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**A JUDICIAL PERSPECTIVE ON
ARBITRATION: WHERE ARE WE HEADED?**

by

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A. INTRODUCTION

Tonight, I would like to offer some thoughts on a debate that preoccupies the legal community—the relationship of arbitration to the rule of law, as administered by the courts.

I am aware that in 2015, David Neuberger addressed a Hong Kong audience on the same subject. Yet four years have passed—four years in which we have seen challenges to the rule of law in many parts of the world, as independent and impartial courts are undermined or politicized. In this context it is worth taking a fresh look at the role of arbitration in maintaining and growing the rule of law throughout the world.

Like David Neuberger, I believe that arbitration is not an out-law, beyond the remit of the rule of law, but an integral part of the rule of law. I will argue that arbitration has always been part of the law and that this is so in the 21st century more than ever in the past. I will further argue that arbitration works to advance the rule of law in a number of ways, offering an alternative to the formalism of the rule of law and introducing legal norms in places that might lack them. Finally, I will suggest ways in which we can assure that arbitration continues to play its vital role as part of the rule of law throughout the world.

B. ARBITRATION IN HISTORY

We sometimes think of arbitration as outside the law—an out-law—or as a late-come addition to the law. Nothing could be further from the truth. I will come in a moment to the question of whether arbitration is part of the rule of law, in its modern conception. At this point, I simply want to point out the eminent pedigree of arbitration in resolving legal disputes and securing justice.

Arbitration has long worked to help people and organizations find justice—justice according to the law. This is particularly the case in commercial matters. Court decisions have been historically important in the commercial arena. But so has arbitration.

We are all familiar with how the court system developed through the centuries to produce the common law and the civil law administered in the courts. We may be less familiar with the long lineage of arbitration. Manchu Emperor Kangzi, who ruled China from 1654 to 1722, wrote approvingly of settling disputes by arbitration instead of the law courts, stating “as for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice due to them.”¹ The Prophet Mohammed served as an arbitrator, which was a fixture of Islamic Law in the 8th century.² These are but two examples; throughout history and throughout the world, people have used arbitration to resolve legal disputes.

Arbitration, trade and commerce have always gone hand in hand. But as courts developed, a question arose: who should decide commercial disputes—the courts or private arbitrators.

France offers an interesting example. In France, Francis II permitted arbitration and trade with the Germans, Swiss and Italians under the Edict of 1560.³ But later, French Parlements stifled arbitration. After the French Revolution, the pendulum swung back in favour of arbitration under the Constitutions of 1793 and 1795⁴. The pendulum swung again with the Napoleonic Code, which abol-

¹ Nael G. Bunni, *The FIDIC Forms of Contract*, 3d ed. (Oxford, UK: Blackwell Publishing, 2005) at 386.

² Amel K. Abdalla, *Arbitration in the MENA*, Gordon Blanke & Habib Al Mulla, eds. (Huntington, NY: JurisNet LLC, 2016), at Part D[1].

³ Gary B. Born, *International Commercial Arbitration*, 1st ed. (Alphen and den Rijn: Kluwer Law International, 2009) at 37.

⁴ Constitution of 1793, Art. 86 (“the right of the citizens to have their disputes settled by arbitrators of their choice shall not be violated in any way whatsoever”); Constitution of 1795, Art. 210 (“The right to choose arbitrators in any dispute shall not be violated in any way whatsoever.”) Law of 16-24 August 1790, Art. 1 (“As arbitration is the most reasonable means of terminating disputes between citizens, the legislators shall not make any provision that would diminish either the favour or efficiency of an arbitration agreement.”)

ished contract clauses that provided for extra-judicial dispute resolution.⁵ In 1843 the Cour de Cassation effectively outlawed arbitration,⁶ but in 1923 the pendulum swung back to arbitration with a resounding clang when the ICC founded the International Court of Arbitration in Paris. Paris became a centre for international arbitration, a position it occupies to this day.

