religious influences over the process and the parties' expectation and perception over the possible outcome of a dispute resolution mechanism. An algorithm including risk analysis in light of the mapped characteristics could then match the individual dispute – the subject of which is in itself a significant factor – with the most suitable method and most efficient procedural steps, as well as the most suitable arbitrator/mediator/neutral characteristics and qualifications, leading to a result-oriented dispute management strategy. Taking the already used risk management and legal analysis into the cross-cultural realm of international disputes, the benefit of this clarification and the recommendations would be to avoid time-consuming and futile attempts to dispute resolution methods that do not lead to the expected results.

As an example, the system would not recommend a method that results in an outcome that has the legal force of a contract when one of the parties does not perceive contracts as binding as the other, but considers them only as 'the first step of negotiation'¹²⁰. In such a scenario, the outcome of an already potentially time-consuming process would only be the first step towards a subsequent one to eventually provide a final and binding, enforceable decision. On the other hand, it would be a wasteful exercise to invest in arbitration if there was a possibility for resolution within a less complex, less expensive, and less adversarial process. Such option, however, does not always become apparent, due to the participants' insufficient understanding of each other's expectations. The overall result of a proper assessment factoring in all legal, socio-cultural, religious, or any other differences, could be a significant reduction of procedural disagreements, abuses and dead-ends during any dispute resolution method. Including a preliminary step in which the dispute is 'matched' with its most suitable dispute resolution mechanism would allow the 'ideal' process, whichever that may be for a given case, to work towards its intended purpose of solving the dispute. Of course, the recommended solution is based on the admittedly optimistic (perhaps even naïve)

119 Paolo Esposito and Jacopo Martire, above n 112, at 328.

120 This hypothetical is reflective of the very differing perception of contracts in the US or Western Europe and Asia.

presumption that dispute resolution methods are genuinely used for the declared purpose of solving the dispute, and not as a strategic tool for some other, hidden agenda¹²¹. In any case, the proposal is intended to revive the true 'spirit of arbitration' – and of ADR in general – aiming 'not to draw from the applicable law a decision against the parties involved but to clarify, together with the parties, what should be done in a given situation to achieve *justice* with co-operation'¹²².

Building a profiling tool like this would require extensive interdisciplinary research not only from lawyers, but with the input of sociologists and psychologists as well – a project yet to be developed, subject to funding. And while international commercial arbitration is a well-researched field, the internationality itself of arbitration is allegedly often overlooked in practice, due to the participating legal practitioners' tendency 'to think along national lines, practices, procedures and laws, in their habit to transpose to transnational situations their national (or provincial) methods and solutions, and/or attempt to impose them on foreign parties'¹²³, and this leaves room for future projects like the one proposed.

121 On abuse in arbitration, see for example William W. Park "Arbitration's discontents: Of elephants and pornography" (2001) 17(3) *Arbitration International* 263-273.

122 Fali S. Nariman, above n 104, at 262 - quoting M. Michel Gaudet, former honorary president of the ICC Court of International Arbitration.

123 See P Lalive "Cultural differences and international arbitration" (1995) 9 *Euromoney* 13-15; Also see Paolo Esposito and Jacopo Martire, above n 112, at 328, acknowledging the absence of comparative research to confirm the observation.

