IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-18-0004-2702

AMICUS NU DOTCO, LLC'S APPENDIX OF LEGAL AUTHORITIES

ICANN INDEPENDENT REVIEW PROCESS

June 26, 2020

LIST OF LEGAL AUTHORITIES

AUTHORITY NO.	DESCRIPTION
AA-40	*Aerojet-Gen. Corp. v. Superior Court*, 211 Cal. App. 3d 216 (1989) *abrogated on other grounds by AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990)
AA-41	*Alvarado v. Selma Convalescent Hosp*., 153 Cal. App. 4th 1292 (2007)
AA-42	*Amazon EU S.A.R.L v. ICANN*, ICDR Case No. 01-16-0000-7056, Final Declaration (Bonner, O'Brien, Matz (concurring and partially dissenting)) (2017)
AA-43	*Asia Green IT System v. ICANN*, ICDR Case No. 01-15-0005-9838, Final Declaration (Hamilton, Cahill, Reichert) (2017)
AA-44	*Bernstein v. Real Estate Comm'n of Md*., 221 Md. 221 (1959)
AA-45	Cal. Civ. Proc. Code § 1859
AA-46	*Crawford-Hall v. United States*, 394 F. Supp. 3d 1122 (C.D. Cal. 2019)
AA-47	DAVID ST. JOHN SUTTON, JUDITH GILL, & MATTHEW GEARING, RUSSELL ON ARBITRATION (23d Ed., 2009)
AA-48	*Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration (Coe, Boesch, Hamilton) (2016)
AA-49	*Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Final Declaration (Brower (dissenting), Kantor, Donahey) (2016)
AA-50	English Arbitration Act 1996, § 48(1)
AA-51	GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2014)
AA-52	*Guinness PLC v. Ward*, 955 F.2d 875 (4th Cir. 1992)
AA-53	*Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124 (2015)
AA-54	*Kendall-Jackson Winery, Ltd. v. Sup. Ct*, 76 Cal. App. 4th 970 (1999)
AA-55	*Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) (2015)
AA-56	*Namecheap, Inc. v. ICANN*, ICDR Case No. 0120-0000-6787, Decision on Request for Emergency Relief (Benton (Emergency Panelist)) (2020)
AA-57	*Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33 (1968)

AUTHORITY NO.	DESCRIPTION
AA-58	*Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945)
AA-59	T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 Ky. L.J. 63 (2011)
AA-60	*UZ Engineered Prod. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068 (Ohio Ct. App. 2001)
AA-61	*White v. W. Title Ins. Co.*, 40 Cal. 3d 870 (1985)
AA-62	*Wolf v. Superior Court*, 114 Cal. App. 4th 1343 (2004)

AA-40

Previously published at: 209 Cal.App.3d 973
(Cal. Rules of Court, Rules 976, 977, 979)

KeyCite Red Flag - Severe Negative Treatment
Abrogated by AIU Ins. Co. v. Superior Court, Cal., November 15, 1990
211 Cal.App.3d 216, 257 Cal.Rptr. 621

AEROJET-GENERAL CORPORATION et al., Petitioners,
v.
THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; CHESHIRE AND COMPANIES et al., Real Parties in Interest

No. A042785.
Court of Appeal, First District, Division 5, California.
Apr 19, 1989.

SUMMARY

Environmental polluters, defendants in a declaratory relief action against them by their insurers, petitioned for a writ of mandate to set aside the trial court's order granting the insurers' motion for summary adjudication of issues. The trial court had ruled that no portion of environmental cleanup and restoration costs, incurred by the insureds in response to governmental lawsuits under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9606(a), 9607), constituted damages within the meaning of their comprehensive general liability policies.

The Court of Appeal granted the petition and issued a writ commanding the trial court to vacate its order granting summary adjudication and to enter a new and different order denying the motion. It held that the term "damages" in the policies encompassed any monetary outlay incurred under compulsion of law to correct or mitigate property damage caused by pollution. It held further, however, that no sums spent to prevent future threatened pollution of a type which has not yet occurred, or to prevent pollution from a source which has not yet caused pollution, constituted damages. (Opinion by Haning, J., with Low, P. J., and King, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d)
Insurance Contracts and Coverage § 79--Risks Covered by Liability Insurance--Property Damage--Environmental Response ***217** Costs.
Comprehensive general liability insurance policies purchased by corporate environmental polluters, covering all sums the insureds became legally obligated to pay as "damages" because of injury to or loss, destruction or loss of use of property, provided coverage for at least some portion of the insureds' environmental response costs incurred in cleanup activities under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9606(a), 9607) and Wat. Code, § 13304. Notwithstanding the general nature of the statutory remedies as equitable, the term "damages" encompassed any monetary outlay incurred under compulsion of law to correct or mitigate property damage caused by pollution, since the term was ambiguous with regard to coverage of response costs and the insureds could reasonably expect the costs to be covered.

[See **Cal.Jur.3d,** Insurance Contracts, § 317 et seq.; **Am.Jur.2d,** Insurance, § 703 et seq.]

(2)
Insurance Contracts and Coverage § 11--Interpretation as Question of Law--Declaratory Relief Action--Appellate Review.
The appellate court is not bound by the legal interpretation of a liability insurance policy made by the trial court in a declaratory relief action, where it is called upon to interpret the policy without extrinsic evidence and the interpretation is therefore one of law.

(3)
Insurance Contracts and Coverage § 17--Reasonable and Ordinary Meaning of Words.
In the absence of circumstances indicating a contrary intention, words in an insurance policy are to be interpreted according to the plain meaning which a layperson would ordinarily attach to them rather than according to their strict legal meaning, as might be analyzed by an attorney or an insurance expert. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.

(4)

Insurance Contracts and Coverage § 15--Interpretation Against Insurer.
Whether there is an ambiguity in the language of an insurance policy is to be determined from the perspective of the layperson. Any such ambiguity is to be resolved against the insurer.

(5)
Insurance Contracts and Coverage § 14--Interpretation to Secure Indemnity.
To protect an insured's reasonable expectation of coverage, an insurance policy will be given such interpretation as is semantically permissible to fairly achieve its object of providing indemnity for the loss to which the insurance relates. If the ambiguity relates to the ***218** extent of coverage, the language will be understood in its most inclusive sense for the benefit of the insured.

(6)
Insurance Contracts and Coverage § 11--Interpretation as Question of Law--Expectation of Coverage.
Whether an insured's expectation of coverage under a policy is reasonable is a question of law.

(7a, 7b)
Pollution and Conservation Laws § 5--Water Pollution--Standing to Claim Damages--Government.
The state's public interest in navigable water is sufficient to confer standing to claim damages caused by environmental pollution. Further, the state and federal governments unquestionably are third party property owners for purposes of insurance policies covering property damage caused by environmental polluters.

(8)
Waters § 5--Ownership and Nature--Usufructuary Nature.
All ownership of water in California is usufructuary; water rights decisions do not speak of the ownership of water, but only of the right to its use.

(9)
Waters § 5--Ownership and Nature--Usufructuary Nature--State's Interest.
The state's property interest in ground water (Wat. Code, § 102) is no less usufructuary than that of private ownership, and public waters may be duly used, regulated and controlled in the public interest.

(10a, 10b)
Pollution and Conservation Laws § 3--Pollution--Comprehensive Environmental Response, Compensation, and Liability Act--Remedies--Response Costs--Restitutionary Nature.
Response costs incurred for environmental pollution cleanup pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9606(a), 9607), whether incurred directly by the polluter or paid to reimburse the government for its cleanup efforts, are not strictly restitutionary in nature, since they are not within the general definition of restitution as the return of something wrongfully received.

(11)
Restitution and Constructive Contracts § 1--Definition.
In its typical sense, restitution is the return of something wrongfully received.

(12)
Pollution and Conservation Laws § 3--Pollution--Comprehensive Environmental Response, Compensation, and Liability Act--Remedies--Response Costs--Distinction From Environmental Damages.
The distinction between a polluter's liability for response costs (42 U.S.C. § 9607(a)(4)(A)) and for natural resource damages (***219** 42 U.S.C. § 9607(a)(4)(C)), in an action under the Comprehensive Environmental Response, Compensation, and Liability Act, is subject to much overlap. Both may involve the restoration of polluted property to its previously uncontaminated state.

(13)
Pollution and Conservation Laws § 3--Pollution--Comprehensive Environmental Response, Compensation, and Liability Act--Remedies--Response Costs--Future Pollution.
The definition of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601(25)) is broad enough to include costs incurred to prevent threatened future pollution where none has yet occurred.

(14)

Insurance Contracts and Coverage § 79--Risks Covered by Liability Insurance--Property Damage--Environmental Response Costs.
Pollution response costs incurred by environmental polluters as a result of governmental actions against them under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9606(a), 9607) were not covered as "damages" under their respective comprehensive general liability insurance policies, to the extent such costs related to expenditures to prevent future pollution that had not yet occurred.

COUNSEL
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No appearance for Respondent.
Barry L. Bunshoft, Richard L. Seabolt, Andrew K. Gordon, Bonnie L. O'Niell, Brian A. Kelly, Hancock, Rothert & Bunshoft, Steven M. Crane and Morris, Polich & Purdy for Real Parties in Interest. ***220**

HANING, J.

This extraordinary writ proceeding arises from a declaratory relief action brought against environmental polluters by their insurers. Petitioners Aerojet-General Corporation and Cordova Chemical Company seek a writ of mandate to set aside an order granting real party insurance companies' summary adjudication of the issue that *no portion of* environmental cleanup and restoration costs, imposed upon petitioners by the state and federal governments, constitute damages within the meaning of petitioners' comprehensive general liability policies. We issued an order to show cause in lieu of an alternative writ, and heard oral argument. We issue a peremptory writ of mandate.

I.

Since the early 1950's petitioners have operated a research and development facility near Sacramento, California, where they developed rocket engines, rocket components, and related products for the country's aerospace and defense programs. Petitioners' operations involved the use of various toxic chemicals. In 1979 government regulatory agencies discovered that toxic chemicals had entered the soil and groundwater beneath petitioners' facility, and had leached into the groundwater of neighboring properties and into the American River.

On December 26, 1979, the State of California filed a "Complaint for Injunction[,] Abatement, and Other Equitable and Civil Monetary Relief" against petitioners in Sacramento County Superior Court. The state alleged that petitioners' discharge of toxic chemical wastes had polluted stateowned waters, both groundwater and the American River, causing "impairment and destruction" of a "natural resource of this state." [1] In addition to civil penalties and an injunction to prevent further discharge of hazardous substances into state waters, the state's lawsuit sought to compel cleanup of the pollution. The state alleged that protection of the water resource required the removal of hazardous wastes from the groundwater to the extent possible, and removal of such wastes which had yet to reach groundwater from petitioners' disposal sites. Accordingly, the state's complaint included a cause of action for "Recovery of Expenditures for Cleanup, Abatement ***221** and Remedial Work" under Water Code section 13304. The state alleged it had "spent, and [was] continuing to spend, substantial sums for performance of cleanup, abatement and remedial work," and prayed for reimbursement from petitioners for the amounts expended.

On January 15, 1986, the United States Department of Justice, at the request of the Environmental Protection Agency, brought suit against petitioners in the United States District Court for the Eastern District of California. The action was brought pursuant to sections 106(a) and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §§ 9606(a), 9607), and other federal statutes. The federal complaint alleged that hazardous chemicals and pollutants had migrated from petitioners' facility to the soil, then to the groundwater and ultimately to the American River, a navigable waterway of the United States. The United States claimed both present and future damage to the environment, and sought injunctive relief to abate an "imminent and substantial endangerment to public health, welfare or [the] environment."

The complaint also alleged that the United States, in order to combat the effects of petitioners' pollution, had incurred and was incurring "response costs" as defined by CERCLA (see 42 U.S.C. § 9601(25)), for which petitioners were liable (42 U.S.C. § 9607). CERCLA defines the costs of "response" to include costs of removal of hazardous substances from the environment and the costs of other remedial work. (42

U.S.C. § 9601(25).)[2] CERCLA provides that any person or business entity responsible for a release or threatened release of hazardous substances "shall be liable for ... [¶] all costs of removal or remedial action incurred by the United States Government or a State ...." (42 U.S.C. § 9607(a)(4)(A).) The same day the federal complaint was filed, the State of California filed a similar CERCLA complaint in the Eastern District. The state's complaint generally tracks the federal pleading and likewise alleged the state had incurred "response costs" as defined by CERCLA.

Under the CERCLA statutory scheme, the government may postpone litigation of liability and obtain an injunction to compel a polluter to clean up its pollution, or the government may conduct the cleanup itself and then sue the polluter for reimbursement. (42 U.S.C. §§ 9606, 9607; see *United* ***222** *States v. Bliss* (E.D.Mo. 1987) 667 F.Supp. 1298.) As a third alternative, CERCLA provides that the federal government may designate the targeted polluter as a "potentially responsible part[y]" and, to foster settlement of a CERCLA action, may permit the polluter to clean up or otherwise respond to environmental pollution. Such an agreement is generally embodied in a consent decree. (42 U.S.C. § 9622(a), (b), (d); see generally Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, (1988) 74 Va. L. Rev. 123.)

Although we are not provided with precise information, it is not disputed that petitioners have responded to the government lawsuits by engaging in cleanup activities designed to correct and mitigate environmental damage and facilitate a settlement of the actions. Petitioners claim to have expended "tens of millions of dollars" on cleanup, removal of chemicals from the groundwater, and activity designed to prevent chemicals already in the soil from migrating into the groundwater. We are informed that the state and federal governments and petitioners have entered into a consent decree concerning response costs, which is still subject to public comment (see 42 U.S.C. § 9622(d)(2)(B)), and is not included in the record. The CERCLA consent decree evidently incorporates not only the state and federal CERCLA actions, but also the state action seeking analogous cleanup costs under Water Code section 13304.

Petitioners seek to recoup their response costs from their liability insurers. During the period of their Sacramento operations petitioners have carried comprehensive general liability (CGL) insurance purchased from real parties in interest. The parties agree that the operative coverage provision of virtually all the policies is essentially identical: the insurer agreed "[t]o pay on behalf of the Insured all sums which the Insured shall become *legally obligated to pay as damages because of injury to or loss, destruction or loss of use of property*." (Italics added.) The policies do not specifically define "damages." Petitioners tendered defense of the government actions to real parties, who refused to defend and denied coverage.

To seek resolution of the coverage question, two of real party insurers brought the instant declaratory relief action against petitioners and remaining real parties. The action sought a declaration that the insurers had no duty to indemnify petitioners under the policy language. Real parties then moved for summary adjudication of two issues: (1) that the government actions against petitioners "assert only claims for equitable relief," and (2) that the policy language quoted above "limit[s] the insurers' obligations to legal claims for 'damages' asserted against the insured, [and the insurers] have no obligation with respect to claims for equitable relief asserted against the insured[.]" ***223**

No extrinsic evidence touching upon the parties' interpretation of the term "damages," or any other portion of the coverage clause, was admitted in support of the motion or as evidence of an undisputed material fact. Rather, the motion argued that as a matter of law "damages" as used in the policy must be interpreted in a strictly technical sense to mean damages awarded in an action at law, but not to response costs in CERCLA litigation.

The trial court granted real parties' motion for summary adjudication of both issues, i.e., that the government claims sought equitable relief and that the policy language did not afford coverage for equitable relief, but only for a traditional award of damages in an action at law. The trial court thus ruled as a matter of law that no portion of environmental cleanup costs are "damages" within the meaning of the policies.[3]

This timely petition followed.

II.

(1a) Petitioners contend the policies cover CERCLA response costs because the layperson buying such insurance would reasonably expect that an agreement "[t]o pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or loss, destruction or loss of use of property" includes any monetary

outlay incurred under compulsion of law. Real parties, noting that CERCLA remedies are generally classified as forms of equitable relief, respond that "damages" unambiguously refers only to an award of legal damages in an ***224** action at law, and not expenses incurred to comply with orders granting equitable relief or to comply with environmental laws and regulations.

After an examination of both California law and the considerable body of federal and sister state decisions resolving this issue under CERCLA, we conclude that the policies generally cover CERCLA response costs. Because the trial court reached a contrary legal conclusion, petitioners are entitled to relief. [4] We emphasize that we determine only that some portion of the response costs are covered under the policies of real parties. We do not attempt to divine the exact components of those costs, nor can we at this stage of the proceedings. Neither do we determine issues of exclusion of coverage, which are not before us.

A.

(2) Since we have been called upon to interpret the policy without extrinsic evidence, the interpretation is one of law (*Chong* v. *Fremont Indemnity Co.* (1988) 202 Cal.App.3d 1097, 1100 [249 Cal.Rptr. 264]; see *Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59 [234 Cal.Rptr. 218]; *Jarrett* v. *Allstate Ins. Co.* (1962) 209 Cal.App.2d 804, 810 [26 Cal.Rptr. 231]), and we are not bound by the legal interpretation made by the trial court. (*Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 512-513 [142 Cal.Rptr. 895]; *Globe Indem. Co. v. State of California* (1974) 43 Cal.App.3d 745, 749 [118 Cal.Rptr. 75].)

In interpreting an insurance contract we are guided by well-established rules. (3) An insurance policy "should be read as a lay[person] would read it and not as it might be analyzed by an attorney or an insurance expert." (*Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115 [95 Cal.Rptr. 513, 485 P.2d 1129, 48 A.L.R.3d 1089], citation omitted.) "'In the absence of circumstances indicating a contrary intention, words in an insurance policy are to be used in their plain, ordinary and popular sense rather than according to their strict legal meaning. [Citations.]'" (*Allstate Ins. Co.* v. *Thompson* (1988) 206 Cal.App.3d 933, 938 [254 Cal.Rptr. 84], quoting *Jarrett v. Allstate Ins. Co., supra*, 209 Cal.App.2d at p. 811.) "Words used in an insurance policy are to be interpreted according to the plain meaning which a lay[person] would ordinarily attach to them. Courts ***225** will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." (*Reserve Insurance Co.* v. *Pisciotta* (1982) 30 Cal.3d 800, 807 [180 Cal.Rptr. 628, 640 P.2d 764], citations omitted.)

(4) Whether there is an ambiguity in policy language is to be determined from the perspective of the layperson. (*Spaid* v. *Cal-Western States Life Ins. Co.* (1982) 130 Cal.App.3d 803, 806 [182 Cal.Rptr. 3, 29 A.L.R.4th 1224].) Any such ambiguity is to be resolved against the insurer. (*Reserve Insurance Co. v. Pisciotta, supra*, 30 Cal.3d at p. 807; *Insurance Co. of North America v. Sam Harris Constr. Co.* (1978) 22 Cal.3d 409, 412-413 [149 Cal.Rptr. 292, 583 P.2d 1335].) (5) To protect the insured's reasonable expectation of coverage, the policy will be given such interpretation as "semantically permissible" to "fairly achieve its object of providing indemnity for the loss to which the insurance relates." (*Harris* v. *Glens Falls Ins. Co.* (1972) 6 Cal.3d 699, 701 [100 Cal.Rptr. 133, 493 P.2d 861], citations omitted; *Reserve Insurance Co.* v. *Pisciotta, supra*, 30 Cal.3d at pp. 807-808.) If the ambiguity relates to the extent of coverage, "'the language will be understood in its most inclusive sense, for the benefit of the insured.'" (*Globe Indem. Co. v. State of California, supra*, 43 Cal.App.3d at p. 750, italics omitted, quoting *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 437-438 [296 P.2d 801, 57 A.L.R.2d 914].) (6) Whether the insured's expectation of coverage is reasonable is a question of law. (*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1019 [247 Cal.Rptr. 638].)

B.

For ease of reference, the pertinent coverage language is here restated: "To pay on behalf of the Insured all sums which the Insured shall become *legally obligated to pay as damages because of injury to or loss, destruction or loss of use of property*." (Italics added.)

(1b) In contending this clause provides coverage for environmental response costs, petitioners submit that the term "damages" is either unambiguous, or is ambiguous and therefore to be construed against the insurers. Asserting that "damages" unambiguously includes response costs, petitioners argue that "damages" is not to be accorded its technical meaning of damages awarded in an action at law, but its ordinary plain meaning. Petitioners contend the ordinary plain meaning of "damages" includes any sums payable under sanction of law, regardless of the nature of the proceeding or of the relief sought. (See, e.g., Webster's New Collegiate Dict. p. 286 ["damages" defined as "compensation

in money imposed by law for loss or injury"]; Black's Law Dict. (5th ed. 1979) pp. 351-352 ["damages" defined as "[a] pecuniary compensation or indemnity, which may be recovered in ***226** the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another"].)

It is not unreasonable to argue that while a technical meaning of "damages" may refer to an award in an action at law, the ordinary plain meaning of damages is broader and covers environmental response costs incurred at the behest of government entities and under express or implied sanction of law. The argument finds some support in Civil Code section 3281, which defines "damages" as compensation for the "detriment [caused by] the unlawful act or omission of another ...." Petitioners observe their "detriment" is the same whether the governments compelled them to initially incur the response costs, or performed the cleanup themselves and then sued petitioners for damages for reimbursement.

We conclude, however, that "damages" is not as clearly read as petitioners would have it, and is subject to two reasonable interpretations of its ordinary plain meaning. The primary source of ambiguity is the obvious fact that "damages because of injury to or loss, destruction or loss of use of property" could mean damages at law or equitable monetary relief designed to correct the damage to property. From the standpoint of the lay insured, "damages" could well include any sum expended under sanction of law, including both money damages and sums paid out to an injured party in response to its claim for equitable relief. Even a federal CERCLA decision supporting real parties, a case discussed *infra*, seems to agree with this conclusion. (*Continental Ins. v. Northeastern Pharmaceutical* (8th Cir. 1988) 842 F.2d 977, 985, cert. den. 488 U.S. 821 [102 L.Ed.2d 43, 109 S.Ct. 66].) Since the insured purchased insurance for property damage resulting from its negligent conduct, the ambiguity is enhanced: the insured may reasonably expect coverage for any sums expended, either at law or equity, as a result of the insured's causing property damage to another. The insured could thus reasonably conclude it was covered for environmental cleanup costs, imposed upon it by the government to remedy and prevent property damage, as well as traditional legal damages.

This conclusion finds support in California law, particularly *Globe Indem. Co. v. State of California, supra*, 43 Cal.App.3d 745. [5] In *Globe*, the insureds negligently caused a fire which spread to adjacent property. The ***227** state sued the insureds to recoup its costs of suppressing the fire. The insureds argued the fire suppression costs were covered under their CGL policy insuring them for "'all sums which the insured shall become legally obligated to pay as damages because of ... property damage ....'" (*Id.*, at pp. 748-749.) The court found an ambiguity whether fire suppression costs, which can only be incurred once there is damage to property by fire, can constitute damages payable "because of" property damage. The court reasoned that since such costs must be preceded by actual damage, and are "expended to prevent further damage to tangible property," one could reason that "the insureds became legally obligated to pay these fire suppression costs *because of* damage to tangible property." (*Id.* at p. 751, italics in original.)

The *Globe* court resolved the ambiguity by interpreting the policy in light of the reasonable expectations of the parties regarding the scope of coverage. "When an insured takes out an indemnity policy, as in this case, it is more reasonable to suppose that he expects to be protected by his insurance in any situation wherein he becomes liable for damage to tangible property. It would seem strangely incongruous to him, as it does to us, that his policy would cover him for damages to tangible property destroyed through his negligence in allowing a fire to escape but not for the sums incurred in mitigating such damages by suppressing the fire." (*Globe Indem. Co. v. State of California, supra*, 43 Cal.App.3d at p. 751.)

Real parties argue that *Globe* is limited to an emergency situation in which there is no time to seek the insurer's consent to incur mitigation costs. This claim is based in part on an issue not before either this court or the trial court, an argument that the policy does not cover expense of the insured incurred without the insurer's consent. In any case, real parties read too much into the *Globe* opinion, and at the same time have read too little: "A rule, reasonably applied, permitting expenses incurred in the mitigation of damages to tangible property to be recoverable under policies insuring against liability incurred because of damages to tangible property *would seem to require universal application as it encourages a most salutary course of conduct*." (*Globe Indem. Co. v. State of California, supra*, 43 Cal.App.3d at p. 752, italics added.) [6]

Under a *Globe* analysis, petitioners could reasonably expect that funds expended to correct third party property damage caused by pollution, and to mitigate the effects of that damage, are covered by their CGL policies. Their pollution

has damaged the groundwater and river water of the state ***228** and federal governments; petitioners could reasonably believe that the governments' detriment would be recompensed by a payment of damages. (Cf. Civ. Code, § 3281.) The fact that the damages do not take the form of a traditional damage award in an action at law is not determinative of the insureds' reasonable expectation of coverage.

Petitioners have become legally obligated to clean up their pollution by virtue of the polite but puissant compulsion of CERCLA. At least to the reasonable insured, this obligation is no less a legal sanction than that of a monetary judgment. Indeed, having purchased insurance to cover them for damages because of property damage, petitioners would be surprised indeed to learn that coverage depended on whether the proceeding employed to obtain recompense was defined as "legal" or "equitable." An insured reading the coverage clause before us would reasonably conclude it provided coverage for any economic outlay compelled by law to rectify and mitigate property damage caused by the insured's pollution. To phrase it another way, persons purchasing a comprehensive general liability policy which promises "to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or loss, destruction or loss of use of property" would reasonably expect to be insured if their negligence caused injury to or loss, destruction or loss of use of [another's] property. It would come as an unexpected, if not incomprehensible, shock to the insureds to discover that their insurance coverage was being denied because the plaintiff chose to frame his complaint in equity rather than in law.

Real parties maintain, however, that the government suits plainly seek only equitable relief and that "damages" is an unambiguous term limited to an action at law. Real parties contend that "damages" must restrict the meaning of the preceding phrase, "all sums which the insured shall become legally obligated to pay," such that "damages" necessarily limits coverage to a legal damage award. This textual argument does not directly address the definitional ambiguity of "damages." Moreover, in making the argument real parties effectively sunder "damages" from the additional restrictive phrase "because of injury to or loss, destruction or loss of use of property." Indeed, at oral argument real parties went so far as to contend that the coverage clause actually ended at the word "damages," and the "because of ..." phrase was a separate "property damage clause." This argument is as much a sophistry as a transparent attempt to persuade us to ignore our responsibility to interpret the coverage clause as a whole. (See Civ. Code, § 1641 [contract must be viewed as a whole and effect given to every part].) The term "damages" does not stand by itself in a vacuum, but is the keystone of the operative phrase "all sums which the insured shall become legally obligated to pay as damages because of injury to or loss, ***229** destruction or loss of use of property." The *Globe* court found the "because of ..." phrase reinforced the insured's reasonable expectation of coverage for environmental cleanup costs. In short, real parties cannot seek a declaration of their responsibility under the coverage clause by asking the court to ignore the operative language of the clause itself.

Real parties also contend there can be no "damages" under the policy because the government suits do not allege property damage. (For the purpose of this argument, real parties seem to reverse their position that the "damages" and the "property damage" segments of the coverage clause are severable.) With regard to the state and federal CERCLA complaints, real parties contend the suits are not for damages, but simply an exercise of police power. We defer discussion of this point to part II(C) below. (7a) With regard to the two state complaints, real parties claim there are no "damages" involved because the state cannot sue for "damages" as would a traditional, fee-simple-absolute property holder. Real parties assert that the concept of public ownership of water, presumably because limited to rights of use and regulation, is a "19th-century fiction." The short answer to this contention is that real parties did not challenge the state's standing below, and should not be permitted to do so now. However, since we conclude real parties are mistaken and the issue could arise again, we resolve it here.

(8) In this state, all ownership of water is usufructuary; water rights decisions "do not speak of the ownership of water, but only of the right to its use." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100 [227 Cal.Rptr. 161], citations omitted.) (9) The state's property interest in groundwater, as established by Water Code section 102 (see fn. 1, *supra*) is no less usufructuary than that of private ownership, and public waters may be duly used, regulated and controlled in the public interest. (See *National Audubon Society* v. *Superior Court, supra*, 33 Cal.3d at p. 441; *Meridian, Ltd.* v. *San Francisco* (1939) 13 Cal.2d 424, 445 [90 P.2d 537].) (7b) The state's public trust interest in the navigable portions of the American River is similarly sufficient for standing to claim damages caused

by environmental pollution. (*National Audubon Society* v. *Superior Court, supra*, at pp. 445-448.)

Unquestionably, the state and federal governments are third party property owners for purposes of insurance coverage. Pollution of the ground and river waters is damage to public property, as well as a direct injury to public welfare. (See *Port of Portland v. Water Quality Ins. Syndicate* (9th Cir. 1986) 796 F.2d 1188, 1193-1194.) Indeed, even real parties' authorities note the great weight of authority holding environmental contamination to be ***230** "property damage." (See *Continental Ins.* v. *Northeastern Pharmaceutical, supra*, 842 F.2d at pp. 983-984.) [7]

(10a) Real parties further argue that CERCLA cleanup costs are "restitutionary" in nature, and that several California cases hold that restitutionary payments are not "damages" in the insurance context. (See *Hackethal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102 [234 Cal.Rptr. 853]; *Jaffe* v. *Cranford Ins. Co.* (1985) 168 Cal.App.3d 930 [214 Cal.Rptr. 567]; *Nationwide Ins. Co. v. King* (S.D.Cal. 1987) 673 F.Supp. 384; see also *United Pacific Ins. Co. v. Hall* (1988) 199 Cal.App.3d 551 [245 Cal.Rptr. 99]; *State Farm Fire & Cas. Co. v. Superior Court* (1987) 191 Cal.App.3d 74 [236 Cal.Rptr. 216].)

Real parties place far too much weight on the broad assertion that CERCLA cleanup costs are restitutionary. True, the federal decisions construing CERCLA describe suits seeking response costs as involving equitable relief. (*Maryland Cas. Co. v. Armco, Inc.* (4th Cir. 1987) 822 F.2d 1348, 1351, cert. den. (1988) 484 U.S. 1008 [98 L.Ed.2d 654, 108 S.Ct. 703]; see *United States v. Northeastern Pharmaceutical* (8th Cir. 1986) 810 F.2d 726, 749, cert. den. (1987) 484 U.S. 1008 [98 L.Ed.2d 102, 108 S.Ct. 146]: "When the government seeks recovery of its response costs under CERCLA ... it is in effect seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances.")

But the equitable nature of CERCLA relief begins, not ends, the inquiry into the reasonable expectation of the insured regarding coverage. Especially where, as here, the insured does not simply reimburse the government for its response costs, but incurs a direct out-of-pocket economic detriment for the response costs in the first instance, the question is not whether the action or the relief sought is equitable or legal, but whether the insured has a reasonable expectation that such costs are insured as "damages because of injury to or loss, destruction or loss of use of property." [8] The insured who ***231** has caused damage to another's property by pollution, and who is required under compulsion of CERCLA to incur response costs to clean up the damage by restoring the polluted areas to their prepolluted condition, or to reimburse the injured party for its costs in doing so, may reasonably expect that its insurance for property damage will cover those costs.

This is especially true because CERCLA response costs, while arising from an essentially equitable proceeding, may not in effect be restitutionary. (11), (10b) In its typical sense, restitution is the return of something wrongfully received. Response costs, whether incurred directly by the polluter or paid to reimburse the government for its cleanup efforts, do not fit easily into this definition. Furthermore, the cost of restoration of property to its undamaged condition is one measure of compensatory property damages. (*Geddes & Smith, Inc.* v. *St. Paul Mercury Indem. Co.* (1965) 63 Cal.2d 602, 604-605 [47 Cal.Rptr. 564, 407 P.2d 868]; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 801-802 [171 Cal.Rptr. 334]; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 919, p. 3204; see *United States Aviex Co. v. Travelers Ins. Co.* (1983) 125 Mich.App. 579 [336 N.W.2d 838, 843] ["The damage to the natural resources is simply measured in the cost to restore the water to its original state."].

Nothing in the five decisions cited by real parties (see p. 230, *ante*) compels a different conclusion. [9] *State Farm* and *United Pacific* hold only that there is no coverage for "damages" in criminal or juvenile proceedings where "damages" are not sought. *Jaffe* involved a criminal prosecution of a doctor for Medi-Cal overcharges. Jaffe argued that his insurance policy covered a suit for civil restitution of the overpayments brought under Welfare and Institutions Code sections 14170 et seq. The court noted this posed a classic restitutionary scenario: "The defendant is asked to return something he wrongfully received; he is not asked to compensate the plaintiff for injury suffered as a result of his conduct." (*Jaffe* v. *Cranford Ins. Co., supra*, 168 Cal.App.3d at p. 935.) The court thus concluded that "payments of a restitutionary nature, if sought by the state pursuant to [Welfare and Institutions Code] sections 14170 et seq., are not 'damages' within the meaning of Jaffe's policy." (*Ibid.*, fn. omitted.) The restitution sought from Jaffe was ***232** within the definition of the return of something wrongfully received, while the response costs at issue in this case are not. *Jaffe* is limited to its particular facts

and is of little pertinence to the interpretation of the coverage clause herein against the statutory backdrop of CERCLA.

Hackethal is even less apposite. It concerned a policy of income reimbursement for attendance at a "'trial of a civil suit for damages against the insured alleged to have been caused by malpractice.'" (*Hackethal v. National Casualty Co., supra*, 189 Cal.App.3d at pp. 1104-1105, italics omitted.) The court held the policy did not apply to a Board of Medical Quality Assurance administrative hearing because it was not a suit for damages, even though Dr. Hackethal was "damaged" by the resultant license suspension. Finally, *Nationwide* only holds that there is no coverage for "damages" for a suit seeking an injunction for the removal of an air conditioner for violation of condominium restrictions. Obviously, there was no issue in that case of property damage and any sums expended "because of" that damage.

(1c) We thus conclude that "damages because of injury to or loss, destruction or loss of use of property" is ambiguous with regard to response costs, and that the ambiguity must be construed against the insurer to maximize the scope of reasonably expected coverage. (*Reserve Insurance Co.* v. *Pisciotta, supra*, 30 Cal.3d at p. 807; *Insurance Co. of North America* v. *Sam Harris Constr. Co., supra*, 22 Cal.3d at pp. 412-413.)

C.

A review of federal and sister-state authority deciding the response costs issue under CERCLA shows that the great weight of authority is consistent with our decision. Real parties, however, rely heavily on two circuit court decisions applying the laws of Maryland and Missouri, which have held that response costs are not damages: *Maryland Cas. Co.* v. *Armco, Inc., supra*, 822 F.2d 1348, and *Continental Ins. v. Northeastern Pharmaceutical, supra*, 842 F.2d 977.

In *Armco*, the Fourth Circuit held that a suit under CERCLA for injunctive relief and reimbursement of remedial costs was not a claim for "damages" under a CGL policy. However, *Armco* was a diversity case decided under Maryland law which, unlike California, "adopt[s] the somewhat narrow, technical definition of damages." (*Maryland Cas. Co. v. Armco, Inc., supra*, 822 F.2d at p. 1352.) The definition used by the court was taken from *Aetna Casualty and Surety Company v. Hanna* (5th Cir. 1955) 224 F.2d 499, 503: damages includes "only payments to third persons when those persons have a legal claim for damages." *Hanna* is a non-CERCLA case ***233** applying Florida law to an insured seeking coverage for costs and expenses incurred in responding to a mandatory injunction. It is not clear why the *Armco* court turned to a 30-year-old case for a definition of "damages," a definition which is essentially a tautology defining damages as payment to a person who has "a legal claim for damages." In any event, following its narrow "damages" definition under Maryland law, the *Armco* court concluded that CERCLA costs were not legal damages, but sums arising from equitable relief. The court also expressed the opinion that insurance policies should not be construed to cover "essentially prophylactic" or "harmavoidance" measures, as opposed to "damages arising from actual, tangible injury." (*Maryland Cas. Co.* v. *Armco, Inc., supra*, at p. 1353.)

In *Continental*, the Eighth Circuit reached a similar result, but only in a sharply divided en banc decision. The majority applied the law of the forum state, Missouri, which provided for an ordinary, plain meaning construction of insurance policies. (*Continental Ins.* v. *Northeastern Pharmaceutical, supra*, 842 F.2d at p. 985.) The majority then noted that "outside the insurance context," the term "damages" was ambiguous and could encompass legal damages or equitable monetary relief. "[F]rom the viewpoint of the lay insured, the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses." (*Ibid.*) Inexplicably, the majority then concluded that in the context of insurance the term "damages" was *not* ambiguous and was limited to traditional legal damages. The majority relied primarily on *Armco* and *Hanna*, decisions espousing a narrow, technical definition of damages. The majority also relied on several non-CERCLA cases which hold that the costs of compliance with an injunction have generally not been considered "damages" in the insurance context. (*Id.*, at p. 986, and cases cited therein.)

As was the *Armco* court, the *Continental* majority was concerned that absent a limited definition of damages, "'all sums which the insured shall become legally obligated to pay *as damages*'" would be reduced to "'*all sums* which the insured shall become legally obligated to pay.'" (*Continental Ins. v. Northeastern Pharmaceutical, supra*, 842 F.2d at p. 986, italics in original.) "The expansive reading of the term 'damages' urged by the state would render the term 'all sums' virtually meaningless. 'If the term "damages " is given the broad, boundless connotations sought by the [insured], then the term "damages " in the contract ... would become mere surplusage, because any obligation to

pay would be covered. ...'" (*Ibid.*, italics omitted, quoting *Maryland Casualty Co. v. Armco, supra*, 822 F.2d at p. 1352.)

The dissent in *Continental* noted that Missouri law, like California's, requires a reasonable-layperson construction of insurance policies. Under that construction "damages" should have been read to include cleanup ***234** costs. The dissent sharply criticized the majority for following *Armco's* technical-meaning rule and ignoring Missouri law: "[T]he majority rejects the dictionary definition of 'damages' on the ground that in the insurance context the word has a technical meaning which does not include the cost of restoring real property to the predamage condition. While this may be justified under the law of some states, it certainly is not under Missouri law. The legal definition of 'damages' under Missouri law ... includes the cost of restoring real property to its pre-damaged condition." (*Continental Ins. v. Northeastern Pharmaceutical, supra*, 842 F.2d at p. 988, citation omitted (dis. opn. of Heaney, J., Lay, J. & Fagg, J.) "If the insurer wished to use a technical legal meaning for [damages] which differed from the accepted dictionary definition, it should have explicitly done so." (*Ibid.*) The dissent also argued that *Hanna*, the intellectual keystone of the *Armco* decision, "is of doubtful applicability." (*Id.*, at p. 989.) *Hanna* simply held that under Florida law, which did not provide for damages for restoration of property to its predamaged state, there was no insurance coverage for an injunction directing the defendant to restore the property. (*Ibid.*)

In addition to *Armco* and *Continental*, real parties rely on *Cincinnati Ins. Co. v. Milliken and Co.* (4th Cir. 1988) 857 F.2d 979; *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.* (W.D.Wash. 1988) 685 F.Supp. 742; and *Verlan, Ltd. v. John L. Armitage & Co.* (N.D.Ill. 1988) 695 F.Supp. 950. All three of these decisions rely exclusively, and somewhat uncritically, on *Armco* and the *Continental* majority opinion.

The reasoning of both *Armco* and the *Continental* majority opinions is based on rules of interpretation or construction adverse to California law, and thus should not be considered persuasive. *Armco* is based on a technical definition of damages apparently required under Maryland law, and *Continental* follows such a definition in derogation of the reasonable layperson test proper under the forum-state law under review. Both cases argue that a broader construction of "damages" would render the term surplusage, requiring coverage of essentially any obligation to pay. As discussed above, a construction of "damages" which includes sums connected with equitable relief is not a boundless universe - such "damages" still must be "because of" property damage. Thus, *Armco's* conclusion that an insurer would be held liable for prophylactic safety measures, taken in advance of any damage to property, is not applicable to the policies under review. Neither is real parties' extrapolation that the insurer would be liable for the costs of compliance with government safety regulations, such as OSHA regulations, rules requiring fire extinguishers, protective clothing, and the like. Such prophylactic costs are not incurred "because of injury to or loss, destruction or loss of use of property" for the simple reason that no property damage has yet occurred, and such costs are ordinary business expenses. At oral ***235** argument, petitioners made it clear that they are not seeking coverage for such items.

Finally, real parties contend that damages cannot be claimed in the CERCLA actions because the governments have not sued under a CERCLA provision for recovery of damages to natural resources. The suits seek liability under 42 United States Code section 9607(a)(4)(A), which provides that the polluter shall be responsible for response costs. Section 9607(a)(4)(C) of 42 United States Code provides a separate basis of liability for "damages for injury to, or destruction of, or loss of natural resources, ..." The statutory distinction between response costs and natural resources damages, however, does not alter the reasonable expectation of the insured that cleanup costs are "damages." (*Continental Ins. v. Northeastern Pharmaceutical, supra*, 842 F.2d at pp. 989-990 (dis. opn. of Heaney, J., Lay, J. & Fagg, J.) The distinction is not entirely clear: "While CERCLA provides separate claims for recovery of costs incurred for 'remedial action,' and for damage to natural resources, it can be expected that there is a great deal of overlap between the two." (*United States* v. *Shell Oil Co.* (D.Colo. 1985) 605 F.Supp. 1064, 1084-1085, fn. 10, citations omitted.) Both may involve the restoration of polluted property to its previously uncontaminated state. The costs of contamination and restoration may be a measure of "natural resource damages" under CERCLA. (*State of Idaho v. Bunker Hill Co.* (D.Idaho 1986) 635 F.Supp. 665, 675-676.) (1d) As the *Continental* dissent concluded, it is not unreasonable for the layperson to expect that restorative response costs are insured.

Numerous federal and sister-state decisions reject *Armco* and *Continental* or otherwise favor petitioners' position. The dissent in *Continental* (which is consistent with the original panel opinion, 811 F.2d 1180) notes that "the cases applying state law requiring the words in an insurance policy to be given their ordinary, non-technical meaning support"

the dissent's position. (*Continental Ins. v. Northeastern Pharmaceutical, supra*, 842 F.2d at p. 990.)

In *Port of Portland v. Water Quality Ins. Syndicate, supra*, 796 F.2d 1188, although the main issue was whether an oil spill constituted "property damage," the court concluded "that discharge of pollution into water causes damage to tangible property and hence cleanup costs are recoverable under a property damage liability clause." (*Id.*, at p. 1194.) In *New Castle County v. Hartford Acc. and Indem. Co.* (D.Del. 1987) 673 F.Supp. 1359, the district court noted that Delaware law required an "'ordinary, usual meaning'" interpretation of insurance policies. (*Id.*, at p. 1365, quoting *Johnston* v. *Tally Ho, Inc.* (Del.Super.Ct. 1973) 303 A.2d 677, 679.) Since the dictionary definition of damages does not distinguish between actions in law and equity, the CERCLA claims for injunctive and other equitable ***236** relief-including cleanup costs-were covered as "damages" under a CGL policy. The claims "involve costs that the [insured] may become 'legally obligated to pay' as a result of injuries sustained by the respective [p]laintiffs or compensation imposed by law for a wrong." (*Id.*, at pp. 1365-1366.)

In an oft-cited decision, *United States Aviex Co.* v. *Travelers Ins. Co., supra*, 336 N.W.2d 838, the Michigan Court of Appeals rejected *Hanna* and its cognate cases as interpreting "damages" too narrowly. "If the state were to sue in court to recover in traditional 'damages', including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, [the insurer's] obligation to defend against the lawsuit and to pay damages would be clear. *It is merely fortuitous from the standpoint of either [the insured] or [the insurer] that the state has chosen to have [the insured] remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing [the insured] to recover those costs*. The damage to the natural resources is simply measured in the cost to restore the water to its original state." (*Id.*, at p. 843, citations omitted, italics added.)

In *Fireman's Fund Ins. Companies v. Ex-Cell-O Corp.* (E.D.Mich. 1987) 662 F.Supp. 71, 75, the court was more succinct: "[C]overage does not hinge on the form of action taken or the nature of relief sought, but on an actual or threatened use of legal process to coerce payment or conduct by a policyholder." The district court relied on the emphasized language of *United States Aviex* above and concluded "'damages' include money spent to clean up environmental contamination." (*Ibid.*) Relying on both *United States Aviex* and *Fireman's Fund*, the Eastern District of Pennsylvania reached the same result. (*Centennial Ins. Co. v. Lumbermens Mut. Cas. Co.* (E.D.Pa. 1987) 677 F.Supp. 342; accord, *Independent Petrochem. Corp. v. Aetna Cas. & Sur.* (D.D.C. 1986) 654 F.Supp. 1334; *Gloucester Tp. v. Maryland Cas. Co.* (D.N.J. 1987) 668 F.Supp. 394.)

Finally, in *Broadwell Realty v. Fidelity & Cas.* (N.J.Super.Ct.App.Div. 1987) 528 A.2d 76, the court held the insurer was liable to pay as damages government-mandated cleanup costs, on the ground that the costs represented a legal obligation owing because of property damage. (*Id.*, at p. 81.) The court reasoned that the mere fact the cleanup costs were incurred by the insured to comply with a cleanup order, and were not damages paid to a third party, was not enough to prevent coverage. "The insured's expenditures were made to discharge its legal obligation to the [New Jersey Department of Environmental Protection] or, at the very least, to prevent what would have been an avoidable legal obligation to pay damages to a third party. The expenses were incurred by virtue of the *in terrorem* and coercive effect of the [Department's] directive. The harm to the State, by reason of the discharge of pollutants into its streams, and to others was continuing ***237** and ongoing. ... Under these circumstances, the [cleanup] expenses constituted 'damages' which Broadwell was legally obliged to pay." (*Id.*, at p. 82.)

These decisions render a broader interpretation of "damages" consistent with the reasonable expectations of the insured. The insured expects to be covered for sums expended as a result of a legal obligation, regardless of whether the nature of that obligation is legal or equitable. This is especially true when the sums are expended to remedy pollution-caused property damage. Such sums are expended because of the polluter's obligation to the government to conduct cleanup operations, and are thus a legal obligation to pay "because of" property damage. (Moreover, as the *Continental* dissent noted, the insurance companies are free to rewrite their policies to cure the ambiguity surrounding the word "damages.")

The interpretation of the coverage clauses under review to encompass cleanup costs is also supported by sound public policy. The California Attorney General, appearing as amicus curiae for petitioners, posits that if an insured polluter knows it is covered for cleanup costs, cleanup activities will be conducted sooner and with greater cooperation with government. Thus, in the long run insurance coverage would seem to enhance the quality of environmental protection.

III.

We concur with the majority of reported decisions that response costs incurred under CERCLA and Water Code section 13304 are "damages because of injury to or loss, destruction or loss of use of property damage" within the meaning of the CGL coverage clauses at issue. We have reached this conclusion without benefit of a specific factual record of the exact nature and scope of petitioners' response costs in this particular case. We thus qualify our holding with the caveat that not all of petitioners' economic outlays may be considered "damages." (13), (14) While the CERCLA definition of "response costs" is broad enough to include costs incurred to prevent threatened *future* pollution where none has yet occurred, those response costs covered as damages must be those in the subset of costs incurred "because of" property damage. Undoubtedly, some portion of the response costs in this case will be covered as "damages," because they will constitute legally compelled expenses for the cleanup of extant pollution. The consent decree might, however, require an expenditure to prevent future pollution of a type which has not yet occurred, or to prevent pollution from a source which has not yet caused pollution. These costs would not be causally related to property damage and would therefore not be covered as "damages" under the policies.

This is illustrated by the following hypothetical: Petitioners have two underground storage tanks for toxic waste. Tank #1 has leaked wastes into ***238** the soil which have migrated to the groundwater or otherwise polluted the environment. Tank #2 has not leaked, but government inspectors discover that it does not comply with regulatory requirements, and could eventually leak unless corrective measures are taken. Response costs associated with Tank #1 will be covered as damages, because pollution has occurred. Tank #2 would not be covered. Likewise, the expense of capital improvements to prevent pollution in an area of a facility where there is none, or improvements or safety paraphernalia required by government regulation and not causally related to property damage, would not be covered as "damages." The exact nature of the response costs, as embodied in the consent decree, will no doubt be established at trial of the declaratory relief action below.

To summarize, petitioners purchased CGL policies protecting them in the event their insured conduct caused injury to or loss, destruction or loss of use of another's property. The government lawsuits contend that such events transpired. To that extent, petitioners are entitled to rely on their policies for protection.

IV.

The superior court erred in granting real parties' motion for summary adjudication. Accordingly, petitioners are entitled to an extraordinary writ to vacate the order granting real parties summary adjudication of issues.

Let a peremptory writ of mandate issue commanding respondent Superior Court of San Mateo County to vacate its order granting summary adjudication of issues, and to enter in its place a new and different order denying said motion.

Low P. J., and King, J., concurred.
A petition for a rehearing was denied May 18, 1989, and the following opinion was then rendered:

THE COURT *

Real parties in interest petition for rehearing contending we have omitted or misstated material facts in our opinion filed April 19, 1989. We have reviewed the allegations of the petition and have found them without merit. We deny the petition for rehearing and add the following comments.

There has been considerable confusion in this case over the role played by the extrinsic evidence in the trial court. Although some extrinsic evidence was presented below, it was entirely stricken on cross-motions to strike and the trial court resolved the question as a matter of law. When this was ***239** drawn to real parties' attention at oral argument, they responded only that one piece of extrinsic evidence, a letter allegedly denying a previous insurance claim, was not stricken. Real parties, however, were mistaken, and in footnote 3 of our opinion we accurately discuss the role and the fate of extrinsic evidence in this case. In the petition for rehearing real parties argue that "the trial court's ruling on Aerojet's objections and motion to strike was limited to striking the evidence in real parties' *reply*. [¶] At no point in the record is there a ruling by the trial court striking the evidence submitted with the original motion."

Aside from the fact that the current contention is broader than real parties' response at oral argument, we cannot agree with real parties' interpretation of the record. Real parties accompanied their motion for summary adjudication with numerous items of purported extrinsic evidence. These items were not cited as supportive evidence of either of the two

material facts set forth in real parties' separate statement of material facts. Indeed, real parties took pains to note again and again that the motion posed only a legal question of insurance contract interpretation; for instance, real parties stated that the motion "presents a legal issue that depends only on the plain meaning of the insurance policies." The motion suggested the factual matters were not necessary to resolve the legal issue, and were presented only for "context." In its opposition to the summary judgment motion, Aerojet attached numerous items of purported extrinsic evidence. In their reply brief, real parties presented additional evidentiary items.

Aerojet filed a motion to strike the purported evidence submitted in support of *both* the motion for summary adjudication and the reply brief. Aerojet's motion was made "on the ground that the material sought to be stricken does not relate to the issues or to the allegedly undisputed facts set forth in [real parties'] Separate Statement [of Material Facts], and, in the case of evidentiary materials, is not listed in said Separate Statement as supporting evidence, all in violation of the applicable statute and Rules of Court." The motion to strike was *not* limited to the reply brief and was *not* made on the ground that any extrinsic evidence should have been presented with the original motion. Real parties filed their own motion to strike several factual assertions of Aerojet's opposition brief as well as its supporting extrinsic evidence.

At the hearing on the motion for summary adjudication, the trial court stated: "Now, moving on through the objections and the motion [*sic*] to strike certain evidence. I don't know which order they came in but I've looked at them both being as far as Chesire's, the way I understand, the evidence that [Aerojet is] objecting to is in the reply memorandum which would not be proper *and I would sustain it*. And it would not enter into my decision on the motion. [¶] As to [real parties' counsel's] objection to Aerojet's, ***240** I would grant it be stricken. I see no relevance in that in the way I have determined and read the case and the motion that is before me." (Italics added.)

It is clear, especially from the court's later ruling denying a motion for reconsideration, that the trial court considered the question one of law. This is the only evident basis for the trial court's granting in its entirety real parties' motion to strike, which targeted Aerojet's extrinsic evidence, with the last sentence of the quoted passage. Although the court suggested its "understanding" of Aerojet's objections as speaking to the reply only, the court's ruling "and I would sustain it" clearly sustained the objections in their entirety. Curiously, real parties neither sought clarification that their original-motion evidence was still in the case nor focused on that evidence in the ensuing argument on the issue of law raised by the motion. In light of these circumstances, and the parties' obvious understanding, shared by the court, that the issue was purely a question of law, we think it clear the extrinsic evidence played and continues to play no role in this case, and we adhere to the phrasing of our opinion.

We also comment on an argument raised in the petition for rehearing concerning the coverage clause. As noted in our opinion, real parties contended at oral argument that the coverage clause actually ended at the word "damages" and the ensuing "because of ..." phrase was a separate "property damage clause." Having suffered defeat in the writ proceeding real parties now urge in their petition for rehearing that "[r]eal parties did not and do not make that contention." This claim is wholly inaccurate. Real parties, having made the contention, may not now deny it to suit their present needs. One may not alter one's appellate argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment.

Low, P. J., and King, J., concurred.

A petition for a rehearing was denied May 18, 1989, and the petition of real parties in interest for review by the Supreme Court was denied August 10, 1989. Panelli, J., was of the opinion that the petition should be granted. ***241**

Footnotes

1 Water Code section 102 provides, in part, that "[a]ll water within the State is the property of the people of the State, ..." In suing petitioners the state was exercising its power to ensure a reasonable and beneficial use of the water in the public interest. (Cal. Const., art. X, § 2; see Wat. Code, § 12922, declaring the People "have a primary interest in the correction and prevention of irreparable damage to, or impaired use of, the ground water basins of this State.") The state also asserted a "public trust" interest in the American River. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-453 [189 Cal.Rptr. 346, 658 P.2d 709], cert. den., 464 U.S. 977 [78 L.Ed.2d 351, 104 S.Ct. 413].)

2 The definition of response costs includes two basic components: costs of removal, defined as the cleanup or removal of hazardous substances in the event of their release or threatened release into the environment (42 U.S.C. § 9601(23)),

and costs of remedial actions, defined as “actions consistent with permanent remedy taken instead of or in addition to removal actions ... to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.” (42 U.S.C. § 9601(24).)

3 The parties, both in their briefs and at oral argument, have persistently referred to various items of extrinsic evidence supposedly presented to the trial court and involved in its decision on the motion. Although some extrinsic evidence was referred to in support of and in opposition to the motion for summary adjudication, the purported evidence was not relied upon in the statements of material fact. Indeed, with both parties arguing as if the issue was purely one of law, the factual matters dubbed “extrinsic evidence” were seemingly offered only for informational purposes. At the hearing on the motion, counsel on both sides asserted the motion raised an issue of law. More significantly, our review of the record reveals that *all* of the extrinsic evidence on both sides of the motion for summary adjudication was stricken by rulings granting cross-motions to strike. Neither petitioners nor real parties have assigned error to these rulings.

Claiming the extrinsic evidence had been considered by the trial court in deciding a motion to reconsider, petitioners argue from the evidence in this court seeking a ruling that at the very least interpretation must await trial. The evidence, however, was not considered by the court below. The court, after observing that petitioners had argued the issue initially as a point of law, stated: “I will deny the motion for reconsideration. I am basing my denial on the basis of the original ruling I made, *not the evidence that was presented in the motion for reconsideration, because I don't think it was properly before me. It should have been brought before me at the time the response was made to the motion ... for summary adjudication*. ... [¶] ... In looking it over I still think it's a matter of law. ...” (Italics added.)

4 Thus, we do not reach petitioners' secondary and tertiary arguments. Petitioners contend that should we disagree with their primary position, the interpretation issue must be resolved as a question of fact at trial. Petitioners also advance a “fallback” contention that the extrinsic evidence proffered in support of the motion for reconsideration precludes summary adjudication in real parties' favor. Because this “evidence” was not considered by the trial court (see fn. 3, *ante*), this argument is without merit. (Cf. *Mahoney* v. *Superior Court* (1983) 142 Cal.App.3d 937, 940, fn. 2 [191 Cal.Rptr. 425]; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 165-166, fn. 5 [143 Cal.Rptr. 450].)

5 The conclusion is also amply supported in *Intel Corp.* v. *Hartford Acc. and Indem. Co.* (N.D.Cal. 1988) 692 F.Supp. 1171, relied upon by petitioners, which applied California's law of insurance contract interpretation and concluded that CERCLA response costs were “damages” under a CGL policy. During the pendency of this petition, however, the *Intel* decision was appealed to the Ninth Circuit. We accordingly do not discuss or rely upon the *Intel* decision in this opinion.

6 Real parties also suggest that *Globe* only applies when coverage is undisputed, so that the insurer who denies coverage may escape liability. To state such an argument is to refute it.

7 Real parties also claim that petitioners, in their pleadings in the government lawsuits and elsewhere, have denied they had caused property damage by pollution. Evidently we are asked to adopt a rule that whenever an insured denies liability to a third party, its insurance company may deny coverage. We need not further discuss this novel concept, as the alleged denials were contained in documents stricken from the record by the trial court.

8 California has long dispensed with the distinction between legal and equitable actions (Code Civ. Proc., § 30), but retains a distinction, at least for some purposes, between legal and equitable relief. The distinction, however, seems to be blurred: “‘In reality the distinction between the two classes of remedies is more or less arbitrary and groundless. It is well said also that the courts of equity are reaching into new fields of operation and the courts of law are encroaching upon the former territory of the courts of equity.’” (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 77, p. 105, quoting *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 515 [36 P.2d 635, 95 A.L.R. 990].) It is interesting to note that Professor Witkin describes quasi-contract and tort actions for restitution as being generally ones at law. (*Id.*, §§ 88, 120, pp. 116, 150-151; see *id.*, § 82, pp. 108-109.)

9 Real parties also maintain that Insurance Code section 533.5, subdivision (a), enacted in 1988, bars coverage. The statute provides, in part, that “[n]o policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty or restitution in any civil or criminal action or proceeding brought by the Attorney General, any district attorney, or any city prosecutor ....” In our view this statute is inapplicable to the payment of CERCLA response costs, which are not restitution in the normal sense of the term. Petitioners do not contend that the policies cover fines or penalty payment.

* Before Low P. J., Haning, J., and King, J.

AA-41

153 Cal.App.4th 1292
Court of Appeal, Second
District, Division 3, California.

Alex ALVARADO, Plaintiff and Appellant,
v.
SELMA CONVALESCENT HOSPITAL
et al., Defendants and Respondents.

No. B184533.
|
Aug. 1, 2007.

Synopsis

Background: Class action lawsuit was brought under unfair competition law (UCL), seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with certain nursing hour requirements. The Superior Court, Los Angeles County, No. BC310771, Peter D. Lichtman, J., sustained an operator's demurrer without leave to amend. Plaintiff appealed.

[Holding:] The Court of Appeal, Kitching, J., held that abstaining from adjudicating class action controversy was not an abuse of discretion.

Affirmed.

West Headnotes (11)

[1] Appeal and Error Objections and exceptions; demurrer

When trial court sustained a demurrer without leave to amend, the Court of Appeal would give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pled.

1 Cases that cite this headnote

[2] Appeal and Error Discretion of lower court; abuse of discretion

Court of Appeal's standard of review was abuse of discretion, when the trial court dismissed case on the basis of the doctrine of judicial abstention.

2 Cases that cite this headnote

[3] Courts Abstention

Because injunctions and restitution are equitable in nature, under the doctrine of judicial abstention, courts have the discretion to abstain from employing them.

5 Cases that cite this headnote

[4] Courts Abstention

Courts may abstain when the lawsuit involves determining complex economic policy which is best handled by the legislature or an administrative agency.

16 Cases that cite this headnote

[5] Courts Abstention

Judicial abstention is appropriate in cases where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.

15 Cases that cite this headnote

[6] Courts Abstention

Courts may abstain when federal enforcement of the subject law would be more orderly, more effectual, less burdensome to the affected interests.

6 Cases that cite this headnote

[7] Constitutional Law Wisdom

The courts of appeal have neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature.

[8] **Constitutional Law** Encroachment on Executive

Courts Abstention

Judicial abstention is appropriate when granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.

19 Cases that cite this headnote

[9] **Courts** Abstention

Courts may abstain from adjudicating a lawsuit and issuing injunctive relief when the injunctive relief would place an unnecessary burden on the court because of the existence of other, more effective remedies.

4 Cases that cite this headnote

[10] **Courts** Abstention

Abstaining from adjudicating controversy raised in class action, brought under unfair competition law (UCL) to obtain restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with certain nursing hour requirements, was not an abuse of discretion; adjudicating controversy would have required trial court to become involved in complex health care matters concerning the staffing of skilled nursing and intermediate care facilities and to assume regulatory functions of the Department of Health Services (DHS), a task for which court was not well-equipped. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.; West's Ann.Cal.Health & Safety Code § 1276.5(a, b).

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 120.

10 Cases that cite this headnote

[11] **Courts** Abstention

Applying the abstention doctrine to decline to grant and enforce injunctive relief requested in class action brought under unfair competition law (UCL), against owners and operators of skilled nursing and intermediate care facilities to require compliance with certain nursing hour requirements, was not an abuse of discretion; granting requested injunctive relief would place a tremendous burden on trial court to undertake a class-wide regulatory function and manage long-term monitoring process to ensure compliance with nursing hour requirements, and Department of Health Services (DHS) had the power, expertise, and statutory mandate to regulate and enforce these requirements. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.; West's Ann.Cal.Health & Safety Code § 1276.5(a).

8 Cases that cite this headnote

Attorneys and Law Firms

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KITCHING, J.

***1295 INTRODUCTION**

Plaintiff and appellant Alvaro Alvarado (Alvarado), now deceased, filed a class action lawsuit under ****252** section 17200 et seq. of the Business and Professions Code (the UCL) seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities

to comply with certain nursing hour requirements set forth in Health and Safety Code section 1276.5, subdivision (a). [1]

We affirm the trial court order sustaining a demurrer without leave to amend. The trial court did not abuse its discretion by abstaining from adjudicating this lawsuit. Adjudicating the alleged controversy would have required the trial court to become involved in complex health care matters concerning the staffing of skilled nursing and intermediate care facilities and assume regulatory functions of the Department of Health Services (DHS). In addition, granting and enforcing the requested relief would place an unnecessary burden on the trial court given the power of the DHS to monitor and enforce compliance with section 1275.6.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff's Complaint*

On February 11, 2004, by and through his successor-in-interest, Alvarado, purporting to act as a private attorney general, filed a class action lawsuit against a number of defendants, including Sun Healthcare Group, Inc. (Sun), which owned or operated more than 20 skilled nursing and/or intermediate care facilities. [2] Alvarado alleged three causes of action: ***1296** (1) unlawful business practice in violation of Business and Professions Code section 17200; (2) unfair and fraudulent business practice in violation of Business and Professions Code section 17200; and, (3) false advertising in violation of Business and Professions Code 17500.

In the complaint, Alvarado defined the purported class as follows: "[A]ll residents of skilled nursing facilities owned, operated and/or managed by [Sun] between February 1, 2000 through the date of the filing of this complaint wherein the defendants were reimbursed for services provided to 'class member' by private pay and/or privately acquired insurance and/or any HMO or PPO."

Alvarado alleged that defendants engaged in a pervasive and intentional failure to provide sufficient direct nursing care for the residents of the skilled nursing facilities. Alvarado further alleged that Sun received substantial profit by failing to comply with section 1276.5, subdivision (a).

Alvarado also alleged that defendants falsely advertised that they provided greater nursing levels than those actually provided. Finally, Alvarado alleged that defendants engaged in unlawful business practices by failing to maintain adequate levels of skilled nursing staff and by misrepresenting to residents and family members ****253** the level of staffing provided at the nursing centers.

2. *Sun Files A Demurrer*

Sun filed a demurrer and motion to strike. Sun asserted the trial court should abstain from adjudicating the action or defer to the primary jurisdiction of the DHS. Sun further asserted that section 1276.5, subdivision (a), did not create a private cause of action.

3. *Alvarado's Opposition to the Demurrer*

In opposition, Alvarado asserted that section 1276.5, subdivision (a), created a private cause of action, the abstention doctrine did not apply, and the doctrine of primary jurisdiction was also inapplicable.

4. *Trial Court Sustains Demurrer Without Leave To Amend*

The trial court sustained Sun's demurrer without leave to amend. The trial court found that even if section 1276.5 permitted a private right of action, the court would nevertheless exercise its discretion to abstain from adjudicating the case. The trial court entered judgment in favor of all defendants. Alvarado timely filed a notice of appeal.

*1297 STANDARD OF REVIEW

[1] **[2]** In this case, the trial court sustained the demurrer without leave to amend. Thus, we give the complaint a reasonable interpretation and treat the demurrer as admitting all material facts properly pled. (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 631, 39 Cal.Rptr.3d 62 (*Shamsian*).) Because the trial court dismissed this case on the basis of the doctrine of judicial abstention, however, our standard of review is abuse of discretion. (*Id.* at p. 641, 39 Cal.Rptr.3d 62 ["The trial court properly exercised its discretion to abstain from employing the remedies available under the unfair competition law."]; see also *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.* (2001) 94 Cal.App.4th 781, 795, 114 Cal.Rptr.2d 623 (*Desert Healthcare*) ["Therefore, because the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them."].)

ISSUE PRESENTED

The issue presented is whether the trial court abused its discretion by abstaining from adjudicating the alleged controversy. [3]

DISCUSSION

Plaintiff contends that the trial court abused its discretion by dismissing this action on the basis of the equitable abstention doctrine. We disagree.

1. *The Abstention Doctrine*

a. *Introduction*

[3] Plaintiff seeks relief under the UCL. In California, the remedies available for alleged violations of the UCL include injunctions and restitution. Because these remedies are equitable in nature, under the doctrine of judicial abstention, courts have the discretion to abstain from employing them. ****254** (*Desert Healthcare, supra,* 94 Cal.App.4th at p. 795, 114 Cal.Rptr.2d 623.)

[4] **[5]** **[6]** ***1298** There are various theories underlying the application of judicial abstention in UCL lawsuits. Courts may abstain when the lawsuit involves determining complex economic policy, which is best handled by the legislature or an administrative agency. (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 218, 27 Cal.Rptr.2d 396 (*California Grocers*).) Judicial abstention is appropriate in cases where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress. (*Diaz v. Kay–Dix Ranch* (1970) 9 Cal.App.3d 588, 599, 88 Cal.Rptr. 443 (*Diaz*).) Courts may also abstain when federal enforcement of the subject law would be " 'more orderly, more effectual, less burdensome to the affected interests.' " (*People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523, 213 Cal.Rptr. 247, 698 P.2d 150, *quoting Diaz, supra,* 9 Cal.App.3d 588, 599, 88 Cal.Rptr. 443.)

b. *Application of the Abstention Doctrine in UCL Cases*

(i) *Certain Complex Economic Policies and Issues Should Be Handled by the Legislature or Administrative Agencies*

[7] Judicial intervention in areas of complex economic policy is inappropriate. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1168, fn. 15, 278 Cal.Rptr. 614, 805 P.2d 873.) The Courts of Appeal have "neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature." (*Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 454, 55 P.2d 177.)

[8] Judicial abstention is appropriate when granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency. (*Shamsian, supra,* 136 Cal.App.4th at p. 642, 39 Cal.Rptr.3d 62; *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301–1302, 22 Cal.Rptr.2d 20 (*Samura)*.)

In *Samura,* the plaintiff sued Kaiser and others for injunctive relief pursuant to the UCL. (*Samura, supra,* 17 Cal.App.4th at p. 1288, 22 Cal.Rptr.2d 20.) The plaintiff alleged that Kaiser's third party liability provisions in service agreements violated the UCL. These provisions provided, inter alia, that if a member received medical services under the service agreement for injuries caused by a third party, and the member recovered a settlement or judgment ***1299** as compensation, the member would pay for the medical services from the settlement or judgment. (*Id.* at p. 1289, 22 Cal.Rptr.2d 20.) Following a trial, the trial court granted the plaintiff injunctive relief, requiring Kaiser, among other things, to re-write and clarify in plain English the third party liability provisions. (*Id.* at p. 1291, 22 Cal.Rptr.2d 20.)

The *Samura* Court of Appeal reversed, concluding that the trial court erred when it tried to enforce compliance with the "regulatory guidelines and requirements of the Knox–Keene Act." (*Samura, supra,* 17 Cal.App.4th at p. 1301, 22 Cal.Rptr.2d 20.) The court stated as follows: "It is immaterial whether or not the challenged contract provisions and business practices comply with these portions of the Knox–Keene Act because the statutes do not define unlawful acts that may be enjoined under Business and Professions Code section 17200. In basing its order on these provisions, the trial court assumed a regulatory power ****255** over Health Plan that the Legislature has entrusted exclusively to the Department of Corporations. Samura unquestionably has certain remedies if the Department of Corporations fails to discharge its responsibilities under the Knox–Keene Act [citation], but the courts cannot assume general regulatory

powers over health maintenance organizations through the guise of enforcing Business and Professions Code section 17200. [Citation.] To the extent that the order on appeal is based on portions of the Knox–Keene Act having a purely regulatory import, it improperly invades the powers that the Legislature entrusted to the Department of Corporations." (*Id.* at pp. 1301–1302, 22 Cal.Rptr.2d 20, fn. omitted.)

In *California Grocers,* the California Grocers Association filed suit against Bank of America to challenge a $3 banking fee for a check processing service as a violation of the UCL. (*California Grocers, supra,* 22 Cal.App.4th at pp. 209–211, 27 Cal.Rptr.2d 396.) The trial court found that the fee was unconscionably high, a violation of the covenant of good faith and fair dealing, and thus an unfair business practice under the UCL. The court granted injunctive relief, limiting the fee to $1.73, which represented the bank's cost plus a 15 percent markup for profit. (*California Grocers, supra,* 22 Cal.App.4th at p. 212, 27 Cal.Rptr.2d 396.)

The Court of Appeal reversed. The court concluded that the fee was not unconscionable. (*California Grocers, supra,* 22 Cal.App.4th at p. 215, 27 Cal.Rptr.2d 396.) Alternatively, as a separate ground for reversing the judgment, the Court of Appeal concluded that injunctive relief was "an inappropriate exercise of judicial authority." (*Id.* at p. 217, 27 Cal.Rptr.2d 396.) The court explained that the case involved ***1300** a question of economic policy, that is, whether service fees charged by banks were too high and should be regulated. The court stated that determining economic policy was primarily a legislative and not a judicial function. (*Id.* at p. 218, 27 Cal.Rptr.2d 396)

In *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 99 Cal.Rptr. 417, the court addressed the legality of a mortgage loan prepayment charge. That court stated, "[T]he control of charges, if it be desirable, is better accomplished by statute or by regulation authorized by statute than by *ad hoc* decisions of the courts. Legislative committees and an administrative officer charged with regulating an industry have better sources of gathering information and assessing its value than do courts in isolated cases." (*Id*. at p. 311, 99 Cal.Rptr. 417.)

In *Wolfe v. State Farm Fire & Casualty Ins.* Co. (1996) 46 Cal.App.4th 554, 53 Cal.Rptr.2d 878 (*Wolfe*), the court explained that following the 1994 Northridge earthquake, a number of residential real property insurers stopped or reduced the sales of homeowner policies because the insurers were required to provide earthquake insurance in those policies. The insurers were concerned about the risk they would be assuming and "their ability to pay all claims in case of another earthquake...." (*Id.* at p. 560, 53 Cal.Rptr.2d 878.)

Acting as a private attorney general, the plaintiff in *Wolfe* sued 17 residential real property insurers for injunctive relief to require the insurers to sell new policies. The plaintiff alleged that the failure to sell new policies constituted an unfair business practice under the UCL. (*Wolfe, supra,* 46 Cal.App.4th at p. 557, 53 Cal.Rptr.2d 878.) The trial court sustained the insurers' demurrers without leave to amend on the basis that the issues in that case were best addressed by the Legislature. (*Id.* at p. 559, 53 Cal.Rptr.2d 878.)

****256** The Court of Appeal affirmed. The court explained that even if the plaintiff could state a cause of action for unfair trade practices based on Proposition 103, "that by itself [did] not permit unwarranted judicial intervention in an area of complex economic policy." (*Wolfe, supra,* 46 Cal.App.4th at p. 565, 53 Cal.Rptr.2d 878.) The *Wolfe* court explained that judicial resolution of the complaint would involve the courts in microeconomic managing of the insurance industry. The court stated that to grant the requested injunctive relief would "necessarily involve the court in evaluating the potential risk being undertaken by each ***1301** individual homeowners/earthquake insurer and analyzing their respective financial conditions to determine whether they would remain sufficiently solvent to undertake those risks." (*Id.* at p. 567, 53 Cal.Rptr.2d 878.)

In *Desert Healthcare, supra,* 94 Cal.App.4th 781, 114 Cal.Rptr.2d 623, a hospital filed an action against a health service plan (PacifiCare) to recover medical expenses for services provided to members of the health service plan. DPA, the entity responsible on behalf of PacifiCare for reimbursing the hospital, had filed for bankruptcy. (*Id.* at p. 785, 114 Cal.Rptr.2d 623.) The hospital sued for violations of the Knox–Keene Health Care Service Plan Act of 1975, for negligence and for violations of the UCL. The Court of Appeal affirmed the order sustaining PacifiCare's demurrer without leave to amend with regard to the Knox–Keene and negligence causes of action. (*Id.* at pp. 791–793, 114 Cal.Rptr.2d 623.)

The *Desert Healthcare* court also found that the hospital had not stated a valid UCL claim, and even if it had, the court would not approve of "judicial intervention under the guise of the UCL...." (*Desert Healthcare, supra,* 94 Cal.App.4th at

p. 794, 114 Cal.Rptr.2d 623). The court explained: "Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy." (*Id.* at pp. 795, 114 Cal.Rptr.2d 623) The court explained that "[i]n order to fashion an appropriate remedy for such a claim, be it injunctive or restitutionary, the trial court would have to determine the appropriate levels of capitation and oversight. Such an inquiry would pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in. As such, there is no proper role for the court of equity to play in the instant dispute." (*Id.* at pp. 796, 114 Cal.Rptr.2d 623.)

In the recent case of *Shamsian, supra,* 136 Cal.App.4th 621, 39 Cal.Rptr.3d 62, the Court of Appeal affirmed an order dismissing the case on the basis of equitable abstention. There, the plaintiff filed a class action lawsuit against the Department of Conservation for allegedly failing to provide convenient, economical and efficient beverage container redemption opportunities as required by section 14501, subdivision (g), of the Public Resources Code and for unfair competition under the UCL. (*Shamsian, supra,* 136 Cal.App.4th at p. 626–627, 39 Cal.Rptr.3d 62.)

***1302** The *Shamsian* court held that Public Resources Code section 14501, subdivision (g), did not impose a mandatory duty on the Department of Conservation, and thus did not create a private cause of action. Alternatively, the court concluded that equitable abstention barred the plaintiff's UCL claims. (*Shamsian, supra,* 136 Cal.App.4th at p. 626, 39 Cal.Rptr.3d 62).

As to the doctrine of equitable abstention, the *Shamsian* court explained: "[T]he complex statutory arrangement of requirements and incentives involving participants ****257** in the beverage container recycling scheme is to be administered and enforced by the department consistent with the Legislature's goals. For the court at this point to issue restitution and disgorgement orders against the corporate defendants would interfere with the department's administration of the act and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance. The public's need for opportunities to recover its cash redemption value funds and to conveniently recycle its beverage containers is not so great as to warrant judicial interference in the administrative scheme designed to address those needs at this point." (*Shamsian, supra,* 136 Cal.App.4th at p. 642, 39 Cal.Rptr.3d 62.)

(ii) *Granting Injunctions in Cases Involving Complex Economic Issues When Other Remedies are Available Can Place an Unnecessary Burden on the Courts*

[9] Courts may abstain from adjudicating a lawsuit and issuing injunctive relief when the injunctive relief would place an unnecessary burden on the court because of the existence of other, more effective remedies.

In *Diaz, supra,* 9 Cal.App.3d 588, 88 Cal.Rptr. 443, plaintiffs sought injunctive relief to prohibit ranchers from employing as farm workers illegal immigrant into the United States. In that case, the court concluded that the trial court should not become involved in issuing and enforcing injunctive relief when there was a more effective federal remedy. The court explained that a single trial court may have to issue dozens of injunctions, creating a network of injunctions to cover growers in rural counties. The trial courts would then have to enforce the injunctions through contempt hearings. (*Id.* at p. 599, 88 Cal.Rptr. 443). The court stated: "Thus, whatever the legal theory underlying the injunction, the court must compare the effects of granting and withholding it and, in that connection, consider the comparative availability and advisability of other forms of amelioration." (*Id.* at p. 593, 88 Cal.Rptr. 443.)

With this understanding of the doctrine of equitable abstention, we turn to the issue of whether the trial court abused its discretion in the context of this case.

***1303** 2. *Section 1276.5*

Adopted in 1976, section 1276.5 provides in pertinent part: "(a) The department shall adopt regulations setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities, subject to the specific requirements of Section 14110.7 of the Welfare and Institutions Code. *However, notwithstanding Section 14110.7 or any other provision of law, commencing January 1, 2000, the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours, except as provided in Section 1276.9.*

"(b)(1) For the purposes of this section, 'nursing hours' means the number of hours of work performed per patient day by aides, nursing assistants, or orderlies plus two times the number of hours worked per patient day by registered nurses

and licensed vocational nurses (except directors of nursing in facilities of 60 or larger capacity) and, in the distinct part of facilities and freestanding facilities providing care for the developmentally disabled or mentally disordered, by licensed psychiatric technicians who perform direct nursing services for patients in skilled nursing and intermediate care facilities, except when the skilled nursing and intermediate care facility is licensed as a part of a state hospital, and except that nursing hours for skilled nursing facilities means the actual hours of work, without doubling the hours ****258** performed per patient day by registered nurses and licensed vocational nurses.

"(2) Concurrent with implementation of the first year of rates established under the Medi–Cal Long Term Care Reimbursement Act of 1990 ... for the purposes of this section, 'nursing hours' means the number of hours of work performed per patient day by aides, nursing assistants, registered nurses, and licensed vocational nurses (except directors of nursing in facilities of 60 or larger capacity) and, in the distinct part of facilities and freestanding facilities providing care for the developmentally disabled or mentally disordered, by licensed psychiatric technicians who performed direct nursing services for patients in skilled nursing and intermediate care facilities, except when the skilled nursing and intermediate care facility is licensed as a part of a state hospital." (Italics added.)

3. *The Trial Court Did Not Abuse Its Discretion by Abstaining From Adjudicating the Alleged Controversy*

a. *Calculating Nursing Hours Per Patient Would Require the Trial Court to Undertake Regulatory Powers Which Would be Better Performed by the DHS*

[10] Adjudicating this class action controversy would require the trial court to assume general regulatory powers over the health care industry through the ***1304** guise of enforcing the UCL, a task for which the courts are not well-equipped. (*Samura, supra,* 17 Cal.App.4th at pp. 1301–1302, 22 Cal.Rptr.2d 20.)

Section 1276.5, subdivision (a) is a regulatory statute, which the Legislature intended the DHS to enforce. We conclude this based upon the wording of section 1276.5, subdivision (a), and its surrounding statutory framework. (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 65 Cal.Rptr.2d 360, 939 P.2d 760 (*Phelps*).)[4]

With regard to the wording of the statute, the first sentence of subdivision (a) indicates that the Legislature intended the DHS to promulgate regulations pursuant to section 1276.5. Subdivision (a) provides in pertinent part: "*The department shall adopt regulations* setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities." (Italics added.)

In addition, section 1276.5 is contained in an Article of the Health and Safety Code entitled "Regulations." With limited exceptions, each statute contained in the article directs the DHS (or another state ****259** agency) to prioritize existing regulations, adopt new regulations or standards, enforce regulations, or ensure that certain health care providers operate in compliance with appropriate license requirements and agency rules and regulations. Notably, the first statute contained in the article, section 1275, begins with the following mandate: "The state department shall adopt, amend, or repeal ... any reasonable rules and regulations as may be necessary or proper to carry out the purposes and intent of this chapter and to enable the state department to exercise the powers and perform the duties conferred upon it by this chapter, not inconsistent with any statute of this state."

The surrounding statutory framework confirms that the Legislature intended the DHS to enforce section 1276.5, subdivision (a). Section 1294 is ***1305** contained in the same chapter of the Health and Safety Code as section 1276.5. Section 1294 provides in pertinent part: "The state department may suspend or revoke any license or special permit issued under the provisions of this chapter upon any of the following grounds and in the manner provided in this chapter: [¶] (a) Violation by the licensee or holder of a special permit of any of the provisions of this chapter or of the rules and regulations promulgated under this chapter. [¶] ... [¶] (c) Aiding, abetting, or permitting the violation of any provision of this chapter or of the rules and regulations promulgated under this chapter. [¶] (d) Conduct inimical to the public health, morals, welfare, or safety of the people of the State of California in the maintenance and operation of the premises or services for which a license or special permit is issued."

In addition, the DHS is better equipped to determine compliance with the statute. Section 1276.5, subdivision (a), requires that a skilled nursing facility must provide a minimum of 3.2 nursing hours per patient day. However, subdivision (a) contains an exception, referring to section 1276.9, subdivision (a), which states that "[a] special treatment program service unit distinct part shall have a

minimum 2.3 nursing hours per patient per day." Subdivision (b) of section 1276.9 defines a " 'special treatment program service unit distinct part' " as "an identifiable and physically separate unit of a skilled nursing facility or an entire skilled nursing facility that provides therapeutic programs to an identified mentally disordered population group." Further complicating matters, subdivision (d) of section 1276.9 provides: "A special treatment program service unit distinct part shall also have an overall average weekly staffing level of 3.2 hours per patient per day, calculated without regard to the doubling of nursing hours, as described in paragraph (1) of subdivision (b) of Section 1276.5, for the special treatment program service unit distinct part."

Thus, to enforce section 1276.5, subdivision (a), the initial task for the trial court would be to determine on a class-wide basis whether a particular skilled nursing or intermediate care facility is governed by section 1276.5 or 1276.9.

The next task for the trial court would be to calculate nursing hours for each facility involved in this case. Subdivision (b) of section 1276.5 identifies various health care professionals whose hours may be counted towards the 3.2 nursing hours per patient day requirement. Thus, adjudicating this class action controversy would require the trial court to classify employees into different categories including aides, nursing assistants, orderlies, registered nurses, licensed vocational nurses, directors of nursing and licensed psychiatric technicians who perform direct nursing services. Once the court classified the ****260** various employees, it would then be required to calculate the hours they worked.

***1306** In addition, section 1276.5, subdivision (b) provides different formulas for calculating nursing hours in different skilled nursing facilities. Thus, the court would have to determine on a class-wide basis the size, configuration and licensing status of skilled nursing and intermediate care facilities. For example, the court would have to determine whether the facility accommodated 60 or more patients, whether a distinct part of a facility or free-standing facility provided care for developmentally disabled or mentally disordered persons, and whether the facility was licensed as a part of a state hospital.

We find that calculating on a class-wide basis whether skilled nursing or intermediate facilities are in compliance with section 1276.5, subdivision (a), or section 1276.9, subdivisions (a) or (d), is a task better accomplished by an administrative agency than by trial courts.

b. *To Grant the Requested Injunctive Relief Would be Unnecessarily Burdensome for the Trial Court*

Courts may abstain when an administrative agency is better equipped to provide an alternative and more effective remedy. (*Diaz, supra,* 9 Cal.App.3d. at p. 599, 88 Cal.Rptr. 443).

[11] If the trial court were to adjudicate this case, it would have to decide whether to issue networks of injunctions across the State of California. If it did issue those injunctions, it would have to monitor and enforce them. As explained, there are numerous variables for determining whether a particular skilled nursing or intermediate care facility is providing 3.2 nursing hours per patient day. Thus, granting the requested injunctive relief would place a tremendous burden on the trial court to undertake a class-wide regulatory function and manage the long-term monitoring process to ensure compliance with section 1276.5, subdivision (a).

The DHS has the power, expertise and statutory mandate to regulate and enforce section 1275.6. Given this alternative and more effective means of ensuring compliance with section 1276.5, we conclude the trial court did not abuse its discretion by applying the abstention doctrine. [5]

***1307 DISPOSITION**

The judgment is affirmed. Defendant Sun is to recover costs on appeal.

We concur: KLEIN, P.J., and CROSKEY, J.

All Citations

153 Cal.App.4th 1292, 64 Cal.Rptr.3d 250, 07 Cal. Daily Op. Serv. 9200, 2007 Daily Journal D.A.R. 11,775

Footnotes

1 Unless otherwise indicates, unspecified statutory references are to the California Health and Safety Code.

2 The other named defendants included: SunBridge Healthcare Corporation; Care Enterprises West, Inc.; Braswell Enterprises, Inc.; Brittany Rehabilitation Center, Inc.; Carmichael Rehabilitation Center; Coalinga Rehabilitation Center; Covina Rehabilitation Center; Fairfield Rehabilitation Center; Fullerton Rehabilitation Center; Glendora Rehabilitation Center; Grand Terrace Rehabilitation Center; Harbor View Rehabilitation Center; Heritage Rehabilitation Center; Huntington Beach Convalescent Hospital; Jackson Rehabilitation Center, Inc.; Meadowbrook Rehabilitation Center; Newport Beach Rehabilitation Center; Paradise Rehabilitation Center, Inc.; Rosewood Rehabilitation Center, Inc.; Shandin Hills Rehabilitation Center; Stockton Rehabilitation Center, Inc. and Vista Knoll Rehabilitation Center, Inc.

3 The parties raise a number of issues which we do not address, including: (1) Alvarado's standing; (2) whether section 1276.5, subdivision (a), created a private cause of action; and (3) whether the doctrine of primary jurisdiction applied. In addition, we express no opinion as to whether a district attorney can pursue litigation against skilled nursing and intermediate care facilities for alleged violations of section 1276.5, subdivision (a).

4 The *Phelps* court explained: " 'A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.] [¶] Additionally, however, we must consider the [statutory language] in the context of the entire statute [citation] and the statutory scheme of which it is a part. 'We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]' [Citations.] ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." [Citation.].... "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]' " (*Phelps, supra,* 16 Cal.4th at p. 32, 65 Cal.Rptr.2d 360, 939 P.2d 760.)

5 Nothing in this opinion is intended to preclude plaintiff from pursuing appropriate writ relief pursuant to the Code of Civil Procedure to compel the DHS to adopt regulations pursuant to the first sentence of section 1276.5, subdivision (a), or to enforce the requirement that "the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours, except as provided in Section 1276.9."

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AA-42

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PANEL

ICDR No. 01-16-0000-7056

In the Matter of an Independent Review Process

Between:

AMAZON EU S.A.R.L.,
Claimant,

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent.

FINAL DECLARATION

IRP Panel:

Hon. Robert C. Bonner, Chair

Robert C. O'Brien, Esq.

Hon. A. Howard Matz (Concurring and partially dissenting)

1. Claimant Amazon EU S. a. r. l. ("Amazon") seeks independent review of the decision of the Board of the Internet Corporation for Assigned Names and Numbers ("ICANN"), acting through ICANN's New gTLD Program Committee ("NGPC"), denying its applications for top-level domain names of .amazon and its IDN equivalents in Chinese and Japanese characters. Amazon contends that in making the decision to deny its applications, the NGPC acted in a manner that was inconsistent with and violated

provisions of ICANN's Articles of Incorporation, Bylaws and/or Applicant Guidebook for gTLD domain names (collectively, ICANN's "governance documents"). ICANN contends, to the contrary, that at all times the NGPC acted consistently with ICANN's governance documents.

2. After conducting a two-day in-person hearing on May 1–2, 2017 and having reviewed and considered the briefs, arguments of counsel and exhibits offered by the parties as well as the live testimony and the written statement of Akram Atallah, the written statement of Scott Hayden, the expert reports of Dr. Heather Forrest, Dr. Jerome Passa, and Dr. Luca Radicati di Bronzoli, the Panel declares that:

    a. The Board, acting through the NGPC, acted in a manner inconsistent with its Articles, Bylaws and Applicant Guidebook because, as more fully explained below, by giving complete deference to the consensus advice of the Government Advisory Committee ("GAC") regarding whether there was a well-founded public policy reason for its advice, the NGPC failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC's consensus advice. In sum, we conclude that the NGPC failed to exercise the requisite degree of independent judgment in making its decision as required by Article IV, Section 3.4(iii) of its Bylaws. (*See also* ICANN, Supplementary Procedures, Rule 8(iii) [hereafter "Supplementary Procedures"].)

    b. The effect of the foregoing was to impermissibly convert the strong presumption to be accorded GAC consensus advice under the Applicant

Guidebook into a conclusive presumption that there was a well-founded public policy interest animating the GAC advice.

c. While the GAC was not required to give a reason or rationale for its consensus advice, the Board, through the NPGC, was. In this regard, the Board, acting through the NGPC, failed in its duty to explain and give adequate reasons for its decision, beyond merely citing to its reliance on the GAC advice and the presumption, albeit a strong presumption, that it was based on valid and legitimate public policy concerns. An explanation of the NGPC's reasons for denying the applications was particularly important in this matter, given the absence of any rationale or reasons provided by the GAC for its advice and the fact that the record before the NGPC failed to substantially support the existence of a well-founded and merits-based public policy reason for denying Amazon's applications.

d. Notwithstanding the strong presumption, there must be a well-founded public policy interest supporting the decision of the NPGC denying an application based on GAC advice, and such public policy interest must be discernable from the record before the NGPC. We are unable to discern a well-founded public policy reason for the NGPC's decision based upon the documents cited by the NGPC in its resolution denying the applications or in the minutes of the May 2014 meeting at which it decided that the applications should not be allowed to proceed.

e. In addition, the failure of the GAC to give Amazon, as a materially affected party, an opportunity to submit a written statement of its position to the GAC, despite Amazon's request to the GAC Chair, violated the basic procedural fairness requirements for a constituent body of ICANN. (*See* ICANN, Bylaws, art. III, § 1 (July 30, 2014) [hereinafter Bylaws].) In its decision denying the applications, the NGPC did not consider the potential impact of the failure of the GAC to provide for minimal procedural fairness or its impact on the presumption that would otherwise flow from consensus advice.

f. In denying Amazon's applications, the NGPC did not violate the Bylaws' prohibition against disparate treatment.

g. Amazon's objections to changes made to the Applicant Guidebook are untimely.

I. PROCEDURAL HISTORY

The relevant procedural background of this Independent Review Process ("IRP") is:

3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: John Thorne of Kellogg, Hansen, Todd, Figel & Frederick

Respondent: Jeffrey LeVee of Jones Day

4. The authority for the Independent Review Process is found at Article IV, Section 3 of the ICANN Bylaws.

5. The applicable Procedural Rules are ICDR's International Dispute Resolution Procedures, as amended and in effect on June 1, 2014, as augmented by ICANN's Supplementary Procedures, as amended and in effect as of 2011.

6. On May 14, 2014, relying primarily upon the GAC's consensus objection, the NGPC rejected Amazon's applications.

7. Amazon's request for reconsideration was rejected by ICANN's Board Governance Committee on August 22, 2014.

8. Thereafter, Amazon notified ICANN of its intention to seek independent review under Article IV, Section 3 of ICANN's Bylaws, and Amazon and ICANN participated in a Cooperative Engagement Process in an attempt to resolve the issues related to Amazon's applications. No resolution was reached.

9. On March 1, 2016, Amazon filed a Notice of Independent Review with the International Centre for Dispute Resolution, and thereafter, this Independent Review Panel (the "Panel") was selected pursuant to the procedures described therein.

10. After a preliminary telephonic conference on October 4, 2016, the Panel issued Preliminary Conference and Scheduling Order No. 1, *inter alia*, establishing timelines for document exchange and granting Amazon's request for an in-person hearing to be held in Los Angeles, California. Thereafter, on November 17, 2016, in its Order No. 2, the Panel granted Amazon's application to permit live testimony at the hearing of Akram Atallah, the Interim President and Chief Executive Officer of ICANN, and denied its requests for live testimony by Amazon's Vice President and Associate

General Counsel for Intellectual Property Scott Hayden; Dr. Heather Forrest, an Amazon expert witness; and Heather Dryden, former chair of the GAC. After some adjustment, a schedule for pre-hearing briefs was established and the merits hearing dates were set for May 1–2, 2017.

11. On January 3, 2017, the Panel approved a Joint Stipulation Against Unauthorized Disclosure of Confidential Information ("Joint Stipulation") providing for the good faith designation of proprietary and sensitive internal documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL.

12. An in-person merits hearing was held in Los Angeles on May 1–2, 2017, at which Mr. Atallah's testimony was taken, exhibits were produced and the matter argued. At the conclusion of the hearing on May 2, the Panel closed the proceedings, subject to receiving a transcript of the hearing and a consolidated exhibit list from counsel, and took the issues presented under submission.

13. Following the merits hearing, on June 7, 2017 the Panel issued its Order No. 3 denying Amazon's objections to ICANN's proposed redactions of the hearing transcript that disclosed information contained in several exhibits designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL under the Joint Stipulation.

II. FACTS

The salient facts are:

14. Amazon is a global e-commerce company incorporated under the laws of Luxembourg. Marketing through retail websites worldwide, Amazon, together with its affiliates, is

one of the largest internet marketers of goods in the world, with hundreds of millions of customers globally. (Statement of Scott Hayden, ¶ 5-6 [hereinafter Hayden Statement].) It has a well-recognized trade name of "Amazon" which is a registered trademark in over 170 nations. (Id., at ¶ 7.) For nearly two decades, Amazon has been granted and used a well-recognized second level domain name of amazon.com. (Id., at ¶ 15.)

15. In April 2012, Amazon applied to ICANN for the delegation of the top-level domain names .amazon and its Chinese and Japanese equivalents, pursuant to ICANN's Generic Top-Level Domains ("gTLD") Internet Expansion Program. (Id., at ¶12.)

16. There are significant security and operational benefits to a company having its own top level domain name, including its ability to "create and differentiate" itself and have its own "digital identity online." (Tr. Akram Atallah Test., 82-83 [hereinafter Atallah Tr.].) Amazon saw the potential of having the .amazon gTLD, or string, as a "significant opportunity to innovate on behalf of its customers" and improve its service to its hundreds of millions of customers worldwide. (Hayden Statement, ¶ 7.) It also saw it as a means to safeguard its globally recognized brand name. (Id.)

17. ICANN is a non-profit, multi-stakeholder organization incorporated in the State of California, established September 30, 1998 and charged with registering and administering internet names, both second and top level, in the best interests of the internet community. (Request for Independent Review, 3.) ICANN operates pursuant to Articles of Incorporation and Bylaws. The Bylaws applicable to this IRP proceeding are those as amended in July 30, 2014. (Id., at 3-4; *see* Bylaws (designated as Ex. C-64).)

18. In 2008 ICANN proposed to expand top level domain names beyond .com, .edu, .org to generic top level domain names. (Request for Independent Review, 6-7.) Through its multi-stakeholder policy development process, over a several-year period ICANN developed and issued an Applicant Guidebook ("Guidebook" or "AGB") setting forth procedures for applying for and the processing and approval of gTLD names. There have been several iterations of the Guidebook. The version applicable to the Amazon applications at issue was adopted in 2012. (Id.; *see* ICANN, gTLD Applicant Guidebook (June 4, 2012) (designated as Ex. C-20) [hereinafter Guidebook].)

19. The Guidebook sets forth procedures for applying for and objecting to top level domain names. As for geographic names, the Guidebook adopts the ISO geographic names registry that includes prohibited geographic names and restricted geographic names, the latter which cannot be used over the objection of a nation that has an interest in such names. (*See* Guidebook, §§ 2.2.1.4.1, 2.2.1.4.2.) There is an initial review process for all applications for gTLDs. (Id., at § 1.1.2.5.) The objection process includes both an Independent Objector ("IO") process and the potentiality of an objection by one or more governments that make up ICANN's Government Advisory Committee ("GAC"). (Id., at §§ 1.1.2.4, 1.1.2.6., 3.2.5.) An IO can lodge an objection which ordinarily results in one or more independent experts being appointed by the International Chamber of Commerce to determine the merits of the objection, against criteria set forth in the Guidebook. (Id., at § 3.2.5.) Short of an objection, a GAC member government is permitted to lodge an "Early Warning Notice" expressing its public policy "concerns" regarding an application for a gTLD or string. (Id., at § 1.1.2.4.) The Guidebook also contemplates situations where the member governments of the GAC

provide "consensus advice" objecting to a string, in which case such "advice" is to be given a strong presumption against allowing an application to proceed. (*See generally* Guidebook, Module 3.)

20. There have been over 1,900 applications for gTLDs. Only a small fraction of them, less than 20, have been the subject of GAC advice. (Atallah Tr., 214.)

21. Amazon's applications passed ICANN's initial review process with flying colors, receiving the highest possible score in ICANN's initial review report ("IER"). (Hayden Statement, ¶¶ 25-30.) Indeed, on July 13, 2013, ICANN issued an IER for the .amazon application that received a maximum score of 41 out of a possible 41 points. (Id.) The IER stated that .amazon did "not fall within the criteria for a geographic name contained in the Applicant Guidebook § 2.2.1.4." (Id.) In other words, at this early stage, ICANN had determined that .amazon is not a listed geographic name in the AGB. This means that .amazon was not a prohibited nor restricted geographic name requiring governmental support. (Id., at ¶ 31.)

22. Nonetheless, on November 20, 2012, Amazon's applications were the subject of an Early Warning Notice filed by the governments of Brazil and Peru. (*See* Ex. C-22.) By its own terms, an Early Warning Notice is not an objection; however, it puts an applicant on notice that a government has a public policy concern about the applied for string that could be a subject of GAC advice at some later point in time. (*See* Guidebook, § 1.1.2.4.) The Early Warning Notice process is set forth in ICANN's Applicant Guidebook. (Id.)

23. The Early Warning Notice began with the recital that "The Amazon region constitutes an important part of the territory of . . . [eight nations, including six others besides Brazil and Peru] due to the extensive biodiversity and incalculable natural resources." (Ex. C-22, at 1.) Brazil and Peru then stated three reasons for their concerns about a private company, Amazon, being granted the gTLD "Amazon." (Id., at 1-2.) The reasons were that:

> (1) It would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising an issue related to the Amazon biome. It would also hinder the possibility of use of this domain name to congregate web pages related to the population inhabiting that geographical region;
>
> (2) The string "matched" part of the name, in English, of the "Amazon Cooperation Treaty Organization," an international organization formed under the Amazon Cooperation Treaty signed in 1978; and
>
> (3) The string had not received support from governments of countries where the geographic Amazon region is located.[1]

(*See* Id.)

24. In a note to the Early Warning Notice, Brazil stated:

> The principle of protection of geographic names that refer to regions that encompass peoples, communities, historic heritages and traditional social networks whose public interest could be affected by the assignment, to

[1] As noted elsewhere, under the Guidebook, a non-listed "geographic" name does not require government support.

> private entities, of gTLDs that directly refer to those spaces, is hereby registered with reference to the denomination in English of the Amazon region, but should not be limited to it.

(Id., at 3.) Brazil went on to state that its concerns about the .amazon string extended to the English word "amazon" in "other languages, including Amazon's IDN [internationalized domain name] applications" using Chinese and Japanese characters. (Id.)

25. The parties stipulated that none of the strings applied for by Amazon are listed geographic names as defined in ICANN's Applicant Guidebook. (Ex. C-102, ¶ 1; Expert Report of Dr. Heater Forrest, 18-28 [hereinafter Forrest Report].)

26. Part of Guidebook procedures provide for an Independent Objector ("IO") to challenge applications for domain names. (Guidebook, § 3.5.4.) Regarding Amazon's applications, on March 12, 2013, an IO, Alain Pellet, initiated community objections to Amazon's applications before the International Centre for Expertise of the International Chamber of Commerce ("Centre"). (Ex. C-102, ¶ 2.) The objections interposed by the IO were virtually identical to the concerns raised by Brazil and Peru in their Early Warning Notice. (Hayden Statement, ¶ 32.) Amazon responded to the IO's community objections in May 2013. Thereafter, on June 24, 2013, the Centre selected Professor Luca G. Radicati di Brozoli as an independent expert to evaluate the IO's objections. (Ex. C-47, at 4.) At the request of the IO, the independent expert, Professor Radicati, allowed both sides to file additional written statements. (Id., at 5.) The IO provided an augmented written statement on August 16, 2013, and Amazon replied to it on August 22, 2013. (Id., at 5.) Although, following an extension of time, his draft expert report

was due October 5, 2013, Dr. Radicati did not submit his final expert report until January 27, 2014. (Id., at 5, 25.)

27. On January 27, 2014, Professor Radicati issued a detailed Expert Determination rejecting the IO community objections. (*See* Ex. C-47.) He methodically considered the four factors laid out in Section 3.5.4 of the Guidebook as to whether the IO's objection on behalf of the community, i.e., the people and area of the Amazon region, had merit. (Id., at 13-14.) Regarding the first factor, he found that there was a strong association between the "community" invoked by the IO and the strings applied for. (Id., at 15.) As to the second factor, i.e., whether there as a "clear delineation of the community" invoked by the IO, Dr. Radicati indicated that: "The record is mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied." (Id., at 16-18.) In light of his conclusion that there was not material detriment to the community being represented by the IO, (*see* discussion *infra*), Dr. Radicati stated that there was no need to reach a "conclusive finding" on the second factor. (Id., at 18.)

28. One of the four factors was "[w]hether the Applications create a likelihood of material detriment to a significant portion of the Amazon community." (Id., at 21). Professor Radicati determined that the applied for string .amazon would not pose a material detriment to the region or the people who inhabit the geographic region proximate to the Amazon River. (Id., at 21-24)

29. Among other things, Professor Radicati found that neither the Amazon community nor any entity purporting to represent that community had applied for the string .amazon. (Id., at 23.) This failure alone, he found, "can be regarded as an indication that the

inability to use the Strings in *not crucial* to the protection of the Amazon Community's interests." (Id. (emphasis added).) Regarding his finding of an absence of material harm, Professor Radicati concluded that the fact that an objector is deprived of future use of a specific gTLD is not a material detriment under ICANN's Guidebook:

> [T]he Amazon Community's inability to use the Strings [.amazon and the two IDNs] is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that *"[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment"* (Section 3.5.4).

(Id., at 23 (Emphasis in the original).)

30. Further, supporting his finding of no material detriment to the Amazon community and region, Professor Radicati noted that the applicant, Amazon, has used the name "Amazon"

> as a brand, trademark and domain name for nearly two decades also in the States [including Brazil and Peru] arguably forming part of the Amazon Community. . . . There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.
>
> . . . [I]t is unlikely that the loss of the '.com" after 'Amazon' will change matters.

(Id., at 23).

31. Regarding the absence of material detriment factor, Professor Radicati concluded:

> More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and it specificities and importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. ".Amazonia" springs to mind.

(Id., at 23.)

32. Another factor considered by independent expert Radicati was: "Whether there is substantial opposition to the Strings within the community." (Id., at 19.) In rejecting the IO objections, Professor Radicati, while aware of the Early Warning Notice of Brazil and Peru, was evidently unaware that they continued to object to the applied for strings, nor was he aware of the GAC advice. (Id., at 20-21.) Indeed, he stated:

> As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.
>
> This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

(Id.) These considerations led Dr. Radicati to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community. (*See* id.)

33. Professor Radicati was mistaken about the continued lack of opposition to the string, especially from Brazil and Peru. Had he been informed of their opposition and the GAC advice objecting to the strings, it would no doubt have changed his finding regarding

whether there was substantial opposition to the strings. Nevertheless, even though, in addition to factors negating detriment, he considered lack of serious opposition as "indirect confirmation" of lack of detriment, it does not appear that Professor Radicati's lack of knowledge regarding the GAC advice would have significantly impacted the reasons for his finding that there was no material detriment to the interest of the people and region proximate to the Amazon River by awarding the string to Amazon. (Id., at 23-24.)

34. The NGPC, rejected Amazon's applications on May 14, 2014. While the NGPC had Professor Radicati's expert rulings and determinations before it, it did not discuss nor rely upon his expert determinations, *inter alia*, regarding the lack of material detriment, in making its decision to reject Amazon's applications. (Ex. C-102, ¶ 2.)

35. In order to assist it in carrying out its functions, ICANN has various supporting organizations and advisory committees. One such committee is the GAC which is comprised of representatives of governments from around the world and several multi-lateral governmental organizations. (Atallah Tr., 98-99.)

36. Amazon's applications were discussed at meetings of the GAC in Beijing in April, 2013[2] and, later, in Durban, South Africa on July 16, 2013.

37. At its plenary session in Durban on July 16, 2013, the GAC discussed the applications for the .amazon strings. The session was transcribed. (*See* Ex. C-40.) At this meeting, representatives of various nations spoke. (Id.) Brazil and Peru led the opposition to

[2] The Beijing GAC meeting was closed and there is no publicly available transcript of what was discussed respecting the application for .amazon and the related IDN strings in Japanese and Chinese characters.

Amazon's strings, and approximately 18 delegates of GAC member nations expressed general support for Brazil and Peru's position opposing the applied for strings. (Id.) With one or two exceptions of no significance, only the governments of Brazil and Peru expressed any actual reasons for opposing the applications, but if anything, Brazil and Peru's reasons at the GAC meeting were either less specific than the three they gave in their Early Warning Notice or they were not well-founded grounds for objecting to the applied for strings. The representative of Peru, for example, stated that the applications should be rejected because "Amazon" was an ISO "listed" geographic name in the Guidebook; a statement which the parties now agree was erroneous, but not corrected during the Durban meeting.[3] (Id., at 14-15.)

38. At the Durban GAC meeting, Brazil essentially pointed out that Brazil and other nations in the Amazon region of South America have a "concern" with the application to register the gTLD .amazon. (Id., at 11-13.) The reason for their concern, much less an articulated public policy concern, is not apparent. (Id.) For example, Brazil asked that the GAC reject the registration of "dot amazon by a private company in the name of the public interest." (Id., at 13.) Brazil does not define what the "public interest" for such a rejection would be. Moreover, how assigning .amazon to the applicant would harm the "public interest" was not explained. Brazil asserted that an undefined "community[,]" quite possibly, the people residing in the Amazon region, will "clearly be impacted[,]" but neither Brazil nor any other nation explained what this "impact"

[3] We note that the word "amazon" can be traced back to ancient Greece as meaning large, powerful female warriors. (*See Amazon*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/amazon (last visited June 12, 2017).) This meaning of the word is found in Virgil's Aeneid. Indeed, it is one of the word's defined meanings in the English language. (*Id*.)

would be or how it would harm the population living in the Amazon region or be detrimental to its "bio systems." (Id., at 11-13). Brazil stated that it cannot accept the registration of .amazon to the applicant as "a matter of principle," but nowhere does it make clear what that "principle" is. (Id., at 13.) A Brazilian vice minister added that dot amazon affected "communities" in eight countries, and it is important to protect "geographical and cultural names." (Id., at 13-14.) Again, he did not articulate how such "names" would be harmed. (Id.)

39. At the Durban meeting, the representative of Peru set forth three "points that we think are crucial to understanding our request [to reject the applied for strings]." (Id., at 14.) According to the Peruvian representative, they were:

    (1) "[L]egal grounds" found in the ICANN's Bylaws, in prior GAC advice and in the Guidebook, (Id., at 14.);[4]

    (2) The string is a geographic name listed in the Guidebook and therefore requiring governmental consent (Id., at 14-15.);[5] and

    (3) The national and local governments of the countries through which the Amazon River flows "have expressed, in writing, their rejection to dot amazon." (Id., at 14-15, 24.).[6]

[4] Based on our review, no "legal" grounds for rejecting the applications is apparent in those documents or elsewhere. (*See* Ex. C-48, at 7, 14.)
[5] As noted elsewhere, the word "Amazon" is not a listed geographic name in the Guidebook. Therefore, government consent is not required.
[6] *See* discussion *supra*, at 10 n. 1 (Individual governmental consent is not required by the Guidebook).

40. At the conclusion of the plenary session at Durban, after the representative of one nation acknowledged that "there are different viewpoints,"[7] the GAC Chair, Heather Dryden, asked:

> So I am now asking you in the [GAC] committee whether there are any objections to a GAC consensus objection to the applications for dot Amazon, which would include their IDN equivalents? I see none. . . . So it is decided.

(Id., at 30.)

41. In a communique at the conclusion of its Durban meeting, the GAC issued consensus[8] advice to the Board of ICANN recommending to the Board that it not proceed with Amazon's applications, stating:

> The GAC Advises the ICANN Board that:
>
> i. The GAC has reached consensus [that the following application should not proceed] on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:
>
> 1. The application for .amazon (application number 1-1315-58056) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591).

(Ex. R-22, at 3-4 (footnote omitted).)

42. In substance, the GAC "advice" or recommendation was that the Board should reject the applications for all three gTLDs applied for by Amazon. (Id.) No reasons were given by the GAC for its advice, nor did it provide a rationale for the same.[9] (*See* Id.)

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[7] *See* Ex. C-40, at 29.

[8] "Consensus" advice means, in essence, no nation objected to the position taken in the advice. It does not mean, however, that there was unanimous approval of the advice.

[9] The Panel requested that the parties attempt to secure a written statement from Heather Dryden, who was the Chair of the GAC at the time of the Durban meeting, regarding the reasons for the

43. During the course of the GAC's meetings in Durban, Amazon Vice President and Associate General Counsel Scott Hayden stated that Amazon "asked the GAC to grant us the opportunity to distribute to the GAC background materials about the .AMAZON Applications and the proposals we had made but the GAC Chair rejected our request." (Hayden Statement, ¶ 37.)

44. At all times pertinent herein, ICANN's Board delegated its authority to decide all issues relating to new gTLD program that would otherwise require a Board decision, including decisions regarding whether an application for a gTLD should proceed or be rejected, to the NGPC.[10] (Ex. C-54, at 6.)

45. Procedures set forth in the Applicant Guidebook, Module 3.1 provide for an opportunity for an applicant to provide a written response to GAC advice. Amazon submitted a response taking issue with the GAC advice. (*See* Ex. C-43.) Thereafter, regarding one of the issues raised by Amazon, that is, whether Brazil or Peru had a right under international law to the name indicating the geographic region or river called "Amazon," the NGPC commissioned an independent legal expert, Dr. Jerome Passa, a law professor at the Université Panthéon-Assas in Paris, France, to opine. (*See* Ex. C-48.)

46. In his March 31, 2014 report, Dr. Passa concluded that neither Brazil nor Peru had a legally cognizable right to the geographic name "Amazon" under international law, or for that matter under their own national laws. (Ex. C-48, at 7, 14; *accord* Forrest

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GAC advice. (Order No. 2, at 4.) No longer the GAC Chair, Ms. Dryden declined to provide a statement. (Atallah Tr., 95.)

[10] This delegation was made on April 10, 2012.

Report, 5, 9-12). In sum, he concluded that there was no legal principle supporting Brazil and Peru's objections. In other words, the legal objection of Brazil and Peru was without merit and did not provide a basis for the rejection of Amazon's gTLD applications.[11] (Ex. C-48, at 14.)

47. Moreover, Dr. Passa found that there was no prejudice to Brazil or Peru if the applied for strings were assigned to Amazon:

> Beyond the law of geographical indications [which do not support Brazil and Peru's legal claims], the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states [Brazil and Peru] who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

(Id., at 10; *see also* Ex. C-47, at 23.)

48. Both Amazon and the governments of Brazil and Peru were afforded an opportunity to respond to Dr. Passa's report. All three did so. (Ex. C-54, at 9-10.)

49. The NGPC considered Amazon's applications at several meetings. Following receipt of Dr. Passa's report and several letters responding thereto, the NGPC met on April 29, 2014 to consider the applications for the .amazon string and its Chinese and Japanese IDN equivalents. (*See* Ex. R-31, at 2-4.) The applications were discussed and the GAC advice referenced, but no decision was reached whether to allow the applications to proceed or to deny them. (Id.) Nor was any discussion or speculation by the NPGC

[11] Regarding whether Amazon had a legal right to be assigned the strings, Dr. Passa opined "no one can claim a TLD simply because the name it consists of is not included on the ISO list" and that Amazon did not have a legal right to the gTLD .amazon based on its registered trademarks for that name in Brazil, Peru and other nations. (Ex. C-48, at 10.) Amazon makes the point that it was not making a legal claim of right based on its trademarks. (Ex. C-51, at 2.)

regarding the rationale for the GAC advice, or any public policy reasons that supported it, reflected in the minutes of this meeting. (Id.)

50. At its May 14, 2014 meeting, the NGPC adopted a resolution[12] in which it rejected Amazon's applications. Under the heading "GAC Advice on .AMAZON (and related IDNs)," the NGPC resolved that: "[T]he NGPC accepts the GAC advice . . . and directs the [ICANN] President and CEO . . . that the applications . . . filed by Amazon EU S.à.r.l. should not proceed." (Ex. C-54, at 6-7.)

51. The resolution goes on to state:

> The action being approved today is to accept the GAC's advice to the ICANN Board contained in the GAC's Durban Communiqué stating that it is the consensus of the GAC that the applications . . . should not proceed. The New gTLD Applicant Guidebook (AGB) provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved." (AGB, § 3.1). To implement this advice, the NGPC is directing the ICANN President and CEO . . . that the applications . . . should not proceed.

(Id., at 7.)

52. After referencing the fact of Amazon's position opposing the GAC advice and stating that it considered the report of Dr. Passa "as part of the NGPC's deliberations in adopting the resolution," the resolution states: "The NGPC considered several significant factors during its deliberations about how to address the GAC advice . . . ." (Id., at 8-10.) The resolution noted that the NGPC "had to balance the competing interest of each factor to arrive at a decision." (Id., at 10.) Then, after noting that it

[12] The minutes of the NGPC meeting on May 14, 2014 (Ex. R-83) are substantially the same and recite verbatim the NGPC resolution. (Ex. C-54).

lacked the benefit of any rationale from the GAC for its advice, it listed factors it relied upon, which were:

(1) The Early Warning Notice submitted by Brazil and Peru that state as reasons for their concern, namely:

(a) The granting of the string to Amazon would deprive the string for use by some future party for purposes of protecting the Amazon biome and/or its use related to the populations inhabiting the Amazon region; and

(b) Part of the string matches the name in English of the Amazon Cooperation Treaty Organization. (Id., at 10.)[13]

(2) Curiously, the NGPC considered correspondence reflecting that Amazon sought to amicably resolve Brazil and Peru's objections. We assume that Amazon's effort to informally resolve concerns of Brazil and Peru was not a factor that *supported* the NGPC's decision denying Amazon's applications. (Id., at 10-11.)[14]

(3) The resolution correctly noted that, as it stood in the position of the ICANN Board, under the Guidebook the NGPC was called upon to "individually

[13] On its face, it is difficult to see how this partial, one-word match in English to a treaty organization's name is a valid reason that supports the GAC advice and hence the NGPC's decision. Indeed, it was undisputed that this organization is commonly referred to as "OTCA," an acronym for its name in Spanish. (Hayden Statement, ¶ 16; Forrest Report, 27.) There appears to be no reason to believe that internet users would be misled or confused.

[14] If so, this would be unwise policy for the same reason that evidence of settlement discussions is not to be considered against a party attempting to settle a matter. (*See, e.g.*, Fed. R. Ev. 408 (and international legal equivalents).)

consider an application for a new gTLD to determine whether approval would be in the best interests of the Internet community." (Id., at 11.)[15]

(4) The resolution goes on to list eighteen documents, including, for example, the Early Warning Notice, that the NGPC reviewed before deciding to reject Amazon's applications. (Id., at 11-13.) Aside from referring to the Early Warning Notice, there is no discussion in the resolution how any of these other documents impacted the NGPC's decision.

53. Thus, the only *reasons* articulated by the NGPC for its decision rejecting Amazon's applications were the strong presumption arising from the GAC consensus advice and, albeit without explanation, two reasons advanced by Brazil and Peru in their Early Warning Notice. Assuming that those reasons animated the GAC advice—and this is by no means clear[16]—there is no explanation by the NGPC in its resolution regarding why the reasons reflect well-founded and credible public policy interests.

54. The only live witness at the hearing was Akram Atallah, ICANN's Deputy Chief Executive Officer and President of its Global Domains Division. Mr. Atallah has held executive positions at ICANN since he joined in 2010, and, significantly, he attended all seven meetings of the NGPC at which Amazon's applications were agendized and discussed, and in particular the last two meetings on April 29 and May 14, 2014. (Atallah Tr., 86:14-24.)

[15] This factor neither supports the grant or the denial of the application, but merely reinforces that NGPC's duty to make an independent and balanced determination in the best interests of the Internet community.

[16] In her testimony before the *DCA Trust* IRP, GAC Chair Heather Dryden stated that Early Warning Notices, and the rationale of nations that issued them, do not reflect GAC's rationale for its advice. (Ex. CLA-5, 314:16-19; *see also* Atallah Tr., 306:12-24.)

55. In substance, Mr. Atallah testified that Amazon's applications would have been allowed to proceed, but for the GAC consensus advice opposing them. (Id., at 88-89).

56. Mr. Atallah testified that the NGPC did not consider the .ipiranga string, named for a famed waterway in Brazil, because neither Brazil nor the GAC opposed that string. Nor did Brazil submit an Early Warning Notice with respect to .ipiranga. (Id., at 90).

57. Regarding the impact of GAC consensus advice on the NGPC's decision, Mr. Atallah testified that ICANN is not controlled by governments, but ICANN procedures permit governments, through the GAC, to provide input, both as to ICANN policy matters and individual applications to ICANN. (Id., at 94-95.) The NPGC resolution (Ex. C-54) provides the entire rationale for the Board's (here, the NGPC's) decision to reject Amazon's applications. (Id., 93.) Because it lacks expertise, the NGPC, acting for the Board, did not and "will not substitute its decision" for the GAC's, especially on public interest issues. (Id., at 99-101, 128.)

58. Once the GAC provides the NGPC with consensus advice, Mr. Atallah explained, not only is there a strong presumption that it should be accepted, but it also sets a bar too "high for the Board to ignore." (Id.) Put differently, the bar is "too high for the Board to say no." (Id.) The Board, he said, defers to the consensus GAC advice as a determination that there is, in fact, a well-founded public policy reason supporting it. (Id., at 102). He added: "the board does not substitute its opinion to the opinion of the countries of that region when it comes to the public interest." (Id., at 128:16-18).

59. Mr. Atallah acknowledged that if GAC consensus advice was based upon the GAC's (or governments' advocating for a GAC consensus objection) mistaken view of

international law, it would outweigh the strong presumption and the advice would be rejected by the Board. (Id., at 127:11-128:4.) But the Board would not consider GAC consensus advice based on an anti-U.S. bias or "fear of foreign exploitation," whether rational or not, as grounds for rejecting such advice. (Id., at 129:21-130:9.)

60. Although the NGPC considered the reasons given in the Early Warning Notice, Mr. Atallah made clear that the NGPC made no independent inquiry regarding whether there was a well-founded public policy rationale for the GAC advice, (Id., 102:17-20), nor did the NGPC explain why the reasons given in the Early Warning Notice stated well-founded public policy concerns for rejecting the applications. Moreover, the NGPC in its resolution did not discuss, much less evaluate Brazil and Peru's reasons for their objection to the strings, (*see* Ex. C-54).

61. On August 22, 2014, ICANN's Board Governance Committee denied Amazon's request for reconsideration of the NGPC's decision. (Ex. C-67.)

62. On March 1, 2016, Amazon filed its Notice and Request for an Independent Review of the NGPC decision denying its applications.

III. PROVISIONS OF THE ICANN'S ARTICLES OF INCORPORATION, BY-LAWS AND APPLICANT GUIDEBOOK

63. The task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN's Articles of Incorporation, Bylaws and Applicant Guidebook.[17] The most

[17] While the Bylaws refer only to the Articles of Incorporation and Bylaws as subjects for the IRP process, the Panel is also permitted to determine whether the procedures of the Guidebook were followed. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration,

salient provisions of these governance documents are listed below.

64. **Article IV, Section 3(4) of the Bylaws and Rule 8 of ICANN Supplementary Procedures for Independent Review Process provide**:

> The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [i.e., the internet community as a whole]?

(*See* Bylaws, Art. IV, § 3(4).) Here, only compliance with requirements (ii) and (iii) is in issue.

65. **Art. 4 of the Articles of Incorporation**:

"[ICANN] shall operate for the benefit of the Internet community as a whole . . . ."

66. **Art. I, Sec. 2 of the Bylaws: CORE VALUES**[18]

> In performing its mission, the following core values should guide the decisions and actions of ICANN:
>
> . . .
>
> 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.
>
> 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making. . . .
>
> 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

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at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf; Resp't Prehearing Br., 6.)

[18] All references to the Bylaws are to those in effect at the time of the NGPC's decision, that is, the Bylaws, as amended July 2014. (*See* Ex. C-64.)

> 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. . . .
>
> 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness [such as the process of independent review].
>
> 11. While remaining rooted in the private sector, recognizing that governments . . . are responsible for public policy and duly taking into account governments' . . . recommendations.
>
> . . . Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

67. **Art. II, Sec. 3 of the Bylaws: NON-DISCRIMINATORY TREATMENT**

"ICANN shall not . . . single out any particular party for disparate treatment unless justified by substantial and reasonable cause . . . ."

68. **Art. III (TRANSPARENCY), Sec. 1 of the Bylaws: PURPOSE**

"ICANN and its constituent bodies shall operate to the maximum extent feasible in a[] . . . transparent manner and consistent with procedures designed to ensure fairness."

69. **Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 1 of the Bylaws: PURPOSE**

". . . ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

70. **Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 3 of the Bylaws: INDEPENDENT REVIEW OF BOARD ACTIONS**

The Board, or in this case, the NGPC final decision is subject to an "independent review" by this independent review panel to determine whether the Board/NGPC made

its decision in a manner consistent with ICANN's articles of incorporation, applicable Bylaws and the applicant guidebook, i.e., its governance documents.

71. **Art. XI (ADVISORY COMMITTEES), Sec. 1 of the Bylaws: GENERAL**

"Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board."