The same happened in England and its colonies. Lord Coke in *Vynior's Case* (1609)⁷ limited arbitration, but statutes in 1697⁸ and 1698⁹ supported it. The King's Bench in *Kill v. Hollister* (1746)¹⁰ ousted arbitral jurisdiction, and the House of Lords did not overturn this case until 1856 in *Scott v. Avery*,¹¹ Lord Campbell stating that the ban on arbitration "probably originated in the contests of the courts of ancient times for extension of jurisdiction." Still, up to and including the 20th century, courts in England and Canada and elsewhere regarded arbitration with a suspect eye. The Supreme Court of Canada in *Seidel v. Telus Communications Inc.*¹² stated (*per* Lebel and Deschamps JJ., dissenting but not on this point): "the courts originally displayed overt hostility to arbitration, effectively treating it as a second-class method of dispute resolution Until the 1990's, commercial arbitration in Canada was not regarded as a real substitute for the courts and the provinces were slow to recognize any distinction between domestic arbitration and international arbitration."

A similar story of tension between courts and arbitration played out in the United States. The Dutch settlers in New Amsterdam favoured commercial arbitration¹³ and George Washington's will directed that any disputes be arbitrated.¹⁴ A long period of judicial

⁵ Art. 2059, C.N. (making pre-dispute arbitration agreements unenforceable); see also Art. 1006 of the Code of Civil Procedure.

⁶ *Cie L'Alliance v. Prunier*, Cass. Civ. 10 Jul. 1843, S. 1843.1, p. 561.

⁷ *Vynior's Case*, 8 Co. 80a and 81b (1609).

⁸ *Statute of Fines and Penalties*, 8 & 9 William III, c. 11 (1697).

⁹ *Arbitration Act*, 9 William III, c. 15 (1698).

¹⁰ *Kill v. Hollister*, (1746), 1 Wilson 129; 95 E.R. 532 (K.B.).

¹¹ *Scott v. Avery*, (1854), 5 H.L. Cas. 811.

¹² *Seidel v. Telus Communications Inc.*, [2011] S.C.R. 531 at para. 89

¹³ Born, *supra*, note 3.

¹⁴ Klaus Peter Berger, "The Arbitration Clause in George Washington's Last Will & Testament", (December 2012), online: ICCA Historic Documents <<https://www.arbitration-icca.org>>.

dominance followed.¹⁵ The pendulum swung back to arbitration under the 1925 *Federal Arbitration Act*, aimed at countering long delays in congested courts, the expense of litigation and the failure to reach just decisions through litigation. “Businessmen,” the drafters proclaimed, “needed solutions that were simpler, faster, and cheaper”.¹⁶ But even with the blessing of the federal government, commercial arbitration remained relatively obscure in the United States until a series of U.S. Supreme Court decisions in the 1980’s and ’90’s.¹⁷ Yet opposition to arbitration continues in the U.S.—competence-competence is not the default for arbitrability.¹⁸

This history suggests that the star of arbitration is firmly fixed in the legal constellation. It is as old as the idea of justice itself, and despite recurrent attempts to suppress it in favour of dispute resolution only by the courts, it has persisted, indeed triumphed.

My conclusion is that we should accept that arbitration is here to stay and that it plays a vital role in legal dispute resolution. The old debate about whether disputes should be resolved in the courts or by arbitration poses a false either/or alternative. It is sterile and leads nowhere. We need the courts to resolve legal disputes in all areas of public and private law. And we need arbitration to resolve legal disputes in a number of private contexts, first and foremost commercial disputes.

¹⁵ See e.g., *Tobey v. County of Bristol*, 3 Story, 800, Fed. Cas. No. 14 (C.C.D. Mass, 1845) (“But when they are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they [courts] necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.”); *Home Ins. Co. v. Morse*, 87 U.S. 445 (1874) (“They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”); *Doyle v. Continental Insurance Co.*, 94 U.S. 535 (1877); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y., 1915); Paul L Sayre, “Development of Commercial Arbitration Law” (1928) 37:5 Yale LJ 595 at 610.

¹⁶ Margaret L. Moses, “Statutory Misconstruction: How the Supreme Court Created a Federal arbitration Law Never Enacted by Congress” (2006) 34:1 Fla. St. U. L. Rev. 99 at 101–113 citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924) (statement of Julius Cohen).

¹⁷ See e.g. *Moses H. Cone Memorial Hop. v. Mercury Const. Corp.* 460 U.S. 1 (1983); *Southland Corp v. Keating*, 465 U.S. 1 (1984); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹⁸ *Henry Schein Inc. v. Archer & White Sales, Inc.*, 586 U.S. ____ (2019).

Against this background, I come to the question at the heart of this lecture: what role does arbitration play in maintaining and promoting the rule of law?