72. **Art. XI, Sec. 2(1)(a) of the Bylaws**

"The [GAC] should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly . . . where they may affect public policy issues."

73. **Art. XI, Sec. 2(1)(j) of the Bylaws**

"The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies."

74. **Module 2 of the Applicant Guidebook** [19]

Module 2 of the Guidebook sets forth the evaluation procedures for gTLD strings, including string similarity, string confusion, DNS stability, reserved names and geographic names.

75. **Sec. 2.2.1.4 of the Applicant Guidebook**

"Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments . . . in geographic names. The requirements and procedure

[19] The applicable version of the Guidebook for purposes of this IRP is Version 10 published on June 4, 2012. (*See* Ex. C-20; Resp't Prehearing Br., 10 n. 29.)

ICANN will follow in the evaluation process are described in the following paragraphs."

76. **Sec. 2.2.1.4.2 of the Applicant Guidebook**

"The following types of applied-for strings are considered geographic names and [require] . . . non-objection from the relevant governments . . . ." This is followed by a list of four specific categories, including, *inter alia*, cities, sub-national place names, etc.

77. **Sec. 2.2.1.4.4 of the Applicant Guidebook**

> "A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name . . . . For any application where the GNP determines that the applied-for string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required."

78. **Attachment to Module 2 of the Applicant Guidebook, at A-1**

"It is ICANN's goal to make the criteria and evaluation as objective as possible."

79. **Module 3 of the Applicant Guidebook**

Module 3 relates to Objection Procedures.

80. **Sec. 3.1, GAC Advice on New gTLDs of the Applicant Guidebook**

> The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities [i.e., may affect public policy issues].
>
> . . .
>
> . . . The GAC [may] advise[] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN that the application should not be approved.

IV. PARTIES' POSITIONS AND REQUEST FOR RELIEF

81. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties and then provides the reasons for its Declaration.

82. Amazon seeks a declaration that the NGPC, acting for the Board, acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its rejection of the Amazon applications. Distilled to their essence, Amazon makes the following contentions:

    a. The GAC was required to state a reason(s) or rationale for its consensus advice, i.e., reason(s) for recommending that Amazon's applications be denied.

    b. As a constituent body of ICANN, the GAC was required to adhere to the Bylaws' duties of procedural fairness under Article III, Section 1. To comply with this Bylaw, the GAC was either required to permit Amazon, as the potentially adversely affected party in interest, to appear before the GAC or, at a minimum, submit information to the GAC in writing before it issued consensus advice.

    c. To warrant a strong presumption, GAC advice must be based upon a valid and legitimate public policy interest(s).

    d. By failing to make an independent evaluation of whether or not there was a valid public policy rationale for the GAC advice, the NGPC abdicated its independent decision making function to the GAC, converted the strong presumption to be given to GAC consensus advice into a conclusive presumption or veto, and otherwise abandoned its obligation to make a sufficient due diligence

investigation of the facts needed to support its decision and/or failed to make an independent, merits-based decision in the best overall interest of the Internet community.

e. To comply with ICANN's transparency obligations, the NGPC must give reasons for its decisions. The NGPC's resolution of May 14, 2014 is not a sufficient statement of reasons for its decision rejecting Amazon's applications in that the NGPC failed to state any public policy rationale for its decision and/or balance the interests of Amazon favoring the granting of the applications with public policy interests militating against granting same.

f. The ICANN Board, acting through the NGPC, violated its obligation not to engage in disparate treatment of the applicant under Article II, Section 3 of the Bylaws by denying its application, whereas under similar circumstances a private Brazilian corporation was granted the gTLD of .ipiranga, a string based on the name of another celebrated waterway in Brazil.[20]

83. As for relief, in addition to a declaration by this Panel that the NGPC acted inconsistently with ICANN governance documents, Amazon seeks affirmative relief in the form of a direction to ICANN to grant Amazon's applications. Alternatively, Amazon asks the Panel to recommend to the ICANN Board that its applications be granted and to set timelines for implementation of the Panel's recommendation, including a timeline for ICANN's "meet and confer" obligation with the GAC.[21]

[20] The Ipiranga is mentioned in the Brazilian national anthem.
[21] In these circumstances, Amazon urges the Panel to retain jurisdiction until final resolution of this matter by the Board.

84. ICANN disputes each of Amazon's contentions and asserts that the NPGC did not violate the Articles of Incorporation, the Bylaws or the Guidebook. Fairly synthesized, it argues:

a. There is nothing in the Articles of Incorporation, applicable Bylaws[22] or Guidebook that requires the GAC to state any reason for its consensus advice.

b. The procedural fairness obligation applicable to the GAC, as a constituent body of ICANN, did not require the Board to assure that a representative of a private company be able to appear before the GAC, nor did it require the Board to allow a potentially adversely affected party to be able to submit written statements to the GAC.[23]

c. Although the GAC advice must be based on legitimate public policy considerations, even in the absence of a rationale for the GAC advice, there was sufficient support in the record before the NGPC for the NGPC to discern a well-founded public policy interest, and it was proper for the NGPC to consider reasons given in the Early Warning Notice as providing a public policy reason supporting the NGPC decision.

d. Given the strong presumption arising from GAC consensus advice, the NGPC appropriately decided to reject Amazon's applications.

[22] Although not applicable to this IRP, Section 12.3 of the new version of the Bylaws adopted in 2016 requires all advisory committees of ICANN, including the GAC, to include "the rationale for such advice." (*See* Ex. R-81; ICANN Bylaws, § 12.3 (eff. Oct. 1, 2016).) The new Bylaws indicate that they are not intended to be retroactive. (*See* ICANN Bylaws, § 27.4 (eff. Oct. 1, 2016.)

[23] ICANN also noted that Amazon had an opportunity to "lobby" governments in between the GAC meetings at which Amazon's applications were discussed and it, in fact, did so. ICANN argued that this overcomes any lack of procedural fairness regarding the GAC.

e. The NGPC gave reasons for its decision, and the reasons given by the NGPC for denying Amazon's applications are sufficient.

f. The NGPC did not engage in disparate treatment of Amazon. The anti-disparate treatment provision contained in the Article II, Section 3 of the Bylaws should be read, not as applying to ICANN as a whole, but as a limitation on actions of the ICANN Board. As there was no objection to .ipiranga, neither the NGPC nor the Board was ever called on to decide whether .ipiranga should be granted to a private company.[24] Accordingly, there could be no disparate treatment by the Board, or the NGPC acting for the Board, regarding the strings at issue in this proceeding.

g. Amazon's challenge to a 2011 change in the Applicant Guidebook relieving the GAC of any requirement to provide reasons for its advice is untimely.

85. Further, ICANN takes issue with the relief requested by Amazon. It argues that the Panel's powers are limited under the Bylaws to declaring whether or not the Board, or in this case the NGPC, complied with its obligations under ICANN's governance documents. It acknowledges, however, that if the Panel finds that the NGPC acted in a manner inconsistent with the governance documents, the Panel may properly make remedial recommendations to the Board.

V. ANALYSIS OF ISSUES AND REASONS FOR DECISION

86. The majority of the Panel discusses *seriatim* each of the pertinent issues fairly raised by parties as part of the Independent Review Process.

[24] ICANN also argued that the Ipiranga, a small waterway running through Sao Paolo, paled by comparison to the Amazon River, both in length and importance.

A. Was the GAC required to state a reason(s) or provide a rationale for its advice?

87. There is little question that a statement of reasons by the GAC, when providing consensus advice regarding an application for an internet name, is desirable. Having a reason or rationale would no doubt be helpful to the ICANN Board in evaluating the GAC's advice and assuring that there is a well-founded public policy interest behind it. Nonetheless, there is no specific requirement that the GAC provide a reason or rationale for its advice, and therefore, we conclude that a rationale or statement of reasons by the GAC was not required at the time of its action in this matter.[25]

88. Amazon argues the decision in the *DCA Trust* IRP, particularly paragraph 74, is precedent for proposition that the GAC must provide a reason for its advice. In that IRP, the Panel held: "As previously decided by this Panel, such accountability requires an organization to *explain or give reasons* for it activities, accept responsibility for them and to disclose the results in a transparent manner." (*See DotConnectAfrica Trust v. ICANN*, Case No. 50-2013-001083, Final Declaration, at ¶ 74 (Int'l Centre for Dispute Resolution, July 31, 2015), https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf (Emphasis added) [hereinafter *DCA Trust*].)

89. While prior IRP decisions are indeed precedential, although not binding on this Panel,[26] we believe that read in context, *DCA Trust* stands for the proposition that the Board, to meet its accountability and transparency obligations, must give reasons for its actions. We do not read this language as requiring the GAC to do so.

90. It is true that ICANN changed its Bylaws in 2016 and now the GAC is required to provide a rationale for its advice, but this change is not retroactive, and, contrary to

[25] *See* discussion *supra*, at 32 n. 22 (discussing a change in the Bylaws effective 2016).
[26] *See* Bylaws, Article IV, Section 3(21).

Amazon's argument, cannot be viewed as merely codifying the holding in *DCA Trust*. (*See* discussion *supra*, at 32 n. 22.)

B. <u>Was Article III, Section 1's procedural fairness requirement violated?</u>

91. This issue is evidently one of first impression. We have been unable to find any prior IRP matter that has considered this issue with respect to the GAC, and none was cited to us by the parties.

92. Article III, Section 1 of the Bylaws provides: "ICANN *and its constituent bodies* shall operate . . . with procedures designed to ensure fairness." (Emphasis added.)

93. The GAC is a constituent body of ICANN within the meaning of this Article. Indeed, ICANN does not argue otherwise. Nor is there any doubt, under the facts presented, that Amazon attempted to offer a written statement or materials regarding why the GAC should not adopt consensus advice opposing Amazon's applications. (Hayden Statement, ¶ 37.) It was not permitted to do so. (Id.) Nor is there any doubt that, as the applicant, Amazon stood to be materially adversely affected if the GAC issued consensus advice against its application, if for no other reason than there would be a strong presumption that, if the GAC did so, Amazon's application should be rejected by the ICANN Board.

94. Basic principles of procedural fairness entitle an applicant who request to have the opportunity to be heard in some manner before the GAC, as a constituent body of the ICANN. There is, however, a question of how much procedural fairness is required to satisfy Article III, Section 1. We need not decide whether such procedural fairness necessarily rises to the level normally required by administrative and quasi-judicial bodies. (*See,* e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313

(1950).) However, in matters relating to individual applications being considered by the ICANN Board itself, it is noteworthy that while individual applicants are not permitted to appear in person and make a presentation to the Board, ICANN's procedures permit an applicant, whose interests may be adversely affected by a decision of the Board regarding its application, to submit a written statement to the Board as to why its application should be permitted to proceed. The Panel is of the view that the same type of procedural fairness afforded by the Board required the GAC, as a constituent body of ICANN, to provide a comparable opportunity. Thus, under the facts of this IRP, the procedural fairness obligation applicable to the GAC, at a minimum, required that the GAC allow a written statement or comment from a potentially adversely affected party, before it decided whether to issue consensus advice objecting to an application. The Board's obligation was to see that the GAC, as a constituent body of ICANN, had such a procedure and that it followed it.

95. In this case, Amazon attempted to distribute written materials explaining its position to the GAC, but the GAC Chair denied its request. (Hayden Statement, ¶ 37.) Allowing a written submission would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that "Amazon" was a *listed* geographic name under the Guidebook. Amazon might have been able to submit information that neither Brazil nor Peru had a legal or sovereign right to the name "Amazon" under international or domestic law and that Amazon had registered the trademark or trade name of "Amazon" in many nations of the world, including Brazil and Peru. In any event, the failure to provide Amazon with an opportunity to submit a written statement - - despite its request that it be allowed to do

so - - to the very body of ICANN that was considering recommending against its application violated Article III, Section 1.

96. In the view of the majority of the Panel, while the GAC had the ability to establish its own method of proceeding, its failure to afford Amazon the opportunity to submit a written statement to the GAC governments at their meeting in Durban undermines the strength of the presumption that would otherwise be accorded GAC consensus advice. While our holding is limited to the facts presented in this matter, it draws support from the principle that a party has the right to present its views where a judicial or arbitral body is deciding its case. Indeed, this fundamental principle of procedural fairness is widely recognized in international law. Moreover, international law also supports the view that the failure to afford a party the opportunity to be present its position affects the value of the decision-making body's proclamations. For example, in the realm of international arbitration, the awards of arbitrators are given substantial, nearly irrefutable, deference. (*See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. III, V, July 6, 1988, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention").) However, the New York Convention allows a court to refuse to enforce an arbitration award—that is, refuse to show the arbitrators deference—if "[t]he party against whom the award is invoked was not given proper notice . . . or was otherwise unable to present his case." (Id., at art. V(1)(b).) Identical provisions allowing a party to either set aside an arbitration award or resist its enforcement appear in the Model Law on International Commercial Arbitration published by United Nations Commission on International Trade Law. (See United Nations Commission on International Trade Law, UNCITRAL Model Law on

International Commercial Arbitration 1985, with Amendments as Adopted in 2008, arts. 34(2)(a)(ii), 36(1)(a)(ii) (Vienna: United Nations, 2008).)

97. We find that this principle, enshrined in international arbitration law by convention, is instructive here. While the GAC is indisputably a political body - - not a judicial or arbitral body - - its consideration of specific gTLD applications takes place within the framework of the ICANN Board's application review process where the GAC's consensus advice is given a strong presumption by the Board, which itself is functioning as a quasi-judicial body. Thus, under the facts before us, the GAC's decision not to provide a affected party with the opportunity to be present a written statement of its position, notwithstanding its specific request to do so, not only constitutes a violation of procedural fairness obligations under Article III, Section 1 of the ICANN Bylaws, it diminishes the strength of the strong presumption that would otherwise be warranted based upon GAC consensus advice.

98. It is true, as ICANN established at the hearing, that because Amazon's applications were considered at two GAC meetings, Amazon had an opportunity between those meetings to lobby one or more governments to object to consensus advice, and it attempted to do so. Whatever this opportunity was, however, it was not a procedure that the GAC made available when requested by an applicant. Moreover, attempting to influence governments, who have their own political agendas and trade-offs that could be extraneous to the merits of an application for an internet name, is not the same as procedural fairness provided by the GAC itself. That duty is independently mandated under the Bylaws and is not supplanted by an opportunity to lobby governments apart from or in-between GAC meetings.

99. Our decision regarding minimum procedural fairness required by Article III, Section 1 of the Bylaws finds support in the *DCA Trust* IRP. In that matter, the Panel noted that DCA Trust was not given "an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice[.]" (*See DCA Trust*, at ¶ 109.) The *DCA Trust* Panel went on to hold that this lack of procedural opportunity was "not [a] procedure[] designed to insure the fairness required by Article III, sec. 1." (*Id*.)

C. <u>Must GAC advice be based upon public policy considerations?</u>

100. The reasons for GAC Advice, even if not expressed, as is the case before us, must nonetheless be grounded in public policy. This proposition is fairly gleaned from several provisions of ICANN's governance documents. Thus, the Bylaws recognize that the GAC's purpose is to advise the Board regarding its activities "where they may affect public policy issues." (Bylaws, art. XI, § 2(1)(a).) So, not only does the GAC have an important role in providing recommendations and advice regarding policy development by ICANN, but it also can intervene regarding a specific application to ICANN provided that the application raises legitimate public policy concerns. The GAC Operating Principles reinforce the need for a nexus between GAC advice and legitimate public policy concerns. (*See* ICANN Governmental Advisory Comm. Operating Principles, art. I, principles 2, 4.) Although not a decision-making body, as reflected in its Operating Principles, the GAC views itself as providing advice and recommendations to the ICANN Board and operating as a forum to discuss "government and other public policy issues and concerns." (Id.) The Applicant

Guidebook indicates that the GAC may object when an application "violates national laws or raises sensitivities."[27] (Guidebook, module 3.1.)

101. Moreover, the public policy concerns underlying GAC advice must be well-founded. Mr. Atallah acknowledged that if GAC consensus advice was based upon a mistaken view of international law, the Board would reject such advice. (Atallah Tr., 127:14-128:4.) Thus, we conclude that if, for example, in the unlikely event that GAC consensus advice was animated by purely private interests, or corruptly procured, the ICANN Board would properly reject it. Put differently, such advice, even if consensus advice, would not be well-founded and would not warrant a strong presumption, or any presumption at all. Similarly, if the only reason for the GAC advice was that the applied for string is a listed geographic name under the Guidebook, whereas in truth and in fact it is not a listed geographic name, that reason, although based on public policy concerns, would be not be well-founded and, therefore, would be rejected by the Board. Put differently, the objection based on such grounds would not warrant a presumption that it should be sustained. Similarly, if the reason for objecting to the string is that assigning it would violate international or national laws, consensus advice might warrant a presumption if well-founded, but that presumption would be overcome by expert reports that make clear that neither international law, nor national law of the

[27] As noted, based on the record before us, the granting of Amazon's application would violate no country's national laws. As for sensitivities, it is noteworthy that nowhere in the record is there a claim, much less any support for same, that the people who inhabit the Amazon region would find the use by the applicant of the English-language string, .amazon, derogatory or offensive. Brazil's statement of concerns regarding the "risks" of granting the applications that relates to "a very important cultural, traditional, regional and geographical name related to the Brazilian culture" falls short of identifying what those "risks" are. (*See* Ex. C-40, at 11-13.) Nor did the delegates from Brazil or Peru articulate why the use of the string would be offensive to the sensibilities of people inhabiting the Amazon River basin. (*See* id.) There was no evidence in the record to support such an assertion, even had it been made.

objecting countries, prohibit the assignment of the string to the applicant. This is especially true where, as here, an independent expert report commissioned by the NGPC made clear that the legal objection of Brazil and Peru lacked merit. If the only reason for the consensus advice is that another entity, presumably a non-governmental organization (NGO), in the future would be denied the string, at a minimum the NGPC, acting for the Board, would need to explain why the Guidebook rule that deprivation of future use of a string, standing alone, is not a basis to deny a string is inapplicable. Further, if the public policy concern supporting the GAC advice is implausible or irrational, presumably the Board would find it not well-founded and would not be compelled to follow it, notwithstanding the strong presumption. (*Cf.* Atallah Tr., 128:24-129:20.)

102. The foregoing illustrates why it is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board. In this matter, the only arguably valid reason for the GAC advice is the assertion by Brazil and Peru that sometime in the future a NGO or other entity may wish to use the applied for English gTLD and equivalents in Chinese and Japanese characters to promote the environment and/or the culture of indigenous people of the Amazon region. This is no doubt a public policy concern. However, the evidence before the NGPC, in the form of expert reports of Dr. Passa and Dr. Radicati, indicates quite clearly that there is no prejudice or material harm to potential future users of the applied for strings. Ordinarily, the Board defers to expert reports, especially expert reports, such as Dr. Passa's, commissioned by the Board, or in this instance, by the NGPC functioning as the Board.

103. We conclude that GAC consensus advice, although no reasons or rationale need be given, nonetheless must be based on a well-founded public interest concern and this public interest basis must be ascertained or ascertainable from the entirety of the record before the NGPC. In other words, the reason(s) supporting the GAC consensus advice, and hence the NGPC decision, must be tethered to valid and legitimate public policy considerations. If the record fails to contain such reasons, or the reason given is not supported by the record, the Board, in this case acting through the NGPC, should not accept the advice.[28]

104. As we explain more fully below, the Board cannot simply accept GAC consensus advice as conclusive. The GAC has not been granted a veto under ICANN's governance documents. If the NGPC's *only* basis for rejecting the applications was the strong presumption flowing from GAC consensus advice, this would have the effect of converting the consensus advice into a conclusive presumption and, in reality, impermissibly shifting the Board's duty to make an independent and objective decision on the applications to the GAC.

105. In this matter, the NGPC relied upon the reasons set out in the Early Warning Notice of Brazil and Peru as providing a rationale supporting the GAC advice. Although there is no clear evidence that the rationale for objecting to the use of the applied-for strings advanced by Brazil and Peru in the Early Warning Notice formed the rationale for the

[28] Under ICANN procedures, the Board would then engage the GAC in further discussions and give GAC a reason why it is doing so. (Atallah Tr., 121-128.) In this case, the reason might well be that there is no discernable valid and legitimate public policy reason for the GAC's recommendation. To the extent that reasons were given in the Early Warning Notice, the mere deprivation of the future use of the string does not appear to be a material reason, especially where there is no showing of harm or prejudice to the environment or inhabitants of the Amazon region.

GAC advice,[29] we believe it was appropriate for the NGPC to consider the reasons given by Brazil and Peru as support for the NGPC's decision, along with the presumption of valid public policy concerns arising from the consensus advice, as a basis for denying Amazon's application. Needless to say, however, the Early Warning Notice itself is not entitled to any presumption that it contains valid public policy reasons.

106. That said, as noted above, the reasons given by Brazil and Peru in their Early Warning Notice do not appear to be based on well-founded public policy concerns that justify the denial of the applications. Further, Brazil and Peru's objection to the applications based on deprivation of future use of the strings is not supported by the record, including the expert reports that are part of that record. In these circumstances, we are constrained to conclude that there is nothing to support the NGPC's decision other than the presumption arising from GAC consensus advice. There must be something more than just the presumption if the NGPC is to be said to have exercised its duty to make an independent decision regarding the applications, especially where, as in this matter, the GAC did not provide the ICANN Board with a rationale or reasons for its advice.

D. Were the Early Warning Notice reasons relied on by the NGPC well-founded public policy reasons?

107. Because the NGPC did not set forth its own reasons or analysis regarding the existence of a well-founded public policy concern justifying its rejection of the applications, the Panel must undertake to review the record before the NGPC. Having done so, we are

[29] Indeed, the testimony of Heather Dryden, the former Chair of the GAC, in the *DCA Trust* IRP, part of the record in this IRP, indicates that there is no consensus GAC rationale for its advice. (Ex. CLA-5, 322:24-324:21.)

unable to discern from the record before the NGPC a well-founded public policy rationale for rejecting the applications.

108. Four reasons were asserted by Brazil and Peru in their Early Warning Notice and the discussion at the meeting of the GAC in Durban on July 16, 2013:

a. Peru asserted that applications should be rejected because "Amazon" is a listed geographic name. ICANN, however, concedes that Peru's assertion, made at GAC's Durban meeting to rally support for GAC advice opposing Amazon's application, was erroneous. "Amazon" is not a listed geographic name. (*See* Ex. C-40, at 14-15, 24; Ex. C-102, ¶ 1.)

b. Brazil and Peru asserted legal rights to the name ".amazon" under international law, causing the NGPC to ask for an expert opinion on this issue. (Atallah Tr., 216:4-13.) Peru specifically claimed it had legal grounds to the name "Amazon," as it denotes a river and a region in both Brazil and Peru, (*see, e.g.*, Ex. C-40, at 14), and it invoked the "rights of countries to intervene in claims that include words that represent a geographical location of their own," (Ex. C-95, at 2). The legal claim of Brazil and Peru is without merit. Dr. Passa's report, part of the record before the NGPC, makes plain that neither nation has a legal or sovereign right under international law, or even their own national laws, to the name. (Ex. C-48.) There appear to be no inherent governmental rights to geographic terms. (*See* Ex. C-34; Forrest Report, ¶ 5.2.1.)

c. Brazil and Peru asserted in their Early Warning Notice that unidentified governmental or non-governmental organizations, who in the future may be interested in using the string to protect the environment ("biome") of the Amazon

region or promote the culture of the people that live in this region, will be deprived of future use of the .amazon top level domain name if the applications are granted. (Ex. C-40, at 11-12.) We discuss this assertion below.

d. Brazil and Peru also asserted that they objected to the applied-for string .amazon because it matched one of the words, in English, used by the Amazon Cooperation Treaty Organization. (*See* Ex. C-22, at 1.) A one word match is not likely to be misleading and is not a plausible public policy reason for an objection. (*See* discussion *supra*, at 22 n. 13.)

109. Only the third reason possibly presents a plausible public policy reason that could be considered to be well-founded. As discussed earlier, the record before the NGPC, however, undermines even this assertion as a well-founded reason for the GAC advice and, therefore, does not support the NGPC's decision denying the applications. First, it is noteworthy that under ICANN's own rules the mere fact that an entity will be deprived of the future use of a string is not a material reason for denying a domain name to an applicant. Indeed, the Guidebook prohibits ICANN from a finding of harm based solely on "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector." (Guidebook, § 3.5.4.) Thus, even had a non-governmental organization filed an application for the .amazon gTLD in order to promote the environment of the Amazon River basin or its inhabitants and objected to that string be awarded to the applicant, this would not alone justify denial of Amazon's applications. While not dispositive, it does lead us to conclude that there must be some evidence of detriment to the public interest in order to justify the rejection of the applications for the strings.

110. Even if, *arguendo*, deprivation of future use could be considered a public policy reason, the uncontroverted record before the NGPC, found in two expert reports, the report of ICC independent expert Professor Radicati di Brozolo and the expert report by Dr. Passa commissioned by the NGPC, was that the use of the string by Amazon was not prejudicial and would not harm such potential future interest in the name, because (1) no entity other than Amazon has applied for the string, (2) Amazon has used this tradename and domain name for decades without any indication it has harmed the geographic region of the Amazon River or the people who live there, and (3) equally evocative strings exist, such as "Amazonia" and "Amazonas"[30] that could be used in the future to further the interests to which Brazil and Peru alluded in their Early Warning Notices. (*See* Ex. C-47, at 13-14, 21-23; Ex. C-48, at 10.) Although Professor Radicati was not informed of the GAC advice[31] , that alone does not undermine his determination that there was no material detriment to the interests of the people inhabiting the Amazon region by awarding the applicant the .amazon string. Moreover, his findings regarding the absence of prejudice or detriment are consistent with and are supported by those of Dr. Passa, the NGPC's independent expert, who was well aware of the GAC objection to the string.

111. The NGPC did not analyze Professor Radicati's or Dr. Passa's reports in its resolution denying the applications. In absence of any statement of the reasons by the NGPC for denying the applications, beyond deference to the GAC advice, we conclude that the NGPC failed to act in a manner consistent with its obligation under the ICANN

[30] It is noteworthy that Amazon agreed not to object to .amazonas and .amazonia, if they were to be applied for. (Hayden Statement, ¶ 21.)

[31] The Panel is surprised and troubled that neither the IO nor Amazon informed Professor Radicati of the GAC advice objecting to the strings before he made his determinations.

governance documents to make an independent, objective decision on the applications at issue. (See Bylaws, art. IV, § 3(4); Supplementary Procedures, Rule 8(iii).) Moreover, without such an explication of a reason indicating a well-founded public policy interest, the Panel is unable to discharge meaningfully its independent review function to determine whether the NGPC made an independent, objective and merits-based decision in this matter.

E. Was the NGPC required to state its reasons for its decision denying the applications?

112. Although the GAC was not required to state reasons for its action (*see* discussion *supra* at 34-35), under the circumstances presented in this matter we hold that, in order to comply with its governance documents, the Board, in this case the NGPC, *was* required to state reasons for its decision in order to satisfy the community that it rendered an independent and objective decision in this matter. "[A]ccountability requires an organization *to explain or give reasons* for its activities." (*See DCA Trust*, at ¶ 74; *accord Vistaprint Ltd. v. ICANN*, Case No. 01-14-0000-6505, Final Declaration, at ¶ 190 (Int'l Centre for Dispute Resolution, Oct. 9, 2015), https://www.icann.org /en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf [hereinafter *Vistaprint*] (stating that the Board's decisions should be "supported by a reasoned analysis.") (quoting *Gulf Cooperation Council v. ICANN*, Case No. 01-14-0002-1065, Interim Declaration on Emergency Request, at ¶ 76 (Int'l Centre for Dispute Resolution, Feb. 12, 2015) https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf).) Similar to *GCC* Final, para. 142, the NGPC resolution in this matter does not discuss the factors or reasons that led to its decision denying the applications, beyond the presumption flowing from

GAC consensus advice. Suffice it to say, the minutes of the NGPC's May 14, 2014 meeting and its resolution adopted that date are bereft of a reasoned analysis.

113. To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC Advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by well-founded public interests. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws as there would be scant possibility of holding it accountable for its decision. (*See* Bylaws, art. I, § 2(8), art. III, § 1.) Here, the limited explanation of the NGPC is deficient. Certainly, there is no way that an independent review process would be able to assess whether an independent and objective decision was made, beyond reliance on the presumption, in denying the applications. The NGPC failed to articulate a well-founded public policy reason supporting its decision. In the event the NGPC was unable to ascertain and state a valid public policy interest for its decision, it had a due diligence duty to further investigate before rejecting Amazon's applications. (Supplementary Procedures, Rule 8(ii); *see also DCA Trust*, at ¶ 74.)

F. Absent a well-founded public policy reason, did the NGPC impermissibly give the GAC consensus advice a conclusive presumption?

114. Implicit in the NGPC resolution is that the GAC advice was based on concerns stated by Brazil and Peru in their Early Warning Notice and that the reasons given in the Early Warning Notice by Brazil and Peru for objecting were based on valid, legitimate and credible public policy concerns. An Early Warning Notice, in and of itself, is not reason for rejecting an application. At a minimum, it would require that the Board independently find that the reason(s) for the objections stated therein reflect a well-

founded public policy interest. As there is no explanation in the NGPC resolution why any of the reasons given by Brazil and Peru supported its decision to reject the applications, we have concluded above that there was not a sufficient statement of the reasons by the NGPC to satisfy the requirement of the Bylaws that the Board give reasons for its decisions.

115. In his testimony, Mr. Atallah acknowledged that ICANN is not controlled by governments, even when governments, through the GAC, provide consensus advice. (Atallah Tr., 94-95.) Consensus advice from the GAC is entitled to a strong presumption that it is based on valid public policy interests, but not a conclusive presumption. In its governance documents, ICANN could have given consensus GAC advice a conclusive presumption or a veto, but it chose not to do so.

116. Yet in this matter, Mr. Atallah candidly admitted that when the GAC issued consensus advice against Amazon's applications, the bar was too high for the Board (NGPC) to say "no." (Atallah Tr., 100-101, 128.) Clearly, the NGPC deferred to the consensus GAC advice regarding the existence of a valid public policy concern and by so doing, it abandoned its obligation under ICANN governance documents to make an independent, merits-based and objective decision whether or not to allow the applications to proceed. By failing to independently evaluate and articulate the existence of a well-founded public policy reason for the GAC advice, the NGPC, in effect, created a conclusive or irrebuttable presumption for the GAC consensus advice. In essence, it conferred on the GAC a veto over the applications; something that went beyond and was inconsistent with ICANN's own rules.

117. Moreover, as observed above, we are unable to discern from the Early Warning Notice a well-founded public policy reason for the NGPC's action. There being none evident, and none stated by the NGPC, much less the GAC, the only rationale supporting the NGPC's decision appears to be the strong presumption of a public policy interest to be accorded to GAC consensus advice. But as that is the only basis in the record supporting the NGPC's decision, to let the NGPC decision stand would be tantamount to converting the strong presumption into a conclusive one and, in effect, give the GAC a veto over the gTLD applications. This would impermissibly change the rules developed and adopted in the Guidebook. And it would also run afoul of two important governance principles of ICANN:

- That the Board state reasons for its decisions; and
- That the Board make independent and objective decisions on the merits.

118. It is noteworthy that, while the NGPC's resolution listed many documents that it considered, the NGPC did not explain how those documents may or may not have affected its own reasons or rationale for denying Amazon's applications, other than its reference to the GAC consensus advice and its presumption. Moreover, nowhere does the NGPC explain why rejecting Amazon's application is in the best interest of the Internet community, especially where a well-founded public policy interest for the GAC advice is not evident.

119. Under these circumstances, the NGPC's decision rejecting the Amazon application is inconsistent with it governance documents and, therefore, cannot stand.

G. Did the NGPC violate ICANN's prohibition against disparate treatment when it denied the applications?

120. Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

121. It is accurate that ICANN's Bylaws prohibit discriminatory treatment by the Board in applying its policies and practices regarding a particular party "unless justified by substantial and reasonable cause." (Bylaws, art. II, § 3.) As pointed out by ICANN's counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws' proscription against disparate treatment applies to Board action, and this threshold requirement is missing. Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

H. Was Amazon's objection to changes to the applicant guidebook untimely?

122. In essence, Amazon argued that the GAC was required to state reasons for its advice under earlier iterations of the Guidebook. To the extent that earlier versions of the Guidebook supported Amazon's contention, the Guidebook was changed in 2012 and earlier requirements that the GAC state reasons for its advice or provide specific

information were deleted. ICANN's launch documents, ICANN argued, are even more explicit regarding this change.

123. We agree with ICANN that to the extent that Amazon is challenging Guidebook changes made in 2011 in this proceeding, its attempt to do so is untimely. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration, at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf; *Vistaprint*, at ¶ 172.) Any disagreement with proposed changes to the Guidebook must be made within 30 days of the notice of proposed amendments to the Guidebook. (*See* Bylaws, Art. IV, § 3.3.)

CONCLUSION

124. Based upon the foregoing, we declare that Amazon has established that ICANN's Board, acting through the NGPC, acted in a manner inconsistent with ICANN's Bylaws, as more fully described above. Further, the GAC, as a constituent body of ICANN, failed to allow the applicant to submit any information to the GAC and thus deprived the applicant of the minimal degree of procedural fairness before issuance of its advice, as required by the Bylaws. The failure by the GAC to accord procedural fairness diminishes the presumption that would otherwise attach to its consensus advice.

125. The Panel recommends that the Board of ICANN promptly re-evaluate Amazon's applications in light of the Panel's declarations above. In its re-evaluation of the applications, the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon's applications. Further, if the Board determines that the applications should

not proceed, the Board should explain its reasons supporting that decision. The GAC consensus advice, standing alone, cannot supplant the Board's independent and objective decision with a reasoned analysis. If the Board determines that the applications should proceed, we understand that ICANN's Bylaws, in effect, require the Board to "meet and confer" with the GAC. (*See* Bylaws, Article XI, § 2.1(j).) In light of our declaration, we recommend that ICANN do so within sixty (60) days of the issuance of this Final Declaration. As the Board is required to state reasons why it is not following the GAC consensus advice, we recommend the Board cite this Final Declaration and the reasons set forth herein.

126. We conclude that Amazon is the prevailing party in this matter. Accordingly, pursuant to Article IV, Section 3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 31 of the ICDR Rules, ICANN shall bear the costs of this IRP as well as the cost of the IRP provider. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$5,750 shall be borne by ICANN and the compensation and expenses of the Panelists totaling US$314,590.96 shall be borne by ICANN. Therefore, ICANN shall reimburse Amazon the sum of US$163,045.51, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Amazon.

127. Each side will bear its own expenses and attorneys' fees.

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Our learned co-panelist, Judge A. Howard Matz, concurs in the result. Attached hereto is Judge Matz's separate concurring and partially dissenting opinion.

SO ORDERED this 10th day of July, 2017

Robert C. Bonner
Chair

Robert C. O'Brien

CONCURRING AND PARTIALLY DISSENTING OPINION

OF A. HOWARD MATZ

128. I greatly admire my colleagues on this Panel and respect their diligent and thoughtful work in providing the foregoing Declaration. Moreover, for the reasons I will summarize at the end of this opinion, I concur in the outcome that they reach. But I do not believe that our authority, or that of any IRP Panel, permits us to invalidate a decision of ICANN based in substantial part on a finding that the GAC violated "basic principles of procedural fairness. . . widely recognized in international law. . ." To the extent that the Majority Declaration overturns ICANN's decision because the NGPC failed to remedy that supposed GAC violation, it extends the scope of an IRP beyond its permissible bounds. And in any event I also reject the factual basis for the Majority's conclusions about due process and fundamental fairness.

AUTHORITY OF AN IRP PANEL

129. The majority correctly states that "the task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN's Articles of Incorporation, Bylaws and Applicant guidebook." Majority Declaration, ¶ 63. The majority goes on to cite Article IV, § 3(4) of the Bylaws as follows:

> The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [*i.e.*, the internet community as a whole]?

Id. ¶ 64.

130. What is troublesome about the Majority Declaration is that it does not comply with the clearly limited scope of review that we are duty-bound to follow. Article IV, § 3(4) specifically mandates that the IRP Panel "shall be charged with comparing contested actions of the *Board* to the Articles of Incorporation and Bylaws, and with declaring whether the *Board* has acted consistently with [those] provisions. . . ." (Emphasis added.) Instead of focusing on whether the *Board* acted consistently with its own responsibilities, the Majority Declaration devotes a considerable portion of the ruling to criticizing the *GAC*. Indeed, it does not merely criticize the GAC, but also finds that because the GAC supposedly violated a "fundamental principle of procedural fairness [that is] widely recognized in international law" [Majority Declaration ¶ 96] it thereby violated Art. III, § 1 of ICANN's Bylaws. *See, e.g.*, Majority Declaration, ¶¶ 2(e); 94-99; 124. Nowhere does the majority provide support for the proposition that this IRP Panel is entitled to opine on whether general principles of international law require that "fundamental notions of due process" be imported onto GAC proceedings, especially when the parties did not even meaningfully brief those "general principles."

131. As stated in the Final Declaration in *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247 (Mar. 3, 2015),

> The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. ¶ 108. . . . Nor . . . does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. ¶ 110 . . .[I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with the applicable rules found in the Articles, Bylaws, and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and

procedures themselves), but merely to apply them to the facts. ¶ 115.

132. The majority finds that the Board (NGPC) violated Article IV, § 3(4) of the Bylaws because it effectively and improperly granted the GAC advice a conclusive presumption, despite that advice having been undermined by the GAC's supposed unfairness. (See below.) In this respect and to this extent, then, although the holding in the Majority Declaration is explicitly based on the conduct of the Board (Majority Declaration ¶ 113), the result must be seen as a reflection of the majority's view about what the GAC did (or failed to do). If the conclusion that "the NGPC failed to exercise the requisite degree of independent judgment" (Majority Declaration, ¶ 2(a)) is dubious, as I think it is, then the Majority Declaration may have exceeded its proper scope.

WAS THERE REALLY A "DUE PROCESS" VIOLATION?

133. The claimed violation by the GAC of due process is based on the written testimony of Mr. Scott Hayden, who is Amazon's Associate General Counsel for Intellectual Property. He wrote, "We had asked the GAC to grant us the opportunity to distribute to the GAC background materials about the Amazon Applications and the proposals we had made but the GAC Chair rejected our request." Hayden Statement, ¶ 37.

134. It is noteworthy that Mr. Hayden did not disclose just who at Amazon asked just which GAC representative for leave to submit just which written disclosure, or when such request was made (although it was evidently before the Durban meeting). Even more noteworthy is the indisputable fact that *the GAC already knew* about those Amazon applications and proposals. Indeed, governments objecting to those applications could not have issued an Early Warning until and unless at least the Amazon application had

come to their attention, and Brazil and Peru did not in fact issue the Early Warning until after they received Amazon's application.

135. Notwithstanding my view that it is not appropriate for this Panel to rest its decision, at least in large part, on whether the GAC was fair, I recognize that it is tempting to invoke Bylaws Article III, § 1 ("ICANN and its constituent bodies shall . . . ensure fairness") as the basis for doing so. "Fair is fair," after all, and it is not uncommon in an IRP for the disputing parties to challenge the fairness of their opponent's conduct. But even assuming the GAC was legally obligated to allow Amazon to make a direct written presentation in Durban, what was the impact of its failure to do so? The record shows that there was no impact at all; the claimed violation or error was utterly harmless.

136. The only supposed harm mentioned by the majority is that "allowing a written submission by Amazon would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that '.Amazon' was a *listed* geographic name under the Guidebook." *Id*. at ¶ 95. (Emphasis in original.) In fact, however, Mr. Atallah testified that if .Amazon had been on the list, the GAC would not even have been considering the issue in the first place. Tr., p. 208. As he put it,

> So the only reason it's accepted as an application is because it was not on the list and everybody knew that. Otherwise, it wouldn't be an issue that required GAC Advice in the first place.

Id. at 209. This testimony was not rebutted.

137. Which leads to another concern that I have with the majority view: it is at odds with reality. It simply defies common sense to depict Amazon as having been effectively shut out of the process leading up to the GAC Advice or as the victim of one-sided,

heavy-handed maneuvering by Brazil, Peru, and the many other governments that joined in the Durban communique. Indeed, the facts show otherwise. At the hearing before this Panel, Amazon's counsel himself conceded that people other than government representatives *were* allowed to attend the GAC meeting in Durban: "I now understand that observers were permitted in Durban. So the transparency issue . . . there were observers there. . . ." Tr., p. 270. Their attendance, counsel further acknowledged, was a form of "participation." *Id*. at 269. In his written testimony, Mr. Atallah affirmed that at the Durban meeting on July 18, 2013 ICANN conducted a "Public Forum," at which several speakers commented on the GAC's advice regarding .Amazon. Amazon's representative, Stacy King, actually stated, "We disagree with these recommendations and object . . . ." *Id.* at ¶ 36. Moreover, ICANN introduced ample and unrefuted evidence that in the spring and summer of 2013 – before the GAC Advice was issued – Amazon communicated its response to the Brazil/Peru opposition to several countries, including Germany (Ex. R-67), Australia (Ex. R-69), the United Kingdom (Ex. R-66) and Luxembourg (Ex. R-68). Nor is it surprising that a company as large and influential as Amazon directly waged such a sustained lobbying campaign with numerous members of the GAC. Amazon, of all possible gTLD applicants, was probably the best equipped to communicate its position to everyone involved in the determination of whether ICANN should grant it a new gTLD. Just as it may be understandable to take into account the notion that "fair is fair" in assessing the GAC's conduct, so too should we recognize the reality that "Amazon is Amazon."

138. For these reasons, then, in my respectful opinion there is little merit in the majority's decision to "piggyback" the claimed due process violation by the GAC into a basis for

"undermin[ing] the strength of the presumption that would otherwise be accorded GAC consensus advice." Majority Declaration, ¶ 96.

139. In addition to the foregoing factors, another reason why it is unfortunate that the Majority Declaration has declared that the GAC has a duty to adhere to international law-based principles of due process is that such declaration might well cause considerable confusion within ICANN. Article III, § 1 of the Bylaws, cited in ¶ 92 of the Majority Declaration, does indeed provide that both ICANN "and its constituent bodies shall operate. . . with procedures designed to ensure fairness." But just what are those bodies? How do they participate within ICANN? Do they all function in the same manner? Do they rely on committees? Are they entitled to representation on Board committees? On the Board's Executive Committee? If constituent bodies must permit direct presentations, would the Board and all its Committees also have to permit third parties to appear before them directly? These are legitimate questions to ask here, notwithstanding that the Majority Declaration states that it is limited to the facts of this case (¶ 113), because this IRP Declaration is entitled to be treated as precedent. (Bylaws Article IV, § 3(21).) But the questions are not even considered, much less answered.

140. Finally, given that it is the ICANN Board whose specific conduct we are reviewing, it must be stressed here that there is absolutely no evidence that it or the NGPC were unaware of both the GAC's thinking and Amazon's position. While I will return to the question of what the NGPC knew and what it did *infra*, at this point it is sufficient to note that as to the GAC's thinking, Mr. Atallah swore under oath that for those NGPC and Board members who attended the seven meetings dealing with Amazon's

application, it would not have been a benefit if GAC had provided a rationale with its advice. As he put it, "as an insider, you know exactly what is going on . . . ." Tr., p. 109. He went on to explain: "ICANN has three meetings a year, every year, where everybody gets together to actually develop policies and do the ICANN business. In every meeting the board actually meets with the GAC. And the issues that the GAC is facing are actually . . . told to the board, and so the board is aware of the issues that . . . the GAC members are bringing up . . . It's open meetings. And in several of those meetings, the South American countries had voiced their issues with the Amazon applications." Tr., p. 113. Mr. Atallah also testified that "when the GAC Advice came about, the board provided notice to Amazon to actually provide it with information, present their view, their side of the topic and they presented a large document to the NGPC which they reviewed and did their due diligence." Tr., p. 184.

DID THE NGPC INDEPENDENTLY INVESTIGATE THE APPROPRIATE FACTS AND FACTORS RELATING TO AMAZON'S APPLICATION?

141. The majority has concluded that "The Board, acting through the NGPC . . . failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC's consensus advice . . . [and thus] failed to exercise the requisite degree of independent judgment . . . . " Majority Declaration, ¶ 2(a). In my respectful opinion, the Majority Declaration either conflates or misapprehends the important difference between what ICANN initially *did* in looking into the GAC Advice re .Amazon and what it concluded after doing so.

142. The Majority Declaration acknowledges that under the then-applicable Bylaws, the GAC was not required to give reasons for its actions. Majority Declaration, ¶¶ 87-90. The Majority Declaration notes that even the decision in the *Dot Connect Africa Trust v. ICANN IRP* (ICDR Case No. 50-2013-001083) does not require the GAC to provide such reasons.[32] But then the Majority Declaration essentially goes on to hold the *Board* responsible for GAC's supposed failure "*to explain or give reasons* for its activities. Majority Declaration, ¶ 112 (emphasis in original). It does so by construing the Board to have relied solely on the "strong presumption" that the GAC's advice is entitled to be implemented as if that presumption was conclusive. Majority Declaration, ¶¶ 104, 114. If that is what the Board did, such action would indeed fail to constitute "independence." But I do not agree that that is what the Board did.

143. Brazil and Peru, as GAC members, issued their Early Warning on November 20, 2012 and the GAC issued its Advice on July 18, 2013. Thereafter, ICANN notified Amazon, and the NGPC proceeded to solicit and receive from Amazon and others numerous documents and submissions, which were read and considered over the course of seven different NGPC meetings. (Exs. R-26 through R-31.) Also reviewed were Professor Radicati's Jan. 27, 2014 analysis (Ex. C-47); Dr. Passa's March 31, 2014 "expert"

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[32] Regrettably, however, the Majority Declaration does not sufficiently make clear that before the Applicant Guidebook was completed, quite a saga had unfolded over how applications for top level domains in names containing geographic meaning would be treated. Various grounds for objection were considered. The GAC is comprised of sovereign governments that by their very nature function through a political lens, but the GAC is vital to the very essence of the internet and ICANN. There could be no worldwide web without the support and cooperation of governments around the globe. The GAC pushed for the right to raise concerns and objections separate and apart from the otherwise generally available grounds. Recognizing this, the full ICANN community granted GAC the very powers that have been challenged here. The outcome was that the entire ICANN community agreed to allow the GAC to use the Early Warning and GAC Advice (without accompanying rationales) procedures. The written testimony of Mr. Atallah explained this in great detail. (¶¶ 11-23.)

opinion (Ex. C-48); the Early Warning (C-22); several letters from Peru (C-45; C-50; C-51); at least four letters from Amazon (C-35; C-36; C-44; C-46) and other items. (See Ex. R-83.) Mr. Atallah testified at length about what the NGPC did. He summarized it this way:

> But the information that the NGPC went through was comprehensive. They looked at every opinion that the counterparties have [sic] and everything that was available to them, and they made their decision based on the process and as well as the issues at hand . . . and actually reviewed so much information, so much data, that the thing took ten month[s] . . ."

Tr., pp. 184-185.

144. I thus conclude that the NGPC did not in fact accept the GAC advice as conclusive. It displayed both due diligence and independent initiative in its effort to carry out its responsibilities.[33] However, whether it actually succeeded in discharging its responsibilities requires us to ascertain whether that independent inquiry led to a conclusion consistent with what the mission or core values of ICANN require. To that analysis I now turn.

145. Paragraph 113 of the Majority Declaration states very clearly,

> To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported *by well-founded* public interest [sic] concerns. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws, Article I, § 2(8), Article III, § 1.

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[33] In reaching this conclusion, I choose not to apply literally and indiscriminately Mr. Atallah's testimony to the effect that the NGPC made no independent inquiry as to whether there was a valid public interest rationale for the GAC advice. (Tr., p. 238.) For Amazon to rely so heavily on that off-the cuff statement, made at the very end of a full day's testimony and in response to a question from the Panel chair, is to take it out of fair context. Indeed Mr. Atallah followed that response with "But there was no reasons for us to believe that the public interests of the Brazilian people is [sic] misrepresented by their governments." *Id.*

(Emphasis added.)

146. I agree, at least as to Article III, § 1. For me, the key requirement is that there be a "well-founded" basis for the NGPC's conclusion, regardless of how procedurally adequate its inquiry otherwise was under the Bylaws. Amazon having at least rebutted the strong presumption supporting advice of the GAC, the burden of making that showing became ICANN's to bear. It failed to do so.

147. The GAC had every right to assert "cultural sensitivities" as the primary basis for its opposition to Amazon's application. See Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs: "New gTLDs should respect . . . the sensitivities regarding terms with national, cultural, geographic and religious significance." But Brazil and Peru needed to do more than raise those concerns in the conclusory manner that they did. Professor Radicati had sound reason to conclude that awarding the string ".Amazon" to Amazon would not in fact create a material detriment to the people who inhabit the wide region in South America that is part of the Amazon River and rain forest. As he put it, ". . . [T]here were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications." Ex. C-47, ¶ 93. Radicati went on to add, "[T]here is no <u>evidence</u> either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community and its specificities [sic] and

importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO." Ex. C-47, ¶ 103. (Emphasis added.)

148. What the objectors, the GAC and the NGPC failed to demonstrate here stands in contrast with what the applicants for the ".persiangulf" gTLD pointed to in the "Partial Final Declaration" in the IRP in *Gulf Cooperation Council (GCC) v. ICANN* (ICDR Case No. 01-14-0002-1065). There, in fact, *both* the applicant (Asia Green) and its opponents presented greater support for their respective positions. For example, Asia Green noted,

> There are in excess of a hundred billion of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .persiangulf gTLD will help change this. (¶ 14)

For its part, the GCC established that "the relevant community was substantially opposed to the ".persiangulf" application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string." (¶ 38)

149. So what, then, could Brazil and Peru have presented to the GAC that the NGPC should have looked for or relied on in order to reach a conclusion consistent with Art. 1, § 2 of the Bylaws, including such ICANN core values as "seeking . . . broad, informed participation reflecting . . . geographic and cultural diversity" (Core Value 4), "open and transparent policy development mechanisms" (Core Value 7) and "recognizing that governments. . . are responsible for public policy" (Core Value 11)? They could have presented: public opinion surveys; expressions of concern by existing native communities; resolutions by existing NGOs; and submissions by historians and

scientists in the Amazon region about the importance of cultural patrimony and ecological preservation. Had Brazil and Peru made at least some such information available to the GAC and had the GAC at least acknowledged that it had received such material, the NGPC's decision to uphold the GAC advice even in the absence of an explicit GAC rationale would have been sufficient, in my opinion.

150. In addition to the foregoing reasons for concurring in the result, there are other considerations that persuade me to join in the outcome of the majority's ruling. For example, as already indicated, I agree with several observations that are central to the majority's conclusion, including the following.

a. GAC advice must be based upon public policy considerations, even if not incorporated into a written "rationale." Majority Declaration ¶ 100.

b. The public policy considerations must be "well-founded," *Id.*, ¶ 101, and "ascertainable from the entirety of the record before the NGPC." *Id.*, ¶ 103.

c. It "is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board." *Id.*, ¶ 102.[34]

d. The Board "cannot accept GAC consensus advice as conclusive." *Id.*, ¶ 104. (Put another way, a "strong" presumption is not the same as an "irrebutable" presumption.)

151. Also, for the most part, Amazon's conduct in pursuing its application was commendably reasonable. For example, it explicitly agreed not to apply for gTLDs with the names (or words) "Amazonas," "Amazonia" and close variants thereof. Such a concrete effort at compromise should not be ignored or taken for granted.

[34] So basic and compelling is this "desirable" factor that it now has become required in the 2016 Bylaws.

152. Moreover, given that the 2016 changes in the Bylaws now impose requirements on the GAC to provide reasons for GAC advice, to the extent that because the GAC did not explicitly do so in this case ICANN's decision has been found to be deficient, the outcome of this IRP will cause little or no detriment to ICANN going forward.

153. In the *Booking* Final Declaration, *supra*, the Panel recognized the value of an IRP "contribut[ing] to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here." ¶ 4. Here, too, there is a demonstrable benefit to the ICANN community that can result from further guidance about the minimum requirements that ICANN must meet in order to have its decisions about GAC advice upheld in the face of challenge. That benefit is especially applicable where, as here, the practical effect of the Panel's ruling is that the dispute is remanded for further proceedings. In other words, Brazil, Peru, the GAC and ICANN, as well as Amazon, may now supplement and strengthen their positions. The Applicant Guidebook states that the objective for ICANN is to "determine whether approval would be in the best interest of the internet community." § 5.1. Here, all the interested parties, including Brazil, Peru and the GAC, are members of that community. *See* Bylaws, Art. I, § 2(11). They all share a common objective and potentially a common benefit in promoting their respective interests anew in light of this Declaration.

Dated: July 10, 2017

A. Howard Matz

AA-43

1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS

ICDR CASE NO. 01-15-0005-9838

In the Matter of an Independent Review Process

Between:

ASIA GREEN IT SYSTEM

BILGISAYAR SAN. VE TIC. LTD. STI., ("AGIT")

Claimant

Vs.

INTERNET CORPORATION for ASSIGNED

NAMES AND NUMBERS ("ICANN")

Respondent

FINAL DECLARATION

Independent Review Process Panel:

Calvin Hamilton, FCIArb (Chair)

Honourable William Cahill (Ret.)

Klaus Reichert SC

PROCEDURAL HISTORY

2. The relevant procedural history of this Independent Review Process ("IRP") is set out in the following paragraphs. The Panel has only recorded those matters which it considers, in its appreciation of the file of this IRP, necessary for this Final Declaration.

3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: Mike Robenbaugh
Robenbaugh Law
548 Market Street (Box No 55819)
San Francisco, CA 94104

Respondent: Eric Enson, Jeffrey A. LeVee, Kelly Ozurovich
Jones Day
555 South Flower Street 50th Floor
Los Angeles, CA 90071

4. The authority for the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with "declaring whether the Board has acted consistently with the Provision of ICANN's Articles of Incorporation and Bylaws."

5. The applicable procedural rules are the International Centre for Dispute Resolution's (ICDR) International Dispute Resolution Procedures, as amended and in effect as of 1st June 2014, as augmented by ICANN's Supplementary Procedures, as amended and in effect as of 2011.

6. On 7th February 2014, ICANN's chairman informed AGIT that, following the New gTLD ("gTLD") Programme Committee ("NGPC") decision and subsequent Resolution made on 5th February 2014, "the NGPC will not address the applications further until such time as the noted conflicts have been resolved".[1] AGIT submit that from this point, their applications were "On Hold".[2]

7. On 26th February 2014, AGIT filed a Request for Reconsideration with ICANN's Board Governance Committee ("BGC"). AGIT's request was summarily dismissed by the BGC on 13th March 2014, and this decision was accepted by the NGPC.[3]

8. On 21st February 2014, AGIT requested that ICANN engage in a "Cooperative Engagement Process" in accordance with the Bylaws of ICANN.[4] The Cooperative Engagement Process was terminated on 13th November 2015 and no resolution was reached.

9. AGIT submitted a Request for Independent Review Process ("IRP Request") on 16th December 2015, which ICANN responded to on 1st February 2016. AGIT submitted a supplemental brief on 6th January 2017, which ICANN responded to on 3rd February 2017.

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[1] See Annex 12 1
[2] This status was confirmed by Mr Enson in paras 13 – 25, pg 95 – Telephonic Hearing
[3] See Annex 14
[4] S3, Article IV, ICANN Bylaws

10. A preparatory conference call was held on 19th April 2016 during which a procedural calendar was agreed upon (Procedural Order No.1).

11. Pursuant to Procedural Order No. 1, AGIT submitted their 'Observations on the Scope of Panel Authority' on 3rd May 2016, which ICANN responded to on 13th May 2016.

12. With respect to document requests, pursuant to Procedural Order No. 1, AGIT were required to submit their request for document production on 3rd May 2016. ICANN were to answer by 13th May and, if appropriate, were to both request documents and object to AGIT's request. On 23rd May 2016, AGIT were to both reply to ICANN's objection, and file their own objection against ICANN's request if appropriate. ICANN were to answer AGIT's objection by 2nd June 2016. The 2nd June 2016 was set for ICANN's document production, and 13th June 2016 for AGIT. The issue of document disclosure was eventually resolved by the parties themselves with little involvement by the Panel.

12. A telephonic hearing took place on 4th May 2017. Present for the hearing were the IRP Panel (Calvin Hamilton (Chair), Honourable William Cahill, Klaus Reichert SC), Mike Rodenbaugh for AGIT ("the Claimant"), Eric Enson for ICANN ("the Respondent"). Amy Stathos and Casandra Fure were also present on behalf of the Respondent. The hearing was reported by Jana J. Bommarito.

PANEL AUTHORITY

13. The authority of this Panel is set out in the following paragraphs.

14. Article IV, Section 3.4 ICANN Articles of Incorporation and Bylaws:

> Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
> a) Did the Board act without conflict of interest in taking its decision?;

b) Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c) Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

15. As articulated by the IRP Panel in *Merck KGaA v ICANN*[5] and as stipulated by the parties in this IRP:

> "*The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for comparison requires careful assessment of the action itself rather than its characterisation by either the complainant or ICANN. The Panel, of course, does take careful note of the characterisations that are advanced by the Claimant and ICANN.*
>
> *As regards the substantive object of the comparison exercise, namely, was there consistency as between the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit in focusing on three specific elements. The phrase "defined standard of review" undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word "consistent" as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.*[6]"

FACTS OF THE CASE

16. The salient facts are set out in the following paragraphs.

17. ICANN is a non-profit, multi-stakeholder organisation incorporated in California, United States of America. It was established in 1998, and is charged with registering and administering both top and second level domain names. ICANN operates pursuant to its Articles of Incorporation and Bylaws.

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[5] International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604

[6] *Merck KGaA v ICANN* International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604IRP Final Declaration Paras 16-18

18. From 2004-2011, the Generic Names Supporting Organisation ("GNSO") of ICANN developed a programme to introduce new top-level domain names into the domain name system (gTLD). An applicant guidebook ("Guidebook") was developed by ICANN in consultation with stakeholders, detailing a "transparent and predictable criteria" for applications.[7]

19. The Guidebook includes detailed procedures for applying for and objecting to the issuance of top level domain names. ICANN aimed to create "an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval."[8] Applicants must provide detailed responses to 50 questions, which seek to establish the competency of applicant. The objection process includes an Independent Objector ("IO") and the prospect of an objection by one or more of the Governments that make up ICANN's Government Advisory Committee ("GAC"). The IO can lodge an objection, which ordinarily results in the appointment of one or more independent experts to consider and determine the merits of the objection.[9]

20. In addition to the IO and GAC formal objections, GAC members are permitted to file an "Early Warning Notice", detailing concerns about applications.[10] Early Warning Notices simply act to place an applicant on notice. It is not a formal objection, however it "raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process."[11] Concerning GAC Advice, in situations where members of the GAC provide "consensus" advice against an application, a strong presumption is created against that application. Should the Board of ICANN decide to act contrary to this advice, they must provide a rationale for doing so.[12] Concerning formal objections, the objection must fall within one of four specified grounds - String Confusion, Legal Rights, Limited Public Interest or Community Objection.[13] In determining whether an objector has standing to object, they must satisfy one of these four identified Objection Grounds which are dependent of the ground being

[7] Recommendation One, S.1.1.5, ICANN, gTLD Final Applicant Guidebook.
[8] Preamble, 'New gTLD Program Background' gTLD Applicant Guidebook Version 2012-06-04
[9] S3.2.5 Applicant Guidebook
[10] S1.1.2.4 Applicant Guidebook
[11] Ibid (1.1.2.4)
[12] S1.1.2.7 Applicant Guidebook
[13] S3.2.1 Grounds for Objection

used.[14] In addition, a Limited Public Interest Objection comment process[15] is available, which allows for the "participation of many stakeholder groups in a public discussion."[16]

21. In early 2012, Asia Green IT System ("AGIT"), a Turkish cooperation, submitted two applications to ICANN under the new gTLD programme to operate the .ISLAM and .HALAL top-level domains. Following their applications, Early Warning Notices were submitted by the United Arab Emirates (UAE) and India[17] in November 2012, to which AGIT filed formal responses.[18] Within their responses, AGIT included a proposed Governance Model and Pubic Interest Commitments ("PICs"), which it hoped would alleviate the concerns raised in the Early Warning Notices.[19]

22. In addition, the IO, Dr Pellet, was instructed to evaluate the applications. The UAE then filed two formal objections under the grounds of a Community Objection against each of the applications. The Applicant Guidebook details those with standing to submit a Community Objections as "(e)stablished institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection."[20] Following this, Mr Cremades, a Panellist from the International Chamber of Commerce, was instructed to consider the objections.

23. On 11th April 2013, the GAC, in accordance with the Applicant Guidebook,[21] published a Communique to the ICANN Board following a meeting in Beijing to consider the two applications. The Communique noted:

> *"The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed."*[22]

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[14] See 3.2.2 Applicant Guidebook.
[15] See telephonic pg 69 lines 20-25
[16] See Guidebook 1.1.2.3
[17] India did not post formal objections following their Early Warning Notices.
[18] See Annex 6
[19] Ibid - 6
[20] See 3.2.2.4
[21] S3.1 Applicant Guidebook
[22] See full text of Communique at https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf

24. Following this, a scorecard system was produced to assist in the evaluation of the applications, and a subsequent meeting took place in Durban in July 2013.

25. On 25th July 2013, both Kuwait and the Gulf Cooperation Council ("GCC") expressed objections to the applications by AGIT and support of the Community Objection by the UAE.[23]

26. On 30th August 2013, AGIT were informed that both the .ISLAM and the .HALAL applications were accepted by ICANN's expert evaluation Panels,[24] and that their applications had passed Initial Evaluation[25].

27. On 4th September 2013, Lebanon expressed objections to the applications by AGIT and support of the Community Objection by the UAE.

28. On 24th October 2013, Mr Cremades published a report evaluating the Community Objection filed by the UAE against both applications. In his decision, Mr Cremades found there was neither substantial opposition to the applications, nor would the applications create a "likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community."[26]

29. On 4th November 2013, a letter was received by the ICANN Board, and subsequently sent to the GAC, from the Organisation of Islamic Council ("OIC"). The letter contained a formal objection to the use of top-level domain names by "any entity not representing the collective voice of the Muslim people."[27] Following receipt of this letter, dialogue was recommended and a meeting held in Buenos Aires. It is submitted by ICANN that the letter of objection by the OIC was received as part of their "public comment" process,[28] which allows for the "participation of many stakeholder groups in a public discussion"[29] thereby giving a platform to interested parties outside of the formal objection process. Time constraints are provided for the consideration of comments during the Initial

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[23] See telephonic pg 67 Lines 6-1
[24] See Annex 2
[25] Ibid
[26] See Annex 8
[27] See pg10 AGIT's request for an IRP wherein they note: "*in November 2013, the Chair of the ICANN Board forwarded to the GAC Chair a letter from the OIC which requested the GAC to "kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.*"
[28] See telephonic pg 69 lines 20-25
[29] See Guidebook 1.1.2.3 and telephonic g 61 lines 10 - 16

Evaluation review (the formal objection period runs for seven months following the posting of applications[30]), however the Guidebook allows for comments received after this period to be "stored and available (along with comments received during the period) for other considerations, such as the dispute resolution process, as described below."[31]

30. On 19 December 2013, the OIC informed ICANN that a unanimous resolution had been adopted by the 57 Member States of the OIC objecting to the operation of .ISLAM and .HALAL by "any entity not reflecting the collective voice of Muslim people".[32] The Panel notes that this resolution is not amongst the materials placed before it.

31. On 24th December 2013, the Government of Indonesia filed its objection with ICANN to both of the applications.

32. On 5th February 2014, the NGPC applied the objections raised to the scorecard, and on 7th February 2014, AGIT were informed "the NGPC will not address the applications further until such time as the noted conflicts have been resolved."[33] The letter informed AGIT that two IGOs and two Government representatives (the GCC, the OIC, Lebanon and Indonesia) had indicated conflicts with AGIT's Governance model and the PIC.

33. The task of this Panel is to determine whether ICANN have acted in a manner consistent with ICANN's Articles of Incorporation, Bylaws and Guidebook.

PROVISIONS OF ICANN'S ARTICLES OF INCORPORATION, BYLAWS AND THE APPLICANT GUIDEBOOK

34. The salient provisions of these governance documents are listed below:

35. Article 4, Articles of Incorporation

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

[30] Guidebook 1.1.2.6
[31] Ibid
[32] See telephonic pg 70 lines 8-13
[33] See Annex 12

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

36. S3 (4) Article IV Bylaws and Rule 8 of ICANN Supplementary (Independent Review of Board Actions)

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

a. *Did the Board act without conflict of interest in taking its decision?*
b. *Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
c. *Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

37. S2 Article I Bylaws (Core Values)

In performing its mission, the following core values should guide the decisions and actions of ICANN:

a. *Core Value 3*
b. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
c. *Core Value 7*
d. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
e. *Core Value 8*
f. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
g. *Core Value 9*
h. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

38. Article II, Section 2 (3) Bylaws (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

39. Article II, Section 2 (1) Bylaws (General Powers)

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors.

40. Article III, Section 3 (6) Bylaws (Notice and Comment on Policy Actions)

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

i. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

ii. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and

iii. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

41. Article VI, S 4 (6) Bylaws and Article 1 Supplemental Procedures

There shall be an omnibus standing Panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The Panelists shall serve for terms that are staggered to allow for continued review of the size of the Panel and the range of expertise. A Chair of the standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing Panel. In the event that an omnibus standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member Panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more Panelists, as required, from outside the omnibus standing Panel to augment the Panel members for that proceeding.

42. §1.1.5 Applicant Guidebook

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process (...)

a. Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider Panel that finds in favor of

the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD

43. §3.1 Applicant Guidebook

The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.[34]

44. §3.1 (II) Applicant Guidebook

GAC Advice may take one of the following forms:

(...)

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

45. §3.2 Applicant Guidebook

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

46. §5.1 Applicant Guidebook

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

[34] "May" no requirement to adhere to advice of experts, or indeed to appoint in the first place. Cf pg 21 AGIT Request for IRP

47. GNSO Recommendations:

ICANN GNSO, Final Report — Introduction of New Generic Top-Level Domains:[35]

> ***Recommendation No. 1:*** *The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.*
>
> ***Recommendation No. 9:*** *There must be a clear and pre-published application process using objective and measurable criteria.*
>
> ***Recommendation No. 12:*** *Dispute resolution and challenge processes must be established prior to the start of the process.*
>
> *Principle G:*
>
> *The String Process must not infringe on the applicant's freedom of expression rights that are protected under internationally recognised principles of law.*

PARTIES' POSITIONS

48. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties.

POSITION OF THE CLAIMANT

49. AGIT seeks a declaration that the Board of ICANN acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its granting of an "On Hold" status to AGIT applications for .HALAL and .ISLAM. AGIT makes the following contentions, set out below.

50. ICANN consulted in secret with the GAC and Objectors regarding the delay or denial of AGIT's application, in violation of Core Values 7 and 9. Core Value 7 mandates open and transparent policy development that promote well informed decisions based on expert advice. Core Value 9 mandates ICANN to act promptly while, as part of the decision-making process, obtaining informed input from those entities most affected.

[35] See AGIT Request for IRP – pg 18

51. In particular, through meetings in Beijing and Durban, and via correspondence with the OIC:

    Beijing meeting:
    Only ICANN staff, executives and Board members were allowed in the room – Restricted to "Members Only"[36] *(although this policy changed shortly afterwards)*
    No minutes, transcripts or rationales from the meeting were released;

    Durban meeting:
    Closed meeting held with "some GAC representatives". No transcript has ever been produced outside of the 32 minute recording.[37]

52. No effort was made to reach out to AGIT to participate in the discussion or provide input. The meeting was only attended by a "few GAC members" without inviting or informing the entire GAC what took place, or informing AGIT, the public or the GNSO of what occurred at the meeting.

53. Despite requests, no Board member met with AGIT CEO/MD while in Durban.

54. ICANN held a number of meetings with the OIC, despite the untimely and undocumented procedure for further objections. AGIT were unable to obtain further information on these meetings.

55. ICANN failed to obtain informed input from either AGIT or the Objectors prior to reaching its 5th February 2014 resolution, in violation of Core Value 9.

56. ICANN violated Core Value 8 by failing to inform AGIT of the conflicts which it must resolve in order to progress from "On Hold" status.

57. ICANN have violated Core Values 3, 7 and 8, along with §3.1 of the Guidebook by deciding in a manner inconsistent with expert advice, and this action is discriminatory.

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[36] Annex 20
[37] See telephonic pg 22 lines 22 – 25

58. ICANN have acted in a discriminatory manner, contrary to Article II, §2 (3) Bylaws (Non-Discriminatory Treatment) by differentiating between the treatment of .KOSHER/.SHIA with .HALAL/.ISLAM.

59. Under Module 3[38], the GAC were responsible for rejecting any applications which violated public interest. By the GAC failing to recommend rejection of AGIT's applications to the Board as per the Guidebook §3.1, they provided implicit consent to both applications. This should have been taken into account by the Board.

60. ICANN have violated §1.1.5 of the Guidebook by acting in a manner inconsistent with the scenarios laid down.

61. The non-disclosure by ICANN of requested documents under the Document Disclosure Policy ("DIDP") violates Core Values 7 and 8.

62. ICANN have violated Article 4, §3 (6) by failing to create a Standing Panel as required by their Bylaws.

POSITION OF THE RESPONDENT

63. ICANN disputes each of AGIT's contentions, and asserts that the Board did not violate the Articles of Incorporation, the Bylaws or the Guidebook.

64. ICANN refutes the accusation that secret consultations took place with GAC Objectors, specifically as regards the *Beijing Meeting:* the ICANN Board examined, discussed, evaluated and responded to the GAC's advice from the Beijing meeting. Meetings prior to mid-2013 were held with GAC members only, making the decision to hold the Beijing meeting with members-only routine.

65. Specifically as regards the *Durban Meeting*, neither the Articles of Incorporation, Bylaws nor the Guidebook mandate a full complement of GAC members or Board members to be present during such a meeting.

66. Neither the Articles of Incorporation, Bylaws nor the Guidebook mandate that members of the Board meet with an applicant on the applicant's request.

[38] See pg7 AGIT - Supplementary Brief

67. Specifically as regards *OIC correspondence* ICANN staff members' responsibilities include outreach and dialogue with stakeholders in the Middle East, which includes the OIC.

68. There is no evidence that any communications with the OIC influenced the Board's decision to place the applications on hold.

69. The Board not only fulfilled but exceeded its requirements under §3.1 (2) by:

    a. Entering into dialogue with concerned GAC members at the Durban meeting;
    b. Reviewing correspondence from various Objectors;
    c. Its use of the 5th February Scorecard; and
    d. Communicating the rationale behind its decision in a letter to the Claimant, dated 7th February 2014, by informing the Claimant of the conflicts arising, the identities of the objectors, the nature of their objections and what the Claimant must do before the Board would resume consideration of the applications.

70. The Board will resume consideration of the .ISLAM and .HALAL applications once the conflicts noted have been resolved, however ICANN is not required to act as liaison between the Claimant and those who objected to its application.

71. New policy has not been created, rather the Board have followed §5.1 of the Guidebook in exercising their discretion to consider individual applications and whether they are in the best interests of the Internet community.

72. The Board is not mandated under either the Articles of Incorporation, Bylaws or Guidebook to follow expert opinion.

73. No discrimination has occurred with the granting of .KOSHER/.SHIA and .HALAL/.ISLAM. Any difference in treatment of the referenced applications was a result of different circumstances.

74. Scenario 4 contained in §1.1.5 Guidebook is not "any sort of promise by ICANN"[39], and instead provides scenarios by which an application may proceed. This provision does not mandate that an application must proceed.[40]

[39] Supplementary Response by ICANN pg 22 para 50

75. ICANN staff are tasked with responding to document requests, not the ICANN Board. Board involvement takes place when a reconsideration request, seeking the Board's review of staff action regarding document disclosure, is requested by a Claimant. As a reconsideration request was not filed, no Board action was taken. An IRP is concerned only with Board actions. However, should ICANN's response to the DIDP request be subject to review by the IRP, ICANN submits that staff complied with "standards applicable to DIDP requests."[41]

76. The decision not to produce certain documents under the DIDP request but to do so under the IRP conforms to standards and processes in place.

STATEMENT OF REASONS

77. The Panel is of the view that in order to address the party's positions as posed in this IRP, the analysis utilised in the *Merck* declaration is instructive. Applying Article IV, §3.4 Articles of Incorporation and Bylaws, with, where relevant, consideration to the following questions:

    a. Did the Board act without conflict of interest when taking its decision?
    b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?
    c. Did the Board members exercise independent judgement in taking the decision, believed to be in the best interests of the company?

BEIJING MEETING:

ACTION: RELIANCE ON LIMITED OUTPUT FROM THE BEIJING MEETING

78. In order for the GAC to properly evaluate gTLD applications, geographic meetings are held in accordance with §3.1 Guidebook.

79. The GAC was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly in matters where there may be an

2. _____

[4040] See telephonic pg. 97 lines 2-10 "These are simply 2 examples of ways in which applications may proceed. This is not intended it be an exhaustive list of possibilities."

[41] Ibid pg 23 para 54

interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

80. The framework and structure for how these meetings are convened, minuted and disseminated are a matter of convention, outside of structured rules. Guidance can be taken from convention, noting from an interview held on 10th May 2014 between Heather Dryden, Head of the GAC with Brad White, ICANN Communications, that, although policy has now changed, previous GAC meetings were held through a 'closed format.'[42] It is instructive that in May 2013, Heather Dryden confirmed that going forward, GAC meetings would be more open.[43]

81. The sole output from the Beijing meeting was a Communique of 6 pages.[44] The only wording relating to the Claimants application consisted of 58 words, detailing concerns on 'religious sensitivity' of the gTLDs.[45] In addition, the Communique stated that the GAC members concerned were of the view that the applications should not proceed.[46] No more is said. Core Value 7 calls upon ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process". It is the opinion of the Panel that a 58 word output in this manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7. Anyone not physically present at that meeting would have little idea, if any, beyond the general contours contained the Communique, as to what actually happened during the meeting nor what was said by any of the participants.

Did the Board act without a conflict of interest?

82. This is not applicable. There is no evidence of a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

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[42] See Annex 21 – Claimant's Supplemental Brief
[43] Ibid
[44] Excluding Annexes.
Full Communique available here: https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf
[45] As quoted in para 23 above
[46] The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .ISLAM and .HALAL. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

83. The closed nature and limited record of the regarding the Beijing meeting provides little in the way of 'facts' to the Board. Of the 6 page document produced by the GAC to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilising vague and non-descript terms. For the reasons set out in paragraph 81 above, any reliance on the Beijing Communique by the Board in making their decision would necessarily be to do so without a reasonable amount of facts.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

84. This is not applicable. There is no evidence of a lack of independence with regards the Beijing Communique and the manner in which the Board considered this document.

DURBAN MEETING:
ACTIONS: LIMITED OUTPUT FROM THE MEETING; INSUFFICIENT INVOLVEMENT BY GAC MEMBERS; INSUFFICIENT INVOLVEMENT BY ICANN BOARD; INSUFFICIENT INVOLVEMENT BY CLAIMANT

85. The meetings in Durban were held in July 2013, post the noted policy change[47] of employing a more open structure to GAC meetings. The Claimant has received a 32-minute audio recording of this meeting, however no Communique was issued.

86. The Guidebook, under §3.1, references the process of the GAC providing advice to the ICANN Board where objections exist to the gTLD application. It would appear eight Board members and ten GAC members were present.

87. The Claimant claims the limited number of GAC attendees at the Durban meeting to discuss the objections renders the advice insufficient to constitute "GAC Advice". §3.1 does not specifically state what constitutes GAC Advice insofar as whether a full complement, majority, minority or affected parties need be present.

88. The Claimant claims that §3.1 should be interpreted using an *Expressio Unius* model in such that as other sections of the Guidebook and Bylaws use a restricted composition of the GAC, then any other reference automatically applies to the full GAC. For example:

[47] Para 71

§2.2.1.4 of the Guidebook states, with regard early warnings: *"... GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities."* and

"... GAC consensus is not required for a GAC Early Warning to be issued."

89. The argument that a full complement of GAC members need to be present in order to constitute GAC advice is flawed. There is no reference to quorum requirements in §3.1 and it is practical that only relevant and concerned members be in attendance.

90. Contrastingly, the Claimant did not reference the statement in Guidebook §3.1 which states the *"... GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors..."* This gives rise to an implication that more than the mere objectors should be present at a GAC advisory meeting.

91. The Claimant uses a number of emails in order to demonstrate disagreement with the manner in which the meeting was carried out. The emails range in date from 1st July 2013 – 12th July 2013, and the Claimant relies specifically on emails sent by Ray Plzak, member of the ICANN Board, between the 1st July 2013 and 10th July 2013, questioning the form in which the meeting was to take place.[48] These emails indicate that Mr Plzak had a number of questions and queries regarding the format of the meeting. Heather Dryden stated that this was to be *"a meeting available to the subset of Members in the GAC that has a direct interest in these strings."*[49] Mr Plzak acknowledges in his 2nd July email *"The fact is that not all GAC members are either interested in all matters or participate in all discussions, or even attend discussions on all matters."*[50]

92. The Claimant claims that the full Board membership should have been present for the Durban meeting. However, it is the view of this Panel that neither the Bylaws nor the Guidebook mandate full Board attendance.

93. The Claimant claims that a breach of Core Values 7 and 9 occurred through the lack of involvement by the CEO/MD[51] of Claimant during the meeting in Durban. The CEO/MD

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[48] See Annex 22, Claimants Supplementary Annexes
[49] Annex 22 - Email dated 2nd July 2013
[50] Ibid
[51] Please note that both titles are present in the 11th July email from Mehdi Abbasnia, and as such, both are used here.

of the Claimant company attempted to meet with ICANN Board members during the Durban meeting (annex 25). The CEO/MD emailed all ICANN Board members on 11th July but was unsuccessful in meeting with any Board members.

Did the Board act without a conflict of interest

94. Claimants claim that the reason for the reduced complement of Board members at the Durban and Beijing meetings was, in the end, to ensure the gTLD string was made available to a 3rd party during the next round of applications.

95. Furthermore, the meetings were deemed to have been organised and structured in a way that was outside of usual GAC and Board meetings. It was accepted that this was not a meeting of the GAC but rather a discussion for the board to understand the concerns of the GAC. The Panel finds on this record the Board did not have a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it

96. The Board is mandated under the Guidebook §3.1 to review advice from the GAC at such meetings in collaboration with additional advice it deems necessary. The Respondent claims that it was unnecessary to include members over and above those with an interest in the gTLD which may have provided more rounded advice.

97. It is the opinion of this Panel that, whilst a meeting with the CEO/MD of the Claimant company may have increased the volume of facts which the Board had in front of it, the lack of available Board members to meet with the Claimant's CEO/MD is not inconsistent with Core Values 7 or 9. The meeting requests were private matters, and therefore at the discretion of each party.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

98. Judgement involving the make-up of the meetings being only those who have an interest is based on the Guidebook, which states:

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

99. The ICANN Board met with the GAC members who had an interest in .HALAL and .ISLAM in order to greater understand the concerns. There is no evidence that the reduced number of GAC members in attendance was not following the exercise of independent judgment.

ACTION: CONTINUED CONSULTATIONS WITH THE ORGANISATION OF ISLAMIC STATES ("OIC")

100. There would appear to be a lack of openness and transparency with regards discussions with the OIC, in particular with regards alleged meetings which occurred via telephone on or around 29th October 2013[52] and in November 2013 in Buenos Aires.[53] ICANN acknowledged through their Supplementary Response that that they are both unclear as to whether the meeting took place and unclear as to what was discussed beyond membership or failed community objections.[54] Whilst it is acknowledged that the OIC had lodged objections to the Claimant's applications through the public comment process, it is the opinion of this Panel that such meetings, held with ICANN staff and not ICANN Board members, are not in breach of Core Value 7. ICANN staff do not hold decision making authority, and it is evidenced through Annex 28 that the OIC were advised of their obligations to follow ICANN procedure.[55] It is further noted that the members of staff which communicated with the OIC at this time were specifically tasked with outreach to the Middle East,[56] making such communications and meetings an expected element of such outreach.

Did the Board act without a conflict of interest

101. ICANN, in its Response to the Claimant's request for an IRP, acknowledge that an outreach programme is operating with the Middle East, and with the OIC representing 57

[52] See Claimant Supplementary Brief pg 5
[53] Ibid
[54] See para 21 ICANN's Response to Claimant's Supplementary Brief: "*Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC's GAC membership or the OIC's failed community objection against the Applications*"
[55] No. 129, Email from ICANN Senior Advisor – OIC Rep "asked the funny question whether the two strings could be delegated to the OIC. We told him never outside the process".
[56] See ICANN Response to AGIT Request for IRP – pg 4.

Muslim states, consultations with the body throughout Claimant's application process were inevitable. ICANN have informed the Panel through their Supplementary Response that ICANN staff do not have decision making authority with respect to applications, and it is ICANN staff who were conducting the outreach. It is therefore the opinion of this Panel that the Board acted without a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

102. The content of the meetings between ICANN staff and the OIC is unclear. However, it is the remit of this IRP to consider Board actions, and it is the opinion of this Panel that the Board have exercised due diligence and care in light of a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

103. This Panel has no evidence of staff members passing on any information from the undocumented meetings discussed above to Board members. In light of the lack of evidence to the contrary, it is the view of this Panel that on this record, independent judgement was made.

ACTION: EXTENT OF INPUT OBTAINED FROM ENTITIES MOST AFFECTED

104. It is the opinion of the Panel that the numerous meetings and subsequent Communiques demonstrate involvement by entities most affected in the context of the objectors, and therefore ICANN did not breach its obligation under Core Value 9. Core Value 9 mandates "acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected". Input was received by ICANN from objectors on numerous occasions, including and notably during the Durban meeting. Numerous communications have taken place between the GAC and the objectors, through both the Community Objection, subsequent support of the Objection and the public comment process. ICANN stated the following in their 7th February letter to the Claimant:

> *"... a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. The Gulf Cooperation Council (25 July 2013: applications not supported by the community, applicants did not*

> *consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC); the Republic of Lebanon (4 September 2013: management and operation of these TLDs must be conducted by a neutral, nongovernmental multistakeholder group); the Organisation of Islamic Cooperation (19 December 2013: foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted); and the government of Indonesia (24 December 2013: strongly opposes approval of .islam) all voiced opposition to the AGIT applications...*"[57]

Did the Board act without a conflict of interest?

105. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

106. Based on the lack of information provided by the Board of the *'religious sensitivities'* or information on how the Governance model offered by the Claimant could be improved, amended or adapted, it is the view of this Panel that, based on this record, the Board did not exercise the appropriate due diligence and care, due to not having a reasonable amount of facts in front of it. Had the Board been in a position to elaborate on the religious sensitivities and subsequent amendments which could be made to ensure the Governance model of the Claimant would be sufficient, the Claimant would have been in an improved position with regards removing itself from the current "On Hold" position in which it finds itself.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

107. The lack of detailed content obtained from the meetings held with concerned GAC members, along with insufficient information on the revisions needed by the Claimant for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board did not exercise independent judgement with regards the objectors. Independent judgement requires a reasonable

[57] See Para 37, Pg 16 ICANN's response to AGIT's Supplemental Brief

amount of facts to be placed before the decision maker. Without such a reasonable amount of facts, independent judgement cannot be achieved.

ACTION: PLACING THE CLAIMANT'S APPLICATIONS "ON HOLD" WITHOUT DOCUMENTED PROCEDURE FOR SUCH AN OCCURRENCE

108. The Claimants maintain that they were not informed as to which conflicts they were to resolve with the objectors, why they must do so, how they might do so, who will judge whether it has done so, by what criteria or following which schedule.[58] ICANN maintains that their behaviour and information provision went over and above that necessary when informing the Claimant.

109. It is the opinion of this Panel that the Claimant was expressly informed as to what conflicts they were to resolve through the letter dated 7th February 2014. Through this letter, the Claimant was informed which countries had raised objections through documented, dated letters, detailed over 2 paragraphs.[59] Although somewhat brief, the conflicts were identified. However, the manner in which the Claimants and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, the Claimant was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved.

110. The Panel accepts the contention made by ICANN that it is not ICANN's responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an "On Hold" applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work.

111. During the telephonic hearing, ICANN submitted that by placing the .HALAL and .ISLAM applications in an "On Hold" category, the Claimants were given an opportunity to work with the community and group which they sought to represent.[60] However, ICANN went on to acknowledge that there is no obligation on the Objectors to speak with

[58] See, for example, pg 10 AGIT Supplementary Response
[59] See Ibid
[60] Telephonic - pg 72 – 73 lines 13-25 and 1 - 7

the Claimant, and ICANN does not have the jurisdiction to require such communication takes place.[61] ICANN stated that should this be the case, and the Claimant is unable to make progress with the Objectors, they should inform ICANN in "some official manner" and inform the Board. This statement, made by Mr Enson on behalf of ICANN, is unacceptably vague, and even at this late stage, fails to provide the Claimant with a structured means of addressing a potential lack of cooperation in resolving in the conflicts noted. It is this absence of procedure and documented policy which concerns this Panel with regards the "On Hold" status. In addition, the Claimant has noted that *"there's been no other applicant put on hold"*[62] and this statement was not refuted by ICANN.

112. Core Value 8 mandates "making decisions by applying documented policies neutrally and objectively, with integrity and fairness". There is a distinct lack of documented policy with regards the next steps required by the Claimant, and in particular how and when these steps will be assessed. Rather, it is unclear as to which or how many objectors have authority to even negotiate a resolution to the objections. Even if that were known, the Claimant is left entirely at the mercy of the Objectors, who may not agree to cooperate, may insist that unreasonable conditions be imposed on the Claimant or indeed any number of other potential unknown outcomes. The Guidebook provides for a detailed, clear, comprehensive and structured approach to applications, documenting policies and providing assistance with the application process. This does not mean that every application has an expectation of success, but rather that applicants know the "rules of the game" and exactly what the requirements for success are. However, the situation in which the Claimant finds itself does not feature in the Guidebook. It is the opinion of this Panel that this is a glaring omission, and should be rectified promptly. Without such a documented procedure, it is the view of this Panel that ICANN is acting in a manner which is inconsistent with Core Value 8.

113. The Claimant claims that by placing its application "On Hold", ICANN has created a new policy, and by doing so without following documented procedure, inconsistency has occurred. The Panel agrees.

114. As discussed above, the Claimant argues that it was not informed as to what conflicts it must resolve with the Objectors, why it must do so, how it might do so, who will judge whether it has done so, and by what criteria or schedule.[63]

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[61] Telephonic – pg 77 lines 16 - 25
[62] Telephonic – pg 36 lines 19-25
[63] See, for example, pg 10 AGIT Supplementary Response

115. There are, therefore, two possible paths to consider with regards the "On Hold" status.

116. First, this is a new concept. A new norm has been created, which ICANN will have the discretion to apply to future applications, which in turn will have new policy creation implications as per the Bylaws.

117. Secondly, this is a one-off. Relevant only to the circumstances surrounding these two applications, in which case, the question of non-discrimination arises.

118. Based on the lack of previous use, and the positive light in which ICANN presented this "On Hold" status during the telephonic hearing *("Judge Cahill, it's a good question and I think it demonstrates what ICANN is doing here. And ICANN, rather than just denying the applications based on every Muslim country saying they don't want this, the ICANN Board gave the Claimant the opportunity to work with the very community (...)")*[64], this Panel are minded to consider this a new policy.

119. Placing the applicant on hold is markedly distinct from a 'yes' or 'no'. Where a 'yes' is given, the Guidebook offers detailed procedure and policy to follow. When a 'no' is given, an application is refused. Both of these options follow clear and concise paths, which are prescribed and available. In contrast, the "On Hold" status is neither clear nor prescribed. One cannot easily predict the way in which such a status will be applied in the same way as they can a 'yes' or 'no'. This is a very specific status, and one which requires greater clarification and explanation. It is for these reasons that the designation of these applications as "On Hold" is considered a new policy, created, without notice or authority, by ICANN.

120. Following the Bylaws, where a new policy is created, a structured procedure must be followed, and ICANN has failed to adhere to this obligation. In addition, with respect to Core Value 7, which calls for the employment of open and transparent policy development mechanisms, it is the opinion of this Panel that such openness and transparency with regards this policy development has not been forthcoming. The first opportunity which the Claimant had to learn of the new policy was when it was imposed upon them through the 7th February letter.

[64] Telephonic – Pg 72 lines 18 – 24

Did the Board act without a conflict of interest?

121. The Claimant contends that the decision to place the applications "On Hold", without method or procedure which the Claimant could utilise to move its application forward, was done in order to allow a third party to submit a applications for these two TLDs. However ICANN staff have rebutted this contention, and no applications for .HALAL or .ISLAM have been accepted, some three or more years after the applications were placed on hold. Whilst questions surround the manner in which this policy has been implemented, it is the opinion of this Panel, on this record, that no conflict of interest has occurred.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

122. The decision to place the applications on hold, without foreseeing the need for a formalised mechanism to be in place under which applications placed in this category are to proceed, would indicate that the Board has not acted with sufficient facts in front of it. The Board could not have had a reasonable amount of facts in front of them pertaining to the operation of the on hold status, as such facts do not exist as yet. Had ICANN created a policy under which decisions such as this would operate and formulated a suitable framework, then the Panel could appreciate how the Board may have been acting with a reasonable amount of facts in order to make the decision to place the applications on hold. However, without such a procedure or mechanism in place to accompany the new policy, it is the view of this Panel that the Board has not exercised due diligence with regards this decision as the Board did not have a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

123. By the Respondent failing to foresee the need for or advance a formalised mechanism under which an "On Hold" applications are to proceed, the parties find themselves in front of this IRP in order to resolve the questions which have arisen following the "On Hold" decision. It is the opinion of this Panel that, although independent judgement was exercised by the Board, the decision to place the applications "On Hold" without foreseeing the difficulties that could arise from such a decision was not in the best interests of the internet. Clear, efficient and effective mechanisms are essential in ensuring that the best interests of the internet are suitably considered and served by ICANN.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH EXPERT ADVICE

124. Core Value 7 calls for "well-informed decisions based on expert advice", but does not mandate that once advice is provided, it must be followed.

125. The Guidebook permits the Board to consult with independent experts under §3.1 *The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.*

126. The Guidebook therefore does not mandate consulting with independent experts, rather the discretion is left to the Board. This is clear through the inclusion of the term "may". It would therefore be counter-logical if this Panel were to interpret the Guidebook as to allowing the Board discretion to determine *whether* to obtain an expert opinion, but should they decide to, *bind them* to the contents of the opinion.

127. In light of the provisions of both the Guidebook and the Bylaws, it is the opinion of this Panel that the Board is entitled to decide in a manner inconsistent with expert advice.

Did the Board act without a conflict of interest?

128. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

129. Although ultimately deciding to follow a course contrary to expert opinion, ICANN was privy to the opinions of experts when making their decision, including that of the Independent Objector, Dr. Pellet and of Mr. Cremades, the Community Objection Expert. There is no evidence of a lack of due diligence and care in having a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

130. Although deciding contrary to expert opinion, ICANN submitted that it did so in light of all of the facts in front of them. Expert opinion was sought and considered, and those experts were considered to be independent. This fact has not been contested. It is therefore the view of this Panel that the Board did exercise independent judgement in reaching its decision with regards expert opinions.

ACTION: DISTINGUISHING BETWEEN THE GRANTING OF .KOSHER/.SHIA AND "ON HOLD" STATUS OF .HALAL/.ISLAM

131. ICANN informed the Panel through their Response to the Supplemental Brief of the following:

> "The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook"[65]

132. In reaching its decision, the Panel have considered the .AMAZON case, whereby an allegation arose of disparate treatment by the NGPC against the Claimant:[66]

> *Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.*
>
> *(...) As pointed out by ICANN's counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws' proscription against disparate treatment applies to Board action, and this threshold requirement is missing.*

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[65] See ICANN's response to the Supplemental Brief Pg 21, Para 48
[66] G : Para 120 – 121 AMAZON EU S.A.R.L

Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

133. It is the opinion of this Panel that, as with .AMAZON, no Board action took place with regards the .KOSHER application, and therefore the threshold for this requirement is missing. No action inconsistent with Article II, S3 of the Bylaws has occurred.

Did the Board act without a conflict of interest?

134. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

135. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

136. This is not applicable as the Board decision is not being considered due to the distinction made above.

ACTION: IMPACT OF THE GAC FAILING TO REJECT AN APPLICATION

137. This is outside of the remit of this Panel, which is tasked with ascertaining whether or not there have been actions by the Board which are inconsistent with the Bylaws, Articles of Incorporation or the Guidebook. However, as an observation, following the Guidebook, the GAC are not mandated to expressly accept or reject an application, and therefore their decision not to reject is in accordance with the Guidebook.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH GUIDEBOOK SCENARIO

138. Following the overarching aim of the Guidebook, one must assume that the scenarios referenced were included in order to assist candidates with their applications, but with no intention of binding the Board. The following, found under §1.1.5, is deemed instructive of this: "*The following scenarios briefly show a variety of ways in which an application*

may proceed through the evaluation process." The express inclusion of the term "may" is further indication that §1.1.5 was not intended to be binding on the Board, nor provide applications with a guaranteed route of success.

139. It is the opinion of this Panel that such scenarios act merely to provide examples of how an application may proceed, but do not purport to provide a roadmap to follow to ensure success. Although it is understandable that a certain level of reliance may be placed on such scenarios by applicants, one would expect in the majority of cases for there to be distinguishing factors. As such, the scenarios cannot be considered binding on the Respondent, and no inconsistent act occurs should ICANN deviate from the scenarios.

Did the Board act without a conflict of interest?

140. The Board were not mandated to follow the scenarios laid down in the Guidebook, as it is found by this Panel that the scenarios were merely instructive. There is no evidence that the Board were conflicted in making this decision, rather they were exercising their judgement in order to distinguish the Claimant's application from the scenario listed.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

141. The decision to act in a manner contrary to the Guidebook scenario was made following an assessment of the objections, independent expert opinions and the applications, whereupon ICANN made the decision to distinguish the scenario from the applications. The status of the scenarios being advisory rather than mandatory confirms the notion that the Board acted with due diligence in choosing to distinguish the applications and act in a manner contrary to the scenario listed.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

142. Independent judgement is evidenced by the Board choosing to distinguish the applications from the scenarios. It is submitted that it is in the best interests of the internet for consideration to be given to each case in turn, rather than mandate through prescribed scenarios the way in which a case must proceed. The Board have utilised their right of independent judgement in taking the decision, and it is submitted that this path is in the best interests of the internet.

ACTION: CLASSIFICATION OF A NUMBER OF DOCUMENTS AS CONFIDENTIAL

143. ICANN has a published Documentary Information Disclosure Policy (DIDP) which states:

> *"ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."*

144. The Claimant claims a request was made under this policy for documents related to the parties' dispute, which was subsequently declined by ICANN, thereby acting in breach of Recommendation No. 1, Core Value 7 and Core Value 8. ICANN claims that the Claimant did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP response. As no reconsideration request was filed, the DIDP response involved no Board action.[67]

145. The remit of this Panel is restricted to the analysis of Board actions or inactions. The Claimant has not produced any evidence to indicate that a reconsideration request was filed, and it is therefore outside the purview of this IRP to consider the actions of ICANN staff members.

ACTION: FAILING TO ESTABLISH A STANDING PANEL

146. §4 (6) of the Articles of Incorporation and Bylaws requires a 'Standing Panel' be established, and this Panel recommends, along with previous IRP panel recommendations[68], that one is created. However, for clarity, this is not to be taken as or in any way inferred as a binding order (as the Panel has no such authority). Also, whether or not there is a standing panel seems to have no direct relationship with the facts of this IRP.

CONCLUSION

147. For the reasons stated above, the Panel concludes that ICANN has acted in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. Specifically:

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[67] See ICANN's Supplementary Response para 4 and https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf

[68] See .AFRICA (DotConnectAfrica Trust v ICANN – Case #50 2013 001083)

148. Core Value 7 – Articles of Incorporation and Bylaws

It is the opinion of the Panel that the volume and quality of information disseminated following the meeting of the GAC in Beijing constituted an act which was inconsistent with Core Value 7; to be consistent with Core Value 7 requires ICANN to act in an open and transparent manner.

149. Core Value 8 - Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent acted inconsistently with Core Value 8; to be consistent with Core Value 8 requires the Respondent to make, rather than defer (for practical purposes, indefinitely), a decision ("making decisions by applying documented policies neutrally and objectively, with integrity and fairness") as to the outcome of the Claimant's applications. The Respondent, in order to act in a manner consistent with its Articles of Incorporation and Bylaws, needs to promptly make a decision on the application (one way or the other) with integrity and fairness. However, nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for the Respondent.

150. Article III (S3 (b)) Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent created a new policy. In light of this, the Respondent failed to follow the procedure detailed in Article III (S3 (b)), which is required when new policy is developed.

151. We further conclude that Claimant is the prevailing party in this IRP. We hold this view consistent with the finding that the designation of "On Hold" is a new policy. ICANN failed to implement procedures pursuant to which applications placed in an "On Hold" status are to proceed. As a result, the Board has not acted with due diligence in this regard.

152. The failure to determine how Claimant should proceed under the new "On Hold" policy has largely resulted in the Claimant's costs in this IRP. Accordingly, pursuant to Article IV, Section 4.3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 34 of the ICDR Rules, ICANN shall bear the costs of this IRP, the cost of the Reporter, as well as the cost of the IRP provider.

153. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling US $6,279.84 shall be borne by ICANN.

154. The compensation and expenses of the Panelists totalling US $175,807.82 shall be borne by ICANN.

155. The fees and expenses of the Reporter, Ms. Bommarito, shall be borne by ICANN. ICANN has already settled Ms. Bommarito's invoices.

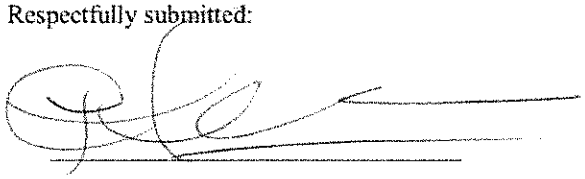
156. Therefore, ICANN shall reimburse AGIT the sum of US $93,918.83, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent.

157. Each party shall bear its own expenses and attorneys' fees.

158. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

The Panel would like to take this opportunity to congratulate the Parties' legal representatives for their hard work, civility and responsiveness during the proceedings. The Panel was pleased with the quality of the written submissions, in addition to the oral advocacy skills displayed throughout the proceedings.

Respectfully submitted:



Calvin A. Hamilton FCIArb., Chair

November 28, 2017
Date

Honourable William Cahill (Ret.)

Date

Klaus Reichert SC

Date

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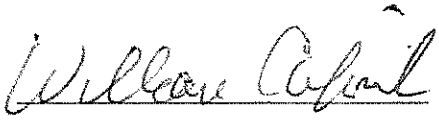
Calvin A. Hamilton FCIArb., Chair	Date
	11/30/2017
Honourable William Cahill (Ret.)	Date
Klaus Reichert SC	Date

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Respectfully submitted:

Calvin A. Hamilton FCIArb., Chair	Date
Honourable William Cahill (Ret.)	Date
Klaus Reichert SC	November 29, 2017 Date

AA-44

221 Md. 221
Court of Appeals of Maryland.

Manuel M. BERNSTEIN et al., etc.
v.
REAL ESTATE COMMISSION
OF MARYLAND et al.

No. 76.
|
Dec. 18, 1959.

Synopsis

Proceeding to review findings and conclusions of Real Estate Commission which suspended licenses of a broker and his associate. The Baltimore City Court, Reuben Oppenheimer, J., entered orders affirming findings and conclusions, and broker and his associate appealed. The Court of Appeals, Horney, J., held that there was sufficient evidence to justify the suspending of licenses of broker and his associate for violation of statute prohibiting continued and flagrant course of misrepresentation, misleading or untruthful advertising and improper dealings as result of posting of a sold sign on property which was not in fact sold, and there was evidence to support Commission finding that broker and his associate had violated statute requiring listing contract to specify a definite termination date without notice from either party.

Orders affirmed.

West Headnotes (9)

[1] **Administrative Law and Procedure** Agency expertise in general

Under statute respecting judicial review of administrative order there is no intention that court should substitute its judgment for expertise of those persons who constitute administrative agency from which appeal is taken. Code 1957, art. 41, §§ 252(d), 255(g)(1-8).

30 Cases that cite this headnote

[2] **Administrative Law and Procedure** Determination and Disposition

When entire record shows that findings of fact and conclusions of law of administrative agency are supported by competent, material and substantial evidence taken before agency and such de novo evidence, if any, as may be taken by court, and such findings and conclusions are not against weight of evidence, it is function of court to affirm order of agency or remand case for further proceedings if that be necessary, but if court should find that substantial rights of a petitioner for review have been prejudiced by one or more of the causes specified in statute respecting judicial review of administrative orders, because of an administrative finding, inference or decision, then it is function of court to reverse or modify order. Code 1957, art. 41, § 255(g)(1-8).

5 Cases that cite this headnote

[3] **Contracts** Presumptions and burden of proof

Ordinarily, when bona fides of a formal contract is attacked for purpose of having it canceled or modified, burden to show that it was not made in good faith is upon those who attack it.

[4] **Administrative Law and Procedure** Presumptions and burden of proof

Ordinarily, burden of proof is upon party asserting affirmative of an issue before an administrative body.

4 Cases that cite this headnote

[5] **Brokers** Licenses and taxes

In proceeding by complaining property owners before Real Estate Commission respecting alleged illegal practices of real estate brokers, burden was upon complaining property owners throughout proceeding to prove alleged violations of real estate code. Code 1957, art. 41, §§ 252(d), 255(g)(1–8).

[6] **Brokers** Licenses and taxes

In proceeding for review of findings and conclusions of Real Estate Commission which suspended licenses of broker and his associate following complaint by property owner respecting activities of broker and associate in regard to posting of sold sign on property when in fact it was not sold, there was substantial, competent and material evidence to justify Commission in suspending licenses of broker and his associate for violation of statute prohibiting flagrant course of misrepresentation, misleading and untruthful advertising, and bad faith and improper dealing. Code 1957, art. 56, § 224(b, j, s).

1 Cases that cite this headnote

[7] **Administrative Law and Procedure** Degree of Proof

Comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, that is, a preponderance of evidence is necessary but proof beyond a reasonable doubt is not required.

7 Cases that cite this headnote

[8] **Brokers** Licenses and taxes

In proceeding for review of findings and conclusions of Real Estate Commission suspending licenses of broker and his associate refusing to receive documentary proof that a commission had been paid for making sale which property owners claimed had not been made by broker and his associate was not error, and even if it were assumed that it should have been received as de novo evidence such evidence would not have destroyed effect of other findings. Code 1957, art. 41, § 255(e), (g) (5–7).

1 Cases that cite this headnote

[9] **Brokers** Licenses and taxes

In proceeding for review of findings and conclusions of Real Estate Commission suspending licenses of broker and his associate for using, in violation of statute, listing contract not specifying termination date in accordance with statutory requirements, there was evidence to support Commission's finding of fact and conclusion of law to effect that brokers had violated statute requiring that a listing agreement contain definite termination date without notice from either party. Code 1957, art. 41, § 255(e), (g) (5–7).

Attorneys and Law Firms

***224** ****658** J. Calvin Carney and Walter C. Mylander, Jr., Baltimore, for appellants.

Joseph S. Kaufman, Asst. Atty. Gen. (C. Ferdinand Sybert, Atty. Gen., on the brief), for Real Estate Commission.

Melvin J. Sykes, Baltimore (Herbert J. Arnold and David Kimmelman, Baltimore, on the brief), for Allen Kleiman and others.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT and HORNEY, JJ.

Opinion

HORNEY, Judge.

This is the first appeal governed by the Administrative Procedure Act to reach this Court since its enactment by Chapter 94 of the Acts of 1957 [now codified as amended as Code (1957), Art. 41, Sections 244–256, inclusive].

***225** On this appeal we are asked to review the orders of the Baltimore City Court affirming ****659** the findings and conclusions of the Real Estate Commission of Maryland (commission) that there was sufficient competent, material and substantial evidence to justify suspending the licenses of a broker and his associate.

The appellants are Manuel M. Bernstein (Bernstein) and Warren S. Shaw (Shaw), trading as Manning-Shaw Realty Company (realty company or Manning-Shaw), often herein referred to collectively as ‘the brokers.’ They are cast on this appeal in two different ‘acts' of unethical misconduct,

combined in one record. The first (in a four-pointed complaint) charged them with violations of Code (1957), Art. 56, Section 224(b), (j), (s) and (a), which prohibits (b) 'a continued and flagrant course of misrepresentation, * * * (j) misleading or untruthful advertising, * * * (s) bad faith, incompetency or untrustworthiness, or dishonest, fraudulent, or improper dealings' by real estate dealers and salesmen or agents and (as applied here to Bernstein only) (a) the obtaining of licenses by 'false or fraudulent representation.' The commission concluded there had been violations of all of the charges except the last, as to which it declined to take any action at the time of the hearing. The complainants cross-appealed the refusal of the commission to act on the last point, but when the lower court sustained the action of the commission they did not appeal to this Court. The second charge (in a separate complaint) concerned a violation of § 224(o) [of Art. 56], which forbids the acceptance of 'a listing contract to sell property unless such contract provides for a definite termination date without notice from either party.' The commission also found there had been a violation of this charge. At the conclusion of the hearing, the commission ordered a three months' suspension of the licenses of the brokers in each case, to run concurrently.

The first complaint concerned the affixing of a 'sold' sticker to a 'for sale' sign placed on the property in Baltimore City known as 3800 Grantley Road and leaving it there for approximately three months. The gist of the complaint was that there had not been a bona fide sale of the property ***226** and that the sticker on the sign was a deliberate misrepresentation to induce property owners in the neighborhood to sell their homes and by immediate solicitation to induce them to use Manning-Shaw as brokers. The realty company countered by claiming that it held a contract of sale signed by Joseph Carter and wife (Carter or the purchaser), which had been executed before the sticker had been affixed to the sign, and that settlement had been delayed because the purchaser had had difficulty in disposing of several other properties then owned by him.

The second complaint, as hereinbefore indicated, concerned the use of an illegal listing contract. The brokers, in denying that the contract contravened the statute, claimed that even if the statute had been violated it was not a wilful transgression.

In their petitions for judicial review by the lower court, the brokers contended, among other things, that the complaints constituted an unlawful conspiracy against the civil rights of themselves and their customers in that, in substance, they were charged with 'block-busting' and that the complaints were intended to prevent Negroes from purchasing and occupying homes of their own selection in violation of constitutional guarantees.

The first complaint, although denying any prejudice on the part of the complainants, did contain allegations that Manning-Shaw had specialized in sales of residential properties to Negroes in formerly all-white neighborhoods, that such practices were intended to promote panic and instability in the vicinity for the purpose of exploiting and capitalizing on such prejudices as did exist in order to obtain as many listings as possible and that such practices had adversely affected the morale of the residents and depreciated property values.

Whatever may have been the real motive of the complainants, the commission early ****660** in the proceeding before it, made it clear, and continued to reiterate, that the hearing was for the sole purpose of determining whether or not Bernstein and Shaw had violated the law in connection with the exercise of their rights under the licenses issued to them, and that the ***227** commission was not concerned with 'block-busting.' Furthermore, we think the lower court was correct in refusing to receive into evidence, even as 'explanatory background,' the proffered exhibits with regard to publicity given the accusation. At the conclusion of the hearing on appeal below, the lower court found no basis in the record to believe the commission was either biased or arbitrary in the manner in which it had conducted the proceeding before it. The question is not specifically before us on the appeal to this Court, and we shall not consider it further.

Since there are two separate and distinct cases we shall summarize the salient parts of the oral testimony and documentary evidence and the findings of fact in each before discussing the questions presented.

The 3800 Grantley Road Case

On June 19, 1958, Carter and his wife entered into a contract to purchase this property from the Eutaw Realty Corporation, the capital stock of which was owned equally by Bernstein and Shaw, who, as herein stated, are partners in Manning-Shaw, the brokers in the transaction. It is this contract that is the main topic of this litigation. The property was sold for $18,00 subject to an annual ground rent of $120. According to the terms of the contract $500 had been paid prior to its execution, $550 was payable within two days and $1,950 on or before the expiration of thirty days. The balance of $15,000 was to be financed by a standard land installment contract with weekly payments of $37.50.

Carter was making only $54.62 a week but claimed his income was $70. His wife, who had an undetermined number of children, was employed as a domestic. At the time the contract was signed, the purchaser had small equities in several other properties. Through Manning-Shaw, also acting as brokers, he had previously placed a $500 deposit on another house under a contract still in effect when the Grantley Road contract was made. Shaw claimed it was understood that the prior contract had been canceled, but there was testimony that Carter and his family claimed it as their 'home' for some time after June 19. Manning-Shaw produced ***228** mortgage loan applications to show that loans had been applied for and rejected shortly after the contract for 3800 Grantley Road had been executed. The $500 allegedly paid prior to the signing of this contract was a credit transaction on the books of Manning-Shaw for that amount held in escrow by them as a deposit on the previously executed contract for the other property. Carter, however, paid $550 on June 21, 1958, and $850 and September 13, 1958. These transactions were verified by ledger entries in the bank account of Manning-Shaw.

The complainants, who resided across the street from and next door to 3800 Grantley Road, testified that after the 'sold' sticker had been affixed to the sign nothing seemed to be done with respect to the property and that it appeared to be unoccupied. On one occasion another neighbor saw Carter doing some work around the house and upon advising him that the electricity should be turned on to provide current for the sump pump, he replied that 'he would see the boss.' Carter also stated, according to the neighbor, that he did not know who had bought the house. A woman police sergeant testified that when she had gone to the property on January 31, 1959, and on subsequent visits, she found Carter's wife and eight children occupying the kitchenette where a gas stove afforded the only heat in the house. Hunger and lack of clothing were also noted. But a photograph, introduced by Manning-Shaw, showed Carter sitting ****661** with an agent of the brokers in a well-furnished living room in the house.

There was also evidence that the sales agent who had made the sale had not, as late as the end of 1958, received a commission on the sale although both he and the realty company admitted a commission was due him. Manning-Shaw claimed they paid the salesman through a drawing account and in round figures not in specific commissions. But their records indicated that previously he had been paid exact commissions by them for the specific properties which he had sold.

Another witness, posing as a buyer after placement of the 'sold' sticker, had been informed by another sales agent of Manning-Shaw that the property was not sold at that time. Manning-Shaw claimed the agent had said the sale might not ***229** go through and that the prospective 'buyer' could have it if the pending sale was not consummated.

On this evidence the commission made five findings of fact to the effect: (i) that the sales agent had not received a commission for making the sale; (ii) that another agent had offered to sell the property to a prospective buyer two months after the purported sale had been made; (iii) that the purchaser was still under contract to purchase another property through the same brokers when he purportedly purchased 3800 Grantley Road; (iv) that there were several unexplained discrepancies between the purported contract of June 19 and the transaction allegedly consummated on September 19, in which the required down payment was made less and the weekly payments were made smaller; and (v) that there had not been a normal occupancy of the property by the purchaser. The commission further found that it was difficult to give credence to the explanations of Bernstein and Shaw; that the testimony of Shaw, who was most familiar with the transaction, was vague and indefinite; and that the testimony of Carter was contradictory and inconsistent and entitled to little weight. Therefore, the commission, having concluded that the alleged sale was not bona fide, found the brokers had violated § 224(b) of Art. 56 [continued and flagrant course of misrepresentation], (j) [misleading and untruthful advertising] and (s) [bad faith and improper dealing].

Section 255(g) of Article 41, supra, provides:
'The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

'(1) In violation of constitutional provisions; or

'(2) In excess of the statutory authority or jurisdiction of the agency; or

'(3) Made upon unlawful procedure; or

'(4) Affected by other error of law; or

'(5) Unsupported by competent, material, and substantial ***230** evidence in view of the entire record as submitted; or

'(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or

'(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or

'(8) Arbitrary or capricious.'

[1] While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, ****662** it is clear that the statute did not intend that the court should substitute its judgment for the *expertise* [1] of those persons who constitute the administrative agency from which the appeal is taken. Cf. Maryland Racing Commission v. McGee, 1957, 212 Md. 69, 80, 128 A.2d 419, 425. See also Marino v. City of Baltimore, 1957, 215 Md. 206, 222, 137 A.2d 198, 205.

[2] Generally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency and such *de novo* evidence, if any, as may be taken by the court, and such findings and conclusions are not against the weight of such evidence, it is the function of the court to affirm the order of the agency or remand the case for further proceedings if that be necessary. On the other hand, if the court should find that the substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified in § 255(g)(1)–(8) [of Art. 41], because of an administrative finding, inference, conclusion or decision, then it is the function of the court to reverse or modify the order.

In this case [3800 Grantley Road], the brokers contend that the exercise by the commission of its statutory functions ***231** was against the weight of the evidence in that they claim the affirmative evidence of good faith—shown by the execution of the original contract and the final consummation of the substituted transaction made three months later, the payments on account of the purchase price and the declined applications for mortgage loans—could not be overcome by the showing of 'negative' evidence of bad faith, or the inferences deducible therefrom. They further contend that the weight of such evidence did not support the conclusions of law reached by the commission.

[3] **[4]** **[5]** Ordinarily it is true, of course, that when the bona fides of a *formal* contract is attacked for the purpose of having it canceled or modified, the burden to show that it was not made in good faith is upon those who attack it. Abrahams v. King, 1909, 111 Md. 104, 111, 73 A. 694, 696. It is also true, as it is in court proceedings, that the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body. 42 Am.Jur., Public Administrative Law, § 131. Thus, in this case, there is no doubt that the complaining property owners had the burden throughout of proving the alleged violations of the prohibitory provisions of the real estate 'code.' 2 Davis, Administrative Law, § 14.14 (1958). But we are of the opinion that the complainants sufficiently met that burden.

[6] In a case such as this, where it was the bona fides of the acts of the real estate brokers which was under attack—not for the purpose of canceling or modifying the contract but for the purpose of showing the brokers had misrepresented the transaction by claiming the contract was valid when in fact it was not—there was no reason why the commission in the exercise of their skill and judgment, as they were specifically empowered to do by § 252(d) [of Art. 41], should not also consider, together with the positive evidence, the so-called negative evidence—that the sales agent had not been paid his commissions; that the purchaser with limited means was still bound at the time under a previous contract to purchase another property; that the discrepancies between the original contract and the substituted transaction were not explained; and that there had not been a normal occupancy ***232** of the premises—and the inferences deducible from such negative evidence. There was also no reason why the commission could not consider the circumstances of the parties, their credibility as witnesses, ****663** the dealings between them prior to the execution of the contract of sale and their subsequent acts and declarations, in deciding whether or not the brokers had violated one or more of the prohibitory provisions charged in the complaint. Moreover, there was also the positive testimony of a neighbor to the effect that the purported purchaser, after the date of the purchase, had denied buying the property and, on the same occasion, had referred to the brokers, or one of them, as his 'boss,' as well as the positive testimony of the prospective 'buyer' to the effect that another sales agent had shown him the property as being for sale when it had purportedly been sold, which evidence, though disputed, the commission may well have believed. Furthermore, under the facts and circumstances in this case, the commission was not obliged to accept the explanations of

Bernstein, or of his associate with respect to the bona fides of the transaction.

[7] The statute specifically provides that an administrative agency 'may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs.' Section 252 (a) [of Art. 41]. There was no contention that the evidence in question did not meet this test. With respect to the weight of the evidence, it is true, of course, that a mere surmise or conjecture that it was sufficient would not be enough. The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, i. e., a preponderance of the evidence is necessary, but proof beyond a reasonable doubt is not required. 42 Am.Jur., Public Administrative Law, Section 132.

On the record from the commission in this case, the trial court found that the findings and conclusions of the commission on the evidence before it were not arrived at in contravention of the standards stated in paragraphs (5), (6) or (7) of Section 255(g), supra, and that such evidence supported ***233** the decisions of the commission. We think the record sustains the trial court. The order of the lower court in the 3800 Grantley Road case will therefore be affirmed.

[8] The brokers also complained that the lower court erred in not receiving the proffered documentary proof that a commission had been paid for making the sale. Such additional evidence is not receivable unless the court is satisfied that it is material and that there were good reasons for failure to present it in the proceeding before the agency. Section 255(e) [of Art. 41]. But, even if we assume, without deciding, that it should have been received as *de novo* evidence, it would not have destroyed, even if it had been believed by the court, the effect of the other findings of fact on which the commission also based its conclusions of law.

The Listing Contract Case

[9] This case involves a more concise factual background. The complainant, an incorporated improvement association, charged that Manning-Shaw had used an illegal listing contract in violation of Section 224(o) [of Art. 56], supra. The offending clause in the contract read:

> 'The owner reserves the right to withdraw the property from said agent at any time after six months. But it is understood that this [a]greement is not revokable while any negotiations are pending for sale or exchange of the property. And if the property is sold or exchanged subsequently to any party with whom said agent has been negotiating, the commission will be paid to said agent.'

In their answer to this charge, the brokers claimed that even if the contract was not proper—in that it did not provide for a definite termination date 'without notice from either party' as the statute requires—the violation was not wilful. In refutation of that claim the former secretary of the ****664** commission testified that Bernstein had been to his office sometime during the year 1956, primarily on another matter, and that, while he (the secretary) could not recall having seen a Manning-Shaw listing contract without an expiration ***234** date, that he was certain that he had warned them that all listing contracts must have a termination date since it was his policy to tell everyone who asked him about the matter that a definite expiration date must be included in order to comply with the law. Bernstein admitted that his firm knew that the law had been recently changed to require a termination date.

The commission found that the brokers had knowledge that their listing contract did not comply with one of the provisions of Section 224(o) [of Art. 56].

When the appeal from the commission in this case reached the court below, the brokers applied for leave to present additional material evidence. The court ordered that such evidence be taken in open court. It was to the effect that Shaw had sent the commission samples of their listing contracts and other forms in a letter dated January 19, 1957, in connection with a complaint dealing with a different matter, the inference being, we assume, that the commission had not then or thereafter objected to the legality of their listing contract.

In this case [Listing Contract], the brokers now contend that their listing contract was a good one and that the statute does not require the use of words 'termination' or 'terminate' if that part of the contract binding on the seller is in fact terminated by the language used, which they insist their contract did. They further contend that the order of the commission suspending their licenses for this technical

violation was arbitrary and capricious since the violation had harmed no one.

The short answer to these contentions is that the statute specifically requires that a listing agreement *must* contain 'a definite termination date *without notice from either party*' [emphasis added] and that since there was a clear-cut violation of the statute, the suspension of the licenses, under the existing facts and circumstances, was not either arbitrary or capricious.

The trial court found that there was competent, material and substantial evidence in the entire record as submitted including the *de novo* evidence taken in open court—not overcome by countervailing evidence—to support the commission's finding of fact and conclusion of law to the effect that ***235** the brokers had violated one of the provisions of Section 224(o) [of Art. 56]. We agree. Since the order of the lower court in the Listing Contract case was proper, it will also be affirmed.

Orders affirmed in both cases, the appellants to pay the costs.

All Citations

221 Md. 221, 156 A.2d 657

Footnotes

1 The statute [Sec. 252(d)] specifically provides that agencies 'may utilize their experience, technical competence and specialized knowledge' in evaluating the evidence.

AA-45

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 4. Miscellaneous Provisions (Refs & Annos)
Title 1. Of the General Principles of Evidence

West's Ann.Cal.C.C.P. § 1859

§ 1859. Construction of statutes or instruments; intent

Currentness

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

Credits
(Enacted in 1872.)

Notes of Decisions (1930)

West's Ann. Cal. C.C.P. § 1859, CA CIV PRO § 1859
Current with urgency legislation through Ch. 4 of 2020 Reg.Sess

End of Document

AA-46

394 F.Supp.3d 1122
United States District Court, C.D. California.

Anne CRAWFORD-HALL et al.
v.
UNITED STATES of America et al.

Case No. 2:17-cv-01616-SVW-AFM
|
Signed 02/13/2019

Synopsis

Background: Owners of land adjacent to land that Indian tribe was petitioning Bureau of Indian Affairs (BIA) to take into trust pursuant to Indian Reorganization Act (IRA) so that tribe could exercise full governance and sovereignty over it with limited state or federal government interference brought action against United States, alleging that BIA lacked authority to issue final decision denying appeals of Notice of Decision (NOD) to take land into trust, Secretary lacked authority under IRA to acquire property in trust for tribe, NOD and final decision violated National Environmental Policy Act (NEPA) by failing to take "hard look" at environmental consequences of accepting that land into trust, NOD and final decision did not adequately address and analyze regulatory factors governing fee-to-trust acquisitions, and they were entitled to mandamus to compel BIA to remove that land from trust. Parties moved for summary judgment.

Holdings: The District Court, Stephen V. Wilson, J., held that:

[1] regulation affirmatively prescribing when and how Assistant Secretary could delegate authority to decide appeals once Assistant Secretary exercised his or her discretionary authority to remove appeal from jurisdiction of Interior Board of Indian Appeals (IBIA) restricted Assistant Secretary to delegations only of non-binding decisionmaking authority and only to Deputy;

[2] principal deputy did not have authority to issue final decision denying appeals by adjoining landowners; and

[3] action could be stayed in interests of judicial efficiency to allow agency to complete its administrative process.

Ordered accordingly.

West Headnotes (34)

[1] Administrative Law and Procedure Standards and grounds for summary judgment or disposition; evidence

When reviewing final agency action, the function of the district court on a motion for summary judgment is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did; thus, the court decides whether the agency's action passes muster under the appropriate standard of review. 5 U.S.C.A. § 706(2)(A); Fed. R. Civ. P. 56(a).

[2] Administrative Law and Procedure Nature and Form of Remedy

Environmental Law Nature and form of remedy; applicable law

Indians Appeal or other review

The Administrative Procedure Act governs judicial review of decisions by agencies, such as fee-to-trust acquisitions by Bureau of Indian Affairs (BIA) analyzed under the Indian Reorganization Act (IRA) and the National Environmental Policy Act (NEPA). 5 U.S.C.A. § 701 et seq.; 25 U.S.C.A. § 5101 et seq.; National Environmental Policy Act of 1969 § 2, 42 U.S.C.A. § 4321 et seq.

[3] Administrative Law and Procedure Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Wisdom, judgment, or opinion in general

The arbitrary and capricious test of the Administrative Procedure Act (APA) is a narrow scope of review of agency factfinding; the court is not empowered to substitute its judgment for that of the agency. 5 U.S.C.A. § 706(2)(A).

[4] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

A court's task under the "arbitrary and capricious" test of the Administrative Procedure Act (APA) is to ascertain whether the agency articulated a rational connection between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

[5] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Administrative Law and Procedure Presumptions and Burdens on Review

Arbitrary and capricious review under the Administrative Procedure Act (APA) is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision. 5 U.S.C.A. § 706(2)(A).

[6] **Administrative Law and Procedure** Theory or grounds not provided or relied upon by agency

Under Administrative Procedure Act (APA) arbitrary and capricious review, the bases for the agency's decision must come from the agency from the court's review of the administrative record. 5 U.S.C.A. § 706(2)(A).

[7] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

Judicial review of agency action under the Administrative Procedure Act (APA) is meaningless unless the court carefully reviews the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors. 5 U.S.C.A. § 706(2)(A).

[8] **Administrative Law and Procedure** Province of, and deference to, agency in general

Where a dispute over an agency's decision primarily rests on issues of fact requiring technical expertise, a court on judicial review under the Administrative Procedure Act (APA) must defer to the agency's expertise in making factual determinations. 5 U.S.C.A. § 706(2)(A).

[9] **Administrative Law and Procedure** Substantial evidence

Where the evidence is susceptible of more than one rational interpretation, a court on judicial review under the Administrative Procedure Act (APA) must uphold the agency's finding if a reasonable mind might accept the evidence as adequate to support a conclusion. 5 U.S.C.A. § 706(2)(A).

[10] **Administrative Law and Procedure** Deference to Agency in General

When presented with an issue of an agency's interpretation of its own regulations, a court on judicial review under the Administrative Procedure Act (APA) must defer to an agency's interpretation of its own ambiguous regulations; this is true even where the agency's interpretation is advanced in a legal brief. 5 U.S.C.A. § 706(2)(A).

[11] **Administrative Law and Procedure** Deference to Agency in General

Administrative Law and Procedure Erroneous or unreasonable construction; conflict with rule or statute

Under *Auer* deference, the agency's regulatory interpretation controls unless plainly erroneous

or inconsistent with the regulation or where there are grounds to believe that the interpretation does not reflect the agency's fair and considered judgment of the matter in question.

[12] **Administrative Law and Procedure** Deference to Agency in General

Administrative Law and Procedure Plain, literal, or clear meaning; ambiguity or silence

On judicial review under the Administrative Procedure Act (APA), a court must defer to an agency's interpretation of a regulation unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. 5 U.S.C.A. § 706(2)(A).

[13] **Administrative Law and Procedure** Plain, literal, or clear meaning; ambiguity or silence

If the regulation at issue is not ambiguous, deference to the agency's interpretation of the regulation under *Auer* is not warranted.

[14] **Administrative Law and Procedure** Plain language; plain, ordinary, or common meaning

As a general interpretive principle, the plain meaning of a regulation governs.

[15] **Administrative Law and Procedure** Plain language; plain, ordinary, or common meaning

Administrative Law and Procedure Administrative Construction of Rules and Regulations

Other interpretative materials, such as the agency's own interpretation of the regulation, should not be considered when the regulation has a plain meaning. 5 U.S.C.A. § 706(2)(A).

[16] **Administrative Law and Procedure** Deference to Agency in General

Administrative Law and Procedure Circumstances or Time of Construction

On judicial review under the Administrative Procedure Act (APA), a court should not defer to an agency's interpretation where doing so would improperly permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation or where the agency's interpretation is nothing more than a convenient litigating position or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack. 5 U.S.C.A. § 706(2)(A).

[17] **Administrative Law and Procedure** Review in general

A court's review of an agency's construction of a regulation falling outside the scope of *Auer* deference is de novo, but the court may still accord the agency's opinion some weight.

[18] **Indians** Administrative proceedings

Regulation affirmatively prescribing when and how Assistant Secretary of Bureau of Indian Affairs (BIA) could delegate authority to decide appeals once he or she exercised his or her discretionary authority to remove appeal from jurisdiction of Interior Board of Indian Appeals (IBIA) restricted Assistant Secretary to delegations only of non-binding decisionmaking authority and only to Deputy. U.S. Const. art. 2, § 2, cl. 2; 5 U.S.C.A. § 301; 25 U.S.C.A. §§ 2, 9; 5 U.S.C.A. § 3348; 25 C.F.R. § 2.20(c).

[19] **Constitutional Law** Delegation of powers by executive

Public Employment Delegation in general

United States Delegation in general

When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent; to determine whether the presumption applies, a court must look to the purpose of the statute to set its parameters regarding subdelegation.

[20] **Administrative Law and Procedure** Effect on agency

Agencies are bound to follow the regulations they promulgate, whether procedural or substantive in nature.

[21] **Constitutional Law** Delegation of powers by executive

Because an agency enacts regulations pursuant to the authority prescribed to the agency by Congress, the text of the agency's regulation itself may constitute affirmative evidence of an intent to restrict subdelegations; thus, whether a subdelegation of agency authority is lawful depends on an analysis of the applicable regulations to determine the agency's own intent regarding subdelegations. 5 U.S.C.A. § 301; 25 U.S.C.A. §§ 2, 9.

[22] **Indians** Administrative proceedings

Only the Assistant Secretary of the Bureau of Indian Affairs (BIA) has the authority to issue a final decision on an administrative appeal of a Notice of Decision (NOD) after the Assistant Secretary takes jurisdiction over an appeal. 25 C.F.R. § 2.20(c)(1).

[23] **Administrative Law and Procedure** Rule or regulation as a whole; relation of parts to whole and one another

When discerning the meaning of regulatory language, a court must interpret the regulation as a whole, in light of the overall statutory and regulatory scheme.

[24] **Administrative Law and Procedure** Permissible or reasonable construction

An agency's interpretation of a regulation must conform with the wording and purpose of the regulation.

[25] **Indians** Administrative proceedings

While the Assistant Secretary of the Bureau of Indian Affairs (BIA) has complete discretion to take jurisdiction from Interior Board of Indian Appeals (IBIA) over an appeal of a Notice of Decision (NOD), the regulatory scheme intends for the Assistant Secretary's jurisdiction to be a limited exception to the normal appeals process before IBIA. 25 C.F.R. § 2.1 et seq.

[26] **Indians** Administrative proceedings

A Deputy to the Assistant Secretary of the Bureau of Indian Affairs (BIA) does not have the authority to bind the agency to action as a person appointed to a position by the President and confirmed by the Senate (PAS officer) and does not have the express authority to issue final decisions on appeals if the Assistant Secretary delegates an appeal taken from Interior Board of Indian Appeals (IBIA) to the Deputy. 25 C.F.R. §§ 2.4(c), 2.4(e), 2.20(c).

[27] **Indians** Administrative proceedings

Any delegation inconsistent with the authority provided by regulation affirmatively prescribing when and how Assistant Secretary of Bureau of Indian Affairs (BIA) could delegate authority to decide appeals once he or she exercised his or her discretionary authority to remove appeal from jurisdiction of Interior Board of Indian Appeals (IBIA) was not presumptively permissible; although language affirmatively prohibiting redelegation was absent, regulation was delegation provision and Secretary spoke to permissible bounds of Assistant Secretary's delegation authority. 25 C.F.R. § 2.20(c).

[28] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

The canon of statutory construction expressio unius est exclusio alterius creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.

[29] **Statutes** Superfluousness

As a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored.

[30] **Indians** Administrative proceedings

Assistant Secretary of Bureau of Indian Affairs (BIA), on irregular basis, could decide appeals of particular political significance or cases involving discretionary decisions made by officials of BIA, under regulation affirmatively prescribing when and how Assistant Secretary could delegate authority to decide appeals once he or she exercised his or her discretionary authority to remove appeal from jurisdiction of Interior Board of Indian Appeals (IBIA). 25 C.F.R. § 2.20(c).

[31] **Indians** Administrative proceedings

Principal deputy of Bureau of Indian Affairs (BIA) did not have authority to issue final decision denying appeals by adjoining landowners over Notice of Decision (NOD) granting Indian tribe's petition for Bureau of Indian Affairs (BIA) to take land into trust pursuant to Indian Reorganization Act (IRA); final decision was executed in violation of Federal Vacancies Reform Act (FVRA) because decision was exclusive function or duty of Assistant Secretary according to Department of Interior regulations. 5 U.S.C.A. § 3345 et seq.; 25 U.S.C.A. § 5101 et seq.; 25 C.F.R. § 2.20(c).

[32] **Indians** Administrative proceedings

Only Assistant Secretary of Bureau of Indian Affairs (BIA) was authorized to issue final decision on appeal of Notice of Decision (NOD) granting Indian tribe's petition for Bureau of Indian Affairs (BIA) to take land into trust pursuant to Indian Reorganization Act (IRA) after he exercised his discretion to remove appeal from jurisdiction of Interior Board of Indian Appeals (IBIA), since Assistant Secretary opted to retain jurisdiction for himself to issue final decision by not assigning appeal to any Deputy within 20 days of filing of appeal. 25 U.S.C.A. § 5101 et seq.; 25 C.F.R. § 2.20(c)(1).

[33] **Administrative Law and Procedure** Ripeness; prematurity

Courts are generally precluded, under the ripeness doctrine, from prematurely adjudicating administrative matters until the proper agency has formalized its decision. U.S. Const. art. 3, § 2, cl. 1.

[34] **Action** Actions and administrative proceedings

After finding that agency's acts were ultra vires, action challenging final environmental assessment (EA), finding of no significant impact (FONSI), and Notice of Decision (NOD) granting Indian tribe's petition for Bureau of Indian Affairs (BIA) to take land into trust pursuant to Indian Reorganization Act (IRA) that purportedly were ripe when originally brought could be stayed in interests of judicial efficiency to allow agency to complete its administrative process; although those causes of action could have been dismissed without prejudice so that case could have been filed anew following final agency decision, that solution would have imposed needless procedural steps in effort to resolve outstanding claims. 25 U.S.C.A. § 5101 et seq.

Attorneys and Law Firms

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Proceedings: ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFFS IN PART AND STAYING FURTHER PROCEEDINGS [51][52]

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Before the Court are cross-motions for summary judgment filed by Plaintiffs ***1127** Anne Crawford-Hall, San Lucas Ranch, LLC, and Holy Cow Performance Horses, LLC ("Plaintiffs"), Dkt. 51, and by Federal Defendants the United States of America et al. (the "United States"), Dkt. 52, regarding Plaintiffs' First, Third, and Fourth causes of action. For the reasons set forth below, the Court GRANTS summary judgment in favor of Plaintiffs on Plaintiffs' First cause of action, the Court DENIES summary judgment to both parties as to Plaintiffs' Third and Fourth causes of action as unripe, and the Court STAYS further proceedings in this action.

I. Factual Background

In 2010, the Santa Ynez Band of Mission Indians (the "Band" or the "Tribe") purchased over 1400 acres of real property in Santa Barbara County, California, locally known as Camp 4 ("Camp 4" or the "Property"). Complaint, Dkt. 1 ("Compl."), ¶ 39; Answer, Dkt. 30 ("Answer"), ¶ 39. Camp 4 is located directly across the street from Plaintiffs San Lucas Ranch, LLC and Holy Cow Performance Horses, LLC, each of which is managed by Plaintiff Crawford-Hall. *Id.* ¶ 14. Camp 4 was previously owned by Ms. Crawford-Hall's family. *Id.*

In June 2013, the Band filed an application with the Bureau of Indian Affairs ("BIA"), a federal agency within the Department of the Interior ("Interior" or the "Department"), requesting that BIA take Camp 4 into trust pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101 *et seq.* (the "IRA"). *See* Administrative Record ("AR") 0030; *see also* 25 U.S.C. § 5108; 25 C.F.R. part 151. The application was supplemented in July 2013, see AR0032, and revised in November 2013, see AR0080. The trust acquisition would allow the Band to exercise full tribal governance and sovereignty over the property, with limited state or federal government interference. AR0194.14. The Band's primary goal for placing Camp 4 in trust was to facilitate the construction of additional housing for the Band's members, which would also advance the Band's efforts to bring tribal members and lineal descendants back to the Band's tribal community in order to protect and maintain the Band's heritage and culture. *See* AR0194.13-14.

A. Environmental Review

In considering the Band's application for trust acquisition for the Camp 4 property, BIA conducted an environmental review pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). In August 2013, BIA prepared a Draft Environmental Assessment (the "Draft EA") and made the Draft EA available for public comment for a total of 90 days. AR0194.8, 12; *see also* AR0127. In May 2014, BIA issued a Final Environmental Assessment (the "Final EA"), totaling almost 2,000 pages, that analyzed the potential environmental effects of the trust acquisition pursuant to the Band's application. *See generally* AR0194.

In the Final EA, BIA addressed a wide variety of environmental issues, including land resources, water resources, air quality and climate change, biological resources, cultural resources, socioeconomic conditions and environmental justice, transportation and circulation, land use, public services, noise, hazardous materials, and visual resources. AR0194.15. The Final EA identified three reasonable project alternatives and analyzed the potential environmental consequences and potential cumulative impacts for each alternative. *See generally* AR0194.17-35; AR0194.120-193. The three alternatives are the following:

- "Alternative A" comprised of 143 five-acre lots for residential housing across approximately 793 acres, and ***1128** included 206 acres of vineyards, 300 acres of open space or recreational land, 98 acres of riparian corridor, 33 acres of oak woodland conservation, and 3 acres for utilities. AR0194.19; *see also* AR0194.20-28.

- "Alternative B" was largely the same as Alternative A, with the exceptions that Alternative B featured 143 one-acre lots for residential housing across only 194 acres, added 30 acres for tribal facilities, and converted the unused residential area into a total of 869 acres

for open space and recreation. AR0194.19; *see also* AR0194.28-32.

- "Alternative C," or the "no action alternative," considered the environmental impacts if the Camp 4 property was not acquired in trust. AR0194.19; *see also* AR0194.32.

BIA compared the three alternatives to assess the relative benefits and environmental impacts for each alternative. AR0194.32-35; *see also* AR0194.120-153 (environmental consequences of Alternative A); AR0194.153-72 (environmental consequences of Alternative B); AR0194.173-75 (environmental consequences of Alternative C); AR0194.176-91 (cumulative effects for Alternatives A and B). In comparing Alternative A to Alternative B, each of which satisfied the Band's objective to obtain Camp 4 under tribal jurisdiction, BIA determined that "Alternative B would result in additional beneficial socioeconomic impacts through the development of additional tribal facilities." AR0194.35. BIA assessed Alternative C and determined that rejecting the Band's trust application would not pose many of the potential environmental effects discussed in connection with the other alternatives. *Id.; see also* AR0194.173. However, BIA also determined that rejecting the Band's application would result in *increased* groundwater usage based on representations from the Band that there would be an expansion of the existing vineyard on the Property, which would not occur if the Band's application was approved. AR0194.173. BIA ultimately concluded that "[d]espite the proportionately greater overall effects on the environment of Alternatives A or B, none of the identified impacts would be significant and unavoidable, following implementation of protective measures and mitigation recommended in this document." AR0194.35.

BIA also considered mitigation measures for the proposed trust acquisition under Alternatives A or B to minimize or eliminate certain adverse impacts. AR0194.194-204. Proposed mitigation measures include, among others: best management practices to minimize impacts to soils (AR0194.194-95); restrictions on where new groundwater wells can be constructed on the property and prohibitions on turf grass irrigation during years of local drought conditions (AR0194.196); measures to protect air quality, largely aimed toward vehicle use on the property (AR0194.196-97); protections for biological resources in the area, such as the preparation of an arborist report to provide a revegetation plan for oak trees and the implementation of habitat sensitivity training for construction contractors and other personnel on the property (AR0194.197-200); the use of buffer zones around cultural resources (AR0194.200); monetary contributions from the Band for traffic improvements (AR0194.201-02); and a requirement for the Band to enter into an agreement with the county fire department to provide fire protection and emergency response services to individuals living on the property after it is taken into trust (AR0194.203). BIA noted that the mitigation measures "will be binding on the Tribe because it is intrinsic to the ***1129** project, required by federal law, required by agreements between the Tribe and local agencies, and/or subject to a tribal resolution." AR0194.194.

The Final EA was released for public comment for a period of 30 days. AR0194.00014. Following the public comment period, on October 17, 2014, BIA issued a Finding of No Significant Impact (the "FONSI"), concluding that the proposed federal action to approve the Band's application to acquire the Property in trust for the purpose of developing up to 143 units of tribal housing and associated facilities "does not constitute a major federal action that would significantly affect the quality of the human environment." AR0237.22. Because BIA found that approving the Band's application would not significantly impact the environment, BIA determined that the preparation of an Environmental Impact Statement was not required. *Id.*

B. Regulatory Review and Approval

On December 24, 2014, BIA Regional Director Amy Dutschke, relying on the Final EA and the FONSI, issued a Notice of Decision announcing the intent to acquire the Property in trust for the Tribe (the "2014 NOD"). *See* AR0258.72-100. In the 2014 NOD, Regional Director Dutschke evaluated the Tribe's application under the applicable regulatory factors and addressed comments from state and local government entities and the general public. *See* AR0258.84-96; 25 C.F.R. §§ 151.10-11.

In late January 2017, Plaintiffs and other parties filed administrative appeals of the 2014 NOD to the Interior Board of Indian Appeals ("IBIA" or the "Board"). Compl. ¶ 64; Answer ¶ 64. IBIA is an administrative appellate board authorized to review decisions of BIA officials. *See* 25 C.F.R. § 2.3; 43 C.F.R. § 4.330. In a letter dated January 30, 2015, Assistant Secretary–Indian Affairs ("Assistant Secretary") Kevin Washburn assumed jurisdiction over the administrative appeals of the 2014 NOD pursuant to 25 C.F.R. § 2.20. *See* AR0258.816-23. By taking jurisdiction over the appeals, Assistant Secretary Washburn divested IBIA of its authority

to hear the appeals, and IBIA transferred the appeals to the Assistant Secretary's offices. *See* AR0258.816-17; 25 C.F.R. § 2.20(c).

While the administrative appeals of the 2014 NOD were pending, on December 31, 2015, Washburn resigned from his position as Assistant Secretary. Compl. ¶ 66; Answer ¶ 66. As "first assistant" to the Assistant Secretary, former Principal Deputy Assistant Secretary–Indian Affairs ("Principal Deputy") Lawrence Roberts automatically assumed the position of Acting Assistant Secretary on January 1, 2016. Compl. ¶ 66; Answer ¶ 66. Roberts served as Acting Assistant Secretary for the maximum allowable period of 210 days under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345 *et seq.* (the "FVRA"). Compl. ¶ 66; Answer ¶ 66. Following Roberts' temporary term as Acting Assistant Secretary, Roberts reverted to his position as Principal Deputy on July 29, 2016, leaving the Assistant Secretary position temporarily vacant. Compl. ¶ 66; Answer ¶ 66.

On January 19, 2017, with the Assistant Secretary position still vacant, Principal Deputy Roberts issued a decision affirming the 2014 NOD (the "2017 Decision"). *See* AR0258.3425-66. In the 2017 Decision, Principal Deputy Roberts concluded:

> Pursuant to the authority delegated to me by 25 C.F.R. § 2.4(c), I affirm the Regional Director's December 24, 2014 decision to take approximately 1,427.28 acres of land in trust for the Santa Ynez Band of Chumash Indians. This decision is final in accordance with 25 C.F.R. § 2.20(c) and no further administrative ***1130** review is necessary. The Regional Director is authorized to approve the conveyance document accepting the Property in trust for the Tribe subject to any remaining regulatory requirements and approval of all title requirements.

AR0258.3466. The 2017 Decision was signed by Roberts as "Principal Deputy Assistant Secretary – Indian Affairs." *Id.*

On January 20, 2017, the day after issuing the 2017 Decision, Principal Deputy Roberts resigned from his position.

On January 12, 2017, the Chairperson for the Band executed a grant deed conveying the Property to the United States of America in trust for the Band (the "Grant Deed"). Compl. ¶ 68; Answer ¶ 68. Following the 2017 Decision, on January 20, 2017, Regional Director Dutschke accepted conveyance of the Property as described in the Grant Deed on behalf of the Secretary (the "Acceptance of Conveyance"). Answer ¶ 68. On January 26, 2017, BIA recorded the Grant Deed and the Acceptance of Conveyance with the office of the Santa Barbara County Reporter. *Id.*

C. Procedural History

On February 28, 2017, Plaintiffs initiated the instant action by filing a complaint against the United States. Dkt. 1. Plaintiffs brought five causes of action, alleging that: (1) Principal Deputy Roberts lacked authority to issue a final decision when he issued the 2017 Decision denying the appeals of the 2014 NOD; (2) the Secretary lacks the authority under the IRA to acquire the Property in trust for the Band; (3) the 2014 NOD and the 2017 Decision violate NEPA by failing to take a "hard look" at the environmental consequences of accepting the Property into trust; (4) the 2014 NOD and the 2017 Decision did not adequately address and analyze the regulatory factors governing fee-to-trust acquisitions; and (5) Plaintiffs are entitled to a mandamus pursuant to 28 U.S.C. § 1651 to compel BIA to remove the Property from trust. Compl. ¶¶ 79-137.

On May 31, 2018, the Court granted the United States' motion to dismiss the Second and Fifth claims with prejudice. Dkt. 49. On July 6, 2018, the parties filed cross-motions for summary judgment on Plaintiffs' First, Third, and Fourth claims. Dkts. 51, 52.

II. Standard of Review

[1] Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing final agency action, however, "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Instead, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* Thus, the Court decides whether the

agency's action passes muster under the appropriate standard of review. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985)).

[2] The Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (the "APA"), governs judicial review of decisions by agencies, such as fee-to-trust acquisitions by BIA analyzed under the IRA and NEPA. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 594-97, 602-08 (9th Cir. 2018). Under the APA, a court may hold unlawful and set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or ***1131** otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

[3] **[4]** **[5]** **[6]** The "arbitrary and capricious" test of the APA is "a narrow scope of review of agency factfinding." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). "The court is not empowered to substitute its judgment for that of the agency." *Id.* (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). Instead, a court's task is to ascertain "whether the agency articulated a rational connection between the facts found and the choice made." *Id.* (citing *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)); *see also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017) (noting that the agency must "examine the relevant data and articulate a satisfactory explanation for its action") (internal quotation marks and citation omitted). Thus, arbitrary and capricious review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotation marks and citation omitted). The bases for the agency's decision "must come from the agency" from the court's review of the administrative record. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (citing *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)).

[7] **[8]** **[9]** Nevertheless, judicial review of agency action is "meaningless" unless the court "carefully review[s] the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.' " *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (noting that a court's inquiry into the agency's decision "must be thorough"). As the Supreme Court articulated, an agency decision is arbitrary and capricious if the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Where a dispute over the agency's decision primarily rests on issues of fact requiring technical expertise, the court must defer to the agency's expertise in making factual determinations. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (citing *Marsh*, 490 U.S. at 377, 109 S.Ct. 1851); *see also Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003). Therefore, where "the evidence is susceptible of more than one rational interpretation," the court must uphold the agency's finding if "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *San Luis*, 747 F.3d at 601.

III. Analysis

Plaintiffs raise three distinct challenges under the APA to the 2014 NOD and the 2017 Decision.

First, Plaintiffs assert that Principal Deputy Roberts lacked the authority to issue the 2017 Decision, a final decision on appeals of the 2014 NOD. Plaintiffs claim ***1132** that the authority to issue final decisions on appeals of BIA decisions fell within the exclusive authority of the position of the Assistant Secretary after former Assistant Secretary Washburn assumed jurisdiction over the appeals of the 2014 NOD but resigned prior to issuing a final decision.

Second, Plaintiffs contest the adequacy of the Final EA, identifying numerous deficiencies in the EA's analysis of certain environmental impacts such as groundwater usage, incompatible land use of the Property compared to the surrounding area, proposed mitigation measures, and the cumulative impacts of the proposed development on the Property.

Third, Plaintiffs assert that BIA did not satisfy the regulatory requirements for fee-to-trust acquisitions because BIA did not sufficiently evaluate the tax impacts of the trust acquisition, failed to evaluate the jurisdictional and land use conflicts of the proposed development on the Property, failed to require the Band to include a business plan, and ignored BIA's obligation to determine whether BIA is equipped to discharge additional responsibilities following the trust acquisition.

A. Principal Deputy's Authority to Issue a Final Decision

1. *The FVRA*

The Constitution requires the President of the United States to obtain "the Advice and Consent of the Senate" prior to appointing certain Officers of the United States. U.S. Const. art. II, § 2, cl. 2; *see also Edmond v. United States*, 520 U.S. 651, 659, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997) (discussing the appointment and confirmation process as a "significant structural safeguard[ ] of the constitutional scheme"). These positions requiring Presidential appointment and Senate confirmation are commonly referred to as "PAS" officers. Federal law designates three Assistant Secretaries of the Interior as PAS officers, with their duties and authority prescribed by the Secretary. *See* 43 U.S.C. §§ 1453, 1453a, 1454.

In order to account for vacancies in PAS offices that would otherwise leave the duties of PAS officers unfulfilled, in 1998 Congress enacted the FVRA. *See generally N.L.R.B. v. SW Gen., Inc.*, —— U.S. ——, 137 S. Ct. 929, 935-36, 197 L.Ed.2d 263 (2017) (discussing the history of the enactment of the FVRA). Under the FVRA, if a PAS officer dies, resigns, or is otherwise unable to perform the functions and duties of the office, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The first assistant's acting duty is subject to a temporal limitation of 210 days from the date the vacancy first occurred, or 210 days following the Senate's rejection, withdrawal, or return of a nomination for the PAS office. *Id.* §§ 3346 (a)(1), (b).

The term "function or duty" is defined in the FVRA as:

> any function or duty of the applicable office that--
>
> (A)(i) is established by statute; and (ii) is required by statute to be performed by the applicable officer (and only that officer); or
>
> (B)(i)(I) is established by regulation; and (II) is required by such regulation to be performed by the applicable officer (and only that officer); and (ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

Id. § 3348(a)(2). In other words, by defining functions or duties as those to be performed "only" by a PAS officer, the FVRA ***1133** was intended to pertain only to "exclusive" functions or duties. Although the FVRA does not address the effect of a vacancy on the "non-exclusive" duties of the vacant PAS office, courts have interpreted the FVRA as allowing any non-exclusive functions or duties not required by law to be performed by that PAS officer to be "reassigned to another official within the agency or department" via the delegation authority of the agency's head. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d. 389, 420 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009) (per curiam).

Sections 3345 and 3346 of the FVRA "are the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of a PAS office. 5 U.S.C. § 3347(a). If no officer is permitted under the FVRA to perform the functions of a PAS office in an acting capacity, "the office shall remain vacant" and only the head of the Executive agency is authorized to perform any of the functions or duties of the vacant office. *Id.* § 3348(b). Any action taken by an agency employee in performance of a function or duty of a vacant POS office without authority pursuant to the FVRA "shall have no force or effect" and "may not be ratified." *Id.* § 3348(d)(1)-(2).

Applying the FVRA to the instant case, it is undisputed that Roberts signed the 2017 as Principal Deputy, not as Acting Assistant Secretary. Washburn resigned as the Assistant Secretary on December 31, 2015. Roberts, as Washburn's "first assistant," automatically assumed the position of Acting Assistant Secretary on January 1, 2016. After 210 days

as Acting Assistant Secretary, on July 29, 2016, Roberts reverted to his position as Principal Deputy, and the Assistant Secretary position was left vacant until a new appointment and confirmation. While the Assistant Secretary position remained vacant, Principal Deputy Roberts signed the 2017 Decision as Principal Deputy on January 19, 2017. *See* AR0258.3466. Therefore, Principal Deputy Roberts signed the 2017 Decision as Principal Deputy, not as Acting Assistant Secretary within the 210-day period prescribed by the FVRA.

During the period that the Assistant Secretary position was vacant after July 29, 2016, only the Secretary could perform any function or duty of the Assistant Secretary's office that was "required by ... regulation to be performed by the applicable officer (*and only that officer*)." *Id.* § 3348(b)(2) (emphasis added); *see also id.* § 3348(a)(2)(B)(i). Therefore, Principal Deputy Roberts had the authority under the FVRA to issue the 2017 Decision as a final decision for the agency only if the ability to issue final decisions on appeals taken from IBIA is not a "function or duty" that could be performed only by the Assistant Secretary—*i.e.*, authority that is "exclusive" to the Assistant Secretary position.

Whether the authority to issue final decisions on appeals is "exclusive" depends on the applicable statutes and agency regulations governing the appeals process over decisions made by BIA officials.

2. *Appeals of BIA Decisions under Department of Interior Regulations*

Regulations promulgated by the Department of the Interior allow for several different officials or governing boards to decide administrative appeals of decisions relating to Indian affairs made by BIA officials or by a Deputy to the Assistant Secretary. Generally, appeals first fall within IBIA's jurisdiction. *See* 25 C.F.R. § 2.4(e); 43 C.F.R. § 4.1(b)(1). A notice of appeal must be filed with IBIA within 30 days following the decision from which the appeal is taken. 43 C.F.R. § 4.332(a); 25 C.F.R. § 2.9(a). The party filing the appeal must send a copy of the notice of appeal ***1134** simultaneously to the Assistant Secretary. 43 C.F.R. § 4.332(a); 25 C.F.R. § 2.20(a).

A notice of appeal is not effective for 20 days following receipt by IBIA, during which the Assistant Secretary may exercise his or her broad discretion to take jurisdiction over the appeal. 43 C.F.R. § 4.332(b); 25 C.F.R. § 2.20(c). The Assistant Secretary's authority to take jurisdiction over an appeal from IBIA is purely within the Assistant Secretary's discretion, and the Assistant Secretary "will not consider petitions to exercise this authority." 25 C.F.R. § 2.20(c). The Assistant Secretary can exercise his authority to take jurisdiction over an appeal in two manners. First, the Assistant Secretary may "[i]ssue a decision in the appeal" directly. *Id.* § 2.20(c)(1). Second, the Assistant Secretary may "[a]ssign responsibility to issue a decision in the appeal to a Deputy to the [Assistant Secretary]." *Id.* § 2.20(c)(2). If the Assistant Secretary exercises his authority to take over an appeal before IBIA in either of these ways, the Assistant Secretary notifies IBIA which transfers the appeal to the Assistant Secretary's office. *Id.* § 2.20(c).

Section 2.20(c) requires the Assistant Secretary, or the Deputy assigned authority by the Assistant Secretary, to issue a decision on the appeal "within 60 days after all time for pleadings (including all extensions granted) has expired." *Id.* If the Assistant Secretary or the Deputy fails to issue a decision in that timeframe, "any party may move the Board of Indian Appeals to assume jurisdiction" over the appeal. *Id.* § 2.20(e).

A decision signed by the Assistant Secretary "shall be final for the Department and effective immediately unless the [Assistant Secretary] provides otherwise in the decision." *Id.* § 2.20(c); *see also* 25 C.F.R. § 2.6(c). However, a decision signed by a Deputy assigned authority to decide the appeal by the Assistant Secretary pursuant to Section 2.20(c)(2) is *not* final and may be further appealed to IBIA. *Id.* § 2.20(c); *see also id.* § 2.6 (omitting reference to any Deputy as having the authority to make final decisions that bind the agency).

The parties disagree about the nature of the Assistant Secretary's authority to decide appeals under Section 2.20(c). Plaintiffs characterize the Assistant Secretary's authority as exclusive to the Assistant Secretary; once the Assistant Secretary assumes jurisdiction from IBIA over an appeal and opts to decide the appeal directly under Section 2.20(c)(1), Plaintiffs argue that only the Assistant Secretary may issue a final decision regarding the appeal. Thus, Plaintiffs construe the Assistant Secretary's jurisdiction to issue final decisions on appeals as a "function or duty" to be performed by the Assistant Secretary and only the Assistant Secretary, as defined by the FVRA. Because this authority is exclusive, Plaintiffs argue, Principal Deputy Roberts' purported exercise of that exclusive authority by issuing the 2017 Decision in his

capacity as Principal Deputy was unlawful as an *ultra vires* act.

In response, the United States argues that the Assistant Secretary's authority to decide an appeal is always non-exclusive under Section 2.20(c) because IBIA also has the authority to decide appeals generally, and because the parties may divest the Assistant Secretary of jurisdiction over an appeal after 60 days have elapsed with no decision following the deadline to file pleadings in the appeal. The United States asserts that because the Assistant Secretary's authority to decide appeals is non-exclusive, the Secretary may subdelegate the Assistant Secretary's non-exclusive authority to other agency officials, because subdelegations are presumptively permissible unless there is evidence that Congress ***1135** intended to prevent subdelegations in the particular context. The United States then points to the Department of the Interior Department Manual (the "Department Manual" or "DM"),[1] which authorizes the Principal Deputy Assistant Secretary to "exercise the authority delegated" to the Assistant Secretary "[i]n the absence of, and under conditions specified by the Assistant Secretary," provided that the authority of the Assistant Secretary is non-exclusive in conformity with the FVRA. 209 DM 8.4(B). Relying on this section of the Department Manual, the United States concludes that, because the Assistant Secretary position remained vacant at the time and because the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c) is non-exclusive, Principal Deputy Roberts had the authority to issue the 2017 Decision as a final action that binds the agency.

[10] **[11]** **[12]** When presented with an issue of an agency's interpretation of its own regulations, courts must "defer to an agency's interpretation of its own ambiguous regulations." *Turtle Island*, 878 F.3d at 733 (citing *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)). This is true even where the agency's interpretation "is advanced in a legal brief." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (citation omitted). Under "*Auer* deference," the agency's regulatory interpretation "controls unless 'plainly erroneous or inconsistent with the regulation,' or where there are grounds to believe that the interpretation 'does not reflect the agency's fair and considered judgment of the matter in question.' " *Turtle Island*, 878 F.3d at 733 (quoting *Christopher*, 567 U.S. at 155, 132 S.Ct. 2156); *see also Singh v. Holder*, 771 F.3d 647, 652 (9th Cir. 2014) ("[W]e are bound to follow an agency's reasonable interpretations of its own regulations, but we do not defer to an agency's interpretation when it is contrary to the plain language of the regulation."). In other words, courts must defer to an agency's interpretation "unless an alternative reading is *compelled* by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (internal quotation marks and alterations omitted) (emphasis in original) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)).

[13] **[14]** **[15]** **[16]** **[17]** If the regulation at issue is not ambiguous, however, then no deference to the agency's interpretation of the regulation under *Auer* is warranted. *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). "As a general interpretive principle, the plain meaning of a regulation governs." *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (internal quotation marks and citation omitted). "Other interpretative materials, such as the agency's own interpretation of the regulation, should not be considered when the regulation has a plain meaning." *Id.* (citations omitted). Courts should not defer to an agency's interpretation where doing so would improperly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation," *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655, or where the agency's interpretation "is nothing more than a convenient litigating position ... or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," *Christopher*, 567 U.S. at 155, 132 S.Ct. 2156 (internal quotation marks and citations omitted). Thus, a ***1136** court's review of an agency's construction of a regulation falling outside the scope of *Auer* deference is de novo, but the court "may still accord the agency's opinion some weight." *Turtle Island*, 878 F.3d at 733 (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-53 (9th Cir. 2009)).

3. *Whether Section 2.20(c) Makes the Assistant Secretary's Authority to Issue Final Decisions on Appeals Exclusive*

[18] The dispositive question in this case is whether 25 C.F.R. § 2.20(c) exclusively reserves with the Assistant Secretary the authority to issue final decisions on appeals of BIA decisions over which the Assistant Secretary assumes jurisdiction, or whether the Assistant Secretary's authority to issue final appeals decisions is delegable to a Deputy.

[19] The Ninth Circuit has recognized a presumption that subdelegations by a federal officer or agency to a subordinate are permissible, and "express statutory authority for [sub]delegation is not required." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (citation omitted). "When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011) (internal quotation marks omitted) (quoting *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004)). To determine whether the presumption applies, courts "must look to the purpose of the statute to set its parameters" regarding subdelegation. *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996). Ultimately, "delegation generally is permitted where it is not inconsistent with the statute." *Id.* (internal quotation marks and citation omitted).

The statutory authority cited for Section 2.20(c) is 5 U.S.C. § 301 and 25 U.S.C. §§ 2 and 9. The former statute, 5 U.S.C. § 301, authorizes the heads of Executive agencies to prescribe regulations that govern the operation of their respective departments. The latter provisions, 25 U.S.C. §§ 2 and 9, authorize the President or the United States or the Commissioner of Indian Affairs, under the direction of the Secretary, to enact regulations governing the management of matters pertaining to Indian affairs. Based on the language in these statutes, Congress wholly contemplated—and in fact directly intended—that the Secretary would delegate and subdelegate his or her responsibilities to various officers or employees within Interior.

[20] **[21]** In this case, however, the issue is not whether *Congress* authorized subdelegations in this particular context, but whether the agency is permitted to engage in subdelegations based on the language of its own regulatory provisions. Agencies are bound to follow the regulations they promulgate, whether procedural or substantive in nature. *Dyniewicz v. United States*, 742 F.2d 484, 485-86 (9th Cir. 1984) (citations omitted); *see also Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates.") (citations omitted); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("An agency is bound by its regulations so long as they remain operative, but may repeal them and substitute new rules in their place.") (citations omitted). Because an agency enacts regulations pursuant to the authority prescribed to the agency by Congress, the text of the agency's regulation itself may constitute "affirmative evidence" of an intent to restrict ***1137** subdelegations. *Frankl*, 650 F.3d at 1350. Thus, whether a subdelegation of agency authority is lawful also depends on an analysis of the applicable regulations to determine the agency's own intent regarding subdelegations.

Here, a plain reading of Section 2.20(c) provides affirmative evidence of an intent to restrict the Assistant Secretary's authority to subdelegate the ability to decide appeals. This is true for two reasons: (1) Section 2.20 only allows the Assistant Secretary to issue final decisions on appeals, and (2) Section 2.20 is a delegation regulation that limits the Assistant Secretary's authority to delegate appeals to subordinates.

i. *Section 2.20(c) Only Authorizes the Assistant Secretary to Decide Appeals in a Final Agency Action*

[22] Reviewing the explicit text of Section 2.20, only the Assistant Secretary has the authority to issue a final decision on an appeal after the Assistant Secretary takes jurisdiction over an appeal pursuant to Section 2.20(c)(1).

First, Section 2.20(c) provides that once the Assistant Secretary exercises jurisdiction to decide an appeal, IBIA no longer has any jurisdiction over the appeal. When the Assistant Secretary exercises his or her discretion under Section 2.20(c) to take an appeal, IBIA must "transfer the appeal" to the Assistant Secretary's office. *Id.* "Transferring" the appeal from IBIA to the Assistant Secretary's office means that IBIA is divested of its jurisdiction over the appeal, placing the authority to issue a decision on the appeal solely with the Assistant Secretary. Thus, a plain reading of the regulation requires that, after the Assistant Secretary accepts jurisdiction to decide an appeal directly under Section 2.20(c)(1), the Assistant Secretary may issue a final decision on the appeal at the exclusion of any prior or subsequent appellate review by IBIA.

After the Assistant Secretary divests IBIA of jurisdiction over an appeal, Section 2.20(c) sets forth clear and specific procedures for how the appeal is to be resolved: the Assistant Secretary may decide the appeal directly, or the Assistant Secretary may assign the authority to decide the appeal to a Deputy. 25 C.F.R. § 2.20(c)(1)-(2). No other procedures are explicitly authorized or reserved in the event that the Assistant Secretary opts to take an appeal away from IBIA. If

the Assistant Secretary decides not to assign a Deputy to an appeal taken away from IBIA's jurisdiction, per the explicit terms of Section 2.20(c), the text of the regulation restricts the authority to issue a decision on the appeal to the Assistant Secretary alone.

Section 2.20(c) explicitly states that a decision on appeal signed by the Assistant Secretary "shall be final for the Department and effective immediately." *Id.* § 2.20(c). By contrast, if the Assistant Secretary decides to assign the appeal to a Deputy, the Deputy's decision would not be final and would be subject to review by IBIA. *See id.* § 2.20(c) ("[I]f the decision is signed by a Deputy to the Assistant Secretary--Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR part 4, subpart D."). Reading Section 2.20(c) as a whole, after the Assistant Secretary accepts jurisdiction to decide an appeal directly under Section 2.20(c)(1), the Assistant Secretary—and *only* the Assistant Secretary—may issue a final decision on the appeal.

To oppose the exclusivity of the Assistant Secretary's authority to issue final decision on appeals after the Assistant Secretary assumes jurisdiction pursuant to Section 2.20(c), the United States relies on Section 2.20(e), which states that any party ***1138** may move for IBIA to take back jurisdiction over an appeal removed by the Assistant Secretary if the Assistant Secretary has not rendered a decision on the appeal after 60 days following the close of pleadings on the appeal. *See* 25 C.F.R. § 2.20(e). However, per this regulatory language, for the Assistant Secretary to be divested of his or her authority to decide the appeal, two conditions must be satisfied: (1) 60 days have elapsed following the close of pleadings; *and* (2) a party has moved for IBIA to take back jurisdiction. If *either* of those two conditions are not satisfied, only the Assistant Secretary may issue a final decision on the appeal. The regulatory language further confirms that "[a] motion for Board decision under this section shall invest the Board with jurisdiction as of the date the motion is received by the Board." *Id.* Because IBIA is "invested" with jurisdiction only *after* receipt of a motion to reclaim jurisdiction filed by a party to the appeal, IBIA is necessarily divested of jurisdiction *prior to* receipt of such a motion. Certainly, prior to the date where 60 days have elapsed since the time for filing pleadings has expired and without a decision on the appeal, no party would be able to motion for IBIA to take back jurisdiction from the Assistant Secretary in the first place. The Assistant Secretary's authority to issue a final decision during that time is exclusive, just as the fact that only the Assistant Secretary may issue a final decision beyond the 60-day deadline if no party moves for IBIA to take back jurisdiction.

The United States also argues that the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c) is not "exclusive" by virtue of the fact that other persons or bodies, including IBIA, generally can issue final decisions on appeals in other circumstances. *See* Dkt. 51-1 at 25 (citing 25 C.F.R. § 2.4; 43 C.F.R. § 4.312 (making decisions on appeals by IBIA final for the Department)). The United States' argument is incorrect, because even if other officials may generally have the authority to issue final decisions on appeals in the abstract, what is relevant to this case is the specific authority to decide an appeal following the Assistant Secretary's exercise of discretionary authority to assume jurisdiction over an appeal pursuant to Section 2.20(c). The United States has not articulated any reason why any other official within Interior enumerated in Section 2.4 would have the authority to make a decision in lieu of the Assistant Secretary in circumstances where (1) the Assistant Secretary has assumed jurisdiction pursuant to Section 2.20(c)(1), and (2) no party has moved for IBIA to take back jurisdiction over the appeal after 60 days have elapsed without a decision following the time for filing pleadings in the appeal. Under these precise conditions, the regulatory scheme over appeals of BIA decisions only allows the Assistant Secretary to issue a final decision—or *any* decision, for that matter—on an appeal.

The United States' reliance on 43 C.F.R. § 4.5 is equally unavailing. Section 4.5(a)(1) authorizes the Secretary "to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office ... and render the final decision in the matter after holding such hearing as may be required by law." 43 C.F.R. § 4.5(a)(1). Per the plain language of this provision, the Secretary's authority to assume jurisdiction over any case at any time does not divest any other official, administrative law judge, or board with jurisdiction over a matter *unless and until* the Secretary exercises his or her discretion to "take jurisdiction." Simply because the Secretary may theoretically do so at any time does not designate the ***1139** Assistant Secretary's responsibility to decide an appeal after assuming jurisdiction under Section 2.20(c) non-exclusive for purposes of the FVRA. Such a conclusion would render any purportedly exclusive obligations of a PAS officer non-exclusive and would wholly eliminate the purpose of the FVRA to prevent non-PAS officials from carrying out the exclusive functions

and duties of a vacant PAS office, including those functions and duties delineated by the head of an Executive agency via regulation.

Taken together, the above findings from a plain reading of Section 2.20(c) dictate that only the Assistant Secretary may issue a final decision on an appeal taken from IBIA's jurisdiction pursuant to Section 2.20(c)(1), unless and until the Assistant Secretary is divested of jurisdiction by a party's motion under Section 2.20(e) or by the exercise of the Secretary's discretionary authority under Section 4.5. This conclusion is "compelled" by the unambiguous language of Section 2.20(c). *Bassiri*, 463 F.3d at 931.

ii. *The Purpose and Context of Section 2.20(c) Supports the Conclusion that Section 2.20(c) Is a Delegation Regulation*

[23] **[24]** Next, an analysis of Section 2.20(c) and the history and purpose behind the Assistant Secretary's authority over appeals reveals that Section 2.20(c) is a delegation regulation that is intended to restrict the Assistant Secretary's permissible delegation authority. When "discerning the meaning of regulatory language," a court must "interpret the regulation as a whole, in light of the overall statutory and regulatory scheme." *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1442 (9th Cir. 1990) (internal quotation marks and citation omitted); *see also Inland Empire*, 88 F.3d at 702 (courts "look to the purpose of the [regulation] to set its parameters" regarding subdelegations). "An agency's interpretation of a regulation must 'conform with the wording and purpose of the regulation.' " *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 628 (9th Cir. 2005) (quoting *Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166 (9th Cir. 2003)).

When Interior first issued proposed regulations governing administrative appeals, the regulations did not provide for a Deputy to the Assistant Secretary to maintain authority to review appeals of BIA administrative actions in any capacity. *See* Appeals from Administrative Actions, 54 Fed. Reg. 6478, 6478 (Feb. 10, 1989). Instead, the regulations limited the Assistant Secretary's jurisdiction over appeals to the Assistant Secretary alone. Following public comment, in 1989 the agency [2] issued a final rule allowing for the Assistant Secretary to delegate his or her discretionary authority to exercise jurisdiction over appeals to a Deputy, whose decision on appeal is not final and is expressly conditioned on further review by IBIA. *See id.* at 6479 (revising Section 2.20(c) "to authorize the Assistant Secretary--Indian Affairs to assign the responsibility to issue a decision in an appeal to a Deputy to the Assistant Secretary--Indian Affairs" and noting that "[a] decision made by a Deputy to the Assistant Secretary pursuant to such an assignment may be appealed to the Board of Indian Appeals"); *see also id.* at 6478 (similar statements regarding the changes to Sections 2.4(d) and (e)).

Interior received comments from the public objecting to the Assistant Secretary's ***1140** authority to exercise his or her discretion to decide an appeal under Section 2.20, or requesting that any decisions made by the Assistant Secretary be subject to further appellate review by IBIA. *Id.* at 6479. The agency rejected these comments, reasoning that "[c]ertain appeals involve policy matters requiring the attention of the Assistant Secretary" and noting that "IBIA does not have jurisdiction to review discretionary decisions of BIA officials." *Id.* In response to another comment that appellants should be able to choose whether to have the Assistant Secretary or IBIA decide their appeals, Interior stated that Section 2.20(c) "is not intended to give the parties to an appeal a choice of forum, but rather is intended to vest the *exclusive authority* to assume jurisdiction over an appeal in the Assistant Secretary." *Id.* (emphasis added). For this reason, Interior added the sentence to Section 2.20(c) stating that the Assistant Secretary "will not consider petitions to exercise" the Assistant Secretary's discretion to decide an appeal. *Id.; see* 25 C.F.R. § 2.20(c).

[25] These statements above in the preamble to the revisions to 25 C.F.R. part 2 reveal that, while the Assistant Secretary has complete discretion to take jurisdiction from IBIA over an appeal, the regulatory scheme intends for the Assistant Secretary's jurisdiction to be a limited exception to the normal appeals process before IBIA. The Assistant Secretary was not assigned jurisdiction broadly over appeals; the agency believed it was important to preserve the Assistant Secretary's jurisdiction only as it pertained to appeals involving important "policy matters" that require the Assistant Secretary's consideration, or appeals involving "discretionary decisions of BIA officials" since IBIA does not have jurisdiction to decide such appeals. By denoting these specific purposes of authorizing the Assistant Secretary's review of appeals, the agency intended to limit the types of cases that would typically proceed before the Assistant Secretary pursuant to the Assistant Secretary's complete discretion.

The same sentiments are also echoed in the regulatory preamble to the 1989 revisions to IBIA's general appeals procedures under 43 C.F.R. part 4 subpart D, released

the same day as the revisions to 25 C.F.R. part 2. *See* Dep't Hearings & Procedures, 54 Fed. Reg. 6483 (Feb. 10, 1989). There, when discussing revisions to Section 4.332(b) authorizing the Assistant Secretary to take jurisdiction over appeals pursuant to Section 2.20(c), the agency reiterated that "there are some decisions involving Indians and Indian tribes that involve policy considerations that cannot adequately be addressed through the usual appeal procedures." *Id.* at 6484. Cases involving important policy considerations beyond the purview of IBIA's review were not expected to be a common occurrence: "It is anticipated that the Assistant Secretary—Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal." *Id.; see also id.* at 6485 ("Because the Department continues to believe that there are *some* instances in which it may be appropriate for the Assistant Secretary—Indian Affairs to review an appeal, the comments suggesting that that official be entirely removed from the review process are not accepted.") (emphasis added). Accordingly, the agency contemplated that the Assistant Secretary's authority to take jurisdiction over an appeal away from IBIA would merely be a limited exception exercised with restraint.

The regulatory history also reveals that, because the Assistant Secretary's discretionary authority over appeals was contemplated to be a rare exception to IBIA's ***1141** jurisdiction, the agency intended to craft the Assistant Secretary's jurisdiction over appeals in a manner that preserved IBIA's general jurisdiction over appeals to the maximum extent possible. In discussing the revisions to Section 4.332(b), the agency explained that IBIA is part of the Office of Hearings and Appeals (the "OHA"), which was established in 1970 as a separate office within the Office of the Secretary "to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices." 54 Fed. Reg. at 6484. When Interior first established IBIA via regulation, the purpose of having IBIA review appeals, instead of delegating that authority to other officials within Interior, was to "ensure impartial review free from organizational conflict" which might otherwise taint the agency's appellate review. *Id.* The agency elaborated that "[i]t was never contemplated that the Assistant Secretary—Indian Affairs would handle administrative appeals as a routine or frequent part of his official duties." *Id.* If the Assistant Secretary were to be given that responsibility, the Assistant Secretary "would have to create, in effect, an Office of Hearings and Appeals within their own offices." *Id.*

The agency's reasoning signifies that the Assistant Secretary's jurisdiction over appeals was meant to be as limited as possible to encourage the Assistant Secretary to decide cases of political importance but not as a matter of course. Like any agency tasked with deciding appeals of decisions made by its own employees, Interior was concerned with the potential "organizational conflict" that might arise if the Assistant Secretary's office became akin to an appeals board but without assurances of neutrality. Allowing appellants to select the Assistant Secretary to adjudicate their appeals instead of IBIA could effectively eliminate the possibility impartial review by IBIA altogether, or alternatively the Assistant Secretary's office would be required to establish its own independent appeals board—surely redundant in light of IBIA's existence. To preclude either possibility, the agency disallowed parties from being able to choose to have their appeal heard by the Assistant Secretary and instead limited the Assistant Secretary's authority over appeals to the sole discretion of the Assistant Secretary, authority which was contemplated to be used only in the rare cases implicating significant policy concerns that must be adjudicated in accord with Interior's general policies as a whole.

[26] Interior's intention to preserve IBIA's jurisdiction to the maximum extent possible is also consistent with the preamble to the rulemaking describing the revisions to Section 4.331(b). There, Interior rejected a comment requesting that the Assistant Secretary's decision on an appeal be subject to further review by IBIA, because IBIA "has not been delegated general review authority over such decisions" by the Assistant Secretary. 54 Fed. Reg. at 6484. In doing so, the agency reiterated the importance of the Assistant Secretary's position "[a]s a Secretarial-level official," since the Assistant Secretary "has authority to issue or approve decisions that are final for the Department." *Id.* Not only does the agency reaffirm the importance of the Assistant Secretary's position as a PAS officer, meaning that the Assistant Secretary's decisions can legally bind the agency, but the agency also explains that the only reason why the Assistant Secretary's appeals decisions are final is that IBIA *does not have the authority* to review such decisions. This reveals that the agency contemplated making even the Assistant Secretary's authority to decide appeals non-final and subject to IBIA review. But the agency could not do so solely ***1142** because of the Assistant Secretary's authority to bind the agency as a PAS officer. By contrast, a Deputy to the Assistant Secretary does *not* have the authority to bind the agency to action as a PAS officer and does *not* have the express authority to issue final decisions on appeals if the Assistant Secretary

delegates an appeal taken from IBIA to the Deputy. *See* 25 C.F.R. § 2.20(c); *id.* § 2.4(c), (e). The agency could have made a Deputy's decision final and not subject to IBIA review like decisions made by the Assistant Secretary directly, but by not doing so, the agency intended to ensure that IBIA's jurisdiction to issue final appeals decisions was preserved to the maximum extent possible.

In order to preserve IBIA's general jurisdiction over appeals, it was vital for the agency to restrict what the Assistant Secretary might do after taking jurisdiction over an appeal under Section 2.20(c). It would be impracticable to require the Assistant Secretary to issue decisions on all of these appeals directly; the Assistant Secretary has a multitude of important duties as a PAS officer that would interfere with the Assistant Secretary's ability to decide appeals in a timely manner, which could deter the Assistant Secretary from exercising jurisdiction over appeals in the first place. On the other hand, if the Assistant Secretary could broadly delegate his or her authority to issue final decisions on appeals that bind the agency, the Assistant Secretary feasibly could exercise his or her discretion to take jurisdiction over appeals frequently and assign those appeals to partial agency officials, usurping IBIA's function without the assurance of independent review. And allowing the Assistant Secretary to delegate final decisionmaking authority over appeals would mean that employees who are not a "Secretarial-level official" subject to Presidential appointment and Senate confirmation, see 54 Fed. Reg. at 6484, would bind the agency on important policy matters that the agency intended to keep singularly within the Assistant Secretary's dominion.

Given these competing considerations, Interior arrived at a middle ground, restricting the Assistant Secretary's delegation authority to assigning appeals to a Deputy for an "advisory" decision that would still be subject to review by IBIA, so that IBIA can issue a final decision on the appeal that binds the agency. The overall regulatory scheme envisioned by 25 C.F.R. part 2 and 42 C.F.R. part 4 subpart D consistently reaffirms that a Deputy's authority to decide appeals is limited to the procedures of Section 2.20(c) and that all decisions by a Deputy are subject to review by IBIA. *See id.* § 2.4(c) (recognizing the authority to decide appeals belonging to "[a] Deputy to the Assistant Secretary--Indian Affairs pursuant to the provisions of § 2.20(c) of this part"); *id.* § 2.4(e) (IBIA may decide appeals "from a decision made by an Area Director or a Deputy to the Assistant Secretary--Indian Affairs"). Moreover, Section 2.6, titled "Finality of decisions," repeats that the Assistant Secretary's decision on an appeal operates as a final decision for Interior, but the regulation makes no mention of any decision made by a Deputy. *See id.* § 2.6(c). By limiting a Deputy's delegated authority over appeals to non-final decisions, the ultimate effect of Interior's procedures governing appeals of decisions by BIA officials is to authorize only two entities to issue final decisions on appeals: IBIA generally, and the Assistant Secretary pursuant to his or her discretionary authority to decide appeals under Section 2.20(c)(1).

To summarize, in the full context of the 1989 revisions to the regulations governing appeals of BIA decisions, the Assistant Secretary's discretionary authority to assume jurisdiction over appeals operates as ***1143** an exception to the general rule that IBIA normally hears appeals of BIA decisions. Interior intended to limit final appellate review in these exceptional circumstances to a PAS official with authority to make decisions that bind the agency, to ensure that the decision on appeal is issued in conformity with Interior's broader policy concerns. To carry out these intentions, the agency restricted the Assistant Secretary's authority to subdelegate appellate review to subordinates, only authorizing the Assistant Secretary to delegate non-final decisionmaking authority to a Deputy. The 1989 revisions confirm that the Secretary intended to vest the authority to issue final decisions on appeals under Section 2.20(c) solely with the Assistant Secretary and at the exclusion of any other agency official. In other words, the Assistant Secretary's authority to make final decisions on appeals taken from IBIA is exclusive.

[27] The United States argues that Section 2.20(c) does not preclude redelegation of the Assistant Secretary's authority to issue a final decision to a Deputy. Because the regulations do not explicitly *prohibit* subdelegations of the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c)(1), the United States asserts that the Assistant Secretary is presumed to have the authority to delegate his final decisionmaking authority to subordinates, including to a Deputy or Principal Deputy. In support of this argument, the United States points to other regulations in which the Secretary clearly restricted subdelegations through clear language, noting that the Secretary could have done so for Section 2.20(c) as well. *See* Dkt. 57 at 19-20 (citing 25 C.F.R. § 33.3; 43 C.F.R. §§ 3191.2(b), 20.202(b)(1)). In this regard, the United States' argument equates to the assertion that the "plain meaning" of Section 2.20(c) does not reveal an intent about whether the Assistant Secretary may re-delegate final decisionmaking authority over appeals.

See Safe Air for Everyone, 488 F.3d at 1097 ("As a general interpretive principle, the plain meaning of a regulation governs.") (internal quotation marks and citation omitted).

[28] The Court acknowledges the absence of language affirmatively prohibiting redelegation by the Assistant Secretary of final decisionmaking authority, which otherwise might imply that Section 2.20(c) is silent on the question of whether the Assistant Secretary may so redelegate. However, such specific language is not absolutely required to amount to an intent to prohibit subdelegations. "The canon of statutory construction *expressio unius est exclusio alterius* ... 'creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.' " *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) (quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)); *see also Christensen*, 529 U.S. at 583, 120 S.Ct. 1655 (accepting the proposition that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (internal quotation marks and citation omitted). The Supreme Court has repeatedly held that while *expressio unius* "does not apply to every statutory listing or grouping," the canon "has force ... when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002)); *cf.* ***1144** *Plata v. Schwarzenegger*, 603 F.3d 1088, 1095 (9th Cir. 2010) (reliance on *expressio unius* is inappropriate "when a single thing provided for is quite different from another thing omitted").

Here, the canon of *expressio unius* applies to the agency's wording of Section 2.20(c). After the Assistant Secretary takes jurisdiction over an appeal, the regulation sets forth a list of two possible choices for the Assistant Secretary: (1) decide the appeal directly, or (2) assign the appeal to a Deputy. *See* 25 C.F.R. § 2.20(c)(1)-(2). These two choices are expressed in an "associated group or series." The two items in the list directly pertain to one another and do not conflict with each other. If the Assistant Secretary chooses to decide the appeal directly under option (1), he or she cannot assign the appeal to a Deputy under option (2) at the same time. Or, if the Assistant Secretary does decide to assign the appeal to a Deputy under option (2), he or she no longer may choose to decide the appeal directly in a final decision under option (1). If the agency wanted to provide the Assistant Secretary with another mechanism by which the Assistant Secretary may delegate authority over appeals, the agency easily could have done so in the text of Section 2.20(c). But by prescribing only these two options for how the Assistant Secretary may dispose of the appeal after exercising jurisdiction, the regulation intended to exclude all other modes of delegation omitted from the list. Therefore, when applying the canon of *expressio unius*, the specific parameters of permissible delegation to a Deputy of non-final decisionmaking authority outlined in Section 2.20(c) prohibit any other delegation of the Assistant Secretary's final decisionmaking authority over appeals. The construction of Section 2.20(c), combined with the regulatory history and intent behind the provision, constitutes "affirmative evidence of a contrary [regulatory] intent" to defeat the presumption that subedelegations of the Assistant Secretary's final decisionmaking authority over appeals is permissible. *Frankl*, 650 F.3d at 1350.

[29] Moreover, "[a]s a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored." *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2008) (citing *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976)). Section 2.20(c) expressly subjects a Deputy's decision on an appeal to further review by IBIA, and the United States' position that the Assistant Secretary may nonetheless delegate final decisionmaking authority to that same Deputy would render the delegation limitations of Section 2.20(c)(2) meaningless. If the United States' argument were to be accepted, the result would in effect be to create a new regulatory scheme for reviews of IBIA appeals that nullifies the explicit restrictions on the Assistant Secretary's delegation authority. It would be impermissible to defer to the United States' interpretation which creates such an absurd result. *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655.

In summary, the restrictive mode of delegation to a Deputy as provided in Section 2.20(c)(2) means that the Secretary has spoken as to the allowable subdelegations of the Assistant Secretary's authority over appeals taken from IBIA. The United States' interpretation of Section 2.20 as authorizing the Assistant Secretary to make subdelegations of final decisionmaking authority is inconsistent with the plain language of the regulation restricting the Assistant Secretary's delegation authority over appeals only to a Deputy and only of non-final authority. *See Singh*, 771 F.3d at 652; *Turtle Island*, 878 F.3d at 733; *Bassiri*, 463 F.3d at 931.

***1145** iii. *Case Law Supports the Conclusion that Section 2.20(c) Restricts the Assistant Secretary's Ability to Delegate Final Decisionmaking Authority*

A review of the applicable case law presented by the parties further supports the reading of Section 2.20(c) as a delegation provision that restricts the Assistant Secretary's authority to delegate.

In *United States v. Giordano*, the Supreme Court addressed a wiretap statute in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, providing that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" a wiretap application. 416 U.S. 505, 507, 513, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (citing 18 U.S.C. § 2516(1) (1968)).[3] In that case, evidence was presented revealing that the Executive Assistant to the Attorney General had approved the special designation of the Assistant Attorney General to authorize a wiretap application, because the Attorney General was away from the office and unable to authorize the designation himself. *Id.* at 510, 94 S.Ct. 1820. The government argued that the Executive Assistant's authorization of an application to intercept wire communications was not inconsistent with the statute. *Id.* at 512, 94 S.Ct. 1820. Relying on another statute authorizing the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General," *id.* at 513, 94 S.Ct. 1820 (quoting 28 U.S.C. § 510), the government concluded that Section 2516 "evinces no intention whatsoever to preclude delegation to other officers" in the Attorney General's staff, *id.* at 512-13, 94 S.Ct. 1820.

The Court rejected the government's argument. *Id.* at 512, 94 S.Ct. 1820. First, the Court addressed the text of Section 2516(1) and determined that the Executive Assistant does not fall within the enumerated categories of officials with authority to authorize a wiretap application. *Id.* at 513, 94 S.Ct. 1820. The Court concluded that "the matter of delegation is expressly addressed by [§ 2516], and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General.' " *Id.* at 514, 94 S.Ct. 1820 (quoting 18 U.S.C. § 2516(1) (1968)). The Court also rejected the government's reliance on the Attorney General's broad delegation authority under Section 510, noting that "Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." *Id.* The Court acknowledged that other statutes contained express language prohibiting re-delegation of authority, and "[e]qually precise language forbidding delegation was not employed in the legislation before us." *Id.* (citing 18 U.S.C. § 245(a)(1)). Nevertheless, the Court held that "[section] 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Id.*

The Court in *Giordano* then discussed at length the statute's purpose and legislative history, which revealed that "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority ***1146** be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Id.* at 515, 94 S.Ct. 1820; *see also id.* at 520, 94 S.Ct. 1820 (finding that the Senate Judiciary Committee's report on the bill "not only recognize[d] that the authority to apply for court orders is to be narrowly confined but also declare[d] that it is to be limited to those responsive to the political process"). Therefore, the Court concluded that the Court's interpretation of a limited delegation authority by the Attorney General over authority to approve wiretap applications was "strongly supported" by the intent behind the statute. *See id.* at 514-23, 94 S.Ct. 1820.

Here, like in *Giordano*, Section 2.20(c) prescribes the delegation procedures available to the Assistant Secretary in issuing decisions on appeals otherwise falling within IBIA's jurisdiction. The Assistant Secretary is limited to delegating initial decisionmaking authority to a Deputy under Section 2.20(c)(2), and the Deputy's decision is non-final and subject to further appeal to IBIA in conformity with the procedures set forth in 43 C.F.R. part 4, subpart D. *See* 25 C.F.R. § 2.20(c). As in *Giordano*, by designating the delegation process of the Assistant Secretary's authority and by limiting a Deputy's authority to decide appeals, the intent of Section 2.20(c) was to preclude the Assistant Secretary from delegating *final* decisionmaking authority to a Deputy. And like *Giordano*'s rejection of the argument that specific language prohibiting subdelegations was required to effectuate that intent, here the applicability of the canon *expressio unius*[4] to Section 2.20(c) and the regulatory history behind Section 2.20(c) both reveal the agency's intent to prohibit subdelegations of the Assistant Secretary's final

decisionmaking authority over appeals, even in the absence of express language to that effect in the regulation itself. All in all, Section 2.20(c), "fairly read," was intended to limit the power to issue final decisions on appeals taken away from IBIA to the Assistant Secretary alone.

[30] Furthermore, just as the Court in *Giordano* determined that the statutory authority to authorize wiretap applications was intended to be "used with restraint," as articulated above, Interior contemplated that the Assistant Secretary's authority under Section 2.20(c) to exercise jurisdiction over an appeal otherwise before IBIA would be used with restraint. As articulated in the preamble to the 1989 final rulemaking, "[i]t is anticipated that the Assistant Secretary—Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal." 54 Fed. Reg. at 6484. The purpose of giving the Assistant Secretary such authority was merely to allow for the Assistant Secretary, on an irregular basis, to decide appeals of particular political significance or cases involving discretionary decisions made by BIA officials. And as the Court noted in *Giordano*, delegations of agency authority to a PAS official are not always contemplated to be freely delegable, particularly where the delegation itself is highly limited in nature. The purpose behind the Assistant Secretary's delegated authority to issue final decisions on appeals is consistent with the explicit language of Section 2.20(c) in making the Assistant Secretary's authority to issue final decisions on appeals an exclusive function of the Assistant Secretary position.

***1147** In support of its argument that the Assistant Secretary's authority to issue final decisions on appeals before IBIA pursuant to Section 2.20(c) is non-exclusive and delegable, the United States relies heavily on *Stand Up for Cal.! v. U.S. Dep't of Interior*, 298 F. Supp. 3d 136 (D.D.C. 2018). Although there are many similarities between *Stand Up* and this case, *Stand Up* is distinguishable because of material differences between the regulations at issue in each case.

In *Stand Up*, the district court was faced with a similar challenge to an action by Principal Deputy Roberts in issuing a Record of Decision approving a fee-to-trust application submitted by the Wilton Rancheria Tribe of California for a 36-acre parcel of land in Elk Grove, California. *Id.* at 137-18. In that case, the plaintiffs challenged Principal Deputy Roberts' authority to issue a decision on a fee-to-trust application under 25 C.F.R. § 151.12(c), which authorizes "the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority," to issue a decision on a fee-to-trust application that would constitute a "final agency action." *Stand Up*, 298 F. Supp. 3d at 141-42; 25 C.F.R. § 151.12(c).

First, the district court in *Stand Up* engaged in an extensive analysis of the regulatory language at issue to determine whether the "presumption of delegability" applied to allow the Assistant Secretary to delegate authority to issue decisions on fee-to-trust applications to a Deputy. *See generally Stand Up*, 298 F. Supp. 3d at 142-49. The court first held that the statutory language in Section 5 of the IRA, 25 U.S.C. § 5108, did not reveal an intent by Congress to preclude subdelegation of the Secretary's authorization to acquire land in trust for Indians. *Id.* at 142. The court determined that the explicit language in Section 151.12(c) did not contain sufficient evidence to overcome the presumption of delegability, specifically calling out the lack of any "affirmative language precluding delegation, such as 'may only be delegated to,' 'may not [be] delegate[d],' 'may not be re[del]egated,' 'shall not be redelegated,' or is 'not subject to delegation.' " *Id.* at 143 (first and second alterations in original) (citations omitted). Noting that "[t]hese types of phrases have been invoked by Congress or the Secretary to clearly preclude delegation in other contexts," *id.* (citations omitted), the court concluded that, because Section 151.12 "is devoid of any similar language prohibiting the delegation of a fee-to-trust decision," the regulation's plain text suggests that delegation of the Assistant Secretary's authority to a Deputy to issue such decisions is "presumptively permissible," *id.* (citing *U.S. Telecom*, 359 F.3d at 565).

Next, the court in *Stand Up* engaged in a review of the purpose and history behind the 2013 revisions to the regulatory language in Section 151.12 and concluded that the context and comments relating to the regulation "do not suggest it is a delegation regulation." 298 F. Supp. 3d at 143. The court determined that the purpose of Section 151.12 "is not about the Secretary's ability to delegate" and that the regulation does not establish a "delegation structure" applicable to the Secretary's delegation authority. *Id.* Instead, the court reasoned, Section 151.12 "exemplifies a situation where the creating entity has mentioned a specific individual only to make it clear that this official has a particular power rather than to exclude delegation to other officials." *Id.* (internal quotation marks and alterations omitted) (quoting *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1033 (Fed. Cir. 2016)). The court elaborated that the regulation merely describes Interior's internal process for reviewing

and deciding fee-to-trust applications "for the benefit of external ***1148** parties," and the agency's comments during the rulemaking process evince "an intent to clarify matters externally, not an intent to internally restrict delegation." *Id.* at 143-44.

The court in *Stand Up* then rejected the plaintiffs' reliance on *Giordano*, distinguishing the statute at issue in that case (18 U.S.C. § 2516(1)) from Section 151.12. *See Stand Up*, 298 F. Supp. 3d at 145. First, the court noted that the statute in *Giordano* "generally served to restrict an action, whereas Section 151.12 and its subsection (c) do not share the same overall goal to restrict" because Section 151.12 was merely procedural in nature to describe the action process for fee-to-trust applications. *Id.* The court also differentiated the legislative history behind Section 2516, which revealed "specific instances where Congress intended 'the authority to apply for court orders [ ] to be narrowly confined but also declare[d] that it is to be limited to those responsive to the political process.' " *Id.* (quoting *Giordano*, 416 U.S. at 520, 94 S.Ct. 1820). By contrast, the court reasoned that "the Secretary's commentary around the rulemaking [for Section 151.12] did not explicitly or implicitly approach the topic of delegation, much less display an intent that final fee-to-trust decisions should be an exclusive power" to the Assistant Secretary. *Id.* The court cited favorably to two circuit court decisions holding on comparable reasoning that statutory provisions were intended to define the scope of an official's powers and were not specifically intended to restrict delegation authority. *See id.* at 146 (quoting *Ethicon*, 812 F.3d at 1033; *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999)). The court ultimately concluded by stating that, based on the legal principles articulated from these cases, "Section 151.12(c) is not intended to preclude the Secretary's authority to delegate to others, and [ ] delegation to the [Assistant Secretary] is one such, but not the only, permissible delegation." *Id.*

Lastly, the court in *Stand Up* rejected the argument that the regulatory language and legal maxims of statutory construction compelled the contrary result that Section 151.12 intended to limit the Assistant Secretary's delegation authority. *Id.* at 147-49. The plaintiffs in *Stand Up* had first attempted to distinguish between Section 151.12(c), which made decisions by the Assistant Secretary a "final agency action," from Section 151.12(d), which made decisions by BIA officials "not a final agency action" until the administrative appeal process to IBIA has been exhausted, as a basis to find that the Assistant Secretary's authority to issue a final action for the agency on a trust application exclusive to the Assistant Secretary. *Id.* at 147; 25 C.F.R. § 151.12(d). The court explained that both subsection (c) and subsection (d) "were promulgated not to restrict who may make trust decisions, but to distinguish between final and non-final agency action and provide external guidance as to when agency decisions must be administratively exhausted versus being immediately judicially reviewable." *Stand Up*, 298 F. Supp. 3d at 147. The court similarly rebuked the plaintiffs' reliance on *expressio unius*—arguing that the revisions to Section 151.12(c), by affirmatively adding the Assistant Secretary as an authorized official to issue final decisions, intended to restrict all other roles from issuing final decisions—and superfluity—*i.e.*, arguing that delegation of the Assistant Secretary's authority to issue final decisions would render superfluous the pre-existing language that the "Secretary of the Interior or authorized representative" is authorized to issue final decisions. *Id.* at 148-49. The court reiterated that "the overall purpose of the 2013 revisions focused on which trust decisions are subject to judicial review, ***1149** and when they become so subject," as opposed to a focus on the exclusivity of any agency official's authority to issue final decisions. *Id.* at 148. The court concluded that "Section 151.12 clarifies that it is the decision-maker (*i.e.*, the Secretary, his authorized representative, the [Assistant Secretary], an individual acting for the [Assistant Secretary] under delegated authority, or a BIA official) who drives whether the decision is final." *Id.* at 148-49.

What distinguishes the instant case from *Stand Up* is that, unlike Section 151.12(c) which is silent on delegation, Section 2.20(c) *does* affirmatively prescribe when and how the Assistant Secretary may delegate authority to decide appeals once the Assistant Secretary exercises his or her discretionary authority to remove an appeal from IBIA's jurisdiction. Section 151.12(c) is wholly silent even on the question of whether and how the Assistant Secretary may delegate authority over decisions on fee-to-trust applications, and the court in *Stand Up* correctly concluded that, in the face of complete silence on the question of subdelegability, the presumption of delegability applies. By contrast, Section 2.20(c) is *not* silent on the scope of the Assistant Secretary's authority: the Assistant Secretary may delegate the authority to decide appeals to a Deputy, but the Deputy's decision is subject to further appeal before IBIA. Stated differently, Section 2.20(c) restricts the Assistant Secretary to delegations only of non-binding decisionmaking authority and only to a Deputy. By restricting the Assistant Secretary's ability to delegate, Section 2.20(c) is far more analogous to the

statutory provision at issue in *Giordano*, which the court in *Stand Up* acknowledged "generally served to restrict an action," than 25 C.F.R. § 151.12(c), which does not generally restrict any delegation authority for any discernible reason.

Furthermore, the final rulemaking for the 1989 revisions to Section 2.20(c) is distinguishable from the final rulemaking for the 2013 revisions to Section 151.12. The court in *Stand Up* correctly concluded that Section 151.12 was not intended to establish any kind of delegation structure within the Assistant Secretary's office regarding authorization to decide fee-to-trust applications. But as analyzed above, the purpose of the revisions to Section 2.20(c) were two-fold: (1) to provide the Assistant Secretary discretionary authority to assume jurisdiction over appeals before IBIA, and (2) to restrict the Assistant Secretary's ability to delegate such authority by limiting permissible delegations only to a Deputy of non-final decisionmaking authority. Even though Section 2.20(c) primarily sets forth the Assistant Secretary's particular powers over appeals, the limited authority of the Assistant Secretary to delegate those powers to a Deputy is indicative of an intent to exclude delegation to other officials. And the exclusivity of the Assistant Secretary's authority over appeals taken from IBIA is manifested in the agency's use of the word "exclusive" throughout the regulatory preambles. *See* 54 Fed. Reg. at 6479 (the amendments to Section 2.20 were "intended to vest the *exclusive* authority to assume jurisdiction over an appeal in the Assistant Secretary") (emphasis added); *id.* at 6485 (noting that "the authority to assume jurisdiction over an appeal [under Section 2.20(c)] lies *exclusively* with the Assistant Secretary") (emphasis added).

Moreover, the conclusion reached by the court in *Stand Up*, that Section 151.12 was intended to provide "external guidance" as to when decisions rendered by agency officials are appealable to IBIA versus when decisions are final and subject to judicial review, does not apply to Section 2.2(c). The regulatory history ***1150** for the revisions to Section 151.12 at issue in *Stand Up* explicitly stated that among the reasons behind the revisions was to " '[p]rovide clarification and transparency to the process for issuing decisions by the Department, whether the decision is made by the Secretary, [the AS–IA], or a [BIA] official' " and to "clarify the distinctions of the 'different means and timelines for challenging decisions' within 'the context of trust acquisition decisions.' " *Stand Up*, 298 F. Supp. 3d at 143-44 (alterations in original) (quoting 78 Fed. Reg. at 67,929). The regulatory preamble for Section 2.20(c) makes no similar representation about being promulgated for the purpose of external clarification and transparency. The rulemaking for 2.20(c) generally states the purpose and effect of the revisions, which is to "eliminate[ ] Central Office action on many of the appeals which originate in the field" and, instead, "[m]ost appeals will be sent directly to the Interior Board of Indian Appeals (IBIA) from the field." 54 Fed. Reg. at 6478. Unlike in *Stand Up*, the revisions to Section 2.20(c) were not intended solely to describe the Assistant Secretary's discretionary authority to decide appeals "for the benefit of external parties" but were promulgated to implement specific changes in the agency's internal review process, including the "elimination" of "Central Office action" over appeals. Thus, Section 2.20(c) was also affirmatively intended to internally restrict delegation to Deputies of the Assistant Secretary as provided in the text of Section 2.20(c), in order to constrain the Assistant Secretary's discretionary authority to rare cases of political significance and to protect IBIA's jurisdiction over appeals to the maximum extent possible. The express delineation of the Assistant Secretary's delegation authority to a Deputy, combined with the statements in the rulemaking revealing that the Assistant Secretary's newfound authority to decide appeals was intended to be a limited exception to the typical IBIA appellate process, indicates an intent to "internally restrict delegation" of the Assistant Secretary's authority under Section 2.20(c) and not merely an intent to "clarify matters externally." *See Stand Up*, 298 F. Supp. 3d at 144. Because Section 2.20(c) affirmatively provides for a scope of delegation by the Assistant Secretary to a Deputy, *Giordano* is on point (as explained above) and *Ethicon* and *Mango*, relied on by the court in *Stand Up*, are distinguishable.

Significantly, the court in *Stand Up* analyzed and rejected the plaintiffs' reliance on the preamble to the final rulemaking for Section 151.12, pointing to the agency's response to a comment suggesting that a Deputy should issue all fee-to-trust acquisitions that the Assistant Secretary otherwise would decide, so that the Deputy's decision would be appealable to IBIA. 298 F. Supp. 3d at 147 (citing Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67,928, 67,934 (Nov. 13, 2013)). The agency had responded to the comment by noting that the Assistant Secretary "retains the discretion to issue a decision or assign responsibility to a Deputy Assistant Secretary to issue the decision under 25 CFR 2.20(c)." 78 Fed. Reg. at 67,934. The court interpreted the agency's response as "focus[ing] on the [Assistant Secretary]'s authority *and an instance where the [Assistant Secretary] may delegate it*, and is not a discussion of the Secretary's intention to constrain his authority on

final fee-to-trust decisions." *Stand Up*, 298 F. Supp. 3d at 147 (emphasis added). This language from the court in *Stand Up* reaffirms that Section 2.20(c) *is a delegation provision* by authorizing the Assistant Secretary to engage in a particular limited delegation procedure. Any contrary ***1151** interpretation would ignore the plain directive of Section 2.20(c)(2) dictating how the Assistant Secretary may delegate his or her discretionary authority to a subordinate—in this case, only to a Deputy and only of non-final decisionmaking authority. Because Section 2.20(c) is a delegation provision, the Secretary has spoken to the permissible bounds of the Assistant Secretary's delegation authority, and any delegation inconsistent with the authority provided by regulation is not presumptively permissible.

The United States also relies on two other cases, both of which were analyzed by the court in *Stand Up*, addressing the Assistant Secretary's delegation authority. The United States asserts that these cases support the conclusion that delegation of the Assistant Secretary's authority under Section 2.20(c) is presumptively permissible, as is the case under other Interior regulations. The Court disagrees.

In *Schaghticoke*, the court held that regulations authorizing the Assistant Secretary to make tribal acknowledgment decisions, found in 25 C.F.R. part 83, did not preclude delegation of the Assistant Secretary's authority over tribal acknowledgment decisions. 587 F. Supp. 2d at 420. The court reasoned that the regulations did not use limiting language such as "exclusively," "only," or "solely" when referencing the Assistant Secretary's responsibilities, and the court placed great weight on the fact that the regulation "defines the term Assistant Secretary to include the [Assistant Secretary] 'or that officer's authorized representative.' " *Id.* at 420-21 (quoting 25 C.F.R. § 83.1). Here, on the other hand, Section 2.20(c) affirmatively restricts the scope of the Assistant Secretary's delegation authority, as already described above. But further, unlike in *Schaghticoke*, neither set of regulations prescribing IBIA's appeals authority and the Assistant Secretary's authority to take jurisdiction over IBIA appeals includes a definition of the term "Assistant Secretary" *at all*. *See* 25 C.F.R. § 2.2 (no definition of the term "Assistant Secretary"); 43 C.F.R. § 4.201 (no definition of the term "Assistant Secretary" despite defining the Secretary as "the Secretary of the Interior or an authorized representative"). The absence of any definition extending the Assistant Secretary's authority to "an authorized representative," as is present in numerous other Interior regulations, indicates that the agency did not intend to allow the Assistant Secretary to designate an authorized representative in these particular circumstances—*i.e.*, taking jurisdiction over an appeal before IBIA—other than to a Deputy, who is expressly limited to a delegation of non-final authority provided by Section 2.20(c)(2).

The other case analyzed by the court in *Stand Up* pertaining to the Assistant Secretary's delegation authority was *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165 (W.D. Wis. 1996). There, the district court rejected a challenge to a Deputy's authority to issue a final decision denying an application to acquire a greyhound racing facility in trust for a tribe under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A), or Section 5 of the IRA. *Id.* at 1181-82. The Assistant Secretary had recused herself from making a determination on the application, and the Deputy issued a final decision in the Assistant Secretary's absence, signing the decision not as "Acting Assistant Secretary" but as "Deputy Assistant Secretary." *Id.* at 1182. Noting that it would have been "wise" for the Assistant Secretary to document her recusal in the administrative record, and that the Deputy's signing of the decision as Acting Assistant Secretary "might have made this judicial inquiry less complicated," the court nonetheless concluded that the Deputy had authority to ***1152** issue a final decision and "evidenced his authority by claiming that the decision was final." *Id.* The court presumed that the Deputy was "aware of the limits of his authority and would know that his decisions as Deputy Assistant Secretary are generally subject to appeal" under 25 C.F.R. § 2.4(e), and because the Deputy was aware of the Assistant Secretary's recusal, the Deputy "knew that he was making a decision that otherwise would have been" for the Assistant Secretary to make. *Id.* Therefore, the court held that the Deputy "was acting as Assistant Secretary and had the authority to make a final decision on plaintiffs' application." *Id.*

Sokaogon is distinguishable because, while the Deputy's authority to issue decisions on trust applications are *generally* subject to appeal under Section 2.4(e), the Deputy's authority to decide an appeal under Section 2.20(c) is *specifically and explicitly* subject to appeal due to the Assistant Secretary's limited delegation authority under Section 2.20(c). *Sokaogon* was not a well-reasoned opinion, in that the court did not attempt to determine whether the Assistant Secretary's authority to issue a final decision on the trust application was exclusive by applying the customary standards governing statutory and regulatory interpretation and examining the rulemaking behind the relevant provisions. Nevertheless, as thoroughly analyzed in *Stand Up*, nothing about the

Assistant Secretary's authority to issue final decisions on fee-to-trust applications under Section 5 of the IRA or 25 C.F.R. § 151.12(c) precludes the Assistant Secretary from delegating his or her authority to a subordinate, making the Assistant Secretary's authority over those decisions non-exclusive. Applying the holding from *Stand Up* to the earlier decision in *Sokaogon*, the court in *Sokaogon* correctly held that the Deputy's decision to issue a final decision on the trust application was appropriately based upon the Assistant Secretary's presumed authority to delegate non-exclusive functions or duties to a Deputy under the Department Manual. But in this case, delegations of the Assistant Secretary's final decisionmaking authority under Section 2.20(c) were not contemplated or intended under the regulations setting forth the review process for decisions by BIA officials, in light of the explicit language of the regulation limiting the Assistant Secretary to assigning non-final authority over an appeal to a Deputy and the regulatory backdrop confirming the exceptional and exclusive nature of the Assistant Secretary's authority over appeals. Thus, for the same reasons *Stand Up* is distinguishable from the instant case, so too is *Sokaogon.*

In summary, the explicit language of Section 2.20(c) restricting the scope of delegations of the Assistant Secretary's authority over appeals to a Deputy, and the requirement that Deputy's decision to be subject to review by IBIA, distinguishes the instant case and the regulation at issue from any precedent cases analyzing Interior regulations that set forth the Assistant Secretary's powers and duties without addressing the delegability of the Assistant Secretary's authority.

4. *The 2017 Decision Issued by Principal Deputy Roberts Was an* Ultra Vires *Action*

[31] Applying the above analysis to the instant case, Principal Deputy Roberts did not have authority to issue a final decision denying the appeals of the 2014 NOD.

[32] Former Assistant Secretary Washburn exercised his discretion under Section 2.20(c) to remove the appeals of the 2014 NOD from IBIA's jurisdiction. After taking control over the appeals, Washburn did not assign the appeals to any Deputy within 20 days of the filing of ***1153** the appeals under Section 2.20(c)(2). Had Washburn decided to assign the appeal to a Deputy, the Deputy would retain the sole authority to decide the appeal subject to further review by IBIA, and Washburn would have relinquished his own ability to issue a final decision on the appeal. Instead of assigning the appeal to a Deputy in that manner, Washburn opted to retain jurisdiction for himself to issue a final decision on the appeals under Section 2.20(c)(1). Therefore, only Assistant Secretary Washburn was authorized to issue a final decision on the appeals.

After Washburn resigned, Washburn's exclusive authority to decide the appeal inured to Principal Deputy Roberts, who stepped in as Acting Assistant Secretary for 210 days under the FVRA. After Roberts reverted to Principal Deputy following the expiration of his term as Acting Assistant Secretary, still no decision had been issued on the appeals of the 2014 NOD. No party had moved for IBIA to take back jurisdiction over the appeals after 60 days without a decision following the close of pleadings, so IBIA did not have jurisdiction over the appeals of the 2014 NOD pursuant to Section 2.20(e).[5] And the Secretary did not exercise the discretionary authority under 43 C.F.R. § 4.5 to take jurisdiction over the appeals of the 2014 NOD away from the Assistant Secretary position after Washburn exercised his discretion to decide the appeals under Section 2.20(c). Because no other agency official or board had jurisdiction over the appeals of the 2014 NOD, only the Assistant Secretary position—which was vacant at the time—could issue a final decision on the appeals under the circumstances in this case.

Roberts signed the 2017 Decision as Principal Deputy and asserted that the decision was "final in accordance with Section 2.20(c)." AR0258.3466.[6] Only the Assistant Secretary had the authority to issue a final decision pursuant to Section 2.20(c) in these circumstances. Thus, by purporting to issue a final decision on an appeal in the absence of the Assistant Secretary, Principal Deputy Roberts acted without authority in performing an exclusive function or duty of the Assistant Secretary and committed an *ultra vires* act in violation of the FVRA and Interior regulations. The United States' position for why Section 2.20(c) allows for Principal Deputy Roberts to issue a final decision on an appeal is not entitled to deference, because the United States' arguments for Principal Deputy Roberts' authority to issue the 2017 Decision are not rooted in the regulatory language or history and merely amount to a *post hoc* rationalization for Principal Deputy Roberts' *ultra vires* action. *See Christopher*, 567 U.S. at 155, 132 S.Ct. 2156. Accordingly, the 2017 Decision issued by Principal Deputy Roberts was "not in accordance ***1154** with the law" in violation of the APA. 5 U.S.C. § 706(2)(A).

Based on the above, the Court GRANTS summary judgment for Plaintiffs on their First cause of action. The 2017 Decision issued by Principal Deputy Roberts is VACATED as an *ultra vires* act, and the various appeals of the 2014 NOD are REMANDED to the agency for final decision by the Assistant Secretary. [7] The Acceptance of Conveyance, premised upon the upon the purported finality of the 2017 Decision, also must be vacated on these grounds.

B. Sufficiency of Environmental and Regulatory Review

[33] The Court's holding above, that the 2017 Decision was unlawful as executed without authority in violation of the FVRA and must be vacated in its entirety, means that there was never a "final agency action" properly subject to judicial review as required by the APA. *See* 5 U.S.C. § 704. The finality of agency action is a jurisdictional requirement for judicial review under the APA. *See Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731, 746 (D.C. Cir. 1987). "Courts are generally precluded, under the ripeness doctrine, from prematurely adjudicating administrative matters until the proper agency has formalized its decision." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1067 (9th Cir. 2002) (citation omitted). Although Plaintiffs also challenge the environmental and regulatory review conducted by BIA in the Final EA, the FONSI, and the 2014 NOD, Plaintiffs' challenges on the "merits" of these decisions are not ripe since the appeals to the 2014 NOD are once again pending following the Court's holding in this case. "A pending appeal would render the action before a court ... 'incurably premature.' " *Church v. United States*, No. CV 12-3990 GAF (SSx), 2013 WL 12064271, at *6 (C.D. Cal. May 15, 2013) (citations omitted). "[I]n the context of a non-final – and thus not ripe – agency decision, strong considerations counsel the Court to avoid interference with agency decisions until absolutely necessary." *Id.* at *7.

Here, the timeline of agency actions challenged by Plaintiffs primarily encompasses four key agency actions: (1) the Final EA, (2) the FONSI, (3) the 2014 NOD, and (4) the 2017 Decision. The first three agency actions are not subject to judicial review until there has been a "final agency action" under 5 U.S.C. § 704. Because the agency's purported final agency action, the 2017 Decision, was *ultra vires*, the Court will not interfere with the precursor decisions made by the agency leading up to the 2017 Decision. Any analysis conducted by the Court regarding the Final EA, the FONSI, or the 2014 NOD would be wholly advisory and speculative. Following the remand of the appeals of the 2014 NOD, the current Assistant Secretary may ultimately decide to change course from the prior administration's decision ***1155** on the appeals of the 2014 NOD, especially considering the duration of time that has elapsed since BIA's initial environmental and regulatory review. If the Court were to analyze BIA's substantive analysis of the Band's application at the present time, the Court's decision might ultimately be rendered moot by the agency's subsequent decision after remand. Moreover, without a final agency action on the parties' appeals to the 2014 NOD, the administrative record before the Court is now incomplete regarding Plaintiffs' remaining claims. Simply put, it would be inappropriate for the Court to continue forward to address the substantive analysis conducted by BIA until the appeals of the 2014 NOD are conclusively resolved via a final agency action. In light of the above, the parties' cross-motions for summary judgment are DENIED as to Plaintiffs' Third and Fourth causes of action.

[34] Consequently, this brings the Court to the question of the appropriate disposition of the Third and Fourth causes of action. The Court fairly could dismiss the Third and Fourth causes of action without prejudice so that Plaintiffs may refile their case anew following a final agency decision regarding the appeals of the 2014 NOD. This solution is inefficient, however, because it imposes needless procedural steps on Plaintiffs in their effort to resolve their outstanding claims.

Instead, because Plaintiffs' challenges to the Final EA, the FONSI, and the 2014 NOD were purportedly ripe when originally brought in this action, the Court finds it more appropriate to stay the action to allow the agency to complete its administrative process, because dismissing an action at the summary judgment stage due to the lack of final agency action would be a judicially inefficient result. *See Church*, 2013 WL 12064271, at *7 (staying an action that became unripe due to the agency's decision to vacate and reopen its previously final decision after the initiation of litigation). Following the agency's review of the appeals of the 2014 NOD upon remand, if the Final EA, the FONSI, and the 2014 NOD are upheld by the agency, Plaintiffs will be permitted to return to this Court to challenge the unchanged environmental and regulatory analysis conducted by the agency.

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion for summary judgment as to the First cause of action is GRANTED. The 2017 Decision and the Acceptance of Conveyance of the Grant Deed to the United States in trust

for the Band are VACATED as unlawful. The parties' cross-motions for summary judgment are DENIED as to Plaintiffs' Third and Fourth causes of action, as those claims are unripe.

This action is STAYED from further proceedings pending the agency's resolution of the appeals of the 2014 NOD in a final agency action subject to judicial review. The case will be placed on the Court's inactive calendar. The parties are ordered to notify the Court when a final agency action issues, at which time the Court will restore the case to the active calendar and proceed to resolve any of Plaintiffs' remaining causes of action not yet adjudicated by the Court.

IT IS SO ORDERED.

All Citations

394 F.Supp.3d 1122

Footnotes

1 The Department Manual is available at https://www.doi.gov/elips/browse.

2 The final rulemaking for the 1989 revisions to 25 C.F.R. part 2 was issued by the Assistant Secretary pursuant to delegated authority from the Secretary according to the Department Manual. *See* 54 Fed. Reg. at 6478 (citing 209 DM 8); *id.* at 6483 (final rulemaking signed by Ross O. Swimmer in his capacity as Assistant Secretary).

3 Title III has since been amended to allow for a wider range of officials to authorize a wiretap application. *See* 28 U.S.C. § 2516(1).

4 The Court in *Giordano* did not explicitly rely on the canon of *expressio unius* in arriving at its conclusion, but the Court's analysis in that case, as described in this Order, is consistent with the doctrine.

5 The parties' ability to move the appeal back to IBIA if no decision is rendered within 60 days pursuant to Section 2.20(e) prevents against the dangers posed by a prolonged vacancy in the Assistant Secretary position, demonstrated by the precise facts of this case. Had the appellants desired a speedier resolution of their appeals, moving for IBIA to take back jurisdiction from the Assistant Secretary would have allowed the appeals to proceed forward under the normal IBIA appellate procedure. Therefore, Section 2.20(e) precludes the argument that the exclusivity of the Assistant Secretary's authority under Section 2.20(c) would place any appeals pending before the Assistant Secretary prior to a vacancy as forever in review purgatory until a new Assistant Secretary is appointed.

6 As discussed above, the applicable agency regulations, including Section 2.20(c), were revised in 1989 and have been in effect ever since, satisfying the requirement under the FVRA that the regulation at issue be in effect during the 180-day time period preceding the date Washburn resigned as Assistant Secretary. *See* 5 U.S.C. § 3348(a)(2)(B)(ii).

7 Because former Assistant Secretary Washburn did not assign the appeals of the 2014 NOD to Principal Deputy Roberts within 20 days of IBIA receiving the notices of appeal as required by Section 2.20(c)(2), the agency did not adhere to the proper procedures for delegating non-final decisionmaking authority to Principal Deputy Roberts. For this reason, the 2017 Decision cannot stand as a *non*-final agency action subject to further review by IBIA. The Assistant Secretary's failure to assign the appeals to a Deputy under Section 2.20(c)(2) thus provides a related basis for granting summary judgment for Plaintiffs on the question of Principal Deputy Roberts' authority to issue *any* decision on the appeals. As analyzed in this Order, only the Assistant Secretary position had the authority to decide the appeals of the 2014 NOD, and therefore the 2017 Decision issued by Principal Deputy Roberts must be vacated in its entirety.

AA-47

Russell on Arbitration 6:4 (23d ed)

Russell on Arbitration, 23d | Database updated September 2009
David St. John Sutton, Judith Gill and Matthew Gearing

Chapter 6. The Award

6:4. Relief and remedies available to the tribunal

6-096 Relief and remedies available. The Arbitration Act 1996 sets out the range of relief and remedies which the tribunal may grant. Section 48 provides:

> 48. (1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
>
> (3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
>
> (4) The tribunal may order the payment of a sum of money, in any currency.
>
> (5) The tribunal has the same powers as the court—
>
> (a) to order a party to do or refrain from doing anything;
>
> (b) to order specific performance of a contract (other than a contract relating to land);
>
> (c) to order the rectification, setting aside or cancellation of a deed or other document.

6-097 Party autonomy. As with so many provisions of the Arbitration Act 1996, s.48 makes clear that party autonomy prevails and preserves the parties' right to extend or restrict the tribunal's powers as regards remedies by agreement in writing.[306] Indeed the parties may agree to confer on the tribunal powers which would not be available to the court.[307] In the absence of contrary agreement between the parties the tribunal has the powers set out in s.48(3) to (5), although these are not necessarily the only powers it will have.[308]

(a) Directing payment of money

6-098 Directing payment. The most common form of relief granted in an award is a direction for the payment of money.[309] This may be either as a debt due or by way of damages or as a payment due in satisfaction of a claim for restitution.[310] Section 48(4) confirms the tribunal's power to order the payment of a sum of money, provided the parties have not agreed otherwise in writing[311] in the arbitration agreement.

6-099 To whom payment should be made. Where an award directs the payment of money, it will usually be payment by one party to the reference to the other party and the award should set out clearly who is to make payment to whom.[311a] There is old authority that an award directing payment of a sum of money to a third party is void unless the payment is for the benefit of one of the parties to the reference, and the onus of showing that benefit is on the party seeking to enforce the award.[312]

6-100 Terms of payment. A tribunal may fix the time at which payment is to be made[313] and it may direct that payment be made in instalments, with the whole becoming payable if one instalment remains unpaid.[314] There is old authority that a

tribunal may order the payment of additional sums for delay in carrying out its award and that this will be regarded as in the nature of liquidated damages rather than as a penalty.[315] It seems unlikely that such a course would now be adopted in the light of the statutory provision for the tribunal to award interest.[316]

6-101 Currency of payment. Section 48(4) of the Arbitration Act 1996 provides that an award may order payment to be made in any currency. The proper construction of this section was considered by the House of Lords *Lesotho Highlands Development Authority v Impreglio SpA* where Lord Phillips explained that there are two possible ways of interpreting the provision.[317] The first is to treat it as simply conferring a procedural power to make an award in any currency, not thereby affecting the existing substantive law concerning awards in a foreign currency. This was the view favoured by the majority in *Lesotho Highlands Development Authority v Impreglio SpA*. The alternative approach, favoured by Lord Steyn, was that s.48(4) represented a change in the substantive law, by introducing an unconstrained power to make an award in any currency. This was rejected by the majority on the basis that if those who drafted the Act had intended to give such a broad discretion they would have done so more clearly, but the matter cannot be considered entirely free from doubt.[318]

Assuming that the existing principles of English law do apply to the exercise of discretion under s.48(4)[319] then the tribunal should make the award in the proper currency of the contract under which the dispute arose unless the parties have expressly or impliedly agreed otherwise in writing.[320] The proper currency of the contract is the currency with which payments under the contract have the closest and most real connection or, if there is none, the currency which most truly expresses the claimant's loss.[321] An award in a foreign currency may be enforced in England without the need to convert it to sterling.[322]

6-102 Certificates as a condition precedent. Certain building and engineering contracts make the issue of an architect's or engineer's certificate a condition precedent to a contractor's right to payment for the work done. Where there has been no certificate and the contractor claims payment, the tribunal may still be able to decide the rights and obligations of the parties, including what sum should be paid to the contractor.[323] Assuming that the tribunal does have such jurisdiction, its award may itself take the place of the certificate, depending upon whether this power has been conferred on the tribunal.

6-103 Exemplary damages. English law permits the award of exemplary or, as they are known in some jurisdictions, punitive damages in actions in tort in three cases.[324] In the arbitration context, there are two issues to be considered in relation to exemplary damages. The first is whether the tribunal has power to make an award providing for the payment of exemplary damages. The second is whether, assuming the tribunal does make such an award, it is enforceable. The present discussion of the topic will be limited to addressing these two issues in the context of English law on the subject.

6-104 Power to award exemplary damages. The first issue is whether a tribunal sitting in England and applying English substantive law would only be entitled to award exemplary damages in cases in which an English court applying English law would be able to do so, i.e. in the three cases set out in the footnote to the previous paragraph. Prior to the Arbitration Act 1996 the answer was probably yes,[325] although there was no direct authority on the point. Given that most arbitrations are concerned with contractual rather than tortious claims, this lack of any decided cases on the point was perhaps unsurprising. Different considerations would have applied, however, to a tribunal sitting in England and applying a foreign substantive law. The scope of the tribunal's power to award exemplary or punitive damages would in such cases have been determined, first, by the scope of the arbitration agreement, (i.e. whether it was sufficiently widely drafted so as to permit, or at least not to exclude, such an award) and, secondly, by the extent to which, if at all, the foreign substantive law permits such an award.

6-105 Has the Arbitration Act 1996 changed the position? Arguably the position has changed with the passing of the 1996 Act, at least where the parties have agreed that the tribunal shall have power to award exemplary damages. Section 48 of the Arbitration Act 1996 makes clear that the parties are free to agree in writing[326] on what powers the tribunal should have as regards remedies and they are not restricted to those that would be available to the court.[327] Presumably, therefore, the parties could by agreement give the tribunal an unfettered right to award exemplary damages if it considered this appropriate.[328]

6-106 Enforcement of award of exemplary damages. There is no decided case on the question whether an English court would enforce an award of exemplary damages made in an arbitration with its seat in England and, if so, in what circumstances. In the light of s.48 of the Arbitration Act 1996 it seems likely that it would do so if the parties had expressly agreed to give the tribunal power to award exemplary damages or had chosen an applicable substantive law that permits the award of exemplary

damages in the circumstances of the particular case. The court would, however, look very closely at the agreement and would seek to construe it narrowly. If a tribunal purported to award exemplary damages in the absence of express agreement between the parties that it should do so, and in circumstances where under English law there is no entitlement to them, the award would be vulnerable to challenge for both serious irregularity under s.68 and for error of law pursuant to s.69 of the Arbitration Act 1996.

Difficulties may arise in the context of international arbitrations where, for example, an award has been made at a seat of arbitration and under an applicable substantive law both of which permit the award of exemplary damages, and enforcement is sought in another jurisdiction which does not permit such awards, or at least not in those circumstances. If enforcement is being sought of a New York Convention award [329] an English court would be likely to enforce the award notwithstanding that it provides for exemplary damages in circumstances where they would not be available under English law. The most obvious ground for not doing so would be to assert that the award is contrary to public policy but it is difficult to see what concerns of this nature would arise given that exemplary damages are available as a matter of English law, albeit in limited circumstances.

(b) Injunctive relief

6-107 Power to grant injunctions. The Arbitration Act 1996 has clarified the power of the tribunal to grant injunctive relief. Unless the parties have agreed otherwise in writing, [330] under s.48(5)(a) it has the same power as the court to order a party to do or refrain from doing anything. A tribunal can therefore include in its award permanent injunctive relief. [331] The position in relation to interim injunctions is dealt with at paras 5–077 above.

(c) Specific performance

6-108 Power to order specific performance. Section 48(5)(b) of the Arbitration Act 1996 provides that the tribunal has the same power as the court to order specific performance of a contract other than a contract relating to land. [332] A contract relating to land is one which creates or transfers an interest in land. [333] In the event of a failure to comply with the tribunal's award, the coercive powers of the court may be available once steps have been taken to enforce the award. [334]

(d) Declaratory relief

6-109 Power to make declarations. A tribunal has power under s.48(3) of the Arbitration Act 1996 to make declarations in an award as to any matter to be determined in the proceedings, provided the parties have not agreed otherwise in writing [335] in the arbitration agreement. [336] A declaration may be made with or without a decision on a related money claim and will be appropriate, for example, where the parties simply want a decision on their rights, or to determine the existence or meaning of a contract. Declarations are often sought together with orders for specific performance. The reference in the statute to "any matter to be determined" suggests that the power is to be construed widely.

6-110 When declaratory relief appropriate. A tribunal should take a similar approach to the court in deciding when to grant declaratory relief. [337] In particular, it should avoid making declarations on academic or hypothetical questions or in respect of claims which have not actually been made. As Lord Diplock said in *Gouriet v Union of Post Office Workers,* "it is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." [338] It may also be appropriate to seek a declaration of a subsisting right, such as an entitlement to indemnification under a policy of insurance, although this will usually be accompanied by a request for an order for payment of monies due under the policy.

(e) Contribution

6-111 Power to order a contribution. A tribunal may have power to order a contribution under s.1 of the Civil Liability (Contribution) Act 1978. The position was considered by the Court of Appeal in *Société Commerciale de Reassurance v Eras (International) Limited and Others* [339] but, at least in relation to a tribunal sitting in England, no firm conclusion was reached. However in *Wealands v CLC Contractors Ltd* [340] the same court expressed the view that the tribunal did have such power. This decision was followed in *X Ltd v Y Ltd* [341] where the court made clear that if the arbitration clause is drafted in appropriate terms, it may encompass a claim for contribution under the Civil Liability (Contribution) Act 1978, notwithstanding that such claims are not specifically addressed in s.48 of the Arbitration Act 1996.

6-112 The current position. It is clear that if the arbitration agreement specifically confers jurisdiction to order a contribution under the 1978 Act then this will be upheld, given the parties' right to agree on the remedies available [342–343] The position is more uncertain in the absence of a clear provision in the arbitration agreement conferring jurisdiction to order a contribution. In *Wealands v CLC Contractors Ltd*, [344] where a party sought to resist a stay of court proceedings, the court decided that even if an arbitrator would lack power to determine a right of contribution under the 1978 Act that would not be a good reason for refusing a stay, because, by agreeing to arbitration, the parties would be deemed to have agreed to forego any right to that remedy. The court went on to consider, *obiter* dicta, the existence of the jurisdiction and, relying on the argument that tribunals in England have implied powers to exercise "every right and discretionary remedy given to a Court of law", [345] the court concluded, somewhat tentatively, that an arbitrator was empowered to order a contribution. In *X Ltd v Y Ltd*, [346] although it was accepted in principle that an arbitration agreement may be drafted in sufficiently wide terms so as to encompass a claim for contribution under the Civil Liability (Contribution) Act 1978, a provision in that case that "all disputes, differences or questions between the parties to the Contract with respect to any matter or thing arising out of or relating to the Contract … shall be referred to the arbitration" was held not to achieve that result. The safest approach if it is contemplated that a claim for a contribution is to fall within the tribunal's jurisdiction is to provide for this expressly in the arbitration agreement.

(f) Indemnity

6-113 Power to order indemnity. Whether there is power to order an indemnity is not specifically addressed in s.48 of the Arbitration Act 1996, perhaps because it is subsumed within the power to order the payment of a sum of money and/or to make a declaration of the right to be indemnified. If the amount of the indemnity cannot be ascertained, for example because it will depend upon the amount, if any, payable to a third party, then the tribunal may grant a declaration of the right to be indemnified and/or may refrain from issuing its final award until the amount payable can be fixed.

(g) Rectification, setting aside or cancellation of a deed or other document

6-114 Power to make order. Section 48(5)(c) of the Arbitration Act 1996 provides that the tribunal has the same power as the court to order the rectification, setting aside or cancellation of a deed or other document. This statutory provision has clarified an area of the law which previously turned on construction of the arbitration agreement and whether it was in sufficiently broad terms to confer this power. [347]

(h) Interest

6-115 Statutory power to award interest. The tribunal has a power to award interest under s.49 of the Arbitration Act 1996.

6-116 Party autonomy. As with so many provisions of the Arbitration Act 1996, s.49 makes clear that party autonomy prevails and preserves the parties' right to agree what powers, if any, [348] the tribunal shall have as regards the award of interest. Again the parties may agree to confer on the tribunal powers which would not be available to the court. [349] In the absence of agreement between the parties [350] the tribunal has the powers set out in s.49(3) to (5), although these are not necessarily the only powers it will have as s.49(6) of the Arbitration Act 1996 preserves any other power of the tribunal to award interest. [351]

6-117 Pre- and post-award interest. The section draws a distinction between interest payable up to the date of the award, and interest payable thereafter on the sums awarded. The former is dealt with in s.49(3) and the latter in s.49(4). The provisions

are the same save for the period over which interest may be awarded and on what. Pre-award interest may be given on any amount awarded by the tribunal or any sum which is claimed in the arbitration [352] and post-award interest may be given on the outstanding amount of any award. Prior to the 1996 Act post-award interest accrued automatically. [353] It no longer does so and, unless there is provision for post-award interest in the arbitration agreement or any applicable rules, [354] it should be the subject of a specific claim in the arbitration. [355]

6-118 Interest on sums which are claimed in the arbitration. It is clear from s.49(3)(b) that the tribunal has power to award interest on sums paid even though it has not reached the stage of making an award in respect of them, provided that those sums were claimed in the arbitration. Correspondingly, the tribunal has no power under the section to award interest on sums paid prior to the arbitration being commenced because they are not claimed in the arbitration.

6-119 Amounts payable following declaratory award. Interest may also be awarded where a sum is payable in consequence of a declaratory award made by the tribunal under s.49(5) of the Arbitration Act 1996. The provision was considered in *Durham CC v Darlington BC* [356] and the court concluded that it had to be construed consistently with the remainder of the section, such that a tribunal was only empowered to award interest in circumstances where, had it made a monetary award, interest could have been awarded under s.49(3). [357]

6-120 Simple or compound interest. Unlike its predecessor, [358] which referred only to simple interest, ss.49(3) and (4) of the Arbitration Act 1996 give the tribunal power to award simple or compound interest. [359] This reflects the position under the rules of various arbitration institutions which empower the tribunal to award compound interest. [360] Compound interest is to be awarded on a compensatory basis and the power should not be used in order to punish the payer. [361] In most cases however compound interest will reflect more accurately than simple interest the loss caused to a party by not having the sum awarded at his disposal. [362]

6-121 Rate of interest. The tribunal has a discretion as to the rate of interest to be applied, but it should keep in mind that the purpose of interest is to compensate the successful party for not having had at his disposal the amount awarded for a period of time. This is underlined by the reference in ss.49(3) and (4) to interest being awarded as the tribunal considers meets the justice of the case. The contract may itself specify an interest rate for unpaid sums. Alternatively, the tribunal may adopt a rate at or above the bank borrowing rate(s) for the period in question. [363] As regards post-award interest it is usual to award a similar rate to the prevailing "judgment rate". [364]

6-122 Period of pre-award interest. Section 49(3) also gives the tribunal a discretion as to the dates from which interest is to be paid and with what rests. Interest may be awarded under this subsection up to the date of payment of any sum which is claimed in the arbitration or on any amount awarded up to the date of the award, whichever is the earlier. Interest will usually be awarded from the date when the sum paid or awarded originally fell due and the cause of action in respect of that sum arose. [365]

6-123 Period of post-award interest. Subsection 49(4) gives the tribunal a discretion to award interest from the date of its award, or any later date, until payment on the outstanding amount of any award. It may also award rests in interest during this period. The subsection makes clear that the power extends to awarding interest on awards in respect of interest and/or costs. [366]

6-124 Power should normally be exercised. The tribunal should normally exercise its power to award interest in the absence of a good reason not to. [367] As Lord Denning M.R. stated in *Panchaud v Pagnan:* "In a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason." [368]

6-125 Effect of delay. Delay in bringing a claim is not of itself a good reason for refusing interest unless the delay is exceptional and inexcusable. [369–370]

6-126 Award silent on interest. If a party has sought interest on sums payable or found to be due but the award is silent on the subject, it may be susceptible to challenge on the grounds of serious irregularity under s.68(2)(d) of the Arbitration Act 1996

for failing to deal with an issue put to the tribunal.[371] Where the omission is due to a clerical mistake or error arising from an accidental slip or omission, it may be corrected by the tribunal under s.57(3)(a) of the Arbitration Act 1996.[372] However, it will usually be more appropriate to exercise the power under s.57(3)(b) to make an additional award in relation to interest.[373]

6-127 Other power to award interest. Section 49(6) specifically preserves any power of the tribunal to award interest other than under the statute. This is a saving provision, such that the other power to award interest will not be ousted by the statutory regime, but nor does the existence of the other power preclude the exercise of the powers under the remaining provisions of s.49.[374] In practice such "other" power will most commonly arise where there is an express or implied contractual right to interest.[375] Various sets of arbitration rules contain such a power.[376]

6-128 Overriding contractual right to interest. Subject to what the parties may have agreed shall be the tribunal's powers as to interest, under s.49 the tribunal has a discretion whether to exercise its power to award interest, although as set out in para.6–124 the power should normally be exercised. If, however, there is a contractual right to interest then it must be awarded. The contractual right may be to receive compound interest and, if so, this must be awarded.[377]

Footnotes

306 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning.

307 This was clearly the intention: see para.234 of the DAC report. See also the discussion in relation to exemplary damages at paras 6–103 *et seq.* below.

308 See, e.g. para.6–113 below concerning the tribunal's power to order an indemnity. Also the parties may agree to confer powers under s.48(1) in addition to those under s.48(3) to (5).

309 See also paras 6–115 *et seq.* below on interest payable on monies awarded.

310 As in *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829.

311 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning.

311a See para.6–092 above.

312 *Wood v Adcock* (1852) 7 Ex. 468 21 L.J. Ex. 204.

313 *Armitage v Walker* (1855) 2 Kay & J. 211.

314 *Royston v Rydal* (1605) Rolle Ab. Arb. H 8 Com. Dig. Arb. E. 15; *Kockill v Witherell* (1672) 2 Keb. 838.

315 *Parfitt v Chambre* (1872) L.R. 15 Eq. 36.

316 Section 49 of the Arbitration Act 1996 and see further para.6–115 below.

317 [2005] UKHL 43; [2006] 1 A.C. 221 at [49].

318 Although the remaining four Law Lords questioned Lord Steyn's interpretation, Lord Hoffmann preferred to express no opinion on the point.

319 In *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; [2006] 1 A.C. 221 Lord Phillips specifically referred to the following statement of the position set out in the 22nd edition of this book.

320 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning.

321 *Jugoslavenska Oceanska Providba v Castle Investment Co Inc* [1974] Q.B. 292; *Services Europe Atlantique Sud (Seas) of Paris v Stockholms Rederiaktiebolag Svea of Stockholm ("The Folias")* [1979] A.C. 685.

322 *Miliangos v George Frank (Textiles) Ltd* [1976] 1 Lloyd's Rep. 201.

323 See further *Keating on Building Contracts* (8th edn), para.5–015.

324 These are, first, oppressive, arbitrary or unconstitutional actions by servants of the government; second, where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and, third, where there is express authorisation by statute: *Rookes v Barnard* [1964] A.C. 1129, HL. A detailed discussion of the subject is beyond the scope of this book but the reader is referred to *McGregor on Damages* (17th edn) Ch.11.

325 On the basis that the availability of exemplary damages concerns heads of damage rather than quantification and is therefore to be determined by the substantive law.

326 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning.

327 See para.6–097 above.

328 There are at least two possible arguments against this. First, it would involve the tribunal deciding the case other than in accordance with English law. The tribunal is entitled to do so if empowered by the parties under s.46 of the Arbitration Act 1996. Secondly, it is arguably contrary to public policy and the exclusion of exemplary damages would be considered a "safeguard … necessary in the public interest" under s.1(b) of the Arbitration Act 1996. This is considered further in the context of enforcement of an award of exemplary damages: see para.6–106 below.

329 See further paras 8–021 *et seq.* below for enforcement of New York Convention awards.

330 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning. See for example *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 where the parties excluded the power to grant injunctions under s.48.

331 In contrast, the court's power under s.44 of the Arbitration Act 1996 is limited to interim injunctive relief: see paras 7–180 *et seq.* below.

332 Formerly s.15 of the Arbitration Act 1950. The proviso in s.15 referred to contracts relating to land or any interest in land, but there was no intention to change the law in this regard: see para.234 of the DAC report.

333 *Telia Sonera AB v Hilcourt (Docklands) Ltd* [2003] EWHC 3540. That case also clarified that it is the relevant contractual obligation of which specific performance is sought that must not relate to land, not the contract as a whole.

334 The English court may be unable to lend its coercive powers if the respondent and/or the subject matter of the award is abroad, but a foreign court may enforce the award. As to enforcement, see paras 8–002 *et seq.* below.

335 The requirement for any agreement between the parties to be "in writing" stems from s.5(1) of the Arbitration Act 1996, although the section gives the expression a broad meaning.

336 As to enforcement of declaratory awards see para.8–012.

337 The court's power is set out in CPR, r.40.20.

338 [1978] A.C. 435 at 501. CPR r.40.20, introduced since that case was decided, does not expressly limit the power to declarations "of rights". See generally Woolf, *The Declaratory Judgment* (3rd edn).

339 [1992] 1 Lloyd's Rep. 570.

340 [1999] 2 Lloyd's Rep. 739.

341 [2005] B.L.R. 341.

342–343 Pursuant to s.48(1) of the Arbitration Act 1996.

344 [1999] 2 Lloyd's Rep. 739.

345 The argument (which was set out by Mustill L.J. in the *Eras* case) is that it is to be implied that the tribunal has the same powers as would have been available in a court of law having jurisdiction to decide the same subject matter. This argument is based on the quoted text from Tucker L.J. in *Chandris v Isbrandtsen-Moller* [1951] 1 K.B. 240; [1950] 2 All E.R. 618 relying on *Edwards v Great Western Railway* (1851) 11 C.B. 588. In the latter case the award was the result of a reference by consent order in a trial at Nisi Prius and accordingly it would have been natural to assume that the tribunal's powers concerning interest were the same as those of the jury whom it replaced. It is questionable how much weight can be placed on this argument given the number of implied terms specifically mentioned in the Arbitration Act 1996 and the terms of the 1978 Act itself, but it nevertheless formed the basis of the court's tentative decision in the *Wealands* case.

346 [2005] B.L.R. 341.

347 The trend was generally towards construing arbitration clauses so as to permit the tribunal to order rectification: *Ethiopian Oilseeds & Pulses Export Corp v Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep. 86; *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 Lloyd's Rep. 73, CA; [1988] 3 W.L.R. 867. Cf. *Crane v Hegeman-Harris Co Inc* [1939] 4 All E.R. 68, CA; *Printing Machinery Co Ltd v The Linotype & Machinery Ltd* [1912] 1 Ch. 566; *Fillite (Runcorn) Ltd v Aqua-Lift* 26 Con. L.R. 66 45 B.L.R. 27.

348 See *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association Ltd (The "Padre Island") (No.2)* [1989] 1 Lloyd's Rep. 239, CA. The intention to exclude interest need not be contained in the arbitration clause itself, provided it can be construed as part of the arbitration agreement.

349 The DAC report does not spell this out as it does at para.234 in relation to remedies under s.48 of the Arbitration Act 1996, but the freedom given to the parties to agree these powers is on the face of it the same subject perhaps to public policy considerations.

350 Selection of a particular governing law will not constitute agreement between the parties for the purposes of s.49 because it does not constitute an agreement in writing in accordance with s.5(1) of the Arbitration Act 1996: see *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; [2006] 1 A.C. 221 at [37].

351 See also para.6–127 below.

352 Assuming that the sum claimed became payable prior to the making of the award: see *Durham CC v Darlington BC* [2003] EWHC 2598.

353 Pursuant to s.20 of the Arbitration Act 1950.

354 *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301; [2005] 2 Lloyd's Rep. 728. See for example art.26.6 of the LCIA Rules.

355 *Walker v Rowe* [2000] 1 Lloyd's Rep. 116. The respondent is named in the official transcript as Rome, rather than Rowe.

356 [2003] EWHC 2598.

357 Although there was a declaratory award in that case, nothing fell due until service of a notice and the sum was not therefore payable consequent upon the declaratory award.

358 Section 19A of the Arbitration Act 1950.

359 See further para.237 of the DAC report which addresses the concerns which had been expressed about conferring a power to award compound interest.

360 See, e.g. the LCIA Rules, Art.26.6.

361 See para.237 of the DAC report.

362 See the discussion in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34.

363 As to the rate of interest to be applied generally, see *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1981] 3 All E.R. 716.

364 8% per annum as at July 2007. Section 49(4) has introduced a substantive change by giving the tribunal considerably more discretion with regard to post-award interest. Its predecessor, s.20 of the Arbitration Act 1950, specifically provided for an award to carry interest at the same rate as a judgment debt unless the award directed otherwise. Thus there was an entitlement to post-award interest where the award itself was silent on the issue. The tribunal could direct that no post-award interest was payable, but it did not have power to give post-award interest at any rate other than that applicable to a judgment debt: see *Timber Shipping Co SA v London and Overseas Freighters Ltd* [1972] A.C. 1 at [21]. There is apparently no such restriction as to the rate to be applied under s.49(4).

365 *BP Chemicals Ltd v Kingdom Engineering (Fife) Ltd* [1994] 2 Lloyd's Rep. 373.

366 The liability to pay interest under s.49 is a liability in debt and can be enforced as such, with interest accruing on the unpaid debt: *Coastal States Trading (UK) Ltd v Mebro Mineraloelhandelsgesellschaft GmbH* [1986] 1 Lloyd's Rep. 465. Further, s.49 has removed a possible anomaly under the earlier statute whereby, as the entitlement to post-award interest arose by statute rather than under the award, it may not have been recoverable when seeking to enforce the award in another jurisdiction under the New York Convention.

367 *Wildhandel N.V. v Tucker and Cross* [1976] 1 Lloyd's Rep. 341.

368 [1974] 1 Lloyd's Rep. 394 at 411.

369–370 *Panchaud v Pagnan* [1974] 1 Lloyd's Rep. 394. In *Antclizo Shipping Corporation v Food Corporation of India (The "Antclizo") (No.2)* [1991] 2 Lloyd's Rep. 485 arbitrators were appointed in 1975 to hear disputes under a charterparty. There followed a prolonged delay and both arbitrators died. Two fresh

arbitrators and an umpire were appointed in July 1989. The umpire found that the failure to pursue the arbitration for eight years from 1975 to 1983 was due in part to the pendency of other arbitrations between the same parties raising similar issues. However, there was no agreement to "freeze" the arbitration. He found that the delay was an inordinate and unreasonable failure to prosecute the claim and declined to award interest for those eight years. The court would not interfere, holding that he was entitled to take an overall view of the position in exercising his discretion.