C. ARBITRATION & THE RULE OF LAW

First, we must consider what we mean by the term “rule of law”. The phrase rolls off the tongue with ease. But it is worth considering what we understand by it. As Oliver Wendell Holmes counseled, “[A judge] must not stop at consecrated phrases, which in their day were a revelation, but which in time from their very felicity, tend to stop the endless necessary process of further analysis and advance.”¹⁹

So let us turn to further analysis of what we mean by the rule of law. British jurist and constitutional scholar A.V. Dicey stated that the rule of law is based on three principles: (1) legal duties and liability to punishment are determined by regular law and not by arbitrary official fiat, government decree or broad discretionary powers; (2) everyone is equal before the law; and (3) judicial review to ensure that all state powers are exercised in accordance with the law. Tom Bingham in 2007 elaborated eight principles: (1) the law must be accessible, clear and predictable; (2) issues should be resolved by law, not discretion; (3) Laws must apply equally to all; (4) the law must protect fundamental human rights; (5) disputes must be resolved economically and fast; (6) public powers must be exercised reasonably, *bona fide*, and appropriately; (7) state adjudicative procedures must be fair; and (8) the state must comply with its international law obligations.²⁰

While formulations vary, a fundamental theme runs through definitions of the rule of law—at its most basic, the rule of law is the doctrine of supremacy of the law. All power must be exercised within the law. People are governed, not by the ruler or parties or representatives, but by the law, validly created and promulgated. No person is above the law: Monarchs and rulers and representatives are themselves governed by law.

¹⁹ Oliver Wendell Holmes, *The Occasional Speeches of Justice Oliver Wendell Holmes*, Mark DeWolfe Howe, ed. (Cambridge, MA: The Belnap Press of Harvard University Press, 1962) at 148.

²⁰ Lord Bingham, “The Rule of Law” (2007) 66:1 Cambridge L.J. 6; Tom Bingham, *The Rule of Law*, (London: Penguin, 2011).

The requirements of the rule of law can be divided into two categories. The first category contains requirements related to the nature of law itself. It must be legitimate, or properly made; it must be clear and predictable, it must protect certain fundamental rights, and it must apply equally to everyone, for example.

The second category of requirements relate to how the laws that meet these characteristics are actually maintained on a day-to-day basis—impartial and independent dispute resolution and enforcement of orders. This is the machinery that makes the rule of law a reality in the lives of people. It is not merely a fancy set of rules on paper; it is the reality in the lives of people, the social matrix and the economy.

Both categories of conditions of the rule of law are essential. A country can have a beautiful suite of laws on the books, but unless they actually operate on the ground, there is no rule of law. This second category is where arbitration contributes to the rule of law.

What are the requirements in this second category? How do we ensure supremacy of the law on a real day-to-day basis? How do we ensure that state power and citizen-to-citizen relations are exercised in accordance with the law? The answer can be stated simply. To ensure the rule of law is maintained, citizens need access to independent impartial decision-makers who are committed to applying the law, whose decisions will be enforced.

This sentence reveals three fundamental procedural requirements for maintaining the rule of law: (1) there must be **independent and impartial decision-makers**; (2) users must be able to **access** the decision-makers; and (3) the orders the decision-makers make must be **enforceable**. Unless all three conditions are met the rule of law, however pretty it looks on the books, will not exist in practice. Arbitration meets all three requirements and thus helps further the rule of law.

When we think of the procedural first requirement—**independent and impartial decision-makers**—we usually think of state-appointed judges. The judiciary decides matters of public and private law. Judges of inherent jurisdiction have broad powers to maintain the rule of law, whenever it is threatened. But judges are not the only decision-makers essential to upholding the rule of law. Every advanced state has tribunals and administrative decision-makers who decide issues under particular legal regimes. And arbitrators—our subject tonight—decide issues of law in private disputes, from

family law to weighty commercial matters. Arbitrators may be appointed privately, and the legal system they apply may be chosen by the parties. But this does not detract from the fact that like judges and administrative decision-makers, arbitrators are independent and impartial decision-makers.

The second condition is that the individuals or organizations that seek to enforce the law must be able to access the decision-makers and resolve their disputes economically and fast. Access to courts is a problem in many countries, including England, Canada and the United States. Litigation may be expensive, denying justice to people of ordinary means. Delays may be significant, and court formalities may get in the way of speedy and effective resolution. Resolving disputes through the courts economically and fast often remains an ideal rather than a reality.