371 See paras 8–093 *et seq.*. below.

372 See *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304 and see para.6–167 below.

373 See para.6–171 below.

374 *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; [2006] 1 A.C. 221 at [38].

375 Mustill & Boyd p.393 identify a number of other circumstances which could give rise to some "other power" to award interest. These are (1) interest as special damages for the late payment of money, (2) the equitable right to interest in relation to profits arising from a breach of fiduciary duty, and (3) where the claim is one which falls within the Admiralty jurisdiction of the High Court but is referred to arbitration.

376 See for example LCIA Rules, Art.26.6.

377 *National Bank of Greece SA v Pinios Shipping Co (No.1) and George Dionysios Tsitsilianis (The "Maira") (No.3)* [1990] 1 Lloyd's Rep. 225.

End of Document

AA-48

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PANEL

Between:	
Donuts, Inc. (Applicant)	
-and-	**ICDR Case No. 01-14-0001-6263**
Internet Corporation for Assigned Names and Numbers (ICANN) (Respondent)	

FINAL DECLARATION OF THE PANEL

Independent Review Panel:

PHILIP W. BOESCH

JACK J. COE, JR. (CHAIR)

RAYNER M. HAMILTON

LIST OF ACRONYMS AND ABBREVIATIONS

BGC: ICANN Board Governance Committee.

Donuts: Donuts Inc. (Claimant).

DRSP: Dispute Resolution Service Provider.

GAC: Government Advisory Committee.

gTLD: Generic Top-Level Domain.

Guidebook: gTLD Applicant Guidebook published by ICANN, September 19, 2011.[1]

ICANN: Internet Corporation for Assigned Names and Numbers (Respondent).

ICANN Articles: Articles of Incorporation of Internet Corporation for Assigned Names and Numbers.

ICANN Board: Board of Directors of Internet Corporation for Assigned Names and Numbers.

ICANN Bylaws: Corporate Bylaws of Internet Corporation for Assigned Names and Numbers.

ICC: International Chamber of Commerce.

ICC Expertise Rules: International Chamber of Commerce Expertise Rules (2003 version).

IR: Independent Review ("IRP" in quoted material).

IRB: International Rugby Board (objector to .RUGBY application).

ITF: International Tennis Federation.

NGPC: New GTLD Program Committee.

RFR: Request for Reconsideration.

SA: SportAccord (objector to .SPORTS application).

LIST OF SHORT-FORM IR CASE NAMES

Booking.com IR: *Booking.com v. ICANN*, ICDR IR Case No. 50-20-1400-0247.

DCA IR: *DotConnectAfrica Trust v. ICANN*, ICDR IR Case No. 50-2013-001083.

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[1] Citations to the Guidebook are to page numbers or section numbers, depending on the context.

ICM IR: *ICM Registry, LLC v. ICANN*, ICDR IR Case No. 50-117-T-00224-08.

Merck IR: *Merck KGaA v. ICANN*, ICDR IR Case No. 01-14-0000-9604.

Vistaprint IR: *Vistaprint Ltd. v. ICANN*, ICDR IR case No. 01-14-0000-6505.

TABLE OF CONTENTS

I. INTRODUCTION

1. This Declaration is the product of an Independent Review (IR) authorized under the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN). Those Bylaws contemplate that:

> ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.[2]

2. Under those Bylaws, standing is conferred on:"[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws."[3]

3. These proceedings arise out of separate applications by subsidiaries of the complainant, Donuts, Inc., to manage specific gTLDs available under the New gTLD Program authorized by a decision of the ICANN Board in June 2011.[4] That Program was designed to make available for use an extensive range of new gTLDs and constitutes, according to ICANN, "by far ICANN's most ambitious expansion of the Internet's naming system."[5] It was undertaken with a view to "enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...."[6]

4. The Program had been several years in development, and reflects diverse input from "representatives from a wide variety of stakeholder groups."[7] The resulting policies and details of implementation are largely consolidated in the "Applicant Guidebook" (Guidebook)[8]—an essential document to which reference will often be made below.

II. THE PARTIES

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[2] ICANN Bylaws, Article IV, Section 3.
[3] Id., para. 2.
[4] Preamble to Guidebook.
[5] Remarks attributed to ICANN by the Booking.com IR Panel, Declaration of March 3, 2015, para.16.
[6] Id.
[7] Specifically:

> [G]overnments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.

Guidebook, (Preamble).
[8] Guidebook, at 1-1, states in relevant part: "This.....Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

5. The entity requesting review in this proceeding, Donuts, Inc., (Donuts) is a Delaware corporation, having its principal place of business in Washington State. Donuts is the sole owner of Steel Edge, LLC and Atomic Cross LLC, the two applicants for the strings giving rise to this IR.

6. It is in the nature of an IR that ICANN is the responding party. ICANN is organized under California law as a "non-profit public benefit corporation" and has it principal place of business in California. By its articles of incorporation, ICANN is restricted to operating "exclusively for charitable, educational, and scientific purposes within the meaning of...the Internal Revenue Code."[9] Its Articles elaborate on these purposes and give a sense of ICANN's distinctive character:

> In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall... pursue the...purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).[10]

7. As stated by the *ICM Registry* Panel, "ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN."[11]

III. THE PANEL'S MANDATE IN BRIEF

8. As more fully discussed below in connection with the Panel's Analysis of the Parties' arguments, the Panel's mandate is highly limited. The Panel is called upon to evaluate only acts (and certain failures to act) of the ICANN Board. The Panel is asked to judge such conduct against ICANN's Bylaws and Articles, and to do so in light of a prescribed standard of review. The Panel serving in the Merck IR[12] described the exercise as follows:

> [T]he Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is

[9] ICANN Articles, Article 3.
[10] ICANN Articles, Article 3.
[11] ICM Registry IR Declaration of Feb. 19, 2010, para. 136.
[12] Merck IR Declaration of Dec. 10, 2015.

required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.[13]

IV. SOURCES OF PROCEDURAL AND SUBSTANTIVE GUIDANCE

9. This IR is administered by the International Centre for Dispute Resolution (ICDR) under its Arbitration Rules as augmented by the "ICDR Supplementary Procedures for [the ICANN] Independent Review Process." The latter ICDR text was produced pursuant to a mandate, found in the ICANN Bylaws.[14]

10. Given the Panel's mandate, substantive guidance necessarily comes from ICANN's Articles and it Bylaws. Additional sources include the Guidebook, as the principal embodiment of ICANN's documented policies, and "relevant principles of international law and applicable international conventions and local law."[15]

11. The parties have debated underlying facts and the meaning of provisions within certain ICANN constituent sources, including, in particular, ICANN's Articles, Bylaws and the Applicant Guidebook. They have not, however, appreciably relied on particular bodies of substantive law, and correspondingly have not offered any conflicts of law analyses.

V. PROCEDURAL HISTORY

A. Procedural Events before this Proceeding

12.

On June 13, 2012, Donuts, through its subsidiary Steel Edge, LLC, applied for the string .SPORTS.

On June 13, 2012, Donuts, through its subsidiary Atomic Cross, LLC, applied for the string .RUGBY.

On March 13, 2013, the International Rugby Board (IRB) filed a community objection to Donuts' application to manage the .RUGBY registry.

On March 13, 2013, SportAccord (SA) filed a community objection to Donuts' application to manage the .SPORTS registry.

On January 21, 2014, ICC Expert Jonathan Taylor issued his determination sustaining Sport Accord's objection to Steel Edge's application to administer the registry for .SPORTS.

On January 31, 2014, ICC Expert Mark Kantor issued his determination sustaining IRB's objection to Atomic Cross' application to administer the registry for .RUGBY.

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[13] Merck IR Declaration, para. 22.

[14] See Bylaws, Article IV, Section 3, para. 8. In the event "there is any inconsistency between [the ICDR] Supplementary Procedures and the [ICDR] Rules, [the ICDR] Supplementary Procedures will govern. ICDR Supplemental Procedures, Section 2.

[15] ICANN is charged with carrying out its activities in conformity with "relevant principles of international law and applicable international conventions and local law." ICANN Articles, Article 4.

On March 24, 2014 (approximately), Donuts sought assistance from ICANN Ombudsman Chris LaHatte in connection with objection rulings including those pertaining to .SPORTS and .RUGBY.

On July 8, 2014, Ombudsman Chris LaHatte, in a letter opinion, ruled that his competency was limited to considering certain matters of process fairness, and thus was not authorized to review the complained-of interpretations of Guidebook principles and law.

B. Procedural Events during this Proceeding

13.

On October 8, 2014, Donuts filed a Request for IR with the ICDR.

On October 8, 2014 Donuts filed with the ICDR a request for relief under ICDR's emergency arbitrator Rules.

On November 14, 2014, ICANN filed a Consolidated Response to Donuts' Request.

On November 21, 2014, Donuts agreed to withdraw its request for emergency relief in exchange for certain undertakings by ICANN.

On July 14, 2015, between 10 and 11:30 a.m. the IR Panel convened with the Parties by phone to conduct an organization meeting.

On July17, 2015, the Panel issued its Procedural Order No 1.

On August 7, 2015, the Panel issued its Procedural Order No. 2.

On August 11 and 12, 2015, the Panel received from the Parties "post-scripts" on the subject of ICANN Bylaws, Article XI-A, Section 1 and its bearing on Donuts' requests for document production.

On August 14, 2015, the Panel issued its Procedural Order No. 3.

On August 20, 2015, Donuts filed its Supplemental Memorandum in Support of its Request for Independent Review.

On September 7, 2015, the Panel issued its Procedural Order No. 4.

On September 21, 2015, ICANN filed its Response to Donut's Supplemental Memorandum in Support of Request for Independent Review.

On September 24, 2015, the Panel by letter ruling informed the Parties that it had decided not to admit the submissions of certain third parties.

On October 8, 2015, the Hearing for Argument was held at the AAA offices at 725 South Figueroa Street, Suite 400, Los Angeles, CA.

On October 29, 2015, the Parties submitted Post-Hearing Briefs.

By email correspondence between January 4 and January 22, 2016, the Panel put questions to, and received answers from, the Parties concerning, inter alia, aspects of the Record.

VI. ICANN GUIDING PRINCIPLES AND VALUES

14. Both parties to this IR rely on interpretations of ICANN's Articles and Bylaws. IR Panels in turn are required to compare Board conduct to those constituent documents. It has become customary for IR Declarations to set out somewhat fully the more oft-relied upon provisions of those sources. This Declaration follows that pattern.

15. First, ICANN's Articles contain the following mandate:

> [ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.[16]

16. Article III of ICANN's Articles requires ICANN constituent bodies to the "maximum extent feasible" to practice transparency and to pursue fairness.[17]

17. The ICANN Bylaws, Article II, Section 3, requires, inter alia, that disparate treatment be justified by a "substantial and reasonable" cause.

18. Finally, ICANN Bylaws, Article I, Section 2 enumerates "Core Values." Those values are to guide decisions and actions of ICANN and its constituent bodies, but are not rules in a technical sense.[18] The enumerated values relied upon by Donuts in particular, are Nos. 6 through 10, as follows:

> ./...
>
> 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
>
> 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
>
> 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
>
> 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

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[16] ICANN Articles, Article 4.

[17] ICANN Bylaws, Article III, Section 1, state: "ICANN...and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

[18] In this connection, the Bylaws advise:

> [The enumerated] core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

./....

VII. THE APPLICATION AND OBJECTION PROCESSES INVOLVED IN THIS CASE

A. Donuts' Applications

19. The Guidebook requires that all applicants specify if their application is "community-based" (as opposed to "standard"—the default designation).[19] A community-based gTLD is one that is "operated for the benefit of a clearly delineated community."[20] The designation is intended "for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string."[21] By contrast, a "standard" applicant "may or may not have a formal relationship with an exclusive registrant or user population [and it] may or may not employ eligibility or use restrictions."[22]

20. The Guidebook provides that "[a] standard gTLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement."[23]

21. Rather than pursuing community-based applications in connection with .SPORTS and .RUGBY, Donuts made "standard" applications, as it was fully entitled to do. Consequently, it was not required to "substantiate [by written institutional endorsements in support of the application] its status as representative of [a] community it names in the application"[24] nor to "demonstrate an ongoing relationship with a clearly delineated community" nor to represent that it was applying for a string "strongly and specifically related to" a specific named community. Other community-related conditions also did not apply because Donuts' applications were of the standard type.[25]

22. Importantly, as seen in these proceedings, the fact that an application is not designated as community-based does not preclude a "community objection" from being raised against it.

B. The Objections

1. In General

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[19] Guidebook, at 1-25 through 1-26.
[20] Guidebook, at 1-25.
[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] Donuts, for instance, was not required to formulate, for later formalization in its registry agreement, "dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named." Guidebook, at 1-25. Similarly, unlike a successful community applicant, Donuts would not have been required, after delegation, to undertake "certain ...contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation." Id. at 1-27.

23. The Guidebook informs applicants that a formal objection may be filed against any application.[26] In contrast to earlier IRs to have arisen out of objections of different kinds, this IR originates in two "community" objections.[27] In pertinent part, the Guidebook provides:

> Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.[28]

24. Community objections are distinctive in several ways. They may be brought by a competing applicant, provided that entity has standing. They are marshaled by institutions, not natural persons.[29] Community objections are not based on a superior legal claim, but rather depend on there being the requisite level of opposition to the application by a "community", and upon certain other factors outlined below.

25. As evidenced by this case, community opposition may well be a reaction to the applicant for the string (or the applicant's intended registration policies). The right to object arises because the string in question is associated with the community represented by the objector and the application (or the applicant's registration policies) creates a certain level of perceived risk that the community will suffer detriment.

2. Community Objector Standing and the Community Element

26. The successful objections prosecuted against .SPORT and .RUGBY were both of the community type. According to the Guidebook, a Community Objection is one expressing "substantial opposition to the gTLD application in question from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."[30]

27. With respect to community objections, there are four elements to standing: 1] the objector must be an established institution;[31] 2] the objector must have an "ongoing relationship" with the community in question;[32] 3] the community in question must be "clearly delineated;"[33] and 4] the community in question must be "strongly associated with" the gTLD string involved.[34]

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[26] Guidebook, at 1-26.

[27] The four grounds upon which an objection may be filed include one alleging superior legal rights to the string, one invoking the public interest in the observance of norms of morality and public order, one based on confusing similarity between the applied-for string and an existing string, and the one involved in this IRP, which asserts the existence of substantial opposition to the gTLD application from a significant portion of a community to which the gTLD string may be explicitly or implicitly targeted—i.e., a "community objection". Guidebook, at 3-4.

[28] Guidebook, at 1-25.

[29] Guidebook, at 3-7.

[30] Guidebook, at 3-4.

[31] Id., at 3-7 through 3-8.

[32] Id.

[33] Id.

[34] Id., at 3-7

28. The Guidebook provides two lists of factors that may be balanced to determine if standing requirements have been satisfied,[35] but notes that the lists are not exhaustive; that is, the expert appointed to decide the objection may consider "other relevant information."[36] Nor is it "expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."[37]

29. The Guidebook references to community objections are somewhat at variance with each other on the question of whether a gTLD can target more than one community. On the one hand, it describes a community objection as being founded on "substantial opposition to the gTLD application from a significant portion of *the* community to which the gTLD string may be explicitly or implicitly targeted."[38] Elsewhere, however, the Guidebook states that the objector must be an "established institution" with "an ongoing relationship with *a* clearly delineated community."[39]

30. The notion that there may be more than one community to which a string alludes is not inconsistent with guidance found in an Implementation Guideline included in the GNSO Final Report of August 8, 2007,[40] and with the Guidebook's instructions that the decision maker (in this case, an ICC Expert) may balance numerous factors in determining if the "clearly delineated community" standing condition has been met.[41]

3. The Substantive Elements in Community Objections

31. The merits portion of the analysis requires the expert to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. The expert is instructed to test the objection against four requirements. A successful objection requires that each be met, and the burden is on the objector to prove each of the four.[42] They are, to paraphrase: 1] the community invoked by the objector is a clearly delineated

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[35] As to whether the objector is an established institution the list consists in: [l]evel of global recognition of the institution; [l]ength of time the institution has been in existence; and public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The Guidebook adds: "The institution must not have been established solely in conjunction with the gTLD application process." Id., at 3-7.

Regarding whether there is the required on-going relationship with a clearly delineated community, the list includes: [t]he presence of mechanisms for participation in activities, membership, and leadership; [i]nstitutional purpose related to the benefit of the associated community; [p]erformance of regular activities that benefit the associated community; and [t]he level of formal boundaries around the community. Id., at 3-8.

[36] Id., at 3-8.

[37] Id.

[38] Id., at 3-4 (emphasis added).

[39] Id., at 3-7 (emphasis added).

[40] See Implementation Guideline P ("[C]ommunity should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted"). In describing the notion of "community", the Guideline does not seem to distinguish between the standing and merits contexts.

[41] See Guidebook, at 3-8.

[42] See Id., at 3-22 through 3-25.

community; 2] that community's opposition to the application is substantial;[43] [3] there is a strong association between the community invoked and the applied-for gTLD string (or 'targeting');[44] and [4] the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.[45]

32. The Guidebook instructs that if opposition by a number of people or entities is established, and yet the group represented by the objector is not clearly delineated community, the objection will fail.[46]

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[43] The objector's burden is to demonstrate "substantial" opposition within the community it has identified itself as representing; the presence of less-than-substantial opposition must lead to the objection failing. To closely paraphrase the Guidebook at 3-23, the non-exhaustive list of factors an expert might consider in testing substantiality includes:

> [n]umber of expressions of opposition relative to the composition of the community; [T]he representative nature of entities expressing opposition; Level of recognized stature or weight among sources of opposition; [d]istribution or diversity among sources of expressions of opposition (including: regional subsectors of community; leadership of community; membership of community; historical defense of the community in other contexts; and the costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.)

[44] Targeting—that is, a strong association between the applied-for gTLD string and the community represented by the objector—is essential for a community objection to prevail. It may be determined by considering, among other factors: [s]tatements contained in application or publically made by the applicant; and associations by the public. If there is some association, but not a strong one, the opposition must fail. Guidebook, at 3-24.

[45] The Guidebook notes that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment." Guidebook, at 3-24. As with the other four factors, the Guidebook, at 3-24 through 3-25, identifies, non-exhaustively, factors that might be considered by the expert. These are:

> [n]ature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; [e]vidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; [i]nterference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; [d]ependence of the community represented by the objector on the DNS for its core activities; [n]ature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and [l]evel of certainty that alleged detrimental outcomes would occur.

[46] Guidebook, at 3-13 (paraphrase). In determining whether the community expressing opposition can be regarded as a "clearly delineated", an expert can balance many factors, according to the Guidebook. The non-exhaustive list provided by the Guidebook includes:

> "[t]he level of public recognition of the group as a community at a local and/or global level; [t]he level of formal boundaries around the community and what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community (this may not apply if the community is territorial); and the number of people or entities that make up the community.

Guidebook, at 3-22 through 3-23.

IIX. THE NATURE OF ICC OBJECTION PROCEEDINGS

A. The ICC-ICANN Relationship

33. The Guidebook contemplates that resolution of objection disputes will be overseen by outside institutions. In the case of "community" objections, duties of administration were committed to the ICC's Center for Expertise, as evidenced in a Memorandum of Understanding (the MOU). The MOU is broken into a "whereas" introductory segment and a main body which restates agreed terms; these two lists overlap with each other and cite as authorization provisions in the Guidebook. Together they help understand the ICC's role and its relationship with ICANN. They are accordingly excerpted at length:

> Whereas:
>
> ICANN has developed a program for the introduction of new generic top-level domain names ("gTLD" and the "New gTLD Program"); [and]
>
> The rules and procedures for the New gTLD Program are set out in the Applicant Guidebook (the "Guidebook"), the most recent version of which was published by ICANN on 11 January 2012; [and whereas]
>
> The Guidebook, Module 3, includes a procedure by which third parties may object to an application for a new gTLD; [and whereas]
>
> A formal objection may be filed on any one of the following four grounds: (i) String Confusion Objection; (ii) Legal Rights Objection; (iii) Limited Public Interest Objection; and (iv) Community Objection;[47] [and whereas]
>
> Objections to applications for new gTLDs may be submitted after ICANN posts the public portions of all applications considered complete and ready for evaluation./…;[48][and whereas]
>
> A formal objection to an application triggers a dispute between the objector and the applicant that shall be heard and decided by an independent expert panel; [and whereas];
>
> A Dispute Resolution Service Provider ("DRSP") shall administer the proceedings, and shall appoint the panel of experts that will preside over the objection proceedings; [and whereas]
>
> Disputes triggered by objections shall be resolved in accordance with the New gTLD Dispute Resolution Procedure (the "Procedure") and the rules of procedure of a particular DRSP that have been identified as being applicable to specific objection proceedings under the Procedure (the "DRSP Rules"); [and whereas]

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[47] Citing Guidebook, § 3.2.1.
[48] Citing Guidebook, §§ 1.1.2.2 & 1.1.2.6.

Upon publication by the DRSP, the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process; [49] [and whereas]

The DRSP Rules for Limited Public Interest Objections and Community Objections are the Rules for Expertise of the International Chamber of Commerce (the "ICC [Expertise] Rules"), including any applicable Appendices and other supplements to such Rules that may be adopted by the ICC; [and whereas]

The Centre shall select experts and administer dispute proceedings in accordance with the Procedure and the ICC [Expertise] Rules and any supplements to the Rules as adopted by ICC; [and whereas]

The Centre, with advice and support from ICANN, shall establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner; [and whereas]

ICANN and the Centre shall communicate regularly with each other and seek to optimize the service that the Centre provides as a DRSP in the New gTLD Program; [and whereas]

The International Centre for Expertise of the ICC (the "Centre") has agreed to act as DRSP for ...Community Objections for at least the first round of applications in the New gTLD Program.

ICANN and ICC therefore agree as follows:

[T]he Centre shall for at least the first Round of the New gTLD Program act as DRSP and administer all disputes arising from Limited Public Interest Objections and Community Objections, as foreseen by Guidebook § 3.2.3 and Procedure Article 3.

The DRSP Rules for...Community Objections are the Rules for Expertise of the International Chamber of Commerce (the "ICC [Expertise] Rules"), including any applicable Appendices and other supplements to such Rules that may be adopted by the ICC.

The Centre shall select experts and administer dispute proceedings in accordance with the Procedure and the ICC [Expertise] Rules and any supplements to the Rules as adopted by ICC.

The Centre, with advice and support from ICANN, shall establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner.

ICANN and the Centre shall communicate regularly with each other and seek to optimize the service that the Centre provides as a DRSP in the New gTLD Program.

B. The Procedural Framework Governing ICC Expert Evaluations

[49] Citing Guidebook, § 3.4.6.

34. Community objections to gTLD applications are filed directly with the ICC, which is charged with subjecting objections to an administrative review and checking for compliance with certain procedural rules. The Guidebook sets limits of form and length on such objections.[50] Under the Guidebook, applicants were required to file timely responses upon being notified of an objection.[51]

35. The ICC Expertise Rules contemplate that the ICC will appoint an expert only after considering "the prospective expert's qualifications relevant to the circumstances of the case" and related factors.[52]

36. Unless otherwise agreed in writing by the parties, experts are to be "independent of the parties involved in the expertise proceedings," and are required to execute a "statement of independence" along with a written disclosure to the Centre of "any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties."[53] Such disclosed information is communicated to the parties, who are entitled to object that the expert does not have the necessary qualifications, including independence.

37. The Applicant Guidebook provides that one expert will serve. The Rules identify the expert's principal task as being to present findings in a written report "after giving the parties the opportunity to be heard and/or to make written submissions."[54]

38. The Rules as published by the ICC state that, unless otherwise agreed by the parties, "the findings of the expert shall not be binding upon [them]."[55] However, the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure (version 2012-01-11), which supplements the ICC Expertise Rules for use in community objection proceedings, reverses that provision; the parties are deemed to have agreed that the expert report is binding upon them. In this regard, the Guidebook also provides that:

> "In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. [Likewise,] an objector accepts the applicability of this gTLD dispute resolution process by filing its objection. Upon publication by the DRSP, the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.[56]

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[50] Attachment to Guidebook Module 3, at Article 8.
[51] Guidebook, at 3-11 through 3-14.
[52] ICC Expertise Rules, Article 3(2).
[53] Id., Article 3.
[54] Id., Article 12(3).
[55] Id.
[56] "Guidebook, Section 3.2 (Public Objection and Dispute Resolution Process) citing Guidebook Section § 3.4.6. In turn, the ICC Practice Note states in relevant part: "By accepting the process as defined in Article 1(d) of the [New gTLD Dispute Resolution] Procedure, parties are deemed to have agreed that the expert determination shall be binding upon [them within the meaning of Article 12(3) of the ICC Expertise Rules]. See Practice Note, version 2012-01-11, item 8.

39. On the subject of immunity, the Rules provide the "neither the experts, nor the Centre, nor ICC and its employees…shall be liable to any person for any act or omission in connection with the expertise procedure."[57]

IX. THE EXPERT DECISIONS IN THIS CASE

A. In General

40. Broadly speaking, Donuts' dissatisfaction with the performance of the ICC experts involved in this IR relates to two broad categories. First, it complains that the experts misapplied the grounds for community objections and consequently incorrectly found that the objector in each case had carried its burden with respect to them. The second type of flaw, by contrast, consists in what Donuts alleges was a failure by one of the experts to fully disclose relationships he had with organizations affiliated with the objector.

41. In this section, the Panel will describe, in summary fashion only, the two experts' respective determinations on the merits. The Panel will defer to a later section its discussion of issues related to expert disclosures. Although the Panel will not recount in detail the arguments of both sides or the full reasoning of the respective ICC experts, it will endeavor to touch upon what Donuts characterizes as the errors giving rise to this proceeding.

B. The .RUGBY Objection Proceeding

42. Donuts applied for .RUGBY in competition with International Rugby Board (IRB). IRB lodged a community objection. Central to the objection was Donut's stated policy with respect to the access it intended to accord to the string. It reflects the same general philosophy associated with all of Donut's 307 applications. Donut's intended:

> [T]o make each domain open to all legitimate uses of the multiple meanings that Internet users may ascribe to the common, English-language words chosen for those strings." …. [which along] with the other TLDs in the Donuts family, …will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN's new TLD program.[58]

43. With respect to .RUGBY in particular, Donuts also posited:

> [.RUGBY] is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is con-

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[57] The Guidebook includes a similar immunity provision, which is nevertheless broader:

> Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

Article 22, New gTLD Dispute Resolution Procedure (version 2011-09-19).

[58] See Application of June 13, 2013 by Atomic Cross for. RUGBY, Item 18(a).

sistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation.[59]

44. The expert ruled in favor of IRB. Donuts cites as error before this Panel the expert's analysis concerning the likelihood of material detriment[60] to the relevant community[61] posed by Donut's proposed registration policies and practices.

45. An examination of the expert's reasoned determination shows that the expert considered several forms of potential detriment, and in assessing them was influenced by what it found to be a close association between the string and one or more communities. In this respect, the expert disagreed with Donut's characterization of the string as "generic." To closely paraphrase the expert's material detriment analysis:

> Objector argues that granting the [Donuts] Application would be likely to cause material detriment…for several reasons.
>
> First, Objector points out that….Donuts has applied for gambling-related strings [enumerated] …[and] seeks to operate gambling-related strings along with ".RUGBY" and other sports-related strings, without limitations and protections to mitigate the adverse consequences…[and] argues that association [with gambling strings] would harm the rugby community.[62]

46. The expert found the objector's gambling-related thesis "persuasive", in light of measures taken by the rugby community to minimize the adverse effects of gambling and certain regulations and codes of conduct precluding: "Unions, Associations, Rugby bodies, clubs and persons [from engaging] in conduct that would undermine the integrity of the sport or bring it into disrepute."[63] The expert observed additionally that "Host Union Agreements prohibit any improper association with gambling-related sponsorships".

He concluded:

> [O]peration of the ".RUGBY" gTLD by [Donuts] will create a likelihood of material detriment to the rugby community due to Donuts' proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure.[64]

47. Considering the objector's further theories of material detriment, the expert continued:

> [O]bjector claims that persons associated with [Donuts] have a track record for weak operation of domains. [It is objector's] understanding that "the founder and CEO of Donuts was formerly President of [a certain company] with a well-known [negative] track record in the ICANN Community.

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[59] Id.
[60] Regarding this objection element, see notes 43-46, supra, and accompanying text.
[61] Regarding the relevant community, see notes 30-34, 46, supra, and accompanying text.
[62] Objection Expertise in IRB v. Atomic Cross, CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134), issued January 31, 2014, paras. 81-83.
[63] Id., para. 83.
[64] Id., para. 84.

> [Objector further alleges] that the public record shows that [during his tenure there were] allegations of cybersquatting – the registration, trafficking in, or using [of] domain name[s] with bad-faith intent to profit from the goodwill of a trademark belonging to another [and that] [d]uring this time, [that company and its subsidiaries] lost twenty-six…domain names disputes brought under ICANN's Uniform Dispute Resolution Policy rules [resulting in many findings]…. that "the disputed domain name ha[d] been registered and used in bad faith." [65]

48. The ICC expert noted Donuts' silence with respect those alleged former practices. For the expert, the CEO's history in managing domains, while "not dispositive" did "weigh in the balance."[66] He further reasoned that:

> The [Donuts] Application [also]…does not propose protection for intellectual property interests other than registered trademarks…. [T]hat approach is insufficient protection for a worldwide community characterized by so many small participants, especially in resource-poor communities and in the developing world.
>
> The [Donuts] Application also does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community. The governance structure for a community-associated domain must necessarily be more protective of the interests of that community than the governance structure for a generic domain.
>
> ./…
>
> [It is persuasive also that Donuts] has no links at all with the worldwide rugby community [and] seeks to operate gambling-related strings along with ".RUGBY" and other sports-related strings, without limitations and protections to mitigate the adverse consequences….Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER." The failure to have links with a sports-related community with which the domain is strongly associated, together with the prospect of cross-linkage with gambling sites, is a topic that must be the object of discussion with leading voices in the rugby community, as well as the U.K. Government[67] and other Governments and institutions with a strong interest in the integrity of the sport…
>
> [Although Donuts] has committed to employ a compliance staff to enforce intellectual property protections and restrain fraudulent activity [and] points to "eight additional measures" to protect users… [a] review of the measures [Donuts enumerates as its program to protect intellectual property] shows that few, if any, are new and innovative….

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[65] Id., para. 85.
[66] Id., para. 86.
[67] In a preceding portion of the ruling, the expert observed that the strong opposition to the application voiced by the UK was "an extremely important factor in the balance, in view of the substantial role the U.K. plays with respect to the rugby community." In particular, it was the "unequivocal view…of the Government of the United Kingdom…that these Applicants do 'not represent the global community of rugby players, supporters and stakeholders [and that they] should withdraw their application.'" See, Id., para. 49.

> [Donuts] claims "its absence from the rugby industry enables it to ensure groups and individuals unaffiliated with Objector and its affiliates will have the same opportunity for expression on the TLD as those with incumbent interests." [However, that response focuses] only on Objector and its affiliates, rather than the rugby community as a whole [and]....fails to take account of the strong association between the rugby community and the particular string ".RUGBY."
>
> [Donuts] argues that "a group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection in any TLD." That ...presumes that only registered trademarks are properly entitled to protections. While that may be true for generic domains, it is an overstatement with respect to gTLDs strongly associated with a particular global community. Small, resource-poor and non-commercial participants in a community require protection as well as larger commercial enterprises....
>
> Finally, ...[Donuts] asserts that Objector has failed to show any level of certainty that [Donuts'] operation of the string ".RUGBY" creates a likelihood of material detriment, and no reasonable quantification of such an outcome. There is no quantification threshold in the Procedure for a "material detriment" showing. Since the question is inherently forward-looking for new domains, quantification of likely future harms cannot reasonably be expected to be easy to show. The ICANN process does not require such a rigorous empirical showing.
>
> In light of the foregoing, the [Donuts] Objection is successful and the Objector thus prevails with respect to that Objection.[68]

C. The .SPORTS Objection Proceeding

49. SportAccord (SA)[69] opposed the application of Donuts based on an alleged material detriment to a delineated community likely to occur from Donuts' registration policies. According to SA, the relatively free access to the .SPORTS registry contemplated by Donuts would allow registrants not sanctioned by organized sports to nonetheless convey the seeming imprimatur of that community (a community referred to by the expert as the "Organized Sports Movement").[70]

50. The objectors argued also that a perception of an association between a .SPORT registrant and the community would interfere with the community's anti-drug, anti-gambling, anti-racism messaging by diluting such campaigns with unsanctioned messaging on the same topics.

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[68] Id., paras. 87-100 (passim).

[69] SportAccord (SA) is described by the expert as a not-for profit "umbrella organization and representative body" formed under Swiss law in 1967. Its members are international sports federations and organizers of sporting events recognized by the International Olympic Committee. Objection Expertise in SportAccord v. Steel Edge, CASE No. EXP/486/ICANN/103 issued January 21, 2014, para. 13.2. SA applied for the gTLD ".SPORT" (as distinct from ".SPORTS"—the gTLD for which Donuts applied).

[70] Id., paras. 41.1.2 & 41.2.2.

Further, the objector asserted that the registry practices of Donuts would enable ambush marketing, brand-jacking, and use of sports themes in connection with pornography.[71]

51. Donuts' defense questioned both SA's standing[72] and the merits of its objection; the delineated community requirement was central to both aspects of that defense. Donuts maintained that .SPORTS potentially targets a community nearly impossible to effectively delineate,[73] being much broader than merely those persons that identify with *organized* sports.

52. Accordingly, argued Donuts, while the putative community of the "Organized Sports Movement" (as the expert characterized it) might be sufficiently targeted by a gTLD denominated less generically, the more generic .SPORTS string implies associations so numerous and diverse that SA cannot claim to have an ongoing relationship with them; nor could the narrow subset consisting in "the Organized Sports Movement" claim to be strongly enough associated with the .SPORTS gTLD to have standing to object.[74]

53. On the merits, the substantial opposition to its application among SA members was, according to Donuts, merely the opposition of a narrow subset of all those for whom sport (in all its forms and modes of appreciation) is a concept. For Donuts, the argument for "substantiality" was weakened accordingly. It followed in Donut's view that a likelihood of detriment to the subset of organized sports bodies and their members and patrons does not equate to a likelihood of detriment to the entire class of natural and juridical entities implicitly targeted by .SPORTS.

54. The expert's analysis differed with that of Donuts. On the critical question of community delineation, the expert interpreted the Guidebook and certain background materials to anticipate that there may be more than one community impliedly targeted by a given gTLD.[75] The expert interpreted SA's pleadings as referring to organized sports, rather than with all sports activities.[76] For the expert, .SPORTS readily conjured a strong association with the Organized Sports Movement, a community that could be identified with sufficient precision to confer standing, and likewise to be amenable to assessments of potential detriment and analyses of related objection requirements.

55. One consequence of the expert's finding of a close association between .SPORTS and the Organized Sports Movement was that the requirement of "a likelihood of material detriment" could be more easily satisfied, which ultimately it was deemed to be.[77]

56. A recurrent theme in the expert's reasoning was that impairment of legitimate interests would likely result from Donuts' openly stated intention to "not limit eligibility or otherwise exclude legitimate registrants in second level names"[78] Not unlike the analysis applied by the expert in the .RUGBY objection proceeding, the .SPORTS expert report devotes several paragraphs to the

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[71] Id., paras. 41.2.1 through 41.2.5.
[72] Id., paras. 13.3, 14.3, 14.6 15.3 and 16.2.
[73] Id., paras. 14.3, 14.6.
[74] Id., paras. 14.3.
[75] Id., paras. 14.1, 14.6, 15.3, 19 & 20.
[76] Id., paras. 14.2 & 14.4.
[77] Id., para. 43.
[78] Id., paras. 42.2, 43.2.

potential consequences for the relevant community of Donut's open policy.[79] In analysis broadly similar to that explicated by the .RUGBY expert, the .SPORTS expert also found such protections as are instituted through the registration agreement to not catch many of the practices that the objector fears will be promoted by Donuts' liberal approach to granting registrations.

X. ARGUMENTS OF THE PARTIES

A. Introduction

57. As more fully developed below, this proceeding is instituted to allow an independent panel to compare the actions and certain inactions of the ICANN Board to the obligations attaching to it under ICANN's Articles, its Bylaws and potentially other documents central to the new gTLD program. This Panel is not authorized to assess acts and omissions by other actors unless those can be attributed to the Board on some basis. A core disagreement between the parties is the extent to which any Board action or inaction cognizable by this Panel has been demonstrated by Donuts. Because the Board ordinarily is not directly involved in processing objections, Donuts has faced a difficult obstacle—the need to show an equivalency between the activities of the ICC and its appointed experts on the one hand, and the Board on the other, or alternatively, to show inaction by the Board that is inconsistent with the Articles or Bylaws.

58. What follows is a brief summary of the parties' submissions to help place in context the Panel's analysis below, which analysis will involve a further examination of the parties' positions.

59. The Panel views the arguments as falling under two broad headings. The first category focuses on the acts of the ICC, and more particularly, its experts and, impliedly, proceeds on the basis that those acts are equivalent to, or attributable to, the Board. As such, Donuts would have this Panel judge them directly against the prescriptions and value guides that govern Board conduct. According to Donuts, those acts include manifest errors by the experts in applying the grounds for community objections set out in the Guidebook[80] and, in the case of one expert, a failure to fully comply with disclosure requirements applicable to ICC Experts.[81]

60. Under the second heading are theories of recovery arising largely, but not fully, out of the same facts as the first category; these allege an unfulfilled duty on the Board's part to act in some remedial fashion, or to adjust the scope of remedial actions it has already taken in other contexts.

B. Alleged Misapplication of Community Objection Standards.

1. In General

61. Donuts alleges that it has been prejudiced by misapplications of the rules established for determining community objections. According to Donuts, several of the principles binding ICANN in executing its mandate[82] have been abridged in the process. In particular, the invention of new rules by experts in sustaining objections constitutes disparate, discriminatory, treatment

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[79] Id., para. 43.

[80] See, e.g., Donuts Request for IR, para. 3 (experts "completely misconstrued" community objections), and para 8 ("clear violations of the Guidebook" in application of the grounds).

[81] See, e.g., id., paras. 41-42; Donuts Post-Hearing Brief, paras. 7-8.

[82] See notes 16-18, supra, and accompanying text.

of Donuts, in violation of ICANN's non-discrimination policies;[83] correspondingly, Donuts has detrimentally relied on what it sees as Guidebook promises concerning who is entitled to manage registries. In turn, the unpredictability generated by what Donuts sees as expert fiat is a form of non-transparency; as such it is inconsistent with express Articles and Bylaws provisions.[84] Finally, the rules applied by experts, according to Donuts, have the effect of favoring "entrenched interests" in contravention of ICANN's undertaking to value competition.[85]

2. The .RUGBY Expertise

62. Donuts asserts that the expert's analysis, in effect, imposes the duties of a community applicant on a standard applicant for the registry in question.[86] Donuts highlights the following passage in the expertise:

> Donuts' application creates a likelihood of material detriment because it "does not offer community members an enforceable voice in governance of a gTLD strongly associated with that community [and] the governance structure for a community-associated domain must necessarily be more protective of the interests of that community than [that]…for a generic domain.[87]

63. Donuts maintains that the above reasoning reveals a misapplication of the Guidebook to favor certain objectors and a variation in rule application that promotes unequal treatment, and discrimination:

> Donuts… applied for new gTLDs legitimately expecting that ICANN would honor the Guidebook. For its sizable investment, Donuts depends upon predictability and consistency in decision-making. Erratic application of Guidebook standards and divergent results in like cases undermine the system. The results have singled out Donuts for disparate treatment in violation of the Bylaws' anti-discrimination creed.[88]

3. The .SPORTS Expertise

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[83] The ICANN Bylaws, Article II, Section 3, require, inter alia, that disparate treatment be justified by a "substantial and reasonable" cause. See also ICANN Bylaws, Article I, Section 2, Core Value No. 8. ("Making decisions by applying documented policies neutrally and objectively, with integrity and fairness").

[84] Donuts relies, inter alia, upon ICANN's Articles. See especially, Article 4 ([ICANN] shall…carry[] out its activities …to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes…."); See also Bylaws, Article III.1 ("ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."); cf. ICANN Bylaws, Article I, Section 2, Core Value No.7 ('Employing open and transparent policy development mechanisms").

[85] See ICANN Articles, Article 4 (mandating processes….that enable competition and open entry in Internet-related markets.) See also ICANN Bylaws, Article I, Section 2, Core Value No. 6 (Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest).

[86] Donuts' Request for IR, para. 54 (.Rugby ruling "essentially requires Donuts to operate the TLD as a community"); and see Id., para. 72 (under expert holdings, Donuts would have to operate as a community).

[87] Excerpt from ICC Expert determination in IRB objection (.Rugby) of January 31, 2014, para. 88.

[88] Donuts' Request for IR, October 8, 2014, para. 9.

64. Donuts' submissions examine the reasoning of the .SPORTS expert in relative detail. Putting aside its allegation of bias (discussed below), Donuts asserts that the expert disregarded the strict standing and merits requirements established by the Guidebook for community objections, and failed to place the burden on the objector, as required by the Guidebook. Instead, states Donuts, the expert liberalized the requirements for successful objections in general and, in particular, in connection with what constitutes a "clearly-delineated-community."[89]

65. In community objection analysis, the manner in which the community is demarked affects both standing and success on the merits. Donuts' alleges that the expert too readily found a close association between the .SPORTS gTLD and what Donuts maintains is a contrived community: organized sports (or the "Organized Sports Movement").[90] For Donuts, the string has reference not only to organized sports, but to a much larger and more highly diffuse group of persons who identify with sporting activity in all the modes in which it is experienced.

66. Donuts also questions the experts' approach to the other community objection requirements[91] and stresses the expert's apparent failure to apply the Guidebook's admonition that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment."[92]

C. Expert Procedural Misconduct; Bias: The .SPORTS Objection

67. Donuts asserts that the expert that decided the .SPORTS objection had represented organizations which are members of SportAccord (SA), the organization that brought the objection.[93] The disclosures he made at the time of his appointment were, according to Donuts, incomplete and misleading. In some of its submissions, Donuts combines that premise with what it regards as his one-sided reasoning on the merits to conclude that the expert was motivated by its affiliations with the objector to reach a result favorable to the objector.[94]

D. Alleged Board Failures to Act

1. In General

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[89] See notes 30-46, supra, and accompanying text.

[90] According to Donuts, the objector's own definition of the relevant community was broad and diffuse—the opposite of clearly delineated. According to the objector, it included: "(i) "individuals and organizations who associate themselves with Sport;" (ii) "practitioners as well as organizers, supporters and audience;" (iii) "individual practitioners of sport, … spectators, … fans and sponsors;" and (iv) "any person in the world." Donuts Request for IR, para. 63.

In its Request, Donuts complained that, rather than finding this capacious delineation to be fatal to the objection, "the expert "strain[ed] to find a 'clearly delineated' community, by proposing without providing evidentiary support, that:

> "when the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model [atop which SA claims to sit]." Id.

[91] These will not be recited by the Panel.

[92] Donuts' Request for IR, October 8, 2014, para.73 (quoting Guidebook at 3-24).

[93] Id., paras. 63-67.

[94] Id., paras. 63-64.

68. Donuts maintains that although the Board must "'apply[ ] documented policies neutrally and objectively, with integrity and fairness,' it has allowed the .SPORTS...and RUGBY panels to exceed their authority and violate this mandate." In like fashion, it avers:

> [t]he expert decisions contested in this case allow community objections to be used "as anti-competitive weapons", permitting the objectors to "hijack "generic" terms ("sports" and "rugby") in a manner that ICANN did not intend.

69. Donuts has specified or alluded to three forms of Board inaction: 1] failure to train ICC experts on the proper application of community objection standards, which failure has led to errors in the application of that standard that prevented Donuts' applications from advancing; 2] failure to institute a review mechanism to regulate the community objection decisions of ICC experts; and 3] failure to intervene in this individual case. These are taken in turn.

2. Failure to Train

70. Donuts failure-to-train argument relies in part on the DCA case summarized below[95] and endeavors to establish a duty to act—to inform, to provide oversight, to ensure—flowing from the powers and responsibilities it attributes to the Board with respect to the new gTLD program. The following excerpt is from a Donuts' submission:

> The facts and reasoning of the DCA Case similarly apply to the second primary point of Donuts' Request – namely, that the Board had an obligation to see to it that experts designated to hear new gTLD objections were "well informed," applied the "documented policies" of the Guidebook concerning such objections "neutrally and objectively, with integrity and fairness," and did not apply such standards so as to single out Donuts (or any applicant) for disparate treatment.... ICANN argues that "no ICANN Board Action was the cause" of the violations of which Donuts complains.
>
> ./...
>
> Significantly, the DCA Case held the Board responsible for oversight of the acts of ICANN's "constituent bodies," such as the GAC, that share ICANN's obligation to adhere to its Bylaws and other governing documents. GAC "advice" amounts to nothing unless and until ICANN acts upon it. Similarly, the [ICC expert] determinations of new gTLD objection panels constitute "expert advice" that have no effect until accepted by ICANN. Only the Board has the power to appoint or provide for the appointment of such experts. It also has ultimate authority over the new gTLD program. As such, the Board has an obligation to assure compliance with ICANN policies and procedures by DRSPs and experts ruling upon new gTLD objections.[96]
>
> ICANN's argument to the contrary ignores the obligations of the Board and advisory bodies[97] such as the DRSPs and their objection panelists. It further overlooks basic principles of causation and agency. ICANN may not view the Board itself as having actually caused Donuts' injury, and instead prefers to hide behind the ICC and the

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[95] See notes 116-28, infra, and accompanying text.
[96] Donuts' Supplemental Memorandum of August 20, 2015, paras. 26-28.
[97] As to the premise that the ICC is an "advisory body", see notes 183-89, infra, and accompanying text.

expert panelists who rendered the decisions that Donuts contends failed to comply with "documented policies" and other governing principles. Certainly, the Board could reasonably foresee that panels may not follow the sole grounds established by the Guidebook for sustaining community objections, or may not apply them consistently.

Donuts therefore asserts that the Board should have provided for training to "inform" DRSPs and experts retained by ICANN regarding the application of the standards for new gTLD objections, as well as requirements of the Bylaws and other governing documents pertaining to conflicts of interest and non-discrimination. Failing to do so would make the Board, under rudimentary legal principles, a proximate cause of harm to Donuts.[98]

3. Failure to Install a Review Mechanism

71. According to Donuts' Request for IR:

> The Board [has also] failed to provide for review in cases of inconsistent results and clear violations of the Guidebook, [such as when] ...each panel finds "material detriment" on the perception that Donuts is not as valid a "steward" of the respective "communities" described...as the objectors themselves – a ground which the Guidebook expressly forbids, and one not followed by other objection panelists.[99]

72. Although this allegation can be examined in several ways, it seems to contain at least two theories of relief. One is that had such an appeals mechanism been in place, either its clarifying jurisprudence, or its availability to Donuts in the case at hand, would have prevented or mitigated the effects of what Donuts believes were errant expert determinations. The second thesis is that by failing to implement such a mechanism, the Board favored certain applicants (those facing certain string similarity objections) over Donuts. Donuts suggests:

> The Board [proposed] in February 2014 an avenue to review certain perceived inconsistent "string confusion" objection results. Donuts commented in support of the proposal and urged its extension to inconsistent community objection determinations.
>
> The Board refused to act on such requests. Instead, it adopted in October 2014 the limited review mechanism it had proposed eight months earlier. The Board cited its "ultimate responsibility" for the new gTLD program as authority for its action.[100]

73. In its post-hearing submission, Donuts alleged:

> While the Board has the same power over new gTLD objections, it admits to having chosen consciously not to use it. ICANN made that choice discriminatorily and despite specific and sustained exhortations to take action from a broad constituency including Donuts.
>
> Specifically, Donuts joined with a number of other applicants, large and small, in a November 2013 letter urging the Board to act to correct and prevent community

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[98] Donuts' Supplemental Memorandum of August 20, 2015, paras. 29-30 (citations omitted).
[99] Donuts' Request for IR, para. 8.
[100] Donuts' Post-Hearing Brief, para. 14.

objection rulings exceeding or failing to apply documented Guidebook standards. The letter suggested, among other things, a review mechanism and panelist training. The Board did not respond.[101]

4. Failure to Act Remedially in .RUGBY and .SPORTS

74. It is suggested in some of Donuts' submissions that even if not acting programmatically to install safeguards, the Board might have acted in its individual case:

> The Board knew how to act when presented with an inequity. It had acted in other contexts …by establishing advance procedures or participating in decision-making to maintain predictability for applicants. It did nothing to protect against *or rectify* the failure to apply the Guidebook's documented policies *in the case of .SPORTS and .RUGBY,* despite having notice of such failures and inconsistencies from Donuts and others.[102]

E. ICANN's Position

75. ICANN's position is straight-forward. It maintains that the acts and omissions about which Donuts complains are not acts or omissions of the Board, and that they therefore are not subject matter falling within the proper scope of an IR:

> Donuts has not identified any conduct by the ICANN Board that was inconsistent with ICANN's Articles or Bylaws. In fact, no Board action took place here at all.
>
> Donuts argues that the Board had an obligation to create an appellate review of expert determinations, and that the failure to do so demonstrates the Board's lack of accountability. Yet, Donuts does not identify the source of such an obligation because none exists…Nothing in the Articles or Bylaws states that appellate mechanisms (or anything of the sort) are required for the New gTLD Program. At best, Donuts alleges Board *inaction* in this regard, but in the absence of an affirmative duty to create an appellate mechanism, the Board's failure to do so cannot result in a violation of the Articles or Bylaws.
>
> Next, Donuts invokes Article I, Section 2.7 of the Bylaws, alleging that the Board failed to "promote well-informed decisions based on expert advice" as required therein, but…this portion of ICANN's "Core Values" refers to policy development (e.g., the policy recommendations that were implemented through the New gTLD Program), not expert determinations resolving objections administered by third-party dispute resolution providers. In short, the cited provision is inapplicable to the procedures at issue in this IRP, and Donuts has therefore failed to identify any violation of it (or any other Article or Bylaws provision).
>
> Donuts does not allege any other action or inaction on the part of the ICANN Board. Instead, the remainder of Donuts' arguments challenge the substance of the community objection determination or the ICC's implementation of its own rules, such as those

[101] Id., paras. 12-13.
[102] Id., para. 16 (emphasis added).

related to purported conflicts of interest on the part of the expert panelist; however, there was no Board action related to the alleged conflict because the ICC is an independent dispute resolution provider that the Board is not required to oversee.

Moreover…Donuts did not file a reconsideration request, by which it might have brought to the Board's attention its concerns about the ICC's implementation of the objection proceedings, including (for example) whether the ICC should have disqualified an expert for bias.

Donuts does not identify any Board action in connection with Donuts' Applications for .SPORTS and .RUBGY that violates ICANN's Articles or Bylaws….[103]

XI. PRECEDENTS

A. In General

76. This is not the first IR proceeding to have arisen out of the new gTLD program. Several declarations have been issued by other Panels. They are to enjoy "precedential value" according to ICANN's Bylaws.[104] The Panel takes that to mean that it should take account of the reasoning of other Panels in pursuing its own analysis, and should, to the extent warranted, seek consistency. It is not feasible or helpful to survey the existing Declarations in detail; a summary of each, however, will give important background to the Panel's analysis of the case before it.

B. Booking.com[105]

77. Booking.com (Booking), is a limited liability that conducts an online hotel reservation service. Its principal focus is on English-language markets. It applied for the .HOTELS string. That string was placed in a contention set with .HOTEIS, with the result that neither applicant could proceed to delegation. That left Booking.com with the options of either privately negotiating with the applicant for .HOTEIS, or proceeding to an auction to settle the contention issue.[106]

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[103] Id., paras. 16-20.

[104] Article IV, Section 3.21 states, in part: "The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."

[105] Booking.com v. ICANN, ICDR Case No. 50-20-1400-0247.

[106] According to the Guidebook, as traversed by the Booking.com panel (Booking.com IR Declaration, paras. 60-62), within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names and other applied-for TLD strings (among other items) for "visual string similarities that would create a probability of user confusion" (Guidebook, at 2-21 et seq.). If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Guidebook. If a contention set is created, only one of the strings within that contention set may be approved for delegation. In the specific case of Bookings, InterConnect Commumications ("InterConnect") performed the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted InterConnect's report, which included two non-exact match contention sets (.hotels/.hoteis and .unicorn/.unicom) as well as 230 exact match contention sets. http://www.icann.org/en /news/announcements/announcement-26feb13-en.htm. The String Similarity

78. Booking.com unsuccessfully pursued a Request for Reconsideration (RFR) of the decision to place .HOTELS in a contention set with .HOTEIS. It viewed the two strings as quite distinguishable from each other. It subsequently sought an IR.

79. The IR Panel found that Booking.com's allegations of Board failings were of two kinds: 1] those that related to the string similarity review process, essentially as instituted by ICANN; and 2] those that related to the specific processing of the .HOTELS objection.

80. The first category addressed alleged Board conduct "in establishing and overseeing the process by which so-called string similarity reviews are conducted." In particular, it was alleged that the manner in which the Board set up, implemented and supervised "the entire…string similarity review process" and its related failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout were acts that were "inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("Guidebook")."[107]

81. As to the first category of allegations, the Panel underscored the distinction between challenges to "validity or fairness of the process as set out in the Guidebook" and those that address "the way in which that process was… implemented and supervised by (or under the authority of) the ICANN Board." That distinction disposed of many of Booking.com's allegations of Board misconduct.

> [T]he time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.
>
> [I]f Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented…….As did all stakeholders, [it had an opportunity to do so].[108]

82. This was true despite the Panel's recognition that the process in place had weak elements, some of which it recounted:

> [T]he Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD

Review was performed in accordance with documentation posted at http://newgtlds.icann.org /en/ program-status/evaluation-panels/geo-names-similarity-process- 07jun13-en.pdf. As part of ICANN's acceptance of the InterConnect's results, a quality assurance review was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

[107] Booking.com IR Declaration, para. 67.

[108] Id., paras. 129-30.

algorithm [and] it provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user."[109]

83. Equally, noted the Panel:

> The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.
>
> Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms - for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations - which Booking.com claims are required under the applicable rules.[110]

84. Nevertheless, ultimately, the Panel concluded:

> [T]he fact is that the sort of mechanisms that Booking.com asserts are required (and which [certain] NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.[111]

85. Under the second category of alleged Board failings, Booking.com cited the Board's failure to intervene in the Booking.com application process, either to reconsider and overturn a decision to place .HOTELS in a string contention set or to countermand the result of the Request for Reconsideration.

86. Before the Booking.com IR Panel, this line of argument also faltered. The Guidebook process had been followed with respect to the application in question and that process either did not call for the Board to act or gave the Board discretion not to act.

87. The analysis was not affected by the conclusions reached by Booking.com's expert, that: "[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone."[112] Nor was it affected by the allegation that the Board was, or should have been, alerted to the errant determination and had ample time to reverse the alleged error "using the authority accorded it by Module 5-4 of the Guidebook to 'individually consider a gTLD application'".[113]

88. The IR Panel found that the Board had not failed to discharge any of its obligations of fairness and transparency. The Panel ruled that:

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[109] Id., para. 127.
[110] Id., paras. 127-28.
[111] Id., para. 129 (emphasis in original).
[112] Id., para. 140.
[113] Id., para. 138.

> [T]the Board's acceptance of the SSPs determination did not constitute Board action (or inaction), or a Board decision made (or not made), or by any other body to accept the SSP's determination. The Guidebook provides that when the applied-for strings are determined by the SSP to have the visual similarity likely to give rise to user confusion, they "will be placed in contention set".[114]

89. "Simply put," reasoned the Panel: "under the Guidebook the Board is neither required nor entitled to intervene at [that] stage to accept or not accept the SSP's determination."[115]

90. In turn, when acting through the BGC and, subsequently, through the NGCP in response to Booking.com's RFR, the Board discharged its duty to exercise due care and independent judgment. The IR Panel found the BGC's assessment to be detailed and carefully reasoned; the NGCP in turn had given extensive consideration to the BGC Recommendation before accepting it.[116]

91. The Panel agreed that in theory the Board could have stepped in under Section 5.1 (Module 5-4) of the Guidebook—that is to "individually consider [the] application…to determine whether approval would be in the best interest of the Internet community." The Panel found no fault in its failure to do so, however. It observed:

> "the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com."[117]

92. In the case at hand:

> [T]he Panel [did] not believe that the Board's inaction…in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case.

C. DCA Trust[118]

93. DCA Trust, was a non-profit organization established under the laws of the Republic of Mauritius for the charitable purpose of, "among other things, advancing information technology

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[114] Id.
[115] Id.
[116] Booking.com cited as compelling evidence of ICANN's failure in this regard statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's RFR was denied. The Panel took those views into account, but concentrated its inquiry on whether the Guidebook process had, or had not, been followed.
[117] Booking.com IR Declaration, para. 138.
[118] DotConnectAfricaTrust (DCA Trust) v. ICANN, Case No. 50 2013 001083.

education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa…"[119] DCA Trust applied to ICANN for the delegation of the gTLD .AFRICA. It did so in competition with a South African company called ZACR. DCA Trust's application was opposed by ICANN's Governmental Advisory Committee (GAC), in a "Consensus Advice" that caused the NGPC to stop processing DCA Trust's application.[120]

94. Thereafter, DCA Trust pursued an RFR of NGPC's decision to halt processing of the application. It was unsuccessful; in August of 2013 the BGC recommended to the NGPC that it deny DCA Trust's Request, and the NGPC followed the BGC's recommendation."[121]

95. According to the Guidebook:

> ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.
>
> The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that may violate national law or raise sensitivities.
>
> GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.[122]

96. The GAC can offer advice on any application, and that advice can take several forms. The advice it gave in the DCA Trust case communicated that it was the consensus of the GAC that DCA Trust's application "should not proceed." According to the Guidebook, such an advice "will create a strong presumption for the ICANN Board that the application should not be approved."[123]

97. The established procedure calls for ICANN, upon receipt of such an Advice to publish it, and:

> [E]ndeavor to notify the relevant applicant(s) promptly, [after which] [t]he applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.[124]

98. In considering the GAC Advice, the Board "may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure…."[125]

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[119] DCA Trust IR Declaration of July 9, 2015, para. 2.
[120] Id., para. 5.
[121] Id., paras. 6, 107.
[122] Guidebook, at 3-1 through 3-2.
[123] Guidebook, at 3-2.
[124] Id., at 3-3.
[125] Id.

99. In the IR, DCA Trust sought a declaration that ICANN Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by, inter alia: "failing to apply ICANN's procedures in a neutral and objective manner", with a level of transparency requisite to procedural fairness, when—"without reasonable investigation"— it accepted the supposedly consensus-based decision behind the GAC's Advice, and when it approved the Board Governance Committee's (BGC)'s recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice.

100. Ultimately, the DCA Trust Panel held that, indeed, by acts and failures to act attributable to the Board, it conducted itself in a manner "inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook."[126]

101. Although the applicant advanced myriad allegations of deficient Board behavior, at the core of the Panel's dispositive analysis was Article III of ICANN's Bylaws (Transparency), Section 1 of which provides:

> ICANN...and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

102. The Tribunal ruled that, the Article III transparency mandate applied to the GAC because under Article XI of the ICANN Bylaws the GAC was a "constituent body" of ICANN, albeit one performing only of an advisory function and having no power to bind the Board.[127]

103. In finding that transparency had not been practiced, the Panel was influenced by testimony from the then-Chair of the GAC and other evidence tending to show that the GAC decision was the product of obscure political maneuvering and was accompanied by no rationale (e.g., analysis or findings explaining potential violations of national laws or reporting on sensitivities bearing on the application in question, as one might have expected from consulting the Guidebook).[128]

104. Additionally:

> DCA Trust was never given any notice or an opportunity... to make its position known or defend its own interests before the GAC reached consensus...and that the Board of ICANN did not take any steps to address this issue.[129]

105. The acts and omissions chargeable to the Board consisted in the NGPC's uncritical acceptance of the GAC supposed consensus that DCA Trust's application should be opposed, the failure of BGC during the RFR to take account of GAC's deficient process when declining to recommend reconsideration (despite the BGC having been empowered to investigate and fact-find) and the NGPC's ultimate acceptance, again without critical examination, of the BGC's decision recommending against reconsideration.

106. The Panel observed:

> The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact

[126] DCA Trust IR Declaration, para.148.
[127] DCA Trust IR Declaration, paras.101-02.
[128] Id., paras. 102-111.
[129] Id., para. 109.

with national laws or international agreements, …that GAC advice is developed through consensus among member nations [and] that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

In light of the clear "Transparency" obligation[s]…found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application [and][t]he Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA.[130]

D. Vistaprint[131]

107. The Vistaprint IR stemmed from a "string confusion" objection, in which the objector prevailed. Applying the Guidebooks criteria,[132] the expert held that the gTLD .WEBS so nearly resembled .WEB "visually, aurally and in meaning" that it is likely to cause confusion in the mind of the average, reasonable Internet user.[133] As a consequence, Vistprint's applications (one standard, the other community-based) did not advance, but became subject to the contention set process.[134]

108. There followed a RFR in which the conduct of the expert (treated as analogous to ICANN "staff" for RFR purposes[135]) was evaluated.[136] The BGC (to whom RFRs are addressed) expressly limited its review to whether the expert violated any established policy or process in reaching its determination, a mandate that did not include performing an evaluation of the correctness of expert's determinations on the merits.[137] The BGC concluded after a detailed analysis that there was no indication that the ICDR or the expert had violated any policy or process, or applied the wrong standard, in reaching its determination.[138]

109. In the IR that followed, Vistaprint alleged that the ICDR expert was bound by ICANN's articulated policies, which he purportedly violated by making certain procedural errors, misapplying the burden of proof,[139] and incorrectly and arbitrarily assessing the Guidebook's standards governing string confusion objections.[140] Vistaprint also questioned the expert's independence and impartiality (or, alternatively, his qualifications) based on "the cursory nature

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[130] Id., paras. 113-14.
[131] Vistaprint Ltd. v. ICANN, ICDR Case No. 01-14-0000-6505.
[132] Under the Guidebook, Section 3.5.19 (at 3-18), the question is whether the applied-for gTLD string is likely to result in "string confusion", which exists when "a string so nearly resembles another that it is likely to deceive or cause confusion." For a likelihood of confusion to exist, it must be probable, not merely possible, that confusion will arise in the mind of the average, reasonable Internet user.
[133] Vistaprint IR Declaration of October 9, 2015, paras. 23-24.
[134] Id., para. 30.
[135] Id., para. 33.
[136] Id., paras. 31-39.
[137] Id., para. 38.
[138] Id., para. 37.
[139] Id., paras. 85 (vii), 166.
[140] Id., para.70.

of the Decision and the arbitrary and selective discussion of the parties' arguments...."[141] It followed, according to Vistaprint, that it had not received a fair opportunity to present its case to the expert,[142] and that accordingly the Board should not have accepted the expert's determination, but rather should have rejected it based on the Board's "ultimate responsibility for the New gTLD Program" and the right it reserved "to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community."[143] Equally, acting through the BGC during the subsequent RFR, the Board, it was argued, should have intervened to address the process deficiencies in question.[144]

110. The Vistaprint Panel ruled that it was not empowered "to review the actions or inactions of ICANN's staff or any third parties, such as the ICDR or [objection] experts, who provided services to ICANN."[145] By contrast, the Board's actions when acting through the BGC (which exercises delegated Board authority when considering a RFR), may be assessed in an IR according to the Panel.

111. The Panel reasoned additionally that when petitioned by an applicant to do so, "the ICANN Board has no affirmative duty to review the result in any particular [string confusion] case."[146] In a related observation, the Panel noted:

> "[w]hile Guidebook...permits ICANN's Board to individually consider new gTLD applications, such as through the RFR mechanism, it does not require that the Board do so in each and every case, sua sponte."[147]

112. In reaching the above conclusions, the Panel noted that the availability of the RFR procedure meant an applicant was not without recourse.[148] The Panel also consulted a fuller excerpt of the same Guidebook provision (§ 5.1) relied upon by Vistaprint:

> The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... of the use of an ICANN accountability mechanism.

113. The Panel noted that the Guidebook example of the "exceptional circumstances" in which the Board might individually intervene was when the applicant had pursued an accountability mechanism, most notably an RFR.[149]

114.Vistaprint also made discrimination claims; there were two related strands to these: One line of argument was that while its application had resulted in a contention set, other applications involving strings said by Vistaprint to be more likely to cause confusion were allowed to proceed

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[141] Id., para. 26.
[142] Id., para. 83.
[143] Id., paras. 153, 156.
[144] Id., para. 70.
[145] Id., para. 150.
[146] Id., paras. 153, 157.
[147] Id., para. 156.
[148] Id., para. 154.
[149] Concerning Requests for Reconsideration, see notes 180-82, 227, infra, and accompanying text.

to delegation;[150] the second theory was that as to some string similarity cases involving inconsistent expert appraisals, the Board had authorized a further review mechanism selectively to operate, but did not accord Vistaprint the same opportunity.[151]

115. Vistaprint complained that the BGC had denied its RFR without considering whether such a review mechanism might also be appropriate for dealing with the string confusion determination involving .WEBS/.WEB.[152]

116. The Panel concluded that the Board violated no Article or Bylaw by not establishing a generally available appeals mechanism for string cases, but concurrently found itself challenged by the question whether, on balance, the string cases before it were distinguishable from those in which selective review had been recently authorized. It resolved, however, that it would be premature to rule on that question disparate treatment claim:

> The IRP Panel is mindful that it should not substitute its judgment for that of ICANN's Board. The Board has not yet considered Vistaprint's claim of disparate treatment, and the arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board. Without the exercise of judgment by ICANN's Board on this question of whether there is any inequitable or disparate treatment regarding Vistaprint's .WEBS gTLD applications, the Board would risk violating its Bylaws, including its core values.[153]

117. The Vistaprint Panel thus found:

> [T]hat due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the timing of ICANN's consultation process and subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD applications that were the subject of adverse SCO decisions, the ICANN Board has not had the opportunity to exercise its judgment on the question of whether, in view of ICANN's Bylaw concerning non-discriminatory treatment and based on the particular circumstances and developments noted above, such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications. Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN's Board – and not this Panel – should exercise its independent judgment on this issue, in light of all of the foregoing considerations.[154]

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[150] Id., paras. 176 et seq.
[151] See id., para. 181. This latter contention is separate from the question whether the Board should have established a general appeals mechanism to review the merits of string confusion determinations, which contention was rejected by the Vistaprint panel. See id., paras. 174, 175(5).
[152] Id., para. 181. The principal provision implicated by this question was Article II, Section 3's of the Bylaws which prohibits ICANN from applying "its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause…"
[153] Id., para. 190.
[154] Id., para. 191.

E. Merck KGaA[155]

118. The Merck IR arose out of a Legal Rights Objection (LRO)[156] instituted by Merck with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure.[157] Merck and another company, MSD, had each filed applications with ICANN for new gTLDs incorporating the word "Merck." Both had objected to the other's application. By determinations issued in 2013, the sole expert rejected both objections.

119. Merck then instituted an RFR. In that proceeding, the BGC ruled against Merck, concluding:

> There is no evidence that the [expert] Panel either applied the improper standard or failed to properly evaluate the parties' evidence. The expert had "correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered [factors used under analogous regimes]) only as a means to further provide context to one of the eight factors.[158]

120. In the IR that followed, Merck argued, inter alia, that ICANN acted without due diligence and care when it "accepted" the expert determination reflecting what were alleged to be noticeable mistakes in applying ICANN's LRO standards and that the BGC's assessment of the relevant circumstances during the RFR was too narrow. Additionally, Merck maintained that the ICANN Board had discriminated against Merck by providing "the possibility for third-party review of some prima facie erroneous expert determinations" but denying the same to similarly situated parties such as Merck.[159] The IR Panel reflected on Merck's complaints about the ICC expertise and the RFR process as follows:

> Merck effectively wanted the BGC to overturn the Sole Panel Expert's decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel

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[155] Merck KGaA v. ICANN, Case No. 01-14-0000-9604.

[156] According to the Guidebook, a holder of existing legal rights (such as trademark) may object that those rights are infringed. Such objections are heard by one expert (unless the parties agree to have three) "with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection:" Guidebook, Section 3.4.4 (at 3-16). In circumstances such as that involved in Merck, the expert's mandate is to determine "whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark". When the objection is based on trademark rights, the panel is instructed to consider a list of non-exclusive factors enumerated in the Guidebook. These include, for example:

> Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.... Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use....

[157] Merck KGaA v. ICANN, IR Declaration of December 10, 2015.

[158] Determination of the Board Governance Committee (BGC) Reconsideration Request 14-9, April 29, 2014, at 1-2.

[159] Merck IR Declaration, para. 53.

> Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had 'been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the [expert] panel's deliberations, and the panel elected to decide the case on inapplicable grounds.'[160]

121. The Merck IR Panel prefaced its analysis by underscoring its limited mandate, and in particular the role of the Standard of Review in confining that charge. Concerning the level of deference, the Panel noted that nothing in the governing disputes architecture required it to approach alleged Board action with deference. Nevertheless, in approaching the BGC's determinations, it also was "clear that the Panel may not substitute its own view of the merits of the underlying dispute"[161] The Merck IR Panel thus limited its mission to examining, not the expert's performance in making the objection determination, but rather the conduct of the BGC in ruling on the RFR (indisputably ICANN Board conduct).[162]

122. Applying the IR Standard of Review to the BGC's processing of the RFR, the Panel concluded that there was no evidence that the BGC had failed to carefully and with due diligence equip itself with a reasonable amount of facts in making its assessment or that it failed to consider those facts fully. The Panel declined to assess whether the expert had applied the correct standards, or to perform a de novo review in place of that performed by the BGC. The BGC had determined that the expert had not applied the wrong standards; the Panel considered itself to be without jurisdiction to review the correctness of that finding. It reasoned:

> Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.

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[160] Id., para. 46.

[161] Id., para. 21.

[162] To some extent, this followed from the fact that the BGC itself was not empowered to replace the expert's merits determinations with its own, but rather was limited to verifying that certain processing standards had been met. The IR Panel thus observed: "None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits. Id., para. 47.

> Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. [T]his is not a basis for action by this Panel[.][163]

123. The Panel also found Merck's discrimination claim lacking. The Panel reasoned that:

> [I]t was within the discretion of the BGC and Board…to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.[164]

XII. MANDATE OF THE PANEL

A. In General

124. The IR Process is one of two review mechanisms intended to ensure that ICANN remains accountable "to the community for operating in a manner that is consistent with [its] Bylaws, and with due regard for the core values set forth in Article I of [those] Bylaws."[165] Both are intended to "reinforce the various accountability mechanisms otherwise set forth in [the] Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout [the] Bylaws"[166]

125. As an IR, the current process is to be distinguished from an RFR, the other accountability process authorized by the Bylaws (Article IV, Section 2), and featured in the IR precedents surveyed above. While both are types of review, the two processes are different in terms of the persons and subject matter falling within their respective remits.

126. The IR mechanism was established to allow "any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws [to] submit a request for independent review of that decision or action."[167] As implied in that description of standing, under the Bylaws (Article IV, Section 3), an IR Panel must compare "contested actions of the Board to the Articles of Incorporation and Bylaws, and [must declare] whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Additionally, as an IR Panel, we are duty-bound to focus on three questions (the "Standard of Review"), as underscored by the Merck Panel in its Declaration, summarized above:

> 1] Did the Board act without conflict of interest in taking its decision;

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[163] Id., paras. 49-50.
[164] Id., para. 61.
[165] ICANN Bylaws, Article IV, Section 1.
[166] Id.
[167] Id., Article IV, Sec. 3 ("In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action").

2] Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; and

3] Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?[168]

127. The ICDR Supplemental IRP Rules replicate the Bylaws as to the above focus questions, but add:

> 8. Standard of Review. ./.... If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

128. Additionally, our ruling as a Panel must be "based solely on the documentation, supporting materials, and arguments submitted by the parties...."[169]

B. Board Actions and Failures to Act

129. It seems to have become common ground between the parties to this IR that under some circumstances the requester may legitimately complain of the Board's failure to take action as well as its affirmative acts. Other Panels are in accord.[170] Not all inaction is actionable, however. Rather, in the Panel's view, "actionable inaction" is a failure that is inconsistent with a duty to act, whether that duty is formally established by ICANN's constitutive documents, generated by some other explicit or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present. In assessing alleged failures to act, the question is not whether the Board has the power to act, or whether to act would be consistent with the Articles and Bylaws, but whether the Board must act given all the circumstances.

C. Level of Deference

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[168] The Bylaws contemplate that, at least sometimes, the complained-of Board action will be evidenced by "minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation." ICANN Bylaws, Article IV, Section 3.3.

[169] The Bylaws place page limits on Requests for IR and ICANN's response thereto, but allow each party to submit "documentary evidence supporting [its position] without limitation." See ICANN Bylaws, Article IV, Section 3, para. 5.

[170] See e.g., Vistaprint IR Declaration, paras.127-128:

> It appears that ICANN's focus in this statement is on affirmative action taken by the BGC in rejecting Vistaprint's Reconsideration Request; however, this does not eliminate the IRP Panel's consideration of whether, in the circumstances, inaction (or omission) by the BGC or the full ICANN Board in relation to the issues raised by Vistaprint's application would be considered a potential violation of the Articles or Bylaws....[T]he Panel considers that a significant question in this IRP concerns one of "omission" – the ICANN Board, through the BGC or otherwise, did not provide relief to Vistaprint in the form of an additional review mechanism, as it did to certain other parties who were the subject of an adverse SCO determination.

130. The corporation laws in most states contain a rich and not fully consistent body of jurisprudence addressing the extent to which boards of directors should be protected in their decision making by one or more presumptions that they acted with due care and in good faith. The law of California, for example, has such jurisprudence.

131. If this were a matter of first impression, this Panel would be required to consider in some detail the applicability of such doctrines in this proceeding. The several Panels to have already addressed the question, however, have done so with relative consistency. In their view, IR Panels are not to accord normal Business Judgment Rule style deference to the work of the ICANN Board, but rather are to purse "objective" review.[171] This conclusion results from the implications of the word "independent", the explicit standard of review to which the Panel is already bound (which functions in place of the more general Business Judgment Rule jurisprudence) and related justifications. This Panel finds those Declarations sufficiently persuasive that it need not depart from what seems to be the established trend and general approach.

132. Although an IR panel is not bound to accord the Board a presumption of requisite due care, good faith, and the like when examining acts and alleged actionable inaction, the notion that review is objective requires some clarification for the purposes of an IR. In particular, this Panel subscribes to the following furthers parameters:

133. First, whatever label one uses to describe the approach (e.g., "objective," "de novo," or 'independent") that approach does not allow the Panel to base its determinations on what it, itself, might have done, had it been the Board. The explicit standard of review—for better or worse—is much narrower than that. In the view of the Booking.com Panel:

> [T]here can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled - indeed, required - to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws...[or] with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."[172]

134. The present Panel has developed a similar sense of the setting in which it must judge such Board action or inaction as may be identified. As did the Booking.com Panel, this Panel finds that, in the absence of a demonstrable conflict of interest, affording a margin of appreciation to Board action and inaction is to some extent dictated by the Bylaws themselves. As noted in the

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[171] See Vistaprint IR Declaration, para. 126:

> The Panel considers that the question on this issue is now settled. Therefore, in this IRP the ICANN Board's conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.

[172] Booking.com IR Declaration, para. 129.

above quote from Booking.com, those Bylaws contemplate that ICANN bodies are expected to assess relevance and strive for "an appropriate and defensible balance among competing values" while understanding that:

> [T]he specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and [that] because [the Core Values] are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.[173]

135. Second, a measure of self-restraint is also dictated by the Standard of Review to which this Panel is bound, expressed as it is in terms of whether the Board made "a reasonable inquiry" as opposed to, for example, an "exhaustive" inquiry to determine if it had "sufficient facts available."[174] Relatedly, to the extent possible given what may be the rather limited fact-finding that can be pursued in an IR, due account ought to be given to such contextual factors as the actual information available to the Board at the relevant time and the array of competing considerations with which it was faced.

136. Finally, complaints about the community objection process as adopted, however well-founded, must be viewed in light of the time bar established in the Bylaws[175] and applied by other Panels.[176] That said, this Panel believes that it may not always be improper to consider *the manner* in which the process, as established by ICANN, was conducted, and in particular the extent to which relevant actors deviated from that process.[177]

XIIV. PANEL'S ANALYSIS REGARDING ACTS EQUATED TO BOARD ACTS

A. Panel's Approach

137. ICANN has argued that the conduct of the ICC and the experts it appoints is neither tantamount to Board action nor properly the basis of any duty on the part of the Board to act. In light of Donuts' arguments to the contrary, and this Panel's mandate, the following multipart inquiry arises: should the actions of the ICC or its experts be deemed to be: 1] those of the Board, 2] attributable to the Board, or 3] such as to require the Board to take particular action, which action it in turn did not take.

B. The Extent of Direct or Imputed Equivalency between the Board and the ICC and its Experts

1. In General

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[173] ICANN Bylaws, Article I, Section 2.

[174] See ICDR Supplemental Procedures for ICANN Independent Review Process, Article 8 (essentially restating the Standard of Review set forth in ICANN Bylaws, Article IV, Section 3.4).

[175] See ICANN Bylaws, Article IV, Sec 3(3).

[176] See Booking.com IR Declaration, at para. 129 ("Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws"). See note 108, supra, and accompanying text.

[177] This was the approach taken by the Bookings.com Panel. See, e.g., para.163 "[O]ur role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable."

138. Some of Donuts' arguments equate the acts of ICC experts, and of the ICC, with those of the Board. There is some variation in how Donuts' explains this equation, but the following, taken from Donuts' Request for an IR, is representative:

> Only the Board has the power to appoint or authorize experts to help it make decisions. Under the Guidebook, in fact, it may directly "consult with … experts … designated to hear objections." The Board wields ultimate authority over the entire new gTLD program, including to consider any application individually. *As such, the …objection rulings against Donuts amount to Board action* reviewable and reversible by this proceeding.[178]

139. Similarly, in its Supplemental written submission, Donuts maintains:

> ICANN contends that its Board has no obligation to ensure that *its* appointed experts act without conflict of interest. However, *appointment of an expert with conflict of interest is clearly a Board action* in violation of ICANN's Bylaws, which, as stated under Bylaws Art. IV § 3.4.a, makes that an express subject of IRP review…[*The Board*, in allowing] that panelist subsequently to rule on the same objector's case against .SPORTS transgresses not only the anti-conflict provision of the Bylaws, but also its non-discrimination mandate at Art. II § 3.[179]

2. Do the Bylaws Support Treating as Equivalent to Board Actions those of the ICC and ICC-Appointed Experts?

140. The Panel starts by examining the Bylaws' Article IV (titled: Accountability and Review). With respect to IRs, the focus is on a "decision or action by the Board" alleged to be inconsistent with the Articles of Incorporation or Bylaws. The explicit focus on Board conduct coincides with the heading: "Independent Review of Board Action" and is redoubled in the ICDR Supplemental Rules developed for IRs; the latter Rules essentially repeat the Standard of Review by instructing this Panel to ask, inter alia: did the *ICANN Board*…make a reasonable inquiry to determine it had sufficient facts available; *did ICANN Board members* ha[ve] a conflict of interest in participating in the decision", or produce a decision not "believed *by the ICANN Board* to be in the best interests of the company…"[180]

141. When that same accountability Article within the Bylaws authorizes RFRs, by contrast, it does so with a broader explicit reach. It makes the process available not only to address the acts and failures to act of the Board[181] but also those of ICANN staff, to the extent conduct of the latter "contradict established ICANN policy(ies)". Consistent with this broader reach, ICANN

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[178] Donuts' Request for IR, para. 5 (emphasis added).
[179] Emphasis added; bracketed insert inferred.
[180] ICDR Supplemental Rules for IRP, Article 8.
[181] In particular:

> [O]ne or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
> [O]ne or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

has acknowledged that the acts and omissions of institutions administering objection proceedings and of the experts they appoint qualify as "staff" conduct, and thus may be the basis of a RFR.[182]

142. No doubt the architects of the IR mechanism could have made the Board directly accountable for designated acts or omissions committed by the ICC and the experts it appoints, either by equating them to Board action or by opening the process to "staff" conduct. The close proximity within the Bylaws of the two accountability processes suggests that differences in the manner of delineating scope were purposeful, not accidental. This seemingly uncontroversial reading of the Bylaws would, however, not preclude attribution to the Board of the conduct of other actors under certain circumstances.

3. Deemed Equivalency; Attribution Theories

143. Donuts does not suggest that in delimiting IR jurisdiction the Bylaws expressly equate the Board with the ICC and its experts. Rather, its position seems to be that ICC experts, in effect, are appointed by the Board by virtue of a delegation of that power to the ICC, which specialized institution in turn makes the appointments on behalf of the Board. As the Panel understands Donuts' theory, the Board is then accountable for prejudicial errors committed by the ICC or its experts in the course of discharging the mandates given them by the Board. Donuts reasons:

> Only the Board has the power to appoint or authorize experts to help it make decisions. Under the Guidebook, in fact, it may directly "consult with … experts … designated to hear objections." The Board wields ultimate authority over the entire new gTLD program, including to consider any application individually. As such, the … objection rulings against Donuts amount to Board action reviewable and reversible by this proceeding.[183]

144. Donuts relies in particular upon Bylaws Article XI-A, Section 1, Paragraph 4, which it interprets as establishing a close relationship between the experts appointed by the ICC and the Board. Section 1 of Article XI-A authorizes the Board to seek "external advice" from sources other than the Committees that may be available to it. The Section's first paragraph states that "[t]he purpose of seeking external expert advice is to allow the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN." The Section refers to entities commissioned to give advice as "Expert Advisory Panels" which may consist in "public or private sector individuals or entities." The Section provides that such panels may be appointed by the Board "on its own initiative or at the suggestion of any ICANN body."

145. In relevant part, Paragraph 4 of Section 1, expressly relied upon by Donuts, states:

> Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President…shall be made pursuant to terms of reference describing the

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[182] See Vistaprint IR Declaration, at note 60 (citing BGC Recommendation on Reconsideration Request 14-5 dated February 27, 2014 ("BGC Determination"), at p. 7, n. 7, Request, Annex 26, and available at https://www.icann.org/en/ system/files/files/determination-vistaprint-27feb14-en.pdf (last accessed on Sept. 14, 2015)).

[183] Donuts' Request for IR, para. 5.

issues on which input and advice is sought and the procedures and schedule to be followed.

146. ICANN offered a different understanding of that provision:

> [The relied upon provision] has nothing whatsoever to do with the retention of experts for objections under the Applicant Guidebook for the New gTLD Program or the Board's decision to outsource the objection process to entities such as the [ICC], which have experts that can be appointed to resolve objections asserted against individual gTLD applications. Accordingly, the ICANN Board did not retain the ICC pursuant to Article XI-A of the Bylaws for the New gTLD Program....
>
> Article XI-A of the Bylaws applies to external expert advice sought for the purpose of "allow[ing] the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN." (Bylaws, Art. XI-A, Section 1.1.). This "policy development process" is the process by which ICANN's various Supporting Organizations develop policy recommendations for ICANN (such as the recommendation by ICANN's Generic Names Supporting Organization to permit a broad expansion of the number of gTLDs).

147. The Panel understands why Donuts invites it to find that the work of ICC experts must have been authorized under Article XI-A. That would show a somewhat direct link between the Board and the ICC experts in this case, and would perhaps imply some level of focused Board processing of individual expert rulings in every case. This would follow from subsequent paragraphs in that article, which elaborate:

> [E]xternal advice pursuant to this Section...is advisory and not binding, and is intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities [and that] "prior to any decision by the Board" an opportunity to comment on such advice is to be given to "the Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees.[184]

148. The Panel agrees with Donuts that when the Guidebook states that an ICC expert's finding "will be considered an expert determination"[185] it is not illogical when finding no other specific Bylaw provision on point to assume that Bylaw XI-A may be relevant.

149. The Panel nevertheless agrees with ICANN that the more natural construction of Bylaws Article XI-A is that it authorizes the Board to engage outside experts to aid in policy development, and that by language and structure it appears not to have within its contemplation seriatim ICC appointments to settle objection disputes with a view to generating whatever incremental policy advice might be gleaned from such individual adjudications.

150. Equally, it is difficult to conceive of the MOU between ICANN and the ICC[186] as constituting a Board request for advice on a particular policy. In any event, determinations based on the distinctive set of facts that exists in each objection case seem ill-suited to providing such

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[184] ICANN Bylaws, Article XI-A, Section 1, para. 5.
[185] See Guidebook, at 3-17.
[186] See notes 46-51, supra, and accompanying text.

"advice" in a form that promotes "the policy-development process within ICANN." [187] The Guidebook account of the objection process also states that ICC expert rulings will be "...advice that ICANN will accept", which diverges from Bylaw XI-A's statement that "[e]xternal advice pursuant to this Section...is advisory and not binding, and is intended to augment the information available to the Board...."

151. Ultimately, of course, there is no need to fit the ICC and its expert regime under Bylaws Article XI-A for such activities to enjoy authorization, or otherwise to be consistent with ICANN's constituent documents. The California statute under which ICANN operates provides that a corporation of the ICANN type:

> [I]]n carrying out its activities, shall have all of the powers of a natural person, including, without limitation, the power to: ... (j) Participate with others in any...association, transaction or arrangement of any kind whether or not such participation involves sharing or delegation of control with or to others.[188]

152. Additionally, the Panel recalls that ICANN's Articles entitle ICANN to "cooperate as appropriate with relevant international organizations."[189]

153. To rule, as we do, that Bylaws Article XI-A does not reveal a direct connection between the appointment of ICC experts and the Board, however, does not fully exhaust the ways in which the work of the ICC and its experts might be imputed to the Board. Under certain circumstances, general principles of agency might justify such attribution.

154. Although the precise basis upon which Donuts might wish the Panel to find an agency relationship has not been supplied by Donuts, Donuts' broader argument in connection with Article XI-A and elsewhere seems to allude to the rudiments of such a theory. It notes, for example, that under AGB § 5.1 the Board "ultimate responsibility for the New gTLD Program" and "reserves the right to individually consider an application for a new gTLD ...."[190]

155. Had the agency theory been more fully addressed by the parties,[191] the propriety of imputing directly to the Board the acts of the ICC and its experts would most likely depend on how the relationship between the ICC and ICANN is characterized; under the general principles of law known to the Panel that would probably turn upon the level of control that ICANN exerts or is entitled to exert over the ICC's operations in respect of objection proceedings.

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[187] It is true that the decisions produced by ICC experts are "written" as required by Article XI-A, Section 1, para. 5, but they do not function with the ICANN system as "advisory and not binding [advice]... intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities." Nor do they seem to fit within an architecture that requires that "prior to any decision by the Board" an opportunity to comment on such advice is be given to "the Governmental Advisory Committee, Supporting Organizations and other Advisory Committees."

[188] Cal. Corporations Code, Section 5140(j).

[189] ICANN Articles of Incorporation, Article 4.

[190] See Donuts Supplemental Memorandum, para. 21.

[191] An antecedent step in elaborating such an argument would be to determine what body of law should be consulted by the Panel.

156. Given that the matter was not elaborated upon by Donuts, let alone briefed by the parties, the Panel will not do more than suggest why it considers that, on balance, there is not enough evidence of control in the record to attribute the acts of the ICC and its experts to the ICANN Board. In this regard, the Panel finds the terms of the ICANN-ICC MOU illuminating, if by no means conclusive.

157. Under the MOU, it is for the ICC to select experts and administer the proceedings according to the ICC Rules and any supplements thereto it. It is also for the ICC to "establish the necessary structure and procedures (comprising information technology, staffing, etc.) to perform its duties as DRSP in a timely and efficient manner" (although it is to do so with "with advice and support from ICANN").

158. The MOU confirms that the ICC-ICANN relationship is a collaborative one under which the ICC enjoys many elements of independence in keeping with its established expertise with respect to the endeavors in question. Moreover, the persistent reference in official ICANN documents to the ICC as a "service provider" when viewed most favorably to Donuts is at most neutral on the question of whether it should be considered an independent contractor as distinct from an agent of ICANN.

159. This Panel concludes given the foregoing, and in accord with the reasoning of other Panels, that the relationship between ICANN and the ICC is not such as to allow an IR Panel "[to] review the actions or inactions of ICANN's staff or any third parties, such as the [DRSP or objection experts] who provided services to ICANN."[192] The notion that administering institutions, such as the ICC, are third-party service providers, and not "constituent entities" of ICANN generally or alter egos of the ICANN Board in particular is consistent with most of what one finds in the reasoning other IR Panels.

4. The Theoretical Consequences of Attribution of Substantive Errors

160. Even if this Panel deemed itself authorized as Independent Reviewers to equate the work of ICC experts in their rulings on objections to that of the Board, however, it would stop well short of acting as a plenary review body concerned with errors of fact or the correct application of substantive standards. We would be required to consult the explicit Standard of Review to which we are bound. Thus, we would ask:

> 1] did the [expert] act without conflict of interest in taking its decision?;
>
> 2] did the [expert] exercise due diligence and care in having a reasonable amount of facts in front of [him]?; and
>
> 3] did the [expert] exercise independent judgment in taking the decision[.]

161. As to the .RUGBY application, Donuts does not offer an assessment of how the work of Mr. Kantor failed any of these tests; rather, Donuts argues that he misapplied the community objection standards adumbrated in the Guidebook. If in fact that is true—and the Panel's review of the Mr. Kantor's reasoning by no means leads to that conclusion—such errors on the merits would fall beyond the three lines of inquiry this Panel is obliged to pursue. In the absence of

[192] Vistaprint IR Declaration, para.150.

further elaboration by Donuts, the .RUGBY proceeding seems readily to clear the hurdles posed by all three questions. Nothing established by Donuts, or apparent from or the record of that proceeding, indicates that a conflict of interest or a lack of independence was present in the work of Mr. Kantor. In turn, the ICC expertise process, which he followed, is one designed to acquaint him with a reasonable amount of facts. Ultimately, to impute Kantor's work to the ICANN Board is to impute conduct not at variance with the Articles or Bylaws, especially when that conduct is considered in light of the required Standard of Review.

162. If other circumstances were equal, the above Standard of Review analysis would apply with equal force to the objection ruling in .SPORTS. Assuming that Mr. Taylor were the agent (or sub-agent) of the Board, his putative errors in applying community objection standards would not be cognizable under the Standard of Review to which this Panel is bound.

163. As is true with respect to the report of the .RUGBY expert, on its face the .SPORT expert opinion shows good conversancy with the parties' arguments and the controlling texts. Whether Donuts agreed with it or not, the reasoning in both cases followed from what appeared to be reasonable fact finding, was lucid, and adopted plausible interpretations of the factual and legal elements involved in those community objections.[193]

164. The .RUGBY and the .SPORTS ruling are not, however, on an equal footing. Donuts alleges that the .SPORTS process was materially defective by virtue of the expert's failure to make sufficient disclosures.

165. If such conduct were deemed by some theory of attribution to be that of the Board, this Panel would struggle with those prongs of the Standard of Review requiring independent, conflict–free, decision making. This Panel finds an insufficient basis, however, for such imputation, for reasons given above.[194] In particular, the deficient case for attribution is not improved merely because alleged conduct in question is the expert's non-disclosure rather than his misapplication of community objection standards. The Panel is not empowered to develop theories on behalf of a party, but must base its declaration on the documents and arguments before it.[195] That Record does not establish a basis for attribution.[196]

166. The Panel examines below whether the Board had a duty to act in light of what Donuts alleges were insufficient disclosures by Mr. Taylor when accepting his appointment as the ICC expert for the .SPORTS objection.[197]

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[193] Putting aside the question of the expert's alleged conflicts of interest, which explains everything according to Donuts, the outcome in .SPORT expert proceeding seems in part attributable to the expert's firm disapproval of some of Donuts' arguments. See note 214, infra, and accompanying text.

[194] See notes 178-92, supra, and accompanying text.

[195] ICDR Supplemental ICANN IR Rules, Article 10(a).

[196] No submission by Donuts explains why Mr. Taylor should be regarded as other than an agent, employee or independent contractor of the ICC (itself an independent contractor of ICANN), under which alternative assumptions common law agency principles, absent more, would preclude attribution. Donuts ultimately had the burden of demonstrating under governing law how such attribution might be called for, and it did not do so.

[197] See notes 208-229, infra, and accompanying text.

XIV. PANEL'S ANALYSIS REGARDING BOARD FAILURES TO ACT

A. In General

167. Donuts has advanced an analytically distinct set of arguments, which faults the Board for failures to act remedially to ameliorate, prospectively or retroactively, prejudice resulting from errors of substance and procedure committed during the two objection determinations giving rise to this IR. To restate the three main allegations, ICANN failed: 1] to train ICC experts to correctly apply community objection standards; 2] to institute a secondary regime to reconcile inconsistent community objection rulings; and 3] to intervene in this individual case to correct what Donuts argues are obvious substantive errors and a failure of due process by reason of deficient expert disclosure.

168. As outlined above, the Panel considers that some but not all failures to act are cognizable by it. In the Panel's view, "actionable inaction" is a failure by the Board that is inconsistent with a duty to act, whether that duty is formally established by ICANN's constitutive documents, established by some other explicit or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present.

169. It follows that not every circumstance in which the Board might be empowered to act gives rise to a duty to act. In particular, when the complaining party points not to an explicit promise to act or a specific obligation to act substantiated in ICANN's constituent documents, but rather relies on the circumstances and more general sources of obligation, actionable inaction would seem to assume circumstances: 1] that are, or ought be, known to the Board; 2] that forcefully impinge on relevant values and principles; and 3] that could reasonably have been expected to be mitigated by Board action. Importantly, even when the three factors just enumerated are present, the inaction must be judged in light of the Standard of Review (that is: it might be that determined inaction is well-informed, independent and conflict-free).

170. As outlined earlier, an in accord with what other Panels have concluded,[198] at any given time the Board is confronted with the range of options and is entitled, indeed required, to balance the competing values listed in the Bylaws when deciding what, if anything, to do. The Board need not react merely because it has been petitioned to do so by a stakeholder, commentator or other observer.[199]

B. Merits-Related Board Failures to Act

1. In General

171. To the extent that Donuts complains of jurisprudential errors and disarray, its arguments assume that timely action by the Board would have led to added legal certainty, more transparency, higher levels of due process and—by extension—unsuccessful objections in the specific cases here involved through the proper application of community objection standards.

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[198] See, e.g., Booking.com IR Declaration, para. 138.
[199] See Id.

2. Failure to Train ICC Experts

172. It is common ground that ICC experts have access to the Applicant Guidebook and other documentation concerning the adaptation of the ICC Expert process for use in determining community objections, but that they received no specific training by ICANN concerning community objection standards. Equally, however, the Board is not specifically required by any constituent document known to the Panel to institute training; nor has it represented that it would perform such training. Consistent with this, Donuts does not argue that it somehow relied on assurances that any expert appointed to decide an objection filing would have received particular training by ICANN.

173. The Panel believes that Donuts has not carried its burdens on this allegation. It has considered several factors:

174. First, the situation in not one in which the Board simply provided no instruction to the experts. The Guidebook itself provides a considerable measure of guidance. It identifies myriad factors for experts to consider in processing community objections, repeats admonitions about an objector's burdens and adds caveats about the need to find all elements satisfied.

175. Further, the Guidebook requires that the experts appointed to each proceeding be appropriately qualified[200] and this requirement is restated in the ICC Rules which require the ICC to consider the prospective appointees' qualifications to be considered before an appointment is made.[201]

176. Second, it is to be expected given the Guidebook's multi-factor tests, diversity of factual patterns and the role of advocates that variations in way experts frame issues and apply the governing factors will be perceived; these may or may not reflect genuine differences of approach or the deficiency of one approach compared to another. As a general matter, it would be surprising if among the corpus of reasoned objections to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected.

177. Moreover, the errors of which Donuts complains in the current case are said by it to be obvious under the Guidebook. If that is true, training would not necessarily have made any difference. An expert that would ignore the Guidebook would likely also ignore any subsequent training based on the Guidebook. In any event, the Panel's study of the reasoned opinions of the experts involved in this IR—done strictly for fact finding purposes [202] – found that neither expert failed to apply the Guidebook factors, nor reached an absurd result.

178. The Panel does not exclude the possibility that jurisprudential disarray might become so acute and prolonged with respect to community objections that the Board would be required to act to improve upon the original manner of equipping experts; Donuts has not demonstrated that such a state of affairs exists, however.

179. The Panel notes as well that, to a large extent, Donuts seems to complain of the system as it was originally instituted, one without training for experts beyond the instruction found in the

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[200] Guidebook, Section 3.4.4.
[201] ICC Expertise Rules, Article 3(2).
[202] The Panel is not entitled under the guise of an IR to propose an authoritative construction of the Guidebook's community objection standards.

Guidebook. As such, Donuts arguably faces the time bar applicable to such complaints, as recognized by other IR Panels.[203]

3. Failure to Institute Appellate Review

180. Similar considerations to those identified with respect to the training of experts apply in assessing the failure of the Board to inaugurate an appeals mechanism of some kind for community objection cases. Donuts argued:

> Donuts and others had specifically urged the Board to implement a means for reviewing new gTLD objection rulings inconsistent with ICANN's "documented policies" governing such procedures in the Guidebook....Several months after that... the NGPC proposed...a mechanism for addressing perceived inconsistent results in certain [string confusion] objection cases.... The NGPC specifically cited, as authority for its determination, Guidebook section 5.1, which provides in part as follows:
>
> > ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application.

181. The Panel believes that to install some sort appeals mechanism might add predictability of outcome and produce greater satisfaction with the process by some. The Panel assumes, without opining, that the Board has the power to institute such a mechanism, and it believes that to do so in a sound fashion after careful study would be consistent with ICANN's Articles and Bylaws.

182. Equally, however, absent jurisprudential disarray so urgently in need of a top-down remedy that the Board would not be entitled to establish other priorities, it may indeed refrain from exercising the power it has already exercised in connection with certain string similarity cases.

183. Even if the record reflected a concrete decision by the Board to take an incremental approach to the implementation of review mechanisms, perhaps delaying in-depth study of the possibility, that Board strategy would be judged against the Standard of Review, and the Board's duty to balance all relevant factors, including those that argue against wholesale adoption of some form of appeals mechanism. In the Panel's view, absent compelling facts to the contrary, the Board need not rush into adding another layer of adjudication or review, whether or not urged to do so by Donuts and others.

4. Failure to Intervene in the Individual Case

184. Relying on the Board's reserved "right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community," Donuts faults the Board for not intervening in its individual case.[204] To the extent it relies on

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[203] See, e.g., reasoning of the Booking.com IR Panel, discussed at note 106, supra, and accompanying text.

[204] Quoting Guidebook, Section 5.1.

putative errors in the application of the community objection standards, the above analysis applies; the Board can, in the Panel's view, pursue other priorities. Apart from questions about whether the errors alleged by Donuts are as obvious as it asserts, a hypothetical Board policy of ordinarily not responding to ad hoc petitions to intervene with respect to individual applications would seems prudent on its face.

185. Accordingly, the Panel agrees with the Vistaprint Panel, who ruled that "the ICANN Board has no affirmative duty to review the result in any particular…case."[205] As Donuts does in this case, Vistaprint had relied upon the Guidebook's reference to individual Board consideration of applications. As the Vistaprint Panel observed, however, the Guidebook's example of the "exceptional circumstances" that involve individual assessment by the Board is when the disappointed applicant engages the Board through an accountability process such as the RFR.[206]

186. True, the RFR example, being only that, does not preclude an ad hoc intervention by the Board; it does however remind one of context, and to consider Board inaction in light of the other grievance mechanisms available to applicants, most notably in this case the RFR option.[207]

XV. PANEL'S ANALYSIS REGARDING FAILURE TO INTERVENE IN THE .SPORTS PROCESS TO ACCOUNT FOR DEFICIENT EXPERT DISCLOSURE.

A. The Disclosure Standard

187. With respect to the .SPORTS objection, Donuts relies heavily on what it considers to have been Mr. Taylor's deficient disclosure. The Panel has suggested above that it does not equate any such failing to direct Board conduct, but Donuts also has advanced a failure to act argument.

188. The ICC Expertise Rules in force at the relevant time contemplated that the ICC would appoint an expert only after considering "the prospective expert's qualifications relevant to the circumstances of the case"[208] and that, unless the parties agree otherwise in writing, the experts appointed are to be "independent of the parties involved in the expertise proceedings."[209]

189. Experts are to execute a "statement of independence" along with a written disclosure to the Centre of "any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties." Such disclosed information is communicated to the parties, who are entitled to object that the expert does not have the necessary qualifications, including independence.[210]

190. There is an obvious tension between the desire to find experts with suitable qualifications (which often implies experience in the relevant sector) and the default rule that experts are to be independent of the parties. To a large extent this struggle of opposing considerations is resolved by the expert making the required disclosures, and the system thus heavily depends on the expert to do so.

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[205] Vistaprint IR Declaration, para. 157.
[206] Id., para. 156 ("For example, the Board might individually consider an application as a result … of the use of an ICANN accountability mechanism.").
[207] See notes 181-82, supra, and 227 infra, and accompanying text.
[208] ICC Expertise Rules, Article 3(2).
[209] Id., Article 3(3).
[210] Id.

191. An examination of the disclosure rule as formulated confirms that disclosure is intended to be relatively broad. It is not, for example, limited to circumstances "likely to call into question" the appointee's independence, but refers instead to matters that "might" do so. Nor is it to be judged in terms of objective, reasonable, parties; the test, instead, is a subjective one asking the prospective expert to determine what should be disclosed when viewed through "the eyes of the[se] parties".[211]

B. The Respective Actors' Roles in Disclosure

192. It might be argued that Donuts has mainly itself to thank for not being prompted to investigate Mr. Taylor further by what one finds on his resume. His c.v., after all, records in several places that he has represented "sports bodies", and in diverse contexts.[212] Given the wide membership enjoyed by SA, it is reasonable to expect that Donuts would have been cued to investigate Mr. Taylor's background more fully by these disclosures; there would seem to have been a high probability that he had acted on behalf of one or more of SA's members. Additionally, Donuts should have come to know his c.v. in detail by virtue of its unsuccessful, contemporaneous, attempt to challenge Mr. Taylor in connection with the .SKI objection proceeding.[213]

193. The sophistication with which Donuts is capable of operating during the appointment process is evidenced moreover by its successful challenge of Mr. McClaren in connection with .RUGBY objection proceeding.[214] One might also note that essentially the same Taylor resume supplied to Donuts led dot SPORT'S representative, Mr. Young, to seek disqualification of Mr. Taylor based on Taylor's connections to SA, the same objecting entity against whom Donuts defended in the present case. Moreover, in doing so, Mr. Young seems to have relied on information largely available through a rudimentary internet search.[215]

194. When a disputant fails to discover, or under appreciates, putative conflicts until after receiving an unfavorable result, questions naturally arise about that party's level of due diligence during the appointment process. Concurrently, Mr. Taylor, to be fair, may well have had in mind rules of disclosure pertaining to other systems, such as those governing under a national arbitration law, while assuming that those standards equaled or surpassed the ICC standard. Nor does it follow, necessarily, from what this Panel regards as his impermissibly abridged disclosures that Taylor was a partisan, such that his determination was the product of bias. While it is true that Mr. Taylor was critical in some respects of the manner in which Donuts' conducted its defense, the irritation expressed by him may well have been heart-felt, and perhaps justified, rather than an expression of partisanship (the Panel is not in a position to judge).[216]

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[211] This would not in every case lead to a duty to err on the side of disclosure; the parties may by involvement in the field both know well the expert and any relevant affiliations he or she has.
[212] Taylor c.v. as attached to ICC Statement of Independence and Impartiality.
[213] Recounted by Donuts in its Request for Independent Review of October 8, 2014, paras. 41, 46- 48.
[214] Recounted by Donuts at id., para. 53.
[215] July 1, 2013 letter to ICC by Mr. Young challenging Mr. Taylor's appointment in relation to .SPORT objection by Sport Accord.
[216] See Taylor expertise, paras. 16.4-16.5. The expert characterized as "extremely misleading" and "(at the very least) unfortunate" that, upon investigation, a document said by Donuts to establish the policy of ICANN and the Guidebook in fact represented the not-adopted view of a certain private entity, and

195. As for Mr. Taylor's reasoned determination on the merits, at least on its face, it seems to be a thorough, balanced, and lucid examination of the community objection grounds that flows logically to a conclusion. Whether he was correct in his appreciation of the merits is not for this Panel to assess.

196. Whatever obligations a party has to investigate a potential appointee (and the Panel believes these are not negligible) ultimately it is primarily the ICC expert's disclosure practices, and not the parties' due diligence, upon which the integrity of the ICC expertise system depends. A prospective appointee's failure to be forthcoming, combined with selective disclosures capable of assuaging the concerns of one of the parties, allows the later-dissatisfied party to complain justifiably about the process while also giving it a plausible reason for not itself investigating more deeply.

197. Even without consulting the IBA Conflicts Rules relied on by Donuts' expert, (which do not apply formally to an ICC Expert proceeding), the Panel would have expected Mr. Taylor to have been more specific in making disclosures based on the above analyzed ICC disclosure formula. He should have identified the members of SA for whom he had recently acted. That would have included listing his advocacy on behalf of the International Tennis Federation (ITF), the conflict which Donuts' expert found to be most troubling.[217] In this respect, the Panel notes that the ICC disclosure statement he signed advises, in underscored text, that "any doubt must be resolved in favour of disclosure." [218]

C. Partial Dissent

198. In light of what all three Panel members regard as disclosure by Mr. Taylor that was on its face insufficient, one member would declare Donuts the prevailing party with respect to the .SPORTS application. He explains why he so holds in a separate document not forming part of this Declaration. Although the majority proceeds on a different basis, it understands how reasonable minds could conclude that the ICC expertise system, as adapted for use in community objection cases, has a systemic defect evident in the case at hand. That defect may allow conflicts to go undetected, and un-remedied, at critical times given that the system combines heavy reliance on adequate candidate disclosure, the absence of court review,[219] single- member

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constituted on the part of Donuts "a contrived argument" intended to defeat the objection but which instead gave rise to a negative inference and questions about Donut's credibility.

[217] Savarian Report of October 7, 2014, at para. 32 (ongoing representation of ITF a 'Waivable Red List" conflict).

[218] ICC Disclosure Form ("Statement of Impartiality and Independence") completed by Jonathan Taylor, June 17, 2013.

[219] Whether a binding expert determination would be regarded as subject to a set aside proceeding is likely to vary with the national arbitration law in question. With respect to potential lawsuits against ICANN itself, the Guidebook stipulates (emphasis in the original) that:

> APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP

expert tribunals, and a binding process in substitution for the original ICC default rule under which expert determinations are merely advisory.[220]

199. Language in at least one precedent, in turn, arguably condones a more plenary review than that which the majority pursues in this case. The Booking.com Panel summarized its investigation as follows:

> The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, *including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP)*, that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (*or any staff or third party*) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (*or any staff or third party*) in relation to the string similarity review of .hotels in particular.[221]

200. A similar search in the case at hand might well support a finding that, unlike what was resolved in Booking.com, conduct of certain third parties (Mr. Taylor) was "inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook" to quote again Booking.com. At least arguably, moreover, no time bar would operate because the complaint is not about the system as installed by ICANN, but rather concerns a failure of the system as designed to be followed in this particular case.

D. The Majority's Position

1. In General

201. The Panel majority finds the views expressed by our colleague to be cogent—indeed, forceful. We take a somewhat different approach, however, and reach a different conclusion.

202. We start by recalling how very narrow our mandate is, and how that confinement is re-doubled by the standard of review. Our task is not to assess whether everything worked perfectly in the objection process, but rather whether or not the Board can be said to have violated ICANN's Articles and Bylaws. For reasons discussed above, the requisite Board action cannot be established by equating directly the expert's deficient disclosure, or the ICC's failure to require better disclosure, to a Board failure to disclose or require disclosure, even though some of

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> COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

Guidebook, at 6-3.

[220] See notes 56, supra, and accompanying text.

[221] Booking.com IR Declaration, paras. 144-45 (emphasis added).

Donuts' submissions have made that leap. More would be needed before this Panel's majority could consider either the ICC or Mr. Taylor to be a partner or agent of the Board.

203. Nor has the ICC been shown by Donuts to be sufficiently analogous to the GAC to warrant Donuts' somewhat heavy reliance on the DCA IR Declaration. Donuts argues:

> [T]he DCA Case held the Board responsible for oversight of the acts of ICANN's "constituent bodies," such as the GAC, that share ICANN's obligation to adhere to its Bylaws and other governing documents....GAC "advice" amounts to nothing unless and until ICANN acts upon it. Similarly, the [ICC expert] determinations of new gTLD objection panels constitute "expert advice" that have no effect until accepted by ICANN.[222]

204. This Panel's majority disagrees. It cannot, absent more, regard the ICC as a "constituent body" of ICANN. The DCA IR panel's analysis, by contrast, proceeded from its explicit finding that the GAC is a "constituent entity" of ICANN, and thus subject to its transparency undertakings. That question was the subject of considerable attention at the DAC IR hearing. Ultimately, the Panel formed a solid view of how the GAC fit within ICANN's constitutional structure.[223] In our case, with so many indications pointing a different direction, the case for considering the ICC a "constituent entity" is far from obvious, and in the majority's view, Donuts has not made its case on that point.

205. The majority also considers that the Booking.com Panel's recounting of its broad but fruitless search for actionable missteps was not a conclusive statement of the proper scope of an IR, but rather reasoning that obviated further inquiry because no missteps were found—process wide. The Panel's report also had the byproduct of not leaving unanswered allegations that experts and service providers had been sub-standard in their work.

2. In Light of Mr. Taylor's Disclosure Practices, Was the Board Required to Act?

206. Donuts, nevertheless, argues that the Board was obliged to act under the circumstances, referred to by it as "egregious." The record does not contain evidence of formal Board consideration of Mr. Taylor's conduct as an expert for this Panel to test against the governing standard of review. Nor does Donuts point to a Board undertaking, or other formal source, that expressly or by clear implication requires the Board to exercise oversight with respect to individual ICC appointments or the sufficiency of an expert's disclosure (although the RFR process arguably provides access to such oversight).

207. Donuts instead posits a duty flowing from the Board's ultimate responsibility for the new gTLD program, its reserved authority to consider individual applications, and an allegation that ICANN officers had been made aware of troubling facts concerning Mr. Taylor. In particular, Donuts avers that there were communications between ICANN and the ICC about Taylor in connection with a proceeding to which Donuts was not party, but which involved SA. Donuts alleged:

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[222] Donuts' Supplemental Memorandum of August 20, 2015, para.28.
[223] See DCA Trust IR Declaration, para.101.

> Though the ICC did not provide other applicants with information regarding Mr. Taylor's potential conflicts, it certainly brought the dot Sport request to disqualify Mr. Taylor to ICANN's attention. In turn, ICANN made detailed inquiries of the ICC regarding dot Sport's conflict allegations. Dot Sport began to include ICANN Board members Fadi Chehadé and Cherine Chalaby, as well as Chris LaHatte, ICANN's Ombudsman, on its communications, after which ICANN staff made further inquiries of the ICC.[224]

208. In its Post-Hearing brief, Donuts reiterates: "[t]he Board has failed to act upon specific information of which it had express notice regarding the SPORTS panelist's conflict of interest."[225]

209. The chain of emails Donuts cites in support of its allegation that ICANN had become aware of Mr. Taylor's conflicts nevertheless do not support the proposition. Those communications related not to Mr. Taylor, but to a different expert's potential conflicts of interest, and correspondingly do not demonstrate active consideration by ICANN of circumstances related to Mr. Taylor's appointment in the .SPORTS objection proceeding. [226]

210. There are also problems with any suggestion that timely Board action to effect Taylor's disqualification—assuming the ICC would have allowed ICANN to so intervene in that fashion—would have led to the appointment of an expert who would have agreed with Donuts' interpretation of the community objection standards. The majority can't help but notice that both Mr. Kantor and Mr. Taylor were persuaded by similar lines of argument, flowing from Donuts' welcoming registration policy, and yet no conflicts have been attributed to Mr. Kantor.

211. In the view of this Panel's majority, however, even if the alleged biases of a particular expert are made known to ICANN officers in the ordinary course of interacting with the ICC, or because ICANN was petitioned by an applicant asking it to intervene, the Board's failure to intervene would have to be considered in light of the range of defensible options available to it and the existing ICANN mechanisms that offer a complaining applicant potential redress. Chief among these alternatives to ad hoc Board intervention is the RFR mechanism, which Donuts elected to forgo in this case.

212. Without purporting to predict the likely outcome of the RFR forgone by Donuts, the majority of this Panel does believe that it would have been an appropriate vehicle by which to address an expert's seemingly insufficient disclosure. The RFR process would have allowed an organ of the Board, with certain fact finding powers, to evaluate Mr. Taylor's conduct, and the ICC's handling of it, to determine if it amounted to: "one or more staff actions or inactions that

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[224] Donuts' Post-Hearing Brief of Supplemental Memorandum of August 20, 2015, para.8.
[225] Id., para. 6.
[226] The Panel can only conclude that the compressed briefing schedule involved in this proceeding and the large volume of documents exchanged late in the process left Donuts insufficient time to study, or perhaps identify correctly, the correspondence upon which it relied. The Panel, nevertheless, spent considerable time in pursuing justification for arguments that, while asserted and repeated, proved to be unsupported by the documents to which the Panel was directed by Donuts.

contradict established ICANN policy(ies)", to quote from the RFR grounds for seeking reconsideration.[227]

213. Had Donuts pursued an RFR, not only might some relief have been forthcoming (perhaps obviating this IR) but any RFR recommendation and subsequent processing of it would involve activities likely to fall properly within the jurisdiction of an IR Panel. Indeed, the RFR path is the one routinely taken by other disappointed applicants before resorting to the IR machinery. The Board was entitled to expect that Donuts would do likewise given the architecture in place. Correspondingly, in the view of this Panel's majority, the Board simply was not required to pursue some other form application-specific intervention in the process.

214. Donuts is no doubt correct that it is not required to pursue an RFR. It is also correct that to the extent it sought a review of the merits, the RFR process would not be appropriate, and to that extent would be futile. The same cannot be so easily said when there is alleged conduct directly implicating the fairness and transparency of ICANN "staff".

215. To its credit, Donuts engaged in an energetic effort to enlist the help of the Ombudsman, Mr. LaHatte. Despite being invited several times by LaHatte to identify some procedural unfairness, Donuts did not, as far as this Panel can ascertain, pin-point the weakness of Taylor's disclosure. Donuts instead persisted in asking LaHatte to review the merits and to infer bias largely from the way in which Taylor reasoned and his connections[228]—to a large extent seeking the very merits review that LaHatte insisted he was not authorized to perform.[229] That is, based on the Donuts' correspondence with Mr. LaHatte, fairness of process was LaHatte's concern; given Donuts' heavy emphasis on the disclosure question in these proceedings, that Donuts appears not to have asked LaHatte to consider the fairness implications of Taylor's weak disclosure is surprising.

216. Ultimately, on the question of the Board's alleged failure to act to ameliorate the consequences of Mr. Taylor's seemingly insufficient disclosure, the majority concludes that the circumstances did not so powerfully suggest a need to act that the Board's failure to do so transgresses the Articles or the Bylaws or otherwise raises doubts under the Standard of Review. Those circumstances include but are not limited to the availability to Donuts of the RFR process and the Board's apparent lack of knowledge of any conflicts potentially impairing Taylor's impartiality that remained both undisclosed and unknown to Donuts.

XVI. DISPARATE TREATMENT CLAIM

217. As noted above, Donuts asserts that the Board has engaged in unjustified discrimination by virtue of its selectivity in installing a mechanism designed to address inconsistent "string

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[227] See notes 181-181, supra, and accompanying text.

[228] See LaHatte Letter Ruling (Report) of May 25, 2014 finding no jurisdiction to examine merits of expert's objection ruling. ("The essence of the complaint is that the dispute resolution providers have made errors in the various decisions relating to the names sought by Donuts, where they lost the dispute resolution processes."); Letter of June 5, 2014 to from Donuts to Chris La Hatte (complaining of conflcits, bias, but not a failure of disclosure).

[229] See email correspondence sent by Chris Lahatte to Jonathon Nevett, May 25, 2014

confusion" objection results. Although Donuts formally supports the initiative, it urges that it should have been extended to inconsistent community objection determinations. Donuts avers:

> [T]he Board...admits to having chosen consciously not to use [its power to reach community objection cases]. ICANN made that choice discriminatorily and despite specific and sustained exhortations to take action from a broad constituency including Donuts.[230]

218. Donuts relies on Bylaw's Article II, Section 3. The latter commands that ICANN:

> [S]hall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

219. By its terms, Article II, Section 3 is not violated if ICANN is justified in its line drawing by "substantial and reasonable" cause. Albeit with a slightly different application of the principle, the Panel agrees with Vistaprint IR Panel that temporal context is important. It is obvious that a fresh phase of study begins when a regime with the many operational features of the new gTLD program moves from planning to implementation. There having been extensive study and stakeholder participation before implementation of the gTLD program, the Board is more likely to violate its duties if acting precipitously rather than with deliberateness.

220. The benefits of deliberateness will in the majority's view often constitute "substantial and reasonable cause" for selective application of new policies and new mechanisms. Moreover, in the majority's opinion, the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances. The record does not allow the Panel to conclude that the considerable consistency issues raised in connection with string similarity cases have emerged in connection with community objection cases as a whole, or with respect to the two expert decisions giving rise to this IR.

221. On the contrary, the materials produced in this case afford ample justification for giving a priority to the string confusion cases,[231] which readily give the impression of containing a certain percentage of irreconcilable outcomes. The opprobrium raised among observers, stakeholders and others in reaction to the string confusion cases, correspondingly, seems to have been of a kind and a degree not occurring with respect to community objections.[232]

XVII DONUTS' CONTRACT THEORIES

222. In its pleadings, Donuts made reference to contractual theories by which it was entitled to relief; these were left under-developed by Donuts.[233] Nevertheless, for the sake of completeness, the majority observes that no contractual analysis it has considered would lead to a different result than that reached above. Under Donuts' occasional characterization of itself as being a

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[230] Donuts' Post-Hearing Brief of Oct. 29, 2015, para. 12.
[231] See, e.g., Booking.com IR Declaration, paras. 119-30.
[232] Cf. Vistaprint IR Declaration, paras. 188-92.
[233] In its Request for IR, para. 80, Donuts provided its most complete explanation of its contract theory ("Applicant agrees to the terms of the Guidebook by applying for a new gTLD, thus forming a contract on those terms with ICANN"). The jurisprudential support for its contract formation thesis was not supplied, however.

contracting party, with ICANN being its counter-party, it is the premise that Board conduct that is not consistent with the Guidebook would be a breach of contract. It follows from the analysis adopted above that, assuming arguendo the existence of a contract, no breach has occurred, including no violation of duties of good faith. The same is true of any reliance-based theory the Panel can envision in the absence of focused pleading on the question.

XIIX DECLARATION

223. To a great extent, Donuts' own initial pleading foreshadowed the majority's rulings in this case. It referred to certain post-ICM case "obstacles" instituted by ICANN, such as "subjecting only Board action to scrutiny, and attempting to narrow the scope of review."[234] Perhaps this was intended by Donuts to suggest that ICANN had acted unfairly to insulate itself from account-ability. Whatever the intimation, these are not "obstacles" this Panel is free to ignore. As the Bookings.com IR panel observed in considering the case of another disappointed applicant:

> In launching this IRP, [the applicant] no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws.[235]

224. As an IR Panel, we are required under the ICANN Bylaws[236] to:

> [D]eclare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws[237]

225. Pursuant to this authority, the Panel (by a majority) declares that Donuts has not met its burden to demonstrate action or inaction by the Board that violated ICANN's Articles or its Bylaws.

226. The Panel also has authority to:

> [R]ecommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP[.]

227. There is precedent for taking a broad view of this prerogative.[238] Even though an IR is an accountability mechanism, it also has the potential to serve an advisory function, inasmuch as it represents the views of three independent neutrals. These considerations prompt the majority to offer the following further thoughts.

228. First, the majority cannot say that the .SPORTS expert was motivated by partiality favoring the objector, only that his failure to elaborate on what he may have thought was already implied in his resume erred too heavily on the side of non-disclosure, and was thus unhelpful to the process. Opting for less than robust disclosure is harmful because, at a minimum, when discovered it may create the impression of bias and thus undercut a party's confidence in the

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[234] Donuts' Request for IR, para. 21.
[235] Booking.com IR Declaration, para.141.
[236] ICANN Bylaws, Article IV, Section 3.
[237] Id., Section 3, para. 1(d).
[238] See Booking.com IR Declaration, para. 4; Vistaprint IR Declaration, paras. 186-90.

system. A more substantial peril is realized when weak disclosure is only a precursor to a determination in fact motivated by partisanship.

229. The majority believes that rather than using single expert panels, the community objection process might to advantage employ panels composed of three experts. In such circumstances, partisans can only do limited damage and, correspondingly, any party concerned about the prospect of biased expert determinations should be reassured to a considerable extent by three-person tribunals. In the majority's view, even with the added costs involved, it would be economically justifiable in the long term and not inconsistent with ICANN's values and principles to adopt a three-neutral model as the default in community objection cases.