Another problem litigants may face on the access front is that disputes can be complex and require decision-makers with a degree of knowledge or specialization. Educating a judge with no commercial background, for example, can prolong hearings, make them more expensive, and sometimes affect the quality of the justice that is eventually meted out.

Many countries, including my own, are working to improve access to justice through the courts. But sometimes the court system does not offer the access to justice parties want or require. At this point, they may look to alternative ways to resolve their legal disputes and enforce their legal rights. So they appoint private judges—arbitrators—to get the access to justice they need.

The third requirement for maintaining the rule of law in fact, and not just appearance, is that the decisions of the independent and impartial decision-makers must be enforceable. Stephen Breyer, Justice of the Supreme Court of the United States, in his book *Making Our Democracy Work*,²¹ discusses the fact that judicial decisions in democracies are accepted and enforced even when they are unpopular. This is vital to maintaining the rule of law in day-to-day life. Decisions that are not enforced are not worth the paper they are written on.

Judicial decisions have long been enforced by the state. The police take an offender into custody or sheriffs seize and sell property to satisfy a debt. The state is making sure the order of the judge is

²¹ Steven Breyer, *Making Our Democracy Work: A Judge's View*, (New York: Alfred A. Knopf, 2010).

enforced. Likewise, judicial decisions are recognized as having *res judicata* or issue estoppel effects.

Arbitration has found ways to harness state apparatus to enforce its awards and on the international front improve enforcement. The New York Convention,²² of course, has allowed for the rapid increase in international commercial arbitration, making it easy to have awards recognized and enforced across the world. Recognition and enforcement of foreign judgments can, by contrast, be difficult, often involving issues of comity and local law.²³ In nearly fifty years, the Hague Convention on Foreign Judgments in Civil and Commercial Matters²⁴ has only attracted three signatories and five parties, while the Brussels Regime is limited to EU and European Free Trade Association members. This leaves arbitration as *the* way to have binding decisions between international parties.

Against this background, let me return to arbitration and the rule of law. Arbitration is not in the business of making laws and ensuring they apply equally and meet a certain quality. These aspects of the rule of law do not directly pertain it. But arbitration is definitely in the business of maintaining the rule of law on the ground, so that it is not just a pretty suite of laws, but a reality in people's lives and organization's activities.

Arbitration, in the private sphere, meets all the procedural requirements of the rule of law. It provides impartial and independent decision-makers who apply the law; it provides access to justice—for some situations superior to the access the court system provides. And it has found means to make its decisions enforceable.

In this way, arbitration enriches the justice system and enhances the rule of law. Within justice systems with a rich conception of the rule of law, consensual justice, devised by the parties, supplements imposed justice, devised by the states. Arbitration fits naturally with resolution of contract disputes, which are formed by consent. This consensual activity, however, takes place under the umbrella of the rule of law. Contracts are created and construed in accordance with the rules of law. The result is a justice system in

²² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”).

²³ See *e.g.*, *Dart v. Dart*, 224 Mich. App. 146, 568 N.W.2d 353 (1997) (Michigan Court of Appeals reversed lower court that refused to recognize or enforce English divorce decision.) *aff'd* 459 Mich. 573, 597 N.W.2d 82 (1999).

²⁴ Hague Convention on Foreign Judgments in Civil and Commercial Matters (1971).

which courts and arbitrators work as separate but compatible dispute resolution mechanisms.

Arbitration also advances the rule of law in countries that may not fully embrace all its tenets. In countries with reductionist versions of the rule of law, arbitration promotes values that underlie the rule of law—decision-making on the basis of principle rather than arbitrary fiat; fair process; certainty and predictability; access to justice; flexibility and informality; and decisions rendered efficiently and flexibly—to mention only a few. Countries lacking effective independent courts may benefit from the arbitral model as applied to commercial disputes, and go on to apply rule of law values in other areas of public and private law.

Peru provides an example of how arbitration works in a state lacking the full range of rule of law protections, discussed by Jan Paulsson in *The Idea of Arbitration*.²⁵ Following the topple of Fujimori, Peru’s lawyers worked diligently to bring about transformative change in their justice system. Despite hard work, the courts remained in the stranglehold of suffocating formalism that prevented from moving through the system. Arbitration has assuaged the situation, and Peru passed favourable arbitration legislation recognizing arbitral awards.

This said, without the support of a strong legal culture, maintaining integrity in arbitration can be difficult. On November 7, 2019, we read that a Peruvian judge had ordered the pre-trial detention of 14 arbitrators for 18 months while they are investigated for allegedly taking bribes to favour a scandal-hit construction company, Odebrecht, in a series of disputes that cost the state more than US \$250 million. Odebrecht, of course, is embroiled in Brazil’s massive and ongoing corruption case. There are similar allegations against the company in Peru involving several of that country’s former presidents. A number of practitioners in Peru have spoken out against the detentions. The cases of three respected arbitrators, for example, rest on allegations that they charged excessive arbitration fees. These fees have been alleged to constitute bribes.²⁶

I conclude that arbitration, far from being an outlaw, is part of a good legal system—indeed, a fundamental pillar in maintaining—

²⁵ Jan Paulsson, *The Idea of Arbitration* (Oxford, UK: Oxford University Press, 2013) at 266–68.

²⁶ Cosmo Sanderson, “Arbitrators jailed in Peru amid Odebrecht corruption scandal” *Global Arbitration Review* (7 November 2019), online: Global Arbitration Review <<https://globalarbitrationreview.com>>.

the rule of law. At its best, it works within legal systems built on a broad conception of the rule of law, in the full sense E.V. Dicey and (even more fulsomely) Tom Bingham described. But it may contribute to the rule of law even where this is not present.

Against this background, I look at what we have already done and what must be done in the future to ensure that arbitration effectively enhances the rule of law.

D. ARBITRATION & THE RULE OF LAW: CHALLENGES FOR THE FUTURE

Arbitration has succeeded by adopting the principles of independent effective decision-making developed by courts operating under the rule of law, and applying them in the private sphere in a flexible, informal way that meets the needs of private litigants. If arbitration is to continue as a strong activity fostering justice and development, it should maintain this approach into the future. The best way forward is to combine the advantages that arbitration offers, with the fundamental principles underlying the rule of law. Easy as this may sound, it is not without its challenges. The following are some of the challenges I see ahead.

1. Maintaining the Independence and Impartiality of Arbitrators.

The great success of arbitration has been combining the rule of law value of independent, impartial decision-making with procedures that meet the particular needs of clients—needs like speed, efficiency and confidentiality.

Arbitrators must not only be independent and impartial—they must be perceived to be independent and impartial. This requirement is reflected in the Conventions and Model Laws that govern arbitration, as well as legislation governing arbitrations in various jurisdictions. The New York Convention in 1958 laid the foundation for independence and impartiality. The result was a new acceptance of the international utility of arbitration. With the formal accession of the Maldives on September 17th, there are now 161 signatories to the New York Convention.²⁷ The Convention enshrines certain procedural rights. Recognition and enforcement can be denied if parties lack capacity²⁸ or do not receive notice or an opportunity to be

²⁷ “Contacting states—New York Convention”, online: New York Arbitration Convention <<http://www.newyorkconvention.org/countries>>.

²⁸ New York Convention, Art. V(1)(a).

heard.²⁹ The New York Convention also protects against tribunals that exceed their jurisdiction³⁰ or fail to comply with the arbitration agreement.³¹ Along with these natural justice protections, local courts' ability to deny recognition or enforcement of an award because it violates public policy helps protect against awards obtained by fraud or corruption.³²

The New York Convention's requirement of impartiality, both actual and perceived, was taken up in the Washington Convention of 1966,³³ and the UNCITRAL Rules³⁴ and Model Law.³⁵ Like the New York Convention, the Washington Convention has enjoyed similar success with 154 countries ratifying it, allowing never-before-seen levels of foreign investment across the globe. The Model Law has also helped to standardize legislative, since currently 80 states and 111 jurisdictions have adopted it, either in the 1985 or current 2006 version.³⁶ All affirm and support independent and impartial decision-making.

The need for perceived and actual impartiality has generated sophisticated sets of rules and guidelines. These come not only from institutions like the HKIAC, but also from the soft law that has come from the International Bar Association³⁷ and the Chartered Institute of Arbitrators,³⁸ among others. Since their introduction in 2004, the IBA's red, orange and green lists for conflicts of interest have become ubiquitous.³⁹

²⁹ *Ibid.*, Art. V(1)(b).