230. Concerning the community objection proceeding brought by SportAccord in connection with .SPORTS, the majority believes it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts). In the event that should happen, the applicant and objector would presumably be highly efficient in presenting their respective cases, having already prepared them fully once.

231. The majority also considers that the cases before this Panel involve a predictable conflict of expectations. The Guidebook authorizes a prospective applicant, who espouses a relatively open registration policy, to pursue a standard application to administer a string prone to be associated with one or more communities; not uncharacteristically, those communities will espouse and be galvanized by formal policies and common perspectives that are likely to be incompatible with unrestrained access to the string involved. The majority suggests that the assumptions and policies that lead to this kind of tension warrant further study.

XIX COSTS

232. The Supplemental Rules, which augment the ICDR arbitration Rules for IR proceedings, state:

> The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.
>
> In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.[239]

233. The majority of this Panel has determined that Donuts has not prevailed. The majority does not find that the circumstances warrant departing from the general rule that, ordinarily, "the party not prevailing in an IRP shall…be responsible for bearing all costs of the proceedings."

[239] Supplementary Procedures for ICANN Independent Review Process, Article 11.

234. The majority considers that any contribution to the public interest Donuts might have made by focusing attention on the proper level of disclosure by ICC experts and related matters has been offset by the tenuousness of some of Donuts' positions.[240]

235. Accordingly, Donuts is to bear all of the fees and expenses of each Member of this Panel, all of the fees and expenses of the ICDR in this IRP, and all expenses of the hearing in Los Angeles on October 8, 2015, including hearing room costs, the fees and expenses of the reporter, and the cost of the transcript.

236. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$4,840.00 shall be borne by Donuts, and the compensation and expenses of the Panelists totaling US$165,895.34 shall be borne by Donuts. Therefore, Donuts shall reimburse ICANN the sum of US$83,067.66, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

237. As to legal fees and similar costs incurred by ICANN, because Donuts availed itself of the cooperative engagement process, the Panel is not *required* to "award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees." The Panel interprets Article 34 of the ICDR Rules as according it discretion to hear the parties on the question of legal fees and to make an award of such fees in whole or in part.[241]

238. Nevertheless, recent precedents—notably Booking.com, Vistaprint, and Merck—(while taking different approaches to the allocation of DRSP and Panel fees) have seemingly established the practice of leaving each party to shoulder its own legal fees. This Panel, in keeping with that trend, unanimously decides that each side should bear its own legal fees and similar costs. It will thus not ask the parties to address through further briefing the proper allocation of such fees in this case.

239. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the final Declaration of this IR Panel.

240. As contemplated in Article 30 (2) of the ICDR Arbitration Rules, this Declaration carries two signatures instead of the usual three. Mr. Boesch dissents, in part, and has written separate remarks.

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[240] See, e.g., notes 183-89, 226, supra, and accompanying text.

[241] The ICDR Rules, Article 34, state in pertinent part:

> The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case. Such costs may include:...d. the reasonable legal and other costs incurred by the parties;...

Philp W. Boesch _____ Rayner M. Hamilton _____

Date: Date:

Professor Jack J. Coe, Jr. (Panel Chair) _____

Date:

Philp W. Boesch _____ Rayner M. Hamilton _____

Date: Date:

Professor Jack J. Coe, Jr. (Panel Chair) _____

Date: May 5, 2016

Philp W. Boesch _____ Rayner M. Hamilton

Date: Date: May 5, 2016

Professor Jack J. Coe, Jr. (Panel Chair) _____

Date:

I, Philip W. Boesch, Jr., Panel Member, decline to sign the Final Declaration of the Panel, for the reasons outlined in this statement, which I respectfully request be attached to and incorporated with the Declaration executed by the other two Members of this Panel.

A. The Promise of Independence, Transparency and Accountability Has Been Violated. There is no disagreement on this Panel and on any Panel considering previous matters, that ICANN is "no ordinary non-profit," but instead is a "regulatory authority of vast dimension and pervasive global reach." The very origin of ICANN's authority relies upon ICANN's "Affirmation of Commitments" with and to the United States Department of Commerce, which lists as the first "key commitment" by ICANN, to "ensure" that decisions are made in the public interest "and are accountable and transparent."[1] (Emphasis Added). ICANN Article Section 4 sets forth ICANN's commitment to "open and transparent processes." (Emphasis Added). Article 3, Section 1 requires that ICANN "shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." (Emphasis Added). The ICANN Guidebook requires the decisions to be made by "an independent expert Panel." (Emphasis Added).

It is the independence of judgment, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulation authority. These essential principles, in this Member's opinion, should be at the forefront of this Panel's review, because ICANN's position in this review seeks a rubberstamping of decision-making that was not independent, that was not transparent, and that has not been held accountable. This Member cannot abide the Expert decision in the .SPORTS Application and would not sustain the Objection filed to that Application.

The Expert who decided the .SPORTS Objection, "impermissibly abridged disclosures," the Majority holds, but then the Majority accommodates by stating that there is no evidence that the Expert really was a "partisan," and by accepting ICANN's speculation that the Expert's decision-making "may" have been "heart-felt." When ICANN receives its extraordinary power and authority, based on the promise of independent judgment, transparency, and accountability, there is no room for whitewashing the egregious failure of disclosure here. The decision-maker was the lawyer for undisclosed clients directly benefited by his ruling. ICANN argues to let this

[1] Affirmation of Commitments No. 3.

stand because the procedures it argues are applicable do not permit any other options. This Member disagrees. This is the failure of the promise of independent, transparent, accountable decision-making and it should not stand.

B. The Requirement of Conformity With Law. This Panel accepts the notion that ICANN must carry out its activities in conformity with "relevant principles of international law and applicable conventions and local law." But in this context the Majority discusses the "California business judgment rule," finds it inapplicable and discusses no other laws, relying on the arguable lack of briefing on conflicts of law. Because the procedures in this case cloak the "expert" with the decision-making power of a judge or arbitrator, the "relevant principles of international law" and "local law" should be those which apply to independent, transparent and accountable decision-making. Conflicts of laws would not seem to deserve much discussion on this point, because there likely are no conflicting laws that permit an arbitrator to decide matters where the arbitrator's undisclosed clients or business associates would directly benefit from his or her ruling. Laws and rules governing disclosures and the independence of the judiciary and the transparency of decision-making, even AAA and ICDR Rules, do not focus on the need to prove that the decision-maker actively promoted the interests of undisclosed clients as direct beneficiaries of his or her judicial ruling. It is the necessity to avoid the appearance of impropriety that dictates the fullest disclosures.

C. There is and There Should Be A Remedy for "Impermissible" Non-Disclosures. Ultimately it should be the ICC experts' disclosures and not the parties' private investigation into the expert's background, upon which the integrity of the ICC expertise system depends. This also is true for judges, and for arbitrators acting pursuant to the California Arbitration Act or in compliance with the Federal Arbitration Act, or in compliance with ICDR Rules. In fact, this Expert's signature on his "impermissibly abridged disclosures" actually appears just below the ICC Disclosures Statement, which advises in underscored text that "any doubt must be resolved in favour of disclosure."

Even though the Expert's conduct in failing to disclose was "impermissible," the Majority suggests for a variety of reasons that there is no remedy for this failure—even while the integrity of the ICC expertise system depends on it. With the very integrity of ICANN's system at issue, this Majority has determined that there are no remedies. If there is no remedy for such a fundamental failure of the independence, transparency and accountability requirements, then this is a systemic defect that required and requires Board action.

This Panel Member also believes, however, that there is and should be a remedy, even within the standards of review, interpretations, and procedures outlined by ICANN and by the Majority.

D. Application of The "Standards of Review" Should Permit a Remedy in This Case. This Panel, as with all Panels, discusses the "standard of review" typically by focusing on whether the Board acted "without conflict of interest," whether the Board exercised "due diligence and care" and whether the Board exercised "independent" judgment. Though this Member takes issue with the narrow interpretation by the Majority of "actionable inaction," it is clear enough from other decisions and even from the Majority in this case, that inaction as well as action may form the basis for the review. In this case, the Board's inaction was not without conflict of interest; the failure of a remedy affecting the integrity of the IRP system does not suggest due diligence; and allowing this Expert opinion to stand is not the achievement of independent judgment.

The Majority finds many reasons not to act, holding that its mandate is so "very narrow" as to be almost non-existent, and how that "confinement" must be "redoubled by the standard of review." Opinion at 57.

But the Panel majority also states: "Concerning the community objection proceeding brought by SportAccord in connection with .SPORTS, the majority believes it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts)." This seems to be an advisory opinion that Donuts can and perhaps should petition for a rehearing, and that it would "not be inconsistent" with ICANN principles for a rehearing to be granted by some entity in authority.

For the Panel to find that it cannot act except at best in an advisory capacity, and that its neutered role is not a systemic problem, is unsatisfactory and unsatisfying. To this Member, after hundreds of thousands of invested dollars in filing fees and in these proceedings, the advice to Donuts to seek a rehearing ("[a]t least arguably, moreover, no time bar would operate") is analogous to a punt on first down if not an abdication of responsibility.

Although the Majority analyzes the deference to be or not to be accorded the Board's actions or inactions, the first question, whether the Board action or inaction is "without conflict of interest," is a flawed inquiry in the context of this case. Every time the Board or its agents or delegated decision-makers consider action or inaction of any kind, in addressing the decision of the Board's delegated decision-maker, the Board is acting with and not without conflict of

interest. If the Board promulgates or leaves in place a procedure or standard of review, stacked in favor of its delegated decision-maker, the Board is acting with and not without a conflict of interest. If ICANN's argument is that the standard of review only refers to "certain kinds of conflicts of interests," that is not an apparent conclusion to draw from the language of the Guidebook or the Articles. Not only should no deference be accorded the decision under review, but also the basic principles justifying ICANN's authority—independent judgment, transparency, and accountability—mandate that the procedures and standards for review not be stacked in any way in favor of ICANN's delegated decision-maker, or applied in a manner that suggests that they are. This Panel Member would find that a remedy is available within the existing standards of review, however the Majority seeks to narrow or "confine them."

E. Application of Contract Law Confirms a Remedy. The promise of independent judgment, transparency and accountability, as to decision-making that is essentially judicial in nature, regarding matters of extreme public import and interest, should not be set aside by resort to technical rules of construction contrary both to equity and to applicable principles of law.

Donuts argues, among other things, that it entered into a simple contract by paying its $185,000 and by filing its Application in accordance with the ICANN Guidebook. No conflicts of laws issues were raised with respect to the basic formation of a contract, and the substantial amounts involved do not suggest anything other than a significant business relationship and mutual commitment. Part of a mutual commitment like this includes, under California law, a covenant of good faith and fair dealing to make certain that the benefits of the contract are achievable by both sides. With the promise of fair dealing, the applicant had every right to expect independent decision-making, transparent decision-making, and accountability of the decision-making, in accordance with fair and reasonable processes. That is a clear covenant by and responsibility of the ICANN Board. This Member also is of the opinion that the applicant had the right to expect that its application would be handled as represented in the Guidebook, without additional terms imposed upon it, including that it operate for the benefit of any one community. ICANN does not persuasively reply—and does not reply at all to the substance of this argument.

F. This Case Should Not Turn on the Majority's View of Agency Law. The Panel Majority bases its opinion on the fiction that the Board's delegated decision-maker is a "third-party," even though it is the Board's delegation that sets up this isolation. And, the Majority posits, the outcome of this proceeding might have been different "[h]ad the agency theory been

more fully addressed by the Parties…" (Opinion 48, ¶155). Because this Panel's century of experience leaves it capable of dealing with the briefings on "agency theory," this again seems to this Member more like an abdication of responsibility than its articulated focus on burden of proof.

Trying to draw narrow distinctions between whether delegated decision-making is the work of an agent or an independent contractor is just such a technical nicety that would not be acceptable in the simplest workers compensation case, much less acceptable in a matter of extraordinary public interest. The Guidebook makes no such distinction. It acknowledges that experts appointed by or under authority of the Board, pursuant to the Bylaws, shall determine Objections. "The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process." See Guidebook, §3.4.6.

In its analysis in the Booking.com IRP, that Panel summarized its investigation:

> The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, *including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP)*, that could be considered to be *inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook.* This includes the challenged actions of the Board (*or any staff or third party*) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (*or any staff or third party*) in relation to the string similarity review of .hotels in particular.[2] (Emphasis Added)

In this case, the conduct of the delegated decision-maker was "inconsistent with ICANN's Articles of Incorporation [and] Bylaws [and] with the policies and procedures established in the Guidebook," and it is the opinion of this Member that it disserves the integrity of the system for an opinion to rely upon whether the delegated decision-maker is an agent of the Board, a staff member reporting to the Board, a Board member, or an "independent contractor" of the Board.

[2] Booking.com Declaration, paras. 144-45.

G. The DCA Case is Not Only Instructive; It Addressed as This Panel Should, the Fundamental Integrity of the System. Similarly, the distinction that is made regarding the DCA case is not only a technical one but one that exalts form over substance. There seems to be very little question that the odor of corruption and impropriety hung over the air of the DCA review; it was the fact that the decision presented a direct and blunt assault on the integrity of the entire process, that led to the DCA conclusion, not the distinctions that might be presented in some state's law between constituents, affiliates, agents, independent contractors, and the like. As stated by the DCA Panel, the Board's failure to maintain its own accountability in any other way leaves the IRP as "the only and ultimate 'accountability' remedy for an applicant."[3]

In this case, all Panel members agree that the integrity of the system is predicated upon the fullest and complete disclosures by the experts. If experts are appointed who are, charitably, unaware of the requirements of disclosure, unaware of the need to avoid the appearance of impropriety, or aware only of some allegedly lesser standard of disclosure, then that is the system's failure. Whether that is an inadequacy in training, as Donuts argues, whether that result is the failure to intervene in an egregious action, as Donuts argues, or whether that is the emergence of bias over reason, as Donuts argues, or all three, the result of this review should be the same. It is not acceptable to the integrity of the process to speculate that the expert's decision "might have been heart-felt." It is not acceptable for a lawyer, whose undisclosed clients shall directly benefit from his decision, to issue the judgment that he did.[4]

H. This Member Would Not Uphold the Objection to Donuts' Application for .SPORTS. This Member of the Panel would furthermore reverse and deny the Objection. It is incredulous to the Panel Member that this Expert construed "community" in a way that SportAccord explicitly had *not* defined it, stating that it was "self-evident" the community "refer[s] to the individuals and organisations who associate themselves with organized sport," which he calls the "Organised Sports Movement." This Expert strained to find a "clearly delineated" community, even though the objecting party itself had "delineated" it to include: (i) "individuals and organizations who associate themselves with Sport;" (ii) "practitioners as well

[3] DCA Declaration, para. 15

[4] This Member finds it persuasive that this same Expert was disqualified in virtually an identical context and matter. This Member also finds the discussion essentially blaming Donuts' investigation and response not only to be unpersuasive but a slap at the integrity of the system that depends on disclosure.

as organizers, supporters and audience;" (iii) "individual practitioners of sport, … spectators, … fans and sponsors;" and (iv) "any person in the world."

Nevertheless, without any evidence, the Expert made up his own definition of the "community":

> …[W]hen the vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model [atop which SportAccord claimed it sat].

This Expert also cited as evidence of "substantial opposition" a letter from one of his own clients, and cited as legal authority for one of his conclusions a case in which he acted as counsel for another of his clients. Without any evidence to support his "self-evident" community definition, and plenty of evidence that undisclosed "organized sports" clients are served by the lawyer acting as decision-maker, this Member is left with the self-evident proposition that there is no other excuse for it than allegiance to the entrenched "organized sport organizations" which the Expert and his lawfirm serve as counsel.

The conclusion that the Objection should be denied is reasonable and consistent with the goals and responsibilities of independence, accountability and transparency. The delegated decision-making process, in this case without adequate accountability and independent review, should not be promoted as a fair process. To this Panel Member, it wasn't.

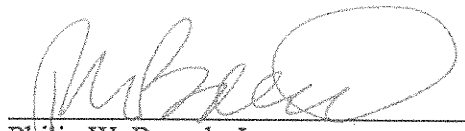
I. This Member Agrees With the Majority Decision to Donuts Application for .RUGBY Affirming the Objection. The integrity of the system is not implicated by the decision on the .RUGBY Objection in the same manner and to the same degree in which it was and is with respect to the .SPORTS Objection. Notwithstanding the opinions presented here that would apply to both Objections, this Member cannot conclude on this record that the delegated decision-making resulted in violation of fundamental principles or covenants, or that the Expert should have reached a different conclusion for other reasons; and therefore this Member does not disagree with the conclusion reached by the Majority with respect to the .RUGBY application.

J. The Awarding of Costs. Because this Member believes that the SportAccord Objection should not have been decided by this Expert in favor of the objecting party, it seems neither fair nor reasonable to award costs and attorneys' fees to ICANN. The Majority further

takes the position that "any contribution to the public interest Donuts might have made by focusing attention on the proper level of disclosure by ICC experts and related matters has been offset by the tenuousness of some of Donuts' positions" (Opinion 64). What this Member finds even more tenuous than this vague reference are the IRP Panel's conclusions that it would not be inconsistent with ICANN principles to award a rehearing of the SportAccord Objection, that the IRP Panel can do nothing about the problem it sees, and that even though the Panel cannot act, the problem really is not systemic in nature. The lack of accountability here, to address a blatant failure of disclosure that cuts at the integrity of the process, exposes the failed promises of independence, transparency and accountability and frankly discourages justifiable challenges to ICANN in the future. This Member would have each side bear its own costs and fees under the circumstances.

Dated: May 5, 2016

Respectfully submitted,



Philip W. Boesch, Jr.
Member of the Panel

AA-49

INDPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review

Concerning ICANN Board Action re

Determination of the Board Governance Committee

Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF SECRETARIES OF STATE

Claimant

And

INTERNET COPRORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

TABLE OF CONTENTS

I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1.ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*,. llc, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is "an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State's office in order to ensure our continued commitment to honor and respect the authorities of each state." New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 0f 66. For ease of reading, this Declaration shall refer to "Dot Registry" as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was "to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of "registered corporations," "registered limited liability companies," and/or "registered limited liability partnerships." Under Dot Registry's proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11.With each of its community applications, Dot Registry deposited an additional $22,000, so as to be given the opportunity to participate in a Community Priority Evaluation ("CPE"). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as "the business information arm of the Economist Group, publisher of the Economist." "The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis." Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented)." Applicant Guidebook ("AGB"), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of EIU Contact Information Redacted EIU Contact Information Redacted of the EIU (hereinafter "EIU Contact Information Redacted Declaration"), ¶¶ 1 and 4, at 1 and 2.

15. EIU Contact Information Redacted declared that EIU was "not a gTLD decision-maker but simply a consultant to ICANN." "The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process." EIU Contact Information Redacted Declaration, ¶3,

at 2. Further, ICANN confirmed at the hearing that ICANN "accepts" the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: "Staff briefed the BGC regarding Dot Registry, LLC's ('Requestor's') request seeking reconsideration of the Community Priority Evaluation ('CPE') Panel's Reports, and ICANN's acceptance of those Reports." (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 ("EIU SoW"). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

> "(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU's] determination and to issue a decision on that basis or not;
>
> (iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU's] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU's] obligations under this SoW;
>
> (iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance." EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines ("CPE Guidelines"). The CPE Guidelines were developed by the Economist Intelligence Unit ("EIU") under contract with ICANN. According to the EIU, "[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process." CPE Guidelines Prepared by the EIU, Version 2.0 ("CPE Guidelines"), at 2. In the CPE Guidelines, the EIU states that "the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process "respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance." Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;

b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;

c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;

d. The Panel failed to evaluate each of Dot Registry's applications independently;

e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;

f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

g. The failure in determining Nexus, led to a failure in determining "uniqueness:"

h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;

i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;

j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry's applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry's Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee ("BGC") issued its Determination that "[Dot Registry] has not stated grounds for reconsideration." The BGC's Determination was based on the failure of Dot Registry to show "that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports." Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party's substantive submissions and the IRP Panel's procedural orders are posted on the ICANN web site covering IRP Proceedings (https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.

2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.

3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

> 4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

> Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

> Resolution ("ICDR"), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC ("Dot Registry") no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit ("EIU") to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU's responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel's order to ICANN to produce documents was clarified as follows:

> The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN's possession, custody or control referring or describing:
>
> (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel's request (the engagement to perform Community Priority Evaluations).
> (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry's Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel's request (the work done and to be done by the EIU with

respect to the Determination). As well as the work-product itself in its various draft and final iterations.

(c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).

(d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC). 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2. 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a

confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;

ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the "Board," and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015. Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also,* Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties' stipulations that the term "local law" as used in Article 4 of ICANN's Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation's Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, "[t]he Panel designate[d] the place of these proceedings as New York, New York."

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of EIU Contact Information Redacted of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that 'these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
b) Added the requirement that the organization must have no other function but to represent the community;
c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express "consistent" support;

f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities "act" and "associated" as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the "members" have an awareness and recognition of their inclusion in the industry community.

51. While noting that 'research' supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee ("BGC") breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);

b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);

c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);

d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);

e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);

f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13.

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;

b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc, .llc,* and *.llp* and by treating Dot Registry's applications discriminatorily;

c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;

d) recommending that the Board issue a resolution confirming the foregoing;

e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and

f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶ 21, at 9, and ¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel's question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to "respect the principles of fairness, transparency and . . . non-discrimination." ICANN's Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California's business judgment rule applies to ICANN and "requires deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests of' the corporation, and 'exercised discretion clearly within the scope of its authority.'" Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN's Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are "relevant principles of international law and applicable international conventions" that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

> 123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.
>
> 124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As Vistaprint has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.
>
> 125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

> board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

> Mr. LeVee: ***
>
> . . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are "binding" or "non-binding." While this question is an interesting one, it is clear beyond cavil that this or any Panel's decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may "recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that "[t]he declarations of the IRP Panel . . . are final and have precedential value."

74. The ICDR Rules contains a provision that "[a]wards . . .shall be final and binding on the parties." ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant "AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION." AGB, Module 6, Section 6 (all caps as in original). Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been "adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies)."

83. Curiously, the BGC ignores Article IV, Section 1, entitled 'PURPOSE," which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: "In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . ." (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels "respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination." As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN's Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program." AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU's work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is "not a gTLD decision-maker, but simply a consultant to ICANN." "The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process."

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that "ICANN will be free in its complete discretion to decide whether or not to follow [EIU's] determination," that "ICANN will be solely responsible to applicants . . . for the decisions it decides to issue," and that "each decision must be issued by ICANN in its own name only."

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, *See*, documents produced to the Panel in response to the Panel's Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that "the Panel repeatedly relies on its 'research.' For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on '[r]esearch [that] showed that firms are typically organized around specific industries**,** locales, and other criteria not related to the entities structure as an .inc' and also that '[b]ased on the Panel's research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.'" "Thus, the Panel's 'research' was a key factor in its decision not to award at least four (but possibly more) points to the .inc Community Application. However, despite the significance of this 'research,' the Panel never cites any sources or gives any information about its substance or the methods or scope of the 'research.'" Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. "The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to 'cit[e] any sources or give[] any information about [] the substance or the methods or scope of the 'research.'" (Citations omitted.) "As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to 'perform independent

research, if deemed necessary to reach informed scoring decisions.'" (Citations omitted). "The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research." Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the "research" language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning "However . . ." contain no reference to any "research." See DR00229, 00262, and 00548.

98. The first references to the use of "research" comes from ICANN staff. "Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, 'based on the Panel's research we could not find any widespread evidence of LLCs from different sectors acting as a community.'" DR00468. "While I agree, I'd like to see some substantiation, something like . . . 'based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.'" DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning "However . . . ," "Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel's research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook."

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

> Panelist Donahey: So when you hear the word "ICANN" or see the word "ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN's board and its constituent bodies?
>
> Mr. LeVee: Including its staff, yes
>
> Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?
>
> [Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

> The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

> In performing its mission, the following core values should guide the decisions and actions of ICANN:
>
> ****
>
> 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
>
> 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
>
> 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
>
> 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

> 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

> These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

> The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

> In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website." Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that "[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

> Requests for [] independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
>
> > a. did the Board act without conflict of interest in taking its decision?
> >
> > b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
> >
> > c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

> Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?
>
> Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. *See, also,* ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board . . . ."

106. As discussed, *supra,* at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any "established policy or procedure" which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision "exercise[d] due diligence and care in having a reasonable amount of facts in front of them" and "exercise[d] independent judgment in taking the decision believed to be in the best interests of the company." Consequently, the Panel must consider whether, in the face of Dot Registry's Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

> Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequitability, nondiscriminatory treatment, or to the maximum extent open and transparent.
>
> Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to "focus" is whether the BGC "exercise[d] due diligence and care in having a reasonable amount of facts" in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to "research" it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally*, *supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

> In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, <u>including the transparency provisions of Article III</u>. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to "conduct whatever factual investigation is deemed appropriate" and to "request additional written submissions from the affected party, or from other parties." Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to "ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website." Bylaws, Art. IV, §2.11. The BGC is also empowered to "request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration]." Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that "consistency of approach in scoring applications will be of particular importance." *See, supra*, ¶ ¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry's allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry's Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its "due diligence" duty. Here the Panel considers whether the BGC complied with its "independent judgment" duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the "package" also included Dot Registry's Reconsideration Requests, setting out Dot Registry's views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135.The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the "board package" for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

> Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

> 2 *** I
> 3 will tell you that the Board Governance
> 4 Committee is aided by the Office of General
> 5 Counsel, which also consults with Board
> 6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests "on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party." Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that "Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.
13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.
3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?
10 MR. LEVEE: Yes.
11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.
17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that "After discussion and consideration of the Request[s]," the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that "the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously."

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel's routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC "exercise[d] due diligence and care in having a reasonable amount of facts in front of them" and "exercise[d] independent judgment in taking the decision." And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.\

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totaling $4,600.00 and the compensation and expenses for the Panelists totaling $461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC $235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party's request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel's jurisdiction will terminate.

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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

Mark Kantor

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

Mark Kantor

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration ("the Declaration"). In my view, Dot Registry LLC's ("Dot Registry") Community Priority Evaluation ("CPE") Applications to operate three generic top level domains ("gTLDs") (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry's Reconsideration Requests to the Board Governance Committee ("BGC") of the Internet Corporation for Assigned Names and Numbers ("ICANN"). Dot Registry's requests for relief before this Independent Review Proceeding ("IRP") Panel should have been rejected in their entirety.

2. I offer four preliminary observations:

3. ***First***, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry's underlying CPE Applications. The applications never had a chance of succeeding. The "communities" proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of "communities" under any definition. They certainly do not satisfy the standards set forth in ICANN's Applicant Guidebook ("AGB"), which require applicants to prove "awareness and recognition of [being] a community," in other words "more . . . cohesion than a mere commonality of interest,"[1] because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

> *[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a "community" with a bookstore, law firm, or children's daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*[2]

4. That foundational flaw in Dot Registry's underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, "Community Establishment," deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN's Articles of Incorporation ("Articles") or ICANN's Bylaws ("Bylaws") occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

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[1] AGB § 4.2.3 ("'Community' - Usage of the expression 'community' has evolved considerably from its Latin origin – '*communitas*' meaning 'fellowship' – while still implying more of cohesion than a mere commonality of interest. Notably, as 'community' is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.").

[2] ICANN's Response to Claimant Dot Registry LLC's Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.[3]

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to "conduct whatever factual investigation is deemed appropriate," Article IV.3.e to "request additional written submissions . . . from other parties," Article IV.8.11 or to "ask the ICANN staff for its views on the matter." As ICANN stated in the hearing of this case:

> *The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*[4]

Hence the BGC's approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN's Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit ("EIU"). ICANN has conceded that its staff members are subject to its Articles and Bylaws,[5] but ICANN clarified that staff conduct is not reviewable in an IRP,[6] and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.[7] The Declaration suggests that it "is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB."[8] The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.[9] Despite the Declaration's statement to the contrary,[10] I cannot

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[3] I have no quarrel with the Declaration insofar as it recognizes that this Panel should not "substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority." Declaration ¶ 153. However, I disagree with the Declaration's statement that "the Dissent's focus on whether Dot Registry should have succeeded in its action is entirely misplaced." Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry's underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant's Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 ("As Dot Registry considers it is the Panel's role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry's CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.").

[4] Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

[5] *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

[6] *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

[7] *See* ICANN's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN's Response to Claimant Dot Registry's Additional Submission dated 10 Aug. 2015, ¶ 9.

[8] Declaration ¶ 152. (Emphasis added.)

[9] *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

[10] *See* Declaration ¶ 152 ("There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach.").

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

> *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> a. *did the Board act without conflict of interest in taking its decision?*
> b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
>
> (Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"[11] the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."

9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."[12] This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

> *These core values are deliberately expressed in very general terms, so that*

[11] Declaration ¶ 151.

[12] *See* Declaration ¶¶ 149–50.

> *they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice,* ***situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible****. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.* (Emphasis added.)

Moreover, the cited provisions are in no way "compulsory." Article IV.2.11 states that "the [BCG] ***may*** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN]," and Article IV.2.14 provides that "The [BGC] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . . ." (Emphasis added.) Thus if the BGC chooses not to "ask the ICANN staff for its views on the matter," no such views become part of the "public written record." The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN's privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that "it is beyond doubt that the BGC obtained and relied upon information and views ***submitted*** by ICANN staff," not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any "balance among competing values" and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry's Reconsideration Requests. For example:

    - ICANN was "[p]reserving and enhancing [its] operational stability [and] reliability" by denying meritless Reconsideration Requests. **(Core Value 1)**

    - ICANN was "delegating coordination functions" to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**

    - ICANN was "[i]ntroducing and promoting competition in the registration of domain names" because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**

    - ICANN was "[a]cting with a speed that is responsive to the needs of the Internet" because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an "all or nothing" endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.[13] Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

    - Dot Registry submitted four fact witness statements[14] and a 96-page expert report to reargue the merits of its CPE Applications,[15] none of which were submitted with Dot Registry's Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN's Bylaws permitted Dot Registry to "submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation."

    - Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN's Supplementary Procedures that "initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font."[16]

    - Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel's warning that "submissions be focused, succinct, and not repeat matters already addressed."[17]

    - Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN's Bylaws directs IRP Panels to "conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible" and Article 4 of ICANN's Supplementary Procedures refers to in-person hearings as "extraordinary."[18]

    - Dot Registry introduced a fact witness to testify at the hearing[19] in plain violation of Article IV.3.12 of ICANN's Bylaws ("the hearing shall be limited to argument only"), paragraph 2 of the Panel's Procedural Order No. 11 ("There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence."), and paragraph 2 of the Panel's Procedural Order No. 12 (same).

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[13] *See, e.g.*, Dot Registry's Additional Submission dated 13 July 2015, ¶ 4.

[14] *See* Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

[15] *See* Expert Report of Michael A. Flynn dated 13 July 2015.

[16] *See* Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

[17] *See* Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

[18] *See* Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

[19] *See* Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."[20] In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.[21] Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.[22] A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."[23] A review of Dot Registry's three Reconsideration Requests

[20] Declaration ¶ 20.

[21] *See* Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20–21.

[22] *See* Declaration ¶¶ 98–100, 103–04, 122.

[23] Declaration ¶¶ 47–48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three "Reconsideration Request Forms," entitled "Detail of Board or Staff Action — Required Information," Dot Registry listed the alleged bases for reconsideration:

> *The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*[24]

15. As can be discerned from Dot Registry's own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry's Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged "unjustified discrimination (disparate treatment)."

16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry's formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words "discrimination," "discriminate," "discriminatory," "disparate," or "unequal." To the extent that my colleagues take the position that Dot Registry's discrimination argument was somehow "embedded" within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),[25] and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,[26] but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP[27] — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry's Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

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[24] *See* Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

[25] *See* Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

[26] *See* Reconsideration Request for Application 14-30 at 6–7; Reconsideration Request for Application 14-32 at 4–5; Reconsideration Request for Application 14-33 at 4–5.

[27] *See* Dot Registry's Additional Written Submission dated 17 July 2015, at 15–17; Dot Registry's Submission dated 12 Oct. 2015, at 27–30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking "research" that went into the CPE Reports.[28] The only references to "research" in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

> *Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.*[29] (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to "research" in a draft of what would eventually become the final CPE Reports in order to further "substantiate" the conclusion that INCs/LLCs/LLPs do not constitute "communities."[30] The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports "repeatedly relie[d]" upon research as a "key factor" without "cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the 'research.'"[31] My colleagues are troubled by what they view as ICANN's Board making "short shrift" of Dot Registry's position concerning the "research."[32] The BGC disposed of Dot Registry's argument as follows:

> *The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to "cit[e] any sources or give[] any information about [] the substance or the methods or scope of the 'research.'" As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to "perform independent research, if deemed necessary to reach informed scoring decisions.["] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor's argument does not support reconsideration.*[33]

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

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[28] Declaration ¶¶ 94–99, 106, 111, 115–22.

[29] Community Priority Evaluation Report for "INC" dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for "LLC" dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for "LLP" dated 11 June 2014, at 2, 3, 4.

[30] Declaration ¶¶ 96–99.

[31] Declaration ¶ 94 (quoting Dot Registry's Reconsideration Requests).

[32] Declaration ¶ 95.

[33] Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

"failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws."[34]

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN's transparency policies by citing "research" in the CPE Reports but failing to detail the nature of that "research." As noted above, however, this Panel's jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that "the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct."[35] In my opinion, my co-Panelists' conclusion that ICANN's Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the "cart before the horse" and fails on that basis alone.

21. Nor has the Declaration given proper consideration to the BGC's analysis (quoted in paragraph 18 above) or to ICANN's position as articulated in one of its written submissions to this Panel:

> *[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: "The panel may also perform independent research, if deemed necessary to reach informed scoring decisions."*
>
> *[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN's custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry's Reconsideration Requests).*[36]

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU's research, given the rather obvious absence of merit in Dot Registry's CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC's Determination on the Reconsideration Requests and ICANN's analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel's right — but not obligation — to perform

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[34] Declaration ¶ 122.

[35] ICANN's Response to Claimant Dot Registry LLC's Additional Submission dated 10 Aug. 2015, ¶ 10.

[36] *See* ICANN's Response to Claimant Dot Registry LLC's Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it "deem[s] necessary to reach [an] informed scoring decision." The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, "reverberate[] through [ICANN's] Articles and Bylaws,"[37] but it notably fails to cite any clause specifically requiring the disclosure of "research." There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to "police" any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry's applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to "research" had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to "research" from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for "Community Establishment." Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN's Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether "the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company."[38] It finds that "the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment."[39] Besides the text of the BGC's Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as "*pro forma*" and "routine boilerplate," the Declaration finds nothing to support the conclusion that the BGC did anything more than "rubber stamp" work supplied by ICANN staff.[40] The Declaration chastises ICANN for submitting "no witness statements or testimony" or documents to prove that its Board acted independently.[41] In response to an assertion from ICANN's counsel that the Board did not rely on staff recommendations, the Declaration retorts, "[That] is simply not credible."[42] Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented "no real evidence" that the BGC exercised independent judgment.[43]

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[37] *See* Declaration ¶¶ 117–21.

[38] Declaration ¶ 126.

[39] Declaration ¶¶ 127, 147.

[40] Declaration ¶¶ 126, 140, 147.

[41] Declaration ¶¶ 127, 147.

[42] Declaration ¶ 141.

[43] Declaration ¶¶ 126, 147, 150.

25. The Declaration[44] relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

> *The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.*
>
> . . .
>
> *The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.*

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."[45]

27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.[46] ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)[47] that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.[48] The Panel, nonetheless, deems ICANN's position "simply not credible."[49] Credibility determinations have no place in this IRP, especially in relation to counsel.[50] The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.

28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

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[44] *See* Declaration ¶¶ 128, 142, 149–50.

[45] Declaration ¶ 149.

[46] *See* Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

[47] *See* Procedural Order No. 6 dated 12 June 2015, ¶ 4.

[48] *See* Attestation of Elizabeth Le dated 17 June 2015.

[49] Declaration ¶ 151.

[50] Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. *See* Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel "shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them]." Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration's repeated references to the "silence in the evidentiary record"[51] make it clear that the Declaration viewed ICANN's failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant's case.[52] Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties' arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry's claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

> *In contrast to Vistaprint's claim that the BGC failed to perform its task properly and "turned a blind eye to the appointed Panel's lack of independence and impartiality", the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*[53]

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that "[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports."[54] The Declaration summarily dismisses those

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[51] Declaration ¶ 128.

[52] *See* Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

[53] *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

[54] *See* https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en.

minutes as "boilerplate" and "*pro forma*."[55] Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words "discussion and consideration." The words must mean what they say: ICANN's Board "discussed" and "considered" Dot Registry's Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN's Board Members had to "wrestle" with difficult issues raised by Dot Registry's Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a "close call." Dot Registry's CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry's weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it "infer[red]," para. 133; "presume[d]," para. 133; stated that "it would appear," para. 134; "consider[ed]," para. 137; found that since "[n]o ICANN staff or Board members presented a witness statement in this proceeding," and there is "no documentary evidence of such a hypothetical discussion," i.e., "oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests," . . . "no evidence at all exists ['apart from *pro forma* corporate minutes of the BGC meeting'] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff," para. 140; found that "[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff," para. 145; and concluded that "ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel's routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions," para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN's Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

[55] Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.[56] It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.[57]

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.[58] Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.[59] As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.[60] This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

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[56] Declaration ¶¶ 133, 135–37, 143, 148–50.

[57] Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

[58] *See* Hearing Transcript dated 29 Mar. 2016, at 211:17–24.

[59] *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

[60] *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State ("NASS"), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC's discretion in this regard can legitimately be affected by the patent lack of any kind of "community" among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members' independent interest in the possibility that their enforcement function would be facilitated if Dot Registry's applications were to be successful:

> *JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?*
>
> *MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar*

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.[61]

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board "give due consideration" to general issues of concern raised by the Claimant.[62] The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.

37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.[63] Since the Declaration, if it is to be given effect, has simply concluded that the BCG violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry's three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to "consider the IRP Panel declaration at the Board's next meeting," as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever "subsequent action on th[e] declaration[]"it deems necessary in light of the findings of the Declaration.[64] In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry's three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry's request that its three applications now be approved without further ado.

38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry's claims and named ICANN as the prevailing party. I respectfully dissent.

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[61] Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

[62] *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

[63] ICANN Bylaws, Article IV.3.11(d) ("The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP."); ICANN Bylaws, Article IV.3.21 ("Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.").

[64] ICANN Bylaws, Article IV.3.21.

29 July 2016

Charles N. Brower

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AA-50

Arbitration Act 1996

1996 CHAPTER 23

An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. [17th June 1996]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Annotations:

Extent Information

E1 This Act extends to England, Wales and Northern Ireland; for exceptions see s.108

Modifications etc. (not altering text)

C1 Act modified (11.11.1999) by 1999 c. 31, **s. 8(1)(2)** (with application as mentioned in s. 10(2)(3))

C2 Act excluded (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24** (with s. 81(2)); S.I. 1996/3146, art. 3 (with transitional provisions in art. 4, **Sch. 2**)
Act excluded (1.8.1998) by 1992 c. 52, **s. 212A(6)** (as inserted (1.8.1998) by 1998 c. 8, **s. 7**; S.I. 1998/1658, art. 2(1), **Sch. 1**
Act excluded (N.I.) (1.3.1999) by S.I. 1998/3162 (N.I. 21), **art. 89(6)**; S.R. 1999/81, **art. 3**
Act excluded (31.3.2002) by The Dairy Produce Quotas Regulations 2002 (S.I. 2002/457), regs. 2, 9(b), 10(1)(b)(4)(b), 11(2), 33(5)(b)(iii), **Sch. 1 para. 34**
Act excluded (31.3.2002) by The Dairy Produce Quotas (Wales) Regulations 2002 (S.I. 2002/897), regs. 2, 9(b), 10(1)(b)(4)(b), 11(2), 33(5)(b)(iii), **Sch. 1 para. 34**

C3 Power to apply conferred (11.9.1996 for certain purposes and otherwise 1.5.1998) by 1996 c. 53, **s. 108(6)**; S.I. 1996/2352, **art. 2(2)**; S. I. 1998/650, **art. 2**

C4 Act applied (E.) (4.7.2002) by Vehicular Access Across Common and Other Land (England) Regulations 2002 (S.I. 2002/1711), regs. 1, **12(3)(b)**

C5 Act applied (W.) (9.2.2004) by The Vehicular Access Across Common and Other Land (Wales) Regulations 2004 (S.I. 2004/248), regs. 1, **12(3)(b)**

C6 Act excluded (31.3.2005) by The Dairy Produce Quotas Regulations 2005 (S.I. 2005/465), regs. 10(2), 11, 12(3), 39(4), **Sch. 1 para. 34**

C7 Act excluded (W.) (31.3.2005) by The Dairy Produce Quotas (Wales) Regulations 2005 (S.I. 2005/537), regs. 10(2), 11, 12(3), 39(4), **Sch. 1 para. 34**

C8 Act applied (W.) (13.1.2006) by The Tir Cynnal (Wales) Regulations 2006 (S.I. 2006/41), **reg. 13(3)**

C9 Act applied (E.W.) (10.11.2008) by The Land Registration Rules 2003 (S.I. 2003/1417), rule 194A(4)(b) (as inserted by The Land Registration (Amendment) Rules 2008 (S.I. 2008/1919), rule 4(1), **Sch. 1 para. 61**)

C10 Act applied (E.W.) (10.11.2008) by The Land Registration Rules 2003 (S.I. 2003/1417), rule 194C(3)(b) (as inserted by The Land Registration (Amendment) Rules 2008 (S.I. 2008/1919), rule 4(1), **Sch. 1 para. 61**)

C11 Act: functions transferred (N.I.) (12.4.2010) by virtue of The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), art. 15(1), **Sch. 17 para. 13** (with arts. 28-31)

C12 Act applied (N.I.) (14.2.2016) by The Animal Feed (Hygiene, Sampling etc. and Enforcement) Regulations (Northern Ireland) 2016 (S.R. 2016/5), **reg. 28(7)**

C13 Act applied (E.W.) (10.8.2016) by The York Potash Harbour Facilities Order 2016 (S.I. 2016/772), **Sch. 10 para. 21(7)** (with arts. 35, 36)

C14 Act applied (20.5.2018) by The Motorcycles (Type-Approval) Regulations 2018 (S.I. 2018/235), **Sch. 1 para. 13(2)(a)** (with reg. 1(c), Sch. 1 paras. 16, 17)

C15 Act applied (20.5.2018) by The Agricultural and Forestry Vehicles (Type-Approval) Regulations 2018 (S.I. 2018/236), **Sch. 1 para. 13(2)(a)** (with reg. 1(c), Sch. 1 paras. 16, 17)

C16 Act applied (21.9.2018) by The Non-Road Mobile Machinery (Type-Approval and Emission of Gaseous and Particulate Pollutants) Regulations 2018 (S.I. 2018/764), **Sch. 1 para. 13(2)(a)** (with reg. 1(c))

PART I

ARBITRATION PURSUANT TO AN ARBITRATION AGREEMENT

Annotations:

Modifications etc. (not altering text)

C17 Pt. I excluded (E.W.) (1.11.1996) by 1996 c. 56, s. 336(4), 476(4), 582(4), **Sch. 40**, para. 4 (with s. 1(4))
Pt. I excluded (31.1.1997) by 1988 c. 8, **s. 6** (as substituted (31.1.1997) by 1996 c. 23, s. 107(1), **Sch. 3 para. 49**; S.I. 1996/3146, art. 3 (with art. 4, **Sch. 2**))
Pt. I excluded (N.I.) (1.3.1999) by S.I. 1998/3162 (N.I. 21), **art. 89(6)**; S.R. 1999/81, **art. 3**

C18 Pt. I (ss. 1-84) excluded (E.W.) by 1998 c. 14, **s. 16(9)** (which is in force: at 4.3.1999 for specified purposes by S.I. 1999/528, art. 2(a), **Sch.**; at 5.7.1999 for specified purposes by S.I. 1999/1958, art. 2(1)(b), Sch. 1 (with transitional provisions in **Sch. 12**, and as amended by S.I. 1999/3178, art. 3(20), **Sch. 20**); at 6.9.1999 for specified purposes by S.I. 1999/2422, art. 2(c), Sch. 1 (subject to transitional provisions in **Sch. 14**, and as amended by S.I. 1999/3178, art. 3(20), **Sch. 20**); at 5.10.1999 for specified purposes by S.I. 1999/2739, art. 2, Sch. 1 (subject to transitional provisions in **Sch. 2**); at 18.10.1999 for specified purposes by S.I. 1999/2860, art. 2(c), Sch. 1 (subject to transitional provisions in **Schs. 16-18**, and as amended by S.I. 1999/3178, art. 3(20), **Sch. 20**); 29.11.1999 for specified purposes by S.I. 1999/3178, art. 2(1), Sch. 1 (subject to transitional provisions in s. 5 and **Schs. 21-23**)

C19 Pt. I (ss. 1-84) excluded by S.I. 1998/1506 (N.I. 10), **art. 16(9)** (which is in force: at 10.3.1999 for specified purposes by S.R. 1999/102, art. 2(a), **Sch. Pt. I**; at 5.7.1999 for specified purposes by S.R. 1999/310, art. 2(1)(b), **Sch. 1**; at 6.9.1999 for specified purposes by S.R. 1999/371, art. 2(b), **Sch. 1**; at 5.10.1999 for specified purposes by S.R. 1999/407, art. 2(b), **Sch.**; at 18.10.1999 for specified purposes by S.R. 1999/428, art. 2(b), **Sch. 1**; at 29.11.1999 for specified purposes by S.R. 1999/472, art. 2(1), **Sch. 1**)

C20 Pt. I excluded (E.W.) (1.9.2000) by 1999 c. 14, **s. 9(4)**; S.I. 2000/2337, **art. 2(1)(e)**
Pt. I excluded (prosp.) by 1999 c. 14, **ss. 9(4)**, 14(2)
Pt. I excluded (N.I.) (22.11.2000 for specified purposes and otherwise 2.7.2001) by 2000 c. 4, ss. 59, 68, **Sch. 7 para. 10** (with s. 66(6)); S.R. 2000/358, art. 2, **Sch. Pt. II**; S.R. 2001/141, art 2(1)(c), **Sch.**
Pt. I excluded (E.W.) (2.7.2001) by 2000 c. 19, s. 68, **Sch. 7 para. 10(8)** (with s. 83(6)); S.I. 2001/1252, **art. 2(2)(a)(i)**

C21 Pt. I: specified provisions applied (with modifications) (N.I.) (28.4.2002) by Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2002 (S.R. 2002/120), **art. 3**, Sch.

C22 Pt. I excluded (22.2.2005 for specified purposes and otherwise 6.4.2005) by Pensions Appeal Tribunals Act 1943 (c. 39), **s. 6D(8)** (as inserted by Armed Forces (Pensions and Compensation) Act 2004 (c. 32), ss. 5, 8, **Sch. 1 para. 4**); S.I. 2005/356, art. 2, {Sch. 1, 2}

C23 Pt. I excluded (N.I.) (1.3.2005 for specified purposes and otherwise 1.4.2005) by Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)), **art. 44(4)**; S.R. 2005/44, **arts. 2**, **3**, Schs. 1, 2 (subject to arts. 4-13)

C24 Pt. I excluded (N.I.) (1.9.2005) by The Special Educational Needs and Disability (Northern Ireland) Order 2005 (S.I. 2005/1117 (N.I. 6)), **art. 23(5)** (with arts. 46, 47); S.R. 2005/336, **art. 2**, Sch.

C25 Pt. I excluded (N.I.) (1.9.2005) by The Education (Northern Ireland) Order 1996 (S.I. 1996/274 (N.I. 1)), art. 23(4) (as substituted by The Special Educational Needs and Disability (Northern Ireland) Order 2005 (S.I. 2005/1117 (N.I. 6)), **Sch. 5 para. 7(4)**; S.R. 2005/336, **art. 2**, Sch.)

C26 Pt. I: power to exclude or restrict conferred (19.9.2007) by virtue of Tribunals, Courts and Enforcement Act 2007 (c. 15), ss. 22, 148, **Sch. 5 para. 14**; S.I. 2007/2709, **art. 2(i)**

C27 Pt. I excluded (3.11.2008) by The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (S.I. 2008/2685), **rule 3(2)**

C28 Pt. I excluded (3.11.2008) by The Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (S.I. 2008/2686), **rule 3(2)**

C29 Pt. I excluded (3.11.2008) by The Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698), **rule 3(2)**

C30 Pt. I excluded (3.11.2008) by The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (S.I. 2008/2699), **rule 3(2)**

C31 Pt. I excluded (1.4.2009) by The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273), **rule 3(2)**

C32 Pt. I excluded (1.9.2009) by The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (S.I. 2009/1976), **rule 3(2)**

C33 Pt. I excluded (4.8.2010 for specified purposes and otherwise 1.10.2010) by Equality Act 2010 (c. 15), ss. 116(3), 216(3), **Sch. 17 para. 6(6)**; S.I. 2010/1736, art. 2, **Sch.**; S.I. 2010/1966, **art. 2**; S.I. 2010/2317, **art. 2(9)(k)(i)** (with art. 15)

C34 Pt. I excluded (1.7.2013) by The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013/1169), art. 1(1) **rule 4(2)** (with art. 2)

Introductory

1 General principles.

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this Part.

2 Scope of application of provisions.

(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) sections 9 to 11 (stay of legal proceedings, &c.), and

(b) section 66 (enforcement of arbitral awards).

(3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a) section 43 (securing the attendance of witnesses), and

(b) section 44 (court powers exercisable in support of arbitral proceedings);

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where—

(a) no seat of the arbitration has been designated or determined, and

(b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

(5) Section 7 (separability of arbitration agreement) and section 8 (death of a party) apply where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.

3 The seat of the arbitration.

In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated—

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

4 Mandatory and non-mandatory provisions.

(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.

5 Agreements to be in writing.

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

The arbitration agreement

6 Definition of arbitration agreement.

(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

7 Separability of arbitration agreement.

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be

regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

8 Whether agreement discharged by death of a party.

(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

Stay of legal proceedings

9 Stay of legal proceedings.

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

10 Reference of interpleader issue to arbitration.

(1) Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.

(2) Where subsection (1) applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

11 Retention of security where Admiralty proceedings stayed.

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those

proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order.

Commencement of arbitral proceedings

12 Power of court to extend time for beginning arbitral proceedings, &c.

(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step—

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied—

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.

(5) An order under this section does not affect the operation of the Limitation Acts (see section 13).

(6) The leave of the court is required for any appeal from a decision of the court under this section.

13 Application of Limitation Acts.

(1) The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.

(2) The court may order that in computing the time prescribed by the Limitation Acts for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter—

(a) of an award which the court orders to be set aside or declares to be of no effect, or

(b) of the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.

(3) In determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

(4) In this Part "the Limitation Acts" means—

(a) in England and Wales, the [M1]Limitation Act 1980, the [M2]Foreign Limitation Periods Act 1984 and any other enactment (whenever passed) relating to the limitation of actions;

(b) in Northern Ireland, the [M3]Limitation (Northern Ireland) Order 1989, the [M4]Foreign Limitation Periods (Northern Ireland) Order 1985 and any other enactment (whenever passed) relating to the limitation of actions.

Annotations:

Marginal Citations

M1 1980 c. 58.
M2 1984 c. 16.
M3 S.I. 1989/1339 (N.I. 11).
M4 S.I. 1985/754 (N.I. 5).

14 Commencement of arbitral proceedings.

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

Annotations:

Modifications etc. (not altering text)

C35 S. 14 applied (31.1.1997) by 1894 c. 60, **s. 496(5)** (as inserted by 1996 c. 23, s. 107(1), **Sch. 3 para. 1**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

The arbitral tribunal

15 The arbitral tribunal.

(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire.

(2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.

(3) If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.

16 Procedure for appointment of arbitrators.

(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(5) If the tribunal is to consist of three arbitrators—

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

(6) If the tribunal is to consist of two arbitrators and an umpire—

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

(7) In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure.

17 Power in case of default to appoint sole arbitrator.

(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given—

(a) make the required appointment, and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.

(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

18 Failure of appointment procedure.

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are—

(a) to give directions as to the making of any necessary appointments;

(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

19 Court to have regard to agreed qualifications.

In deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure), the court shall have due regard to any agreement of the parties as to the qualifications required of the arbitrators.

20 Chairman.

(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).

(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3).

21 Umpire.

(1) Where the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be, and in particular—

(a) whether he is to attend the proceedings, and

(b) when he is to replace the other arbitrators as the tribunal with power to make decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The umpire shall attend the proceedings and be supplied with the same documents and other materials as are supplied to the other arbitrators.

(4) Decisions, orders and awards shall be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration.

In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(5) If the arbitrators cannot agree but fail to give notice of that fact, or if any of them fails to join in the giving of notice, any party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court which may order that the umpire shall replace the other arbitrators as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

22 Decision-making where no chairman or umpire.

(1) Where the parties agree that there shall be two or more arbitrators with no chairman or umpire, the parties are free to agree how the tribunal is to make decisions, orders and awards.

(2) If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators.

23 Revocation of arbitrator's authority.

(1) The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) The authority of an arbitrator may not be revoked except—

(a) by the parties acting jointly, or

(b) by an arbitral or other institution or person vested by the parties with powers in that regard.

(4) Revocation of the authority of an arbitrator by the parties acting jointly must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.

(5) Nothing in this section affects the power of the court—

(a) to revoke an appointment under section 18 (powers exercisable in case of failure of appointment procedure), or

(b) to remove an arbitrator on the grounds specified in section 24.

24 Power of court to remove arbitrator.

(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed—

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C36 S. 24(1)(a)(c)(2)(3)(5)(6) applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 43(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C37 S. 24(1)(a)(c)(2)(3)(5)(6) applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 43** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C38 S. 24(1)(a)(c)(2)(3)(5)(6) applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 52EW**

C39 S. 24(1)(a)(c)(2)(3)(5)(6) applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 52EW** (with art. 6)

C40 S. 24(1)(a)(c)(2)(3)(5)(6) applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 43**

C41 S. 24(1)(a) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

C42 S. 24(1)(c) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

C43 S. 24(2) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

C44 S. 24(3) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

C45 S. 24(5) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

C46 S. 24(6) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 40**

25 Resignation of arbitrator.

(1) The parties are free to agree with an arbitrator as to the consequences of his resignation as regards—

(a) his entitlement (if any) to fees or expenses, and

(b) any liability thereby incurred by him.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court—

(a) to grant him relief from any liability thereby incurred by him, and

(b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

26 Death of arbitrator or person appointing him.

(1) The authority of an arbitrator is personal and ceases on his death.

(2) Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority.

27 Filling of vacancy, &c.

(1) Where an arbitrator ceases to hold office, the parties are free to agree—

(a) whether and if so how the vacancy is to be filled,

(b) whether and if so to what extent the previous proceedings should stand, and

(c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.

(4) The tribunal (when reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office.

(5) His ceasing to hold office does not affect any appointment by him (alone or jointly) of another arbitrator, in particular any appointment of a chairman or umpire.

28 Joint and several liability of parties to arbitrators for fees and expenses.

(1) The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.

(2) Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.

(3) If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment.

(4) The above provisions have effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(5) Nothing in this section affects any liability of a party to any other party to pay all or any of the costs of the arbitration (see sections 59 to 65) or any contractual right of an arbitrator to payment of his fees and expenses.

(6) In this section references to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

29 Immunity of arbitrator.

(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

Jurisdiction of the arbitral tribunal

30 Competence of tribunal to rule on its own jurisdiction.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31 Objection to substantive jurisdiction of tribunal.

(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

32 Determination of preliminary point of jurisdiction.

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

The arbitral proceedings

33 General duty of the tribunal.

(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

34 Procedural and evidential matters.

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include—

(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

35 Consolidation of proceedings and concurrent hearings.

(1) The parties are free to agree—

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

36 Legal or other representation.

Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

Annotations:

Modifications etc. (not altering text)

C47 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24**) (with s. 81(2)); S.I. 1996/3146, **art. 3**

C48 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)**(as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

37 Power to appoint experts, legal advisers or assessors.

(1) Unless otherwise agreed by the parties—

(a) the tribunal may—

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters,

and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

38 General powers exercisable by the tribunal.

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

Annotations:

Modifications etc. (not altering text)

C49 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C50 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49** (with S. 81(2)); S.I. 1996/3146, art. 3 (with art. 4, **Sch. 2**)

39 Power to make provisional awards.

(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

(2) This includes, for instance, making—

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.

This does not affect its powers under section 47 (awards on different issues, &c.).

Annotations:

Modifications etc. (not altering text)

C51 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C52 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49** (with s. 81(2)); S.I. 1996/3146, art. 3 (with art. 4, **Sch. 2**)

40 General duty of parties.

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes—

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

Annotations:

Modifications etc. (not altering text)

C53 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3**, para. 24) (with s. 81(2)); S. I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C54 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

41 Powers of tribunal in case of party's default.

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent,

the tribunal may make an award dismissing the claim.

(4) If without showing sufficient cause a party—

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,

the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

(7) If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following—

(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;

(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;

(c) proceed to an award on the basis of such materials as have been properly provided to it;

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

Annotations:

Modifications etc. (not altering text)

C55 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3**, para. 24) (with s. 81(2)); S. I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C56 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49** (with s. 81(2)); S.I. 1996/3146, art. 3 (with art. 4, **Sch. 2**)

Powers of court in relation to arbitral proceedings

42 Enforcement of peremptory orders of tribunal.

(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

(2) An application for an order under this section may be made—

(a) by the tribunal (upon notice to the parties),

(b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or

(c) where the parties have agreed that the powers of the court under this section shall be available.

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C57 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C58 S. 42 applied (with modifications)(E.W.)(1.5.1998) by S.I. 1998/649, art. 2, **Sch. Pt. I para.24**

C59 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)**(as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

43 Securing the attendance of witnesses.

(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if—

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.

Annotations:

Modifications etc. (not altering text)

C60 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3**, para. 24) (with s. 81(2)); S.I. 1996/3146 art. 3 (with art. 4, Sch. 2)

C61 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 49**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

44 Court powers exercisable in support of arbitral proceedings.

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C62 Power to apply conferred (31.1.1997) by 1966 c. 41, **s. 3** (as substituted by 1996 c. 23, s. 107(1), **Sch. 3 para. 24**) (with s. 81(2)); S.I. 1996/3146, **art. 3** (with art. 4, Sch. 2)

C63 Power to apply conferred (31.1.1997) by 1988 c. 8, **s. 6(1)** (as substituted by 1996 c. 23, **Sch. 3 para. 49**) (with s. 81(2)); S.I. 1996/3146, **art. 3**

45 Determination of preliminary point of law.

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

Annotations:

Modifications etc. (not altering text)

C64 S. 45 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 94(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C65 S. 45 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 93** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C66 S. 45 applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 110EW**

C67 S. 45 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 108EW** (with art. 6)

C68 S. 45 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 93**

C69 S. 45 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 89**

The award

46 Rules applicable to substance of dispute.

(1) The arbitral tribunal shall decide the dispute—

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Annotations:

Modifications etc. (not altering text)

C70 S. 46(1)(b) applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, **art. 4(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))
S. 46(1)(b) applied (with modifications) (N.I.) (28.4.2002) by Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2002 (S.R. 2002/120), **art. 4**

C71 S. 46(1)(b) applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), **art. 4** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C72 S. 46(1)(b) applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), **art. 5(1)**

C73 S. 46(1)(b) applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), **art. 5** (with art. 6)

C74 S. 46(1)(b) applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), **art. 4**

C75 S. 46(1)(b) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), arts. 1, **6**

47 Awards on different issues, &c.

(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2) The tribunal may, in particular, make an award relating—

(a) to an issue affecting the whole claim, or

(b) to a part only of the claims or cross-claims submitted to it for decision.

(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.

48 Remedies.

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court—

(a) to order a party to do or refrain from doing anything;

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document.

49 Interest.

(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.

50 Extension of time for making award.

(1) Where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.

(2) An application for an order under this section may be made—

(a) by the tribunal (upon notice to the parties), or

(b) by any party to the proceedings (upon notice to the tribunal and the other parties),

but only after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired.

(5) The leave of the court is required for any appeal from a decision of the court under this section.

51 Settlement.

(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

52 Form of award.

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.

53 Place where award treated as made.

Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

54 Date of award.

(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.

(2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.

55 Notification of award.

(1) The parties are free to agree on the requirements as to notification of the award to the parties.

(2) If there is no such agreement, the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.

(3) Nothing in this section affects section 56 (power to withhold award in case of non-payment).

56 Power to withhold award in case of non-payment.

(1) The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

(2) If the tribunal refuses on that ground to deliver an award, a party to the arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court, which may order that—

(a) the tribunal shall deliver the award on the payment into court by the applicant of the fees and expenses demanded, or such lesser amount as the court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as the court may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrators.

(4) No application to the court may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

(5) References in this section to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.

(6) The above provisions of this section also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the tribunal's award.

As they so apply, the references to the fees and expenses of the arbitrators shall be construed as including the fees and expenses of that institution or person.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

(8) Nothing in this section shall be construed as excluding an application under section 28 where payment has been made to the arbitrators in order to obtain the award.

57 Correction of award or additional award.

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award.

58 Effect of award.

(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

(2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Costs of the arbitration

59 Costs of the arbitration.

(1) References in this Part to the costs of the arbitration are to—

(a) the arbitrators' fees and expenses,

(b) the fees and expenses of any arbitral institution concerned, and

(c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).

60 Agreement to pay costs in any event.

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

61 Award of costs.

(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.

(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

62 Effect of agreement or award about costs.

Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.

63 The recoverable costs of the arbitration.

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.

If it does so, it shall specify—

(a) the basis on which it has acted, and

(b) the items of recoverable costs and the amount referable to each.

(4) If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may—

(a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or

(b) order that they shall be determined by such means and upon such terms as it may specify.

(5) Unless the tribunal or the court determines otherwise—

(a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and

(b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

(6) The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).

(7) Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses.

64 Recoverable fees and expenses of arbitrators.

(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)—

(a) determine the matter, or

(b) order that it be determined by such means and upon such terms as the court may specify.

(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

65 Power to limit recoverable costs.

(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

Powers of the court in relation to award

66 Enforcement of the award.

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the [M5]Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

Annotations:

Modifications etc. (not altering text)

C76 S. 66 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, **arts. 2**, 3 Sch. para. 159(1) (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C77 S. 66 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 111** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C78 S. 66 applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 183EW**

C79 S. 66 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 135EW** (with art. 6)

C80 S. 66 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 111**

C81 S. 66 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 108**

Marginal Citations

M5 1950 c. 27.

67 Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C82 S. 67 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 162(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C83 S. 67 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 113** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C84 S. 67 applied (with modifictaions) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 187EW**

C85 S. 67 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 138EW** (with art. 6)

C86 S. 67 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 113**

C87 S. 67 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 110**

68 Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C88 S. 68 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 163(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C89 S. 68 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 114** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C90 S. 68 applied (with modifictaions) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 194EW**

C91 S. 68 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 145EW** (with art. 6)

C92 S. 68 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 114**

C93 S. 68 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 111**

69 Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Annotations:

Modifications etc. (not altering text)

C94 S. 69 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 164(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C95 S. 69 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 115** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C96 S. 69 applied (with modifictaions) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 200EW**

C97 S. 69 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 151EW** (with art. 6)

C98 S. 69 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 115**

C99 S. 69 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 112**

70 Challenge or appeal: supplementary provisions.

(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is—

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.

Annotations:

Modifications etc. (not altering text)

C100 S. 70 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 165(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C101 S. 70 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 116** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C102 S. 70 applied (with modifictaions) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 205EW**

C103 S. 70 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 156EW** (with art. 6)

C104 S. 70 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 113**

C105 s. 70(3) modified (E.W.) (25.3.2002) by S.I. 2001/4015, Rule 29, **Sch. Rule 62**.9

71 Challenge or appeal: effect of order of court.

(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal's award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

Annotations:

Modifications etc. (not altering text)

C106 S. 71 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 167(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C107 S. 71 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 118** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C108 S. 71 applied (with modifictaions) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 212EW**

C109 S. 71 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 163EW** (with art. 6)

C110 S. 71 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 118**

C111 S. 71 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 115**

Miscellaneous

72 Saving for rights of person who takes no part in proceedings.

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.

(2) He also has the same right as a party to the arbitral proceedings to challenge an award —

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

73 Loss of right to object.

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

74 Immunity of arbitral institutions, &c.

(1) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.

(3) The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.

75 Charge to secure payment of solicitors' costs.

The powers of the court to make declarations and orders under section 73 of the [M6]Solicitors Act 1974 or Article 71H of the [M7]Solicitors (Northern Ireland) Order 1976 (power to charge property recovered in the proceedings with the payment of solicitors' costs) may be exercised in relation to arbitral proceedings as if those proceedings were proceedings in the court.

Annotations:

Marginal Citations

M6 1974 c. 47.

M7 S.I. 1976/582 (N.I. 12).

Supplementary

76 Service of notices, &c.

(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post—

(a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

(b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to giving or serving a notice or other document shall be construed accordingly.

77 Powers of court in relation to service of documents.

(1) This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement, is not reasonably practicable.

(2) Unless otherwise agreed by the parties, the court may make such order as it thinks fit—

(a) for service in such manner as the court may direct, or

(b) dispensing with service of the document.

(3) Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations:

Modifications etc. (not altering text)

C112 s. 77 applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 177(1)**

C113 S. 77 applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 128** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 8))

C114 S. 77 applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 223EW**

C115 S. 77 applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 174EW** (with art. 6)

C116 S. 77 applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. Para. 128**

C117 S. 77 applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 123**

78 Reckoning periods of time.

(1) The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement.

(2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.

(3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.

In relation to England and Wales or Northern Ireland, a "public holiday" means Christmas Day, Good Friday or a day which under the [M8]Banking and Financial Dealings Act 1971 is a bank holiday.

Annotations:

Modifications etc. (not altering text)

C118 S. 78(2)(3)(4)(5) applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 178(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C119 S. 78(2)(3)(4)(5) applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 129** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C120 S. 78(2)(3)(4)(5) applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 224EW**

C121 S. 78(2)(3)(4)(5) applied (with modifications) (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 175EW** (with art. 6)

C122 S. 78(2)(3)(4)(5) applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. Para. 129**

C123 S. 78(2)-(5) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 124**

Marginal Citations

M8 1971 c. 80.

79 Power of court to extend time limits relating to arbitral proceedings.

(1) Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.

This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.).

(2) An application for an order may be made—

(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or

(b) by the arbitral tribunal (upon notice to the parties).

(3) The court shall not exercise its power to extend a time limit unless it is satisfied—

(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and

(b) that a substantial injustice would otherwise be done.

(4) The court's power under this section may be exercised whether or not the time has already expired.

(5) An order under this section may be made on such terms as the court thinks fit.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

80 Notice and other requirements in connection with legal proceedings.

(1) References in this Part to an application, appeal or other step in relation to legal proceedings being taken "upon notice" to the other parties to the arbitral proceedings, or to the tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement.

(2) Rules of court shall be made—

(a) requiring such notice to be given as indicated by any provision of this Part, and

(b) as to the manner, form and content of any such notice.

(3) Subject to any provision made by rules of court, a requirement to give notice to the tribunal of legal proceedings shall be construed—

(a) if there is more than one arbitrator, as a requirement to give notice to each of them; and

(b) if the tribunal is not fully constituted, as a requirement to give notice to any arbitrator who has been appointed.

(4) References in this Part to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court.

(5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

(6) Provision may be made by rules of court amending the provisions of this Part—

(a) with respect to the time within which any application or appeal to the court must be made,

(b) so as to keep any provision made by this Part in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court, or

(c) so as to keep any provision made by this Part in relation to legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court.

(7) Nothing in this section affects the generality of the power to make rules of court.

Annotations:

Modifications etc. (not altering text)

C124 S. 80(1)(2)(4)(5)(6)(7) applied (with modifications) (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 171(1)** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C125 S. 80(1)(2)(4)(5)(6)(7) applied (with modifications) (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 122** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C126 S. 80(1)(2)(4)(5)(6)(7) applied (with modifications) (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 217EW**

C127 S. 80(1)(2)(4)(5)(6)(7) applied (with modifications) (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 122**

C128 S. 80(1)(2) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 119**

C129 S. 80(4)-(7) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 119**

81 Saving for certain matters governed by common law.

(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to—

(a) matters which are not capable of settlement by arbitration;

(b) the effect of an oral arbitration agreement; or

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.

Annotations:

Modifications etc. (not altering text)

C130 S. 81(1)(c)(2) applied (E.W.) (21.5.2001) by S.I. 2001/1185, arts. 2, 3, **Sch. para. 166** (which amending S.I. was revoked (6.4.2004) by S.I. 2004/753, **art. 3** (subject to art. 8))

C131 S. 81(1)(c)(2) applied (E.W.) (6.4.2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, **Sch. para. 117** (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C132 S. 81(1)(c)(2) applied (E.W.) (6.4.2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, **Sch. para. 209EW**

C133 S. 81(1)(c)(2) applied (E.W.) (1.10.2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, **Sch. para. 160EW** (with art. 6)

C134 S. 81(1)(c)(2) applied (N.I.) (21.5.2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S.R. 2006/206), arts. 2, 3, **Sch. para. 117**

C135 S. 81(1)(c) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 114**

C136 S. 81(2) applied (with modifications) (N.I.) (27.9.2012) by The Labour Relations Agency Arbitration Scheme Order (Northern Ireland) 2012 (S.R. 2012/301), art. 1, **Sch. para. 114**

82 Minor definitions.

(1) In this Part—

"arbitrator", unless the context otherwise requires, includes an umpire;

"available arbitral process", in relation to any matter, includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter;

"claimant", unless the context otherwise requires, includes a counterclaimant, and related expressions shall be construed accordingly;

"dispute" includes any difference;

"enactment" includes an enactment contained in Northern Ireland legislation;

"legal proceedings" means civil proceedings **[**F1 in England and Wales in the High Court or the county court or in Northern Ireland **]** in the High Court or a county court;

"peremptory order" means an order made under section 41(5) or made in exercise of any corresponding power conferred by the parties;

"premises" includes land, buildings, moveable structures, vehicles, vessels, aircraft and hovercraft;

"question of law" means—

(a) for a court in England and Wales, a question of the law of England and Wales, and

(b) for a court in Northern Ireland, a question of the law of Northern Ireland;

"substantive jurisdiction", in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement.

Annotations:

Amendments (Textual)

F1 Words in s. 82(1) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(1)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

83 Index of defined expressions: Part I.

In this Part the expressions listed below are defined or otherwise explained by the provisions indicated—

agreement, agree and agreed	section 5(1)
agreement in writing	section 5(2) to (5)
arbitration agreement	sections 6 and 5(1)
arbitrator	section 82(1)
available arbitral process	section 82(1)
claimant	section 82(1)
commencement (in relation to arbitral proceedings)	section 14
costs of the arbitration	section 59
the court	section 105
dispute	section 82(1)
enactment	section 82(1)
legal proceedings	section 82(1)

Limitation Acts	section 13(4)
notice (or other document)	section 76(6)
party—	
—in relation to an arbitration agreement	section 82(2)
—where section 106(2) or (3) applies	section 106(4)
peremptory order	section 82(1) (and see section 41(5))
premises	section 82(1)
question of law	section 82(1)
recoverable costs	sections 63 and 64
seat of the arbitration	section 3
serve and service (of notice or other document)	section 76(6)
substantive jurisdiction (in relation to an arbitral tribunal)	section 82(1) (and see section 30(1)(a) to (c))
upon notice (to the parties or the tribunal)	section 80
written and in writing	section 5(6)

84 Transitional provisions.

(1) The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.

(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order).

PART II

OTHER PROVISIONS RELATING TO ARBITRATION

Domestic arbitration agreements

PROSPECTIVE

85 Modification of Part I in relation to domestic arbitration agreement.

(1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is—

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(3) In subsection (2) "arbitration agreement" and "seat of the arbitration" have the same meaning as in Part I (see sections 3, 5(1) and 6).

PROSPECTIVE

86 Staying of legal proceedings.

(1) In section 9 (stay of legal proceedings), subsection (4) (stay unless the arbitration agreement is null and void, inoperative, or incapable of being performed) does not apply to a domestic arbitration agreement.

(2) On an application under that section in relation to a domestic arbitration agreement the court shall grant a stay unless satisfied—

(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or

(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement.

(3) The court may treat as a sufficient ground under subsection (2)(b) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration.

(4) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the legal proceedings are commenced.

PROSPECTIVE

87 Effectiveness of agreement to exclude court's jurisdiction.

(1) In the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court under—

(a) section 45 (determination of preliminary point of law), or

(b) section 69 (challenging the award: appeal on point of law),

is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made.

(2) For this purpose the commencement of the arbitral proceedings has the same meaning as in Part I (see section 14).

(3) For the purposes of this section the question whether an arbitration agreement is a domestic arbitration agreement shall be determined by reference to the facts at the time the agreement is entered into.

88 Power to repeal or amend sections 85 to 87.

(1) The Secretary of State may by order repeal or amend the provisions of sections 85 to 87.

(2) An order under this section may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate.

(3) An order under this section shall be made by statutory instrument and no such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

Consumer arbitration agreements

89 Application of unfair terms regulations to consumer arbitration agreements.

(1) The following sections extend the application of **[**F2Part 2 (unfair terms) of the Consumer Rights Act 2015**]** in relation to a term which constitutes an arbitration agreement.

For this purpose "arbitration agreement" means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).

[F3(2) In those sections "the Part" means Part 2 (unfair terms) of the Consumer Rights Act 2015.**]**

(3) Those sections apply whatever the law applicable to the arbitration agreement.

Annotations:

Amendments (Textual)

F2 Words in s. 89(1) substituted (1.10.2015) by Consumer Rights Act 2015 (c. 15), s. 100(5), **Sch. 4 para. 31(2)**; S.I. 2015/1630, art. 3(g) (with art. 6(1))

F3 S. 89(2) substituted (1.10.2015) by Consumer Rights Act 2015 (c. 15), s. 100(5), **Sch. 4 para. 31(3)**; S.I. 2015/1630, art. 3(g) (with art. 6(1))

[F4**90 Part applies where consumer is a legal person**

The Part applies where the consumer is a legal person as it applies where the consumer is an individual.**]**

Annotations:

Amendments (Textual)

F4 S. 90 substituted (1.10.2015) by Consumer Rights Act 2015 (c. 15), s. 100(5), **Sch. 4 para. 32**; S.I. 2015/1630, art. 3(g) (with art. 6(1))

91 Arbitration agreement unfair where modest amount sought.

(1) A term which constitutes an arbitration agreement is unfair for the purposes of the **[**[F5]Part**]** so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.

(2) Orders under this section may make different provision for different cases and for different purposes.

(3) The power to make orders under this section is exercisable—

(a) for England and Wales, by the Secretary of State with the concurrence of the Lord Chancellor,

(b) for Scotland, by the Secretary of State [F6]. . ., and

(c) for Northern Ireland, by the Department of Economic Development for Northern Ireland with the concurrence of the Lord Chancellor.

(4) Any such order for England and Wales or Scotland shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Any such order for Northern Ireland shall be a statutory rule for the purposes of the [M9]Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution, within the meaning of section 41(6) of the [M10]Interpretation Act (Northern Ireland) 1954.

Annotations:

Amendments (Textual)

F5 Word in s. 91(1) substituted (1.10.2015) by Consumer Rights Act 2015 (c. 15), s. 100(5), **Sch. 4 para. 33**; S.I. 2015/1630, art. 3(g) (with art. 6(1))

F6 Words in s. 91(3)(b) repealed (19.5.1999) by S.I. 1999/678, **art. 6**

Modifications etc. (not altering text)

C137 S. 91(3): functions of the Lord Advocate transferred (19.5.1999) to the Secretary of State by virtue of S.I. 1999/678, arts. 2(1), **Sch.** (with art. 7)

Commencement Information

I1 S. 91 wholly in force 31.1.1997: S. 91 not in force at Royal Assent see s. 109(1); S. 91 in force for certain purposes only at 17.12.1996 otherwise in force at 31.1.1997 by S.I.1996/3146, arts. 2, 3, **Sch. 1**;

Marginal Citations

M9 S.I. 1979/1573 (N.I. 12).

M10 1954 c. 33 (N.I.).

Small claims arbitration in the county court

92 Exclusion of Part I in relation to small claims arbitration in the county court.

Nothing in Part I of this Act applies to arbitration under section 64 of the [M11]County Courts Act 1984.

Annotations:

Marginal Citations

M11 1984 c. 28.

Appointment of judges as arbitrators

93 Appointment of judges as arbitrators.

(1) **[**F7An eligible High Court judge**]** or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement.

(2) **[**F8An eligible High Court judge**]** shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of business in the High Court and the Crown Court, he can be made available.

(3) An official referee shall not do so unless the Lord Chief Justice has informed him that, having regard to the state of official referees' business, he can be made available.

(4) The fees payable for the services of **[**F9an eligible High Court judge**]** or official referee as arbitrator or umpire shall be taken in the High Court.

[F10(4A) The Lord Chief Justice may nominate a senior judge (as defined in section 109(5) of the Constitutional Reform Act 2005) to exercise functions of the Lord Chief Justice under this section.**]**

(5) In this section—

"arbitration agreement" has the same meaning as in Part I; F11...

[F12"eligible High Court judge" means—

(a) a puisne judge of the High Court, or

(b) a person acting as a judge of the High Court under or by virtue of section 9(1) of the Senior Courts Act 1981;**]**

"official referee" means a person nominated under section 68(1)(a) of the M12**[**F13Senior Courts Act 1981**]**F13 to deal with official referees' business.

(6) The provisions of Part I of this Act apply to arbitration before a person appointed under this section with the modifications specified in Schedule 2.

Annotations:

Amendments (Textual)

F7 Words in s. 93(1) substituted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(a)**, 4(2)

F8 Words in s. 93(2) substituted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(a)**, 4(2)

F9 Words in s. 93(4) substituted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(b)**, 4(2)

F10 S. 93(4A) inserted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(c)**, 4(2)

F11 Word in s. 93(5) omitted (20.2.2019) by virtue of Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(d)(i)**, 4(2)

F12 Words in s. 93(5) inserted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(6)(d)(ii)**, 4(2)

F13 Words in s. 93(5) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59(5), 148(1), **Sch. 11 para. 1(2)**; S.I. 2009/1604, **art. 2(d)**

Marginal Citations

M12 1981 c. 54.

Statutory arbitrations

94 Application of Part I to statutory arbitrations.

(1) The provisions of Part I apply to every arbitration under an enactment (a "statutory arbitration"), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98.

(2) The provisions of Part I do not apply to a statutory arbitration if or to the extent that their application—

(a) is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised or recognised by it, or

(b) is excluded by any other enactment.

(3) In this section and the following provisions of this Part "enactment"—

(a) in England and Wales, includes an enactment contained in subordinate legislation within the meaning of the [M13]Interpretation Act 1978;

(b) in Northern Ireland, means a statutory provision within the meaning of section 1(f) of the [M14]Interpretation Act (Northern Ireland) 1954.

Annotations:

Modifications etc. (not altering text)

C138 S. 94 modified (W.) (15.2.2006) by The Valuation Tribunals (Wales) Regulations 2005 (S.I. 2005/3364), regs. 1(4), **42(2)**

Marginal Citations

M13 1978 c. 30.

M14 1954 c. 33 (N.I.).

95 General adaptation of provisions in relation to statutory arbitrations.

(1) The provisions of Part I apply to a statutory arbitration—

(a) as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement, and

(b) as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement.

(2) Every statutory arbitration shall be taken to have its seat in England and Wales or, as the case may be, in Northern Ireland.

96 Specific adaptations of provisions in relation to statutory arbitrations.

(1) The following provisions of Part I apply to a statutory arbitration with the following adaptations.

(2) In section 30(1) (competence of tribunal to rule on its own jurisdiction), the reference in paragraph (a) to whether there is a valid arbitration agreement shall be construed as a reference to whether the enactment applies to the dispute or difference in question.

(3) Section 35 (consolidation of proceedings and concurrent hearings) applies only so as to authorise the consolidation of proceedings, or concurrent hearings in proceedings, under the same enactment.

(4) Section 46 (rules applicable to substance of dispute) applies with the omission of subsection (1)(b) (determination in accordance with considerations agreed by parties).

97 Provisions excluded from applying to statutory arbitrations.

The following provisions of Part I do not apply in relation to a statutory arbitration—

(a) section 8 (whether agreement discharged by death of a party);

(b) section 12 (power of court to extend agreed time limits);

(c) sections 9(5), 10(2) and 71(4) (restrictions on effect of provision that award condition precedent to right to bring legal proceedings).

98 Power to make further provision by regulations.

(1) The Secretary of State may make provision by regulations for adapting or excluding any provision of Part I in relation to statutory arbitrations in general or statutory arbitrations of any particular description.

(2) The power is exercisable whether the enactment concerned is passed or made before or after the commencement of this Act.

(3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

PART III

RECOGNITION AND ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Enforcement of Geneva Convention awards

99 Continuation of Part II of the Arbitration Act 1950.

Part II of the [M15]Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.

Annotations:

Marginal Citations
M15 1950 c. 27.

Recognition and enforcement of New York Convention awards

100 New York Convention awards.

(1) In this Part a "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards—

(a) "arbitration agreement" means an arbitration agreement in writing, and

(b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

In this subsection "agreement in writing" and "seat of the arbitration" have the same meaning as in Part I.

(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.

(4) In this section "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

101 Recognition and enforcement of awards.

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

As to the meaning of "the court" see section 105.

(3) Where leave is so given, judgment may be entered in terms of the award.

102 Evidence to be produced by party seeking recognition or enforcement.

(1) A party seeking the recognition or enforcement of a New York Convention award must produce—

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

103 Refusal of recognition or enforcement.

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

104 Saving for other bases of recognition or enforcement.

Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.

PART IV

GENERAL PROVISIONS

105 Meaning of "the court": jurisdiction of High Court and county court.

(1) In this Act "the court" **[**F14 in relation to England and Wales means the High Court or the county court and in relation to Northern Ireland **]** means the High Court or a county court, subject to the following provisions.

(2) The Lord Chancellor may by order make provision—

[F15(za) allocating proceedings under this Act in England and Wales to the High Court or the county court;**]**

(a) allocating proceedings under this Act **[**F16 in Northern Ireland **]** to the High Court or to county courts; or

(b) specifying proceedings under this Act which may be commenced or taken only in the High Court or in **[**F17 the county court or (as the case may be) **]** a county court.

(3) The Lord Chancellor may by order make provision requiring proceedings of any specified description under this Act in relation to which a county court **[**F18 in Northern Ireland **]** has jurisdiction to be commenced or taken in one or more specified county courts.

Any jurisdiction so exercisable by a specified county court is exercisable throughout F19... Northern Ireland.

[F20(3A) The Lord Chancellor must consult the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland (as the case may be) before making an order under this section.

(3B) The Lord Chief Justice of England and Wales may nominate a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

(3C) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under this section—

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).**]**

F20(4) An order under this section—

(a) may differentiate between categories of proceedings by reference to such criteria as the Lord Chancellor sees fit to specify, and

(b) may make such incidental or transitional provision as the Lord Chancellor considers necessary or expedient.

(5) An order under this section for England and Wales shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) An order under this section for Northern Ireland shall be a statutory rule for the purposes of the M16Statutory Rules (Northern Ireland) Order 1979 which shall

be subject to **[**[F21]negative resolution (within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954)**]**.

Annotations:

Amendments (Textual)

F14 Words in s. 105(1) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(a)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F15 S. 105(2)(za) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(b)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F16 Words in s. 105(2)(a) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(c)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F17 Words in s. 105(2)(b) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(d)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F18 Words in s. 105(3) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(e)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F19 Words in s. 105(3) omitted (22.4.2014) by virtue of Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 9 para. 60(2)(f)**; S.I. 2014/954, art. 2(c) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

F20 S. 105(3A)-(3C) inserted (3.4.2006) by Constitutional Reform Act 2005 (c. 4), ss. 15(1), 148, **Sch. 4 para. 250**; S.I. 2006/1014, **art. 2(a)**, Sch. 1 para. 11(v)

F21 Words in s. 105(6) substituted (12.4.2010) by The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), art. 15(5), **Sch. 18 para. 50(2)** (with arts. 28-31)

Marginal Citations

M16 S.I. 1979/1573 (N.I. 12).

106 Crown application.

(1) Part I of this Act applies to any arbitration agreement to which Her Majesty, either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party.

(2) Where Her Majesty is party to an arbitration agreement otherwise than in right of the Crown, Her Majesty shall be represented for the purposes of any arbitral proceedings —

(a) where the agreement was entered into by Her Majesty in right of the Duchy of Lancaster, by the Chancellor of the Duchy or such person as he may appoint, and

(b) in any other case, by such person as Her Majesty may appoint in writing under the Royal Sign Manual.

(3) Where the Duke of Cornwall is party to an arbitration agreement, he shall be represented for the purposes of any arbitral proceedings by such person as he may appoint.

(4) References in Part I to a party or the parties to the arbitration agreement or to arbitral proceedings shall be construed, where subsection (2) or (3) applies, as references to the person representing Her Majesty or the Duke of Cornwall.

107 Consequential amendments and repeals.

(1) The enactments specified in Schedule 3 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

(2) The enactments specified in Schedule 4 are repealed to the extent specified.

Annotations:

Commencement Information

I2 S. 107 wholly in force 31.1.1997: S. 107 not in force at Royal Assent see s. 109(1); S. 107 in force for certain purposes at 17.12.1996 and otherwise in force at 31.1.1997 by S.I. 1996/3146, arts. 2, 3, **Sch. 1**

108 Extent.

(1) The provisions of this Act extend to England and Wales and, except as mentioned below, to Northern Ireland.

(2) The following provisions of Part II do not extend to Northern Ireland—

section 92 (exclusion of Part I in relation to small claims arbitration in the county court), and

section 93 and Schedule 2 (appointment of judges as arbitrators).

(3) Sections 89, 90 and 91 (consumer arbitration agreements) extend to Scotland and the provisions of Schedules 3 and 4 (consequential amendments and repeals) extend to Scotland so far as they relate to enactments which so extend, subject as follows.

(4) The repeal of the [M17]Arbitration Act 1975 extends only to England and Wales and Northern Ireland.

Annotations:

Marginal Citations

M17 1975 c. 3.

109 Commencement.

(1) The provisions of this Act come into force on such day as the Secretary of State may appoint by order made by statutory instrument, and different days may be appointed for different purposes.

(2) An order under subsection (1) may contain such transitional provisions as appear to the Secretary of State to be appropriate.

Annotations:

Subordinate Legislation Made

P1 S. 109 power partly exercised (16.12.1996): 17.12.1996 and 31.1.1997 appointed for specified provisions by S.I. 1996/3146, **arts. 2**, 3 (with transitional provisions in art. 4, Sch. 2)

110 Short title.

This Act may be cited as the Arbitration Act 1996.

SCHEDULES

SCHEDULE 1

Section 4(1).

MANDATORY PROVISIONS OF PART I

sections 9 to 11 (stay of legal proceedings);
section 12 (power of court to extend agreed time limits);
section 13 (application of Limitation Acts);
section 24 (power of court to remove arbitrator);
section 26(1) (effect of death of arbitrator);
section 28 (liability of parties for fees and expenses of arbitrators);
section 29 (immunity of arbitrator);
section 31 (objection to substantive jurisdiction of tribunal);
section 32 (determination of preliminary point of jurisdiction);
section 33 (general duty of tribunal);
section 37(2) (items to be treated as expenses of arbitrators);
section 40 (general duty of parties);
section 43 (securing the attendance of witnesses);
section 56 (power to withhold award in case of non-payment);
section 60 (effectiveness of agreement for payment of costs in any event);
section 66 (enforcement of award);
sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections;
section 72 (saving for rights of person who takes no part in proceedings);
section 73 (loss of right to object);
section 74 (immunity of arbitral institutions, &c.);
section 75 (charge to secure payment of solicitors' costs).

SCHEDULE 2

Section 93(6).

MODIFICATIONS OF PART I IN RELATION TO JUDGE-ARBITRATORS

Introductory

1 In this Schedule "judge-arbitrator" means **[**[F22]an eligible High Court judge**]** or official referee appointed as arbitrator or umpire under section 93.

Annotations:

Amendments (Textual)

F22 Words in Sch. 2 para. 1 substituted (20.2.2019) by Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 (c. 33), **ss. 1(7)**, 4(2)

General

2 (1) Subject to the following provisions of this Schedule, references in Part I to the court shall be construed in relation to a judge-arbitrator, or in relation to the appointment of a judge-arbitrator, as references to the Court of Appeal.

(2) The references in sections 32(6), 45(6) and 69(8) to the Court of Appeal shall in such a case be construed as references to the **[**[F23]Supreme Court**]**[F23].

Annotations:

Amendments (Textual)

F23 Words in Sch. 2 para. 2(2) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40(4), 148, **Sch. 9 para. 60**; S.I. 2009/1604, **art. 2(d)**

Arbitrator's fees

3 (1) The power of the court in section 28(2) to order consideration and adjustment of the liability of a party for the fees of an arbitrator may be exercised by a judge-arbitrator.

(2) Any such exercise of the power is subject to the powers of the Court of Appeal under sections 24(4) and 25(3)(b) (directions as to entitlement to fees or expenses in case of removal or resignation).

Exercise of court powers in support of arbitration

4 (1) Where the arbitral tribunal consists of or includes a judge-arbitrator the powers of the court under sections 42 to 44 (enforcement of peremptory orders, summoning witnesses, and other court powers) are exercisable by the High Court and also by the judge-arbitrator himself.

(2) Anything done by a judge-arbitrator in the exercise of those powers shall be regarded as done by him in his capacity as judge of the High Court and have effect as if done by that court.

Nothing in this sub-paragraph prejudices any power vested in him as arbitrator or umpire.

Extension of time for making award

5 (1) The power conferred by section 50 (extension of time for making award) is exercisable by the judge-arbitrator himself.

(2) Any appeal from a decision of a judge-arbitrator under that section lies to the Court of Appeal with the leave of that court.

Withholding award in case of non-payment

6 (1) The provisions of paragraph 7 apply in place of the provisions of section 56 (power to withhold award in the case of non-payment) in relation to the withholding of an award for non-payment of the fees and expenses of a judge-arbitrator.

(2) This does not affect the application of section 56 in relation to the delivery of such an award by an arbitral or other institution or person vested by the parties with powers in relation to the delivery of the award.

7 (1) A judge-arbitrator may refuse to deliver an award except upon payment of the fees and expenses mentioned in section 56(1).

(2) The judge-arbitrator may, on an application by a party to the arbitral proceedings, order that if he pays into the High Court the fees and expenses demanded, or such lesser amount as the judge-arbitrator may specify—

(a) the award shall be delivered,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as he may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of fees and expenses properly payable is the amount the applicant is liable to pay under section 28 or any agreement relating to the payment of the arbitrator.

(4) No application to the judge-arbitrator under this paragraph may be made where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded.

(5) Any appeal from a decision of a judge-arbitrator under this paragraph lies to the Court of Appeal with the leave of that court.

(6) Where a party to arbitral proceedings appeals under sub-paragraph (5), an arbitrator is entitled to appear and be heard.

Correction of award or additional award

8 Subsections (4) to (6) of section 57 (correction of award or additional award: time limit for application or exercise of power) do not apply to a judge-arbitrator.

Costs

9 Where the arbitral tribunal consists of or includes a judge-arbitrator the powers of the court under section 63(4) (determination of recoverable costs) shall be exercised by the High Court.

10 (1) The power of the court under section 64 to determine an arbitrator's reasonable fees and expenses may be exercised by a judge-arbitrator.

(2) Any such exercise of the power is subject to the powers of the Court of Appeal under sections 24(4) and 25(3)(b) (directions as to entitlement to fees or expenses in case of removal or resignation).

Enforcement of award

11 The leave of the court required by section 66 (enforcement of award) may in the case of an award of a judge-arbitrator be given by the judge-arbitrator himself.

Solicitors' costs

12 The powers of the court to make declarations and orders under the provisions applied by section 75 (power to charge property recovered in arbitral proceedings with the payment of solicitors' costs) may be exercised by the judge-arbitrator.

Powers of court in relation to service of documents

13 (1) The power of the court under section 77(2) (powers of court in relation to service of documents) is exercisable by the judge-arbitrator.

(2) Any appeal from a decision of a judge-arbitrator under that section lies to the Court of Appeal with the leave of that court.

Powers of court to extend time limits relating to arbitral proceedings

14 (1) The power conferred by section 79 (power of court to extend time limits relating to arbitral proceedings) is exercisable by the judge-arbitrator himself.

(2) Any appeal from a decision of a judge-arbitrator under that section lies to the Court of Appeal with the leave of that court.

SCHEDULE 3

Section 107(1).

CONSEQUENTIAL AMENDMENTS

Merchant Shipping Act 1894 (c.60)

1 In section 496 of the Merchant Shipping Act 1894 (provisions as to deposits by owners of goods), after subsection (4) insert—

"(5) In subsection (3) the expression "legal proceedings" includes arbitral proceedings and as respects England and Wales and Northern Ireland the provisions of section 14 of the Arbitration Act 1996 apply to determine when such proceedings are commenced.".

Stannaries Court (Abolition) Act 1896 (c.45)

2 In section 4(1) of the Stannaries Court (Abolition) Act 1896 (references of certain disputes to arbitration), for the words from "tried before" to "any such reference" substitute " referred to arbitration before himself or before an arbitrator agreed on by the parties or an officer of the court ".

Tithe Act 1936 (c.43)

3 **F24** . . . . . .

Annotations:

Amendments (Textual)

F24 Sch. 3 para. 3 repealed (22.7.2004) by Statute Law (Repeals) Act 2004 (c. 14), **s. 1(1)**, {Sch. 1 Pt. 6 Group 3}

Education Act 1944 (c.31)

F25 4 . . . . . .

Annotations:

Amendments (Textual)

F25 Sch. 3 para. 4 repealed (1.11.1996) by 1996 c. 56, ss. 582(2)(3), 583(2), Sch. 38 Pt. I, **Sch. 39** (with s. 1(4))

Commonwealth Telegraphs Act 1949 (c.39)

5 In section 8(2) of the Commonwealth Telegraphs Act 1949 (proceedings of referees under the Act) for "the Arbitration Acts 1889 to 1934, or the Arbitration Act (Northern Ireland) 1937," substitute " Part I of the Arbitration Act 1996 ".

Lands Tribunal Act 1949 (c.42)

6 F26 . . . . . .

Annotations:

Amendments (Textual)

F26 Sch. 3 para. 6 repealed (1.6.2009) by The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 (S.I. 2009/1307), art. 5(5), **Sch. 4** (with Sch. 5)

Wireless Telegraphy Act 1949 (c.54)

7 F27 . . . . . .

Annotations:

Amendments (Textual)

F27 Sch. 3 para. 7 repealed (25.7.2003) by Communications Act 2003 (c. 21), ss. 406, 411(2)(3), **Sch. 19(1)** (with Schs. 18, 19(1) Note 1); S.I. 2003/1900, **art. 2(1)**, Sch. 1 (with arts. 3-6)

Patents Act 1949 (c.87)

8 In section 67 of the Patents Act 1949 (proceedings as to infringement of pre-1978 patents referred to comptroller), for "The Arbitration Acts 1889 to 1934" substitute " Part I of the Arbitration Act 1996 ".

National Health Service (Amendment) Act 1949 (c.93)

9 In section 7(8) of the [M18]National Health Service (Amendment) Act 1949 (arbitration in relation to hardship arising from the National Health Service Act 1946 or the Act), for "the Arbitration Acts 1889 to 1934" substitute " Part I of the Arbitration Act 1996 " and for "the said Acts" substitute " Part I of that Act ".

Annotations:

Marginal Citations
M18 1946 c. 81.

Arbitration Act 1950 (c.27)

10 In section 36(1) of the Arbitration Act 1950 (effect of foreign awards enforceable under Part II of that Act) for "section 26 of this Act" substitute " section 66 of the Arbitration Act 1996 ".

Interpretation Act (Northern Ireland) 1954 (c.33 (N.I.))

11 In section 46(2) of the Interpretation Act (Northern Ireland) 1954 (miscellaneous definitions), for the definition of "arbitrator" substitute—

""arbitrator" has the same meaning as in Part I of the Arbitration Act 1996;".

Agricultural Marketing Act 1958 (c.47)

12 In section 12(1) of the Agricultural Marketing Act 1958 (application of provisions of Arbitration Act 1950)—

(a) for the words from the beginning to "shall apply" substitute " Sections 45 and 69 of the Arbitration Act 1996 (which relate to the determination by the court of questions of law) and section 66 of that Act (enforcement of awards) apply "; and

(b) for "an arbitration" substitute " arbitral proceedings ".

Carriage by Air Act 1961 (c.27)

13 (1) The Carriage by Air Act 1961 is amended as follows.

(2) In section 5(3) (time for bringing proceedings)—

(a) for "an arbitration" in the first place where it occurs substitute " arbitral proceedings "; and

(b) for the words from "and subsections (3) and (4)" to the end substitute " and the provisions of section 14 of the Arbitration Act 1996 apply to determine when such proceedings are commenced. ".

(3) In section 11(c) (application of section 5 to Scotland)—

(a) for "subsections (3) and (4)" substitute " the provisions of section 14 of the Arbitration Act 1996 "; and

(b) for "an arbitration" substitute " arbitral proceedings ".

Factories Act 1961 (c.34)

14 In the Factories Act 1961, for section 171 (application of Arbitration Act 1950), substitute—

"**171 Application of the Arbitration Act 1996.**

Part I of the Arbitration Act 1996 does not apply to proceedings under this Act except in so far as it may be applied by regulations made under this Act.".

Clergy Pensions Measure 1961 (No. 3)

15 In the Clergy Pensions Measure 1961, section 38(4) (determination of questions), for the words "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Transport Act 1962 (c.46)

16 (1) The Transport Act 1962 is amended as follows.

(2) In section 74(6)(f) (proceedings before referees in pension disputes), for the words "the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

(3) In section 81(7) (proceedings before referees in compensation disputes), for the words "the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

(4) In Schedule 7, Part IV (pensions), in paragraph 17(5) for the words "the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Corn Rents Act 1963 (c.14)

17 In the Corn Rents Act 1963, section 1(5) (schemes for apportioning corn rents, &c.), for the words "the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Plant Varieties and Seeds Act 1964 (c.14)

[F28]18 . . . . . .

Annotations:

Amendments (Textual)

F28 Sch. 3 para. 18 repealed (8.5.1998) by 1997 c. 66, s. 52, **Sch. 4**; S.I. 1998/1028, **art. 2**

Lands Tribunal and Compensation Act (Northern Ireland) 1964 (c.29 (N.I.))

19 In section 9 of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 (proceedings of Lands Tribunal), in subsection (3) (where Tribunal acts as arbitrator) for "the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Industrial and Provident Societies Act 1965 (c.12)

F29 20 . . . . . .

Annotations:

Amendments (Textual)

F29 Sch. 3 para. 20 repealed (1.8.2014) by Co-operative and Community Benefit Societies Act 2014 (c. 14), s. 154, **Sch. 7** (with Sch. 5)

Carriage of Goods by Road Act 1965 (c.37)

21 In section 7(2) of the Carriage of Goods by Road Act 1965 (arbitrations: time at which deemed to commence), for paragraphs (a) and (b) substitute—

"(a) as respects England and Wales and Northern Ireland, the provisions of section 14(3) to (5) of the Arbitration Act 1996 (which determine the time at which an arbitration is commenced) apply;".

Factories Act (Northern Ireland) 1965 (c.20 (N.I.))

22 In section 171 of the Factories Act (Northern Ireland) 1965 (application of Arbitration Act), for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Commonwealth Secretariat Act 1966 (c.10)

23 F30 . . . . . .

Annotations:

Amendments (Textual)

F30 Sch. 3 para. 23 omitted (7.6.2005) by virtue of International Organisations Act 2005 (c. 20), **ss. 1(2)**, 11(with s. 1(3)); S.I. 2005/1870, **art. 2** and said provision repealed (prosp.) by International Organisations Act 2005 (c. 20), s. 9, **Sch.**

Arbitration (International Investment Disputes) Act 1966 (c.41)

24 In the Arbitration (International Investment Disputes) Act 1966, for section 3 (application of Arbitration Act 1950 and other enactments) substitute—

"**3 Application of provisions of Arbitration Act 1996.**

(1) The Lord Chancellor may by order direct that any of the provisions contained in sections 36 and 38 to 44 of the Arbitration Act 1996 (provisions concerning the conduct of arbitral proceedings, &c.) shall apply to such proceedings pursuant to the Convention as are specified in the order with or without any modifications or exceptions specified in the order.

(2) Subject to subsection (1), the Arbitration Act 1996 shall not apply to proceedings pursuant to the Convention, but this subsection shall not be

taken as affecting section 9 of that Act (stay of legal proceedings in respect of matter subject to arbitration).

(3) An order made under this section—

(a) may be varied or revoked by a subsequent order so made, and

(b) shall be contained in a statutory instrument.".

Poultry Improvement Act (Northern Ireland) 1968 (c.12 (N.I.))

25 In paragraph 10(4) of the Schedule to the Poultry Improvement Act (Northern Ireland) 1968 (reference of disputes), for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Industrial and Provident Societies Act (Northern Ireland) 1969 (c.24 (N.I.))

26 (1) Section 69 of the Industrial and Provident Societies Act (Northern Ireland) 1969 (decision of disputes) is amended as follows.

(2) In subsection (7) (decision of disputes)—

(a) in the opening words, omit the words from "and without prejudice" to "1937";

(b) at the beginning of paragraph (a) insert " without prejudice to any powers exercisable by virtue of Part I of the Arbitration Act 1996, "; and

(c) in paragraph (b) omit "the registrar or" and "registrar or" and for the words from "as might have been granted by the High Court" to the end substitute " as might be granted by the registrar ".

(3) For subsection (8) substitute—

"(8) The court or registrar to whom any dispute is referred under subsections (2) to (6) may at the request of either party state a case on any question of law arising in the dispute for the opinion of the High Court.".

Health and Personal Social Services (Northern Ireland) Order 1972 (N.I.14)

27 In Article 105(6) of the Health and Personal Social Services (Northern Ireland) Order 1972 (arbitrations under the Order), for "the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Consumer Credit Act 1974 (c.39)

28 (1) Section 146 of the Consumer Credit Act 1974 is amended as follows.

(2) In subsection (2) (solicitor engaged in contentious business), for "section 86(1) of the Solicitors Act 1957" substitute " section 87(1) of the Solicitors Act 1974 ".

(3) In subsection (4) (solicitor in Northern Ireland engaged in contentious business), for the words from "business done" to "Administration of Estates (Northern Ireland) Order 1979" substitute " contentious business (as defined in Article 3(2) of the Solicitors (Northern Ireland) Order 1976. ".

Friendly Societies Act 1974 (c.46)

29 (1) The Friendly Societies Act 1974 is amended as follows.

(2) For section 78(1) (statement of case) substitute—

"(1) Any arbitrator, arbiter or umpire to whom a dispute falling within section 76 above is referred under the rules of a registered society or branch may at the request of either party state a case on any question of law arising in the dispute for the opinion of the High Court or, as the case may be, the Court of Session.".

(3) In section 83(3) (procedure on objections to amalgamations &c. of friendly societies), for "the Arbitration Act 1950 or, in Northern Ireland, the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Industry Act 1975 (c.68)

30 In Schedule 3 to the Industry Act (arbitration of disputes relating to vesting and compensation orders), in paragraph 14 (application of certain provisions of Arbitration Acts)—

(a) for "the Arbitration Act 1950 or, in Northern Ireland, the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ", and

(b) for "that Act" substitute " that Part ".

Industrial Relations (Northern Ireland) Order 1976 (N.I.16)

F31 31 . . . . . .

Annotations:

Amendments (Textual)

F31 Sch. 3 para. 31 repealed (24.9.1996) by S.I. 1996/1921 (N.I. 18), art. 28, **Sch. 3**

Aircraft and Shipbuilding Industries Act 1977 (c.3)

F32 32 . . . . . .

Annotations:

Amendments (Textual)

F32 Sch. 3 para. 32 repealed (22.3.2013) by The Public Bodies (Abolition of the Aircraft and Shipbuilding Industries Arbitration Tribunal) Order 2013 (S.I. 2013/686), art. 1(2), **Sch. 1 para. 7**

Patents Act 1977 (c.37)

33 In section 130 of the Patents Act 1977 (interpretation), in subsection (8) (exclusion of Arbitration Act) for "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Judicature (Northern Ireland) Act 1978 (c.23)

34 (1) The Judicature (Northern Ireland) Act 1978 is amended as follows.

(2) In section 35(2) (restrictions on appeals to the Court of Appeal), after paragraph (f) insert—

"(fa) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part;".

(3) In section 55(2) (rules of court) after paragraph (c) insert—

"(cc) providing for any prescribed part of the jurisdiction of the High Court in relation to the trial of any action involving matters of account to be exercised in the prescribed manner by a person agreed by the parties and for the remuneration of any such person;".

Health and Safety at Work (Northern Ireland) Order 1978 (N.I.9)

35 In Schedule 4 to the Health and Safety at Work (Northern Ireland) Order 1978 (licensing provisions), in paragraph 3, for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

County Courts (Northern Ireland) Order 1980 (N.I.3)

36 (1) The County Courts (Northern Ireland) Order 1980 is amended as follows.

(2) In Article 30 (civil jurisdiction exercisable by district judge)—

(a) for paragraph (2) substitute—

"(2) Any order, decision or determination made by a district judge under this Article (other than one made in dealing with a claim by way of arbitration under paragraph (3)) shall be embodied in a decree which for all purposes (including the right of appeal under Part VI) shall have the like effect as a decree pronounced by a county court judge.";

(b) for paragraphs (4) and (5) substitute—

"(4) Where in any action to which paragraph (1) applies the claim is dealt with by way of arbitration under paragraph (3)—

(a) any award made by the district judge in dealing with the claim shall be embodied in a decree which for all purposes (except the right of appeal under Part VI) shall have the like effect as a decree pronounced by a county court judge;

(b) the district judge may, and shall if so required by the High Court, state for the determination of the High Court any question of law arising out of an award so made;

(c) except as provided by sub-paragraph (b), any award so made shall be final; and

(d) except as otherwise provided by county court rules, no costs shall be awarded in connection with the action.

(5) Subject to paragraph (4), county court rules may—

(a) apply any of the provisions of Part I of the Arbitration Act 1996 to arbitrations under paragraph (3) with such modifications as may be prescribed;

(b) prescribe the rules of evidence to be followed on any arbitration under paragraph (3) and, in particular, make

provision with respect to the manner of taking and questioning evidence.

(5A) Except as provided by virtue of paragraph (5)(a), Part I of the Arbitration Act 1996 shall not apply to an arbitration under paragraph (3).".

(3) After Article 61 insert—

" Appeals from decisions under Part I of Arbitration Act 1996

61A (1) Article 61 does not apply to a decision of a county court judge made in the exercise of the jurisdiction conferred by Part I of the Arbitration Act 1996.

(2) Any party dissatisfied with a decision of the county court made in the exercise of the jurisdiction conferred by any of the following provisions of Part I of the Arbitration Act 1996, namely—

(a) section 32 (question as to substantive jurisdiction of arbitral tribunal);

(b) section 45 (question of law arising in course of arbitral proceedings);

(c) section 67 (challenging award of arbitral tribunal: substantive jurisdiction);

(d) section 68 (challenging award of arbitral tribunal: serious irregularity);

(e) section 69 (appeal on point of law),

may, subject to the provisions of that Part, appeal from that decision to the Court of Appeal.

(3) Any party dissatisfied with any decision of a county court made in the exercise of the jurisdiction conferred by any other provision of Part I of the Arbitration Act 1996 may, subject to the provisions of that Part, appeal from that decision to the High Court.

(4) The decision of the Court of Appeal on an appeal under paragraph (2) shall be final.".

Annotations:

Commencement Information

I3 Sch. 3 para. 36 wholly in force 31.1.1997: Sch. 3 para. 36 not in force at Royal Assent see s. 109(1); Sch. 3 para. 36 in force for certain purposes only at 17.12.1996 othererwise in force at 31.1.1997 by S.I. 1996/3146, arts. 2, 3, **Sch. 1**

Supreme Court Act 1981 (c.54)

37 (1) The Supreme Court Act 1981 is amended as follows.

(2) In section 18(1) (restrictions on appeals to the Court of Appeal), for paragraph (g) substitute—

"(g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part;".

(3) In section 151 (interpretation, &c.), in the definition of "arbitration agreement", for "the Arbitration Act 1950 by virtue of section 32 of that Act;" substitute " Part I of the Arbitration Act 1996; ".

Merchant Shipping (Liner Conferences) Act 1982 (c.37)

38 In section 7(5) of the Merchant Shipping (Liner Conferences) Act 1982 (stay of legal proceedings), for the words from "section 4(1)" to the end substitute " section 9 of the Arbitration Act 1996 (which also provides for the staying of legal proceedings). ".

Agricultural Marketing (Northern Ireland) Order 1982 (N.I.12)

39 In Article 14 of the Agricultural Marketing (Northern Ireland) Order 1982 (application of provisions of Arbitration Act (Northern Ireland) 1937)—

(a) for the words from the beginning to "shall apply" substitute " Section 45 and 69 of the Arbitration Act 1996 (which relate to the determination by the court of questions of law) and section 66 of that Act (enforcement of awards) " apply; and

(b) for "an arbitration" substitute " arbitral proceedings ".

Mental Health Act 1983 (c.20)

40 In section 78 of the Mental Health Act 1983 (procedure of Mental Health Review Tribunals), in subsection (9) for "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Registered Homes Act 1984 (c.23)

[F33 41 In section 43 of the Registered Homes Act 1984 (procedure of Registered Homes Tribunals), in subsection (3) for "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".**]**

Annotations:

Amendments (Textual)

F33 Sch. 3 para. 41 repealed (1.4.2002 for E.W.) by 2000 c. 14, ss. 117(2), 122, Sch. 6; S.I. 2001/4150, art. 3(3)(c)(xi) (subject to art. 4 and to S.I. 2002/1493, art. 4) (as amended by S.I. 2002/1493, art. 6); S.I. 2002/920, **art. 3(3)(g)(ix)** (subject to art. 3(4)(5), Schs. 1-3 and with art. 3(6)-(10))

Housing Act 1985 (c.68)

42 In section 47(3) of the Housing Act 1985 (agreement as to determination of matters relating to service charges) for "section 32 of the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Landlord and Tenant Act 1985 (c.70)

F34 43 . . . . . .

Annotations:

Amendments (Textual)

F34 Sch. 3 para. 43 repealed (1.9.1997) by 1996 c. 52, s. 227, **Sch. 19**, Pt. III; S.I. 1997/1851, **art. 1**, 2

Credit Unions (Northern Ireland) Order 1985 (N.I.12)

44 (1) Article 72 of the Credit Unions (Northern Ireland) Order 1985 (decision of disputes) is amended as follows.

(2) In paragraph (7)—

(a) in the opening words, omit the words from "and without prejudice" to "1937";

(b) at the beginning of sub-paragraph (a) insert " without prejudice to any powers exercisable by virtue of Part I of the Arbitration Act 1996, "; and

(c) in sub-paragraph (b) omit "the registrar or" and "registrar or" and for the words from "as might have been granted by the High Court" to the end substitute " as might be granted by the registrar ".

(3) For paragraph (8) substitute—

"(8) The court or registrar to whom any dispute is referred under paragraphs (2) to (6) may at the request of either party state a case on any question of law arising in the dispute for the opinion of the High Court.".

Agricultural Holdings Act 1986 (c.5)

45 **F35** . . . . . .

Annotations:

Amendments (Textual)

F35 Sch. 3 para. 45 repealed (19.10.2006) by The Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 (S.I. 2006/2805), arts. 1(1), 18, **Sch. 2** (with art. 10)

Insolvency Act 1986 (c.45)

46 In the Insolvency Act 1986, after section 349 insert—

"**349A Arbitration agreements to which bankrupt is party.**

(1) This section applies where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.

(2) If the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.

(3) If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings—

(a) the trustee with the consent of the creditors' committee, or

(b) any other party to the agreement,

may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.

(4) In this section—

"arbitration agreement" has the same meaning as in Part I of the Arbitration Act 1996; and

"the court" means the court which has jurisdiction in the bankruptcy proceedings.".

Building Societies Act 1986 (c.53)

47 In Part II of Schedule 14 to the Building Societies Act 1986 (settlement of disputes: arbitration), in paragraph 5(6) for "the Arbitration Act 1950 and the Arbitration Act 1979 or, in Northern Ireland, the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Mental Health (Northern Ireland) Order 1986 (N.I.4)

48 In Article 83 of the Mental Health (Northern Ireland) Order 1986 (procedure of Mental Health Review Tribunal), in paragraph (8) for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Multilateral Investment Guarantee Agency Act 1988 (c.8)

49 For section 6 of the Multilateral Investment Guarantee Agency Act 1988 (application of Arbitration Act) substitute—

"**6 Application of Arbitration Act.**

(1) The Lord Chancellor may by order made by statutory instrument direct that any of the provisions of sections 36 and 38 to 44 of the Arbitration Act 1996 (provisions in relation to the conduct of the arbitral proceedings, &c.) apply, with such modifications or exceptions as are specified in the order, to such arbitration proceedings pursuant to Annex II to the Convention as are specified in the order.

(2) Except as provided by an order under subsection (1) above, no provision of Part I of the Arbitration Act 1996 other than section 9 (stay of legal proceedings) applies to any such proceedings.".

Copyright, Designs and Patents Act 1988 (c.48)

50 In section 150 of the Copyright, Designs and Patents Act 1988 (Lord Chancellor's power to make rules for Copyright Tribunal), for subsection (2) substitute—

"(2) The rules may apply in relation to the Tribunal, as respects proceedings in England and Wales or Northern Ireland, any of the provisions of Part I of the Arbitration Act 1996.".

Fair Employment (Northern Ireland) Act 1989 (c.32)

F36 51 . . . . . .

Annotations:

Amendments (Textual)

F36 Sch. 3 para. 51 repealed (1.3.1999) by S.I. 1998/3162, art. 105(4), **Sch. 5**; S.R. 1999/81, **art. 3**

Limitation (Northern Ireland) Order 1989 (N.I.11)

52 In Article 2(2) of the Limitation (Northern Ireland) Order 1989 (interpretation), in the definition of "arbitration agreement", for "the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Insolvency (Northern Ireland) Order 1989 (N.I.19)

53 In the Insolvency (Northern Ireland) Order 1989, after Article 320 insert—

" Arbitration agreements to which bankrupt is party.

320A (1) This Article applies where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.

(2) If the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract.

(3) If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings—

(a) the trustee with the consent of the creditors' committee, or

(b) any other party to the agreement,

may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.

(4) In this Article—

"arbitration agreement" has the same meaning as in Part I of the Arbitration Act 1996; and

"the court" means the court which has jurisdiction in the bankruptcy proceedings.".

Social Security Administration Act 1992 (c.5)

54 In section 59 of the Social Security Administration Act 1992 (procedure for inquiries, &c.), in subsection (7), for "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Social Security Administration (Northern Ireland) Act 1992 (c.8)

[F37]55 . . . . . .

Annotations:

Amendments (Textual)

F37 Sch. 3 para. 55 repealed (29.11.1999) by S.I. 1998/1506, art. 78(2), **Sch. 7**; S.R. 1999/472, art. 2(2)(1)(a), **Sch. I**

Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)

56 In sections 212(5) and 263(6) of the Trade Union and Labour Relations (Consolidation) Act 1992 (application of Arbitration Act) for "the Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Industrial Relations (Northern Ireland) Order 1992 (N.I.5)

57 In Articles 84(9) and 92(5) of the Industrial Relations (Northern Ireland) Order 1992 (application of Arbitration Act) for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Registered Homes (Northern Ireland) Order 1992 (N.I.20)

58 **[**[F38]In Article 33(3) of the Registered Homes (Northern Ireland) Order 1992 (procedure of Registered Homes Tribunal) for "The Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".[F38]**]**

Annotations:

Amendments (Textual)

F38 Sch. 3 para. 58 repealed (N.I.) (1.4.2005) by The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)), arts. 1, 50(2), **Sch. 5**; S.R. 2005/44, art. 3, **Sch. 1** (with arts. 4-13)

Education Act 1993 (c.35)

[F39]59 . . . . . .

Annotations:

Amendments (Textual)

F39 Sch. 3 para. 59 repealed (1.11.1996) by 1996 c. 56, ss. 582(2)(3), 583(2), Sch. 38 Pt. I, **Sch. 39** (with s. 1(4))

Roads (Northern Ireland) Order 1993 (N.I.15)

60 (1) The Roads (Northern Ireland) Order 1993 is amended as follows.

(2) In Article 131 (application of Arbitration Act) for "the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

(3) In Schedule 4 (disputes), in paragraph 3(2) for "the Arbitration Act (Northern Ireland) 1937" substitute " Part I of the Arbitration Act 1996 ".

Merchant Shipping Act 1995 (c.21)

61 In Part II of Schedule 6 to the Merchant Shipping Act 1995 (provisions having effect in connection with Convention Relating to the Carriage of Passengers and Their Luggage by Sea), for paragraph 7 substitute—

"7 Article 16 shall apply to arbitral proceedings as it applies to an action; and, as respects England and Wales and Northern Ireland, the provisions of section 14 of the Arbitration Act 1996 apply to determine for the purposes of that Article when an arbitration is commenced.".

[F40*Employment Tribunals Act 1996****]*** *(c.17)*

Annotations:

Amendments (Textual)

F40 Words in crossheading to Sch. 3 para. 62 substituted (E.W.S.) (1.8.1998) by virtue of 1998 c. 8, **s. 1(2)(c)** (with s. 16(2)); S.I. 1998/1658, art. 2(1), **Sch. 1**

62 In section 6(2) of **[**F41the Employment Tribunals Act 1996**]** (procedure of **[**F41employment tribunals**]**), for "The Arbitration Act 1950" substitute " Part I of the Arbitration Act 1996 ".

Annotations:

Amendments (Textual)

F41 Words in Sch. 3 para. 62 substituted (E.W.S.) (1.8.1998) by 1998 c. 8, **s. 1(2)(b)(c)** (with s. 16(2)); S.I. 1998/1658, art. 2(1), **Sch. 1**

SCHEDULE 4

Section 107(2).

REPEALS

Annotations:

Commencement Information

I4 Sch. 4 wholly in force 31.1.1997: Sch. 4 not in force at Royal Assent see s. 109(1); Sch. 4 in force for certain purposes only at 17.12.1996 otherwise in force at 31.1.1997 by S.I. 1996/3146, arts. 2, 3, **Sch. 1**

Chapter	Short title	Extent of repeal

1892 c. 43.	Military Lands Act 1892.	In section 21(b), the words "under the Arbitration Act 1889".
1922 c. 51.	Allotments Act 1922.	In section 21(3), the words "under the Arbitration Act 1889".
1937 c. 8 (N.I.).	Arbitration Act (Northern Ireland) 1937.	The whole Act.
1949 c. 54.	Wireless Telegraphy Act 1949.	In Schedule 2, paragraph 3(3).
1949 c. 97.	National Parks and Access to the Countryside Act 1949.	In section 18(4), the words from "Without prejudice" to "England or Wales".
1950 c. 27.	Arbitration Act 1950.	Part I. Section 42(3).
1958 c. 47.	Agricultural Marketing Act 1958.	Section 53(8).
1962 c. 46.	Transport Act 1962.	In Schedule 11, Part II, paragraph 7.
1964 c. 14.	Plant Varieties and Seeds Act 1964.	In section 10(4) the words from "or in section 9" to "three arbitrators)". Section 39(3)(b)(i).
1964 c. 29 (N.I.).	Lands Tribunal and Compensation Act (Northern Ireland) 1964.	In section 9(3) the words from "so, however, that" to the end.
1965 c. 12.	Industrial and Provident Societies Act 1965.	In section 60(8)(b), the words "by virtue of section 12 of the said Act of 1950".
1965 c. 37.	Carriage of Goods by Road Act 1965.	Section 7(2)(b).
1965 c. 13 (N.I.).	New Towns Act (Northern Ireland) 1965.	In section 27(2), the words from "under and in accordance with" to the end.
1969 c. 24 (N.I.).	Industrial and Provident Societies Act (Northern Ireland) 1969.	In section 69(7)— (a) in the opening words, the words from "and without prejudice" to "1937"; (b) in paragraph (b), the words "the registrar or" and "registrar or".
1970 c. 31.	Administration of Justice Act 1970.	Section 4. Schedule 3.
1973 c. 41.	Fair Trading Act 1973.	Section 33(2)(d).

1973 N.I. 1.	Drainage (Northern Ireland) Order 1973.	In Article 15(4), the words from "under and in accordance" to the end. Article 40(4). In Schedule 7, in paragraph 9(2), the words from "under and in accordance" to the end.
1974 c. 47.	Solicitors Act 1974.	In section 87(1), in the definition of "contentious business", the words "appointed under the Arbitration Act 1950".
1975 c. 3.	Arbitration Act 1975.	The whole Act.
1975 c. 74.	Petroleum and Submarine Pipe-Lines Act 1975.	In Part II of Schedule 2— (a) in model clause 40(2), the words "in accordance with the Arbitration Act 1950"; (b) in model clause 40(2B), the words "in accordance with the Arbitration Act (Northern Ireland) 1937". In Part II of Schedule 3, in model clause 38(2), the words "in accordance with the Arbitration Act 1950".
1976 N.I. 12.	Solicitors (Northern Ireland) Order 1976.	In Article 3(2), in the entry "contentious business", the words "appointed under the Arbitration Act (Northern Ireland) 1937". Article 71H(3).
1977 c. 37.	Patents Act 1977.	In section 52(4) the words "section 21 of the Arbitration Act 1950 or, as the case may be, section 22 of the Arbitration Act (Northern Ireland) 1937 (statement of cases by arbitrators); but". Section 131(e).
1977 c. 38.	Administration of Justice Act 1977.	Section 17(2).
1978 c. 23.	Judicature (Northern Ireland) Act 1978.	In section 35(2), paragraph (g)(v). In Schedule 5, the amendment to the Arbitration Act 1950.
1979 c. 42.	Arbitration Act 1979.	The whole Act.

1980 c. 58.	Limitation Act 1980.	Section 34.
1980 N.I. 3.	County Courts (Northern Ireland) Order 1980.	Article 31(3).
1981 c. 54.	Supreme Court Act 1981.	Section 148.
1982 c. 27.	Civil Jurisdiction and Judgments Act 1982.	Section 25(3)(c) and (5).
		In section 26— (a) in subsection (1), the words “to arbitration or”; (b) in subsection (1)(a)(i), the words “arbitration or”; (c) in subsection (2), the words “arbitration or”.
1982 c. 53.	Administration of Justice Act 1982.	Section 15(6). In Schedule 1, Part IV.
1984 c. 5.	Merchant Shipping Act 1984.	Section 4(8).
1984 c. 12.	Telecommunications Act 1984.	Schedule 2, paragraph 13(8).
1984 c. 16.	Foreign Limitation Periods Act 1984.	Section 5.
1984 c. 28.	County Courts Act 1984.	In Schedule 2, paragraph 70.
1985 c. 61.	Administration of Justice Act 1985.	Section 58. In Schedule 9, paragraph 15.
1985 c. 68.	Housing Act 1985.	In Schedule 18, in paragraph 6(2) the words from “and the Arbitration Act 1950” to the end.
1985 N.I. 12.	Credit Unions (Northern Ireland) Order 1985.	In Article 72(7)— (a) in the opening words, the words from “and without prejudice” to “1937”; (b) in sub-paragraph (b), the words “the registrar or” and “registrar or”.
1986 c. 45.	Insolvency Act 1986.	In Schedule 14, the entry relating to the Arbitration Act 1950.
1988 c. 8.	Multilateral Investment Guarantee Agency Act 1988.	Section 8(3).
1988 c. 21.	Consumer Arbitration Agreements Act 1988.	The whole Act.
1989 N.I. 11.	Limitation (Northern Ireland) Order 1989.	Article 72. In Schedule 3, paragraph 1.

1989 N.I. 19.	Insolvency (Northern Ireland) Order 1989.	In Part II of Schedule 9, paragraph 66.
1990 c. 41.	Courts and Legal Services Act 1990.	Sections 99 and 101 to 103.
1991 N.I. 7.	Food Safety (Northern Ireland) Order 1991.	In Articles 8(8) and 11(10), the words from “and the provisions” to the end.
1992 c. 40.	Friendly Societies Act 1992.	In Schedule 16, paragraph 30(1).
1995 c. 8.	Agricultural Tenancies Act 1995.	Section 28(4).
1995 c. 21.	Merchant Shipping Act 1995.	Section 96(10).
		Section 264(9).
1995 c. 42.	Private International Law (Miscellaneous Provisions) Act 1995.	Section 3.

Status:
This version of this Act contains provisions that are prospective.

Changes to legislation:
Arbitration Act 1996 is up to date with all changes known to be in force on or before 15 April 2019. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

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Chapter 3: International Arbitration Agreements and Separability Presumption

[Chapter 3] (1)

P 350 An international arbitration agreement is almost invariably treated as presumptively "separable" or "autonomous" from the commercial or other contract within which it is found. This result is generally referred to as an application of the "separability doctrine," or, more accurately, the "separability presumption." This Chapter discusses the development, current status, analytical bases and applications of the separability presumption.

§ 3.01 INTRODUCTION

The separability presumption is one of the conceptual and practical cornerstones of international arbitration. The presumption is variously articulated. In the words of one leading common law authority:

> "The[] characteristics of an arbitration agreement...are in one sense independent of the underlying or substantive contract [and] have often led to the characterization of an arbitration agreement as a 'separate contract.' [An arbitration agreement] is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract." (2)

More succinctly, "courts must treat the arbitration clause as severable from the contract in which it appears." (3) In the same vein, a frequently-cited arbitral award states the presumption as follows: "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained." (4)

From the civil law perspective, a classic French judicial authority summarizes the separability (or autonomy) doctrine as follows:

> "In matters of international arbitration, the arbitration agreement, concluded separately or included in the legal act to which it is related, always has, except in exceptional circumstances, a complete juridical autonomy excluding it from being affected by an eventual invalidity of that act." (5)

Similarly, a leading Swiss judicial decision holds that "Swiss law recognizes the principle of autonomy of the arbitration agreement, a principle adopted in case law for decades (and universally accepted in Western Europe and in the United States under the concepts of 'severability' or 'separability')." (6)

P 351 Whatever its precise formulation, the separability presumption is of central significance in international commercial arbitration. Indeed, as discussed below, the presumption is one of the foundations of the contemporary legal regime applicable to international arbitration agreements.

The separability presumption has substantial practical, as well as analytical, importance, and has a number of closely-related consequences relating to issues of choice of law, contractual validity and competence-competence. Specifically, the consequences include: (a) the possible application of a different national law, or a different set of substantive legal rules, to the arbitration agreement than to the underlying contract; (7) (b) the possible validity of an arbitration agreement, notwithstanding the non-existence, invalidity, illegality, or termination of the parties' underlying contract; (8) (c) the possible validity of the underlying contract, notwithstanding the invalidity, illegality, or termination of an associated arbitration clause; (9) and (d) in the (mistaken) view of some authorities, the analytical foundation for the "competence-competence" doctrine, whereby the jurisdiction of the arbitral tribunal to decide on its own jurisdiction is recognized. (10) The first two of the effects of the separability doctrine – the possible applicability of different legal rules and the possible validity of the arbitration agreement, notwithstanding defects in the underlying contract – play vital roles in ensuring the efficacy of the international arbitral process. (11)

Despite the practical and analytical importance of the separability presumption, there are significant uncertainties as to its basis, content and effects. There are even uncertainties concerning the appropriate name of the "separability doctrine."

Common law jurisdictions have historically referred to the "separability" or "severability" doctrine, reflecting a focus on the contractual origins of the doctrine and the view that an arbitration clause is an agreement that is "severable" from the parties' related contract.
P 352 (12) In contrast, civil law jurisdictions have more often referred to the "autonomy" (13) or "independence" (14) of the arbitration clause, arguably reflecting a greater focus on

the external legal regime applicable to international arbitration agreements and arguably implying a greater degree of separation or legal distance between an arbitration agreement and the parties' underlying contract, than the "separability doctrine" connotes.

The complexities surrounding the separability presumption in some civil law jurisdictions are exacerbated by occasional references to the "autonomy" of international arbitration agreements from national legal systems and rules of national law (as well as from the parties' underlying contract). (15) In particular, as discussed below, a number of leading French judicial authorities refer to the "autonomy" or "independence" of an international arbitration clause from any national law, holding that "the arbitration agreement has a validity and effectiveness of its own" (16) and emphasizing the "total autonomy of arbitration agreements in the field of international arbitration." (17) As one arbitral award, applying French international arbitration law, explains: "The arbitral clause is doubly autonomous: in relation to the arbitral agreement and in relation to the law of the contract." (18)

There is little to be gained from debates over the appropriate label – "autonomy" or "separability" – to be used in discussing international arbitration agreements. That is particularly true because both sets of labels can create misimpressions and suffer from imprecisions.

Nonetheless, the more accurate nomenclature is "separability," rather than "autonomy" or "independence." (19) That is because, as discussed in greater detail below, it is inaccurate to describe the arbitration clause as either wholly or necessarily "autonomous" or "independent" from the parties' underlying contract. In reality, the arbitration clause is closely connected to the parties' main contract and has an interrelated, supportive function for that contract. While the arbitration agreement
P 353 should presumptively be "separated" from the underlying contract, for various ● purposes, it is never entirely or necessarily "autonomous" or "independent" from the underlying agreement. (20)

Moreover, the term "separability" more accurately directs attention to the central role of the parties' intentions, as a contractual matter, in forming a "separate" arbitration agreement, rather than to external legal rules imposing a particular conception of an "autonomous" arbitration agreement upon the parties. (21) That is, it is the parties' intentions (either expressly stated or implied) that provide the foundation for the separability of their arbitration agreement: indeed, as discussed elsewhere, the separability doctrine is more accurately termed the "separability presumption," reflecting the parties' ability to negate or alter the separable status of their arbitration clause by agreement. (22) Labels which suggest that parties cannot agree upon an alternative type of arbitration agreement (*e.g.*, an arbitration agreement that is not separate from their underlying contract) or upon particular consequences of the separability doctrine (*e.g.*, that the same law governs the arbitration agreement as the underlying contract) are inaccurate.

Finally, it is also helpful to avoid references to the "autonomy" of the arbitration agreement given the usage of that phrase in some legal systems to denote the independence of the arbitration clause from any national law. (23) The separability doctrine refers solely to the separability of the arbitration agreement from the parties' underlying contract, and does not connote any autonomy on the part of the arbitration clause from national legal systems.

Accordingly, the following discussion will refer to the "separability" presumption, in preference to the "autonomy" or "independence" of the arbitration clause. Although the latter phrases are not wrong, and are frequently encountered in practice, they are more likely to give rise to inaccurate connotations which oversimplify the relationship between the parties' arbitration clause and their underlying contract.

P 354 ● § 3.02 DEVELOPMENT OF SEPARABILITY PRESUMPTION

The origins of the separability doctrine have not been systematically explored. In some legal systems, arbitration agreements were historically referred to as merely a part of the underlying contract in which they were included. (24) In the words of one early U.S. court, "the arbitration clause here is an integral part of the charter party." (25) Or, as a mid-20th century Indian decision put it, "the logical outcome...would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was nonetheless an integral part of the contract, which had no existence outside the contract." (26)

These views were not consistent with other historical views and have long since and almost universally been abandoned: arbitration clauses are now uniformly regarded in virtually all jurisdictions as presumptively separate from – and not "an integral part" of – the parties' underlying contract. Indeed, as discussed below, it is now clear that the separability presumption can be regarded as a general principle of international arbitration law, reflected in international arbitration conventions, national arbitration legislation and judicial decisions, institutional arbitration rules and arbitral awards. Although there are some differences in application of the presumption, it is universally affirmed and almost never questioned.

The historical development of this separability presumption is discussed below. (27) The application and legal consequences of the separability presumption, in various contexts, is discussed in subsequent sections of this Chapter. (28)

[A] International Arbitration Conventions

The first modern international arbitration conventions impliedly treated arbitration agreements as distinct, at least in some respects, from the parties' underlying substantive contract. While not expressly providing for separability, these provisions rested upon, and helped confirm, the notion that arbitration agreements were presumptively separable from the underlying contract.

P 355 ● **[1] Geneva Protocol and Geneva Convention**

The first modern international arbitration convention, the Geneva Protocol, provided in Article IV(1) that the courts of Contracting States, "on being seized of a dispute regarding *a contract… including an arbitration agreement*…which is valid…and capable of being carried into effect," shall refer the parties to arbitration. (29) Article IV(1) drew both a textual and a substantive distinction between underlying "contract[s]" and "arbitration agreement[s]," which were "include[ed]" within those contracts: specifically, Article IV(1) referred separately to a "contract" and an "arbitration agreement," and established substantive rules of validity and enforceability with regard to the latter, but not the former.

The Geneva Convention was similar, providing in Article I(a) for recognition of foreign awards "made in pursuance of *a submission to arbitration* which is valid under the law applicable *thereto*." (30) These provisions were entirely consistent with the historic treatment of arbitration agreements under many national laws – which, as discussed above, treated arbitration agreements differently (and sometimes less favorably) than other contracts (31) – requiring instruments such as the Geneva Protocol and Geneva Convention to specifically address and provide for the validity of such (arbitration) agreements. (32)

[2] New York Convention

In similar fashion, the New York Convention does not independently impose or require application of a separability (or autonomy) doctrine. Like the Geneva Protocol, however, the Convention does assume that international arbitration agreements are separable from the parties' underlying contract, impliedly treats them as such, and sets forth substantive rules applicable only to such agreements. In so doing, the Convention reflects the general understanding and expectations of parties to international arbitration agreements that such agreements are separable, but does not mandate such an understanding.

Both Article II and Article V(1)(a) of the New York Convention impliedly treat arbitration agreements as separable from underlying contracts. Article II(1) refers to an arbitration agreement as "*an agreement* in writing under which the parties undertake to submit to arbitration all or any differences" (33) arising between the parties. More clearly, Article II(2) defines a written agreement to arbitrate as including "*an arbitral clause in a contract* or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." (34)

P 356 ● Both Article II(1) and II(2) rest on the assumption that an "arbitral clause in a contract" is itself an "agreement," dealing with the subject of arbitration. (35) Neither provision requires that such agreements always be treated as "separable," or even assumes that this will necessarily be the case. On the other hand, both provisions are most naturally understood as assuming that arbitration clauses will presumptively be separate agreements, capable of being treated as such, notwithstanding their relation to another contract between the parties. More importantly, these agreements also attract specific legal rules that do not apply to the parties' underlying contract (*e.g.*, Article II(1)'s "writing" requirement (36) and Article II's presumption of substantive validity, together with specified exceptions to that presumption). (37)

Similarly, Article V(1)(a) of the Convention presumes the separability of arbitration agreements. Among other things, it provides for an exception to the enforceability of arbitral awards where "the said [arbitration] agreement is not valid under the law to which the parties *have subjected it* or, failing any indication thereon, under the law of the country where the award was made." (38) This provision contemplates the application of a specific national law to the arbitration agreement itself (as distinct from the underlying contract) and an inquiry into the validity of that agreement (again, as distinguished from the underlying contract). (39) Even more clearly than Article II, Article V(1)(a) rests on the premise that international arbitration agreements are presumptively separate from the parties' underlying contract, and thereby susceptible of being subject to different national laws and legal rules than the underlying contract.

Commentators have reached divergent conclusions regarding the question whether these provisions of the New York Convention compel recognition of the separability doctrine. Some authors take the view that the Convention is "indifferent" to the existence of the separability doctrine. (40) Others conclude that the Convention adopts or requires

application of the separability doctrine "by implication." (41)

P 357 ● Both of these positions are mistaken. In reality, the New York Convention neither "adopts" nor is "indifferent to" the separability doctrine. Rather, Articles II and V(1)(a) of the Convention rest on the premise that arbitration agreements can, and will ordinarily, be separate agreements and that these agreements therefore will often be treated differently from, and subject to different rules of validity and different choice-of-law rules than, the parties' underlying contracts. (42)

This presumption of separability is not dictated or required by the Convention, but was instead accepted by the Convention's drafters based upon their understanding of commercial parties' intentions and expectations, developed and interpreted in light of the needs and objectives of the international arbitral process. The Convention then takes these ordinary intentions and expectations of separability into account in the rules it articulates with regard to international arbitration agreements. Simply put, the Convention rests on the premise that parties may, and ordinarily do, intend their arbitration agreements to be separable, and it therefore sets forth specialized legal rules (of substantive and formal validity, and governing choice-of-law issues) that operate on the basis of this premise and that apply specifically (and only) to arbitration agreements.

Finally, as discussed below, the Convention also gives effect, and requires national courts to give effect, to the parties' agreement to treat their arbitration clause as separable. (43) This obligation arises from Article II(1)'s basic requirement that arbitration agreements – including constituent elements of such agreements, such as their separable character – be recognized. (44) In this manner, Article II does not mandate separability, but it does mandate recognition of agreements, express or implied, to treat arbitration clauses as separable. In practice, virtually all international arbitration agreements are impliedly intended by their parties to be separable, with Article II thus effectively mandating recognition of the separability of the arbitration agreement in almost all circumstances.

[3] European Convention

The European Convention rests even more explicitly than the New York Convention on the premise that international arbitration agreements are presumptively separable. Like Article II of the New York Convention, Article I(2)(a) of the European Convention presumes
P 358 that arbitration agreements are separate from the parties' ● underlying contract. (45) Even more explicitly, Article V of the European Convention acknowledges the separability of the arbitration agreement, by authorizing arbitral tribunals to consider challenges to the "existence or the validity of the *arbitration agreement or* of *the contract* of which the agreement forms part." (46) Likewise, Article VI of the Convention provides a specialized set of choice-of-law rules applicable only to arbitration agreements (comparable to those in Article V(1)(a) of the New York Convention). (47) Again like the New York Convention, the European Convention does not require the separability doctrine, but instead both permits it and presumes that this will be what the parties intended.

[4] ICSID Convention

The ICSID Convention does not expressly refer to the separability doctrine. Nonetheless, ICSID tribunals have consistently given effect to the separability doctrine in the context of ICSID arbitrations. (48) Thus, one ICSID tribunal referred to "the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause." (49) Similarly, like many other institutional arbitration rules, (50) the ICSID Additional Facility Rules provide that "an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included." (51)

[B] National Arbitration Legislation

The origins of the separability presumption predate contemporary international arbitration conventions. As discussed below, national legal systems have long treated arbitration agreements as separate and distinct from other contractual obligations. (52) Indeed, as discussed below, it is now universally accepted that an international arbitration agreement is presumptively separable from the parties' underlying contract; virtually no jurisdiction, developed or otherwise, dissents from this view.

P 359 ● In many legal systems, national contract law includes principles of separability or severability that have been developed with respect to other contractual terms. These principles typically address the question whether an invalid provision of a contract may be "severed," thus permitting the remainder of the contract to be enforced, (53) or whether a particular provision of a contract is governed by a different law from the remainder of the contract. (54) For the most part, these general principles of severability have played very limited roles in the development of the separability presumption in the context of international arbitration agreements. (55)

[1] Historic Origins

As discussed above, some jurisdictions historically refused to give full effect to agreements to arbitrate future disputes. This treatment can be traced to very early times,

including under Roman law, and continued intermittently until the early 20th century (particularly in England, France and the United States). (56) Indeed, as also discussed above, Roman law provided that the arbitration clause was a separate contract ("*promisum*"), which could only be made enforceable by combining it with another contract, being a penalty mechanism (to produce a "*com-promisum*"). (57)

This historic ambivalence towards arbitration clauses involved categorizing these provisions differently from other categories of contracts (like sales contracts) and providing that arbitration agreements were, in contrast to other contracts, either not valid or not specifically enforceable. Ironically, given the contemporary "pro-arbitration" function of the separability presumption, this historic hostility towards arbitration agreements helped lay the foundations for the future separability of such agreements – since it was the separate, distinctive character of such agreements on which restrictions on their enforceability and validity were grounded.

[2] "Procedural" Character of Arbitration Agreement

At least a part of the impetus, and theoretical foundation, for the separability doctrine can also be traced to the 19th century notion that the arbitration agreement was properly
P 360 characterized as a "procedural contract," (58) rather than a substantive one. ● One authority reasoned that "the arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract," (59) while another concluded that arbitration agreements "are not mere agreements between individuals, but procedural agreements which are subject to public law." (60)

Although sometimes misleading, (61) this characterization captured the underlying nature of the arbitration agreement, which is that of an ancillary agreement that provides a specific dispute resolution mechanism which is related to, but distinct from, the parties' substantive commercial contract(s). (62) In the words of one English judicial decision:

> "[A]n agreement to arbitrate…is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract. The primary obligations under the agreement to arbitrate exist only for the purpose of informing the parties by means of an award what are their rights and obligations under the underlying contract." (63)

One consequence of this analysis was (and is) to detach the "procedural" arbitration agreement from the "substantive" main contract: the differing natures and characterizations of the two agreements made it easy, indeed almost inevitable, that they generally be regarded as "separable."

[3] Contemporary National Arbitration Legislation and Judicial Decisions

As discussed below, the separability presumption was articulated in its modern form in 19th and early 20th century German and Swiss judicial decisions. (64) These decisions
P 361 held in a variety of contexts that particular arbitration clauses were not affected by ● legal defects in the parties' underlying contract (such as fraud, mistake, or termination). Using language remarkably similar to contemporary judicial analyses, these decisions relied on concepts comparable to the separability presumption to hold that arbitrators were authorized to decide disputes regarding the validity and legality of the parties' underlying contract. (65)

Today, the separability presumption is widely established in the arbitration statutes of all developed jurisdictions. (66) Under this legislation, and accompanying judicial decisions, international arbitration agreements are presumptively separable from the parties' underlying contract: as a consequence, among other things, the invalidity, illegality, or non-existence of the underlying contract will not necessarily affect the validity of the associated arbitration agreement. The separability presumption is also well-established in judicial decisions and commentary in jurisdictions, both common law and civil law, where national arbitration legislation provides no express basis for the doctrine. (67)

Although there are occasional suggestions that the separability presumption is not universally-acknowledged, (68) these views are mistaken. In fact, as the discussion below makes clear, there are few aspects of private international law where there is more uniform and consistent affirmation of a basic principle and the application of that principle in concrete cases.

National legislatures and courts have recognized the separability presumption for a variety of reasons, and in order to produce a number of distinct consequences, which are discussed in greater detail below. (69) The basic justification, which recurs in diverse contexts, has been the importance of the presumption to uphold the validity and enforceability of international arbitration agreements, in order to efficiently resolve
P 362 international disputes, (70) and, thereby, to "facilitate international trade." (71) For ● example, as a U.K. consultation paper on proposed English arbitration legislation reasoned:

> "Whatever degree of legal fiction underlying the doctrine, it is not generally considered possible for international arbitration to operate effectively in jurisdictions where the doctrine is precluded....[I]nternational consensus on autonomy has now grown very broad." (72)

As discussed below, the separability presumption accomplishes these purposes by limiting the categories of claims which are capable of impeaching the existence, validity, or legality of the arbitration agreements, to claims directed specifically at the arbitration agreement itself, (73) while also providing the foundation for "pro-arbitration" choice-of-law rules that inhibit the use of idiosyncratic or discriminatory national laws to invalidate agreements to arbitrate. (74)

[a] Germany

German law has long embraced the separability presumption, both well prior to and after Germany's adoption of the UNCITRAL Model Law in 1998. (75) Indeed, as early as the 1890's, German courts articulated and repeatedly applied what amounted to a separability presumption. (76) Thus, one early decision held, "[t]he [arbitral] clause can... have an independent existence [so] that it shall also apply to decisions whether or not the main contract is invalid," (77) while another held "[the arbitration clause] is not invalid because the main contract somehow appears to be invalid. The arbitral tribunal is therefore competent to decide on the validity of the main contract." (78)

The separability doctrine was first accepted by German courts at the beginning of the 20th century, albeit subject to important qualifications. As a general rule, the
P 363 Reichsgericht treated the arbitration clause as dependent on, and sharing the legal fate of, the underlying contract. (79) Nonetheless, the Reichsgericht (and some German lower courts) also held that the arbitration agreement could be separable, in some cases, provided that this was what the parties intended; in these cases, German courts held that an arbitral tribunal would be competent to decide whether or not the underlying contract was valid. (80) This general approach was apparently not applicable in cases involving claims of illegality, with German courts consistently holding that arbitration agreements in gambling contracts (which were contrary to public policy and unenforceable) suffered the same legal fate as the underlying contract. (81)

More recently, German courts reversed their historic presumption that arbitration clauses were not separable, instead holding that such agreements are presumptively separable, but again subject to contrary agreement by the parties. With occasional exceptions, this analysis was followed throughout the 20th century. Thus, in 1970, the German Bundesgerichtshof held that the invalidity of a commercial contract (because of the absence of a required governmental approval) did not necessarily entail the invalidity of the arbitration clause contained therein, which instead could remain effective for purposes of resolving disputes concerning the underlying contract's validity. (82)

Consistent with German courts' historic focus on the parties' intentions, the Bundesgerichtshof held that the question whether or not the arbitration clause was separable depended on what "the parties agreed." (83) It rejected a presumption (preferred by the lower court) that arbitration agreements were "dependent" on the contract in which they were contained, instead reasoning that businessmen would generally intend their arbitration clauses to be separable from their underlying contract:

> "There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals....The fact that the assessment of
P 364 [the invalidity of an agreement and claims under a valid agreement would have] to be entrusted to different tribunals according to one's approach will scarcely occur to the contracting parties. Above all, however, the parties to an arbitration agreement will as a rule wish to avoid the unpleasant consequences of separate jurisdiction." (84)

Accordingly, the Bundesgerichtshof concluded that arbitration clauses generally are intended by their parties to mean "in cases of doubt that the arbitration tribunal shall also decide on the question of the validity of the contract and on the claims arising in the event of nullity." (85) The Court's decision was a classic and careful articulation of the separability presumption, with particular attention to the parties' objective expectations. This view was (and is) shared by virtually all contemporary German courts and commentators. (86)

Germany's enactment of the UNCITRAL Model Law in 1998 adopted the Model Law's formulation of the separability presumption. (87) There is no indication in that legislation, or subsequent commentary and judicial decisions, that the statute was intended to alter historic German judicial analysis of the separability presumption. (88) On the contrary, the Bundesgerichtshof has held that §1040(1) of the ZPO, adopting the Model Law, "codifies a basic principle of international arbitration....The arbitration agreement is autonomous from the underlying contract." (89)

P 365 Under the German version of the Model Law, German courts continue routinely to apply the separability presumption, holding that challenges to the parties' underlying contract

do not necessarily impeach the separable arbitration agreement and are for the arbitral tribunal to decide. (90) Nonetheless, German commentary has suggested that some defects in the underlying contract may also simultaneously affect the existence or validity of the arbitration agreement. (91) Thus, the Bundesgerichtshof has held that where consent to the underlying contract is vitiated by duress or fraud, the arbitration clause may be invalidated as well, but only where these defects affected consent to the arbitration agreement specifically. (92)

[b] Switzerland

Another one of the first modern jurisdictions to expressly recognize the separability presumption in contemporary jurisprudence was Switzerland. As early as the turn of the 20th century, Swiss courts held that the invalidity of the underlying contract did not affect the arbitration agreement. (93) Thereafter, a 1933 decision of the Swiss Federal Tribunal held that:

> "the invalidity of the main contract does not render immediately the arbitration clause contained therein invalid; the clause according to which disputes arising under the main contract shall be submitted to arbitration encompasses, in cases of doubt, also disputes relating to the validity and the objection of simulation." (94)

P 366 ● In its reasoning, the Federal Tribunal relied on the "procedural" nature of the agreement to arbitrate, explaining:

> "According to settled case law of the Swiss Federal Tribunal the arbitration clause is not an agreement of substantive law but of procedural nature. Even where the arbitration clause is contained in the same document as the substantive law contract to which it relates and therefore from the outside appears as a part of the main agreement, *it still does not simply constitute a single provision of the main agreement but an independent agreement of a special nature*. Accordingly, the invalidity of the main contract cannot without further ado cause the invalidity of the arbitration agreement. This would only be the case if the grounds for invalidity at the same time affect the main contract and the arbitration agreement (*e.g.*, where the party which signed the contract document was incapable or unlawfully forced to do so)." (95)

This rationale was in part a reflection of the historic categorization of arbitration agreements as "procedural," rather than "substantive." (96) At the same time, the Swiss Federal Tribunal's analysis went further, treating the arbitration clause as "an independent agreement of a special nature" (which need not inevitably follow from characterizing the clause as "procedural"). Equally important, the Swiss Federal Tribunal also concluded that invalidity of the underlying contract did not inevitably result in the invalidity of the arbitration clause.

More recent Swiss authority is to the same effect. For example, the Geneva Court of Appeal has reasoned broadly that "[t]he principle of autonomy of the arbitration clause in relation to its validity is generally accepted in international arbitration. In fact, such a clause can validly be concluded, while the contract in which it is inserted lacks validity or the reverse." (97) This position is now codified in Article 178 of the Swiss Law on Private International Law, (98) and universally accepted in Swiss commentary. (99) As with earlier Swiss judicial decisions, Article 178 states a rule of substantive validity of the arbitration agreement, applicable in both national courts and arbitral tribunals.

P 367 Swiss courts routinely apply the separability presumption, holding that challenges to the underlying contract do not necessarily affect the validity of the separable ● arbitration agreement. (100) At the same time, Swiss authority also recognizes that some defects in the underlying contract may also affect the associated arbitration agreement. In particular, the Swiss Federal Tribunal has held that incapacity to conclude the underlying contract or duress will also invalidate the arbitration clause. (101)

[c] U.S. Federal Arbitration Act

U.S. arbitration legislation provided early, relatively express statutory recognition of the separability doctrine. Section 2 of the FAA, enacted in 1925, refers to "a *written provision* in... *a contract* evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." (102) Sections 3 and 4 of the FAA then provide for the enforcement of "an agreement in writing for such arbitration" (103) and a "written agreement for arbitration." (104) Like the Geneva Protocol and the New York Convention, (105) these provisions fairly clearly presuppose that the arbitration agreement can be a separate and distinct agreement from the parties' underlying contract or transaction. (106)

P 368 ● As discussed below, U.S. courts have consistently embraced the separability doctrine in both international and domestic cases. (107) An early judicial recognition of the separability doctrine was a land-mark Second Circuit decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, where the court held that "the mutual promises to arbitrate [generally] form the *quid pro quo* of one another and constitute a separable and

enforceable part of the agreement." (108) The Court of Appeals went on, in a closely-reasoned opinion, to hold that an arbitral tribunal (rather than a national court) therefore presumptively had jurisdiction to decide claims that a contract (rather than an arbitration clause itself) had been fraudulently induced. (109) In so doing, the Court expressly invoked the presumption that an arbitration clause is separable from the parties' underlying agreement. (110)

The conclusion in *Robert Lawrence Co.* was followed in subsequent U.S. authorities, including the U.S. Supreme Court's 1967 holding in *Prima Paint Corp. v. Conklin Mfg Co.*
P 369 (111) There, the Court declared that, "except where the parties otherwise intend,... arbitration clauses are 'separable' from the contracts in which they are embedded." (112) Although the Court left open the possibility that the parties might otherwise agree, (113) it concluded that an arbitration agreement was presumptively separable from the parties' underlying contract. In reaching this conclusion, the Court adopted reasoning later used by the German Bundesgerichtshof, recognizing the parties' presumptive desire to insulate their arbitration agreement from challenges directed at their underlying contract, and emphasized the FAA's legislative purpose that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (114)

Relying on the presumptive separability of the arbitration clause, the *Prima Paint* Court also held that "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it." (115) As in *Robert Lawrence Co.*, the Supreme Court concluded that a challenge to the parties' underlying contract (again, based on fraudulent inducement) could not ordinarily be considered by a court prior to referring the issue to arbitration. (116) Rather, the Court said that the FAA does not "permit the federal court to consider claims of fraud in the inducement of *the contract generally*," and that the court could "consider only issues relating to the making and performance of *the agreement to arbitrate*." (117) And, where a dispute involved a challenge that was directed generally to both the underlying contract and the arbitration clause, the Court held that referring these issues to arbitration was required by the "plain meaning of the statute" and the parties' presumed intention that their agreed dispute resolution mechanism not be "subject to delay and obstruction in the courts." (118)

The U.S. Supreme Court reaffirmed the separability presumption, and its implications for the allocation of jurisdictional competence between courts and arbitral tribunals under the FAA, in *Buckeye Check Cashing Inc. v. Cardegna*. (119) There, the Court reversed a Florida state court decision, which had refused to enforce an arbitration clause in a loan agreement on the grounds that the loan violated Florida's usury laws and was therefore void – with this invalidity supposedly extending to the arbitration clause contained within the loan agreement. (120) Relying on *Prima Paint*, (121) the U.S. Supreme Court reversed, holding that the separability presumption applied where the parties' underlying contract was allegedly void, as well as where it was voidable. (122)

P 370 The *Buckeye* Court held that the separability presumption was a substantive rule of federal law, dictated by the FAA:

> "as a matter of substantive federal arbitration law, *an arbitration provision is severable* from the remainder of the contract." (123)

The Court also reiterated, and made even more explicit, its holding in *Prima Paint* that a challenge directed "generally" to the underlying contract would be referred to arbitration and that only a challenge "specifically" directed at the arbitration agreement itself would be subject to interlocutory judicial resolution. The Court reasoned that, "because respondents challenge the Agreement, *but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract*," and "should therefore be considered by an arbitrator, not a court." (124) Applying this standard, the Court held that the illegality challenges at issue in *Buckeye* were not specifically directed at the arbitration agreement and therefore did not affect the validity of that agreement; those claims were therefore for the arbitrators' substantive decision, not jurisdictional challenges for interlocutory judicial resolution under §§2, 3 and 4 of the FAA. (125)

More recently, the Supreme Court reaffirmed and extended the separability doctrine in *Rent-A-Center West, Inc. v. Jackson*. (126) A sharply-divided Court held that a so-called "delegation" provision contained within an arbitration agreement, providing for resolution of any disputes about the validity or scope of the arbitration agreement by the arbitral tribunal, was itself separable from the more general arbitration agreement. (127) The Court reversed a lower court decision which had upheld an employee's challenge of the underlying arbitration agreement on unconscionability grounds. (128) Applying *Prima Paint*, the Supreme Court treated the delegation clause as a separate "mini-arbitration agreement divisible from the contract in which it resides – which just so happens also to be an arbitration agreement." (129) The Court explained that:

> "[i]n this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract." (130)

P 371 ● In so doing, the Court envisaged a new aspect of the separability presumption – "something akin to Russian nesting dolls" – treating an agreement to arbitrate jurisdictional objections as separable from the (also separable) arbitration agreement itself. (131)

Applying *Prima Paint, Buckeye* and other Supreme Court authority, a large body of lower U.S. court decisions hold that arbitration clauses are presumptively separable from the underlying contract. As one lower court put it, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." (132) Among other things, that conclusion permits the existence and validity of an arbitration agreement to be upheld even where the underlying contract is invalid (133) or
P 372 – albeit less clearly – nonexistent; (134) it is also relied upon to refer ● challenges to the validity or legality of the parties' underlying contract to arbitration, on the basis that those challenges do not impeach the validity of the separable arbitration agreement. (135)

These and other U.S. decisions make clear that there is only a *presumption* of separability, which may be reversed by agreement. This analysis recognizes that parties would be free to agree that their arbitration agreement was not separable from their underlying contract (*e.g.*, by being governed by the same substantive law or by being valid only insofar as the underlying agreement was valid). (136) As one lower court put it, "arbitration clauses must be treated as severable from the documents in which they appear *unless there is clear intent to the contrary*." (137)

Similarly, the analysis in *Rent-A-Center, Buckeye* and other U.S. decisions recognizes that arbitration agreements are not entirely independent from the parties' underlying contract in all circumstances. (138) Rather, the facts and circumstances that render the underlying contract nonexistent or invalid may also – in particular cases – independently impeach the separable arbitration agreement. Examples of this can include cases where a party denies ever having agreed to anything (for example, because its signature on the putative contract was forged) or denies the capacity of its representative to have concluded any agreement on its behalf. These circumstances, where a challenge involving the underlying contract also impeaches the separable arbitration clause, are discussed in detail below. (139)

Finally, it is clear that the separability presumption developed principally in domestic U.S. settings applies fully in international contexts, including arbitration agreements
P 373 subject to the New York Convention. (140) As one lower court concluded: "*Prima Paint's* ● holding that claims of unconscionability must be made against the arbitration agreement directly applies to cases arising under the Convention." (141) This is confirmed by §208 of the FAA, which makes the provisions of the domestic FAA applicable in cases under the New York Convention (unless inconsistent with the Convention); as discussed in greater detail below, that includes §§2, 3 and 4 of the FAA and their statutory recognition of the separability presumption. (142)

This conclusion is clearly correct: if anything, the separability presumption has a more deeply-rooted international, rather than domestic, history (traced to the Geneva Protocol and earlier international authority). (143) In contemporary settings, the separability presumption is given effect by the mandatory international obligations of Article II of the New York Convention (144) and serves the significant purpose of safeguarding the agreement to arbitrate and the arbitral process from parochial national laws, obstructive litigation tactics and delays. (145) For all these reasons, it is even more important to give effect to the separability presumption in the context of international than in domestic settings.

[d] France

French courts have also repeatedly relied upon the separability presumption in recent decades in considering the choice of law governing arbitration agreements and the substantive validity of such agreements. (146) In 1963, the French Cour de cassation expressly adopted the separability doctrine in *Gosset v. Carapelli*. (147) In that case, Carapelli sought to enforce an Italian arbitral award made pursuant to an arbitration clause found in a sales contract. Gossett argued that the award should not be enforced because the underlying sales contract was null and void as a result of violations of French import regulations, which in turn supposedly rendered the arbitration clause contained within the sales contract invalid. The Cour de cassation rejected Gossett's argument, reasoning:

> "In matters of international arbitration, the arbitration agreement, concluded separately or included in the legal act to which it is related, always has, except in exceptional circumstances, a complete juridical autonomy excluding it from being affected by an eventual invalidity of that act." (148)

P 374 ● This formulation of the separability doctrine was stated in what might be mistaken for absolute terms (*e.g.*, "a complete juridical autonomy excluding it from being affected"). In fact, however, the Cour de cassation recognized that the separability presumption would not invariably apply; it acknowledged that there would be "exceptional circumstances" where a different result would be appropriate. Although the Court did not explain this, it

no doubt recognized that, in the event that parties so intended, an arbitration agreement would be "inseparable" from, or otherwise limited to, the underlying contract and its legal categorization. (149)

Subsequent French judicial decisions have uniformly reaffirmed the formulation of the separability presumption set forth in *Gossett*. (150) As one classic decision expressed the presumption:

> "The arbitration agreement is legally independent from the underlying contract in which it is included either directly or by reference, and its existence and efficiency are interpreted…according to the common parties' intention." (151)

In 1980, the French New Code of Civil Procedure at least impliedly codified the judicially-developed separability presumption, providing in Article 1442 that "[a]n arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration the disputes which may arise in relation to that contract." (152) French judicial decisions and commentary repeatedly reaffirmed the separability doctrine and applied it broadly, including in cases where the underlying contract was allegedly nonexistent or void. (153)

P 375 ● Article 1442 and its codification of the separability presumption were retained in the 2011 revision of French arbitration legislation, with Article 1447 of the revised French Code of Civil Procedure providing that "[t]he arbitration agreement is independent from the contract to which it refers. It is not affected by its ineffectiveness." (154) Commentary and French judicial decisions are unanimous in concluding that French law continues to recognize and give broad application to the separability presumption. (155) According to one commentator, "ineffectiveness" is a broad concept and the separability presumption will apply in all cases, whether the contract is deemed inexistent, void, rescinded, obsolete, or terminated. (156)

[e] UNCITRAL Model Law

The UNCITRAL Model Law recognizes, at least for some purposes, the presumptive separability of the parties' arbitration agreement. Article 7(1) of the Model Law drew on the 1976 UNCITRAL Rules and earlier national law authorities, and defined an arbitration agreement as:

> "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. *An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement*." (157)

As with Article II of the New York Convention, this provision acknowledges that "arbitration agreement[s]" will often take the form of a clause in an underlying contract, which implies and presupposes the existence of a separate agreement dealing with the subject of arbitration. In turn, the Model Law prescribes specialized rules of formal validity, (158) substantive validity (159) and competence-competence (160) for such arbitration agreements. (161)

P 376 ● In addition, Article 16 of the Model Law extends beyond the New York Convention, in limited respects, in giving effect to the separability presumption. Derived from Article 21(2) of the 1976 UNCITRAL Rules, Article 16(1) of the Model Law provides:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." (162)

By the terms of the Model Law, Article 16 is not directly applicable to arbitrations seated abroad; in contrast to Article 8, Article 16 is not included in Article 1(2)'s list of provisions which apply regardless of the arbitral seat. (163) Nonetheless, consistent with the character of the separability presumption as a general principle of international arbitration law, courts in Model Law jurisdictions have consistently applied Article 16 and the separability presumption to foreign-seated arbitrations, as well as locally-seated arbitrations. (164)

Article 16 recognizes the separability presumption even more explicitly than the New York Convention or the European Convention. It does so by stating that "an arbitration clause… *shall be treated as an agreement independent of the other terms* of the contract," at least for purposes of an arbitral tribunal's jurisdiction to consider challenges to its own jurisdiction (or competence-competence). (165) This provision goes beyond the New York Convention and the European Convention by declaring an affirmative legal rule requiring
P 377 that arbitration agreements be treated as separable ● from the parties' underlying contract for certain competence-competence purposes, (166) rather than merely assuming that the parties have intended such a result.

It is unclear whether the Model Law treats the separability presumption as a general rule of substantive validity of the arbitration agreement or only a rule applicable for the particular purposes of an allocation of competence over jurisdictional disputes. Article 16(1)'s second sentence provides that an arbitration clause shall be treated as "independent," but qualifies that rule with the statement that it is "for th[e] purpose" of the tribunal's competence-competence. (167) At the same time, the final sentence of Article 16(1) arguably states a general principle of contractual "[]validity of the arbitration clause." (168)

The effect (and intent) of these provisions is unclear. The better view, however, is that the final sentence of Article 16(1) states a generally-applicable rule of contractual validity, which is applicable for all purposes. As discussed in greater detail elsewhere, it is only on the basis of such a rule of contractual validity that Article 16(1) affects the allocation of jurisdictional competence. (169)

Article 16(1) also reflects the essential nature of the separability presumption regarding the parties' intentions, whose application is dependent on the circumstances of particular cases. Hence, the final sentence of Article 16(1) provides that the nullity of an underlying contract "*shall not entail ipso jure the invalidity of the arbitration clause.*" (170) Under this rule, the invalidity of the parties' underlying contract does not necessarily or inevitably invalidate the parties' arbitration clause, but which may nonetheless do so in particular cases: Article 16(1) provides that the parties' arbitration clause may be valid, notwithstanding the invalidity of the arbitration agreement, while leaving open the possibility that, in some circumstances, the invalidity of the parties' underlying contract will be accompanied by the invalidity of their arbitration agreement. (171)

P 378 ● Put differently, although the invalidity of the underlying contract does not necessarily or automatically invalidate the associated arbitration clause, there may be circumstances in which this result does occur, by virtue of either the parties' intentions or the nature of the reasons for the invalidity of the underlying contract. Judicial decisions in Model Law jurisdictions have been consistent with this analysis, generally holding arbitration agreements separable and frequently giving them effect notwithstanding the invalidity or non-existence of the underlying contract. (172) Nonetheless, judicial authority and commentary recognize that there are occasional cases in which the defect affecting the underlying contract may also simultaneously affect the existence or validity of the associated arbitration agreement. (173)

P 379 ● [f] England

English courts have also acknowledged the separability of the arbitration agreement, while historically demonstrating particular reluctance to embrace sweeping formulations of any general principle of "autonomy" or "independence." That reluctance has been largely abandoned, in recent legislative reform and judicial decisions, which adopt an expansive view of the separability presumption. (174)

Throughout the early and mid-20th century, English courts recognized that international arbitration agreements could survive the termination of the underlying contract with which they were associated, (175) while expressing doubts as to the treatment of arbitration clauses contained within illegal (176) and void or voidable (177) contracts. One distinguished English judge put these doubts as follows:

> "If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void." (178)

Over time, however, English courts adopted the view that "an arbitration agreement constitutes a self-contained contract collateral or ancillary to the substantive agreement." (179) In the words of a leading decision:

> "These characteristics of an arbitration agreement which are in one sense
P 380 independent of the underlying or substantive contract have often led to the ● characterization of an arbitration agreement as a 'separate contract.' For an agreement to arbitrate within an underlying contract is in origin and function parasitic. It is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract. The primary obligations under the agreement to arbitrate exist only for the purpose of informing the parties by means of an award what are their rights and obligations under the underlying contract." (180)

Nonetheless, to a greater extent than many other national courts, English judicial decisions historically expressed caution regarding the "independence" of an arbitration clause from the parties' underlying contract. In particular, English judicial decisions repeatedly emphasized that separability is the product of contractual interpretation,

based on the parties' intentions, (181) and that there are instances in which an arbitration clause will *not* survive the non-existence, illegality, or invalidity of the parties' underlying agreement. (182)

In a land-mark 1993 case, in *Harbour Assurance Co. v. Kansa General International Insurance Co.*, the English Court of Appeal held that the illegality of a reinsurance contract did not necessarily affect the legality or validity of an arbitration clause contained in that contract. (183) In reaching this conclusion, the court adopted reasoning strikingly similar to that of the U.S. Supreme Court in *Prima Paint* and the German Bundesgerichtshof in its classic 1970 decision on the separability of arbitration agreements:

> "First, there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so....Secondly, if the arbitration clause is not held to survive the invalidity of the contract, a party is afforded the opportunity to evade his obligation to arbitrate by the simple expedient of alleging that the contract is void. In such cases courts of law then inevitably become involved in deciding the substance of a dispute. Moreover, in international transactions where the neutrality of the arbitral process is highly prized, the collapse of this consensual method of dispute resolution compels a party to resort to national courts where in the
P 381 real world the badge of neutrality is sometimes perceived to be absent. For ● parties the perceived effectiveness of the neutral arbitral process is often a vital condition in the process of negotiation of the contract. If that perception is absent, it will often present a formidable hurdle to the conclusion of the transaction. A full recognition of the separability principle tends to facilitate international trade." (184)

The English Arbitration Act, 1996, left this well-considered analysis intact, while also providing a statutory resolution of sorts to the historic debate in England concerning the scope of the separability doctrine. The Act provides in §7:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, nonexistent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and *it shall for that purpose be treated as a distinct agreement*." (185)

Like Article 16 of the UNCITRAL Model Law, (186) §7 of the Arbitration Act, 1996, expressly adopts the presumption that an arbitration clause is separable, at least for some purposes, from the parties' underlying contract. (187) Even more explicitly than the Model Law, §7 makes clear that the parties *presumptively* intend their arbitration agreement to be separable from their underlying contract (by stating that the presumption applies "unless otherwise agreed by the parties"). (188)

Unlike the UNCITRAL Model Law, however, the English Arbitration Act, 1996 clearly treats the arbitration agreement as separable for purposes of the substantive validity of that
P 382 agreement, (189) while the Model Law (in Article 16(1)) arguably does so only for ● purposes of competence-competence. (190) As discussed below, the English legislative approach is the superior one, because the separability presumption is properly understood as a matter relating to validity and not merely or only competence-competence.

In 2007, the English Court of Appeal and House of Lords embraced the most expansive view of the separability doctrine thus far taken under English law. (191) As discussed in greater detail below, the English courts held in *Fiona Trust & Holding Corp. v. Privalov* that claims of fraudulent inducement (involving bribery of one party's agent) of the underlying contract did not impeach the arbitration clause contained within that contract. (192) Among other things, relying on comparable U.S. judicial authority, the Court of Appeal declared:

> "It is not enough to say that the bribery impeaches the whole contract *unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular*....It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contract." (193)

The House of Lords reiterated this on appeal, holding that:

> "[t]he principle of separability enacted in section 7 [of the English Arbitration Act, 1996] means that the invalidity or rescission of the main contract does not necessarily entail the validity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable *only on the grounds which relate directly to the arbitration clause*." (194)

As Lord Hope concluded: "Taken overall, the wording [of the arbitration agreement]

indicates that arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes. Disputes about validity, after all, are no less appropriate for determination by an arbitrator than any other kind of dispute that may arise." (195)

The holding and rationale in *Fiona Trust* appear to have marked the conclusion of a lengthy evolution, with the English courts now accepting a very expansive conception of
P 383 the separability presumption. (196) At the same time, as in other jurisdictions and as ● discussed in greater detail below, the decision in *Fiona Trust* recognized that there will be cases in which circumstances giving rise to defects in the underlying contract (*i.e.*, capacity or formation defects) may also impeach the associated arbitration agreement. (197) More recently, English lower courts have applied the separability presumption to arbitration agreements contained in contracts that are nonexistent, holding that, "where negotiations had (at least arguably) not yet resulted in a binding agreement," it was for the arbitrator to decide whether the underlying contract had come into existence. (198)

[g] Japan

Japanese lower courts have long accepted the separability presumption. (199) In 1975, the Japanese Supreme Court embraced the presumption, dismissing an action brought for a declaration that a distribution agreement was not validly concluded and that the arbitration agreement it contained was therefore invalid. (200) Basing its decision on the separability of the arbitration clause, the Court reasoned:

> "An arbitration agreement was concluded in conjunction with the principal contract, but its effect must be separated from the principal contract and judged independently. And, unless there is a special agreement between the
> P 384 ● parties, a defect in the formation of the principal contract does not affect the validity of the arbitration agreement." (201)

The Japanese Supreme Court's opinion affirmed that commercial parties presumptively intend their arbitration agreement to be separable from their underlying contract (and, thus, not necessarily affected by defects in the latter); although this presumption can be reversed, by "a special agreement between the parties," the court held that the separability of the arbitration clause is the ordinary expectation of commercial parties. (202)

The revised Japanese Arbitration Law, which went into effect in 2004, statutorily adopted the doctrine of separability. (203) Like the English Arbitration Act, 1996, and unlike the UNCITRAL Model Law, the Japanese Law addressed the separability presumption in the context of the substantive validity of the arbitration agreement, and not competence-competence. (204)

In a recent decision, the Tokyo High Court relied on Article 13 of the Japanese Arbitration Law to uphold the validity of an arbitration agreement, despite the fact that the underlying contract had been terminated by one of the parties. (205) As with other developed legal systems, the Japanese formulation of the separability presumption is that the invalidity of the underlying contract does not "necessarily" affect the validity of the arbitration agreement – leaving open the possibility that in particular transactions an arbitration clause will not be separable, or that particular defects affecting the formation or validity of the underlying contract will also affect the arbitration agreement.

[h] China

The separability doctrine in Chinese law has undergone a significant evolution over the past two decades. Chinese courts were historically hesitant to embrace the doctrine, holding that an arbitration clause in a contract that was found to be void *ab initio* was
P 385 also void. (206) In the words of one commentator, "when a contract [was] ● terminated or legally voided, the arbitral clause enclosed may cease to be valid with the 'dying' of the main contract." (207)

The Chinese approach to the separability doctrine began to change in the early 1990s. (208) In 1990, the Guangdong Higher People's Court held that a CIETAC arbitration clause was valid despite the fact that the underlying joint venture contract was void for lack of governmental approval. (209) The 1995 Chinese Arbitration Law reflected this development, as well as broader international developments, and expressly adopted the separability doctrine. Article 19 of the Law provides:

> "An arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. The arbitration tribunal has the right to affirm the validity of a contract." (210)

Three years after the Arbitration Law was enacted, the Chinese Supreme People's Court adopted an expansive view of the separability doctrine. It upheld the validity of an arbitration clause although the underlying contract – including the arbitration agreement – was procured by fraud. (211)

Subsequently, in 1999, the Beijing Higher People's Court issued an opinion, similar to that in *Prima Paint* and *Fiona Trust*, holding that the validity of an arbitration agreement could

be challenged only by evidence showing that this agreement "*per se*" was invalid:

> "In the absence of evidence showing that the arbitration agreement *per se* was concluded under fraudulence or duress, the arbitration agreement will be considered as an authentic record of the parties' intention to arbitrate the stated dispute. The underlying contract will have no bearing on the validity of the arbitration agreement." (212)

P 386 ● This position was reiterated by the Supreme People's Court in a Judicial Interpretation in 2006, referring to Article 19 of the Arbitration Law, (213) which appears to fully embrace the separability presumption in a manner not materially different from that in other leading jurisdictions.

As in other jurisdictions, there are limits to the separability presumption under Chinese law. Under the Chinese Arbitration Law, the separability presumption applies only to issues of contractual "amendment, rescission, termination or invalidity." (214) Article 19 of the Arbitration Law leaves open the question of whether the presumption also applies when a party challenges the existence of the contract. (215)

[i] India

The separability presumption has also undergone an evolution under Indian law. Historically, Indian courts viewed the doctrine with skepticism. In the 1960s, the Indian Supreme Court declared that:

> "[T]he logical outcome...would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was none the less an integral part of the contract, which had no existence outside the contract." (216)

More recently, however, Indian legislation and judicial decisions have embraced the separability presumption. The 1996 Indian Arbitration and Conciliation Act, adopted from the UNCITRAL Model Law, adopted a statutory version of the separability presumption, based on Article 16 of the UNCITRAL Model Law. (217) Relying in part on the Act, recent Indian judicial decisions have also repeatedly recognized the separability presumption. In the words of one lower court:

> "even assuming for the sake of argument that the agreement dated 20 May 1994 between the parties was illegal and *non-est*, the same shall not on its own
P 387 ● render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same." (218)

Similarly, in a 2004 decision, the Indian Supreme Court relied upon the Arbitration and Conciliation Act to hold that the arbitration clause contained in a partnership deed was "separable from other clauses" and "constitute[d] an agreement by itself." (219)

Indian lower courts have applied the separability presumption in a wide range of cases. Among other things, the presumption has been extended to cases involving fraud in the inducement, fraud in the factum and termination of the underlying contract by mutual consent. (220) The Indian Supreme Court has suggested, albeit in dicta, a limitation of the presumption in cases involving extensive fraud:

> "the jurisdiction of the arbitrator to determine his own jurisdiction is on the basis of that arbitration clause which may be treated as an agreement independent of the other terms of the contract and his decision that the contract is null and void shall not entail *ipso jure* the validity of the arbitration clause. But, the question would be different where the entire contract containing the arbitration agreement stands vitiated by reason of fraud of this magnitude." (221)

The Supreme Court has not yet, however, considered the applicability of the separability presumption in cases where the underlying contract never came into existence (for example, for lack of consent or capacity).

[j] Other Jurisdictions

International arbitration legislation in a number of other jurisdictions, both common law and civil law, has recognized some version of the separability presumption. That includes a number of Model Law jurisdictions, such as Ireland, (222) Spain, (223) Singapore, (224)
P 388 Hong Kong, (225) Australia (226) and New Zealand. (227) It also includes other ● jurisdictions from all regions of the world and reflecting a wide diversity of legal systems, such as Belgium, (228) the Netherlands, (229) Sweden, (230) Italy, (231) Portugal, (232) Turkey, (233) Syria, (234) Indonesia, (235) Scotland (236) and Algeria. (237)

P 389 ● Further, a number of Latin American states that traditionally rejected the validity of agreements to arbitrate future disputes have recently embraced the separability presumption in modern "pro-arbitration" legislation. That includes Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Mexico, Paraguay, Peru and Venezuela. (238)

National courts, in jurisdictions from every region of the world, have also adopted the separability presumption. In 1980, an Italian appellate court declared that "the arbitral clause is an autonomous legal contract with respect to the contract in which it is included," holding that an arbitration agreement could be governed by a different substantive law than the underlying contract. (239) Other Italian decisions rely on the same presumption, also holding that the invalidity or nullity of the underlying contract does not affect the associated arbitration agreement. (240)

Likewise, the Portuguese Supreme Court has held that: "[i]n our legal regime, the autonomy principle or the separability of the arbitration agreement from the contract which contains it...is valid, which means that, even if included in a single document, contains two contracts: an insurance contract...and an arbitration agreement." (241) Similarly, a recent Irish decision applied the "well established concept which emanates from the doctrine of separability which applies to arbitration clauses in contracts. That doctrine recognizes that an arbitration agreement has a separate existence from the matrix contract for which it provides the means of resolving disputes." (242)

Judicial authorities in Sweden, (243) India, (244) Canada, (245) Australia, (246) Spain, (247) Israel, (248) Argentina (249) and Uruguay (250) have also recognized the presumptive
P 390 separability of ● international arbitration agreements. Indeed, it is virtually impossible to identify reported national court decisions rendered in the past several decades which reject or question the separability presumption. (251) National judicial authority is essentially unanimous in recognizing the basic principle that an agreement to arbitrate is presumptively separable from the underlying commercial contract in which it is contained and that a defect in the underlying contract will not ordinarily affect the validity of the associated arbitration agreement.

[C] International Arbitral Awards

Like national judicial decisions, international arbitral awards made by a wide variety of tribunals in different jurisdictions and legal systems have consistently recognized and relied on the separability presumption. At least as explicitly as national judicial decisions, these awards have cited the parties' express and implied intentions in
P 391 concluding that international arbitration agreements are presumptively separable ● from the parties' underlying contract. Like national judicial decisions, (252) these awards have invoked the separability presumption as a means of insulating the arbitration agreement from attacks on the underlying contract, thereby giving maximum effect to the international arbitral process.

During the 1970s, successive arbitral awards in three Libyan nationalization cases affirmed the separability of the parties' arbitration agreements from their underlying contracts. In 1973, the tribunal in *BP Exploration Co. v. Libya* held that the termination of the underlying oil concession agreement did not affect the existence or validity of the arbitration clause contained with that contract. (253) In 1975, the tribunal in *Texaco v. Libya* recognized "[t]he principle...of the autonomy or the independence of the arbitration clause" (254) in rejecting an argument that the alleged voidness of the parties' underlying contract affected the associated arbitration clause. Similarly, in 1977, the tribunal in *LIAMCO v. Libya*, held that it "is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination." (255)

Subsequent international arbitral awards have consistently recognized the principle of separability in even more explicit terms. In *Elf Aquitaine v. National Iranian Oil Company*, the tribunal reasoned that:

> "The autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of the most qualified publicists on international arbitration, in arbitration regulations adopted by international organizations and in treaties. Also, in many countries, the principle forms part of national arbitration law." (256)

Relying on the separability presumption, the tribunal concluded that the parties' arbitration clause was "unimpaired" by claims that the parties' underlying contract was null and void *ab initio*. (257)

Numerous other awards have also adopted the separability doctrine in a wide variety of contexts and under a wide variety of applicable laws. (258) As one ICC award formulated the doctrine:

P 392 > ● "it is now generally accepted, in the law and practice of international commercial arbitration, that an arbitration clause in a contract constitutes a separate and autonomous agreement between the parties, which is distinct from their substantive agreement." (259)

Similarly, another frequently-cited award held:

> "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained...and its existence and validity are to be

> ascertained, taking into account the mandatory rules of national law and international public policy, in the light of the common intention of the public policy, in the light of the common intention of the parties, without necessarily referring to a state law." (260)

At the same time, leading awards have almost uniformly recognized that the separability of the arbitration agreement is not absolute and that there are instances in which the non-existence or invalidity of the parties' underlying contract will affect the associated arbitration clause. In the words of one award:

> "There may be instances where a defect going to the root of an agreement between the parties affects both the main contract and the arbitration clause." (261)

Other well-considered awards, from a wide variety of provenances, are to the same effect. (262) Importantly, like comparable national court decisions, these awards do not
P 393 question or contradict the separability presumption, but instead define its scope and limits. An arbitration agreement is presumptively separable from the underlying contract, and the invalidity, illegality, or non-existence of the underlying contract will not necessarily affect the associated arbitration agreement; nonetheless, there will be circumstances in which particular defects affecting the existence or validity of the underlying contract will also simultaneously affect the separable arbitration agreement. (263)

[D] Institutional Arbitration Rules

Over the past several decades, the rules developed by leading arbitral institutions have propounded the separability doctrine with increasing detail. This has been true of arbitral institutions from most geographical regions of the world, again reflecting the consistency with which the separability doctrine is acknowledged in contemporary international business and legal communities.

One of the first international arbitral institutions to recognize the separability of the arbitration agreement was the ICC in the 1955 version of the ICC Rules. Article 13(4) of the 1955 ICC Rules gave effect to the separability doctrine, providing that the nullity or non-existence of the underlying contract does not affect the arbitrator's jurisdiction. (264) The 1988 ICC Rules retained and expanded this recognition of the separability doctrine, (265) as did Article 6(4) of the 1998 ICC Rules, and, most recently, Article 6(9) of the 2012 ICC Rules. (266)

As with most national arbitration statutes and decisions, Article 6(9) recognizes the status
P 394 of the separability doctrine as a statement of the parties' intent (which is made explicit in the case of parties who adopt the ICC Rules), that can be reversed by agreement (hence, Article 6(9)'s introductory phrase "[u]nless otherwise agreed"). Likewise, Article 6(9) recognizes that an arbitration agreement may (but does not necessarily) continue to exist notwithstanding the non-existence or nullity of the parties' underlying contract. (267)

The 2010 UNCITRAL Rules also expressly acknowledged the separability of the arbitration agreement (in terms closely paralleled by Article 16 of the UNCITRAL Model Law). (268) Thus, Article 23(1) of the 2010 UNCITRAL Rules provides:

> "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause." (269)

The predecessor provision of current Article 23(1) was the former Article 21(2) of 1976 UNCITRAL Rules, which referred in its final sentence to a decision by a tribunal that "the contract is null and void." (270) The 2010 amendments to the UNCITRAL Rules deleted the term "void," instead referring to a decision that the "contract is null." That change is best understood as confirming the broad scope of the separability presumption's applicability (to any contracts that are held "null," even if not both "null and void"); in practice, the change should have no practical consequence, because the term "null" as used in Article 23(1) has a broad meaning, reaching any instance where a court or tribunal holds a contract null, void, or nonexistent. (271)

Other institutional arbitration rules have embraced the separability doctrine, albeit with varying degrees of specificity. (272) In almost all instances, provisions adopting the separability presumption link it, with slightly differing formulae, to the arbitrators' competence-competence. (273)

P 395 The fact that international arbitral institutions from around the world consistently provide for the presumptive separability of the arbitration clause from the parties' underlying contract is further evidence of the expectations which business and other users attach to an international arbitration agreement and of the importance of the separability presumption in accomplishing those objectives. These rules reflect both past

experience and future expectations, which are incorporated by institutions in their efforts to draft rules that address the needs of commercial and other parties. (274) These rules also continue, even more specifically, to reflect expectations of commercial parties after they have been promulgated, when parties adopt them in their contracts.

[E] Future Directions: Separability Presumption and Its Basis

As detailed above, a recurrent and virtually universal theme in national arbitration legislation, judicial decisions and arbitral awards, across common law, civil law and other legal systems from every region of the world, has been that arbitration agreements may be – and presumptively are intended by their parties to be – separable from the underlying contracts with which they are associated. This conclusion has been reached in multiple contexts, including with regard to formal validity, (275) substantive validity, (276) choice of law (277) and allocations of jurisdictional competence. (278) The breadth and consistency of the acknowledgements of the separability presumption demonstrate the presumption's universal and enduring character, as well as its practical utility.

In contrast, it is very difficult to identify national court decisions, national legislation, or arbitral awards that reject the separability presumption. There are virtually no instances of national court decisions or arbitral awards simply rejecting the proposition that an arbitration agreement may, as a matter of principle, be separable. (279) Equally,
P 396 although the separability presumption may be reversed by ● agreement, there are virtually no decisions holding that this was intended and that a particular arbitration clause was not separable. (280)

At the same time, these sources do *not* dictate a mandatory rule of international arbitration law. Rather, these sources instead reflect and confirm the intention of parties to international arbitration agreements that such agreements be separable from their underlying contracts. This is not a "rule" or "principle" that is dictated by external legal sources and that parties are obliged to follow: parties are free to agree that their arbitration clause is not separable from their underlying contract, for either some or all purposes. (281)

Nor is this a "rule" that necessarily derives its existence or terms from legislative or other legal sources external to the parties' intentions: the separability presumption is instead derived from and defined by the expectations of reasonable commercial parties to international business transactions. (282) These intentions are often implied, but as the
P 397 consistent approach across virtually all jurisdictions confirms, (283) these ● intentions are unmistakable. Similarly, and for the same reasons, parties in practice virtually never intend that their arbitration agreement not be separable from their underlying contract.

As discussed above, the separability doctrine rests partly on the fact that the exchange of promises to resolve disputes by international arbitration (instead of some other means) is different in nature from other exchanges of commercial promises in the parties' underlying contract. (284) The arbitration agreement has a peculiar, specialized function – sometimes referred to as "procedural" (285) or "ancillary" (286) – as contrasted to the parties' underlying "substantive" or "main" contract. Thus, the arbitration clause is concerned with the "separate" function of resolving disputes about the parties' commercial relations, rather than contractually regulating the substantive terms of the parties' commercial bargain. (287)

This distinct character is reflected in the very term "arbitration agreement," connoting a separate, independent agreement of a particular kind, as well as in the substance of that agreement and in the historically separate and distinct legal regimes applicable to arbitration agreements. (288) These related factors provide a starting point for
P 398 concluding that parties will expect and intend that their arbitration clause be ● treated as separable from their underlying contract. Not surprisingly, similar conceptions of separability are applied to other contractual provisions with comparable functions (such as choice-of-law clauses, choice-of-forum clauses, expert determination clauses and similar provisions (289)).

More importantly, as also discussed above, commercial parties very often expect and intend – and certainly should be presumed, as objectively rational parties, to intend – that an arbitration agreement will ordinarily remain valid and binding, notwithstanding either claims or determinations regarding the non-existence, invalidity, illegality, or termination of their underlying contract. That is because parties will ordinarily and reasonably expect their arbitration clause to remain effective and encompass disputes about the existence, validity, legality and continuing effectiveness of their underlying contract. (290) As we have seen, parties do so in order to maximize the validity and enforceability of their arbitration agreements and in order that disputes over the validity and legality of their underlying contract – which frequently arise in international matters – can be resolved in a binding manner in the same forum and proceedings as other contractual disputes. (291)

Thus: (a) parties to arbitration agreements generally "intend to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty"; (b) without the separability doctrine, "it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitration obligation by the simple expedient of declaring the agreement void"; and (c) "the very concept and phrase

P 399 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreement if needs be." (292)

As discussed in greater detail above, any other result would, at a minimum, be an invitation to costly and multiplicitous legal proceedings in different forums and, more seriously, would dramatically undermine the efficacy and durability of arbitration agreements. (293) This would be particularly pernicious in the international context, where it would lead to parallel proceedings in different national courts, with the attendant risks of inconsistent or partisan outcomes; of course, it is precisely to avoid such multiplicitous proceeding that parties agree to international arbitration. (294) Moreover, permitting such proceedings in national courts would also often result in lengthy delays and uncertainties in the arbitral process, which again contradicts the basic objectives of that process. (295)

Absent exceptional circumstances, no reasonable commercial parties would intend or desire the results that would follow from denying the separability of the arbitration clause. Accordingly, it is not surprising that there has been such a consistent and uniform approach, across very diverse legal systems, towards the separability of international arbitration agreements. Simply put, this approach relies upon – and confirms – the expectations and intentions of commercial parties with respect to their international arbitration agreements. And, for the same reasons, by helping to address the needs of international businesses and to provide a mechanism for resolving international disputes efficiently, "[a] full recognition of the separability principle tends to facilitate international trade." (296)

The foregoing understanding of the basis for the separability presumption ensures that the presumption is truly international, applicable to all international arbitration agreements, regardless of national legal systems and regardless of the seat of the arbitration. That is because the separability of the arbitration clause is not derived from, or dictated, by national law, but is instead derived from the intentions of rational commercial parties seeking good faith resolution of possible future international disputes. (297) These intentions are directed by the needs and objectives of the international commercial arbitration process, rather than by the provisions of particular national legal systems. And, as discussed below, the parties' agreement with regard to the separability of their arbitration agreement is recognized and given mandatory international effect by Article II of the New York Convention. (298)

P 400 It is in this respect that it can, correctly, be said that the separability presumption is a general principle of international arbitration law. (299) It is not a rule that mandatorily binds the parties or has its origins in national legislation. Rather, it is a recognition of the parties' presumptive intentions in concluding international arbitration agreements, given mandatory effect by Article II of the Convention and parallel provisions of national arbitration legislation.

Finally, it is critical to appreciate that the separability presumption concerns the existence and substantive validity of the agreement to arbitrate, and only indirectly concerns issues of competence-competence or the allocation of jurisdictional competence between courts and arbitral tribunals. As discussed above, some national arbitration legislation and institutional arbitration rules refer to the separability presumption only in the context of recognizing an arbitral tribunal's competence-competence, and particularly the arbitrator's jurisdiction to consider challenges to the existence or validity of the underlying contract. (300) More recent and well-considered national arbitration legislation adopts a different approach, expressly treating the separability presumption as a rule concerning the substantive validity of the arbitration agreement. (301)

The latter legislative approach is better-considered and analytically-coherent. As discussed below, the separability presumption concerns the contractual formation and validity of the arbitration agreement: (302) it concerns the parties' intentions regarding their agreement to arbitrate and not the legislative framework for a tribunal's exercise of competence-competence. There will, of course, be circumstances in which the separability doctrine has consequences for an arbitral tribunal's competence, because a defect *only* in the underlying contract will necessarily *not* affect the arbitration agreement and the tribunal's jurisdiction. (303) That is a consequence, however, of the substantive status and validity of the arbitration agreement – which is the fundamental nature of the separability presumption – and not a separate rule of competence-competence. (304)

P 401 ## § 3.03 APPLICATIONS OF SEPARABILITY PRESUMPTION

The separability presumption has a number of applications with highly important consequences for the international arbitral process. These consequences play a vital role in ensuring the efficacy and efficiency of the arbitral process. Indeed, it has been said that "[a]cceptance of [the] autonomy of the international arbitration clause is a conceptual cornerstone of international arbitration." (305)

As detailed below, the consequences of the separability presumption include: (a) the possible validity of an arbitration agreement, notwithstanding the non-existence,

invalidity, or illegality of the parties' underlying contract; (306) (b) the possible application of a different national law to the arbitration agreement than to the underlying contract; (307) (c) the possible application of different legal rules within the same legal system to the arbitration agreement than to the underlying contract; (308) (d) the possible validity of the underlying contract, notwithstanding the invalidity, illegality, or termination of an associated arbitration clause; (309) and (e) in the (mistaken) view of some authorities, the analytical foundation for the "competence-competence" doctrine, whereby the jurisdiction of the arbitral tribunal to decide on its own jurisdiction is recognized. (310) These various applications and consequences of the separability presumption are outlined below, and then returned to in subsequent Chapters in this Part.

[A] Consequences of Separability Presumption: Non-Existence, Invalidity, Illegality, or Termination of Underlying Contract Does Not Necessarily Affect Arbitration Agreement

The first essential consequence of the separability presumption is that the actual non-existence, ineffectiveness, invalidity, illegality, or termination of the parties' underlying contract does not necessarily impeach the parties' "separable" arbitration agreement. This in turn has two related, but distinct, applications: (a) the non-existence, ineffectiveness, invalidity, or illegality of the underlying contract does not necessarily mean that the associated arbitration clause is also nonexistent, ineffective, or invalid; (311) and (b) a challenge to the existence, validity, legality, or continued effectiveness of the parties' underlying contract may (and sometimes must) be often referred to arbitration because it does not in fact affect the existence or validity of the associated, but separable, arbitration agreement. (312)

P 402 ● Analytically, it is important to distinguish very clearly between these two consequences of the separability presumption: although related, the question whether a valid arbitration clause exists is separate from the issue of who has competence-competence to decide these questions of validity. (313) As discussed below, neither national court decisions nor commentary has always recognized this distinction, instead often conflating issues of separability and competence-competence. (314)

As with other aspects of the separability doctrine, the principle that an arbitration agreement is not necessarily affected by the invalidity of an associated contract is recognized in a wide variety of international authority. International arbitration conventions, national legislation and judicial decisions, and international arbitral awards consistently confirm that the validity of an international arbitration agreement is not necessarily affected by the non-existence or invalidity of the underlying contract. (315) As noted above, and discussed in detail below, an arbitration clause may very readily be valid, notwithstanding the non-existence, invalidity, illegality, or termination of the parties' underlying contract. (316)

At the same time, as discussed below, these authorities also all recognize that an arbitration agreement is not wholly independent or separate from the associated underlying contract and that there are circumstances in which the status of the latter will affect the former. (317) In particular, in cases where the underlying contract was never concluded (or formed), or where that contract never included a particular party, there will be serious questions whether the associated arbitration agreement was ever formed. (318) Likewise, there will be circumstances where the invalidity, illegality, or termination of the parties' underlying contract may affect the validity or effectiveness of the arbitration clause. (319)

P 403 ● The interrelation between the parties' arbitration agreement and their underlying contract is not surprising. Parties do not typically agree to arbitration in the abstract or in a vacuum, but instead do so in connection with a particular contract, transaction, or project. (320) That is because of the essential character of an agreement to arbitrate – as an "ancillary" or "procedural" contract – which is to provide a dispute resolution mechanism for a particular category of commercial (and other) disputes. (321) If the underlying contract giving rise to such disputes never comes into existence, it is natural that the associated arbitration agreement might be affected.

The relationship between the arbitration agreement and the underlying contract raises some of the most difficult analytical issues in international arbitration. As discussed below, these issues include matters of choice of law, (322) competence-competence and the allocation of jurisdictional competence, (323) and substantive validity, (324) each of which is also addressed elsewhere. In particular, issues involving the arbitrators' competence-competence are often raised in conjunction with application of the separability presumption and are also addressed in Chapter 7 below. (325)

[1] International Arbitration Conventions

As discussed above, a number of the provisions of the New York Convention rest on the premise that arbitration clauses are presumptively separable from the parties' underlying contract. (326) Nonetheless, the Convention does not expressly provide that, as a consequence, an arbitration clause may exist or continue to exist notwithstanding the non-existence, invalidity, illegality, or termination of the parties' underlying contract.

(327) Instead, the Convention permits, but does not require, parties to agree to separable arbitration agreements, (328) and, where they do so agree, requires that their agreement to the separability of the arbitration clause be given effect. (329) It is only in this latter regard – requiring Contracting States to recognize agreements regarding the separability of the arbitration clause – that the Convention can properly be said to mandate the separability presumption.

In contrast, as also discussed above, Article V of the European Convention recognizes the separability presumption and also explicitly provides that arbitral tribunals may consider challenges to the "existence or the validity of the arbitration agreement *or* of the contract of which the agreement forms part." (330) In so doing, the European Convention clearly recognizes that the validity of an arbitration agreement is a distinct
P 404 ● issue, distinguishable from that of the validity of the underlying contract. (331) At the same time, as discussed below, the Convention also gives effect to the competence-competence doctrine, affirming the arbitrators' authority to consider and decide on challenges to both the parties' underlying contract and their arbitration agreement. (332)

[2] National Arbitration Legislation

National arbitration legislation and judicial decisions from a wide variety of jurisdictions have repeatedly recognized that one consequence of the separability presumption is that the non-existence or invalidity of the parties' underlying contract does not necessarily result in either the invalidity of the associated arbitration clause or a loss of the tribunal's jurisdiction. These statutory provisions and decisions have applied the separability presumption in the context of a number of different types of challenges to the existence, validity, or legality of the parties' agreements, in a wide range of different factual settings, producing a complex, sometimes confusing body of authority.

In addressing questions of separability in this context, it is important to distinguish between two issues, already outlined above: (a) whether a court, as distinguished from an arbitral tribunal, will consider on an interlocutory basis whether there is a valid arbitration agreement; (333) and (b) regardless who considers the issue, whether as a substantive matter the underlying contract is nonexistent, ineffective, or invalid and whether this results in the non-existence, ineffectiveness, or invalidity of the arbitration agreement. As noted above, these are two analytically distinct issues: the former is an issue of competence-competence and the allocation of jurisdictional competence, relevant to determining who decides disputes regarding the validity of an arbitration agreement, while the latter is a substantive question, relevant to determining whether or not a valid arbitration agreement exists. Despite this distinction, both issues are often addressed in the same authorities (both U.S. (334) and non-U.S. (335)), often without clearly distinguishing the two lines of analysis.

[a] UNCITRAL Model Law

Article 16 of the Model Law goes beyond the New York Convention and European
P 405 ● Convention, in limited respects, in recognizing the consequences of the separability doctrine for international arbitration agreements in cases where the validity of the underlying contract is challenged. Thus, as discussed above, Article 16 provides that:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." (336)

Article 16(1) declares that, for the purpose of an arbitral tribunal's jurisdiction (or competence-competence), an arbitration clause shall be treated as "independent" from the underlying contract within which it is contained, (337) and then provides that a decision by an arbitral tribunal that an underlying contract is invalid "shall not entail *ipso jure* the invalidity of the arbitration clause." These provisions of Article 16 prevent a "Catch-22" situation, where a tribunal could arguably not declare a contract invalid without simultaneously rendering the arbitration agreement (and, arguably, its own award) invalid. (338) Moreover, like the European Convention, the Model Law approach expressly removes any question as to the tribunal's competence to rule on challenges to the validity of the underlying contract. (339)

As noted above, Article 16 refers to the separability presumption only in the context of the arbitral tribunal's competence-competence ("[f]or that purpose") and not in the context of the substantive validity of the arbitration agreement. (340) Nonetheless, the better view is that the separability presumption reflected in Article 16(1) applies to the substantive contractual validity of the arbitration agreement (which, in turn, is the basis for Article 16's treatment of the arbitral tribunal's competence-competence). (341)

There are a growing number of judicial decisions from Model Law jurisdictions considering whether the non-existence, invalidity, illegality, or ineffectiveness of the parties' underlying contract affects an arbitration clause associated with the contract. These decisions have repeatedly held, on particular facts, that the non-existence or invalidity of various underlying contracts on a variety of different grounds does not entail

P 406 the non-existence or invalidity of the arbitration agreement associated with ● those contracts. (342) Other decisions have held, again on particular facts, that the illegality of the underlying contract did not affect the arbitration clause, (343) and that termination of the main contract did not have the effect of terminating the separable arbitration
P 407 agreement. (344) Similarly, the repudiation or frustration of the underlying ● contract has been held by courts in Model Law jurisdictions, relying on the separability presumption, not to affect the arbitration clause. (345)

At the same time, the UNCITRAL Model Law does not provide that the non-existence, invalidity, illegality, or termination of the parties' underlying contract *never* affects the associated arbitration clause. On the contrary, the Model Law merely provides that the invalidity of the underlying contract does not "entail *ipso jure*" the invalidity of the parties' arbitration clause – recognizing that there may be circumstances where such a result may nonetheless follow, even if not "*ipso jure*." Those cases would include, in particular, circumstances where the existence of the underlying contract was challenged on grounds that also applied to the separable arbitration agreement (*e.g.*, no consent, lack of capacity or authority). (346) Nonetheless, there have been extremely few reported decisions in Model Law jurisdictions where defects in the underlying contract have invalidated the associated arbitration agreement. (347)

[b] U.S. Federal Arbitration Act

As discussed above, the U.S. FAA impliedly recognizes the separability presumption (in §§2, 3 and 4). (348) Under the FAA, U.S. courts have applied the separability presumption in a wide range of circumstances, generating a remarkably large body of precedent. (349) A central element of these decisions is the conclusion that an arbitration agreement is valid notwithstanding the invalidity and, in some cases, non-existence of the underlying contract.

P 408 ● As noted above, in considering U.S. authority under the FAA, it is important to distinguish between issues of the substantive validity of the arbitration agreement, on the one hand, and issues of competence-competence and the allocation of jurisdictional authority between arbitrators and U.S. courts, on the other. This is because, under U.S. law, these issues are related, (350) with the allocation of jurisdictional competence often depending, at least in part, on whether the substantive validity of the agreement to arbitrate is challenged.

[i] Prima Paint, Buckeye Check Cashing and Rent-A-Center

The most frequently-cited U.S. decisions on the separability presumption are *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* (351) and *Buckeye Check Cashing Inc. v. Cardegna*. (352) This is ironic, and sometimes confusing, because both decisions principally involve the allocation of competence to address jurisdictional objections. Similarly, in a more recent decision also dealing with the separability presumption – *Rent-A-Center West, Inc. v. Jackson* (353) – the Supreme Court again linked issues of substantive validity and allocation of jurisdictional competence.

(1) Prima Paint

As discussed above, the Supreme Court held in *Prima Paint* that claims of fraudulent inducement, directed at the underlying contract and capable of rendering it voidable, did not impeach the arbitration clause contained in that contract. The Court reasoned that, "except where the parties otherwise intend…arbitration clauses are 'separable' from the contracts in which they are embedded." (354) Relying on the presumptive separability of the arbitration clause, the Court also held that the FAA allocates the competence of U.S. courts to consider jurisdictional objections: specifically, the FAA does not "permit the federal court to consider claims of fraud in the inducement of *the contract generally*" and that a court may "consider only issues relating to the making and performance of *the agreement to arbitrate*." (355) The Court implied, but did not squarely hold, that the separability presumption was a rule of substantive federal law governing evaluation of the validity of agreements to arbitrate. (356)

P 409 ● *(2) Buckeye Check Cashing*

The holding and reasoning in *Prima Paint* were reaffirmed and extended by the Supreme Court in *Buckeye*. (357) As discussed above, in *Buckeye*, the U.S. Supreme Court reversed a Florida decision which had held that the illegality of a usurious loan agreement rendered both that agreement and its arbitration clause void *ab initio* as a matter of Florida law. (358)

In reaching this conclusion, the Supreme Court held that the separability presumption was a substantive rule of federal law, arising under the FAA, which applied regardless of state (or foreign) law characterizations of particular contracts as invalid, void, voidable, illegal, or void *ab initio*. (359) The Court also held that, under this rule of federal law, only challenges "*specifically*" to the arbitration agreement would impeach its validity and, as a consequence, "*general*" challenges to the underlying contract had to be referred to arbitration; the Court emphasized that this conclusion applied even where the underlying contract was alleged to be "void" or "void *ab initio*." (360) The Court's opinion in *Buckeye* contains a number of important conclusions, relevant to both the validity of an

arbitration agreement and the allocation of competence over jurisdictional objections under the FAA.

First, the *Buckeye* Court reaffirmed (and arguably extended) *Prima Paint*'s statement of the separability presumption and its legal basis. The Court declared that "as a matter of substantive federal arbitration law, *an arbitration provision is severable* from the remainder of the contract." (361) That substantive rule of "federal arbitration law" was based on the statutory requirement, in §§2, 3 and 4 of the FAA, to enforce agreements to arbitrate (362) – including to enforce the parties' presumptive intention that such agreements are separable from the underlying contract. (363)

Second, the Court observed that "challenges to the validity of arbitration agreements" can be divided into two categories: (a) "challenges specifically to the validity of the agreement to arbitrate," and (b) "challenges [to] the validity of the contract as a whole, either on the ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." (364) The *Buckeye* Court reiterated its holding in *Prima Paint* that a challenge directed "generally" to the underlying contract would be referred to arbitration and that only a challenge "specifically" directed at the
P 410 arbitration agreement itself would be subject to ● interlocutory judicial resolution. (365) The Court declared: "regardless of whether the challenge is brought in federal or state court, *a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator*." (366)

This aspect of the Court's opinion was a decision regarding the allocation of jurisdictional competence, holding when particular issues would be referred to arbitration and when they would be for interlocutory judicial resolution. This decision regarding jurisdictional competence rested, however, on the underlying rule of federal substantive law, providing that arbitration agreements are separable from underlying contracts.

Third, the *Buckeye* Court rejected the argument that the separability presumption was inapplicable where a party claimed that the underlying contract was "void" or "void *ab initio*." (367) Specifically, the Court held that *Prima Paint*'s separability presumption made any "distinction between void and voidable contracts" "irrelevant." (368) In doing so, the *Buckeye* Court rejected a substantial line of state (and federal) court authority holding that the separability presumption did not apply where the underlying contract was "void" (as opposed to "voidable"). (369)

P 411 ● Fourth, the Court's opinion in *Buckeye* elaborated on the character and consequences of the separability presumption, reasoning:

> "because respondents challenge the Agreement, *but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract*. The challenge should therefore be considered by an arbitrator, not a court." (370)

This analysis is vitally important to the nature of the separability presumption under the FAA. The Court's analysis links both: (a) a conclusion about the substantive validity of the arbitration agreement ("those provisions are enforceable apart from the remainder of the contract"), and (b) a conclusion about the allocation of jurisdictional competence ("[t]he challenge should *therefore* be considered by an arbitrator, not a court"). Indeed, the *Buckeye* Court bases its allocation of jurisdictional competence expressly on the separability presumption and the existence of a challenge to the separate arbitration agreement, reasoning that, because the separable arbitration agreement is valid, "therefore" the challenge to the underlying contract must be referred to arbitration.

The Court's analysis in *Buckeye* made explicit what *Prima Paint* had implied about the character of the separability presumption, with a much more specific statement that the separability presumption concerned the substantive validity of the arbitration agreement. The logic of the *Buckeye* analysis, prefigured in *Prima Paint*, is that, where there is no challenge to the arbitration agreement, then §§2, 3 and 4 of the FAA require giving effect to that agreement, by compelling arbitration and staying litigation. (371) Conversely, where there is a challenge "specifically" to the arbitration agreement, then §4 requires a court to resolve that challenge (including by conducting a trial). (372)

Finally, and also importantly, the *Buckeye* Court noted a potential qualification to this statement of the separability presumption, applicable in cases where a party challenged the *existence* – as distinguished from the effectiveness or validity – of the underlying contract. (373) The Court held that the question whether the underlying contract was validly formed is, for purposes of determining whether interlocutory judicial consideration is required, "different from" the question whether the underlying contract is valid or effective. The Court did not decide whether the separability presumption
P 412 would apply in cases where no underlying contract was ever ● formed, to require arbitral consideration of such challenges, but it strongly suggested it would not: (374)

> "The *issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded*. Our opinion today addresses only the former, and does not speak to the issue decided in [cases]...which hold that it is for courts to decide whether the

alleged obligor ever signed the contract, whether the signed lacked authority to commit the alleged principal and whether the signor lacked the mental capacity to assent." (375)

In particular, the *Buckeye* Court identified cases involving disputes over consent (*e.g.*, "whether the alleged obligor ever signed the contract") and capacity or authority (*e.g.*, "lacked authority") as potentially requiring judicial resolution. (376)

(3) Rent-A-Center

More recently, the Supreme Court reaffirmed this distinction between challenges to the legality or validity of the underlying contract, and challenges to the existence of that contract and, extended it to so-called "delegation" provisions within a broader arbitration agreement. In *Rent-A-Center West, Inc. v. Jackson*, (377) the Court reversed a Ninth Circuit decision holding that a court should decide the question whether a clause within an arbitration agreement, providing for resolution of jurisdictional disputes by the arbitrator, was unconscionable. (378) Relying on Prima Paint and Buckeye, the Ninth Circuit held that where a party challenges the arbitration agreement specifically – and not the entire contract – as unconscionable, resolution of that challenge is for the court, not the arbitrator. (379)

The Supreme Court rejected the Ninth Circuit's reasoning, instead treating the arbitration agreement as the underlying contract and the clause delegating resolution of the jurisdictional objection to the arbitrator as a "mini-arbitration agreement" (380) that was separable from the general arbitration agreement. Applying the reasoning in *Prima Paint* and *Buckeye* – but one layer deeper – the Supreme Court held that challenges as to the validity of the arbitration agreement as a whole (as well as challenges to the underlying contract) would be for initial decision by the arbitrator; challenges specifically to a (so-called delegation) provision within the arbitration agreement providing for arbitration of jurisdictional disputes would be for the court to adjudicate. (381)

P 413 The *Rent-A-Center* Court concluded that, because the party challenging jurisdiction had not specifically challenged the delegation clause, but the arbitration agreement as a whole, the jurisdictional objection was for the arbitrator, not the court. (382) In addition, the *Rent-A-Center* Court declared that "[t]he issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" (383) As it had in *Buckeye*, the Court strongly suggested, albeit in dicta, that challenges to the existence of the underlying contract would be for interlocutory judicial consideration (rather than reference to the arbitrators). (384)

[ii] Applications of Separability Presumption by U.S. Courts

The separability analysis in *Prima Paint, Buckeye* and *Rent-A-Center* has been applied differently by U.S. lower courts depending on the nature of the challenge to the underlying contract. In particular, as discussed below, U.S. courts have adopted different approaches to the effects of the separability presumption depending on whether (a) the validity, legality, or continued effectiveness of the underlying contract is "*generally*" challenged; (b) the existence, validity, legality, or continued effectiveness of the arbitration agreement is "*specifically*" challenged; or (c) the *existence* of the underlying contract, as distinguished from its *validity or effectiveness*, is challenged.

In the first category, U.S. courts have held that challenges to the validity, legality, or effectiveness of the underlying contact do not affect the arbitration agreement, and therefore are for the arbitrators to resolve; interlocutory judicial consideration of such challenges is not permitted under the FAA. In the latter two categories, U.S. courts have held that challenges to the existence or formation of the underlying contract or challenges *specifically* to the validity, legality, or effectiveness of the arbitration agreement do impeach the arbitration agreement itself, and therefore are generally for immediate interlocutory judicial resolution. Although these general principles appear well-accepted, there remains a substantial degree of uncertainty regarding their application.

(1) Treatment of Claims Challenging Validity, Legality, or Continued Effectiveness of Underlying Contract Under Federal Arbitration Act

There is a substantial body of U.S. judicial authority addressing the consequences of challenges to the validity, legality and continued effectiveness of the parties' underlying contract. As in other contexts, it is important in considering this authority to distinguish between the allocation of jurisdictional competence and questions of substantive validity.

The approach of U.S. courts to the substantive validity of an arbitration clause, when the validity, legality, or continued effectiveness of the underlying contract has been
P 414 challenged, is set forth in *Buckeye*. There, the U.S. Supreme Court held that, where there has been a challenge to the validity of the underlying contract, "*but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract*." (385) That holding fairly clearly adopted the separability presumption as a rule of a substantive federal law, providing that, unless otherwise agreed, a challenge to the underlying contract, rather than a challenge "specifically" to its arbitration clause, does

not affect the validity of the agreement to arbitrate – which is "enforceable apart from the remainder of the contract."

A substantial body of U.S. lower court authority has applied the separability presumption recognized in *Prima Paint* and *Buckeye* in cases involving challenges to the validity of the underlying contract. Those decisions generally concern the allocation of competence to resolve jurisdictional issues and do not ordinarily hold expressly that the arbitration agreement is valid. Rather, these decisions simply refer the challenge to the underlying contract to arbitration, presuming the validity of the arbitration agreement, but often not stating this expressly.

Nonetheless, given the U.S. approach to the allocation of jurisdictional competence, which links the existence of a challenge to the arbitration agreement to the availability of interlocutory judicial consideration, (386) these decisions necessarily rest on conclusions about the substantive validity of the arbitration agreement. Moreover, albeit in dicta, a number of U.S. courts have expressly affirmed the substantive validity of arbitration agreements where only challenges to the separable, underlying contract have been made. (387)

Applying this analysis, U.S. courts have almost uniformly refused to consider interlocutory jurisdictional objections based on allegations of invalidity, illegality, or termination of
P 415 the parties' underlying contract. U.S. lower courts have repeatedly ● held that general claims that the underlying contract is invalid or illegal must be referred to arbitration. (388) In the words of one lower court:

> "[w]here claims of error, fraud or unconscionability do not specifically address the arbitration agreement containing the arbitration provisions, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitration....[I]f, after examining the crux of the complaint, the district court concludes that the challenge is not to the arbitration provision itself but, rather, to the validity of the entire contract, then the issue of the contract's validity should be considered by an arbitrator in the first instance." (389)

Another representative decision adopts similar reasoning, holding that challenges to the parties' underlying agreement had to be submitted to arbitration:

> "These claims do not relate to the Arbitration Agreements themselves; rather, they allege the...Agreements, in general, were adhesive...the FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive." (390)

U.S. courts have applied this principle to require arbitration of objections resting on a wide variety of alleged bases for invalidity of the underlying contract, including claims of fraudulent inducement, (391) fraud, (392) lack of consideration, (393) illegality, (394)
P 417 adhesion ● or unconscionability, (395) the failure of a condition precedent, (396) mistake (397) and expiration or termination. (398)

P 418 ● A representative decision in this line of authority reasoned:

> "The Plaintiffs do not contest the formation of an agreement to arbitrate. Rather, they challenge the validity of the contract and assert that any agreement to arbitrate was rendered invalid *ab initio* by Louisiana's real estate license laws....The matter should be referred to the arbitrator for a resolution of this dispute, including consideration of the Plaintiffs' defense of illegality." (399)

Or, as another court explained its analysis:

> "[W]hen claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement." (400)

These holdings have attracted some fairly harsh domestic criticism, on the grounds that they afford undue authority to arbitrators and deny parties the opportunity for immediate judicial review of their (asserted) jurisdictional objections. (401) Nonetheless, this is emphatically the Supreme Court's interpretation of the FAA, now repeated in multiple decisions. (402)

P 419 ● This analysis also applies in cases involving a so-called "delegation clause." If the parties' arbitration agreement includes a delegation provision, providing for the arbitration of jurisdictional challenges to the arbitration agreement, a court will only decide the challenge if it is directed specifically to the delegation provision. (403) If the parties have agreed to arbitrate jurisdictional challenges, a challenge to the entire arbitration clause will be referred to the arbitrators, rather than judicially resolved, because there has been no challenge to the specific agreement to arbitrate jurisdictional disputes. (404)

P 420 ● *(2) Treatment of Claims Challenging Validity, Legality, or Continued Effectiveness of*

Arbitration Agreement "Specifically" Under Federal Arbitration Act

As discussed above, the Supreme Court held in both *Buckeye* and *Rent-A-Center* that challenges that are directed "specifically" at the arbitration agreement itself are for interlocutory judicial resolution, rather than reference to arbitration. (405) Thus, as already discussed, the Court made it clear in *Buckeye* that a challenge "*specifically to the arbitration clause*" is for interlocutory judicial resolution. (406)

U.S. lower courts have applied this standard in numerous cases. In the words of one lower court decision, "a challenge to the validity of a contract as a whole, and not specifically to an arbitration clause, must be presented to the arbitrator and not the courts," and "[t]he courts may consider, in the first instance, only those challenges that are directed solely to the arbitration component itself." (407) The general tenor of these decisions is reflected in the analysis of one lower court:

> "An attack on the validity of the contract as a whole, as opposed to the arbitration clause in particular, does not present a question of arbitrability… the well-settled general rule is that when a contractual party challenges the validity of an arbitration agreement by contending that one or more of its terms is unconscionable and unenforceable, a question of arbitrability is presented….A party's unconscionability challenge to the enforcement of one or more terms of an arbitration agreement presents a gateway matter for judicial determination." (408)

Despite uniform application of the analysis of the separability presumption in *Prima Paint, Buckeye* and *Rent-A-Center*, it is not entirely clear when a challenge will be considered directed "specifically" at the parties' arbitration agreement, as distinguished from the underlying contract "generally." In particular, it is uncertain what is required in order to challenge an arbitration clause "specifically" – is it enough to claim that the arbitration agreement and the underlying contract are both invalid or is it necessary to claim that only the arbitration agreement is invalid?

Applying the standards formulated in *Buckeye* and *Rent-A-Center*, lower U.S. federal and state courts have generally required the allegation of separate factual grounds, relevant solely to the validity of the arbitration agreement, before concluding that the challenge
P 421 is subject to interlocutory judicial resolution. (409) The same rule applies to so-● called "delegation clauses" under the analysis in *Rent-A-Center*. (410) In particular, most U.S. courts have held that grounds for invalidity that apply to *both* the underlying contract and arbitration agreement do not "specifically" impeach the arbitration agreement and therefore must be referred to arbitration. (411)

For example, one appellate court held that a challenge to the underlying contract – including to the arbitration clause – for fraud, without "identify[ing] any misrepresentations particular to the arbitration agreement *separate from the contract as a whole*" was "insufficient" to invalidate the arbitration agreement. (412) Similarly, another lower court held that where the "challenge was to the validity of the contract as a whole" this did not invalidate the arbitration agreement and the dispute "must therefore be submitted to arbitration." (413) The court added that:

> "The Court realizes that the arbitration panel may find the [underlying] Agreement void due to fraud in the factum, which would mean that the Court enforced an arbitration clause in a void contract. While this result may seem paradoxical, it is exactly the result contemplated by the Court in *Buckeye*." (414)

Applying this standard, U.S. lower courts have considered and resolved challenges to arbitration agreements, on an interlocutory basis, where those challenges were directed specifically to the validity, legality, or effectiveness of the arbitration agreement itself. Thus, as discussed in detail below, U.S. courts have considered challenges to arbitration
P 422 agreements based on fraudulent inducement, (415) fraud, (416) ● lack of consideration or mutuality, (417) duress, (418) mistake, (419) unconscionability, (420) impossibility, (421)
P 423 uncertainty, (422) illegality, (423) public policy, (424) failure to comply with a ● condition precedent to arbitration (425) and expiration or termination. (426) Critically, in each case, the challenge must be made specifically to the arbitration agreement, and not generally to the underlying contract.

P 424 ● Some U.S. lower courts have adopted a different position, holding that an arbitration agreement can be "specifically" challenged on grounds that also apply to the underlying contract, but it appears to be a minority view. (427) Thus, according to one court, where an allegation of fraud in the inception was directed at both the principal contract and the arbitration agreement, "it cannot be seriously contended that the party knew he was signing one contract but did not know he was agreeing to another agreement when the two agreements [the arbitration agreement and the underlying contract] are contained in the same document." (428) In that situation, "if a party is unaware he is signing any contract, obviously he is also unaware he is agreeing to arbitration." (429)

(3) Treatment of Claims Challenging Existence of Underlying Contract Under Federal Arbitration Act

A final category of cases involves the effect of challenges to the existence or formation of the underlying contract on the parties' arbitration clause (as distinguished from challenges to the validity, legality, or continued effectiveness of the underlying contract). As discussed above, the U.S. Supreme Court noted this issue in *Buckeye*, holding that the issue of *contract formation* is for these purposes "different from" that of *contractual validity*, but reserving judgment on whether the separability presumption would apply in cases where no underlying contract was ever formed. (430) In particular, the Court identified cases involving disputes over contractual consent (*e.g.*, "whether the alleged obligor ever signed the contract") and capacity or authority (*e.g.*, "lacked authority"), in each case with respect to the underlying contract, as potentially impeaching the separable arbitration agreement and requiring interlocutory judicial resolution. (431)

More recently, as also discussed above, the Supreme Court confirmed this distinction between challenges to the legality or validity of a contract, and challenges to the existence of the contract. In particular, the Court held in *Rent-A-Center West, Inc. v.*
P 425 *Jackson* (432) that "[t]he issue of the agreement's 'validity' is different from the issue ● whether any agreement between the parties 'was ever concluded,'" (433) and made clear that the issue of formation of the underlying contract was for interlocutory judicial consideration. This holding was confirmed by the Supreme Court more recently in *Granite Rock Co. v. Int'l Bhd of Teamsters*, where the Court ruled that "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." (434)

As already discussed, it is important to distinguish between issues of competence-competence and substantive validity in considering U.S. authority under the FAA. (435) With regard to the first issue, concerning the allocation of jurisdictional competence, lower U.S. courts have thus far generally entertained interlocutory claims that no underlying contract was ever formed (rather than referring them to arbitration). (436) The weight of U.S. authority holds that challenges to the formation of the underlying contract are for interlocutory judicial resolution, even though challenges to the underlying contract's validity or legality are ordinarily for arbitral resolution:

> "the *Prima Paint* doctrine has been extended to require arbitration panels to decide many issues regarding the validity of a contract containing arbitration language – including allegations that such contracts are voidable because they involved duress, undue coercion, confusion, mutual mistake, or unconscionability. However, *Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*." (437)

Or, as another lower court reasoned:

> "Where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute." (438)

Almost all lower courts appear to adopt this analysis, holding that a challenge directed to the existence of the underlying contract also necessarily affects the existence of the arbitration agreement and is therefore for interlocutory judicial resolution. (439) Despite
P 426 ● this general consensus, however, lower courts have reached widely divergent results in applying this principle to different types of challenges to the underlying contract.

Thus, some lower courts have held that claims of lack of capacity or authority, directed at the underlying contract, also necessarily impeach the associated agreement to arbitrate, and must therefore be the subject of interlocutory judicial determination, (440) while other courts have adopted the opposite view, holding that such claims do not impeach the arbitration clause and are for initial arbitral determination. (441) For example, some courts have held that, "[u]nlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be
P 427 directed only at the entire contract," (442) ● while others have concluded that a claim of mental incapacity is "not a specific challenge to the arbitration clause." (443)

The same diversity in U.S. lower court authority exists with regard to claims of a lack of consent, including claims of duress. (444) For example, some courts have held that "duress…issue relates to the contract as a whole and not solely the arbitration provision [and] is therefore an issue to be decided in arbitration," (445) while other courts have held:

> "The plaintiff here contends that no contract was ever formed because the plaintiff was under duress and did not freely assent to enter into the separation agreement or *any* of its provisions….[This] claim of duress challenges the existence of the contract itself, and therefore relates to all the clauses and provisions in it, including the arbitration clause. The argument that the arbitration clause is invalid and unenforceable, therefore, is not barred by the rule in *Prima Paint*." (446)

P 428 ● U.S. lower courts have also not reached uniform results in cases involving alleged forgery of the underlying contract. (447) Thus, one appellate court reasoned, in the context of claims that a putative party's signature on the contract was forged, and that no

agreement at all had ever been formed, that:

> "Because the legal status of the arbitration clause is unresolved, Advent's desire to arbitrate, separate from the contract, appears as a desire, floating in the legal ether, untethered by either reciprocal promises or other sufficient consideration. Only a [judicial] ruling on the effect of Huep's signature can ground Advent's wishes in the firmament." (448)

In contrast, at least one other U.S. lower court has reached the opposite conclusion, on very similar facts, holding that "challenges claiming that – *as a whole* – a contract is illegal, is void as a matter of law, *contains forged signatures*, or was induced by fraud will generally not serve to defeat an arbitration clause." (449)

U.S. lower courts have similarly reached divergent conclusions on the substantive question of whether the consequence of the non-existence of an underlying contract is that there also is no arbitration agreement (depending on the facts and applicable substantive legal rules). Some courts have held that "because" there was never any underlying contract, there is no arbitration agreement; (450) other courts have held that
P 429 ● a valid arbitration agreement was formed, notwithstanding the absence (or apparent absence) of any underlying contract. (451)

For example, one U.S. court refused to enforce an arbitration agreement contained within a contract that it held had never been concluded, reasoning that "something can be severed only from something else that exists. How can the Court 'sever' an arbitration clause from a non-existent charter party?" (452) Similarly, another court reasoned that:

> "The validity of the arbitration clause as a contract, which the District Court must determine prior to ordering arbitration, derives from [the agent's] authority to bind Advent. Therefore, there does not appear to be any independent source of the validity of the arbitration clause once the underlying contract is taken off the table. *If the [agent's] signature is not binding, there is no arbitration clause.*" (453)

In contrast, other courts have conducted a more nuanced inquiry, considering whether, notwithstanding the non-existence of the underlying contract, the parties independently concluded an agreement to arbitrate. For example, in *Republic of Nicaragua v. Standard Fruit Co.*, (454) the court considered whether an arbitration clause contained in an unsigned, unfinalized set of agreements was binding, notwithstanding the fact that the underlying contracts had admittedly never been finalized. The Court upheld the existence of an agreement to arbitrate and ordered the parties to arbitrate their substantive disputes, rejecting the argument that the non-existence of the underlying contracts resulted in the non-existence or invalidity of the arbitration clause. Quoting earlier U.S. authority, the Court reasoned:

> "[The defendant] argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. *The conclusion does not follow its premise.* The agreement to arbitrate and the agreement to buy and sell motors are
> P 430 separate. [The plaintiff's] promise to arbitrate was given in ● exchange for [the defendant's] promise to arbitrate and each promise was sufficient consideration for the other." (455)

Relying on this rationale, the *Standard Fruit* court held that the parties had agreed to arbitrate their disputes, notwithstanding the non-existence of their underlying contracts, and ordered them to do so. This holding rested on the conclusion that an arbitration agreement may be – and on the facts of the case was – validly formed even in circumstances in which the underlying contract was never concluded. (456)

Other U.S. lower courts have reached similar decisions, holding on particular facts that the parties agreed to arbitrate, even if no underlying commercial contract was concluded. (457) This result may follow from either the application of a different national law to the arbitration agreement than to the underlying contract, (458) or from factual evidence indicating that the parties had concluded their arbitration agreement, even if they had not yet entered into the underlying contract. (459) Thus, as one U.S. court put it, "if they have agreed on nothing else, they have agreed to arbitrate," (460) while another court concluded that, despite an apparent lack of consensus on the underlying contract, "there was a meeting of the minds on the mode of arbitrating disputes between the parties" and "the parties had agreed to arbitrate their claims." (461)

While acknowledging the possibility that an arbitration agreement may validly be formed
P 431 even if no underlying contract was formed, U.S. courts are frequently not ● persuaded that this has occurred as a factual matter. (462) In this regard, many U.S. courts have been skeptical about the likelihood that an arbitration agreement may have been validly formed, even though the underlying contract was not. Nonetheless, even these courts have generally recognized the possibility that an agreement to arbitration can be validly concluded apart from the underlying contract and even if the underlying contract is never formed. (463)

[iii] "Arbitration Fairness Act"

Legislation has been proposed in the United States that, at least in some versions, would overrule *Prima Paint* and *Buckeye* and limit the consequences of the separability doctrine in some domestic U.S. cases. The so-called "Arbitration Fairness Act" would provide that any question of validity or enforceability of certain arbitration agreements subject to the domestic FAA would be resolved on an interlocutory basis by a court, not the arbitral tribunal. The proposed legislation would require this result, for provisions subject to the new enactment, regardless whether the arbitration clause is challenged specifically or in conjunction with the underlying contract, providing:

> "The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, *irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or*
> P 432 ● *in conjunction with other terms of the contract containing such agreement*." (464)

The proposed legislation does not overrule the separability presumption as a rule affecting the substantive validity of agreements to arbitrate (leaving intact the statutory basis for the presumption in §§2, 3 and 4 of the FAA). (465) Instead, the proposed Act would reverse the existing U.S. approach to the allocation of jurisdictional competence, as articulated in *Prima Paint* and *Buckeye*, without affecting analysis of the substantive validity of arbitration agreements. The proposed act, as drafted in more recent versions, would not apply to most international commercial arbitration provisions (instead being limited to consumer, labor, civil rights and antitrust claims). (466)

As discussed below, the proposed Act's treatment of competence-competence would be a profoundly retrograde step, particularly if it were extended to international commercial arbitration agreements and the international arbitral process. If applied to international arbitration agreements, the Act would be ill-considered policy that would likely place the United States in serious violation of its commitments under the New York Convention. (467) In part for that reason, most versions of the proposed "Arbitration Fairness Act" have excluded international arbitration from their reach. (468) In any event, for the moment, these issues remain purely theoretical, as the Arbitration Fairness Act has failed to be enacted in a number of previous Congresses (since 2007) and may well progress no further in the future.

[iv] Future Directions: Separability Under the Federal Arbitration Act

There is a substantial body of U.S. judicial authority addressing the separability presumption under the FAA. In evaluating that authority, it is important to distinguish between issues of the substantive validity of the arbitration clause and the allocation of competence over jurisdictional objections. As discussed above, under the U.S. approach to the allocation of jurisdictional competence, these matters are closely-related. (469) Nonetheless, an evaluation of the U.S. approach to the separability presumption requires different analyses and different conclusions for each.

P 433 ● *(1) Future Directions: Substantive Validity of Arbitration Agreements Under Federal Arbitration Act*

As discussed above, it is well-settled that an agreement to arbitrate is presumptively separable as a matter of substantive law under the FAA. Thus, "except where the parties otherwise intend…arbitration clauses are 'separable' from the contracts in which they are embedded" (470) and "as a matter of substantive federal arbitration law, *an arbitration provision is severable* from the remainder of the contract." (471)

It is now also well-settled that, as a consequence of this separability presumption, the invalidity, illegality, or ineffectiveness of the underlying contract does not affect the validity of the associated arbitration agreement. Thus, where there has been a challenge to the validity of the underlying contract, "but not specifically its arbitration provisions, *those provisions are enforceable apart from the remainder of the contract*." (472) In order to challenge the validity of the arbitration agreement, there must be a challenge "specifically" to that agreement, as distinguished from the underlying contract. (473) That requirement is a matter of substantive federal law which, in §§2, 3 and 4 of the FAA, gives effect to the parties' agreement to arbitrate, including its presumptively separable character. (474)

As also discussed above, U.S. courts have reached divergent results in applying the separability presumption. In particular, lower courts have struggled in determining when an arbitration agreement has been "specifically" challenged and when a challenge to the "existence" of the underlying contract impeaches the arbitration agreement. (475) These two issues, which are related, require further discussion.

First, as discussed above, most U.S. lower courts have held that an arbitration agreement is only challenged "specifically" where a party alleges facts and makes arguments concerning the validity of that agreement alone, not applicable also to the underlying contract. (476) That approach is mistaken and should be reconsidered.

The only relevant question for purposes of the substantive validity of an arbitration agreement should be whether the validity of the arbitration agreement itself has been

challenged by claims that specifically affect the validity of its terms, and not whether the underlying contract's validity has also been challenged. A challenge should be regarded as directed "specifically" at the arbitration agreement, and capable of vitiating its validity, if a party satisfactorily alleges that the arbitration agreement itself is invalid, even if the grounds for that claim are also simultaneously applicable to the underlying contract.

P 434 For example, a challenge to the arbitration clause "specifically," capable of vitiating its substantive validity, should be found if a party claims that both the arbitration agreement and the underlying contract are unconscionable, alleging that particular aspects of each agreement are unacceptably one-sided (477) and that the relationship between the parties and character of the bargaining process was fundamentally unfair. (478) The fact that a party also challenges the validity of the underlying contract, on parallel or closely-related unconscionability grounds, does not mean that there is no challenge to the substantive validity of the arbitration agreement itself. Similarly, a challenge "specifically" to the arbitration agreement should be found where a party claims that there has been a fundamental change in circumstances, affecting both the viability of a contractually-agreed project in a host state and an agreement to arbitrate in the host state, because of radical changes in the host state's government and legal system.

In each case, the relevant question is whether there has been a claim of invalidity directed specifically at the terms of the arbitration agreement itself – and not whether the same or a similar claim has also or simultaneously been directed at the underlying contract. The fact that there are parallel claims of invalidity does not alter the fact that there is a claim of invalidity directed specifically at the arbitration agreement. Rather, only where there is no more than a claim directed generally at the validity of the underlying contract should it be appropriate to conclude that there is no claim directed "specifically" at the arbitration agreement.

As a practical matter, a challenge to the validity, legality, or continued effectiveness of the underlying contract will very seldom also be capable of affecting the validity, legality, or continued effectiveness of the arbitration agreement. That is because of the different characters of the underlying contract and the arbitration agreement. In particular, the two agreements have different provisions and different objectives; as a consequence, a defect in the validity of the underlying contract – for example, for uncertainty or indefiniteness, unconscionability, impossibility, frustration, or fraud – will very seldom be capable of also having an effect on the validity of the arbitration agreement.

For example, the fact that the terms of an underlying contract are uncertain or indefinite says nothing at all about the certainty or definiteness of the arbitration agreement (which could well be a standard ICC or UNCITRAL model clause). The fact that the underlying contract was tainted by fraud (for example, concerning the quality of goods sold) has nothing to do with the separable arbitration agreement (which could have been thoroughly negotiated). And the fact that the underlying contract had been frustrated or become impossible to perform does not in any way suggest that the associated arbitration agreement cannot be performed in precisely the manner intended by the parties.

Nonetheless, given the relationship between the underlying contract and the arbitration agreement, there will be cases where grounds for challenging the validity of one
P 435 agreement do affect the other in at least some respects. For example, claims of unconscionability directed at the underlying contract and the arbitration agreement may involve common allegations, including the parties' relative bargaining power and sophistication and the nature of the negotiations (or lack thereof). Similarly, claims of mistake or fraud concerning a counter-party's identity or the basic nature of the transaction will provide the basis for simultaneous challenges to both the underlying contract and associated arbitration agreement.

The critical point is that the question whether the substantive validity of an arbitration agreement is challenged requires considering the specific allegations and claims that are made by a party and, in particular, considering whether these allegations and claims are directed to the validity of the arbitration agreement itself. If there are such claims, then the fact that similar or identical allegations and claims are made with respect to the underlying contract is irrelevant. If there are allegations and arguments directed at the arbitration agreement itself, then that agreement's substantive validity has been challenged and the agreement may be held invalid.

Second, a related analysis applies to U.S. decisions considering challenges to the existence of the parties' underlying contract. As discussed above, U.S. courts have uniformly held that a challenge to the underlying contract's "existence" is "different from" a challenge to its "validity," and that, as a consequence, such challenges are for interlocutory judicial resolution. (479) Nonetheless, in applying this rule, U.S. lower courts have reached widely divergent conclusions with regard to the treatment of challenges to capacity, duress, authority, forgery and the like. (480)

A sharp distinction between challenges to the "validity" and the "existence" of the underlying contract is difficult to justify in analysis of the substantive validity of the

arbitration agreement (and, in particular, the international arbitration agreement). Specifically, it is very difficult to say that an arbitration clause in an underlying contract that is "void," "voidable," "invalid," or "illegal" – because of fraud, mistake, lack of consideration, or termination – necessarily exists, but that an arbitration clause in any underlying contract that is "nonexistent" – because of duress, lack of capacity, lack of authority, lack of consideration, or lack of consent – necessarily does not exist. In fact, there is very little basis for concluding that particular categories of contract law defects in the underlying contract necessarily affect or do not affect an associated arbitration clause in all cases. (481)

Thus, as discussed above, there can readily be instances in which a valid arbitration agreement exists, notwithstanding the "non-existence" of the underlying contract –
P 436 including because of lack of consent, (482) lack of authority, (483) or duress. (484) Less ● frequently, and as already discussed, there can also be instances in which an arbitration agreement is invalid or nonexistent for the same reasons that lead to the "voidness" or "invalidity" of the underlying contract – including fraud, (485) illegality (486) and mistake. (487) The simple point is that general categorization of the type of challenge to the underlying contract does not have any necessary relationship to the existence or non-existence of a valid arbitration agreement.

For example, claims of duress may in some cases apply equally to both the underlying contract and the arbitration agreement, as when one party procures the signature on a contract at the point of a gun. Likewise, claims of lack of capacity or authority may apply equally to both the underlying contract and the arbitration agreement – for example, when a party lacks any mental capacity or when a putative agent is not authorized to do anything at all for the alleged principal. Similarly, where a party's signature is forged on a contract, containing an arbitration clause, that necessarily affects the arbitration clause contained within the contract; the same is true when one party never agreed to, or even discussed, anything with its asserted counter-party. These are all examples of "doubly relevant facts," where a defect in the underlying contract is simultaneously also a defect in the arbitration agreement. (488)

Nonetheless, as also discussed above, there can also readily be cases where the non-existence of the underlying contract does not affect the existence of the separable arbitration agreement. For example, an agent or corporate officer may be authorized to enter into some types of contracts (including arbitration agreements), but not others; a challenge to the agent's authority to commit its principal to the underlying contract may not, in these cases, affect the validity of the arbitration clause. (489) Similarly, there may well be cases where economic duress applies to the underlying contract, but not to the separable arbitration agreement (which may take the form of a standard institutional
P 437 arbitration clause, frequently used by parties in the ● industry). (490) And, parties can, and sometimes do, conclude agreements to arbitrate even though they do not consent to the terms of an underlying transaction. (491)

As a consequence, the proper approach to the substantive validity of the arbitration agreement under the FAA is to consider the specific factual allegations and legal claims or defenses that are presented by a particular challenge to the arbitration agreement. The decisive question in that consideration is whether these allegations and claims concern or are directed at the arbitration agreement itself, as distinguished from the underlying contract. Only if there are allegations and claims that would impeach the arbitration agreement itself (*e.g.*, the arbitral mechanism is unconscionable, uncertain, or terminated; there was fraud regarding the existence or fundamental character of the arbitration agreement) can there be a challenge to the validity of that agreement.

This analysis of the substantive validity of the arbitration agreement would not produce results that are substantially different from those currently reached under well-reasoned decisions applying the FAA. Consistent with U.S. lower court decisions, this analysis will virtually always result in upholding the parties' separable agreement to arbitrate, notwithstanding the invalidity or illegality of the underlying contract. (492) That is, the unconscionability, indefiniteness, illegality, or fraudulent inducement of the underlying contract will almost never impeach the arbitration agreement: the contractual terms, negotiations, fairness and performance of the underlying contract will simply not be relevant to, or bear upon, the separable agreement to arbitrate. In contrast, again consistent with most U.S. lower court authority, the non-existence of the underlying contract will be substantially more likely to impeach the associated agreement to arbitrate. (493) That is, the absence of consent, capacity, or authority in relation to the underlying contract will very often also simultaneously involve defects in formation of the agreement to arbitrate.

Nonetheless, in assessing the substantive validity of an arbitration agreement, no weight should be placed on whether a party "also" claims that no underlying contract exists, as well as that no arbitration clause exists. As already discussed, there will be instances where a challenge to the underlying contract also impeaches the associated arbitration clause (*e.g.*, the underlying contract is forged, an agent lacked any authority or a party lacked mental capacity). The proper inquiry in these cases should be to consider whether the alleged defects in the particular case separately impeach the arbitration clause – which they may (or may not) do regardless whether they also affect the underlying contract. The decisive question in such cases is whether the asserted facts give rise to the

non-existence or invalidity of the agreement to arbitrate, whether or not the underlying contract is also impeached.

P 438 ● *(2) Future Directions: Allocation of Jurisdictional Competence Under Federal Arbitration Act*

As discussed above, U.S. judicial authority expressly bases the allocation of jurisdictional competence on the existence of a challenge to the validity of the arbitration agreement. (494) Where a challenge is made "specifically" to the validity of the separate arbitration agreement exists, *Prima Paint, Buckeye* and *Rent-A-Center* require U.S. courts to resolve it themselves, on an interlocutory basis; where no such challenge exists, the parties' dispute must be referred to arbitration. As the Court declared in *Buckeye*, linking the allocation of jurisdictional competence expressly to the existence of a challenge to the arbitration agreement: "because respondents challenge the Agreement, but not specifically its arbitration provisions, *those provisions are enforceable* apart from the remainder of the contract. The challenge should *therefore* be considered by an arbitrator, not a court." (495)

The approach to the allocation of jurisdictional competence under *Prima Paint* and its progeny makes less sense than the approach to the substantive validity of the arbitration agreement. There are a number of significant shortcomings to the approach to the allocation of jurisdictional competence under the FAA.

First, for many of the reasons discussed above, it is ill-conceived to base the allocation of competence to consider and resolve jurisdictional objections on sharp distinctions between different categories of contract law defenses, holding that challenges to the "formation" or "existence" of the underlying contract are for interlocutory judicial resolution, but that challenges to the "validity" or "legality" of the underlying contract are for arbitral determination. Doing so lacks any doctrinal justification and, even if it were supported by some sort of formal logic, is impracticable and inefficient.

The Supreme Court rightly held in *Buckeye* that distinctions between "void" and "voidable" contracts were artificial for purposes of allocating jurisdictional competence. (496) For the same reason, it is also artificial to distinguish between "nonexistent" contracts, on the one hand, and "void" or "invalid" contracts, on the other hand. Even if the allocation of jurisdictional competence is linked to the existence of a challenge to the arbitration agreement (as the terms of the domestic FAA suggest), (497) a distinction between "nonexistent" and "void" or "invalid" contracts lacks any substantive justification. Rather, as discussed above, there are instances in which no valid arbitration agreement exists, for the same reasons that the parties' underlying contract is invalid; conversely, there are other instances in which a valid arbitration agreement does exist, even though no underlying contract was ever formed. (498)

P 439 ● Second, basing the allocation of jurisdictional competence on the existence of a challenge to the substantive validity of the arbitration agreement, as *Buckeye* and other U.S. authority does, is unwise. This is illustrated graphically by the numerous irreconcilable U.S. lower court decisions, detailed above, adopting contrary conclusions regarding disputes over the allocation of jurisdictional competence in disputes concerning capacity, duress, forgery and the like. (499) Moreover, the enormous number of U.S. judicial authorities addressing the allocation of jurisdictional competence is a dramatic outlier, compared to other jurisdictions, while the complexity and confusion of that body of authority does little to provide guidance to parties, while imposing enormous expense. (500)

Furthermore, the approach mandated by *Buckeye*, linking the allocation of jurisdictional competence to the existence of a "specific" challenge to the arbitration agreement, ignores important considerations of judicial efficiency, fairness and the parties' likely intentions. (501) Instead of considering what forum would be the most efficient and fair place to consider a jurisdictional challenge, the *Buckeye* analysis adopts an arbitrary rule that any challenge directed specifically to the arbitration agreement or to the existence of the underlying contract must be resolved on an interlocutory basis by a court. (502)

Relatedly, the *Buckeye* rule is difficult and costly to apply and produces inefficient and unfair results. The difficulty and complexity of the *Buckeye* rule is evidenced by the large numbers of divergent U.S. decisions on the subject (detailed above). The inefficiency of the rule is also evident from the fact that U.S. courts will be required to consider any challenge made to an arbitration agreement, regardless whether or not an arbitral tribunal is already in place, with greater expertise in the applicable law. As discussed in greater detail below, this makes very little practical sense at all. (503)

Rather than adopting this rule, the better approach would be for courts to stay litigation of challenges to the parties' arbitration agreement, and permit them to be arbitrated, depending principally on considerations of efficiency and fairness. That approach, which is authorized by §3 of the FAA and the inherent authority of courts to stay proceedings before them, would produce the following general guidelines. (504)

First, where there is no challenge of any sort to the existence of the arbitration clause, then the parties' substantive dispute regarding the underlying contract *must* be referred to arbitration. That is, if the court determines that a party has simply not challenged the

P 440 existence or validity of the arbitration agreement, but only the underlying contract, then the challenge not only should, but must, be arbitrated (as ● in *Prima Paint*). (505) As discussed in detail below, where there is no challenge to the arbitration clause, then the New York Convention and most developed national arbitration legislation (including §§2 and 4 of the FAA) impose a mandatory requirement to refer the parties to arbitration. (506)

Second, if either the validity or the existence of the arbitration agreement itself is specifically challenged, then courts should consider whether it is efficient and fair to resolve the challenge on an interlocutory basis. If the challenge is conclusory, unsubstantiated, or belated, or if the arbitral tribunal is better-suited to consider the challenge efficiently, then it should be referred to arbitration. (507) For example, if the arbitration is well-advanced when litigation is commenced; if the arbitration agreement is governed by a foreign law in which the arbitrators are expert; if the jurisdictional issues are intertwined with the merits issues; or if the challenge to the arbitration agreement is unsubstantiated, then it will virtually always be appropriate to refer the jurisdictional dispute to arbitration. Conversely, if the arbitral tribunal has not been constituted or the dispute is governed by U.S. law, then it may be appropriate for the court to decide the dispute on an interlocutory basis.