³⁰ *Ibid.*, Art. V(1)(c).

³¹ *Ibid.*, Art. V(1)(d).

³² *Ibid.*, Art. V(2)(b).

³³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1966 (the "Washington Convention").

³⁴ UNCITRAL Arbitration Rules (1976); UNCITRAL Arbitration Rules (2010); UNCITRAL Arbitration Rules (2013).

³⁵ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (the "Model Law").

³⁶ *Ibid.*

³⁷ *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004); *IBA Rules on the Taking of Evidence in International Arbitration* (2010); and the *IBA Guidelines for Drafting International Arbitration Clauses* (2010) to name a few.

³⁸ The CIARB provides excellent free resources covering all aspects of arbitration.

³⁹ *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004), revised (2014).

Motions to unseat an arbitrator on grounds of perceived lack of independence due to conflicts of interest and professional and personal relationships are not uncommon. Many situations are clear, but others may depend on a complicated set of circumstances. Adjudicators may be forced to draw fine lines between maintaining high standards of independence and avoiding removal of arbitrators that a party might prefer not to have for other reasons. In England, absent other factors, a barrister may appoint another member of chambers as an arbitrator.⁴⁰ In France, an award has been overturned when one of the parties retained the arbitrator's multi-jurisdictional law firm on unrelated business.⁴¹ The LCIA has come to a similar conclusion.⁴² An English court, however, will not remove an arbitrator if the conflicts system at his or her firm does not show that one of the parties has acquired a firm client.⁴³ A Canadian court did not find a conflict of interest where a party had been—unbeknownst to the arbitrator—a client of the arbitrator's *former* law firm.⁴⁴ Yet a Canadian court also held that a reasonable apprehension of bias exists where two arbitrators are partners of a small law firm and are hearing related matters.⁴⁵

Of course, the notion of impartiality must not be abused. After-the-fact attacks based on accusations of lack of independence and corruption are also sometimes mounted in an attempt to undercut the legitimacy of arbitral awards. I earlier mentioned the allegations that respected Peruvian arbitrators took bribes by charging high fees. Without pre-judging that case, it is easy to see how frivolous accusations of lack of independence can damage the image of arbitration. Because they are privately appointed, arbitrators do not come with the Good Housekeeping Seal of Approval that state-appointed judges do.

In sum, arbitration has over the last seventy years developed and maintained high standards of independence and impartiality, in accordance with the highest values of the rule of law. However,

⁴⁰ *Laker Airways Inc. v. F.L.S. Aerospace Ltd. and Ors.*, [2000] 1 W.L.R. 113 (Q.B.).

⁴¹ *SA Auto Guadeloupe Investissements v. Columbus Acquisitions Inc.*, RG 13/13459 (cour d'appel de Paris, 14 October 2014).

⁴² LCIA Reference No. 111947, Decision Rendered 4 September 2012, online: LCIA Challenge Decision Database: <<https://www.lcia.org/challenge-decision-database.aspx>>

⁴³ *W Ltd v. M SDN BHD*, [2016] EWHC 422 (Comm).

⁴⁴ *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604.

⁴⁵ *Telesat Canada v. Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023.

the challenges of maintaining continued confidence are considerable. Meeting them will be critical to arbitration's success within the rubric of the rule of law.

2. Maintaining Efficient and Fast Decision-making

One of Tom Bingham's criteria for the rule of law is efficient and fast decision-making. Arbitration has done an excellent job of adhering to this value. Indeed, efficient and fast decision-making is one reason why parties may prefer private adjudication by arbitration to judge-based adjudication.

The list of innovations arbitration has introduced is long and impressive. Expedited discovery limited to what is really in issue. Bundling of documents, sometimes aided by hyperlinking, so that all those involved can deal with the critical documents rapidly and efficiently. Procedures to make expert witness testimony more efficient, like interactive processes like "hot-tubbing". Scott schedules which detail the parties position and evidence on particular sub-issues in advance of the hearing. These are but some of the ways in which arbitration has made dispute resolution faster and more efficient. Courts are paying arbitration the supreme compliment by integrating some of these techniques into their own processes. In all these ways, arbitration has advanced the rule of law.