If there are no strong arguments for or against interlocutory judicial consideration, the presumption should be that the jurisdictional objection will be referred to arbitration for initial consideration. (508) As discussed below, the foregoing approach is consistent with the European Convention and well-considered national court authority, which provide that consideration of jurisdictional objections are presumptively for the arbitral tribunal but may, in particular cases, be resolved by a national court. (509) In international cases, this approach also avoids the risks of competing national court decisions about a single dispute, while permitting initial resolution of the dispute in the presumptive contractual forum.

Finally, even if a court does undertake interlocutory judicial consideration of jurisdictional objections, the facts (and law) may very well establish that the clause was validly formed even though the underlying contract was not. In this case, the court would refer the parties' dispute over their underlying contract to arbitration, pursuant to their valid arbitration agreement, where the arbitrators would be free to find that the underlying contract either was or was not validly formed. This result is a consequence of the separable status of the arbitration agreement as a matter of substantive contract validity.

P 441 ● [c] England

English courts have repeatedly held that the invalidity of the parties' underlying contract does not necessarily result in the invalidity of an associated arbitration clause. This was reflected first in common law decisions and then, more recently, in the English Arbitration Act, 1996, and judicial interpretations of the Act. (510)

Early English decisions recognized a separability presumption, but did not apply it broadly, instead generally holding that claims of non-existence, voidness, or illegality of the underlying contract necessarily affected the validity of the arbitration clause. (511) In one court's words:

> "The plaintiffs in this action sought a declaration that the contract which I have just read was illegal by reason of the war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it." (512)

As the House of Lords observed later, "there was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause." (513)

Over time, however, the English courts more whole-heartedly embraced the separability doctrine, culminating in the Court of Appeal's ruling in *Harbour Assurance Co. (U.K.) Ltd v. Kansa General International Insurance Co.* (514) There, the court held that the parties' arbitration clause was separate from the underlying insurance contract and that, as a consequence, the initial illegality of the underlying insurance contract did not necessarily affect the arbitration clause. (515) At the same time, paralleling developments in the United States, the *Harbour Assurance* court emphasized that there would be instances in which the invalidity that affected the underlying contract also affected the arbitration clause (*e.g.*, claims of forgery of the underlying contract or denial of the existence of any underlying contract):

P 442 > ● "There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of *non est factum* or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence." (516)

This general approach to the separability presumption was embraced, and expanded, in §7 of the English Arbitration Act, 1996. Section 7 provides that, unless otherwise agreed,

"an arbitration agreement which forms…part of another agreement…shall not be regarded as invalid, non-existent, or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." (517) This provision confirms earlier English authority holding that an arbitration agreement is not necessarily invalid, nonexistent, or ineffective because of the invalidity of the parties' underlying contract. (518)

Importantly, §7 provides for the separability of the arbitration agreement with specific reference to the substantive validity of the arbitration agreement (providing that the arbitration clause "shall for *that purpose* be treated as a distinct agreement"). (519) As noted above, this contrasts with Article 16 of the Model Law, which deals with separability only in the context of competence-competence ("The arbitral tribunal may rule on its own jurisdiction…[f]or *that* purpose."). (520)

At the same time, in this respect like the Model Law, (521) §7 of the Act provides only that an arbitration clause is not invalid simply "*because*" of the invalidity of the underlying contract. In so doing, §7 recognizes that the circumstances which give rise to the non-existence, invalidity, or ineffectiveness of the underlying contract, or other circumstances, may also, in particular cases, result in the same status for the associated arbitration clause. (522) Section 7 only provides that an arbitration agreement is not invalid, nonexistent, or ineffective simply or automatically because the underlying contract is.

P 443 ● English courts have given expansive effect to §7's statement of the separability presumption. (523) In particular, applying §7 in *Fiona Trust & Holding Corp. v. Privalov*, the English Court of Appeal and the House of Lords confirmed and extended the historic scope of the separability presumption.

The Court of Appeal firmly embraced the separability presumption in *Fiona Trust*, holding that, in order to challenge an arbitration agreement, "it is not enough to say that the contract as a whole is impeachable" and that "there must be something more than that to impeach the arbitration clause." (524) The court reasoned that "[i]t is only if the arbitration agreement is itself *directly impeached for some specific reason* that the tribunal will be prevented from deciding the disputes that relate to the main contract." (525) The court cited, as examples of circumstances where the arbitration agreement would be "directly impeached," cases involving forgery of a signature or fundamental mistake. (526) Applying this formulation of the separability presumption, the court held that a claim that the parties' underlying contract had been fraudulently induced did not impeach the separable arbitration agreement, and referred the dispute to arbitration.

On appeal, the House of Lords affirmed, holding that a claim that the parties' underlying contract was procured by fraud (specifically, bribery of one party's employee) does not affect the alleged contract's putative arbitration clause, unless the fraud was directly specifically at the arbitration agreement. The House of Lords reasoned that claims not directed specifically at the arbitration agreement are for arbitral determination, subject
P 444 to subsequent judicial review of the award. (527) In ● particular, citing to *Prima Paint* and subsequent authority, (528) the House of Lords explained the separability presumption in broad terms, similar to those adopted by the U.S. Supreme Court in *Buckeye*: "The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on *grounds which relate directly to the arbitration agreement*." (529) Lord Hope's judgment underscored the rigor of this requirement:

> "The doctrine of separability requires *direct impeachment* of the arbitration agreement before it can be set aside. *This is an exacting test.* The argument must be based on facts which are *specific to the arbitration agreement*. Allegations that are parasitical to a challenge to the validity to the main agreement will not do." (530)

Based on this analysis, the House of Lords went on to hold that a claim that the underlying contract had been procured by fraud had to be referred to arbitration, because that claim did not relate "directly" or "specifically" to the arbitration agreement. The Law Lords reasoned that: "if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement." (531) Rather:

> "Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration." (532)

P 445 ● *Fiona Trust* was an application of the separability presumption, codified in §7 of the Arbitration Act, leading to a conclusion that the arbitration agreement in question had not been challenged and, as a consequence, that the challenge to the underlying contract had to be referred to arbitration. The linkage between the existence of a challenge to the substantive validity of the arbitration agreement and the allocation of jurisdictional

competence was made explicit in Lord Hope's judgment, which concluded: "That being the situation in this case [*i.e.*, no direct challenge to the arbitration agreement], the agreement to go to arbitration must be given effect." (533)

Lord Hope's judgment also expressly adopted the approach of *Buckeye* to §4 of the FAA, under U.S. law, basing the allocation of jurisdictional competence on the existence of a challenge to the validity of the arbitration agreement:

> "That section [§4 of the FAA] provides that, on being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. Section 7 uses slightly different language, but it is to the same effect." (534)

The *Fiona Trust* judgment also adopted an analysis similar to that in *Buckeye*, and other U.S. authorities, holding that challenges to the "existence" of the underlying contract may impeach the associated arbitration clause. (535) Thus, the Law Lords concluded that some challenges to the underlying contract would also impeach the validity of the arbitration agreement, reasoning that:

> "there may be cases in which the ground upon which the main agreement is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement,' was forged." (536)

Similarly, the *Fiona Trust* judgments identified cases where "a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf," and reasoned that this is also "an attack on both the main agreement and the arbitration agreement." (537)

P 446 ● More clearly than analysis by U.S. courts under the FAA, the Law Lords identified precisely why it is that some challenges to the existence of the underlying contract may also involve challenges to the associated arbitration agreement. As the House of Lords explained, when there is a claim that a signature on the underlying contract was forged, "the ground of attack is not that the main agreement was invalid," but is instead "that the signature to the arbitration agreement, as a 'distinct agreement,' was forged." (538) Put differently, and as discussed above, the facts that establish certain defects in the underlying contract are "doubly relevant" facts, which simultaneously establish the non-existence or invalidity of the arbitration agreement. (539)

If English courts were to return to the questions presented in *Heyman v. Darwins Ltd*, they could be expected to adopt a conclusion similar to that reached in 1942 by Viscount Simon:

> "If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission [to arbitration]." (540)

Importantly, however, the rationale of English courts for this conclusion under *Fiona Trust* and the English Arbitration Act, 1996, would be vitally different. In particular, English courts would no longer reason that by denying it concluded the underlying contract, a party "thereby" denied it ever agreed to arbitrate. Rather, the approach under *Fiona Trust* would be that the facts underlying a claim that no underlying contract was ever formed was generally be identical, or largely identical to, the facts underlying a claim that no arbitration agreement was ever formed either. That difference is important both analytically and practically – because in at least a reasonable number of cases, there will be additional facts demonstrating that, despite the non-existence of the underlying contract, the parties did conclude a valid arbitration agreement. (541)

[d] France

As discussed above, French courts have long recognized the "autonomy" or "independence" of the arbitration agreement. (542) In turn, French arbitration legislation has codified that principle, in Article 1442 of the 1980 version of the French arbitration legislation and Article 1447 of the 2011 Decree. In particular, as discussed above, Article 1447 of the revised French Code of Civil Procedure provides that "[t]he arbitration agreement is independent from the contract to which it refers. It is not affected by [the underlying contract's] ineffectiveness." (543)

Like courts in other jurisdictions, French courts have long held that, as a consequence of the separability presumption, various defects in the parties' underlying contract will not
P 447 affect the associated arbitration clause. Among other things, French courts have ● upheld the validity of international arbitration agreements notwithstanding claims that the underlying contract was repudiated, discharged, illegal, or voided. (544)

As in other jurisdictions, however, there are limits to the separability presumption in French law. Paralleling U.S. and English approaches, in cases involving allegations that no underlying contract was ever formed, French courts have generally held that these claims are likely to involve facts that also impeach the existence of the arbitration agreement. (545) As one leading French commentator reasons:

> "The scenario in which an arbitration clause most clearly would not be severed, and hence would be invalid, is where the assent of one of the parties is lacking. If the person to whom the offer is made does not accept it, then no contract has been formed, and the arbitration clause contained in the offer has not been agreed to any more than any of the other clauses, for there was no specific mutual agreement with respect to that clause." (546)

On the other hand, again paralleling U.S. and English authority, French commentary concludes that challenges to the validity or legality of the underlying contract, as distinguished from challenges to the existence of the underlying contract, do not generally affect the associated arbitration clause. In the words of one commentator:

> "it is thus necessary to carefully distinguish between the voidness of the contract (with the arbitration clause) and the total lack (inexistence) of such a contract (with the arbitration clause). In such a case, the existence of the arbitration agreement (of the clause inserted into the contract) is at stake and the concept of the autonomy is no longer sufficient." (547)

It is also important to note that the foregoing conclusions are directed, under French law, towards the substantive validity of the arbitration agreement (rather than the allocation of competence over jurisdictional objections). As discussed in detail below, French courts have adopted a specialized competence-competence regime, which permits arbitral
P 448 consideration of (and generally precludes interlocutory judicial ● consideration of) all jurisdictional challenges, including challenges specifically to the arbitration agreement and challenges to the existence of the underlying contract. (548)

[e] Switzerland

As discussed above, Swiss courts were among the earliest proponents of the separability doctrine in contemporary times, with the Swiss Law on Private International Law now statutorily confirming the principle. (549) There is a substantial body of Swiss authority applying the separability presumption. (550)

In a number of different contexts, Swiss courts have held that claims that the underlying contract was voidable, void, illegal, or terminated do not automatically impeach the arbitration agreement and are for resolution by the arbitrators. (551) Nevertheless, the Swiss Federal Tribunal has also repeatedly held that the separability presumption does not necessarily result in validation of an arbitration clause where the grounds for the invalidity of the underlying contract likewise affect the arbitration clause. According to these decisions, this is generally true for deficiencies in assent, such as duress or lack of capacity. (552) One Swiss decision explained this analysis as follows:

> "Without any doubt, the invalidity of a contract does not always render the arbitration clause invalid: the clause inserted in a contract that was contested on grounds of fraudulent misrepresentation would still apply to the proceedings seeking invalidation since as an independent procedural agreement it would remain effective even where one of the parties were not bound by the contract. *However, it is required that the clause was agreed to by someone who was capable of signing the contract which contains the clause.*" (553)

Swiss commentary is to the same effect, reasoning that there are cases of an "identity of defect" in both the underlying contract and arbitration agreement – such as lack of
P 449 capacity, lack (or excess) of authority, lack of consent and duress. (554) This analysis ● parallels that adopted in other jurisdictions, including the United States, England, France and elsewhere, where courts have recognized the possibility of "doubly relevant facts" or circumstances that affect both the underlying contract and the arbitration agreement. (555)

[f] Germany

As discussed above, German courts have for nearly a century held that the invalidity of an underlying contract (for example, because a mandatory governmental approval for the contract had not been granted) does not necessarily entail the invalidity of an arbitration clause contained therein, which instead may remain effective for purposes of resolving disputes between the parties connected to the underlying contract. (556) Other German authorities have reached similar results, (557) generally holding that a challenge must be directed at the separable arbitration agreement itself (rather than the underlying contract) in order to impeach the validity of that agreement. (558) In one court's words:

> "The arbitral tribunal…and the court of first instance correctly noted that the nullity of the main contract, if there is such nullity, does not affect the

> arbitration clause. This reasoning agrees with the widespread opinion also adopted in German legal circles as to the relation of arbitration agreement and main contract." (559)

P 450 ● The separability presumption, and its application to preserve the validity of the arbitration agreement notwithstanding the invalidity of the underlying contract, was confirmed by the German enactment of the UNCITRAL Model Law (560) and by German commentary on the Model Law. (561)

At the same time, like other jurisdictions, German authorities also hold that defects in consent to the underlying contract can also affect the associated arbitration clause. German commentators reason that the separability presumption does not validate an arbitration clause if a challenge to the underlying contract is identical to the grounds for challenge to the arbitration clause ("identity of defect" or "*Fehleridentität*"). (562) For example, if a party is deceived about the identity of its counter-party, that can invalidate both the underlying contract and the associated arbitration agreement. (563)

[g] Other Jurisdictions

Courts in other jurisdictions around the world have also affirmed that the separability presumption permits an arbitration clause to survive the invalidity, illegality, or termination of the underlying agreement. The Italian Supreme Court held in 1981 that an arbitration clause is "not affected by any nullity" of the underlying contract and that this "bar[s] the admissibility before the court, of an action aimed at having a contract declared null and void because its subject matter is unlawful." (564) Another Italian decision declared: "the arbitral clause is autonomous with respect to the contract – so that the nullity of the latter does not automatically affect the former." (565)

P 451 Similarly, as early as 1936, the Swedish Supreme Court held that claims of fraud and unconscionability of the underlying contract did not effect the existence or ● applicability of that contract's arbitration clause. (566) The same court reiterated this conclusion in 1976, relying on the separability doctrine to hold that alleged failures to reach agreement regarding the terms of the main contract were irrelevant to the existence and validity of the arbitration clause contained in that contract. (567) These results have been codified in the current Swedish international arbitration statute. (568)

As also discussed above, the Japanese Supreme Court held in 1975 that the invalidity of the parties' underlying contract did not affect the validity of an arbitration clause contained within the contract. (569) The court reasoned broadly that the arbitration clause "must be separated from the principal contract and judged independently," and that, "unless there is a special agreement between the parties, a defect in the formation of the principal contract does not affect the validity of the arbitration agreement." (570) The Japan Arbitration Law, which was modeled on the UNCITRAL Model Law, confirmed this approach and expressly provides for the separability of arbitration agreements. (571)

Likewise, particularly in recent years, Chinese courts have applied the separability presumption to uphold the validity of the arbitration agreement, notwithstanding the invalidity of the underlying contract. (572) Among other things, Chinese courts have held that claims of fraud or duress directed at the underlying contract "will have no bearing on the validity of the arbitration agreement." (573)

Some Chinese decisions have recognized limits to the separability presumption; one Chinese court refused to give effect to an arbitration agreement contained in a contract that one party had created using a cut-and-paste fraud to forge the signature of an unsuspecting counter-party. (574) More recently, the Chinese Supreme People's Court held that the separability presumption applies even in cases "where the main contract is
P 452 not concluded (null) ● or does not come into effect after conclusion (void)," reasoning that even these defects "will not influence the effect of the arbitration clause agreed by the parties, as the arbitration clause is completely separable from the contract." (575)

Similar conclusions have been reached in numerous jurisdictions including India, (576) Pakistan, (577) Australia, (578) Canada, (579) New Zealand, (580) Netherlands, (581) Bermuda, (582) Israel (583) and Hong Kong. (584) In the words of the Pakistani Supreme Court,

> "[u]nder English and Pakistan laws, Arbitration Clauses contained in contracts are treated as separate and self-contained contracts in that if it were not so, arbitration clauses would not at all survive an attack on the main contract which is known as the doctrine of 'separability'...[A]llegations of invalidity even serious allegations of its being *ab initio* void are perfectly capable of being referred to arbitration." (585)

P 453 ● At the same time, virtually all national courts have also recognized the limits of the separability presumption, holding that at least some defects affecting the underlying contract may also impeach the associated arbitration clause. These decisions have typically involved so-called "doubly relevant" facts or "identity of defects," in which a lack of consent, capacity, or authority vitiate both the underlying contract and the arbitration agreement. (586)

[3] Institutional Arbitration Rules

Leading institutional rules provide that a consequence of the separability presumption is that the validity of the arbitration clause is not necessarily affected by the invalidity of the underlying contract. The 2010 UNCITRAL Rules are representative, providing in Article 23(1) that "[a] decision by the arbitral tribunal that the contract is null and void shall not entail automatically the invalidity of the arbitration clause." (587) The current ICC, (588) ICDR (589) and LCIA Rules (590) are all similar, as are other leading institutional rules. (591)

All of these rules contain provisions which expressly recognize that an arbitration
P 454 agreement may continue to exist notwithstanding the non-existence or nullity of the ● parties' underlying contract. None of these institutional rules provide further guidance as to the circumstances in which the underlying contract's invalidity will affect the associated arbitration clause and when it will not. Making this determination is the responsibility of the arbitral tribunal, subject to any relevant national court review. (592)

Leading institutional rules also expressly or impliedly provide for the arbitral tribunal's competence-competence to consider whether the arbitration agreement itself (as distinguished from the underlying contract) is nonexistent, invalid, or illegal. (593) The resolution of this issue – determining the existence of a valid arbitration agreement – raises issues of competence-competence, which are discussed in detail below. (594)

[4] International Arbitral Awards

Like judicial decisions in most jurisdictions, international arbitral awards consistently recognize that a principal consequence of the separability presumption is that the invalidity of the underlying contract does not necessarily affect the substantive validity of the associated arbitration clause. A classic application of the separability doctrine was by the tribunal in *Sojuznefteexport v. JOC Oil Ltd*. There, an arbitral tribunal appointed by the Soviet Foreign Trade Arbitration Commission ("FTAC") considered, *inter alia*, whether or not the parties' arbitration clause was valid, notwithstanding the invalidity of the parties' underlying contract (for failure to comply with a requirement under Soviet law for two signatures). (595) In a classic exercise of competence-competence, (596) the tribunal upheld the validity of the arbitration clause, concluding that:

> "by virtue of its procedural content and independently of the form of its conclusion, [the arbitration clause] is autonomous in relation to the material-legal contract. An arbitration clause, included in a contract, means that there
> P 455 are regulated in it relationships different in legal nature, and that therefore ● the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract." (597)

The *JOC Oil* tribunal reasoned that the arbitration clause "is autonomous in relation to the [underlying] material-legal contract," and, therefore, that "the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract." (598) The tribunal also reasoned that:

> "[t]he requirements, laid down for the recognition of the validity of the two contracts, which differ in their legal nature, need not coincide....[The] question as to the validity or invalidity of this contract does not affect the agreement of the parties about the submission of the existing dispute to the jurisdiction of the FTAC." (599)

As to the parties' underlying contract, the tribunal applied "Soviet civil law," which imposed a two-signature requirement for such agreements, and held that this requirement had not been satisfied. In contrast, as to the arbitration clause, the tribunal applied the FTAC Rules and the New York Convention, which did not impose the same requirements as Soviet civil law. (600) Accordingly, although the tribunal concluded that the parties' underlying contract was invalid, it also held that "the arbitration clause contained in the contract is valid." (601)

Other arbitral awards have reached similar results. (602) In *Interim Award in ICC Case No. 4145*, the tribunal held that "the question of validity or nullity of the main contract, for reasons of public policy, illegality or otherwise, is one of merits and not of jurisdiction, [with the result of] the validity of the arbitration clause having to be considered separately from the validity of the main contract." (603) Similarly, in the *Final Award in ICC Case No. 10329*, the arbitrator reasoned that "should the arbitrator declare, on the merits, that there is no contract binding on the parties this would not necessarily cause the invalidity of the arbitration agreement by virtue ● of Art. 178(3) of the [Swiss Law on
P 456 Private International Law] which affirms the well internationally established principle of 'severability' or 'separability' of the arbitration agreement." (604)

At the same time, most international arbitral awards have also held that there are cases in which the non-existence or invalidity of the parties' underlying contract *will* affect the associated arbitration clause. In the words of one award:

> "An arbitration clause may not always be operative in cases where it is clearly

indicated by facts and circumstances that there never existed a valid contract between the parties." (605)

While there are other awards to the same effect, relatively few arbitral tribunals have considered claims that there never was a contract between the parties. (606) In the majority of cases (particularly those involving issues of validity or legality, rather than formation), arbitral tribunals have rejected arguments that alleged defects in the underlying contract also impeached the associated arbitration agreement. (607)

P 457 ● **[5] Future Directions: Separability Presumption and Validity of Arbitration Agreement**

In sum, national arbitration statutes, judicial decisions, institutional arbitration rules, international arbitral awards and other authorities uniformly hold that the non-existence, invalidity, illegality, or termination of the parties' underlying contract does not necessarily impeach or affect the associated arbitration agreement. In turn, this has two related applications in particular cases: (a) the arbitration agreement will exist and be substantively valid, notwithstanding the non-existence, invalidity, or illegality of the underlying contract; and (b) the arbitral tribunal may (and must) consider challenges to the existence, validity or legality of the underlying contract, because such challenges do not impeach the arbitration agreement, which requires resolving those challenges to the underlying contract by arbitration. These two consequences of the separability presumption must be distinguished from the competence-competence doctrine, discussed in detail below, which permits an arbitral tribunal to consider challenges to the existence of the arbitration agreement itself. (608)

First, relying on the separability principle, national and international authorities have almost uniformly held that the non-existence, invalidity, or illegality of the underlying contract does not necessarily result, as a substantive matter, in the invalidity of the arbitration agreement. (609) This conclusion is, in many respects, the most elementary, and most significant consequence of the separability presumption. It is a direct and logical consequence of the separability of the arbitration agreement, and it can be regarded as a general principle of international arbitration law, giving effect to the parties' intentions.

Second, national courts and arbitral tribunals have held, in the circumstances of a large number of particular cases, that the invalidity or illegality of the parties' underlying contract did not in fact affect or invalidate the associated arbitration agreement. (610) Properly viewed, the separability presumption means not just that the invalidity of the underlying contract will not *necessarily* affect the associated arbitration agreement, but will not *ordinarily* do so. Rather, in the vast majority of cases, the invalidity, illegality, termination, or ineffectiveness of the underlying contract will have no effect on the associated agreement to arbitrate.

Third, national courts and arbitral tribunals have also held, albeit in relatively rare cases, that the non-existence of the underlying contract has resulted in the non-existence or invalidity of the associated arbitration agreement. These decisions have typically arisen in connection with incapacity, lack of authority, duress, forgery, or similar lack of consent to the underlying contract, where courts or tribunals have held that facts establishing the
P 458 non-existence or invalidity of the underlying contract also ● invalidated the parties' arbitration agreement. Courts in a number of jurisdictions, including the United States, England, France and Switzerland, have all reached such results, albeit in rare and relatively unusual cases. (611)

For example, a party may deny that it ever executed or in any way assented to the underlying contract, or even conducted negotiations with its putative counter-party (and that the asserted underlying contract is a sham or a forgery). Critics of the separability presumption argue that this example demonstrates the presumption's inadequacy, because it makes no sense to posit the existence of an arbitration agreement where no underlying contract was conceivably entered into:

> "carried to its extreme,...the separability doctrine...could give rise to a valid arbitral award even if two parties had never met, so long as one person alleged there was a contract between the containing an arbitration clause." (612)

Other commentators broaden their criticism of the separability presumption, reasoning that:

> "[I]f an agreement contains an obligation to arbitrate disputes arising under it, but the agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part. If the agreement was never entered into at all, its arbitration clause never came into force. If the agreement was not validly entered into, then, *prima facie*, it is invalid as a whole, as must be all of its parts, including its arbitration clause." (613)

These comments do not ultimately provide grounds for rejecting the separability presumption and the possible validity of the arbitration agreement, notwithstanding the non-existence or invalidity of the underlying contract.

It is true that the non-existence of an underlying contract *may* be accompanied by the non-existence of the arbitration agreement. Thus, where two parties never met or negotiated in any way, there will be no arbitration agreement and no underlying contract. This is not, however, in any way inconsistent with the separability presumption; on the contrary, properly analyzed, this type of case is a useful illustration of the separability presumption's application.

As discussed above, the separability presumption does not provide that, where the underlying contract is nonexistent or invalid, the arbitration agreement is nonetheless necessarily existent and valid. (614) Rather, it merely provides that the arbitration
P 459 agreement *may* be existent and valid even if the underlying contract is not. The ● relevant question, therefore, is whether the parties did or did not negotiate and conclude a valid agreement to arbitrate their disputes even if they did not also conclude the underlying contract. (615)

In general, given the close relationship between the underlying contract and the arbitration agreement, defects in the formation of the former are likely to affect the latter: parties do not ordinarily agree to arbitration provisions in the abstract ("floating in the legal ether" (616)), without an underlying contract. Nevertheless, there will be instances where the parties are held to have concluded their negotiations, and reached a valid binding agreement, on an arbitration clause, but not on the underlying contract. (617)

Importantly, under the separability presumption, the underlying factual allegations for any alleged contractual defect must be considered separately, from both factual and legal perspectives, to determine whether that defect impeaches the arbitration clause or the underlying contract. In doing so, it is appropriate, as U.S., English, German and other courts have concluded, to require that challenges to the existence or validity of the arbitration agreement be made "specifically," "directly," "*per se*," or "in particular," to the agreement to arbitrate. (618) These formulations all correctly require that any challenge to the arbitration agreement involve factual allegations and legal claims that are specifically relevant to the existence and validity of the agreement to arbitrate.

Contrary to the analysis in some lower court decisions, (619) however, the decisive issue – for purposes of deciding the substantive validity of the arbitration agreement – is not whether a defect *also* affects the underlying contract. That is because, in particular cases, defects involving matters such as duress, forgery and incapacity may apply equally to *both* the underlying contract and the arbitration agreement – so-called "doubly relevant"
P 460 facts or "identities of defect." (620) The fact that a defect affects the ● underlying contract should not preclude it from also and simultaneously affecting the arbitration clause.

For example, there will be instances where a party lacked any mental capacity to agree to anything, (621) where a party's signature was forged without it ever having even contemplated contracting with its putative counter-party, (622) or where wholly unlawful duress occurred. (623) In cases involving these types of facts, the substantive validity of the arbitration clause itself will almost always be impeached, as well as the underlying contract.

In all of these cases, the arbitration agreement is not impeached "because" the underlying contract is impeached, but rather, the arbitration agreement is impeached for the same reasons and based on the same facts that impeach the underlying contract. The critical point is, as the House of Lords observed in *Fiona Trust*, that the arbitration agreement is a separate agreement, whose existence and validity must be considered separately: "the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement,' was forged." (624) The fact that an arbitration agreement, as well as the underlying contract, may be invalid or nonexistent is thus not inconsistent with the separability presumption, but an application of it.

On the other hand, many claims or facts that impeach the underlying contract will not affect the substantive validity of the associated arbitration clause. That would be true of virtually all fraudulent inducement, illegality, mistake, unconscionability, frustration, and termination claims (*e.g.*, the underlying contract is terminated, without any intention of terminating the arbitration agreement, or the underlying contract is usurious or lacks governmental approval), as well as some forgery or duress claims (*e.g.*, the parties agree upon the arbitration clause, and initial it, but do not voluntarily agree upon the underlying contract, which is then "procured" by forgery or duress). (625) In these cases, there is a defect affecting the underlying commercial contract, but there is nothing in the particular nature or circumstances of that defect that provides any basis for challenging the associated arbitration clause.

The decisive issues in each case should be what the particular factual allegations of a defect are and what the asserted legal consequences of those allegations are. Most categories of defects can in principle be directed specifically at the arbitration agreement (*e.g.*, the arbitration agreement's terms are unconscionable, were procured by fraud, were illegal, or were indefinite), involving matters that do not concern the underlying contract. Equally, and again in principle, these categories of defects can also be directed specifically and only at the underlying contract. With regard to issues of

P 461 substantive validity, the decisive question in each case is whether ● the specific factual allegations and legal claims of the parties do or do not impeach the separable arbitration agreement.

The most difficult issues arise when a particular alleged defect in formation affects *both* the arbitration clause and the underlying contract (*e.g.*, the contract, including the arbitration clause, was never executed, or the contract was affected by forgery, or a party lacked mental capacity). These are cases of "doubly relevant" facts or "identities of defects," where a particular fact or defect is relevant to the validity or existence of both the underlying contract and the associated arbitration agreement.

In these cases, absent special or additional circumstances, the reasons for the defect in the underlying contract almost always also affects the substantive validity of the arbitration agreement. There is seldom a credible basis for arguing that forgery of a signature on a contract, affecting the underlying contract, does not also impeach the arbitration clause: unless the arbitration clause was separately signed, or agreed in some other manner, then a forged signature on the underlying contract evidences the absence of agreement on anything in that document. (626) Similarly, the failure to execute the underlying contract will generally evidence a failure to agree upon the associated arbitration clause; there may be cases where separate expressions of assent exist with regard to the arbitration agreement, but these circumstances will be unusual, (627) and must be established through allegations directed specifically at the existence of an arbitration agreement. Likewise, a lack of capacity or authority to conclude the underlying contract will often simultaneously impeach the associated arbitration clause; there may be cases where a party has capacity to execute one agreement, and not the other, but these are unusual. (628)

In light of this, and returning to the commentary cited above, it is not correct to state that, "[where] the [underlying commercial] agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part." (629) There *may* be cases where this result is true, but that depends on a separate analysis of the invalidity or ineffectiveness of the arbitration agreement itself, not an automatic conclusion that the arbitration clause "disappears with the agreement of which it is a part." On the contrary, in some circumstances the legal or factual reasons for the underlying contract's invalidity will simply not also apply to the separable arbitration agreement.

Likewise, it is also not correct to say that, "[i]f the agreement was never entered into at all, its arbitration clause never came into force." (630) Again, this *may* sometimes (or even often) be true, but there will also be cases where an arbitration agreement is formed
P 462 prior to the parties' underlying contract being consummated, just as there are cases ● where termination of the underlying contract does not result in termination of the associated arbitration clause. (631)

Turning to the extreme example of an arbitration agreement between two parties who have never dealt with one another, the short answer is that no arbitration agreement would exist in such circumstances. That would be true under the separability presumption, just as under an analysis where there was no such presumption: there would simply be no consent to any agreement to arbitrate anything, whether separable or not. (632) The hypothetical therefore does not, on a correct analysis, provide grounds for questioning the separability presumption: it merely underscores the fact that even a separable arbitration agreement may suffer from its own separate flaws of formation, invalidity, or legality. (633) The essential point of the separability presumption, however, is that it is the legal rules and facts *relating to the existence and validity of the separable arbitration agreement*, not to the underlying contract, that must be considered in particular cases.

Fourth, many decisions involving the separability presumption arise in the context of national court proceedings considering questions of competence-competence, and particularly whether a claim of contractual non-existence, invalidity, or illegality should be referred to arbitration or judicially resolved. As discussed above, it is important to distinguish between decisions, and analysis, based on allocations of jurisdictional competence and those based only on the substantive validity of the arbitration agreement. (634)

Where a party challenges only the underlying contract, that claim *must* be referred to arbitration. That is because, as a consequence of the separability presumption, a challenge directed *only* to the underlying contract does not impeach the arbitration clause and there is no basis for denying that the parties' dispute must be referred to arbitration. Simply put, the challenge to the underlying contract is not a jurisdictional challenge at all, and is therefore for decision by the arbitrators. (635)

In contrast, where a party specifically challenges the separable arbitration agreement, and not the underlying contract, that claim raises "pure" questions of the allocation of jurisdictional competence, discussed in greater detail below. (636) Importantly, the allocation of competence to decide these true jurisdictional challenges depends on different considerations than the separability presumption or substantive validity of the arbitration agreement. As discussed below, the allocation of jurisdictional competence
P 463 depends instead on considerations of fairness and efficiency, which may ● well call for

resolving true jurisdictional challenges by an arbitral tribunal, notwithstanding the existence of a good faith dispute about the existence or validity of any agreement to arbitrate. (637)

The same analysis applies where a party challenges *both* the underlying contract and the arbitration agreement. In order for such a challenge to impeach the arbitration agreement, most national courts have held that it must be directed "specifically" or "in particular" at the arbitration clause, and not "generally" at the underlying contract. (638) As already discussed, unless a challenge is directed at the arbitration agreement, then there is no jurisdictional challenge and the challenge (to the underlying contract) must be referred to arbitration. (639)

The better view is that challenges nominally directed to both the parties' underlying contract and the associated arbitration agreement should be carefully examined to determine whether they actually impeach the arbitration clause. In many cases of alleged invalidity or illegality – including claims of fraudulent inducement, unconscionability, duress, mistake, frustration and illegality (640) – a challenge to the underlying contract will (as noted above) simply not impeach the separable arbitration clause. In these instances, such claims must be referred to arbitration, even if they purport to impeach the arbitration clause, because they, in actuality, only concern the parties' underlying dispute.

In other cases of alleged non-existence or invalidity – including claims of lack of consent (forgery, duress), lack of authority, or incapacity – a challenge to the underlying contract may also impeach the arbitration agreement. If a claim does impeach the arbitration agreement, then generally-applicable rules regarding the allocation of jurisdictional competence apply. As discussed in greater detail below, in these cases, procedural considerations of efficiency, fairness and the apparent credibility of the parties' claims should inform the decision whether to refer a jurisdictional dispute to arbitration or retain it for interlocutory judicial consideration. (641)

Finally, it is important in assessing national court decisions on this subject to take into account their precise procedural posture and holding. As discussed below, national courts sometimes rely on loose formulations of the separability presumption to "reject" jurisdictional challenges and to require the parties to arbitrate, when their decisions are in fact allocations of jurisdictional competence, referring a jurisdictional challenge to initial decision by the arbitrators for reasons of efficiency. (642) Importantly, these decisions cannot properly be considered final, substantive applications of the separability presumption. Rather, these decisions reflect a procedural allocation of
P 464 competence to render an initial decision on the jurisdictional dispute, which neither ● decides the substantive validity of the arbitration agreement or the limits the scope of judicial review of any jurisdictional award by the arbitrators. (643)

[B] Consequences of Separability Presumption: Potential Applicability of Different National Laws to Arbitration Agreement and Underlying Contract

The separability presumption has a second consequence, in addition to permitting the arbitration agreement to remain valid, notwithstanding the non-existence or invalidity of the underlying contract. As discussed in detail below, (644) the separability presumption means that an arbitration agreement can be governed by a different national law from that (or those) applicable to the parties' underlying contract. The leading explanation for this result is the separability presumption, which postulates two separable agreements of differing characters, (645) which can readily be governed by two different national (or other) legal regimes.

As with its other applications, the separability presumption does not generally mean that the law applicable to the arbitration clause is *necessarily* different from that applicable to the underlying contract. (646) Indeed, in many cases, the same law governs both the arbitration agreement and the underlying contract notwithstanding the separability of the arbitration agreement. (647) The separability presumption instead means that differing national laws *may* apply to the main contract and the arbitration agreement. The essential point, however, is that, where the arbitration clause is a separate agreement, a separate conflict of laws analysis must be performed with regard to that separate agreement. (648)

Moreover, as discussed in greater detail below, (649) the result in many cases where the law applied to the arbitration clause differs from that applicable to the underlying contract has been that the arbitration clause was upheld against challenges to its validity. That is, by applying a law different from that governing the parties' underlying contract, national courts and arbitral tribunals have insulated international arbitration agreements against challenges to their validity and legality based on (often idiosyncratic
P 465 or discriminatory) local law. (650) By providing the ● foundation for this result, the separability presumption has contributed significantly to the efficacy of international arbitration agreements and the arbitral process. (651)

[C] Consequences of Separability Presumption: Potential Applicability of Different Legal Rules Within Same Legal System to Arbitration Agreement and Underlying Contract

Even if only one national (or other) legal system applies to both an underlying contract and its associated arbitration clause, a third consequence of the separability presumption is that different substantive legal and/or choice-of-law rules within the same legal system may, and often do, apply to the two agreements. It follows from the separability presumption that an arbitration agreement is categorized as a different type of agreement than is the underlying contract, (652) and that this agreement can be subject to a different set of legal rules than the underlying contract.

Thus, different rules governing formation, formal validity and substantive validity may potentially apply to the parties' arbitration agreement and to their underlying contract. (653) This has been true historically, (654) and is the direct result of both international arbitration conventions and, in a number of jurisdictions, national arbitration legislation. (655) This possibility has received less attention than the potential applicability of different national legal systems to the arbitration agreement and underlying contract, but is of almost equal significance.

Most importantly, the New York Convention (and other international conventions, including the European Convention) prescribe rules with regard to the form of arbitration agreements, which are specifically applicable to international arbitration agreements, and not to other types of agreements. (656) These treaties also contain basic "pro-arbitration" principles with regard to the presumptive substantive validity of international arbitration agreements, which are not applicable to other types of agreements. (657) Of critical importance, the rules applicable to international arbitration agreements under the New York Convention (and other international arbitration treaties) are international rules – in contrast to the rules applicable to most other types of contracts – which individual states are obliged to respect. Equally, many developed jurisdictions have adopted national arbitration statutes that prescribe ● specific rules
P 466 with regard to the form and validity of international arbitration agreements which are not applicable generally to other types of contracts. (658)

This analysis is well-illustrated by the award in *Sojuznefteexport v. JOC Oil*, a classic arbitral decision (also discussed above). (659) There, the tribunal held that Soviet law applied to both the parties' underlying contract and their arbitration agreement, but that the underlying contract had *not* been validly concluded, under the Soviet law applicable to the contract formation of such agreements, while the associated arbitration agreement *had* been validly concluded, under the less-demanding rules of Soviet law applicable to the formation of arbitration agreements:

> "An arbitration clause, included in a contract, means that there are regulated in it relationships different in legal nature, and that therefore the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract. The requirements, laid down for the recognition of the validity of the two contracts, which differ in this legal nature, need not coincide." (660)

As discussed in greater detail below, a number of national court decisions and arbitral awards have reached similar results, applying differing legal sets of rules to uphold the existence of a valid arbitration agreement notwithstanding the absence of a valid underlying contract. (661) These results are applications of the presumption that international arbitration agreements are separate from the underlying contract with which they are associated and, in many cases, are subject to a separate, specialized set of legal rules. (At the same time, as also discussed below, the New York Convention is also best understood as imposing international limits on Contracting States' discrimination against international arbitration agreements, which prevent the application of specialized rules of contract law to deny effect to such agreements. (662))

[D] Consequences of Separability Presumption: Existence, Validity and Legality of Underlying Contract Does Not Necessarily Affect Arbitration Agreement

Just as the *non*-existence or *in*validity of the underlying contract does not necessarily result in the non-existence or invalidity of the arbitration clause, the converse is true: the
P 467 *existence* and *validity* of the underlying contract does not necessarily result in the ● same status for the arbitration agreement. Rather, the separability of the arbitration clause, and the existence of specialized legal rules applicable to the arbitration clause, (663) creates circumstances in which the arbitration agreement may be invalid, notwithstanding the undisputed existence and validity of the underlying contract.

For example, as discussed in greater detail below, the New York Convention, UNCITRAL Model Law and other international arbitration instruments impose particular form requirements on international arbitration agreements (*e.g.*, requirements of a "writing"). (664) The fact that an underlying contract satisfies the form requirements applicable to it (*e.g.*, a valid oral contract) does not necessarily mean that the associated arbitration agreement satisfies these specialized form requirements. (665)

Alternatively, while the underlying contract is indisputably valid, there may be substantive defects in the associated arbitration clause which can nonetheless render it invalid (*e.g.*, contradictory terms, (666) lack of specificity, (667) unacceptably one-sided terms, (668) etc.). Or, while the parties may clearly have expressed their assent to the

terms of the underlying commercial contract, they may not have agreed upon dispute resolution provisions. (669) Likewise, the parties may have agreed to terminate, (670) or waived, (671) the arbitration agreement, while not disturbing their underlying commercial contract; alternatively, the arbitration agreement may have been repudiated (672) or become impossible to perform, (673) even though the underlying contract has not. All of these cases are consequences of the separable character of the arbitration agreement.

As discussed above, in determining whether an arbitration agreement is valid, notwithstanding the non-existence or invalidity of the underlying contract, it is essential to focus "specifically" and "directly" on the agreement to arbitrate. (674) Precisely the same analysis applies in determining whether an arbitration agreement is invalid, notwithstanding the existence and validity of the underlying contract. That is, determining whether an arbitration agreement has been validly formed and remains in effect requires considering that agreement specifically, and not the underlying contract.

[E] Consequences of Separability Presumption: Invalidity, Illegality, or Repudiation of Arbitration Agreement Does Not Necessarily Affect Underlying Contract

P 468 ● There is another related application of the separability presumption, which receives little attention, but which has some practical importance: the separability presumption means that the invalidity, illegality, or repudiation of the arbitration clause does not necessarily entail the invalidity of the underlying contract.

Despite deep-seated international and national commitments to the enforceability of international arbitration agreements, there are instances in which such agreements are invalid or illegal under applicable law. (675) Similarly, there are cases in which one party repudiates its commitment to arbitrate, typically by commencing litigation in national courts notwithstanding the parties' arbitration agreement, (676) or in which circumstances render an arbitration clause dysfunctional and unenforceable. (677)

Where the parties' agreement to arbitrate is invalid or repudiated, there is at least a theoretical possibility that the parties' underlying contract is thereby also invalidated. If the arbitration clause were considered to be an integral part of the parties' overall agreement, as was historically the case in some jurisdictions, (678) then the invalidity of the arbitration clause would arguably require invalidating the underlying contract as well. (679)

In practice, however, there are relatively few circumstances in which the invalidity or repudiation of the parties' arbitration agreement results in the invalidity of their underlying contract. Indeed, national courts are virtually never presented with this argument. That is, in large part, a result of the separability presumption: under the presumption, defects in the parties' arbitration agreement will presumptively not taint the parties' underlying contract.

More specifically, the separability presumption recognizes that the purpose of an international arbitration agreement is to resolve disputes relating to the underlying contract in the fairest, most efficient manner possible and that, where the arbitration agreement is invalidated for unexpected reasons (and cannot be replaced by alternative
P 469 terms), this will ordinarily not provide a basis for concluding that the ● parties' underlying commercial transaction would not have been entered into. Rather, it will require dealing with the resulting contractual gap in an internationally-neutral manner. Only where this cannot be done will the invalidity of the arbitration clause potentially impeach the underlying contract.

This analysis is different from cases involving competing proposals between the parties as to whether or not arbitration should be used as a dispute resolution mechanism, or as to what arbitral mechanism should be used. (680) In these cases, where there has never been a meeting of the minds on any arbitration clause, the validity of any underlying contract may be affected by the non-existence of any agreement on arbitration or other dispute resolution mechanisms. In particular, in transactions involving foreign states or foreign state entities, where a private party seeks to internationalize the dispute resolution mechanism, non-existence or invalidation of the arbitration agreement may very well impeach the entire contractual relationship.

[F] Separability Presumption Does Not Provide Basis for Competence-Competence Doctrine

It is sometimes asserted or assumed that the separability presumption requires or implies the existence of the competence-competence doctrine. Thus, it is sometimes suggested, the separability of the arbitration clause enables an arbitral tribunal to consider the existence and scope of its own jurisdiction. (681) In the words of one commentary:

> "An independent (or autonomous) arbitration clause thus gives the arbitral tribunal a basis to decide on its own jurisdiction, even if it is alleged that the main contract has been terminated by performance or by some intervening event." (682)

This analysis is mistaken; it confuses the separability presumption with the competence-

competence doctrine. As discussed below, the separability presumption does not in fact explain the competence-competence doctrine. (683) Although the competence-competence doctrine arises from the same basic objectives as the separability presumption (*e.g.*, enhancing the efficacy of international arbitration as a means of dispute resolution), it is not logically dependent upon, nor explicable by reference to, the separability presumption. (684)

P 470 ● Rather, the competence-competence doctrine permits an arbitral tribunal to consider and decide upon its own jurisdiction even where the existence or validity of an arbitration agreement (as distinguished from the underlying contract) is disputed. (685) That is made explicit, for example, in Articles V(3) and VI(3) of the European Convention, (686) Article 16(1) of the UNCITRAL Model Law (687) and judicial authority in all developed jurisdictions. (688) Accordingly, an arbitral tribunal's jurisdiction to consider its own jurisdiction cannot depend on the separability of the arbitration clause from the underlying contract, but must instead rest on other considerations. (689)

Put simply, the competence-competence doctrine could very readily exist without a separability presumption and, conversely, the separability presumption could be accepted without also adopting a rule of competence-competence. Thus, national law can – and, in some jurisdictions (such as France and India), (690) does – grant arbitral tribunals competence-competence to consider and decide *all* jurisdictional objections, whether directed to the underlying contract or the arbitration agreement. Conversely, national law could (and often does) recognize the separability presumption, and thereby provide that challenges only to the underlying contract are not jurisdictional challenges to the arbitrators' power, but that, where true jurisdictional objections to the validity or existence of the arbitration agreement are made, there is no rule of competence-competence and the objections must be resolved by national courts. (691)

Finally, it is important to note that the separability presumption and substantive validity of the arbitration agreement raise different questions from the appropriate scope of judicial review of either applications of the presumption or arbitral awards addressing challenges to the validity of arbitration agreements. The scope of judicial review for arbitrators' jurisdictional decisions in different legal systems is discussed in detail below. (692)

Nonetheless, there are material relationships between the separability presumption and the competence-competence doctrine. One consequence of the separability doctrine is that many allegations that would otherwise potentially impeach the validity of the arbitration agreement do not do so and therefore must be submitted to the arbitral
P 471 tribunal for resolution as part of their mandate of resolving the merits of the parties' ● dispute. That is, because of the separability doctrine, certain claims regarding the underlying contract simply do not impeach or question the validity of the arbitration agreement, and therefore must be resolved by the arbitrators. (693)

Despite these complexities, the separability presumption serves a very significant function in the international arbitral process. It permits analysis of jurisdictional objections to be focused specifically – and properly – on the arbitration agreement itself, rather than the underlying contract. Even if the parties' underlying contract is invalid or nonexistent, this will often not affect the associated arbitration agreement, which will remain fully effective as a means to resolve the parties' disputes. The separability presumption also enables the arbitrators to consider and resolve disputes about the existence, validity, legality and termination of the underlying contract, regardless whether the competence-competence doctrine is accepted, while requiring arbitration of disputes that concern only the existence, validity, or legality of the underlying contract (and not the arbitration agreement). In all these respects, the separability presumption is essential to preventing delays and disruptions in the international arbitral process
P 471 arising from litigation in national courts. ●

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1) For commentary, *see* Aeberli, *Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Route Map*, 21 Arb. Int'l 253 (2005); Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012); Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 Am. Rev. Int'l Arb. 551 (2011); A. Briggs, *Agreements on Jurisdiction and Choice of Law* 70-79, 85-97 (2008); J. Carter & J. Fellas, *International Commercial Arbitration in New York* 213-15 (2010); Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 Ford. Urb. L.J. 167 (1999); Dimolitsa, *Separability and Kompetenz-Kompetenz*, in A. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 217 (ICCA Congress Series No. 9 1999); Drahozal, Buckeye Check Cashing *and the Separability Doctrine*, 1 Y.B. Arb. & Med. 55 (2009); L. Edmonson (ed.), *Domke on Commercial Arbitration* §11 (3d ed. & Update 2013); Gardner, *The Doctrine of Separability in Soviet Arbitration Law: An Analysis of* Sojuzneftexport v. JOC Oil Co., 28 Colum. J. Transnat'l L. 301 (1990); Gee, *The Autonomy of Arbitrators and Fraud Unravels All*, 22 Arb. Int'l 337 (2006); Herrera Petrus, *Spanish Perspectives on the Doctrine of Kompetenz-Kompetenz and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act*, 11 Am. Rev. Int'l Arb. 397 (2000); H. Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 51-54 (2010); Mayer, *L'autonomie de l'arbitre internationale dans l'appréciation de sa propre compétence*, 217 Recueil des Cours 319 (1989); Mayer, *The Limits of Severability of the Arbitration Clause*, in A. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 261 (ICCA Congress Series No. 9 1999); Monestier, *"Nothing Comes of Nothing"...Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration*, 12 Am. Rev. Int'l Arb. 223 (2001); Note, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 Duke L.J. 588 (1968); Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609 (1940); Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 9 Arb. & Disp. Res. L.J. 19 (2000); Rau, *Arbitral Jurisdiction and the Dimensions of "Consent"*, 24 Arb. Int'l 199 (2008); Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435 (2011); Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1 (2003); Rau, *"The Arbitrability Question Itself"*, 10 Am. Rev. Int'l Arb. 287 (1999); Rogers & Launders, *Separability – The Indestructible Arbitration Clause*, 10 Arb. Int'l 77 (1994); Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 Ford. Int'l L.J. 599 (1993-1994); Samuel, *Separability in English Law: Should An Arbitration Clause Be Regarded as An Agreement Separate and Collateral to A Contract in Which It Is Contained?*, 3(3) J. Int'l Arb. 95 (1986); Samuel, *Separability and the U.S. Supreme Court Decision in* Buckeye v. Cardegna, 22 Arb. Int'l 477 (2006); Sanders, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann* 31 (1978); Schlosser, *The Competence of Arbitrators and of Courts*, 8 Arb. Int'l 189 (1992); S. Schwebel, *International Arbitration: Three Salient Problems* (1987); Sheppard, *The Moth, the Light and the United States' Severability Doctrine*, 23 J. Int'l Arb. 479 (2006); Stipanovich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 Am. Rev. Int'l Arb. 323 (2011); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶2-007 to 2-014 (23d ed. 2007); Svernlov, *The Evolution of the Doctrine of Separability in England: Now Virtually Complete?*, 9(3) J. Int'l Arb. 115 (1992); Svernlov & Carroll, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8(4) J. Int'l Arb. 37 (1991); Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 Nev. L.J. 107 (2007); Wilske & Fox, *Recognition of Arbitration Agreements,* in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary* 182 (2012).

2) *Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.). *See also Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd* [1981] AC 909, 980 (House of Lords) ("The arbitration clause constitutes a self-contained contract collateral or ancillary to the [underlying contract].").
3) *Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S.Ct. 2847, 2857 (U.S. S.Ct. 2010). *See also Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959) ("mutual promises to arbitrate [generally] form the *quid pro quo* of one another and constitute a separable and enforceable part of the agreement").
4) *Final Award in ICC Case No. 8938*, XXIVa Y.B. Comm. Arb. 174, 176 (1999).
5) *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e). *See also Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681 (French Cour de cassation) ("Such [an arbitration] clause, due to its autonomy with regard to the underlying agreement in which it is embedded, is not affected – except where specifically stipulated – by the ineffectiveness of the contract.").
6) *Judgment of 2 September 1993, Nat'l Power Corp. v. Westinghouse*, DFT 119 II 380, 384 (Swiss Federal Tribunal).
7) *See* §§3.03[B]-[C]; §4.02.
8) *See* §3.03[A].
9) *See* §3.03[E].

10) *See*§3.03[F].
11) *See*§§3.03[A]-[C].
12) *See, e.g., Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S.Ct. 2847, 2857 (U.S. S.Ct. 2010) ("[C]ourts must treat the arbitration clause as severable from the contract in which it appears."); *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395, 402 (U.S. S.Ct. 1967) ("arbitration clauses are 'separable' from the contracts in which they are embedded"); *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 345 (5th Cir. 2008); *United Steel Serv. Workers Int'l Union v. Trimas Corp.*, 531 F.3d 531, 538 (7th Cir. 2008); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983) ("The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other."); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959); *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶17 (House of Lords) ("principle of separability"); *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat'l Oil Co.* [1987] 2 Lloyd's Rep. 246, 250 (English Ct. App.), *rev'd on other grounds*, [1988] 2 Lloyd's Rep. 293 (House of Lords); *Peterson Farms Inc. v. C&M Farming Ltd* [2004] 1 Lloyd's Rep. 603, 609 (QB) (English High Ct.) ("doctrine of separability"). *Compare*English Arbitration Act, 1996, §7 ("distinct agreement").
13) *See, e.g.,Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681 (French Cour de cassation); *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e); *Judgment of 2 September 1993, Nat'l Power Corp. v. Westinghouse*, DFT 119 II 380, 384 (Swiss Federal Tribunal) (describing principle of "autonomy" as counterpart of principle of "separability" or "severability" in other jurisdictions).
14) In German, the concept is generally referred to as the "*Selbstständigkeit*" of the arbitration agreement, equating most closely to "independence." *See Judgment of 17 January 1891*, 27 RGZ 378, 379 (German Reichsgericht); *Judgment of 12 December 1918*, 1919 Leipziger Zeitschrift für Deutsches Recht 501 (Oberlandesgericht Marienwerder); *Judgment of 11 January 1912*, 13 Sächsisches Archiv 148, 149 (1912) (Oberlandesgericht Dresden).
15) These observations typically are made with regard to the choice of the substantive law applicable to the arbitration agreement and issues of substantive validity of the arbitration agreement. *See*§3.03[A][2]; §§3.03[B]-[C]; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶47-52, 389-419, 420-51 (1999).
16) *Judgment of 20 April 1988, Société Clark Int'l Fin. v. Société Sud Matériel Serv.*, 1988 Rev. arb. 570, 572 (Paris Cour d'appel).
17) *Judgment of 4 July 1972, Hecht v. Buisman's*, 99 J.D.I. (Clunet) 843, 843 (French Cour de cassation civ. 1e) (1972).
18) *Final Award in ICC Case No. 8938*, XXIV Y.B. Comm. Arb. 174, 175 (1999).
19) The term "separability" is also preferable to "severability," because the latter is more frequently associated with the judicial act of "severing" an invalid provision from a contract. *See* Drahozal, Buckeye Check Cashing *and the Separability Doctrine*, 1 Y.B. Arb. & Med. 55, 82 (2009).
20) At the same time, the term "separability" can also imply a lack of relation or connection between the arbitration clause and underlying contract, much like that conveyed by the terms "autonomy" and "independence." The difference is one of degree, rather than nature, and the important point is to focus on the substance conveyed by whatever label is employed. *See also* W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶5.04 n.11 (3d ed. 2000) ("It may be argued that the word 'severability' reflects a more modest vision than 'autonomy,' in that it denotes merely *potential* or *occasional* as opposed to *invariable* distinctness.") (emphasis in original); Mayer, *Les limites de la séparabilité de la clause compromissoire*, 1998 Rev. arb. 359 ("Preferable to the term 'autonomy,' that of 'severability' suggests that if the fate of the arbitration clause can be dissociated from the fate of the rest of the contract when there may be good reasons for this, this is not always the case.").
21) As discussed below, there are legislative recognitions of the separability presumption (for example, in Articles II and V(1)(a) of the New York Convention, Articles 7 and 16 of the UNCITRAL Model Law and §§2, 3 and 4 of the U.S. FAA). These provisions reflect and implement – and do not override – the parties' intentions; it is the basic contractual structure of the arbitration agreement, reflecting the parties' intentions, that is the foundation for the separability presumption, rather than statutory or treaty provisions.
22) *See*§3.02[E].
23) *See*§4.02[A][2][c]; §4.04[B][3][e].

24) *See, e.g.*, *Judgment of 18 May 1904*, 58 RGZ 152, 155 (German Reichsgericht); *Judgment of 17 January 1891*, 27 RGZ 378, 379 (German Reichsgericht); Powell, *The Independent Validity of Arbitration Clauses*, 7 Current Legal Probs. 75 (1954). *Compare*Samuel, *Separability in English Law: Should An Arbitration Clause Be Regarded as An Agreement Separate and Collateral to A Contract in Which It Is Contained?*, 3(3) J. Int'l Arb. 95 (1986) (suggesting treatment of arbitration clause as "secondary" obligation comprised within main contract, akin to liquidated damages, liability limitation and similar provisions). *See also*§1.01[B][5]; §§3.02[B][1]-[2].

25) *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942). *See also Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766, 769 (S.D.N.Y. 1968) ("since [the] arbitration provision is an integral part of the alleged contract, the issue as to whether the parties agreed to that provision requires [the court] to first determine if a contract exists.").

26) *Union of India v. Kishorilal Gupta & Bros.*, (1960) 1 SCR 493, 508 (Indian S.Ct.).

27) *See*§3.02[B].

28) *See*§§3.03[A]-[C] (choice of law); §§3.03[D]-[E] (substantive validity); §3.03[F] (competence-competence).

29) Geneva Protocol, Arts. III, IV (emphasis added). *See*§1.01[C][1].

30) Geneva Convention, Art. I(a) (emphasis added). *See*§1.01[C][2].

31) *See*§§1.01[B][2]-[6].

32) *See*§1.01[C]. As discussed elsewhere, the same treatment of arbitration agreements also required national legislation to overcome their revocability, unenforceability and invalidity. *See*§§1.01[B][2]-[5]; §1.04[B][1][e]; §5.01[B].

33) New York Convention, Art. II(1) (emphasis added).

34) New York Convention, Art. II(2) (emphasis added).

35) As one authority puts it, "the very concept and phrase 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreement if need be." S. Schwebel, *International Arbitration: Three Salient Problems* 3-6 (1987). *Compare*H. Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 52 (2010) ("The New York Convention does not expressly provide for the application of the 'doctrine of separability.' Our comments are based on the assumption that this doctrine applies, due to the doctrine's prevalence in national and transnational law."); A. van den Berg, *The New York Arbitration Convention of 1958* 146 (1981) ("The New York Convention does not contain express provisions concerning the separability of the arbitral clause. It is suggested that the Convention would imply the separability of the arbitral clause because Article V(1)(a) provides for conflicts rules for determining the law applicable to the arbitration agreement"; "it must be presumed that the Convention is indifferent as to the separability of the arbitral clause...[and] it reverts to municipal law whether the clause is to be treated independently.").

36) *See*§5.02[A][2].

37) *See*§2.01[A][1][a]; §4.04[A][1][b][i]; §4.04[B][2][b][i]; §5.01[B][2].

38) New York Convention, Art. V(1)(a) (emphasis added).

39) It does so either by operation of a specific choice of the parties or by application of a default choice-of-law rule. *See*§§4.04[A][1][b][ii] & [v]; §4.04[B][2][b][i].

40) A. van den Berg, *The New York Arbitration Convention of 1958* 145-46 (1981). *See also*E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶299 (1999); Lessing, Sauer-Getriebe K.G. v. White Hydraulics, Inc.: *Applicability of the Federal Arbitration Act to International Commercial Arbitration*, 2 Int'l Tax & Bus. L. 331, 338 (1984); Samuel, *Book Review – S. Schwebel, International Arbitration: Three Salient Problems*, 5(1) J. Int'l Arb. 119, 123 (1988); Svernlov & Carroll, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8(4) J. Int'l Arb. 37, 42 (1991).

41) S. Schwebel, *International Arbitration: Three Salient Problems* 22 (1987).

42) *See also*§3.02[E]; §4.02[A][1] (especially §4.04[A][1][b][v]).

43) *See*§3.03[A][1]; §§4.04[B][2][b][i]-[ii].

44) New York Convention, Art. II(1) ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them."). As discussed below, Article II(1) requires Contracting States to give effect to all material terms of international arbitration agreements – including regarding the seat of arbitration, number and means of selection of arbitrators, procedural rules and (of relevance here) separable character of the arbitration agreement. *See*§5.01[B][2].

45) European Convention, Art. I(2)(a) ("The term: 'arbitration agreement' shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.").

46) European Convention, Art. V(3) (emphasis added).

47) European Convention, Art. VI(2).

48) *See, e.g., Duke Energy Int'l Peru Invs. No. 1, Ltd v. Repub. of Peru, Decision on Annulment in ICSID Case No. ARB/03/28 of 1 March 2011*, ¶131 ("The separability of an arbitration agreement from the contract of which it forms part is a general principle of international arbitration law today."); *ATA Constr. Indus. & Trading Co. v. Hashemite Kingdom of Jordan, Award in ICSID Case No. ARB/08/2 of 18 May 2010*, ¶119; *Inceysa Vallisoletana SL v. Repub. of El Salvador, Award in ICSID Case No. ARB/03/26 of 2 August 2006*, ¶164; *S. Pac. Props. Ltd v. Arab Repub. of Egypt, Decision on Jurisdiction in ICSID Case No. ARB/84/3 of 27 November 1985*, 3 ICSID Rep. 112, 129 (1995). *See also* C. Schreuer *et al.*, *The ICSID Convention: A Commentary* Art. 25, ¶622 (2d ed. 2009).

49) *Plama Consortium Ltd v. Repub. of Bulgaria, Decision on Jurisdiction in ICSID Case No. ARB/03/24 of 8 February 2005*, 20 ICSID Rev. 262, ¶212 (2005).

50) *See*§3.02[D].

51) ICSID Additional Facility Rules, Rule 45(1).

52) *See*§3.02[B][3].

53) *See, e.g.*, UNIDROIT Principles of International Commercial Contracts, Art. 6.1.17; *Restatement (Second) Contracts* §208 (1981).

54) *See Restatement (Second) Conflict of Laws* §188(1) & comment d (1971) ("The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6."; "[t]he courts have long recognized that they are not bound to decide all issues under the local law of a single state").

55) For a discussion of the application of the severability doctrine to choice-of-law agreements, *see* A. Briggs, *Agreements on Jurisdiction and Choice of Law* 85-97 (2008).

56) *See*§§1.01[B][1]-[5]; §1.04[B][1][e][i].

57) *See*§1.01[B][1].

58) *See, e.g.*,*Interim Award in ICC Case (1995),* 14 ASA Bull. 544, 556 (1996) ("An arbitration clause, as a specific procedural and jurisdictional clause, requires particularly careful interpretation."); *Interim Award in VIAC Case No. SGH-5024 A of 5 August 2008,* 2(2) Int'l J. Arab Arb. 341, 352 (2010) ("an arbitration agreement is a procedural contract"); *Award in Polish Foreign Trade Chamber of Commerce Case of 7 May 1963*, 97 J.D.I. (Clunet) 405 (1970) ("[T]he arbitration agreement…is a judicial contract and, therefore, has a special autonomous character different from the other clauses of the contract concerning a transaction of material law."); *Judgment of 7 October 1933, Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177, 179 (Swiss Federal Tribunal) ("According to settled case law of the Swiss Federal Tribunal the arbitration clause is not an agreement of substantive law but of procedural nature."); *Judgment of 28 May 1915, Jörg v. Jörg*, DFT 41 II 534, 538 (Swiss Federal Tribunal) (procedural contract); *Judgment of 30 January 1957*, 23 BGHZ 198, 200 (German Bundesgerichtshof) ("[arbitration agreement is] a contract of substantive law governing procedural relations"). *See also*§1.01[B][2].

59) *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry Case of 9 July 1984,* XVIII Y.B. Comm. Arb. 92, 97 (1993).

60) *Interim Award in ICC Case No. 4504*, 113 J.D.I. (Clunet) 1118, 1119 (1986).

61) *See*§1.05[B].

62) *See*§1.05.

63) *Westacre Invs. Inc. v. Jugoimport-SPDR Holdings Co.* [1998] 4 All ER 570, 582 (QB) (English High Ct.). *See also Fiona Trust & Holding Corp. v. Privalov* [2007] EWCA Civ 20, 22-23 (English Ct. App.) ("Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment referring an issue of the invalidity of the contract to arbitration disappears.") (citing *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81 (English Ct. App.)), *aff'd*, [2007] UKHL 40 (House of Lords); *AstraZeneca UK Ltd v. Albermarle Int'l Corp.* [2010] EWHC 1028, ¶98 (Comm) (English High Ct.) (quoting *Fiona Trust*); *El Nasharty v. J. Sainsbury plc* [2007] EWHC 2618, ¶26 (Comm) (English High Ct.) (quoting *Fiona Trust*); *OK Petroleum AB v. Vitol Energy SA* [1995] CLC 850, 857 (QB) (English High Ct.) ("ancillary and therefore separable nature of an arbitration clause").

64) *See*§§3.02[B][3][a]-[b].

65) *See*§§3.02[B][3][a]-[b]. *See also Judgment of 11 January 1912*, 13 Sächsisches Archiv 148, 149 (1912) (Oberlandesgericht Dresden); *Judgment of 24 May 1909*, 1910 Zeitschrift für Rechtspflege in Bayern 43 (Oberlandesgericht Nürnberg).

66) *See*§3.02[B][3].

67) *See*§§3.02[B][3][a]-[d]; §3.02[B][3][j].

68) *See, e.g.*, Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 4 (2012) ("often proclaimed universality [of separability presumption]…is in fact misleading"). These authors confuse the allocation of jurisdictional competence, where there is substantial diversity, and the acceptance and application of the separability presumption, where there is virtually none. *See*§3.03[A][2][b][ii].

69) *See*§§3.03[A]-[F].

70) *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395, 404 (U.S. S.Ct. 1967) (separability presumption adopted in order that "arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"); *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1993] 3 All ER 897 (English Ct. App.) ("there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so"); *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 82 (German Bundesgerichtshof) (1990) ("Above all, however, the parties to an arbitration agreement will as a rule wish to avoid the unpleasant consequences of separate jurisdiction."). *Compare* Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing Inc. v. Cardegna, 8 Nev. L.J. 107, 134 (2007) ("the separability doctrine – unlike nearly all the rest of arbitration law – is incompatible with, and thus cannot be justified as an application of, contract law").

71) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.). *See also* §3.02[E].

72) U.K. Department of Trade and Industry, *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill*, reprinted in 10 Arb. Int'l 189, 227 (1994).

73) *See* §3.03[A][2][b][ii](2).

74) *See* §3.03[B]; §4.02; §4.03.

75) Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609, 610-11 (1940) (separability doctrine can be found in German case law as early as 1890).

76) *See, e.g., Judgment of 12 January 1934*, 1934 Hanseatische Rechts-und Gerichtszeitschrift 113 (German Reichsgericht) (invalidity of underlying contract by reason of mistake does not invalidate separable arbitration clause); *Judgment of 26 March 1926*, 1926 Leipziger Zeitschrift für Deutsches Recht 543 (German Reichsgericht) (non-existence of underlying contract does not necessarily result in non-existence of arbitration clause); *Judgment of 17 April 1914*, 1914 JW 772, 773 (German Reichsgericht); *Judgment of 30 April 1890*, 1890 JW 202, 203 (German Reichsgericht); *Judgment of 28 February 1929*, 1929 JW 2617 (Kammergericht Berlin) (non-existence of underlying contract does not necessarily result in non-existence of arbitration clause); *Judgment of 6 February 1924*, 1924 JW 1182, 1183 (Kammergericht Berlin) (non-existence of underlying contract held not to affect separable arbitration clause); *Judgment of 12 December 1918*, 1919 Leipziger Zeitschrift für Deutsches Recht 501 (Oberlandesgericht Marienwerder) (invalidity of underlying contract by reason of fraud does not invalidate separable arbitration clause). *See also* Hamburger, *Kompetenz-Kompetenz der Schiedsgerichte*, 3 Internationales Jahrbuch für Schiedsgerichtswesen 152 (1931) (arbitration clause may "have an independent existence").

77) *Judgment of 12 December 1918*, 1919 Leipziger Zeitschrift für Deutsches Recht 501, 501 (Oberlandesgericht Marienwerder).

78) *Judgment of 30 April 1890*, 1890 JW 202, 203 (German Reichsgericht).

79) *See, e.g., Judgment of 18 May 1904*, 58 RGZ 152, 155 (German Reichsgericht); *Judgment of 17 January 1891*, 27 RGZ 378, 379 (German Reichsgericht); Nussbaum, *Schiedsgerichte und Rechtsordnung*, 1926 JW 55.

80) *See, e.g., Judgment of 6 February 1924*, 1924 JW 1182, 1183 (Kammergericht Berlin); *Judgment of 30 April 1890*, 1890 JW 202, 203 (German Reichsgericht); *Judgment of 21 June 1921*, 1921 Hanseatische Gerichtszeitung 191 (Hanseatisches Oberlandesgericht Hamburg); *Judgment of 11 January 1912*, 13 Sächsisches Archiv 148, 149 (1912) (Oberlandesgericht Dresden); *Judgment of 24 May 1909*, 1910 Zeitschrift für Rechtspflege in Bayern 43 (Oberlandesgericht Nürnberg).

81) *See, e.g., Judgment of 18 May 1904*, 58 RGZ 152, 155 (German Reichsgericht); *Judgment of 17 January 1891*, 27 RGZ 378, 379 (German Reichsgericht); Nussbaum, *Schiedsgerichte und Rechtsordnung*, 1926 JW 55.

82) *Judgment of 27 February 1970*, 6 Arb. Int'l 79 (German Bundesgerichtshof) (1990). *See also Judgment of 6 June 1991*, 1991 NJW 2215, 2216 (German Bundesgerichtshof); *Judgment of 28 May 1979*, 1979 NJW 2567, 2568 (German Bundesgerichtshof).

83) *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 82 (German Bundesgerichtshof) (1990) ("It is rather a question of whether the parties agreed that the arbitration tribunal should decide not only on claims arising from the valid main contract, but also on the validity of the main contract....[I]f the parties have also referred to the arbitration tribunal the decision on the effectiveness of the main contract, the ineffectiveness of the main contract of course cannot affect the existence of the arbitration agreement.").

84) *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 85 (German Bundesgerichtshof) (1990). The Bundesgerichtshof described these consequences as follows: "For if the arbitration tribunal is not allowed to decide also on the effectiveness of the main contract, the situation is as follows: either it must, as soon as this point is disputed in the arbitration procedure, refrain from further activity and refer the parties for clarification of this dispute to the ordinary court: if the latter confirms the effectiveness of the main contract, the parties will have to return to the arbitration tribunal and continue the dispute there. Or the arbitration tribunal can, if it finds the main contract to be effective continue its proceedings....[T]here is then the danger, however, that the state tribunal will find differently on the effectiveness of the main contract than the arbitration tribunal and the arbitration award will therefore be reversed....Both outcomes cannot be desirable to reasonable parties whose purpose in concluding an arbitration agreement is usually to accelerate a decision." *See also* Boyd, *Arbitration Under A Stillborn Contract – The BGH Decision of 27 February 1970*, 6 Arb. Int'l 75 (1990).

85) *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 86 (German Bundesgerichtshof) (1990).

86) Professor Schlosser authored a well-reasoned comment on the Court's decision which began: "A truly excellent judgment!" *See Judgment of 27 February 1970*, 6 Arb. Int'l 79, 86 (German Bundesgerichtshof) (1990), Comment, Schlosser. *See also* J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶¶662-72 (3d ed. 2008); Münch, in G. Lüke & P. Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* §1040, ¶8 (3d ed. 2008); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1029, ¶40 (22d ed. 2002); K.-H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* Kap. 4, ¶¶41-16 to 41-17 (7th ed. 2005).

87) German ZPO, §1040(1) ("The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.").

88) *See, e.g.*, *Judgment of 28 July 2005*, XXXI Y.B. Comm. Arb. 673, 676 (Oberlandesgericht Koblenz) (2006); *Judgment of 12 March 1998*, XXIX Y.B. Comm. Arb. 663, 667 (Hanseatisches Oberlandesgericht Hamburg) (2004) ("nullity of the main contract, if there is such, does not affect the arbitration clause"); Kröll, *Schiedsrechtliche Rechtsprechung 2006*, 2007 SchiedsVZ 145, 147; J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶385 (3d ed. 2008); Voit, in H.-J. Musielak (ed.), *Kommentar zur Zivilprozessordnung* §1040, ¶4 (9th ed. 2012).

89) *Judgment of 27 November 2008*, 2009 HmbSchRZ 5 (German Bundesgerichtshof).

90) *See, e.g.*, *Judgment of 29 October 2008*, XII ZR 165/06, 24 (German Bundesgerichtshof) ("In case of doubt, an arbitration clause has to be interpreted widely, to the effect, that it also covers the question of the invalidity of the main contract."); *Judgment of 12 February 2008*, 2008 34 SchH 006/07 (Oberlandesgericht München) (claim that underlying contract was void for fraud was not directed at arbitration clause specifically and was therefore for arbitral tribunal to decide).

91) *See, e.g., Judgment of 27 November 2008*, 2009 HmbSchRZ 5 (German Bundesgerichtshof) (arbitration clause may be unenforceable "if the threat or deception that led to the conclusion of the underlying contract also directly affected the conclusion of the arbitration agreement"); *Judgment of 29 March 2012*, 2012 SchiedsVZ 159 *et seq.* (Oberlandesgericht München) (separability presumption does not apply where defect affecting underlying contract also specifically applies to arbitration clause); Rieder & Schoenemann, *Korruptionsverdacht, Zivilprozess und Schiedsverfahren*, 2011 NJW 1169, 1172 *et seq.*; K. Schwab & G. Walter, *Schiedsgerichtsbarkeit* ¶4-18 (7th ed. 2005) ("Certain defects can apply to both contracts,...the arbitration agreement and the underlying contract, because of deception, threat or mistake.").

92) *See, e.g., Judgment of 27 November 2008*, 2009 HmbSchRZ 5 (German Bundesgerichtshof) (arbitration clause may be unenforceable "if the threat or deception that led to the conclusion of the underlying contract also directly affected the conclusion of the arbitration agreement"); *Judgment of 29 March 2012*, 2012 SchiedsVZ 159 (Oberlandesgericht München).

93) *See, e.g., Judgment of 27 April 1931*, 1931 Entscheidungen des Appellationsgerichts des Kantons Basel-Stadt 13 (Basel-Stadt Appellationsgericht) (invalidity of underlying contract by reason of mistake or fraud does not invalidate separable arbitration clause); *Judgment of 3 October 1913*, (1915) Blätter für Zürcherische Rechtsprechung 21 (Zurich Obergericht) (invalidity of underlying contract does not invalidate arbitration clause). *But see Judgment of 5 March 1915*, DFT 41 II 310 (Swiss Federal Tribunal) (invalidity of underlying contract results in invalidity of associated arbitration clause); *Judgment of 22 October 1881*, DFT 7 I 705 (Swiss Federal Tribunal) (same).

94) *Judgment of 7 October 1933, Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177, 179 (Swiss Federal Tribunal).

95) *Judgment of 7 October 1933, Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177, 179 (Swiss Federal Tribunal) (emphasis added). *See also Judgment of 28 January 1938*, DFT 64 I 39, 44 (Swiss Federal Tribunal); *Judgment of 6 November 1936*, DFT 62 I 230, 233 (Swiss Federal Tribunal).

96) *See* authorities cited §3.02[B][2].

97) *Judgment of 14 April 1983, Carbomin SA v. Ekton Corp.*, XII Y.B. Comm. Arb. 502, 504 (Geneva Cour de Justice) (1987).

98) Swiss Law on Private International Law, Arts. 178(2), (3) ("As regards its substance, an arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law. The validity of an arbitration agreement cannot be contested on the grounds that the main contract may not be valid or that the arbitration agreement concerns disputes which have not yet arisen.").

99) *See, e.g.*, B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶604 (2d ed. 2010); D. Girsberger & N. Voser, *International Arbitration in Switzerland* ¶¶405-07 (2d ed. 2012); P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse* Art. 178, ¶4 (1989); Wenger, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 178, ¶76 (2000).

100) *See, e.g.*,*Judgment of 16 October 2001*, 2002 Rev. arb. 753, 757 (Swiss Federal Tribunal) ("fact that due to its function the arbitration clause is separable from the underlying contract does not necessarily entail that it is independent"); *Judgment of 6 September 1996*, 15 ASA Bull. 291, 300 (Swiss Federal Tribunal) (1997) ("[T]he arbitration clause has an independent or autonomous character....[T]he arbitral tribunal has jurisdiction to decide on disputes concerning, among other issues, the validity and extinction of the underlying contract."); *Judgment of 15 March 1990, Sonatrach v. K.C.A. Drilling Ltd*, DFT 116 Ia 56, 58 (Swiss Federal Tribunal) (arbitration clause in construction service contract remains valid, even if parties agree to terminate main contract).

101) *See Judgment of 2 February 1993*, DFT 119 II 380, 384 (Swiss Federal Tribunal) (any defect in capacity for party to consent, or duress, affects arbitration clause); *Judgment of 7 July 1962*, DFT 88 I 100, 105 (Swiss Federal Tribunal). *See also* D. Girsberger & N. Voser, *International Arbitration in Switzerland* ¶407 (2d ed. 2012).

102) U.S. FAA, 9 U.S.C. §2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

Similarly, the Revised Uniform Arbitration Act provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract." Revised Uniform Arbitration Act, §6(a) (2000).

103) U.S. FAA, 9 U.S.C. §3.

104) U.S. FAA, 9 U.S.C. §4. The U.S. Supreme Court has also held that §2 of the FAA (applicable in state as well as federal courts) gives effect to the separability presumption. *See Rent-A-Ctr, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2778 (U.S. S.Ct. 2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (U.S. S.Ct. 2006).

105) *See*§§3.02[A][1]-[2]; §3.03[A][1].

106) *See* Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 9 Arb. & Disp. Res. L.J. 19, 27 (2000); Rau, *"The Arbitrability Question Itself"*, 10 Am. Rev. Int'l Arb. 287 (1999); Rosen, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 Ford. Int'l L.J. 599 (1993-1994).

107) *See*§3.02[B][3][c]; §3.03[A][2][b]; Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1, *passim* (2003).

U.S. state courts, applying state law, almost uniformly adopt the separability presumption. *See, e.g., J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 129 (Colo. 2007) (adopting separability standard from *Prima Paint* under Colorado Uniform Arbitration Act); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854-55 (Ky. 2004) (adopting separability doctrine from *Prima Paint* under Kentucky Uniform Arbitration Act; noting that "of the thirty-five states that have adopted the Uniform Arbitration Act thus far, at least thirty have chosen to follow the majority view"); *Old Repub. Ins. Co. v. Lanier*, 644 So.2d 1258 (Ala. 1994); *Weiss v. Voice/Fax Corp.*, 640 N.E.2d 875 (Ohio 1994); *Thompson v. Lee*, 589 A.2d 406 (D.C. 1991); *Quirk v. Data Terminal Sys., Inc.*, 400 N.E.2d 858 (Mass. 1980); *Weinrott v. Carp*, 298 N.E.2d 42, 47 (N.Y. 1973) (adopting separability doctrine in relation to arbitrations governed by New York law: "The result we suggest in this case is consistent with the policy adopted by the Federal courts.").

As discussed below, there are a few isolated state court decisions which appear to reject the separability presumption, but these are preempted by the FAA and wrong. *See*§3.03[A][2][b][ii](1) n. 387.

108) *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959). *See also In re Kinoshita & Co.*, 287 F.2d 951, 952-53 (2d Cir. 1961); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 320 (3d Cir. 1945); *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 880-81 (6th Cir. 1944); *Paramount Famous Lasky Corp. v. Nat'l Theatre Corp.*, 49 F.2d 64, 66 (4th Cir. 1931); *In re Albert*, N.Y. L.J. 1176 (12 March 1936) (N.Y. Sup. Ct. 1936) (recognizing separability of arbitration clause).

109) *Robert Lawrence Co.*, 271 F.2d at 412. The Court also relied on §2 of the FAA, and in particular its references to the arbitration agreement as a separable provision of the underlying contract. *Id.* at 410-11.

110) *Robert Lawrence Co.*, 271 F.2d at 409-10 ("That the [FAA] envisages a distinction between the entire contract between the parties on the one hand and the arbitration clause of the contract on the other is plain on the fact of the statute. Section 2 [of the FAA, which concerns the validity, irrevocability and enforceability of arbitration clauses] does not purport to affect the contract as a whole.").

111) *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (U.S. S.Ct. 1967).

The Court in *Prima Paint* appeared to distance itself somewhat from the rationale in *Robert Lawrence Co.* ("We agree, albeit for somewhat different reasons."), but without clearly identifying the differences in its analysis. *Id.* at 400. The Court's analysis appeared not to rely on §2 of the FAA, as the Court of Appeals had, instead apparently relied only on §§3 and 4 (and, as a consequence, at least arguably confined its decision to cases arising in federal (and not state) courts). The Supreme Court subsequently made clear, in *Buckeye*, that the separability presumption was a matter of federal law, applicable in state, as well as federal, courts. *See*§3.03[A][2][b][i]; J. Carter & J. Fellas, *International Commercial Arbitration in New York* 213 (2010).

112) *Prima Paint*, 388 U.S. at 402.

113) *Prima Paint*, 388 U.S. at 402.

114) *Prima Paint*, 388 U.S. at 404.

115) *Prima Paint*, 388 U.S. at 403-04.

116) *Prima Paint*, 388 U.S. at 404.

117) *Prima Paint*, 388 U.S. at 404 (emphasis added).

118) *Prima Paint*, 388 U.S. at 404. Subsequent U.S. lower court decisions almost uniformly adopted the separability presumption. *See* authorities cited §3.02[B][3][c].

119) *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (U.S. S.Ct. 2006).

120) *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860, 864-65 (Fla. S.Ct. 2005) ("We hold that an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void *ab initio*.").

121) *Prima Paint*, 388 U.S. at 425.

122) *Buckeye*, 546 U.S. at 448.

123) *Buckeye*, 546 U.S. at 445.

124) *Buckeye*, 546 U.S. at 446. *See also*§3.03[A][2][b][ii](2).

125) *Buckeye*, 546 U.S. at 446. *See*§3.03[A][2][b][i](2), pp. 409-11.

126) *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S.Ct. 2772 (U.S. S.Ct. 2010); Stipanovich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 Am. Rev. Int'l Arb. 323, 361 (2011).

The conclusion that a portion of an arbitration agreement can be severable from the rest of the arbitration agreement was suggested in earlier U.S. appellate authority. *See Puleo v. Chase Bank USA*, 605 F.3d 172, 186 (3d Cir. 2010). As discussed below, it is doubtful that the conclusion that portions of the arbitration agreement (including so-called "delegation agreements") are separable from the arbitration agreement itself is well-considered. *See*§3.03[A][2][b][i](3).

127) *Rent-A-Ctr*, 130 S.Ct. at 2778-79.

128) *Rent-A-Ctr*, 130 S.Ct. at 2778-79. *See also*§3.03[A][2][b][i](3).

129) *Rent-A-Ctr*, 130 S.Ct. at 2787 (Stevens, J., dissenting).

130) *Rent-A-Ctr*, 130 S.Ct. at 2779. Indeed, the Supreme Court saw "no logical reason why an agreement to arbitrate one controversy is not severable from an agreement to arbitrate a different controversy (enforceability)" as there is no "magic bond between arbitration provisions that prevents them from being severed from each other." *Id.* at 2779.

131) *Rent-A-Ctr*, 130 S.Ct. at 2786 (Stevens, J., dissenting).

132) *D'Antuono v. Serv. Road Corp.*, 789 F.Supp.2d 308, 319 (D. Conn. 2011).

133) *See, e.g., Arrigo v. Blue Fish Commodities, Inc.*, 408 F.Appx. 480, 482 (2d Cir. 2011) (holding arbitration clause "valid" and leaving "unscrambling" of "incomprehensible" and "garbled" contract to arbitrators); *Dialysis Access Ctr, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) ("Although appellants have challenged the validity of the [contract] as a whole, they have not specifically challenged the validity of the arbitration clause itself....Appellants have not alleged that the arbitration clause itself was fraudulently induced....[T]he arbitration clause is severable from the [contract] and must be enforced."); *JLM Indus. v. Stolt–Nielsen SA*, 387 F.3d 163, 170 n.5 (2d Cir. 2004); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 933 (6th Cir. 1998) ("[T]he arbitration agreement is effectively considered as a separate agreement which can be valid despite being contained in a fraudulently induced contract."); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868-69 (7th Cir. 1985) ("An arbitration clause will often be 'severable' from the contract in which it is embedded, in the sense that it may be valid even if the rest of the contract is invalid."); *D'Antuono v. Serv. Road Corp.*, 789 F.Supp.2d 308, 319 (D. Conn. 2011) ("unless the challenge is to the [enforceability of the] arbitration clause itself, the issue of the contract's validity is [usually] considered by the arbitrator"); *Torrance v. Aames Funding Corp.*, 242 F.Supp.2d 862, 868-69 (D. Or. 2002) ("arbitration clause may be enforced even though the rest of the contract is later held invalid by the arbitrator"); *Solar Planet Profit Corp. v. Hymer*, 2002 WL 31399601, at *2 (N.D. Cal.) ("arbitration clause in a voidable contract remains valid"); *Cline v. H.E. Butt Grocery Co.*, 79 F.Supp.2d 730, 732 (S.D. Tex. 1999) ("Questions related to the enforcement of a contract as a whole are properly referable to an arbitrator; it is only when an attack is made on the arbitration clause itself that a court, rather than an arbitrator, should decide questions of validity."); *Hodge Bros., Inc. v. DeLong Co.*, 942 F.Supp. 412, 417 (W.D. Wis. 1996); *Hydrick v. Mgt Recruiters Int'l, Inc.*, 738 F.Supp. 1434, 1435 (N.D. Ga. 1990) ("[I]f the arbitration clause is valid, the Court must enforce it, even if the underlying contract might be declared invalid.").

134) *See, e.g., Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001) ("if they have agreed on nothing else, [the parties] have agreed to arbitrate"); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 754-55 (7th Cir. 1994) (despite apparent lack of meeting of minds on underlying contract, "there was a meeting of the minds on the mode of arbitrating disputes between the parties" and "the parties had agreed to arbitrate their claims"); *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477 (9th Cir. 1991); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990) (parties signed draft agreement, including arbitration clause, which was to be finalized; court considered challenge to arbitration clause and rejected it); *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563, 1568 (6th Cir. 1990) (validity of arbitration agreement should be analyzed separately from underlying contract, challenged as void for fraud *in factum*); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("arbitration clause enforceable in spite of a claim that the... contract containing it was void from its inception because of the parties' failure to comply with a state statute").

As discussed in detail below, U.S. courts have applied the separability presumption and principles of competence-competence differently in cases involving, on the one hand, claims of *invalidity* of the underlying contract, and, on the other hand, claims of *non-existence* of the underlying contract. *See*§§3.03[A][2][b][ii](1) & (3). It is nonetheless clear that, in principle, the separability presumption can be applied in both sets of cases, although it may produce different results in each; in particular, in many cases where the underlying contract is nonexistent, the same facts will also result in the non-existence of the arbitration clause. *See*§3.03[A][2][b][ii](3).

135) *See*§3.03[D].

136) *Prima Paint*, 388 U.S. at 402 ("The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others, is that – *except where the parties otherwise intend* – arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded.") (emphasis in original) (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959) and *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961)); *Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167, 171 (U.S. S.Ct. 1963); *Spahr v. Secco*, 330 F.3d 1266, 1271 (10th Cir. 2003); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994); *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477 (9th Cir. 1991) ("Thus, *in the absence of any evidence that [the arbitration agreement] was intended as non-severable*, we must strictly enforce [it, even if the rest of the contract is later held to be invalid].") (emphasis added); *Sigety v. Axelrod*, 535 F.Supp. 1169, 1172 (S.D.N.Y. 1982) ("*Unless the parties intend otherwise* arbitration clauses are separable from the contracts in which they are embedded...") (emphasis added) (quoting *Prima Paint*, 388 U.S. at 402).

137) *Boston Telecomms. Group, Inc. v. Deloitte Touche Tohmatsu*, 278 F.Supp.2d 1041, 1049 (N.D. Cal. 2003).

138) *See*§3.03[A][2][b][ii](3).

139) *See*§3.03[A][2][b][ii](3); *Buckeye*, 546 U.S. at 444 n.1.

140) *See, e.g., Sphere Drake Ins. Ltd v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2d Cir. 2001); *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000); *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477 (9th Cir. 1991); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); *Ernst & Young Ltd v. Quinn*, 2009 WL 3571573 (D. Conn.); *Toray Indus. Inc. v. Aquafil SpA*, 17(10) Mealey's Int'l Arb. Rep. D-1 (N.Y. Sup. Ct. 2002) (2002).

141) *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, 2005 WL 1118130 (D. Kan.).

142) *See* §3.03[A][2][b][i](2).

143) *See* §3.02[A].

144) *See* §3.02[A][2].

145) *See* §1.02[B]; §3.02[B][3].

146) French decisions have not relied on the separability presumption in considering issues of competence-competence. That is because of the broad French approach to a tribunal's competence and the limited interlocutory role of French courts in considering challenges to the existence, validity, or scope of international arbitration agreements. *See* §7.03[B][2].

147) *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e).

148) *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e).

149) Later French decisions recognized that parties are free to agree that an arbitration agreement is, contrary to the presumptive rule, not separable from the underlying contract. *See, e.g.*, *Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681, 682 (French Cour de cassation) ("Such a[n arbitration] clause, due to its autonomy with regard to the underlying agreement in which it is embedded, is not affected – *except where specifically stipulated* – by the ineffectiveness of the contract.") (emphasis added).

150) *See, e.g.*, *Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681, 682 (French Cour de cassation) ("[The arbitration clause], because it is separate from the underlying contract in which it is included, is not affected by the unenforceability of the contract as a whole."); *Judgment of 4 April 2002, Société Barbot CM v. Société Bouygues Bâtiment et autre*, 2003 Rev. arb. 103 (French Cour de cassation civ. 2e); *Judgment of 20 December 1993, Municipalité de Khoms El Mergeb v. Société Dalico*, 1994 Rev. arb. 116 (French Cour de cassation civ. 1e); *Judgment of 26 March 1991, Comité populaire de la Municipalité d'El Mergeb v. Société Dalico contractors*, 1991 Rev. arb. 456 (French Cour de cassation civ. 1e); *Judgment of 24 February 1994, Ministry of Public Works v. Société Bec Frères*, XXII Y.B. Comm. Arb. 682 (Paris Cour d'appel) (1997).

151) *Judgment of 20 December 1993, Municipalité de Khoms El Mergeb v. Société Dalico*, 1994 Rev. arb. 116 (French Cour de cassation civ. 1e).

152) French Code of Civil Procedure, Art. 1442.

153) *See, e.g.*, *Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681 (French Cour de cassation) (extending separability presumption to contracts that are void, voidable, or ineffective); *Judgment of 11 July 2006, Société Nat'l Broadcasting Co. v. Bernadaux*, 2006 Rev. arb. 981 (French Cour de cassation civ. 1e) (extending separability presumption to nonexistent contract); *Judgment of 25 October 2005*, Case No. D. 2005.3052 (French Cour de cassation com.), Note, Clay (arbitration agreement is affected by neither invalidity nor non-existence of underlying contract); *Judgment of 4 April 2002, Société Barbot CM v. Société Bouygues Bâtiment et autre*, 2003 Rev. arb. 103 (French Cour de cassation civ. 2e); *Judgment of 20 December 1993, Municipalité de Khoms El Mergeb v. Société Dalico*, 1994 Rev. arb. 116 (French Cour de cassation civ. 1e); *Judgment of 7 April 2011*, 2011 Rev. arb. 747 (Paris Cour d'appel) (arbitration agreement is independent from underlying contract); *Judgment of 10 September 2003, Quille v. SQ CEE Euro Idolation*, 2004 Rev. arb. 623 (Paris Cour d'appel) (judicial aspect of arbitration agreement explains its separability from underlying contract); *Judgment of 8 October 1998, Sam v. Perrin*, 1999 Rev. arb. 350 (Paris Cour d'appel) (arbitration clause is enforceable regardless of existence or validity of underlying contract); *Judgment of 24 February 1994, Ministry of Public Works v. Société Bec Frères*, XXII Y.B. Comm. Arb. 682 (Paris Cour d'appel) (1997).

154) French Code of Civil Procedure, Art. 1447.

155) *Judgment of 25 November 2008, Sté Les Pains du Sud v. Sté Spa Tagliavini*, 2008 Rev. arb. 681 (French Cour de cassation); *Judgment of 11 July 2006, Société Nat'l Broadcasting Co. v. Bernadaux*, 2006 Rev. arb. 981 (French Cour de cassation civ. 1e); *Judgment of 25 October 2005*, D. 2005.3052 (French Cour de cassation com.), Note, Clay; *Judgment of 20 December 1993, Municipalité de Khoms El Mergeb v. Société Dalico*, 1994 Rev. arb. 116 (French Cour de cassation civ. 1e); Castellane, *The New French Law on International Arbitration*, 28 J. Int'l Arb. 371 (2012); Clay, *"Liberté, Egalité, Efficacité": La devise du nouveau droit français de l'arbitrage*, 139 J.D.I. (Clunet) 8 (2012); P. Mayer, *Les limites de la separabilité de la clause compromissoire*, 1998 Rev. arb. 359.

156) T. Clay, *"Liberté, Egalité, Efficacité": La devise du nouveau droit français de l'arbitrage*, 139 J.D.I. (Clunet) 8 (2012).

157) UNCITRAL Model Law, Art. 7(1) (emphasis added). *See* P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶¶2-006 to 2-013 (3d ed. 2009); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 258 (1989).

158) UNCITRAL Model Law, Art. 7(2); §1.04[B][1][a]; §§5.02[A][5][a]-[b].

159) UNCITRAL Model Law, Art. 8(1); §5.01[C][1].

160) UNCITRAL Model Law, Arts. 8(1),16; §7.02[B][1]; §7.03[A].

161) Articles 34(2)(a)(1) and 36(1)(a)(1) of the Model Law permit annulment and non-recognition of an award if "a party to the arbitration agreement referred to in Article 7 was under some incapacity, or *the said agreement is not valid under the law to which the parties have subjected it* or, failing any indication thereon, under the law of the country where the award was made." UNCITRAL Model Law, Arts. 34(2)(a)(1), 36(1)(a)(1) (emphasis added). *See*§25.03[A]. As with Article V(1)(a) of the New York Convention, this provision acknowledges the presumptive separability of international arbitration agreements, for choice-of-law purposes, and adopts a particular choice-of-law rule applicable to such agreements. *See*§3.02[A][2]; §4.02[A][2][a]; §4.04[A][2][i].

162) UNCITRAL Model Law, Art. 16(1) (emphasis added). *See* P. Binder, *International Commercial Arbitration and Conciliation inUNCITRAL Model Law Jurisdictions* ¶¶4-006 to 4-011 (3d ed. 2009); H. Holtzmann & J. Neuhaus, *A Guide to theUNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 478-81 (1989).

163) UNCITRAL Model Law, Art. 1(2). *See*§3.02[B][3][e].

164) *See, e.g., Siderurgica Mendes Junior SA v. "Icepearl"*, [1996] CanLII 2746 (B.C. S.Ct.) (applying separability presumption to agreement for foreign-seated arbitration); *Harper v. Kvaerner Fjellstrand Shipping A.S.*, [1991] CanLII 1735 (B.C. S.Ct.); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd*, [2002] O.J. No. 1465 (Ontario Super. Ct.); *OEMSDF Inc. v. Europe Israel Ltd*, [1999] O.J. No. 3594 (Ontario Super. Ct.); *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192 (Australian Fed. Ct.) (applying separability presumption even though Article 16(1) not literally applicable where arbitration agreement provides for foreign arbitral seat); *Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, [2005] FCA 1102 (Australian Fed. Ct.) (same); *Subway Sys. Australia Pty Ltd v. Ireland*, [2013] VSC 550, ¶57 (Victoria S.Ct.); *Blue Ltd v. Jaribu Credit Traders Ltd*, Civil Case No. 157 of 2008 (Nairobi High Ct.).

165) UNCITRAL Model Law, Art. 16(1) (emphasis added).

166) The application of Article 16 is discussed below. *See*§3.03[A][2][a]; §7.02[B][1].

167) UNCITRAL Model Law, Art. 16(1). Article 16(1) might be interpreted as applying only in the context of the arbitral tribunal's consideration of jurisdictional issues. UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 76 (2012) ("second sentence could be read as limiting the operation of the separability principle to situations where a jurisdictional objection is being examined by the arbitral tribunal, as opposed to a court"). That suggestion would make no sense (because the same approach to separability must apply in both arbitral proceedings and national courts).

Courts in Model Law jurisdictions have consistently adopted this analysis. *See, e.g., Siderurgica Mendes Junior SA v. "Icepearl"*, [1996] CanLII 2746 (B.C. S.Ct.); *Krutov v. Vancouver Hockey Club Ltd*, [1991] CanLII 2077 (B.C. S.Ct.); *Harper v. Kvaerner Fjellstrand Shipping AS*, [1991] CanLII 1735 (B.C. S.Ct.); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd*, [2002] O.J. No. 1465 (Ontario Super. Ct.); *OEMSDF Inc. v. Europe Israel Ltd*, [1999] O.J. No. 3594 (Ontario Super. Ct.); *Campbell v. Murphy*, (1993) 15 O.R.3d 444 (Ontario Super. Ct.); *Mind Star Toys Inc. v. Samsung Co.*, (1992) 9 O.R.3d 374 (Ontario Super. Ct.); *Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, [2005] FCA 1102 (Australian Fed. Ct.); *Judgment of 25 September 2008, Blue Ltd v. Jaribu Credit Traders Ltd*, Civil Case No. 157 of 2008 (Nairobi High Ct.).

168) UNCITRAL Model Law, Art. 16(1).

169) *See also*§3.03[A][2][a]; §7.02[B][1]; §7.03[A].

170) UNCITRAL Model Law, Art. 16(1) (emphasis added).

171) The circumstances in which the non-existence, invalidity, or illegality of the parties' underlying contract can affect their arbitration agreement are discussed in greater detail below. *See*§3.03[A][2][a]. *See also* Sanders, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann* 31 (1978).

172) *See, e.g., JSC BTA Bank v. Ablyazov* [2011] EWHC 587, ¶¶42-54 (Comm) (English High Ct.) (relying on *Fiona Trust* to hold that arbitration agreement is separable and valid even though underlying contract was voidable because signed by agent acting outside scope of authority); *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] BCSC 532 (B.C. Sup. Ct.) (ineffectiveness of underlying contract, because effective date had not occurred, did not render arbitration agreement ineffective); *World LLC v. Parenteau Int'l Inc.*, [1998] A.Q. No. 736 (Québec Super. Ct.) (recognizing separability presumption); *Globe Union Indus. Corp. v. G.A.P. Mktg Corp.*, [1994] CanLII 186 (B.C. S.Ct.) (claim that underlying contract was illegal does not affect arbitration clause); *Brian Harper v. Kvaerner Fjellstrand Shipping AS*, XVIII Y.B. Comm. Arb. 358, 359-60 (B.C. S.Ct. 1991) (1993); *Krutov v. Vancouver Hockey Club Ltd*, [1991] CanLII 2077 (B.C. S.Ct.) (arbitration clause not affected by failure of condition precedent to underlying contract); *Rampton v. Eyre*, [2007] ONCA 331 (Ontario Ct. App.) (relying on separability presumption to hold that termination of underlying contract did not affect arbitration clause); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd*, [2002] O.J. No. 1465 (Ontario Super. Ct.) (relying on separability presumption to hold that fraud affecting underlying contract did not affect arbitration clause); *NetSys Tech. Group AB v. Open Text Corp.*, (1999) 1 B.L.R.3d 307 (Ontario Super. Ct.) (claim that underlying contract was void on grounds of mistake did not impeach arbitration clause); *Campbell v. Murphy*, (1993) 15 O.R.3d 444 (Ontario Super. Ct.) (repudiation of underlying contract did not affect arbitration clause); *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192 (Australian Fed. Ct.) (relying on separability presumption to hold that fraud affecting underlying contract did not affect arbitration clause); *Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, [2005] FCA 1102 (Australian Fed. Ct.) (same); *Ferris v. Plaister*, (1994) 34 NSWLR 474 (N.S.W. Ct. App.) (claim that underlying contract is fraudulently induced does not impeach arbitration clause); *M/S Magma Leasing & Fin. Ltd v. Potluri Madhavilata*, AIR 2010 SC 488 (Indian S.Ct.) (arbitration clause valid where underlying contract was terminated by breach); *Fittydent Int'l GmbH v. Brawn Labs., Ltd*, XXXV Y.B. Comm. Arb. 401 (Delhi High Ct. 2010) (2010) ("[E]ven assuming for the sake of arguments [sic] that the agreement dated 20 May 1994 between the parties was illegal and *non-est*, the same shall not on its own render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same."); *Blue Ltd v. Jaribu Credit Traders Ltd*, Civil Case No. 157 of 2008 (Nairobi High Ct.) (arbitration clause not affected by failure of condition precedent to underlying contract).

173) *See, e.g., Judgment of 27 November 2008*, 2009 HmbSchRZ 5, 5 (German Bundesgerichtshof) (arbitration clause may be invalid "if the threat or deception that led to the conclusion of the underlying contract also directly affected the conclusion of the arbitration agreement"); K. Schwab & G. Walter, *Schiedsgerichtsbarkeit* ¶4-18 (7th ed. 2005) ("Certain defects can apply to both contracts,...the arbitration agreement and the underlying contract, because of deception, threat or mistake."); *Sojuznefteexport v. JOC Oil Ltd*, XV Y.B. Comm. Arb. 384 (Bermuda Ct. App. 1989) (1990) (exception may exist to separability doctrine where underlying contract never existed); van den Berg, *Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002)*, XXVIII Y.B. Comm. Arb. 562, 626-27 (2003).

174) *See* L. Collins (ed.), *Dicey Morris and Collins on The Conflict of Laws* ¶¶16-008 *et seq.* (15th ed. 2012); R. Merkin, *Arbitration Law* ¶¶5.40 *et seq.* (1991 & Update August 2013); Samuel, *Separability in English Law: Should An Arbitration Clause Be Regarded as An Agreement Separate and Collateral to A Contract in Which It Is Contained?*, 3(3) J. Int'l Arb. 95 (1986); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶2-007 *et seq.* (23d ed. 2007); Svernlov, *The Evolution of the Doctrine of Separability in England: Now Virtually Complete?*, 9(3) J. Int'l Arb. 115 (1992).

175) *See, e.g., Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd* [1981] AC 909 (House of Lords); *Heyman v. Darwins Ltd* [1942] AC 356, 366 (House of Lords); *Mackender v. Feldia AG* [1967] 2 QB 590 (English Ct. App.); *Paul Smith Ltd v. H & S Int'l Holdings Inc.* [1991] 2 Lloyd's Rep. 127 (QB) (English High Ct.).

176) *See, e.g., Joe Lee Ltd v. Lord Dalmeny* [1927] 1 Ch 300 (Ch) (English High Ct.) (illegality/invalidity of underlying gambling contract invalidates associated arbitration clause); *Ateus v. Lashley*, 101 ER 435 (1794) (English K.B.) (annulling award on grounds that underlying contract was illegal "stock-jobbing" agreement).

177) *Heyman v. Darwins Ltd* [1942] AC 356, 366 (House of Lords). In early precedents of this sort, English courts often spoke of the arbitration clause as simply another term of the parties' underlying contract, albeit one which warranted special treatment. *Ashville Inv. Ltd v. Elmer Contractors Ltd* [1988] 3 WLR 867 (English Ct. App.); *Dalmia Dairy Indus. Ltd v. Nat'l Bank of Pakistan* [1978] 2 Lloyd's Rep. 223 (English Ct. App.).

178) *Heyman v. Darwins Ltd* [1942] AC 356, 366 (House of Lords) (Viscount Simon, L.C.).

179) *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat'l Oil Co.* [1987] 2 Lloyd's Rep. 246, 250 (English Ct. App.), *rev'd on other grounds*, [1988] 2 Lloyd's Rep. 293 (House of Lords). *See also Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd* [1981] AC 909 (House of Lords); *Paul Smith Ltd v. H & S Int'l Holdings Inc.* [1991] 2 Lloyd's Rep. 127 (QB) (English High Ct.).

180) *Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.).

181) *See, e.g., Peterson Farms Inc. v. C&M Farming Ltd* [2004] 1 Lloyd's Rep. 603, 609 (QB) (English High Ct.) ("Under the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears. The autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration. A corollary to the separability doctrine is that the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract underlying the dispute and to the arbitral proceedings themselves."); *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 92-93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.).

182) *See*§3.03[A][2][c]; *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords).

183) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1993] 3 All ER 897 (English Ct. App.); Gross, *Separability Comes of Age in England:* Harbour v. Kansa *and Clause 3 of the Bill*, 11 Arb. Int'l 85 (1995); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶2-007 to 2-013, ¶2-070 (23d ed. 2007).

184) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 92-93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.).

185) English Arbitration Act, 1996, §7 (emphasis added). Section 7 used the term "distinct," rather than "separable" or "autonomous." There does not appear to have been any change in substantive meaning attributed to the new terminology.

186) *See*§3.02[B][3][e]; §3.03[A][2][a].

187) Aeberli, *Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Route Map*, 21 Arb. Int'l 253, 253 n.3 (2005) ("note also §7 (giving effect to the doctrine of separability)"); R. Merkin, *Arbitration Law* ¶5.40 (1991 & Update August 2013) ("There are two intertwining principles recognized at common law, and codified by the Arbitration Act 1996....The first principle is that of separability...now set out in §7 of the Arbitration Act 1996."); Samuel, *Separability and the U.S. Supreme Court Decision in* Buckeye v. Cardegna, 22 Arb. Int'l 477, 491 (2006) ("This led to the assumption that a future House of Lords would introduce mainstream separability if it ever dealt with a case involving a main contract that was illegal. In 1992, the Court of Appeal in *Harbour*, however, 'jumped the gun' and ruled that the alleged illegality of an insurance contract did not deprive the arbitrator of jurisdiction. Unsurprisingly, the views expressed there were reproduced in section 7 of the Arbitration Act 1996.").

188) English Arbitration Act, 1996, §7; R. Merkin, *Arbitration Law* ¶5.43 (1991 & Update August 2013).

189) *Compare*English Arbitration Act, 1996, §7*with*UNCITRAL Model Law, Art. 16(1). *See*§3.02[B][3][e], p. 375; §7.02[B][1]; §7.03[A], p. 1110.

The English choice was a deliberate one. U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ¶43 (1996) ("This clause [§7] sets out the principle of separability which is already part of English law, which is also to be found in Article 16(1) of the Model Law, and which is regarded internationally as highly desirable. However, it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction, so that, unlike the Model Law, we have dealt with the latter elsewhere in the Bill (Clause 30)."") (citing *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1993] 3 All ER 897 (English Ct. App.)).

190) *See*§3.03[A][2][a]; §7.02[B][1]; §7.03[A].

191) *See also Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221, 232 (House of Lords) (separability presumption is "part of the very alphabet of arbitration law").

192) *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords).

193) *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891, ¶¶29, 38 (English Ct. App.) (emphasis added), *aff'd*, [2007] UKHL 40 (House of Lords). The Court of Appeal relied in particular on L. Collins (ed.), *Dicey, Morris and Collins on The Conflict of Laws* ¶12-099 (14th ed. 2006), which approved the analysis in *Prima Paint* and subsequent U.S. decisions.

194) *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶17 (House of Lords).

195) *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶27 (House of Lords).

196) In *El Nasharty v. J. Sainsbury plc*, a case involving a claim of duress, the court applied *Fiona Trust* and held that the arbitration clause would only be invalidated if that clause itself resulted from duress. Although there was substantial evidence that the underlying contract had been procured by duress, the Court held that the "duress did not prevent [the party from] exercising his own free will in relation to [the] dispute resolution machinery." *El Nasharty v. J. Sainsbury plc* [2007] EWHC 2618, ¶31 (Comm) (English High Ct.). *See also Deutsche Bank AG v. Asia Pac. Broadband Wireless Commc'ns Inc.* [2008] EWCA Civ 1091 (English Ct. App.) (applying separability presumption where contract was unauthorized and thus void); *Entico Corp. Ltd v. United Nations Educ. Scientific & Cultural Ass'n* [2008] EWHC 531 (Comm) (English Ct. App.) (applying separability presumption where contract's existence was contested); *UR Power GmbH v. Kuok Oils & Grains Pte Ltd* [2009] EWHC 1940 (Comm) (English High Ct.) (applying separability presumption where negotiations had arguably not yet resulted in binding agreement); *Vee Networks Ltd v. Econet Wireless Int'l Ltd* [2005] 1 Lloyd's Rep. 192 (QB) (English High Ct.); *Svenska Petroleum Exploration AB v. Lithuania* [2005] EWHC 2437 (Comm) (English High Ct.).

197) *See*§3.03[A][2][b][ii](3); §3.03[A][2][c].

198) *UR Power GmbH v. Kuok Oils & Grains Pte Ltd* [2009] EWHC 1940, ¶34 (Comm) (English High Ct.) (arbitrator to decide whether condition precedent to formation of underlying contract, containing arbitration clause, had been fulfilled).

199) Lower court decisions holding that termination of an underlying agreement does not terminate an arbitration clause include *Judgment of 5 August 1936, Cont'l Ins. Co. v. Fuji Shokai*, IV Y.B. Comm. Arb. 115, 122 (Tokyo Koto Saibansho) (1979) (agency agreement); *Judgment of 21 October 2005, Taiyo Ink Mfg Ltd v. Tamura Kaken Ltd*, Hanrei Jiho No. 1926-127 (Tokyo Chiho Saibansho) (validity of arbitration agreement is not affected by validity of underlying license agreement); *Judgment of 25 August 1999*, Heisei 10 (wa) 3851 (Yokohoma Chiho Saibansho) (applying separability presumption where sale agreement was terminated); *Judgment of 3 May 1980, Kabushiki Kaisha Ameroido Nihon v. Drew Chem. Corp.*, VIII Y.B. Comm. Arb. 394 (Yokohama Chiho Saibansho) (1983); *Judgment of 17 October 1973, Koji Sato v. Ikeuchi Kenchiku Seisaku K.K.*, 301 Hanrei Taimuzu 227 (Tokyo Chiho Saibansho) (construction contract); *Judgment of 10 April 1953, Compañia de Transportes del Mar SA v. Mataichi K.K.* (Tokyo Chiho Saibansho) (charter party agreement), cited in T. Doi, *Japan: The Role of Courts in the Settlement of Commercial Disputes by Arbitration*, 4 Int'l Co. & Comm. L.R. 366, 366 (1993).

200) *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979).

201) *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979).

202) *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979). *See also Judgment of 30 May 1994*, XX Y.B. Comm. Arb. 745, 748 (Tokyo Koto Saibansho) (1995) (fraud in connection with underlying contract does not taint arbitration clause).

203) Japanese Arbitration Law, Art. 13(6) ("Even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected.").

204) *See also*§3.02[B][3][f]; §3.03[A][2][a]; §7.02[B][1]; §7.03[A].

205) *Judgment of 26 February 2006, Taiyo Ink Mfg Ltd v. Tamura Kaken Ltd*, LEX/DB 28110611 (Tokyo Koto Saibansho).

206) *See China Nat'l Tech. Imp. Exp. Corp. v. Swiss Indus. Res. Co. Inc.*, [1989] 1 Gazette of the Supreme People's Court of the PRC 26 (Chinese Zuigao Fayuan) (where respondent defrauded claimant regarding nonexistent goods, entire sale of goods contract, including arbitration clause, was *void ab initio*), cited in Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 164-65 (2007).

207) Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 164-65 (2007).

208) As discussed below, China's approach to the competence-competence doctrine has not thus far reflected a similar evolution, with the Chinese Arbitration Law continuing to significantly restrict the arbitrators' competence-competence. *See*Chinese Arbitration Law, Art. 20; §7.03[H].

209) *See* N. Kaplan, J. Spruce & M. Moser, *Hong Kong and China Arbitration Cases and Materials* 314 (1994) (under Chinese Joint Venture Law, joint venture contract not valid until approved by government).

210) Chinese Arbitration Law, Art. 19. *See also* Chinese Contract Law, Art. 57 ("The invalidation, cancellation or discharge of a contract does not impair the validity of the contract provision concerning the method of dispute resolution, which exists independently in the contract.").

211) *Jiangsu Materials Group Light Indus. & Weaving Co. v. Hong Kong Top-Capital Holdings Ltd & Prince Dev. Ltd*, [1998] 3 Gazette of the Supreme People's Court of the PRC 109-10 (Chinese Zuigao Fayuan), cited in Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 168 (2007).

A Chinese commentator criticized the strong presumption the court gave to the separability of the arbitration clause, suggesting that the court had not "even attempt[ed] to test whether the parties had expressed their true intentions in concluding the arbitration agreement in the fraudulent contractual circumstances." Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 169 (2007).

212) Beijing Higher People's Court, Economic Division, *Provisional Regulations and Opinions on Some Issues Regarding the Determination of An Application for Ascertaining the Validity of An Arbitration Agreement, and Motions to Revoke An Arbitration Award* ¶7 (December 1999), cited in Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 169 (2007).

213) *Interpretation of the Supreme People's Court Concerning Several Matters on Application of the Arbitration Law of the P.R.C.*, Art. 10 ("In case a contract has been invalid or cancelled after being formed, Paragraph 1 of Article 19 of the Arbitration Law shall apply to determine the validity of the arbitration agreement.").

214) Chinese Arbitration Law, Art. 19.

215) Article 5 of the 2005 CIETAC Rules is broader than Article 19 of the Arbitration Law. Article 5(4) provides: "An arbitration clause contained in a contract shall be treated as a clause independent and separate from all other clauses of the contract, and an arbitration agreement attached to a contract shall be treated as independent and separate from the other parts of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by any modification, rescission, termination, transfer, expiry, invalidity, ineffectiveness, revocation or *non-existence* of the contract." CIETAC Arbitration Rules, Art. 5 (emphasis added). *See also* Beijing Arbitration Commission Arbitration Rules, Art. 5 (similar formulation of separability).

216) *Union of India v. Kishorilal Gupta & Bros.*, (1960) 1 SCR 493, 508 (Indian S.Ct.).

217) Indian Arbitration and Conciliation Act, Art. 16 ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.").

218) *Brawn Labs. Ltd v. Fittydent Int'l GmbH*, (2000) DLT 204, ¶11 (Delhi High Ct.). The resulting award was subsequently enforced by the Delhi High Court in *Fittydent Int'l GmbH v. Brawn Labs. Ltd*, [2010] CS(OS) 2447/2000 (Delhi High Ct.).

219) *Firm Ashok Traders v. Gurumukh Das Saluja*, [2004] ARBLR 141 SC, ¶13 (Indian S.Ct.).

220) *See, e.g., P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Dev. Corp.*, (2009) 2 SCC 494 (Indian S.Ct.) (arbitration clause survived termination of contract by mutual assent); *Nat'l Agric. Coop. Mktg Fed'n India Ltd v. Gains Training Ltd*, (2007) 5 SCC 692 (Indian S.Ct.) (arbitration clause was severable from contract and survived termination by mutual agreement); *Fittydent Int'l GmbH v. Brawn Labs., Ltd*, XXXV Y.B. Comm. Arb. 401 (Delhi High Ct. 2010) (2010) (arbitration agreement was valid although underlying contract was null and void).

221) *India Household & Healthcare Ltd v. LG Household & Healthcare Ltd*, AIR 2007 SC 1376, 1379 (Indian S.Ct.). *See also M/S Magma Leasing & Fin. Ltd v. Potluri Madhavilata*, AIR 2010 SC 488, ¶18 (Indian S.Ct.) ("Merely because the contract has come to an end by its termination due to the breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising 'in respect of' or 'with regard to' or 'under' the contract.").

222) Irish Arbitration Act, 2010, Art. 16(1) (adopting UNCITRAL Model Law).

223) Spanish Arbitration Act, 2011, Art. 22(1) (adopting UNCITRAL Model Law).

224) Singapore International Arbitration Act, 2012, §7(1) (adopting UNCITRAL Model Law).

225) Hong Kong Arbitration Ordinance, 2013, §34 (adopting UNCITRAL Model Law); *Fung Sang Trading Ltd v. Kai Sun Sea Prods. & Food Co.*, XVII Y.B. Comm. Arb. 289, 297 (H.K. Ct. First Inst. 1991) (1992) ("Article 16(1) enshrines the doctrine of separability"); *Lin Ming v. Chen Shu Quan* [2012] HKCFI 328, ¶28 (H.K. Ct. First Inst.) (citing *Fung Sang Trading*, "Art 16(1) of the Model Law enshrined the doctrine of separability which English law had partially recognized since *Heyman v. Darwins* [1942] AC 356. Thus the arbitration clause is separable from the contract containing it so that even if the contract is repudiated and the repudiation is accepted, the arbitration clause survives the repudiation.").

226) *Subway Sys. Australia Pty Ltd v. Ireland*, [2013] VSC 550, ¶57 (Victoria S.Ct.); *Altain Khuder LLC v. IMC Mining Inc.*, [2011] VSC 1, ¶80 (Victoria S.Ct.) ("The authorities are clear that an arbitration agreement, contained in a broader agreement, is separable from the other terms of that agreement.").

227) New Zealand Arbitration Act, Schedule 1, Art. 16(1) (adopting UNCITRAL Model Law).

228) Belgian Judicial Code, Art. 1690(1) (The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.").

229) Netherlands Code of Civil Procedure, Art. 1053 ("An arbitration agreement shall be considered and decided upon as a separate agreement"; "The arbitral tribunal shall have the power to decide on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related.").

230) Swedish Arbitration Act, §3 ("Where the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement shall be deemed to constitute a separate agreement.").

231) Italian Code of Civil Procedure, Art. 808(3) ("The validity of the arbitration clause shall be evaluated independently from the underlying contract; nevertheless, the capacity to enter into the contract includes the capacity to agree to the arbitration clause.").

232) Portuguese International Arbitration Act, 2011, Art. 18(2) ("[A]n arbitration clause that is part of a contract is considered to be independent from other terms of such contract."), Art. 18(3) ("[A] decision by the arbitration tribunal finding the contract null does not imply the nullity of the arbitration clause."); *Judgment of 27 November 2008*, Process 08B3522 (Portuguese Supremo Tribunal de Justiça).

233) Turkish International Arbitration Law, Art. 4(4) ("One cannot raise an objection to the arbitration agreement on the basis that the main agreement is not valid; or that the arbitration agreement pertains to a dispute that has not yet arisen."); *Judgment of 24 May 2007*, Case No. E.2007/193, K.2007/3494 (Turkish Yargitay), cited in Süral, *Nearly A Decade On: The Perception of International Arbitration Law by Turkish Courts*, 26 Arb. Int'l 421, 427 (2010).

234) Syrian Arbitration Law, Art. 11 ("The arbitral clause is deemed to be an agreement that is independent of the other terms of the contract. The expiration, nullity, repudiation, revocation or termination of the contract shall not affect the arbitral clause therein, provided such clause is valid *per se*, unless agreed otherwise by the parties.").

235) Indonesian Arbitration and ADR Law, Art. 10 ("An arbitration agreement shall not become null or void under any of the following circumstances: (a) the death of one of the parties, (b) the bankruptcy of one of the parties, (c) novation, (d) the insolvency of one of the parties, (e) inheritance, (f) effectivity of the requirements for the cancellation of the main contract, (g) the implementation of the agreement is transferred to one or more third parties, with the consent of the parties who made the agreement to arbitrate, or (h) the expiration or voidance of the main contract.").

236) Scottish Arbitration Act, 2010, Art. 5 ("Separability: (1) An arbitration agreement which forms (or was intended to form) part only of an agreement is to be treated as a distinct agreement. (2) An arbitration agreement is not void, voidable or otherwise unenforceable only because the agreement of which it forms part is void, voidable or otherwise unenforceable. (3) A dispute about the validity of an agreement which includes an arbitration agreement may be arbitrated in accordance with that arbitration agreement.").

237) Algerian Code of Civil and Administrative Procedure, Art. 458 bis 1, ¶3 ("The validity of an arbitration agreement cannot be challenged on the sole ground that the underlying contract would be null and void.").

238) Grigera Naón, *Arbitration and Latin America: Progress and Setbacks*, 21 Arb. Int'l 127, 149 (2005) (citing Bolivian Law on Arbitration and Mediation, Art. 32; Brazilian Arbitration Law, Art. 8; Chilean International Commercial Arbitration Law, Art. 16(1); Colombian Arbitration Law, Art. 79; Costa Rican Arbitration Law, 2011, Art. 16(1); Ecuadorian Law on Arbitration and Mediation, Art. 5; El Salvadoran Law on Mediation, Conciliation and Arbitration, Art. 30; Mexican Commercial Code, Art. 1432; Paraguay Law on Arbitration and Mediation, Art. 19; Peruvian Arbitration Law, Art. 41(2); Venezuelan Commercial Arbitration Law, Arts. 7, 25).

239) *Judgment of 26 April 1980*, VII Y.B. Comm. Arb. 340, 341 (Venice Corte d'Appello) (1982).