Still, maintaining arbitral efficiency and speed as we move to the future, presents challenges. Complaints that arbitration may be becoming too formal and inflexible are heard from time to time.⁴⁶ Some worry that the same complaints made of the courts—that their processes are too rigid, formal and inflexible to allow optimum adjudication of particular disputes, will increasingly be made of arbitration, particularly in large commercial arbitration. Arbitration is in a difficult spot. A generation ago, billion-dollar cases hardly existed, and those that did were unlikely to go to arbitration. Cost, length and expense may be an unavoidable consequence of the complexity of the dispute itself. Arbitration is not the problem; often it's the complexity, magnitude and importance of the dispute.

⁴⁶ Sundradesh Menon SC, *ICCA 2012 Congress in Singapore Keynote Address, The Coming of a New Age for Asia (and Elsewhere)* (Singapore, 2012) at para. 25 ("Today, arbitration is a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts. The lack of an avenue of appeal and minimal curial intervention were meant to simplify things. Instead, these factors have given rise to the realisation that there is little room for error in arbitration.").

For better or worse, the phrase ‘due process paranoia’ has become a rallying cry. The introduction of *The Prague Rules* in December 2018 was a response to the influence of common law traditions—especially discovery—on international cases. Whether *The Prague Rules* shorten arbitration remains to be seen.

3. Advancing the Law so that it Remains Clear and Predictable

One of the central pillars of the rule of law is that the law be clear, coherent and provide legal guidance to individuals and organizations as they make decisions. Courts have done this for centuries by a system of public judgments backed up by the doctrine of precedent. The decisions themselves became the law. They were open and accessible.

Arbitration awards are private—indeed, this is one of the primary attractions of arbitration for many parties. Arbitrators do not publish their awards. While they may be obliged to give reasons—awards can usually be set aside for lack of reasons—their reasons do not add to the lexicon of the law. Yet, more and more, it is arbitrators rather than the courts that are dealing with cutting-edge issues of commercial law. This raises the danger that the guidance for the future that the law should provide will be undercut by arbitration. It also raises concerns that arbitrators may not have the benefit of knowing what other arbitrators on cases similar to theirs have ruled. Both these concerns are relevant to maintaining the rule of law.

Maintaining clarity, consistency and predictability in the law on emerging issues in a context where courts are more and more shut out is one of the principle challenges arbitration faces in the 21st century. Some arbitration centres are grappling with the problem of meeting this challenge without losing the confidentiality essential to the arbitral process. One idea is to publish decisions on important legal issues as law reports would, with the identities of parties and other critical facts excised.⁴⁷ Certainly, ICSID has had success publishing non-binding⁴⁸ decisions.

⁴⁷ ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2019) at paras. 40–46; see also, Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 23:3 Arb. Int’l 357.

⁴⁸ *El Paso Energy International Co. v. Argentine Republic*, ICSID Case ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 39 (“ICSID arbitral tribunals are established ad hoc, ... and the present Tribunal knows of no provision, ... establishing an obligation of *stare decisis*. It is

Some would argue that publication of awards is antithetical to arbitration, which focuses on confidentiality and privacy, and that attempts to publish arbitral decisions, even with redaction are futile and misconceived. To the extent this may be so, we may wish to explore other opportunities for advancing clear and practicable jurisprudence in the worlds of commerce and construction law, which are more and more dominated by arbitration. One idea is to establish courts – not to oust arbitration - but to supply arbitral procedures and insights within a judicial framework that allows for appeals and published decisions, to which parties can, if they wish, resort. The Singapore International Commercial Court (SICC) is such a body. Another idea is to take inspiration from the civil law, which develops the law not on the basis of reported cases and precedent, but upon principles and academic commentary.

E. CONCLUSION

Arbitration has always been part of the legal firmament, and today plays a fundamental role in maintaining and enhancing the rule of law, both domestically and on the international plane. Arbitration is not an outlaw; on the contrary, it is firmly planted within the edifice of the rule of law. Much of the success of arbitration in the past seventy years can be attributed to the fact that it adheres and builds on the pillars of the rule of law.

The future success of arbitration depends on its continued adherence to the fundamental tenets of the rule of law. I have suggested three challenges arbitration faces in this task—the challenge of maintaining actual and perceived independence and impartiality without illegitimately undermining arbitral awards; the challenge of maintaining flexible, fast and efficient decision-making appropriate to the issue at hand; and the challenge of developing the law of the future in a way that is clear and accessible. I believe arbitration can meet these challenges and in doing so continue to enhance the rule of law throughout the world.

nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.”).