240) *Judgment of 2 July 1981*, 1981 Foro it., Rep., voce Arbitrato no. 61 (Italian Corte di Cassazione) (tribunal held that *irrituale* arbitration clause was not separable from main contract, distinguishing it from *rituale* clause: "In fact, contrary to a *rituale* arbitration clause, the above arbitration clause, which is a secondary agreement whose basis and purpose are linked to the main agreement in which it is included, cannot continue to exist if the above mentioned invalidity causes exist, since those invalidity causes imply that the source of the arbitrators' power would indeed cease to exist."); *Judgment of 21 December 1991, SpA Coveme v. Compagnie Française des Isolants*, XVIII Y.B. Comm. Arb. 422, 425 (Bologna Corte d'Appello) (1993) ("arbitral clause is autonomous with respect to the contract – so that the nullity of the latter does not automatically affect the former").

241) *Judgment of 27 November 2008*, Process 08B3522, ¶6 (Portuguese Supremo Tribunal de Justiça).

242) *Barnmore Demolition & Civil Eng'g Ltd v. Alandale Logistics Ltd*, 2010 No. 5910P, 3 (Irish High Ct.).

243) *Judgment of 3 October 1936, AB Norrköpings Trikåfabrik v. AB Per Persson*, 1936 NJA 521, 524 (Swedish S.Ct.) ("There is no evidence of circumstances that would not make the arbitration clause in the agreement between the parties – regardless of whether this would otherwise be considered valid or not – binding for [the claimant]. Therefore, and as the arbitration agreement must be considered to include also a dispute…about [whether the arbitration agreement is valid despite invalidity of main agreement], the [Swedish Supreme Court] confirms the verdict of the [lower court].").

244) *See, e.g., P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Dev. Corp.*, (2009) 2 SCC 494 (Indian S.Ct.); *DHV BV v. Tahal Consulting Eng'rs Ltd*, [2007] INSC 913 (Indian S.Ct.); *Firm Ashok Traders v. Gurumukh Das Saluja*, [2004] ARBLR 141 SC (Indian S.Ct.); *Fittydent Int'l GmbH v. Brawn Labs., Ltd*, XXXV Y.B. Comm. Arb. 401 (Delhi High Ct. 2010) (2010); *M/S Hicare India Props. v. M/S Adidas India Mktg*, [2010] ARB.P. 370/2009, 11-14 (Delhi High Ct.).

245) *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] BCSC 532 (B.C. Sup. Ct.); *Brian Harper v. Kvaerner Fjellstrand Shipping AS*, XVIII Y.B. Comm. Arb. 358, 359- (B.C. S.Ct. 1991) (1993) ("British Columbia Legislature accepts the doctrine of separability").

246) *Nexus Energy Corporate Pty Ltd v. Trident Australasia Pty Ltd*, [2010] FCA 1328 (Australian Fed. Ct.); *Altain Khuder LLC v. IMC Mining Inc.*, [2011] VSC 1, ¶79 (Victoria S.Ct.) ("there is a presumption of 'separability'; that an international arbitration agreement is separable from the underlying commercial contract with which it is associated or is contained"); *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628, 632 (Queensland S.Ct. 1993) (1995) (arbitration clause separable from terminated underlying contract); *Ferris v. Plaister*, (1994) 34 NSWLR 474 (N.S.W. Ct. App.).

247) *Judgment of 5 June 2009, Gasolinera San Isidro v. Compañia Española Distribuidora de Petróleos*, SAP M 10841/2009 (Madrid Audiencia Provincial).

248) *Judgment of 12 April 2010, Elbex Video Ltd v. Tyco Bldg Servs., Ltd*, XXXV Y.B. Comm. Arb. 409 (Israeli S.Ct.) (2010) (arbitration clause valid despite invalidity of underlying contract due to failure of condition precedent).

249) *Judgment of 27 August 1999, Camuzzi Argentina SA v. Sodigas Sur SA*, La Ley 1999-ED, 185-125 (Argentine Cámara Nacional de Apelaciones en lo Comercial); *Judgment of 26 September 1988, Enrique C. Wellbers S.A.I.C. AG v. Extraktionstechnik Gesellschaft für Anlagenbau*, La Ley 1989-E-302 (Argentine Cámara Nacional de Apelaciones en lo Comercial) (recognizing separability of international arbitration clauses under Argentine law).

250) *Judgment of 2 May 2001, Limonta Floor Coverings SpA v. Deportes SRL*, Case No. 87/2001, LJU 125/2002 (Uruguayan Tribunal de Apelaciones).

251) There are a few anomalous exceptions among U.S. state courts, applying state law in domestic matters. *See, e.g., Shaffer v. Jeffery*, 915 P.2d 910, 916-17 (Okla. 1996) (Oklahoma law); *B.A.P. LLP v. Pearman*, 250 P.3d 332 (Okla. Civ. App. 2011) (same); *New Orleans Private Patrol Serv., Inc. v. Valiant Payroll Serv., Inc.*, 56 So.3d 1084, 1087-88 (La. Ct. App. 2011); *Wilson v. Mike Steven Motors, Inc.*, 2005 WL 1277948, at *5 (Kan. Ct. App.) ("Kansas has not favored applying the separability doctrine to contracts governed by the KUAA."); *City of Wamego v. L.R. Foy Constr. Co.*, 9 Kan.App.2d 168, 173 (Kan. Ct. App. 1984). These decisions are preempted by the U.S. FAA insofar as they involve interstate or foreign commerce. They are also anomalous and ill-reasoned.

252) *See*§3.02[B][3]; §3.03[A][2][b].

253) *BP Exploration Co. v. Gov't of the Libyan Arab Repub., Ad Hoc Award on Merits of 10 October 1973*, V Y.B. Comm. Arb. 143, 157 (1980) (Libyan legislation "was effective to terminate the BP concession, *except in the sense that the BP concession forms the basis of the jurisdiction of the Tribunal* and of the rights of the Claimant to claim damages from the Respondent before the Tribunal") (emphasis added).

254) *Texaco Overseas Petroleum Co. v. Libyan Arab Repub., Preliminary Ad Hoc Award on Jurisdiction of 27 November 1975*, IV Y.B. Comm. Arb. 177, 179 (1979).

255) *Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Repub., Ad Hoc Award of 12 April 1977*, VI Y.B. Comm. Arb. 89, 96 (1981).

256) *Elf Aquitaine Iran v. Nat'l Iranian Oil Co., Preliminary Ad Hoc Award of 14 January 1982*, XI Y.B. Comm. Arb. 97, ¶20 (1986). *See id.* at ¶18 ("It is a generally recognized principle of the law of international arbitration that arbitration clauses continue to be operative, even though an objection is raised by one of the parties that the contract containing the arbitration clause is null and void.").

257) *Elf Aquitaine Iran v. Nat'l Iranian Oil Co., Preliminary Ad Hoc Award of 14 January 1982*, XI Y.B. Comm. Arb. 97 (1986).

258) *See, e.g., Partial Award in ICC Case No. 13764*, 20(1) ICC Ct. Bull. 108, ¶140 (2009) ("The separability of the arbitration agreement from the agreement in which it is to be found is well known."); *Final Award in ICC Case No. 7626*, XXII Y.B. Comm. Arb. 132, 137 (1997); *Interim Award in ICC Case No. 7263*, XXII Y.B. Comm. Arb. 92, 100 (1997) (recognizing "principle of severability of the arbitral clause from the contract as a whole," based on Swiss Law on Private International Law and ICC Rules); *Award in ICC Case No. 6367*, discussed in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 54 (2001) (separability of arbitration agreement is "internationally recognized"); *Final Award in ICC Case No. 6268*, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), *Collection of ICC Awards 1991-1995* 68, 71 (1997); *Award in ICC Case No. 1526*, 101 J.D.I. (Clunet) 915, 217 (1974) ("It is also a rule, now generally admitted in international arbitration matters, or in the process of being so admitted, that...the arbitration agreement, whether it be entered into specially or included in the legal contract to which it applies, apart from exceptional circumstances, has a complete juridical independence, excluding the possibility that it may be affected by the possible invalidity of the contract."); *Preliminary Award in ICC Case No. 1512*, in S. Jarvin & Y. Derains (eds.), *Collection of ICC Awards 1974-1985* 33, 36 (1990); *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry Case of 9 July 1984*, XVIII Y.B. Comm. Arb. 92 (1993); *Award in Arbitral Tribunal of the Netherlands Oils, Fats and Oilseeds Trade Association Case of 10 September 1975*, II Y.B. Comm. Arb. 156 (1977); *Award in Bulgarian Chamber of Commerce and Industry Case No. 88/1972 of 23 June 1973*, IV Y.B. Comm. Arb. 189 (1979).

259) *Award in ICC Case No. 9480*, discussed in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 55 (2001).

260) *Final Award in ICC Case No. 8938*, XXIV Y.B. Comm. Arb. 174, 176 (1999).

261) *Preliminary Award in ICC Case No. 6401*, 7(1) Mealey's Int'l Arb. Rep. B-1, B-14 (1992).

262) *See, e.g.*,*Final Award in ICC Case No. 7626*, XXII Y.B. Comm. Arb. 132, 138-39 (1997) ("The issue before us, then, resolves into one of deciding whether or not the parties agreed to this arbitration clause. This issue can only be resolved in the context of our more general consideration as to whether one or both of the Agreements are binding on P and A, the parties to this arbitration."); *Partial Award on Jurisdiction and Admissibility in ICC Case No. 6474*, XXV Y.B. Comm. Arb. 279, 306 (2000) ("There are cases where [invalidity of the main contract] may directly affect the validity of the arbitration clause, *e.g.* defects of consent or the absence of authority of the signatories."); *Pollux Marine Agencies v. Dreyfus, Award in AAA Case No. 1569 of 3 August 1981*, VIII Y.B. Comm. Arb. 171, 176 (1983) ("An arbitration clause is not severable when the existence of the contract from it is to be severed is in dispute."); *Elf Aquitaine Iran v. Nat'l Iranian Oil Co., Preliminary Ad Hoc Award of 14 January 1982*, XI Y.B. Comm. Arb. 97, 103-04 (1986) ("An arbitration clause may not always be operative in cases where it is clearly indicated by facts and circumstances that there never existed a valid contract between the parties.").

263) These circumstances are discussed in greater detail below. *See*§3.03[A][2][b][ii](3), (fraud *in factum*, signatories without capacity or power to sign underlying contract and contract never existed).

264) 1955 ICC Rules, Art. 13(4) ("Unless otherwise stipulated, the arbitrator shall not cease to have jurisdiction by reason of an allegation that the contract is null and void or nonexistent. If he upholds the validity of the arbitration clause, he shall continue to have jurisdiction to determine the respective rights of the parties and to make declarations relative to their claims and pleas even though the contract should be null and void or non-existent.").

265) 1988 ICC Rules, Art. 6(4).

266) Article 6(4) of the 1998 ICC Rules and Article 6(9) of the 2012 ICC Rules provide: "Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void." 1998 ICC Rules Art. 6(4); 2012 ICC Rules, Art. 6(9). *See* M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* ¶¶6-89 to 6-103 (2d ed. 2008); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 111-13 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-281 to 3-286 (2012).

267) Hence, the provision requiring that the arbitral tribunal upholds the validity of the arbitration agreement. *See*Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 113 (2d ed. 2005).

268) *See*§3.02[B][3][f]; §3.03[A][2][a]; §7.02[B][1]; §7.03[A].

269) 2010 UNCITRAL Rules, Art. 23(1).

270) 1976 UNCITRAL Rules, Art. 21(2). *See also* S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010* 87-90 (2012). The answer should be clearly in the negative: there is no conceptual difference for purposes of the Rules between a contract that is "null" and a contract that is "null and void."

271) *See* P. Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* ¶¶23-010 to 23-014 (3d ed. 2013). The term "null" alone is broad enough to encompass all contractual defects. One commentator noted that the term was given a wider interpretation in case law than the former wording. *See id.* at ¶23-014. The new wording also aligns the English version of the Rules with languages in other versions.

During the 2010 revisions, another change was suggested, but not adopted. The proposal involved adding the words "legal instrument" after the word "contract" to avoid a limitation in the types of disputes parties could submit to arbitration. This suggestion was rejected, however, to avoid transposing a presumption that applied to commercial contracts to international treaties. *See ibid.*

272) ICDR Rules, Art. 15(2); LCIA Rules, Art. 23(1); 2012 Swiss Rules, Art. 21(2); 2012 CIETAC Rules, Art. 5(4); 2013 HKIAC Rules, Art. 19(2); 2013 SIAC Rules, Art. 25(2). These provisions are set forth in §3.03[A][3].

273) *See*§3.03[A][3]; §7.02[C].
274) *See*§1.04[C][5].
275) *See*§5.02[A]; New York Convention, Art. II(2); UNCITRAL Model Law, Art. 7(2); U.S. FAA, 9 U.S.C. §2.
276) *See*§5.06[A][1]; New York Convention, Arts. II(1), (2); UNCITRAL Model Law, Art. 8(1); U.S. FAA, 9 U.S.C. §§3, 4.
277) *See*§4.02[A]; UNCITRAL Model Law, Art. 34(2)(a)(i); A. Briggs, *Agreements on Jurisdiction and Choice of Law* 85-97 (2008).
278) *See*§7.02[F]; UNCITRAL Model Law, Art. 16; A. Briggs, *Agreements on Jurisdiction and Choice of Law* 66-70, 258-59 (2008). *Compare Rimpac. Navigation Inc. v. Daehan Shipbldg Co.* [2009] EWHC 2941 (Comm) (English High Ct.) (declining to extend separability presumption to jurisdiction agreements).
279) As noted above, there are (very) isolated domestic state court decisions in the United States, which reject the separability presumption. *See* §3.02[B][3][j] n. 251. As also noted above, these decisions are anomalous and preempted by the FAA insofar as foreign and interstate commerce is concerned.

It is difficult to find commentators who dispute the existence and desirability of the separability doctrine, even in domestic settings. For two exceptions, *see* Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 S.M.U. L. Rev. 819, 878 (2003) ("[The Supreme Court] should repudiate separability, and make clear that the validity of an arbitration provision in a container contract is contingent upon the validity of the container contract itself, and that courts are to decide that issue."); Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing Inc. v. Cardegna, 8 Nev. L.J. 107, 119 (2007) ("separability doctrine should be repealed because [sic] I believe that no dispute should be sent to arbitration unless the parties have formed an enforceable contract requiring arbitration of that dispute").

280) Parties might choose to agree to arbitration only if their underlying contract and commercial dealings were validly concluded and successfully underway, reserving disputes about contract formation, validity and termination for litigation. This is very unlikely, as a commercial matter, but possible. *See Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167, 171 (U.S. S.Ct. 1963).
281) *See*English Arbitration Act, 1996, §7; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (U.S. S.Ct. 2006); *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395, 402 (U.S. S.Ct. 1967) ("*except where the parties otherwise intend*...arbitration clauses are 'separable' from the contracts in which they are embedded") (emphasis added); *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 92-93 (QB) (English High Ct.) ("First, there is the imperative of *giving effect to the wishes of the parties*....[I]t must be presumed that the parties intended to refer all the disputes arising out of the particular transaction to arbitration. Party autonomy therefore militates in favor of the full recognition of the separability principle.") (emphasis added), *aff'd*, [1993] 3 All ER 897 (English Ct. App.); *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 82 (German Bundesgerichtshof) (1990) ("every reason to presume that reasonable parties will wish"); *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979) ("unless there is a special agreement between the parties"). *See also* R. David, *Arbitration in International Trade* 192 (1985) (recognizing contractual foundations of separability presumption); Samuel, *Separability and the U.S. Supreme Court Decision in* Buckeye v. Cardegna, 22 Arb. Int'l 477, 485-86 (2006).
282) As noted above, legislative provisions in many jurisdictions (including Articles II and V(1)(a) of the New York Convention, Articles 7 and 16 of the UNCITRAL Model Law and §§2, 3 and 4 of the FAA) recognize, but do not dictate, the separability presumption. *See*§3.02[A][2]; §§3.02[B][3][b]-[c] & [e].

283) *See* authorities cited §3.02[B][3][a], pp. 362-65; §3.02[B][3][b], pp. 365-67; §3.02[B][3][c], p. 373; §3.02[B][3][d], p. 373; §3.02[B][3][e], pp. 375-78; §3.02[B][3][g], pp. 383-84; §3.03[E][h], pp. 384-86; §3.02[B][3][e], pp. 386-87. *See also* *Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, UNCITRAL, Eighth Session*, U.N. Doc. A/CN.9/97, VI UNCITRAL Y.B. 163, 175 (1975) (separability doctrine can be "considered to conform with the underlying intentions of the parties"); Klein, *Du caractère autonome de la clause compromissoire, notamment en matiere d'arbitrage international*, 50 Rev. Critique de Droit Int'l Privé 499, 507 (1961); A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* 157-58 (1989) ("most that can usually be said is that the parties do not actively intend the fate of the main contract to determine automatically that of the arbitral clause"); Sanders, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann* 31, 33-35 (1978) (separability presumption reflects parties' intentions).

284) *See* §3.02[B][2].

285) *See* §3.02[B][2]; *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry of 9 July 1984*, XVIII Y.B. Comm. Arb. 92, 97 (1993) ("arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract"); *Judgment of 3 December 1986*, 1987 NJW 651, 652 (German Bundesgerichtshof) ("The arbitration agreement is a subcategory of the procedural contract."); *Judgment of 30 January 1957*, 23 BGHZ 198, 200 (German Bundesgerichtshof) (characterizing arbitration agreement as "a contract of substantive law governing procedural relations"); *Judgment of 7 October 1933, Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177, 179 (Swiss Federal Tribunal) ("According to settled case law of the Swiss Federal Tribunal the arbitration clause is not an agreement of substantive law but of procedural nature.").

286) *See* §3.02[B][2]; *Westacre Invs. Inc. v. Jugoimport-SPDR Holdings Co.* [1998] 4 All ER 570, 582 (QB) (English High Ct.) ("[A]n agreement to arbitrate within an underlying contract is in origin and function parasitic. It is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract."); *OK Petroleum AB v. Vitol Energy SA* [1995] CLC 850, 857 (QB) (English High Ct.) ("ancillary and therefore separable nature of an arbitration clause"); A. Briggs, *Agreements on Jurisdiction and Choice of Law* 71-72 (2008) ("Whether the term, or contract in which the term is contained, is described as ancillary or as severable, the consequence is that it is insulated from those arguments which would lead to the termination of the principal contract."). *Compare* A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* 161 (1989) ("one can think of other contract terms, such as liquidated damages provisions, which, like the arbitral clause, perform the task of putting into effect the principal terms of the contract, but of which one would not say that they constituted agreements separate from that in which they appear").

287) *See* §1.05; §3.02[B][2]; *Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.); *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 174 (1976) (separability doctrine "reflects the view that the arbitration clause, although contained in, and forming part of, the contract, is in reality an agreement distinct from the contract itself, having as its object the submission to arbitration of disputes arising from or relating to the contractual relationship").

288) *See* §3.02[B][2]. As discussed above, these distinct legal regimes range from specialized rules of Roman law, to early English arbitration legislation (in 1698, 1833, 1854, 1889), to the Geneva Protocol, and today to the UNCITRAL Model Law and New York Convention.

289) *See* §4.02; §5.08[A]; §6.03[C][4].

290) *See* §3.02[B]; §3.03[A][2] (especially for disputes regarding contract formation, ongoing validity and effectiveness of contract); Mayer, *Les limites de la séparabilité de la clause compromissoire*, 1998 Rev. arb. 359, 361 ("[T]he choice-of-law clause escapes the nullity of the contract because it is its very purpose to specify the applicable law according to which the judge or arbitrator will decide whether the contract is void. And for the same reason, the arbitration clause must be respected if it implies the parties' will to confide the question of whether the contract is valid or void to an arbitrator."); U.K. Department of Trade and Industry, *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill*, reprinted in 10 Arb. Int'l 189, 227 (1994) ("Whatever degree of legal fiction underlying the doctrine, it is not generally considered possible for international arbitration to operate effectively in jurisdictions where the doctrine is precluded....[I]nternational consensus on autonomy has now grown very broad.").

291) *See*§3.02[B]. *See also Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395, 404 (U.S. S.Ct. 1967) (separability presumption adopted in order that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"); *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶26 (House of Lords) ("golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly"); *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.); *Judgment of 27 February 1970*, 6 Arb. Int'l 79, 82 (German Bundesgerichtshof) (1990) ("Above all, however, the parties to an arbitration agreement will as a rule wish to avoid the unpleasant consequences of separate jurisdiction."); Rau, *"Separability" in the United States Supreme Court*, 2006:1 Stockholm Int'l Arb. Rev. 1, 3 ("Consent to arbitration, then, allows [courts] to infer a willingness to arbitrate any challenges made to the main agreement. Such a presumption is certainly reinforced here by a concern to avoid collateral litigation intended to delay or to derail the arbitral process.").

292) S. Schwebel, *International Arbitration: Three Salient Problems* 3-6 (1987). *Compare* Samuel, *Separability and the U.S. Supreme Court Decision in* Buckeye v. Cardegna, 22 Arb. Int'l 477, 486 (2006) (suggesting that parties do not in fact contemplate invalidity of main contract, but affirming "presumption or implied term imposed by law that the arbitration clause will survive the invalidity of the main contract and vice versa. The idea is to produce a sensible result whenever the parties have not considered the point. It is virtually impossible to identify a reason not to have this presumption which the parties can always exclude by agreement.").

293) *See*§3.02[B][3].

294) *See*§3.02[B][3]; 3.02[E].

295) *See*§§1.02[B][3] & [5].

296) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.).

297) *See*§3.02[A][2].

298) *See*§5.01[B][2].

299) *See, e.g.*, K.-P. Berger, *International Economic Arbitration* 121 (1993); L. Collins (ed.), *Dicey Morris and Collins on The Conflict of Laws* ¶16-011 (15th ed. 2012) ("general principle of international commercial arbitration"); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* 106 (2003) ("one of the true transnational rules of international commercial arbitration").

300) *See*UNCITRAL Model Law, Art. 16(1); German ZPO, §1040(1); 2012 ICC Rules, Art. 6(9); *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (U.S. S.Ct. 1967); *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords); *Rent-A-Ctr*, 130 S.Ct. at 2778. *Compare U.R. Power GmbH v. Kuok Oils & Grains Pte Ltd* [2009] EWHC 1940, 33 (Comm) (English High Ct.) (recognizing distinction between separability presumption and principle of competence-competence).

301) *See*§§3.02[B][3][a]-[b], [d], [f]-[g]; English Arbitration Act, 1996, §7; Swiss Law on Private International Law, Arts. 178(2), (3); Japanese Arbitration Law, Art. 13(6).

302) *See*§§3.03[A] & [D].

303) *See*§3.03[E]; §7.02[F]; §7.03[E][7][b].

304) *See also*§3.03[A].

305) *See* W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶5.04 (3d ed. 2000). *See also*§3.01.

306) *See*§3.03[A].

307) *See*§3.03[B]; §4.02[A].

308) *See*§3.03[C].

309) *See*§3.03[E].

310) *See*§3.03[F].

311) *See*§3.03[A][2][b][ii](1); §3.03[A][2][b][iv](1).

312) *See*§3.03[A][2][b][ii](2); §3.03[A][2][b][iv](2).

Where challenges to and defects in the underlying contract do not affect the validity of the separable arbitration agreement, an arbitral tribunal can consider such challenges without controversy about its own jurisdiction and can render a binding award declaring the underlying contract invalid without impugning the status of an associated arbitration clause. Thus, the separability presumption provides one way to avoid the "Catch-22" situation where a defect in the parties' underlying contract would impeach the arbitration agreement, preventing the arbitrators from either considering claims, or rendering an award declaring, that such a defect existed. Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609, 609-10 (1940) ("In case the destruction of [the underlying contract] carries over to the arbitration agreement, the arbitrators are deprived of their jurisdiction, and an award already rendered would lose all legal effect. The arbitration clause, designed to facilitate settlement of controversies might lead in such cases to duplication of proceedings inasmuch as arbitration may be followed by a regular suit in the ordinary law courts....Still worse, the mere fact that a defense, though unfounded, is raised, injects a disturbing uncertainty into the proceedings itself; it may delay and even paralyze action especially where legislative regulation is technically poor, or as it sometimes happens in the international field, is difficult to ascertain.").

313) *See also*§3.03[A][2][g], discussing the differences between the treatment of the separability presumption under the English Arbitration Act, 1996, §7 and the Japanese Arbitration Law, on the one hand, and the UNCITRAL Model Law, on the other hand.
314) *See*§3.03[A][2][b][ii](2); §7.02[F].
315) *See*§3.02[B][3]; §3.03[A]; W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶5.04 (3d ed. 2000) ("The motivating force behind the establishment of the autonomy of the arbitration clause in international contracts is the plain desire to uphold the validity of the agreement to arbitrate.").
316) *See*§3.02[B][3]; §3.03[A].
317) *See*§§3.03[A]-[E].
318) *See*§3.03[A][2][b][ii](3); §3.03[D].
319) *See*§3.03[A][2][b][ii](1).
320) Leading international arbitration conventions confirm this. New York Convention, Art. II(2) ("arbitral clause in a contract"); Geneva Protocol, Art. IV(1) ("dispute regarding a contract...including an arbitration agreement").
321) *See*§1.05[A]; §3.02[B][2].
322) *See*§3.03[B]; §4.02.
323) *See*§3.03[F]; §7.02[F].
324) *See*§§3.03[A] & [D].
325) *See*§7.02[F].
326) *See*§3.02[A][2].
327) *See*§3.02[A][2]; §3.02[E].
328) *See*§3.02[A][2].
329) *See*§3.02[A][2].
330) European Convention, Art. V(3); §3.02[A][2].
331) *See*§3.02[A][2].
332) *See*§7.02[A][2]. As discussed below, properly analyzed, the competence-competence doctrine does not depend on, or arise from, the separability presumption. *See*§3.03[F]. Article V of the European Convention illustrates this by affirming the arbitrators' authority to consider challenges to both the underlying contract and the arbitration agreement. European Convention, Art. V.
333) This issue is addressed in detail below in the context of the competence-competence doctrine. *See*§3.03[F]; §7.03[E].
334) *See Rent-A-Ctr, W., Inc. v. Jackson*, 130 S.Ct. 2772 (U.S. S.Ct. 2010); *Buckeye*, 546 U.S. 440; *Prima Paint*, 388 U.S. 395; §3.03[A][2][b][i].
335) *See Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords); *M/S Magma Leasing & Fin. Ltd v. Potluri Madhavilata*, AIR 2010SC 488, ¶18 (Indian S.Ct.); UNCITRAL Model Law, Art. 16(1); 2012 ICC Rules, Art. 6(9); §§3.03[A][2][a] & [c]; §7.02[F].
336) UNCITRAL Model Law, Art. 16(1) (emphasis added). *See* P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶¶4-006 to 4-011 (3d ed. 2009); H. Holtzmann & J. Neuhaus, *A Guide to theUNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 478-81 (1989).
337) UNCITRAL Model Law, Art. 16(1) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."). *See*§7.03[A].
338) *See*§3.02[B][3][e].

339) H. Holtzmann & J. Neuhaus, *A Guide to theUNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 480 (1989); P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶¶4-009 to 4-010 (3d ed. 2009); §3.02[B][3][e]; §7.02[B][1]; §7.03[A].

340) *See*§3.02[B][3][e].

341) *See*§3.02[B][3][e]. Similarly, as also discussed above, the separability presumption set forth in Article 16 has been applied to foreign-seated, as well as locally-seated, arbitrations. *See*§3.02[B][3][e].

342) *See, e.g., Capital Trust Inv. Ltd v. Radio Design AB* [2002] 1 All ER 514 (English Ct. App.) (claim that underlying contract was voidable for misrepresentation did not affect validity of arbitration clause); *Vee Networks Ltd v. Econet Wireless Int'l Ltd* [2005] 1 Lloyd's Rep. 192 (QB) (English High Ct.) (claim that underlying contract was *ultra vires* and void did not affect validity of arbitration clause); *Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd* [2002] 1 All ER (Comm) 627 (Comm) (English High Ct.) (fact that some provisions of contract were void for uncertainty did not affect validity of arbitration agreement); *New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd*, [2010] BCSC 1496 (B.C. S.Ct.) (fraud or deceit relating to underlying contract did not affect arbitration clause); *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] BCSC 532, ¶¶24-25 (B.C. Sup. Ct.) (ineffectiveness of underlying contract, because effective date had not occurred, did not render arbitration agreement ineffective: "the evidence tends to show that the License Agreement never came into effect and the plaintiff argues that the 'rights, duties and obligations' of the parties did not commence until after the development work had been completed. I am satisfied however that the arbitration clause…subsists as a separate agreement despite the failure of the parties to complete the work under the development plan. Therefore, it cannot be determined that the arbitration agreement itself is 'null and void, inoperative or capable of being performed' because the Licensing Agreement itself never came into effect."); *Krutov v. Vancouver Hockey Club Ltd*, [1991] CanLII 2077 (B.C. S.Ct.) (arbitration clause not affected by failure of condition precedent to underlying contract); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd*, [2002] O.J. No. 1465 (Ontario Super. Ct.) (same); *NetSys Tech. Group AB v. Open Text Corp.*, (1999) 1 B.L.R.3d 307 (Ontario Super. Ct.) (claim that underlying contract was void on grounds of mistake did not impeach arbitration clause); *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192 (Australian Fed. Ct.) (fraud or deceit relating to underlying contract did not affect arbitration clause); *Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, [2005] FCA 1102 (Australian Fed. Ct.) (same); *Subway Sys. Australia Pty Ltd v. Ireland*, [2013] VSC 550, ¶57 (Victoria S.Ct.) ("latter provisions would be expected to survive the failure of the Franchise Agreement on the basis of the doctrine of separability of arbitration clauses and their consequent survival, regardless of the fate of the agreement in which they might be contained"); *Ferris v. Plaister*, (1994) 34 NSWLR 474 (N.S.W. Ct. App.) (claim that underlying contract is fraudulently induced does not impeach arbitration clause); *M/S Magma Leasing & Fin. Ltd v. Potluri Madhavilata*, AIR 2010 SC 488, ¶18 (Indian S.Ct.); *P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Dev. Corp.*, (2009) 2 SCC 494 (Indian S.Ct.); *Judgment of 21 October 2005, Taiyo Ink Mfg Ltd v. Tamura Kaken Ltd*, Hanrei Jiho No. 1926-127 (Tokyo Chiho Saibansho) (validity of arbitration agreement not affected by validity of underlying license agreement); *Blue Ltd v. Jaribu Credit Traders Ltd*, Civil Case No. 157 of 2008 (Nairobi High Ct.) (arbitration clause not affected by failure of condition precedent to underlying contract). *See also*§§3.03[A][2][a], [c] & [f].

343) *See, e.g., Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.) (allegation that underlying contract was void for illegality did not affect validity of arbitration agreement), *aff'd*, [2007] UKHL 40 (House of Lords); *Globe Union Indus. Corp. v. G.A.P. Mktg Corp.*, [1994] CanLII 186 (B.C. S.Ct.) (claim that underlying contract was illegal does not affect arbitration clause); *Fittydent Int'l GmbH v. Brawn Labs., Ltd*, XXXV Y.B. Comm. Arb. 401 (Delhi High Ct. 2010) (2010) (rejecting claim that, because of lack of required regulatory approval, nullity of underlying contract rendered arbitration clause void: "[E]ven assuming for the sake of arguments that the agreement dated 20 May 1994 between the parties was illegal and non-est, the same shall not own its own render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same.").

344) *See, e.g., Crestar Ltd v. Carr* [1987] 2 FTLR 135 (English Ct. App.) (claim that underlying contract had been terminated did not affect validity of arbitration agreement); *Paul Smith Ltd v. H & S Int'l Holdings Inc.* [1991] 2 Lloyd's Rep. 127 (QB) (English High Ct.) (arbitration clause applies to post-termination disputes); *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] BCSC 532 (B.C. S.Ct.) (termination of underlying contract does not affect arbitration clause); *Siderurgica Mendes Júnior SA v. "Icepearl"*, [1996] CanLII 2746 (B.C. S.Ct.); *Globe Union Indus. Corp. v. G.A.P. Mktg Corp.*, [1994] CanLII 186 (B.C. S.Ct.); *Roy v. Boyce*, (1991) 57 B.C.L.R.2d 187 (B.C. S.Ct.); *Harper v. Kvaerner Fjellstrand Shipping AS*, [1991] CanLII 1735 (B.C. S.Ct.); *Rampton v. Eyre*, [2007] ONCA 331 (Ontario Ct. App.); *9095-5378 Québec Inc. v. Perform Environnement Inc.*, [2004] CanLII 7022 (Québec Super. Ct.); *NetSys Tech. Group AB v. Open Text Corp.*, (1999) 1 B.L.R.3d 307 (Ontario Super. Ct.); *OEMSDF Inc. v. Europe Israel Ltd*, [1999] O.J. No. 3594 (Ontario Super. Ct.); *World LLC v. Parenteau Int'l Inc.*, [1998] A.Q. No. 736 (Québec Super. Ct.); *Boart Sweden AB v. Nya Stromnes AB*, (1988) 41 B.L.R. 295 (Ontario Super. Ct.).

345) *Krutov v. Vancouver Hockey Club Ltd*, [1991] CanLII 2077 (B.C. S.Ct.); *OEMSDF Inc. v. Europe Israel Ltd*, [1999] O.J. No. 3594 (Ontario Super. Ct.); *Campbell v. Murphy*, (1993) 15 O.R.3d 444 (Ontario Super. Ct.) (repudiation of underlying contract did not affect arbitration clause); *Mind Star Toys Inc. v. Samsung Co.*, (1992) 9 O.R.3d 374 (Ontario Super. Ct.); *Fung Sang Trading Ltd v. Kai Sun Sea Prods. & Food Co.*, XVII Y.B. Comm. Arb. 289 (H.K. Ct. First Inst.) (1992).

346) *See*§§3.03[A][2][a], [c] & [f]. *See also Westacre Invs. Inc. v. Jugoimport-SPDR Holdings Co.* [1998] 4 All ER 570, 593 (QB) (English High Ct.) ("There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable....Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration.").

347) *See, e.g., Judgment of 20 July 2007*, 26 Sch 3/06 (Oberlandesgericht Frankfurt) (citing grounds for rescission that affected main contract as well as arbitration agreement); *O.D.C. Exhibit Sys. Ltd v. Lee*, 41 B.L.R. 286 (B.C. S.Ct. 1988) (denying stay of litigation where original contract held terminated and subsequent contract contained no arbitration clause).

348) *See* U.S. FAA, 9 U.S.C. §§2, 3, 4; §3.02[B][3][c].

349) *See, e.g.*, 108 A.L.R. Fed. 179, §§13(a)-(b), 29(c); §3.02[B][3][c].

350) *See*§3.02[B][3][c]; §3.02[E].

351) *Prima Paint*, 388 U.S. 395; §3.03[A][2][b][i](1).

352) *Buckeye*, 546 U.S. 440; §3.03[A][2][b][i](2).

353) *Rent-A-Ctr*, 130 S.Ct. 2772.

354) *Prima Paint*, 388 U.S. at 402.

355) *Prima Paint*, 388 U.S. at 404 (emphasis added). *See also id.* at 403-404 ("[I]f the claim is fraud in the *inducement of the arbitration clause itself* – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider *claims of fraud in the inducement of the contract generally*.") (emphasis added). *See*§3.03[A][2][b][ii].

356) *Prima Paint*, 388 U.S. at 402-04. As discussed above, in contrast to earlier lower court authority, the *Prima Paint* opinion did not rely on §2 of the FAA and did not unambiguously hold that the separability presumption was a rule of substantive federal law. *See*§3.02[B][3][c], p. 370.

357) *Buckeye*, 546 U.S. 440.

358) *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860, 864-65 (Fla. S.Ct. 2005) ("arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void *ab initio*.").

359) *Buckeye*, 546 U.S. at 447.

360) *Buckeye*, 546 U.S. at 447-48.

361) *Buckeye*, 546 U.S. at 445.

362) *See*§3.02[B][3][c]. As discussed above, §§2 and 4 also contain language that presumes the separability of the arbitration agreement.

363) *See*§3.01, p. 353. As discussed above, the presumptive separability of the arbitration agreement can be overcome by agreement of the parties, although this seldom occurs. *See*§3.02[B][3][c].

364) *Buckeye*, 546 U.S. at 444.

365) *Buckeye*, 546 U.S. at 444.

366) *Buckeye*, 546 U.S. at 449 (emphasis added). The Court noted that its earlier decisions had given effect to the separability presumption regardless whether a challenge alleged that the underlying contract was void or voidable – including in cases such as *Southland Corp. v. Keating*, alleging "fraud, misrepresentation, breach of contract, breach of fiduciary duty and violation of the California Franchise Investment Law." *Buckeye*, 546 U.S. at 446 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (U.S. S.Ct. 1984)).

367) *Buckeye*, 546 U.S. at 447-48.

368) *Buckeye*, 546 U.S. at 446.

369) *See Adams v. Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005) ("[A contract is] 'void' when, for example, there was no meeting of the minds about essential terms or where there was fraud in the factum. 'Voidable' contracts are subject to rescission, but otherwise create legal obligations. An agreement entered into through fraud in the inducement is an example of a 'voidable' contract. Only if a contract is 'void,' and not 'voidable,' can a party challenge the enforceability of an arbitration clause without alleging a particular defect with that clause. If a contract is 'void,' a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically; if a contract is 'voidable,' the party must show that the arbitration clause itself is unenforceable."); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 216-17 (5th Cir. 2003); *Sphere Drake Ins. Ltd v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2d Cir. 2001) ("If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue.... However, under the rule of *Prima Paint,* if a party merely alleges that a contract is voidable, then, for the party to receive a trial on the validity of the arbitration clause, the party must specifically allege that the arbitration clause is itself voidable"); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (separability doctrine did not apply to contract that plaintiff argued never existed because defendant's agent did not have authority to sign contract); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991); *Anderson v. Delta Funding Corp.*, 316 F.Supp.2d 554, 561 (N.D. Ohio 2004) ("A contract deemed void *ab initio* threatens the existence of all provisions of a contract, including embedded arbitration clauses, because a void contract lacks legal stamina from its inception."). *See* Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1, 38 (2004) ("I do like using the phrase *'void ab initio.'* I like the gravitas that it imparts into an argument, and I like the way it makes me feel – like a substantial person, a keeper of the sacred mysteries, a lineal descendant of Coke and Blackstone. I only wish I could do so with a straight face. I only wish it had some relevance to this (or indeed any) problem. But alas it doesn't.").

370) *Buckeye*, 546 U.S. at 446.

371) *See*§3.02[B][3][c]; *Prima Paint*, 388 U.S. at 403-04. *See also Rent-A-Ctr*, 130 S.Ct. at 2778 ("§2 [of the FAA] states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.") (emphasis in original).

372) Section 4 provides, in relevant part: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction...of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

373) *Buckeye*, 546 U.S. at 447-48.

374) *Buckeye*, 546 U.S. at 444 n.1.

375) *Buckeye*, 546 U.S. at 444 n.1 (emphasis added). *See*§7.03[E][5][c].

376) The Court cited *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992) (dispute as to whether contract was signed), *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000), *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (dispute as to authority of agent), and *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003) (dispute as to mental capacity).

377) *Rent-A-Ctr*, 130 S.Ct. at 2778.

378) *Rent-A-Ctr*, 130 S.Ct. at 2775.

379) *Jackson v. Rent-A-Ctr*, 581 F.3d 912, 917 (9th Cir. 2009).

380) *Rent-A-Ctr*, 130 S.Ct. at 2787 (Stevens. J., dissenting). *See also*§3.02[B][3][c].

381) *Rent-A-Ctr*, 130 S.Ct. at 2779.

382) *Rent-A-Ctr*, 130 S.Ct. at 2779-80.

383) *Rent-A-Ctr*, 130 S.Ct. at 2778.

384) *Rent-A-Ctr*, 130 S.Ct. at 2782.

385) *Buckeye*, 546 U.S. at 446.

386) *See*§3.03[A][2][b][i](2); §3.03[A][2][b][ii](3).

387) *See, e.g., ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008) ("Under *Prima Paint* and the structure and content of the arbitration clause, the clause should be considered 'separable' and any alleged finding of fraudulent inducement [of the underlying contract] does not taint the validity of the arbitration clause as a whole."); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998) ("[T]he arbitration agreement is effectively considered as a separate agreement which can be valid despite being contained in a fraudulently induced contract."); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868-69 (7th Cir. 1985) ("objections to other parts of the contract, based on fraud or unconscionability or mistake or whatever, need not spill over to the arbitration clause"); *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528-29 (1st Cir. 1985) ("In this case, the arbitration clause is separable from the contract and is not rescinded by [a party's] attempt to rescind the entire contract based on mutual mistake and frustration of purpose."); *Torrance v. Aames Funding Corp.*, 242 F.Supp.2d 862, 868-69 (D. Or. 2002) ("arbitration clause may be enforced even though the rest of the contract is later held invalid by the arbitrator"); *Hodge Bros., Inc. v. DeLong Co.*, 942 F.Supp. 412, 416-17 (W.D. Wis. 1996) ("A party may not invalidate an arbitration clause by attacking the legality of the underlying contract containing that clause."); *Hydrick v. Mgt Recruiters Int'l, Inc.*, 738 F.Supp. 1434 (N.D. Ga. 1990) ("[I]f the arbitration clause is valid, the Court must enforce it, even if the underlying contract might be declared invalid.").

There are contrary results in early decisions, since overruled by *Buckeye*. *Compare Metro Plan Inc. v. Miscione*, 15 N.Y.S.2d 35 (N.Y. App. Div. 1939) (illegality/invalidity of underlying mortgage instrument by reason of usury invalidates associated arbitration clause); *In re Cheney Bros.*, 219 N.Y.S. 96 (N.Y. App. Div. 1926) ("If the contract was voided by fraud, the arbitration provision therein falls.").

388) *See, e.g., M.A. Mortenson Co. v. Saunders Concrete Co.*, 676 F.3d 1153, 1158 (8th Cir. 2012) ("Any challenge to the validity of the contract as a whole should be considered by an arbitrator, not a court.") (citing *Buckeye*); *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741 (7th Cir. 2011) ("When faced with motions to stay suits or order arbitration, courts should evaluate only the validity of the arbitration agreement; challenges to the validity of the entire contract – *e.g.*, fraud in the inducement – should be left to the arbitrator."); *Arrigo v. Blue Fish Commodities, Inc.*, 408 F.Appx. 480 (2d Cir. 2011) (compelling arbitration where challenge went to "incomprehensible" clauses rendering contract unenforceable); *Pan Am Flight 73 Liaison Group v. Dave*, 639 F.3d 1102, 1105 (D.C. Cir. 2011) ("These [arguments raised by the defendants] go to the validity of the underlying contract, not to the enforceability of the arbitration clause. As such, they are properly left to the arbitrator."); *Allen v. Regions Bank*, 389 F.Appx. 441, 445 (5th Cir. 2010) ("If it is another provision of the contract, or the contract as a whole, that is contested, the court may still require arbitration of that dispute because the arbitration provision itself is not challenged."); *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 396-97 (5th Cir. 2006) ("Where claims of error, fraud, or unconscionability do not specifically address the arbitration agreement itself, they are properly addressed by the arbitrator, not a federal court."); *Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) ("We also reject [appellant's] arguments that the arbitration clause must be declared invalid on grounds that the customer's agreement as a whole is void due to 'overreaching, unconscionability and fraud,' as well as lack of consideration. Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution.").

389) *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263-64 (9th Cir. 2006).

390) *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005).

391) *See*§5.06[C][1]; *Solymar Invs., Ltd v. Banco Santander SA*, 672 F.3d 981, 994 (11th Cir. 2012) ("*Prima Paint* requires reference to an arbitrator for a general challenge to a contract on the grounds of fraud in the inducement."); *Moran v. Svete*, 366 F.Appx. 624 (6th Cir. 2010) (compelling arbitration where challenge was based on fraudulently-induced underlying contract); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 575 (6th Cir. 2003); *ACE Capital Re Overseas, Ltd v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29-30 (2d Cir. 2002); *Sleeper Farms v. Agway, Inc.*, 211 F.Supp.2d 197, 203 (D. Me. 2002); *Coddington Enters., Inc. v. Werries*, 54 F.Supp.2d 935, 942 (W.D. Mo. 1999), *rev'd on other grounds*, 253 F.3d 1083 (8th Cir. 2001) (claims of fraudulent inducement "cannot fairly be limited to the making of the arbitration clause" and are therefore for arbitral, not judicial, determination); *Acquaire v. Canada Dry Bottling*, 906 F.Supp. 819, 825 (E.D.N.Y. 1995) ("In order to avoid arbitration...[plaintiffs] must allege fraud in the inducement not of the contract generally but of the arbitration clause itself."); *Vella v. Atl. Int'l Fin., Inc.*, 890 F.Supp. 321, 322 (S.D.N.Y. 1995) (compelling arbitration when "there [was] no colorable claim of fraud in the inducement of the arbitration clause itself, as distinct from the contract generally").

392) *See*§5.06[C][1]; *Allen v. Regions Bank*, 389 F.Appx. 441, 442, 445 (5th Cir. 2010) (claim that contract was obtained through fraud for arbitrator to decide); *Parkland Environmental Group, Inc. v. Laborers' Int'l Union of N. Am.*, 390 F.Appx. 574 (7th Cir. 2010) (whether employer misled employee into signing contract containing arbitration clause for arbitration for arbitrator to decide); *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) ("Under *Prima Paint*... , the central issue in a case like this is whether the plaintiffs' claim of fraud relates to the making of the arbitration agreement itself or to the contract as a whole. If the fraud relates to the arbitration clause itself, the court should adjudicate the fraud claim. If it relates to the entire agreement, then the [FAA] requires that the fraud claim be decided by an arbitrator."); *Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) ("We also reject [appellant's] arguments that the arbitration clause must be declared invalid on grounds that the customer's agreement as a whole is void due to 'overreaching, unconscionability and fraud.'...Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution."); *Williams v. Waffle House, Inc.*, 2012 WL 3438666, at *3 (E.D. La.) (claim that plaintiff was "duped" into signing contract to be resolved by arbitrator); *Friedman v. Yula*, 679 F.Supp.2d 617, 626 (E.D. Pa. 2010) ("[The] challenge falls squarely within *Buckeye*'s second category, a challenge to the contract as a whole and, therefore, compels submission to arbitration....Any claim that the Joinder Agreement was fraudulently induced must be directed to the arbitrator."); *Fox Int'l Relations v. Fiserv Sec., Inc.*, 418 F.Supp.2d 718, 724 (E.D. Pa. 2006); *Dillow v. Household Int'l Inc.*, 2004 WL 5336055, at *3 (D. W.Va.) ("The Court finds that the allegedly fraudulent mischaracterization by Defendants goes to the nature of the contract generally, and not solely to the Arbitration Riders. Accordingly, the impact of the alleged fraud is properly determined by the arbitrator."); *Giannone v. Ayne Inst.*, 290 F.Supp.2d 553, 564 (E.D. Pa. 2003) ("The Giannones have not claimed that the alleged fraud induced them to agree to arbitrate claims....Rather, they assert that the fraud affects the validity of 'the entire contract, including the arbitration provision.'...[This] requires us to allow an arbitrator to decide if the alleged fraud induced assent to the Contract."); *Bank One, NA v. Coates*, 125 F.Supp.2d 819, 829-30 (S.D. Miss. 2001).

393) *See* §5.06[C][3]; *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 808 (7th Cir. 2003) ("arbitration provision was not an independent contract requiring mutual assent or consideration"); *Hellenic Lines, Ltd v. Louis Dreyfus Corp.*, 372 F.2d 753 (2d Cir. 1967); *Cook v. River Oaks Hyundai, Inc.*, 2006 U.S. Dist. LEXIS 21646, at *2 (N.D. Ill.); *Cline v. H.E. Butt Grocery Co.*, 79 F.Supp.2d 730, 732 (S.D. Tex. 1999) ("[Plaintiff's] claim that [defendant's] promise was illusory is an attack on the [contract] as a whole, and not the arbitration provision itself. Questions related to the enforcement of a contract as a whole are properly referable to an arbitrator; it is only when an attack is made on the arbitration clause itself that a court, rather than an arbitrator, should decide questions of validity."); *Axtell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 744 F.Supp. 194, 196 (E.D. Ark. 1990) ("plaintiffs' allegations of failure of consideration and overreaching go to the making of the contract generally, and therefore are to be considered by the arbitrator"); *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006).

There are contrary decisions, since overruled by *Buckeye*. *See Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).

394) *See*§5.06[C][12]; *Buckeye*, 546 U.S. at 447; *M.A. Mortenson Co. v. Saunders Concrete Co.*, 676 F.3d 1153, 1158 (8th Cir. 2012) (challenge to legality of underlying contract as contrary to New York lien laws was "irrelevant" as "any challenge to the validity of the contract as a whole should be considered by an arbitrator, not a court"); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002) (claims that loan agreement was usurious "do not relate specifically to the Arbitration Agreement" and therefore are for arbitral determination); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002) (claims that usurious and unlicensed loans were illegal did not concern "arbitration agreement specifically" and "arbitrator should decide those questions"); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("[Defendants] do not challenge the legality of the arbitration provision itself, but the legality of the entire contract. This court has applied *Prima Paint* to hold an arbitration clause enforceable in spite of a claim that the gas sales contract containing it was void from its inception because of the parties' failure to comply with a state statute regulating the sale of the state's gas. We regard this case as indistinguishable."); *Mesa Operating Ltd P'ship v. La. Intrastate Gas Corp.*, 797 F.2d 238, 244 (5th Cir. 1986) (enforcing arbitration clause, even when main contract may be void *ab initio*); *Nuclear Elec. Ins. Ltd v. Cent. Power & Light Co.*, 926 F.Supp. 428 (S.D.N.Y. 1996) (claim that violations of Texas Insurance Code rendered insurance policies illegal related to "the entire policy" and were for arbitral, not judicial, determination); *Belship Navigation Inc. v. Sealift, Inc.*, 1995 WL 447656 (S.D.N.Y.) (claim that contract violated Cuban trade controls concerned entire agreement and for arbitrators to decide); *Dewey v. Wegner*, 138 S.W.3d 591, 601-02 (Tex. App. 2004); *Moncharsh v. Heily & Blasé*, 3 Cal.4th 1, 29-30 (Cal. 1992).

395) *See*§5.06[C][4]; *Puleo v. Chase Bank USA*, 605 F.3d 172, 192 (3d Cir. 2010) ("Since the issue of the class action waiver's unconscionability is not an issue of arbitrability, and is not reserved for the court by agreement, it should have been referred by the District Court to the arbitrator."); *Stinger v. Chase Bank USA,* 265 F.Appx. 224, 228 (5th Cir. 2008) ("Whether the contract as a whole is unconscionable must be determined through arbitration."); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) ("FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive"); *Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 1000 (8th Cir. 2004) ("plaintiffs' arguments that their…transactions were generally unconscionable were subject to resolution by an arbitrator, absent a showing by the plaintiffs that the DRA [dispute resolution agreement], standing alone, was invalid"); *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 170 (2d Cir. 2004); *Ernst & Young Ltd v. Quinn*, 2009 WL 3571573, at *10 (D. Conn.) ("[R]espondents direct their allegations of unconscionability at the engagement letters as a whole, not at the arbitration agreement provisions contained therein.…Even if respondents' claims of unconscionability are colorable, those claims do not preclude this court from compelling arbitration."); *Flannery v. Tri-State Div.*, 402 F.Supp.2d 819, 825 (E.D. Mich. 2005) ("The unconscionability claim alone would be decided by an arbitrator under the prevailing authority because it goes to the substance of the agreement."); *Gutierrez v. Academy Corp.*, 967 F.Supp. 945 (S.D. Tex. 1997); *Brener v. Becker Paribas, Inc.*, 628 F.Supp. 442, 446 (S.D.N.Y. 1985); *Universal Computer Consulting Holding, Inc. v. Hillcrest Ford Lincoln-Mercury, Inc.*, 2005 WL 2149508, at *2 (Tex. App.) ("Defenses, such as unconscionability and fraudulent inducement, to the contract as [a] whole must be referred to arbitration as long as the arbitration provision is valid.").

396) *See*§5.08[A][4]; *Solymar Invs., Ltd v. Banco Santander SA*, 672 F.3d 981, 999 (11th Cir. 2012) (challenges to Exchange Agreement based on failure to fulfill condition precedent dismissed in favor of arbitration); *Kawasaki Heavy Indus. Ltd v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 n.4 (7th Cir. 2011) ("[F]ailure to fulfill a condition precedent does not negate the fact that a contractual relationship exists, and thus arbitration is still appropriate in such a situation."); *Schacht v. Beacon Ins. Co.*, 742 F.2d 386 (7th Cir. 1984) (question whether condition precedent to underlying contract is fulfilled is for arbitrators); *McIntyre v. Household Bank*, 2004 WL 1088228, at *1 (N.D. Ill.) ("[I]t is the arbitrator's role to consider any arguments about the validity or enforceability of the entire contract, including the failure of a condition precedent."); *Capitol Vial, Inc. v. Weber Scientific*, 966 F.Supp. 1108, 1111 (M.D. Ala. 1997) ("[T]here is no stated condition precedent, in the contract, to the operation of the arbitration clause itself. *Prima Paint* clearly governs here.").

There are a few contrary results, particularly in older decisions, now overruled by *Buckeye. See Adams v. Suozzi*, 433 F.3d 220, 227-28 (2d Cir. 2005) ("[W]e see no reason why a contract that does not exist due to failure of a condition precedent to formation is any less 'void' than any other contract that never comes into existence. [I]f the…condition imposed by the [agreement] was not met, both the contract and any arbitration agreements therein would never have existed.").

397) *See*§5.06[C][2]; *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 742 (7th Cir. 2010) (arbitration clause was still valid even though there may not have been any "meeting of the minds" as to other terms of contract); *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 629 (6th Cir. 2004) (arbitration clause remains valid despite claim of mutual mistake with regard to main contract); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868-69 (7th Cir. 1985) ("objections to other parts of the contract, based on… mistake or whatever, need not spill over to the arbitration clause"); *Williams v. Waffle House, Inc.*, 2012 WL 3438666, at *3 (E.D. La.) ("[Plaintiff's] argument that she signed the agreement 'under the mistaken impression that she was taking a managerial role with corresponding managerial responsibilities' does not undermine the enforceability of the arbitration agreement."); *Bratt Enters., Inc. v. Noble Int'l Ltd*, 99 F.Supp.2d 874, 885 (S.D. Ohio 2000) (party claimed mutual mistake as to terms of underlying contract, but there was no claim "that there was any 'mutual mistake' in the negotiation of the arbitration clause itself").

398) *See*§5.06[C][7]; *N.J. Bldg Laborers Statewide Benefits Fund v. Am. Coring & Supply*, 341 F.Appx. 816 (3d Cir. 2008) (whether contract expired and arbitration clause within it became unenforceable was for arbitrator to decide); *ACE Capital Re Overseas, Ltd v. Cent. United Life Ins. Co.*, 307 F.3d 24 (2d Cir. 2002) (arbitral determination required of claims that underlying contract was not properly terminated in accordance with its terms); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56 (1st Cir. 2002) (enforcing arbitration clause when main contract had been rescinded); *In re Rarities Group, Inc.*, 434 B.R. 1, 8 (D. Mass. 2010) ("An arbitration agreement generally lives on even when the agreement containing it expires, such that disputes over a provision of that expired agreement remain arbitrable."); *Kuklachev v. Gelfman*, 600 F.Supp.2d 437, 459 n.9 (E.D.N.Y. 2009) ("Plaintiffs argue that the arbitration clause is inapplicable here, because many of defendants' actions occurred after the expiration of the contract. A party's obligation under an arbitration clause survives the expiration of an agreement when post-expiration action 'infringes a right that accrued or vested under the agreement.'") (quoting *CPR (U.S.A.) Inc. v. Spray*, 187 F.3d 245, 255 (2d Cir. 1999)); *Clifton D. Mayhew, Inc. v. Mabro Constr. Inc.*, 383 F.Supp. 192 (D.D.C. 1974); *Ambulance Billing Sys., Inc. v. Gemini Ambulance Serv., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) ("dispute regarding whether a settlement agreement was reached replacing or cancelling" original agreement for arbitrator's determination); *Elgin Silk Co. v. Bayers*, N.Y. L.J. 1278 (14 June 1927) (N.Y. Sup. Ct. 1927) (cancellation of underlying contract does not affect arbitration clause).

399) *Pinpoint Enters. v. Barnett Fin. Servs., Inc.*, 2004 U.S. Dist. LEXIS 6630, at *9-10 (E.D. La.).

400) *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302, 305 (4th Cir. 2001).

401) *See, e.g.*, Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing Inc. v. Cardegna, 8 Nev. L.J. 107 (2007). *See also* Barnes, Buckeye, *Bull's-Eye or Moving Target: The FAA, Compulsory Arbitration, and Common Law Contract*, 31 Vt. L. Rev. 141 (2006-2007); Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 Am. Rev. Int'l Arb. 1, 17-18 (2004).

402) *Rent-A-Ctr*, 130 S.Ct. at 2772; *Buckeye*, 546 U.S. 440; *Southland Corp. v. Keating*, 465 U.S. 1 (U.S. S.Ct. 1984); *Prima Paint*, 388 U.S. 395. *See*§7.03[E][7][b].

403) *In re Checking Account Overdraft Litg.*, 674 F.3d 1252, 1256 (11th Cir. 2012) ("A delegation provision is severable from the rest of the arbitration agreement and must be challenged 'specifically.'"); *Valley Power Sys., Inc. v. Gen. Elec. Co.*, 2012 WL 665977, at *5 (C.D. Cal.) ("[While plaintiff] asserts that the arbitration provision is unconscionable, [plaintiff] does not specifically challenge the arbitration provision's express selection of the ICDR Rules, which delegates the determination of enforceability issues to the arbitrators. Accordingly, the Court finds that whether the arbitration provision is enforceable is a determination to be made by the arbitrators."); *Smith v. ComputerTraining.com Inc.*, 772 F.Supp.2d 850, 860 (E.D. Mich. 2011) ("Plaintiffs have not challenged the validity of the delegation clause. Thus, the determination of the 'validity, enforceability, arbitrability or scope of this Arbitration Agreement,' must be decided in arbitration."); *Morocho v. Carnival Corp.*, 2011 WL 147750, at *1 (S.D. Fla.) ("[I]t was appropriate for this Court to determine this issue [of the validity of the delegation provision] because Plaintiff has framed his issues as challenges to the validity of the arbitration delegation clause itself, as opposed to the entire Agreement and such issues are for the Court to resolve."); *Madgrigal v. AT&T Wireless Serv.*, 2010 WL 5343299, at *4 (E.D. Cal.) ("[*Rent-A-Center*] makes clear that where there has been delegation of gateway authority to the arbitrator, federal courts may not address a challenge to the validity of the arbitration agreement unless the challenge is specific to the delegation provision itself.").

404) *See, e.g., Kuehn v. Citibank NA*, 2012 WL 6057941, at *3 (S.D.N.Y.) ("[I]n light of a delegation agreement, a party's challenge to the arbitration agreement on unconscionability grounds is a dispute that must be resolved by arbitration unless the party opposing arbitration demonstrates that the delegation agreement itself is unenforceable. Accordingly, a party seeking to avoid arbitration on unconscionability grounds must demonstrate that the delegation agreement in particular, rather than the arbitration agreement as a whole, is unconscionable."); *Garcia v. Dell*, 2012 WL 5928132, at *4 (S.D. Cal.) ("where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, the district court considers the challenge if a party challenges the agreement that an arbitrator will determine the enforceability of the agreement. However, if a party challenges the agreement that an arbitrator will determine the enforceability of the agreement as a whole, the arbitrator considers the challenge."); *Dean v. Draughons Jr. College, Inc*., 2012 WL 5398653, at *4 (M.D. Tenn.) ("[C]ourts applying *Rent-A-Center* refuse to address challenges that are directed to the arbitration agreement as a whole, which they refer to the arbitrator to decide."); *Fox v. Career Educ. Corp*., 2012 WL 1205155, at *4 (E.D. Mo.) ("None of plaintiff's arguments challenge the provision of the arbitration clause delegating authority to an arbitrator to resolve issues of arbitrability. Thus, it is for the arbitrator to determine the enforceability of the arbitration clause."); *Smith v. ComputerTraining.com Inc*., 772 F.Supp.2d 850, 860 (E.D. Mich. 2011) (issue of arbitrability was delegated to arbitrator, where plaintiffs only asserted defenses to enforcement of arbitration agreement as a whole, not to delegation provision); *Amway Global v. Woodward*, 744 F.Supp.2d 657, 668 (E.D. Mich. 2010) ("Respondents have advanced various challenges to the enforceability of the parties' arbitration agreement as a whole,...but they do not separately contest the enforceability of the specific provision...that empowers the arbitrator to decide jurisdictional and arbitrability disputes. Under *Rent–A–Center*, then, this 'delegation provision'...is entitled to enforcement under the FAA, and Respondents' challenges to the validity of the parties' arbitration agreement as a whole were properly left for the arbitrator to decide.").

405) *Buckeye*, 546 U.S. at 447. *See*§7.03[E][5][c].
406) *Buckeye*, 546 U.S. at 449 (emphasis added).
407) *Salley v. Option One Mortg. Corp*., 925 A.2d 115, 120 (Pa. 2007).
408) *Puleo v. Chase Bank USA*, 605 F.3d 172, 180 (3d Cir. 2010).
409) *See, e.g., Quillion v. Tenet Healthsys. Philadelphia, Inc*., 673 F.3d 221, 230 (3d Cir. 2012) ("Because [plaintiff] claims that the arbitration agreement specifically, is unconscionable, the District Court did not err in addressing the validity of the agreement to arbitrate."); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp*., 622 F.3d 996, 1000 (9th Cir. 2010) (claim challenging validity of arbitration clause "for reasons independent of any reasons the remainder of the contract might be invalid" is for court to decide); *Puleo v. Chase Bank USA*, 605 F.3d 172, 188 (3d Cir. 2010) ("The [plaintiffs] do not contest the validity of the entire cardmember Agreement.... Instead, they challenge the validity of the arbitration provisions within a larger contract, apart from the validity of the contract as a whole, a matter which the Arbitration Agreement cannot be read to refer to the arbitrator."); *Nagrampa v. MailCoups, Inc*., 469 F.3d 1257 (9th Cir. 2006); *Griffen v. Alpha Phi Alpha, Inc*., 2007 WL 707364, at *4 (E.D. Pa.) (because plaintiff "challenges the substantive unconscionability of the arbitration clause itself, the Court is permitted to decide [the] validity of the clause"); *In re Frascella Enter., Inc*., 349 B.R. 421, 428 (E.D. Pa. 2006); *Rubin v. Sona Int'l Corp.*, 457 F.Supp.2d 191, 193 (S.D.N.Y. 2006) ("*Buckeye Check Cashing* makes clear that whether [a party] argues that the agreement is void or voidable, [it] may only avoid arbitration if it can successfully challenge the validity of the arbitration clause itself."); *Alexander v. U.S. Credit Mgt*, 384 F.Supp.2d 1003, 1008 (N.D. Tex. 2005); *Lexington Mktg Group, Inc. v. Goldbelt Eagle, LLC*, 157 P.3d 470, 475 (Alaska 2007); *Kirby v. Grand Crowne Travel Network, LLC*, 2007 WL 1732761, at *1 (Mo. Ct. App.); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574, 577 (Fla. Ct. App. 2007) ("Unconscionability is clearly at issue in the present case and the provision limiting liability, being part of the arbitration provision, pertains to the arbitration provision itself. Therefore, the trial court had authority to determine the enforceability of the remedial limitations."); *Bess v. DirecTV, Inc.*, 2007 WL 2013613, at *7 (Ill. Ct. App.) ("Given all the circumstances in the present case, we conclude that the arbitration provisions is procedurally unconscionable and that the procedural unconscionability is sufficient to invalidate the arbitration provision.").
410) *Washington v. William Morris Endeavor Entertainment, LLC*, 2011 WL 3251504 (S.D.N.Y.) (where party challenged delegation clause specifically, validity of delegation clause was to be decided by court); *Womack v. Career Educ. Corp*., 2011 WL 6010912 (Mo. Ct. App.) (where parties fail to confine their challenge to delegation clause, validity of delegation clause is to be decided by arbitrator).
411) *See* authorities cited §3.03[A][2][b][ii](3), pp. 424-31; §7.03[E][5][c] p. 1173.
412) *Moran v. Svete*, 366 F.Appx. 624, 631 (6th Cir. 2010) (emphasis added).
413) *Fox Int'l Relations v. Fiserv Sec., Inc*., 418 F.Supp.2d 718, 724 (E.D. Pa. 2006).

414) *Fox Int'l Relations*, 418 F.Supp.2d at 724 (E.D. Pa. 2006). Of course, given the separability presumption, there is nothing paradoxical about a conclusion that invalidity of the underlying contract does not entail invalidity of the arbitration agreement. Rather, that is one of the common, and inevitable, consequences of the presumption.

415) *See*§5.06[C][1]; *Prima Paint*, 388 U.S. at 403-04 ("[I]f the claim is fraud in the *inducement of the arbitration clause itself* – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it.") (emphasis added); *Moran v. Svete*, 366 F.Appx. 624, 630 (6th Cir. 2010) ("[I]f the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the federal court may proceed to adjudicate it. Otherwise, the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."); *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) ("Under *Prima Paint*..., the central issue in a case like this is whether the plaintiffs' claim of fraud relates to the making of the arbitration agreement itself or to the contract as a whole. If the fraud relates to the arbitration clause itself, the court should adjudicate the fraud claim.").

416) *See*§5.06[C][1]; *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) ("If the fraud relates to the arbitration clause itself, the court should adjudicate the fraud claim. If it relates to the entire agreement, then the [FAA] requires that the fraud claim be decided by an arbitrator."); *Nanosolutions, LLC v. Prajza*, 793 F.Supp.2d 46, 54-55 (D.D.C. 2011); *Cline v. H.E. Butt Grocery Co.*, 79 F.Supp.2d 730, 732 (S.D. Tex. 1999).

417) *See*§5.06[C][3]; *N.J. Bldg Laborers Statewide Benefit Funds v. Perfect Concrete Cutting*, 2010 WL 2292102, at *2 (D.N.J.) ("challenge based on the lack of mutuality of the arbitration clause would be for the court"); *Tyson Foods, Inc. v. Archer*, 147 S.W.3d 681 (Ark. 2004) (court decides claim that arbitration agreement is void for lack of mutuality); *Peleg v. Neiman Marcus Group, Inc.*, 204 Cal.App.4th 1425 (Cal. Ct. App. 2012) (court decides whether arbitration agreement was illusory and unenforceable); *Richard Harp Homes, Inc. v. Van Wyck*, 2007 WL 2660213 (Ark. Ct. App.) (court decides claim that arbitration agreement is void for lack of mutuality); *Cored Panels, Inc. v. Meinhard Commercial Corp.*, 420 N.Y.S.2d 731 (N.Y. App. Div. 1979) (same).

418) *See*§5.04[D][8]; *Clerk v. First Bank of Del.*, 735 F.Supp.2d 170 (E.D. Penn. 2010) ("If... [plaintiff] has alleged...duress...with respect to the arbitration clause itself, then judicial consideration of these issues is mandated before arbitration of the state claims can be compelled."); *Acquaire v. Canada Dry Bottling*, 906 F.Supp. 819, 826 (E.D.N.Y. 1995) (court considers claim that arbitration clause was product of duress); *Rust v. Drexel Firestone, Inc.*, 352 F.Supp. 715 (S.D.N.Y. 1972) (same); *ITT Commercial Fin. Corp. v. Tyler*, 1994 WL 879497 (Mass. Super.) (same); *Wheeler v. St. Joseph Hosp.*, 63 Cal.App.3d 345, 775 (Cal. Ct. App. 1976) (same).

419) *See*§5.06[C][2]; *Gar Energy & Assocs. v. Ivanhoe Energy Inc.*, 2011 WL 6780927, at *8-9 (E.D. Cal.) (considering claim that arbitration agreement was void for mistake because it designated nonexistent arbitral institution).

420) *See*§5.06[C][4]; *Quilloin v. Tenet Healthsys. Philadelphia, Inc.*, 673 F.3d 221, 228 (3d Cir. 2012) (challenge to arbitration agreement on grounds of unconscionability for court to decide); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002 (9th Cir. 2010) (unconscionability claims "clearly...marshaled against the validity of the arbitration clause alone, and...[were] properly decided by the district court"); *Puleo v. Chase Bank USA*, 605 F.3d 172, 179 (3d Cir. 2010) ("In stark contrast with the question of arbitration procedure at issue in *Howsam* and the question of contractual interpretation discussed in *PacifiCare*, when a party challenges the validity of an arbitration agreement by contending that one or more of its terms is unconscionable under generally applicable state contract law, a question of arbitrability is presented."); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006) (addressing unconscionability of arbitration agreement); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126 (2d Cir. 1997) (same); *Clerk v. First Bank of Del.*, 735 F.Supp.2d 170, 182 (E.D. Pa. 2010) (unconscionability challenge directed specifically to arbitration agreement for court to decide); *Griffen v. Alpha Phi Alpha, Inc.*, 2007 WL 707364, at *4 (E.D. Pa.) (because plaintiff "challenges the substantive unconscionability of the arbitration clause itself, the Court is permitted to decide [the] validity of the clause"); *Bruni v. Didion*, 73 Cal.Rptr.3d 395, 410 (Cal. Ct. App. 2008) ("a court [not an arbitrator,] must decide whether there is a valid agreement to arbitrate between the parties. Hence, if the party resisting arbitration is claiming that the arbitration clause itself is unconscionable, a court must decide this claim."); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246 (N.Y. App. Div. 1998).

421) *See*§5.06[C][8]; *Gar Energy & Assocs. v. Ivanhoe Energy Inc.*, 2011 WL 6780927, at *7-8 (E.D. Cal.) (considering claim that arbitration agreement was void for impossibility because it designated nonexistent arbitral institution).

422) *See*§5.04[D][2]; *Polimaster Ltd v. RAE Sys. Inc.*, 623 F.3d 832, 843 (9th Cir. 2010) (upholding "unusual" clause that did not provide for choice of law, choice of procedural rules, number of arbitrators, or method for appointment); *Jain v. de Mere*, 51 F.3d 686, 688 (7th Cir. 1995) (upholding clause providing for arbitration by "arbitrary commission" without mentioning rules, seat or other matters); *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 716 (7th Cir. 1987) (arbitration clause, which did not specify arbitrators, where arbitration would take place, the applicable arbitration rules, was "not too vague to be enforced"); *Bauhinia Corp. v. China Nat'l Mach. & Equip. Imp. & Exp. Corp.*, 819 F.2d 247 (9th Cir. 1987); *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 499 F.Supp.2d 245 (E.D.N.Y. 2007) (rejecting argument that arbitration clause was void because it failed to specify seat other than "China" and failed to designate arbitral institution); *Vegter v. Forecast Fin. Corp.*, 2007 WL 4178947 (W.D. Mich.) (rejecting argument that failure to specify institutional rules or means for selecting arbitrators rendered arbitration clause invalid on indefiniteness grounds); *Zurich Am. Ins. Co. v. Cebcor Serv. Corp.*, 2003 WL 21418237, at *2 (N.D. Ill.) ("the term 'arbitration' in the Reinsurance Cover Note" is a valid arbitration agreement); *CNA Reins. Co., Ltd v. Trustmark Ins. Co.*, 2001 WL 648948, at *6 (N.D. Ill.) (phrase "arbitration clause" in a contract is sufficient to establish the parties' agreement to arbitrate).

423) *See*§5.06[C][12]; *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1271-75 (9th Cir. 2006) (collecting cases); *John B. Goodman Ltd P'ship v. THF Constr., Inc.*, 321 F.3d 1094 (11th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Smith v. Legal Helpers Debt Res. LLC*, 2012 WL 2118132 (D.N.J.); *Sheehan v. Centex Homes*, 2011 WL 1100031, at *3 (D. Haw.); *Siderurgica del Orinoco (Sidor), CA v. Linea Naviera de Cabotage, CA*, 1999 WL 632870 (S.D.N.Y.); *Herwig v. Hahnaman-Albrecht, Inc.*, 1997 WL 72079, at *3 (N.D. Ill.) ("court deciding a motion to arbitrate under the FAA is limited to deciding only whether the arbitration agreement itself is invalid, illegal or unenforceable and is not free to evaluate the overall contract").

424) *See*§5.06[C][13]; *D'Antuono v. Serv. Road Corp.*, 789 F.Supp.2d 308, 327 (D. Conn. 2011) ("[t]o the extent that Plaintiffs' public policy arguments are targeted solely at the arbitration clause, the Court believes it is appropriate to consider those arguments").

425) *See*§5.08[A][4]*Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (court holds party not entitled to demand arbitration where it had not complied with arbitration agreement's requirement that "the matter shall be mediated within fifteen (15) days after receipt of notice" and that "[i]n the event the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten [10] days after receipt of notice."); *Consolidated Edison Co. of NY v. Cruz Constr. Corp.*, 685 N.Y.S.2d 683, 684 (N.Y. App. Div. 1999) (parties' duty to submit dispute and attempt to settle it for 30 days was condition precedent to arbitration); *Jack Kent Cooke Inc. v. Saatchi*, 635 N.Y.S.2d 611, 612 (N.Y. App. Div. 1995) (notice and 270-day negotiation requirements were conditions precedent to arbitration); *Belmont Constr., Inc. v. Lyondell Petrochem. Co.*, 896 S.W.2d 352 (Tex. Ct. App. 1995) (parties' failure to complete mediation held to bar commencement of arbitration); *Sucher v. 26 Realty Assocs.*, 554 N.Y.S.2d 717, 718 (N.Y. App. Div. 1990) (timing and notice requirements were conditions precedent to arbitration); *NY Plaza Bldg Co. v. Oppenheim, Appel, Dixon & Co.*, 479 N.Y.S.2d 217, 221 (N.Y. App. Div. 1984) (notice requirement was a "prerequisite to entry into the arbitration process"); *Rockland County v. Primiano*, 431 N.Y.S.2d 478, 481 (1980) (parties "erected a prerequisite to the submission of any dispute to arbitration, in effect a precondition to access to the arbitral forum"). *Compare Int'l Ass'n of Bridge, Structural Etc. v. EFCO Corp. & Constr. Prods., Inc.*, 359 F.3d 954, 956-57 (8th Cir. 2004) (compliance with procedural prerequisites in arbitration agreement is not a bar to commencement of arbitration, but instead is substantive issue for arbitrators).

426) *See*§5.06[C][7]; *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358-59 (Fed. Cir. 2004) ("question of whether an arbitration agreement has expired is for the court to decide, even if this requires interpretation of the language of the agreement"); *ACE Capital Re Overseas, Ltd v. Cent. United Life Ins. Co.*, 307 F.3d 24 (2d Cir. 2002); *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F.Supp. 1464 (S.D.N.Y. 1983); *Clifton D. Mayhew, Inc. v. Mabro Constr. Inc.*, 383 F.Supp. 192 (D.D.C. 1974); *In re Neutral Posture, Inc.*, 135 S.W.3d 725 (Tex. App. 2003) (whether parties' agreement to arbitrate expired by its terms concerns existence of agreement to arbitrate and, thus, an issue for judicial determination); *Ambulance Billing Sys., Inc. v. Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003); Annotation, *Violation or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein*, 3 A.L.R.2d 383 (1949).

427) *See, e.g., Stinger v. Chase Bank USA*, 265 F.Appx. 224, 228 (5th Cir. 2008) (where both arbitration agreement and underlying contract were challenged as unconscionable, court considered whether arbitration agreement specifically was unconscionable); *Adams v. Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005) ("If a contract is 'void,' a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically.");*Grynberg Prod. Corp. v. British Gas, plc*, 867 F.Supp. 1278, 1283-84 (E.D. Tex. 1994) (claim that underlying contract never existed naturally encompassed claim that parties failed to agree to submit dispute to arbitration).

428) *Strotz v. Dean Witter Reynolds, Inc.*, 227 Cal.App.3d 208, 217 (Cal. Ct. App. 1990), *rev'd on other grounds*, 58 Cal.Rptr.2d 875 (Cal. Ct. App. 1996).
429) *Strotz*, 227 Cal.App.3d at 217. *See also Adams v. Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005) ("Only if a contract is 'void,' and not 'voidable,' can a party challenge the enforceability of an arbitration clause without alleging a particular defect with that clause. If a contract is 'void,' a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically.").

430) *Buckeye*, 546 U.S. at 444, n.1.
431) The *Buckeye* Court cited cases involving disputes as to whether any contract was signed, the authority of agents and mental capacity. *See Buckeye*, 546 U.S. at 444.
432) *Rent-A-Ctr*, 130 S.Ct. at 2778.
433) *Rent-A-Ctr*, 130 S.Ct. at 2778.
434) *Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S.Ct. 2847, 2855-56 (U.S. S.Ct. 2010). *See also Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 406 n.5 (2d Cir. 2009) ("[Q]uestions about whether a contract was ever made…are presumptively to be decided by the court even without a specific challenge to the agreement to arbitrate.").
435) *See*§3.02[B][3][c]; §3.03[A][2][b][i].
436) *See*§3.03[A][2][b][i]; §7.03[E][5][a].
437) *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (emphasis in original). *See also Janiga v. Questar Capital Corp.*, 615 F.3d 735 (7th Cir. 2010) (claim that contract, containing an arbitration clause, never existed is for judicial determination).
438) *Will-Drill Res. Inc. v. Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003).
439) *See, e.g., Dedon GmbH v. Janus et Cie*, 411 F.Appx. 361, 363 (2d Cir. 2011) ("well-established precedent that where a party challenges the very existence of the contract containing an arbitration clause, a court cannot compel arbitration without first resolving the issue of the contract's existence"); *Koch v. Compucredit Corp.*, 543 F.3d 460 (8th Cir. 2008) (whether contract was validly assigned necessarily implicated existence of contract; thus, it was for court to decide validity before referring to arbitration); *Sanford v. Member Works, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("Issues regarding the validity or enforcement of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the existence of a contract as a whole must be determined by the court prior to ordering arbitration."); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 488 (6th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 106 (3d Cir. 2000) ("we conclude that the doctrine of severability presumes an underlying existent agreement"); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (reading *Prima Paint* as "limited to challenges seeking to avoid or rescind a contract – not to challenges going to the very existence of a contract that a party claims never to have agreed to"); *Chavez v. Bank of Am.*, 2011 WL 4712204, at *4 (N.D. Cal.) ("Here, the parties disagree as to whether a contract was formed between Plaintiffs and Defendants. Plaintiffs contend that they were not aware that any contract had been formed. The Court finds that it, not the arbitrator, must decide this threshold issue."); *Down to Earth Landscaping v. N.J. Bldg, at Laborers Dist. Council Local 595*, 2006 U.S. Dist. LEXIS 30113, at *9 (D.N.J.). *See*§7.03[E][5][c].
440) A number of decisions have required judicial determination of incapacity claims. *See*§7.03[E][5][c][ii]; *Spahr v. Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) (court must decide whether party had sufficient mental capacity to enter into contract containing arbitration agreement); *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 590-92 (7th Cir. 2001); *MJR Int'l, Inc. v. Am. Arb. Ass'n*, 596 F.Supp.2d 1090, 1096 (S.D. Ohio 2009) ("In cases like this one, involving disputes about whether a purported agent had the authority to bind a nonsignatory principle to a contract containing an arbitration clause, federal courts have repeatedly held that the court, not the arbitrator, must decide whether there is an agreement to arbitrate."); *Mariner Health Care, Inc. v. Ferguson*, 2006 WL 1851250, at *7 (N.D. Miss.) (retaining case for judicial determination because purported agent "had neither actual, apparent, or statutory authority to bind [defendant] and her beneficiaries to the arbitration agreement"); *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, 2005 WL 1118130, at *7 (D. Kan.) ("[b]ecause the [mental incapacity] defense went to both the enforceability of the entire contract and the specific arbitration provision, it placed the 'making' of the agreement to arbitrate in question"); *CitiFin., Inc. v. Brown*, 2001 WL 1530352, at *5 (N.D. Miss.) ("[T]he issue of John Brown's mental incompetence goes directly to the making of the arbitration agreement. If he could not read or understand the arbitration agreement, he certainly could not consent to it."); *In re Morgan Stanley & Co.,* 293 S.W.3d 182, 192 (Tex. S.Ct. 2009) ("Since a mental-incapacity defense goes to whether an agreement was made, the court must decide it."); *Rhymer v. 21st Mortg. Corp.*, 2006 Tenn. App. LEXIS 800, at *3-4 (Tenn. Ct. App.); *Am. Med. Techs., Inc. v. Miller*, 149 S.W.3d 265, 270-71 (Tex. App. 2004).

441) These decisions adopt the theory that they impeach the whole contract generally, not the arbitration clause "specifically." *See*§3.03[A][2][b][ii](2); §7.03[E][5][c][ii]; *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) ("[Defendant's] capacity defense is a defense to his entire agreement with [Plaintiff] and not a specific challenge to the arbitration clause. Therefore, [Defendant's] capacity defense is part of the underlying dispute between the parties which, in light of *Prima Paint* and its progeny, must be submitted to arbitration."); *Shegog v. Union Planters Bank*, 332 F.Supp.2d 945, 948 n.4 (S.D. Miss. 2004); *In re Steger Energy Corp.*, 2002 WL 663645, at *1 (Tex. App.) (requiring arbitration of claim, where one party claimed to be "incompetent at the time he signed the contracts – in the early stages of Alzheimer's," on grounds that "defense asserted relates to the contract as a whole" and did not "specifically relate to the arbitration agreement itself").

442) *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003).

443) *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002).

444) *See*§7.03[E][5][c]. A number of decisions have required judicial determination of duress and lack of consent claims. *See*§7.03[E][5][c], p. 1177; *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 963 (9th Cir. 2007) (plaintiff's contention that she was not aware she was part of membership program was issue of contract formation for judicial, not arbitral, determination); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32, 35 (2d Cir. 2002) ("plaintiffs may not be compelled to arbitrate their claims" because, among other things, license agreement was contract "to which plaintiffs never assented"); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) ("[It] has never been...[required from] arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*.") (emphasis added); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) ("By contending that they never entered into such contracts, plaintiffs also necessarily contest any agreements to arbitrate within the contracts."); *Kwan v. Clearwire Corp.*, 2012 WL 32380, at *10 (W.D. Wash.) ("Because the parties have stipulated to the existence of a genuine issue of material fact concerning whether [plaintiff] assented to the arbitration clause contained with the TOS by clicking on the 'I accept terms' button on [defendant's] website, the court is required to 'proceed summarily to a trial thereof.'").

Other decisions have required arbitration of claims of duress or lack of consent. *See*§7.03[E][5][c][ii], p. 1178; *Villa Garcia v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 833 F.2d 545 (5th Cir. 1987) (alleged illiteracy goes to "formation of the entire contract" and is therefore for arbitral, not judicial, determination); *Estrategias en Accion SA v. Castle CRM, LLC*, 2010 WL 5095368 (S.D.N.Y.) (claim that parties evidenced "mutual lack of intent to be bound by the purported agreements" attacked validity of agreement as a whole, not arbitration clause, and was for arbitrator to decide); *Johnnie's Homes, Inc. v. Holt*, 790 So.2d 956, 961 (Ala. 2001) (claim of illiteracy for arbitral, not judicial, resolution because it "bears upon [party's] comprehension of the entire contract, not just the arbitration agreement").

445) *Serv. Corp. Int'l v. Lopez*, 162 S.W.3d 801, 810 (Tex. App. 2005).

446) *Flannery v. Tri-State Div.*, 402 F.Supp.2d 819, 825 (E.D. Mich. 2005). Likewise, U.S. commentary takes divergent positions on these issues. *Compare* Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 33 (2012) (fraud, duress and mistake claims should be left to arbitral, not judicial, resolution); Rau, *Arbitral Jurisdiction and the Dimensions of "Consent"*, 24 Arb. Int'l 199, 205 (2008) (because duress vitiates consent to arbitration and leads to non-existence of arbitration agreement, it is matter for courts); Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 Nev. L.J. 107, 124 (2007) (duress and fraud affect consent to arbitration and should be for courts).

447) Most decisions have required judicial determination of forgery and related claims. *See*§7.03[E][5][c], p. 1177; *Gregory v. Interstate/Johnson Lane Corp.*, 188 F.3d 501 (4th Cir. 1999) (forgery claims are for judicial resolution because they affect arbitration clause and entire agreement); *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 32, 34 (2d Cir. 1997) (where alleged "surreptitious substitution" of pages in contract, no assent if "party did not know and had no reasonable opportunity to know that a page with materially changed terms had been substituted"); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 853 (11th Cir. 1992) (forgery claims for judicial resolution); *Jolley v. Welch*, 904 F.2d 988 (5th Cir. 1990) (forgery claims for judicial resolution); *Opals on Ice Lingerie v. Bodylines, Inc.*, 2002 WL 718850, at *3 (E.D.N.Y.) ("if a party's signature were forged on a contract, it would be absurd to require arbitration if the party attacking the contract as void failed to allege that the arbitration clause itself was fraudulently obtained"); *Dougherty v. Mieczkowski*, 661 F.Supp. 267, 275 (D. Del. 1987) ("defendants cannot rely on a contract which plaintiffs never signed and, on the record, never saw, to establish the existence of an agreement to arbitrate").

Nonetheless, a few decisions have required arbitration of claims that a signature on the underlying contract was forged. *See*§7.03[E][5][c], p. 1178; *Alexander v. U.S. Credit Mgt*, 384 F.Supp.2d 1003, 1007 (N.D. Tex. 2005); *AmSouth Bank v. Bowens*, 351 F.Supp.2d 571, 575 (S.D. Miss. 2005) ("In the case at bar, the Bowenses do not deny that they have a contractual relationship of some sort with AmSouth by virtue of having deposited funds with AmSouth. However, the Bowenses take the position that they are not bound by any of the provisions of the customer agreement, including the arbitration provision, inasmuch as they never signed the agreement.... [S]ince the Bowenses' forgery allegation regards the customer agreement as a whole and not just the arbitration clause of the customer agreement, it is an issue that must be submitted to the arbitrator as part of the underlying dispute.").

448) *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 109 (3d Cir. 2000).

449) *Alexander v. U.S. Credit Mgt*, 384 F.Supp.2d 1003, 1007 (N.D. Tex. 2005) (emphasis added).

450) *See, e.g., Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3d Cir. 2000) ("If [defendant] did not bind itself to the JVA through [the party representative's] signature, as it contends, when did it promise to go to arbitration? What is its consideration for Sandvik's promise to do the same?"); *Opals on Ice Lingerie v. Bodylines, Inc.*, 2002 WL 718850, at *3 (E.D.N.Y.) ("if a party's signature were forged on a contract, it would be absurd to require arbitration"); *Nuclear Elec. Ins. Ltd v. Cent. Power & Light Co.*, 926 F.Supp. 428, 434 (S.D.N.Y. 1996) ("[Where] a party claims that it never actually manifested assent to a contract containing an agreement to arbitrate...that party cannot be forced to arbitrate until it is first established...that the party willingly manifested assent to the underlying contract."); *Kyung In Lee v. Pac. Bullion (N.Y.) Inc.*, 788 F.Supp. 155, 157 (E.D.N.Y. 1992) ("If no agreement arose between the parties, there can be no severable agreement to arbitrate."); *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 354 (Minn. 2003) ("[P]arties may not be compelled to arbitrate claims if they have alleged that the contract at issue never legally existed. Therefore, allegations that a contract is void may be heard by a court, even if not specifically directed to the arbitration clause, while allegations that a contract is voidable must be sent to arbitration.").

451) *See, e.g., Madura v. Countrywide Home Loans, Inc.*, 344 F.Appx. 509 (11th Cir. 2009) (alleged forgery of signature on contract amounted to claim of fraudulent inducement, and was for arbitrator to resolve); *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001) ("if [the parties] have agreed on nothing else, ...they have agreed to arbitrate....[S]ometimes the ambiguity is so important to the bargain that the promises are deemed unenforceable."); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 754-55 (7th Cir. 1994) (despite apparent lack of meeting of minds on underlying contract "there was a meeting of the minds on the mode of arbitrating disputes between the parties" and "parties had agreed to arbitrate their claims"); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990) (judicial challenge to arbitration clause rejected where parties signed draft agreement, including arbitration clause, which was to be finalized).

452) *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F.Supp. 211, 219 (S.D.N.Y. 1978).

453) *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3d Cir. 2000) (emphasis added).

454) *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991).

455) *Standard Fruit*, 937 F.2d at 477 (quoting *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983)).

456) *See*§3.03[C], p. 465 (discussing *Sojuznefteexport v. JOC Oil Ltd*). *See also*§3.02[B][2], p. 359; §3.03[A][4], p. 454.

457) *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (allegations based on non-existence *ab initio* of underlying contract not enough to avoid arbitration); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003) ("That one of the parties later disputes the enforceability of that agreement does not change the fact that at some point in time, the parties reached an agreement, and that agreement included the decision to arbitrate disputes arising out of the agreement. The existence of this agreement provides the arbitrator with the authority required to decide whether the agreement will continue to exist."); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990) (rejecting challenge to arbitration clause where parties signed draft agreement, including arbitration clause, which was to be finalized); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("arbitration clause [is] enforceable in spite of [underlying] contract containing it [being] void from its inception"); *Pinpoint Enters. v. Barnett Fin. Servs., Inc.*, 2004 U.S. Dist. LEXIS 6630 (E.D. La.) ("The underlying contract may be valid or invalid, legal or illegal, enforceable or void; but where the parties have expressed their assent to an arbitration agreement, the Federal Arbitration Act assigns the resolution of those legal challenges to the arbitrator."); *Johnston v. Beazer Homes Tex., LP*, 2007 U.S. Dist. LEXIS 20519, at *8-10 (N.D. Cal.); *Alexander v. U.S. Credit Mgt*, 384 F.Supp.2d 1003, 1007 (N.D. Tex. 2005); *Sadler v. William Chevrolet/Geo, Inc.*, 306 F.Supp.2d 788, 789-90 (N.D. Ill. 2004); *Toray Indus. Inc. v. Aquafil SpA*, 17(10) Mealey's Int'l Arb. Rep. D-1, D-2 (N.Y. Sup. Ct. 2002) (2002) ("parties have agreed to arbitrate" because they "actively negotiated the choice-of-law and arbitration clause" despite claim that there was only an agreement to agree, and no binding contract).

458) *See*§3.03[B]; §4.02.

459) This appears to have been at least a part of the rationale in *Standard Fruit*, 937 F.2d at 477. *See also* authorities cited §3.03[A][5] pp. 457-64.

460) *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001).

461) *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 754-55 (7th Cir. 1994).

462) *See*§5.04[D][7][d]; *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000-01 (11th Cir. 1986) ("Where misrepresentation of the character or essential terms of a proposed contract occurs, assent to the contract is impossible. In such a case there is no contract at all."); *Dedon GmbH v. Janes et Cie*, 2010 WL 4227309 (S.D.N.Y.) (parties had not agreed to submit their disputes to arbitration where underlying Distribution Agreement containing arbitration clause was never executed), *aff'd*, 411 F.Appx. 361 (2d Cir. 2011); *Williams v. MetroPCS Wireless, Inc.*, 2010 WL 62605 (S.D. Fla.) (motion to stay litigation denied where party alleged that no contract was ever formed because of lack of assent to that contract); *Blythe v. Deutsche Bank AG*, 2005 WL 53281, at *6 (S.D.N.Y.) ("Because they are mutually fraudulent, the consulting agreements are not merely voidable, but void *ab initio*. The consulting agreements describe services that were...never rendered nor intended to be rendered....The consulting agreements are therefore void, and the arbitration clauses are not enforceable."); *Opals on Ice Lingerie v. Bodylines, Inc.*, 2002 WL 718850, at *3 (E.D.N.Y.); *Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 2003 WL 105310 (Ill. App.) (judicial determination of claim that underlying contract, and "therefore" arbitration clause, was never formed). *See also* Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609, 610 (1940) ("It is universally [sic] recognised that on principle, invalidity of the main contract entails invalidity of the arbitration agreement."); Svernlov & Carroll, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8(4) J. Int'l Arb. 37 (1991) ("Where it is alleged that no agreement has been entered into, the application of the separability doctrine is more doubtful. If the principal agreement was never entered into, the arbitration agreement contained therein must be affected by the invalidity as well.").

463) *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (allegations based on non-existence of underlying contract not enough to avoid arbitration); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); *City of Wamego v. L.R. Foy Constr. Co.*, 9 Kan.App.2d 168 (Kan. Ct. App. 1984) (repudiation of contract included repudiation of arbitration clause: "unless there is evidence of an independent meeting of the minds on the issue of arbitration alone, the arbitration agreement cannot stand as a separate contract"); *Toray Indus. Inc. v. Aquafil SpA*, 17(10) Mealey's Int'l Arb. Rep. D-1 (N.Y. Sup. Ct. 2002) (2002).

464) H.R. 1837, S. 987, 112th Cong., §402(b)(1) (2011) (emphasis added). *See* Brin, *The Arbitration Fairness Act of 2009, 25* Ohio St. J. Disp. Res. 821 (2010); Lanctot, *Reality Check: Is the United States' Arbitration Fairness Act of 2009 Likely to Cause Problems With International Arbitration Beyond Theory?*, 13 Vindobona J. 307 (2009).

465) *See* Drahozal, Buckeye Check Cashing *and the Separability Doctrine*, 1 Y.B. Arb. & Med. 55, 82 (2009).

466) Arbitration Fairness Act of 2013, S. 878, H. R. 1844, 113th Cong. (2013).

467) *See*§1.04[A][1].

468) *See* Arbitration Fairness Act of 2013, S. 878, H.R. 1844, 113th Cong. (2013); H.R. 1863, 112th Cong. (2011).

469) *See*§§3.03[A][2][b][i]-[ii].

470) *Prima Paint,* 388 U.S. at 402. For a case where the parties did not intend their arbitration agreement to be separable, *see Moseley v. Elec. & Missile Facilities, Inc.*, 374 U.S. 167, 171 (U.S. S.Ct. 1963).
471) *Buckeye*, 546 U.S. at 445.
472) *Buckeye*, 546 U.S. at 446.
473) *Buckeye*, 546 U.S. at 449 (emphasis added).
474) *Buckeye*, 546 U.S. at 445 ("First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *Rent-A-Ctr* 130 S.Ct. at 2778 ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.").
475) *See*§§3.03[A][2][b][ii](2)-(3).
476) *See*§3.03[A][2][b][ii](2).
477) For example, that both the price of goods sold is unconscionably high and that the procedures prescribed in the arbitration agreement are unconscionably one-sided.
478) For example, that the superior bargaining power of one party and the absence of any negotiation of the parties' contract.
479) *See*§§3.03[A][2][b][ii](1) & (3); *Buckeye*, 546 U.S. at 444 n.1; *Rent-A-Ctr*, 130 S.Ct. at 2778.
480) *See*§3.03[A][2][b][ii](3).
481) *See* Drahozal, Buckeye Check Cashing *and the Separability Doctrine*, 1 Y.B. Arb. & Med. 55, 72-73 (2009); Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing Inc. v. Cardegna, 8 Nev. L.J. 107, 125 (2007) ("separability doctrine cannot accommodate a principled distinction between the gun-point example and a misrepresentation case like *Prima Paint*").
482) *See*§3.03[A][2][b][ii](3). Specifically, a party may commit itself to an arbitration agreement in the course of negotiations of the underlying contract, but not ultimately consent to the underlying contract.
483) *See*§3.03[A][2][b][ii](3). Specifically, an agent may have authority to conclude an arbitration agreement, but not the authority to conclude the underlying contract.
484) *See*§3.03[A][2][b][ii](3). Specifically, duress might be exerted with respect to the terms of the underlying contract (*e.g.*, with regard to price or warranties), but not with respect to the arbitration agreement.
485) *See*§3.03[A][2][b][ii](3). Specifically, bribery of a counter-party's agent might, in some circumstances, vitiate that party's consent to the arbitration agreement, as well as the underlying contract.
486) *See*§3.03[A][2][b][ii](3). Specifically, illegality of the underlying contract (*e.g.*, the highwayman's contract to divide stolen property) might, in some circumstances, vitiate the validity of the arbitration agreement, as well as the underlying contract.
487) *See*§3.03[A][2][b][ii](3). Specifically, mistake with regard to the identity of a counter-party or fundamental content and character of a contract might, in some circumstances, vitiate the validity of the arbitration agreement, as well as the underlying contract.
488) *See, e.g., Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3d Cir. 2000) ("If [defendant] did not bind itself to the JVA through [a representative's] signature, as it contends, when did it promise to go to arbitration?"); *Different Drummer LLC v. Nat'l Urban League, Inc.*, 2012 WL 406907, at *4 (S.D.N.Y.) ("[T]he court must resolve the question of the Contract's existence here to resolve the question of arbitrability of the instant action. In other words, if it appears that [the parties] formed a direct contract, which was never reduced to writing, and thus, never contained an arbitration clause, the matter must remain with this Court."); *Dedon GmbH v. Janes et Cie*, 2010 WL 4227309 (S.D.N.Y.) (parties had not agreed to submit disputes to arbitration where underlying Distribution Agreement containing arbitration clause was never executed), *aff'd*, 411 F.Appx. 361 (2d Cir. 2011); *Blythe v. Deutsche Bank AG*, 2005 WL 53281, at *6 (S.D.N.Y.).
489) *See*§3.03[A][2][b][ii](3).
490) *See*§3.03[A][2][b][ii](3).
491) *See*§3.03[A][2][b][ii](3).
492) *See*§3.03[A][2][b][ii](1).
493) *See*§3.03[A][2][b][ii](3).
494) *See*§§3.03[A][2][b][i]-[ii].
495) *Buckeye*, 546 U.S. at 446 (emphasis added).
496) *Buckeye*, 546 U.S. at 444-47. *See*§3.03[A][2][b].
497) In fact, as discussed below, it makes little sense to base the allocation of jurisdictional competence on the existence of a challenge to the arbitration agreement itself, as U.S. courts have done. Rather, it is more sensible to base the allocation of jurisdictional competence on considerations of fairness and efficiency, with most jurisdictional challenges being for initial resolution by the arbitrators. *See*§7.03[I][3], p. 1232.
498) *See*§3.03[A][2][b][ii](3).
499) *See*§3.03[A][2][b][ii](3); §7.03[E][5][b].
500) *See*§3.02[B][3][c]; §3.03[A][2][b]; §7.03[H].

501) As discussed below, decisions concerning the allocation of competence to consider challenges to an arbitration agreement should turn on issues of efficiency (*e.g.*, are arbitral or judicial proceedings addressing a jurisdictional issue underway and advanced?), fairness and likely party intent (*e.g.*, does it appear that the objections to the arbitration agreement are credibly founded?). *See*§3.03[F]; §7.03. These issues are not dependent on particular categories of contract law defenses. *See*§3.03[F]; §7.03.

502) *See*§3.03[A][2][b][i](2).
503) *See*§7.03[E][5].
504) *See*§7.03[E][1][b].
505) That is likely to be the case, for example, where only a claim of illegality, frustration, unconscionability, or repudiation of the underlying contract is involved. These claims do not, as a matter of law, ordinarily involve the arbitration clause. *See*§3.03[A][2][b][i](1); §7.03[E][5][b][ii]; §7.03[E][5][c][ii].
506) *See*§4.04[A][1][b][i]; §5.06[A][1].
507) *See*§§7.03[E][7]-[8].
508) *See*§7.03[E]. As discussed in greater detail below, there is uncertainty under the FAA concerning the consequences of an arbitral decision resolving a party's jurisdictional challenge. *See*§7.03[E][1][a]. The better, and more principled, view is that such decisions are subject to judicial review with regard to the jurisdictional aspects of the tribunal's decision. *See*§7.03[E][7]. Moreover, if an award holds that the parties' underlying contract was validly formed, and "therefore" that the associated arbitration clause is valid, the jurisdictional aspect of this award is subject to *de novo* judicial review – even if it involves factual questions regarding the formation of the underlying contract. *See*§7.03[E][7][c], p. 1196.
509) *See*§7.02[A][1]; §7.02[B][2].
510) *See Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords); Gross, *Separability Comes of Age in England:* Harbour v. Kansa *and Clause 3 of the Bill*, 11 Arb. Int'l 85, 88-91 (1995); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶2-007 to 2-014, ¶2-070 (23d ed. 2007).
511) *See Ashville Inv. Ltd v. Elmer Contractors Ltd* [1988] 3 WLR 867, 873 (English Ct. App.) ("[it] is a principle of law that an arbitrator does not have jurisdiction to rule upon the initial existence of the contract"); *Dalmia Dairy Indus. Ltd v. Nat'l Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, 292 (English Ct. App.) ("[W]e can find nothing...to justify departure from the logical conclusion that there is no difference in principle between a contract containing an arbitration clause admittedly concluded but void for initial illegality and a contract containing such a clause admittedly concluded but where it is alleged that either the contract or the arbitration clause or both have become void because of subsequent illegality."); *Heyman v. Darwins Ltd* [1942] AC 356, 366 *et seq.* (House of Lords) (Viscount Simon, L.C.) ("If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission."); §3.02[B][3][f]. *See also* Gross, *Separability Comes of Age in England:* Harbour v. Kansa *and Clause 3 of the Bill*, 11 Arb. Int'l 85, 88-91 (1995); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶¶2-011 to 2-013 (23d ed. 2007).
512) *Smith, Coney & Barrett v. Becker, Gray & Co.* [1916] 2 Ch 86 (English Ct. App.).
513) *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶9 (House of Lords).
514) *See*§3.02[B][3][f].
515) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81, 92-93 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.).
516) *See Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1993] 3 All ER 897 (English Ct. App.).
517) English Arbitration Act, 1996, §7. *See* U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ¶43 (1996); §3.02[B][3][f].
518) *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1993] 3 All ER 897 (English Ct. App.); *Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.); R. Merkin, *Arbitration Law* ¶5.43 (1991 & Update August 2013).
519) English Arbitration Act, 1996, §7 (emphasis added). The application of §7 by the English courts is discussed below. *See*§3.03[A][2][c].
520) *See*UNCITRAL Model Law, Art. 16(1) (emphasis added); §3.02[B][3][e].
521) *See*§3.02[B][3][e].
522) *See*§3.03[A][2][c]; *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶¶9, 10 (House of Lords) ("The principle of separability enacted in §7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid."); R. Merkin, *Arbitration Law* ¶5.45 (1991 & Update August 2013); D. Sutton, J. Gill & M. Gearing, *Russell on Arbitration* ¶2-012 (23d ed. 2007).

523) *See, e.g., Soleimany v. Soleimany* [1999] QB 785, 979 (English Ct. App.); *Beijing Jianlong Heavy Indus. Group v. Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm) (English High Ct.) (invalidity of guarantees for illegality does not affect validity of arbitration clauses in related charter-parties); *JSC BTA Bank v. Ablyazov* [2011] EWHC 587, ¶¶42-54 (Comm) (English High Ct.) (applying separability presumption to uphold arbitration agreement where agent acted beyond authority in signing underlying agreement, because this rendered agreement merely voidable, not "null and void"); *Entico Corp. Ltd v. United Nations Educ. Scientific & Cultural Ass'n* [2008] EWHC 531 (Comm) (English High Ct.) (applying separability presumption where contract's existence was contested); *Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co.* [1999] 1 Lloyd's Rep. 784, 796-98 (QB) (English High Ct.) (applying separability presumption but holding that fraud in formation of underlying contract can permit conclusion that arbitration clause also was induced by fraud); *Westacre Invs. Inc. v. Jugoimport-SPDR Holdings Co., Ltd* [1998] 4 All ER 570, 583 *et seq.* (QB) (English High Ct.).

524) *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891, ¶25 (English Ct. App.) (emphasis added), *aff'd*, [2007] UKHL 40 (House of Lords). The Court of Appeal relied upon the separability presumption to reach a conclusion regarding the allocation of competence over asserted jurisdictional challenges. According to the court, §7 of the Act "codifies the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement." *Id.* at ¶23.

525) *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.) (emphasis added), *aff'd*, [2007] UKHL 40 (House of Lords). Commentary relied upon by the Court of Appeal (but not quoted) went on to say: "The consequence of these arguments is to limit the extent to which a jurisdiction agreement [or arbitration agreement] needs to satisfy the provisions of a particular law in order to establish its *prima facie* validity." L. Collins (ed.), *Dicey Morris and Collins on The Conflict of Laws* ¶12-099 (14th ed. 2006).

526) *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords).

527) *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40 (House of Lords). For commentary, *see* Huang & Lim, *Corruption in Arbitration – Law and Reality*, 8 Asian Int'l Arb. J. 1, 61-63 (2012); Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 Arb. Int'l 477 (2007); Pengellery, *Separability Revisited: Arbitration Clauses and Bribery* – Fiona Trust & Holding Corp v. Privalov, 24 J. Int'l Arb. 5 (2007); Samuel, *Agora: Thoughts on* Fiona Trust – *Separability and Construing Arbitration Clauses: The House of Lords' Decision in* Premium Nafta *and the* Fiona Trust, 24 Arb. Int'l 475 (2008); Style & Knowles, *Agora: Thoughts on* Fiona Trust – Fiona Trust: *10 Years on, the Fresh Start Entrenched*, 24 Arb. Int'l 489 (2008).

528) The House of Lords cited U.S. and German authority, including *Prima Paint* and the German Bundesgerichtshof's *Judgment of 27 February 1970. See Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶¶14, 30-32 (House of Lords).

The Court of Appeal also cited to international authority. *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891, ¶27 (English Ct. App.) ("The Supreme Court of the United States has also held that a challenge to the existence of the jurisdiction agreement based on fraud or duress must be based on facts specific to the clause and cannot be sustained on the basis of a challenge on like grounds to the validity of the contract containing it.") (quoting L. Collins (ed.), *Dicey Morris and Collins on The Conflict of Laws* ¶12-099 (14th ed. 2006)). As noted above, the House of Lords also cited German, U.S., as well as other authority.

529) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶17.

530) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶35.

531) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶18.

532) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶18. The Law Lords also reasoned: "It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been." *Id.* at ¶19. *See also ibid.* ("But §7 in my opinion means that [the underlying contract and the arbitration agreement] must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.").

533) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶35.

534) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶32.

535) *See*§3.03[A][2][b][i](2); §3.03[A][2][b][ii](2).

536) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶17. Lord Hope's judgment adopted a similar characterization: "So, where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it. Issues as to whether the entire agreement was procured by impersonation or by forgery, for example, are unlikely to be severable from the arbitration clause." *Id.* at ¶34 *See also Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891, ¶29 (English Ct. App.) ("*non est factum* or the sort of mistake which goes to the question whether there was any agreement ever reached"), *aff'd*, [2007] UKHL 40 (House of Lords).

537) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶17.
538) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶17.
539) *See*§3.03[A][2][b][ii](3).
540) *Heyman v. Darwins Ltd* [1942] AC 356, 366 (House of Lords).
541) *See*§3.03[A][2][b][ii](3); §3.03[A][2][d]; §3.03[D].
542) *See*§3.02[B][3][d].
543) French Code of Civil Procedure, Art. 1447.
544) *See, e.g., Judgment of 25 November 1966, Société des mines d'Orbagnoux v. Fly Tox*, 1967 Dalloz 359 (French Cour de cassation civ. 2e) (repudiation); *Judgment of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e) (underlying agreement allegedly illegal because of lack of governmental approval); *Judgment of 21 February 1964, Meulemans, et Cie v. Robert*, 92 J.D.I. (Clunet) 113 (Paris Cour d'appel) (1965). *See also*Mayer, *Les limites de la séparabilité de la clause compromissoire*, 1998 Rev. arb. 359.
545) *Compare*Judgment of 10 July 1990, L et B Cassia Associes v. Pia Inv. Ltd, 1990 Rev. arb. 857, 859 (French Cour de cassation civ. 1e) ("in international arbitration, the independent existence of the arbitration clause finds a limitation in the non-existence of the underlying contract") *with*Judgment of 6 December 1988, Société Navimpex Centrala Navala v. société Wiking Trader, 1989 Rev. arb. 641, 644 (French Cour de cassation civ. 1e) ("According to the principle of the autonomy of the arbitration clause, it is permitted to rely on such clause even though the [underlying] contract, signed by the parties, has never come into force, if the dispute concerns the conclusion of such contract.").
546) Mayer, *The Limits of Severability of the Arbitration Clause*, in A. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 261, 264 (ICCA Congress Series No. 9 1999).
547) *See* Sanders, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann* 31, 34 *et seq.* (1978). *Compare*E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶410, 411 (1999).
548) *See*§7.03[B].
549) Swiss Law on Private International Law, Art. 178(3); B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶¶618-622a (2d ed. 2010). *See*§3.02[B][3][b].
550) *See*§3.02[B][3][b]; §4.02[A][2][b].
551) *See, e.g.,Judgment of 9 June 1998, C. Srl v. L.S. SA*, 16 ASA Bull. 653, 657 (Swiss Federal Tribunal) (1998); *Judgment of 7 October 1993, Tobler v. Justizkommission des Kantons Schwyz*, DFT 59 I 177 (Swiss Federal Tribunal); *Judgment of 28 January 1938*, DFT 64 I 39, 44 (Swiss Federal Tribunal); *Judgment of 6 November 1936*, DFT 62 I 230, 233 (Swiss Federal Tribunal); *Judgment of 2 January 1984, K. KG v. M. SA & M.G.*, 3 ASA Bull. 19 (Basel-Stadt Appellationsgericht) (1985) (rejecting challenge to arbitration clause based upon mistake as to underlying contract); *Judgment of 14 April 1983, Carbomin SA v. Ekton Corp.*, XII Y.B. Comm. Arb. 502 (Geneva Cour de Justice) (1987).
552) *See, e.g.*, §3.02[B][3][b]; *Judgment of 20 December 1995*, DFT 121 III 495, 500 (Swiss Federal Tribunal); *Judgment of 2 September 1993, Nat'l Power Corp. v. Westinghouse*, DFT 119 II 380, 384 (Swiss Federal Tribunal); *Judgment of 7 July 1962*, DFT 88 I 100, 105 (Swiss Federal Tribunal).
553) *Judgment of 17 March 1939*, DFT 65 I 19, 22 (Swiss Federal Tribunal).
554) *See, e.g.*, B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶622 (2d ed. 2010) ("there are a number of situations in which – notwithstanding the rule established in PILS, Art. 178(3) and CCP, Art. 357(2) – a specific defect does not only affect the validity of the main contract, but *ipso facto* entails the nullity of the arbitration agreement contained in it. In legal doctrine, these situations are described as the phenomenon of 'identity of defect' (*Fehleridentität*)."); P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse* Art. 178, ¶22 (1989) ("[T]here are cases when such invalidity [of the underlying contract] may directly affect the validity of the arbitration clause, *e.g.*, defects of consent or the absence of authority of the signatories. The…effect of the invalidity of the main contract must be examined separately when the arbitration clause comes under examination."); Wenger, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 178, ¶77 (2000) ("This does not of course preclude that identical reasons might exist which impair the validity both of the main contract and also of the arbitration agreement – for instance capacity, deficiencies of intent, lack of authority.").
555) *See*§3.03[A][2][b][ii](3); §3.03[A][2][c]; §3.03[A][2][d].
556) *See*§3.02[B][3][a]; *Judgment of 27 February 1970*, 6 Arb. Int'l 79 (German Bundesgerichtshof) (1990); *Judgment of 30 April 1890*, 1890 JW 202, 203 (German Reichsgericht) ("[T]he arbitration clause is not invalid because the main contract somehow appears to be invalid. The arbitral tribunal is therefore competent to decide on validity of the main contract.").

557) *See, e.g.*,*Judgment of 15 March 1990, Sonatrach v. K.C.A. Drilling Ltd*, DFT 116 Ia 56 (Swiss Federal Tribunal); *Judgment of 18 February 2009*, 11 Sch 07/08 (Oberlandesgericht Dresden) (recognizing Czech award holding that, despite invalidity of underlying contract, arbitration clause contained therein was valid); *Judgment of 12 March 1998*, XXIX Y.B. Comm. Arb. 663, 666 (Hanseatisches Oberlandesgericht Hamburg) (2004); *Judgment of 16 March 1977*, III Y.B. Comm. Arb. 274 (Landgericht Hamburg) (1978).

558) *See, e.g., Judgment of 27 November 2008*, 2009 HmbSchRZ 5 (German Bundesgerichtshof); *Judgment of 23 May 1991*, III ZR 144/90 (German Bundesgerichtshof) (threats or deceit affecting underlying contract must have direct effect on arbitration clause); *Judgment of 28 July 2005*, XXXI Y.B. Comm. Arb. 673 (Oberlandesgericht Koblenz) (2006); *Judgment of 12 March 1998*, XXIX Y.B. Comm. Arb. 663 (Hanseatisches Oberlandesgericht Hamburg) (2004) ("nullity of the main contract, if there is such, does not affect the arbitration clause").

559) *Judgment of 12 March 1998*, XXIX Y.B. Comm. Arb. 663, 666 (Hanseatisches Oberlandesgericht Hamburg) (2004).

560) *See* German ZPO, §1040(1) ("The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.").

561) Berger, *Germany Adopts the UNCITRAL Model Law*, 1998 Int'l Arb. L. Rev. 121; Böckstiegel, *An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law*, 14 Arb. Int'l 19 (1998); Kröll, *Recourse Against Negative Decisions on Jurisdiction*, 20 Arb. Int'l 55 (2004); Schlosser, *Arbitral Tribunals or State Courts: Who Must Defer to Whom?*, in *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* 15, 27 (ASA Spec. Series No. 15 2001).

562) *See, e.g.*, Rieder & Schoenemann, *Korruptionsverdacht, Zivilprozess und Schiedsverfahren*, 2011 NJW 1169, 1172; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* ¶393 (2d ed. 1989) ("In case the defect put forward with regard to the main contract also affects the arbitration agreement itself..., sure enough the arbitration agreement cannot be upheld in isolation. If the issue is, whether the parties have already finally agreed on the conclusion of an agreement, an arbitral tribunal cannot bindingly decide this issue."); Schlosser, *Der Grad der Unabhängigkeit einer Schiedsvereinbarung vom Hauptvertrag*, in *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* 697, 704, 706 (2001); Schwab & Walter, *Schiedsgerichtsbarkeit*, 7 Aufl. Kap. 4Rz. 18 ("Certain defects can apply to both contracts,...the arbitration agreement and the underlying contract, because of deception, threat or mistake."). *See also Judgment of 29 March 2012*, 2012 SchiedsVZ 159 (Oberlandesgericht München).

563) *See, e.g.*,*Judgment of 23 May 1991*, III ZR 144/90 (German Bundesgerichtshof) (defects affecting underlying contract must have direct effect on arbitration clause); J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶542 (3d ed. 2008).

564) *Judgment of 2 July 1981*, 1981 Foro it., Rep. voce Arbitrato no. 61 (Italian Corte di Cassazione).

565) *Judgment of 21 December 1991, SpA Coveme v. Compagnie Française des Isolants*, XVIII Y.B. Comm. Arb. 422, 425 (Bologna Corte d'Appello) (1993).

566) *Judgment of 3 October 1936, AB Norrköpings Trikåfabrik v. AB Per Persson*, 1936 NJA 521 (Swedish S.Ct.). *See* Hobér, *The Doctrine of Separability Under Swedish Arbitration Law, Including Comments on the Position of American and Soviet Law*, 68 SvJT 257 (1983).

567) *Judgment of 24 March 1976, Hermansson v. AB Asfalbelaeggnigar*, 1976 NJA 125 (Swedish S.Ct.).

568) Swedish Arbitration Act, §3 ("When ruling on the validity of an arbitration agreement which forms part of another agreement, for the purpose of determining the jurisdiction of the arbitrators, the arbitration agreement shall constitute a separate agreement."); §3.02[B][3][j]; §7.03[G].

569) *See*§3.02[B][3][g]; *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979).

570) *Judgment of 15 July 1975, Kokusan Kinzoku Kogyo K.K. v. Guard-Life Corp.*, IV Y.B. Comm. Arb. 115, 122 (Japanese Saiko Saibansho) (1979); *Judgment of 3 May 1980, Kabushiki Kaisha Ameroido Nihon v. Drew Chem. Corp.*, VIII Y.B. Comm. Arb. 394 (Yokohama Chiho Saibansho) (1983) ("where the arbitration clause stipulates that 'all disputes...which may arise...out of or in relation to or in connection with this Agreement' shall be submitted to arbitration the arbitration clause retains its validity even after the termination of the principal contract").

571) Japanese Arbitration Law, Art. 13(6).

572) *See*§3.02[B][3][h].

573) *"Provisional Measures" and "Opinion on Several Questions" Regarding the Ruling on Cases Requesting for the Validity of Arbitration Agreement and Setting Aside An Arbitral Award*, ¶7 (Beijing Gaoji Fayuan) (1999), cited in Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 169 (2007).

574) *Judgment of 12 November 2003*, XXXI Y.B. Comm. Arb. 620 (Chinese Zuigao Fayuan) (2006) (where signature on underlying contract was forged through "cutting-and-pasting," arbitration agreement was void: "arbitration agreement was entered into as a result of fraud...[and was] invalid under the applicable law of the place of arbitration").

575) Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 Asian Int'l Arb. J. 163, 171 (2007).

576) *See, e.g., DHV BV v. Tahal Consulting Eng'rs Ltd* [2007] INSC 913 (Indian S.Ct.) (upholding arbitration agreement notwithstanding termination of underlying contract); *Fittydent Int'l GmbH v. Brawn Labs., Ltd*, XXXV Y.B. Comm. Arb. 401 (Delhi High Ct. 2010) (2010).

577) *See, e.g., The Hub Power Co. v. Pakistan WAPDA*, 16 Arb. Int'l 439, 450-51 (Pakistan S.Ct. 2000) (2000).

578) *See, e.g.,Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd*, [2005] FCA 1102, ¶89 (Australian Fed. Ct. 2005) (2006) ("The arbitration clause is seen as constituting a severable and separate agreement between the parties"; claim that underlying contract was fraudulently induced does not impeach arbitration clause); *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628, 632 (Queensland S.Ct. 1993) (1995) (although underlying contract had been terminated, arbitration clause was separable and remained enforceable after termination).

579) *See, e.g.,Brian Harper v. Kvaerner Fjellstrand Shipping AS*, XVIII Y.B. Comm. Arb. 358 (B.C. S.Ct. 1991) (1993); *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] BCSC 532 (B.C. S.Ct.).

580) *See, e.g., Clarence Holdings Ltd v. Prendos Ltd*, [2000] DCR 404 (Auckland Dist. Ct.) (termination of underlying contract did not affect arbitration clause: "it must follow that a purported repudiation of the contract by one party, even if later found to be legally valid, cannot bring down with it an arbitration clause in that agreement").

581) *See, e.g., Judgment of 6 December 1963*, 1964 Neder. Juris. No. 43 (Netherlands Hoge Raad); *Judgment of 18 January 1967*, 1967 Neder. Juris., No. 90 (Arnhem Gerechtshof); *Judgment of 5 November 1952*, 1953 Neder. Juris. No. 327 (Amsterdam Arrondissementsrechtbank) (alleged fraud which resulted in voidness of underlying contract did not impeach arbitration clause); *Judgment of 19 December 1952*, 1953 Neder. Juris. No. 328 (Amsterdam Arrondissementsrechtbank) (invalidity of underlying contract on grounds that condition precedent was not satisfied and did not impeach arbitration clause).

582) *See, e.g.,Sojuznefteexport v. JOC Oil Ltd*, XV Y.B. Comm. Arb. 384, 407 (Bermuda Ct. App. 1989) (1990).

583) *See, e.g.,Judgment of 12 April 2010, Elbex Video Ltd v. Tyco Bldg Servs., Ltd.*, XXXV Y.B. Comm. Arb. 409, ¶14 (Israeli S.Ct.) (2010) ("It would be possible to think that where a contract is voided, all of its sections are also voided, including the arbitration clause within it. However, in the case of a void contract as well, there are situations in which the arbitration clause is accorded independent life.").

584) *See, e.g., Fung Sang Trading Ltd v. Kai Sun Sea Prods. & Food Co.*, XVII Y.B. Comm. Arb. 289 (H.K. Ct. First Inst. 1991) (1992) ("arbitration clause is separable from the contract containing it so that if the contract is repudiated and the repudiation is accepted the arbitration clause survives the repudiation thus enabling the arbitrator to render an award on the claim resulting from the alleged repudiation").

585) *The Hub Power Co. v. Pakistan WAPDA*, 16 Arb. Int'l 439, 450-51 (Pakistan S.Ct. 1999) (2000).

586) *See, e.g., Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 108 (3d Cir. 2000) ("If [defendant] did not bind itself to the JVA through [its representative's] signature, as it contends, when did it promise to go to arbitration?"); *Different Drummer LLC v. Nat'l Urban League, Inc.*, 2012 WL 406907 (S.D.N.Y.) ("[T]he court must resolve the question of the Contract's existence here to resolve the question of arbitrability of the instant action....[I]f it appears that [the parties] formed a direct contract, which was never reduced to writing, and thus, never contained an arbitration clause, the matter must remain with this Court."); *Grynberg Prod. Corp. v. British Gas, plc*, 867 F.Supp. 1278, 1283-84 (E.D. Tex. 1994) (no agreement to arbitrate where underlying contract was never executed).

587) 2010 UNCITRAL Rules, Art. 23(1). *See also* S. Nappert, *Commentary on the UNCITRAL Arbitration Rules 2010* 87-90 (2012); T. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents, Materials* ¶¶23-6 to 22-33 (2010).

588) 2012 ICC Rules, Art. 6(9) ("Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."). *See also* M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* ¶¶6-89 to 6-131 (2d ed. 2008); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-281 to 3-286 (2012).

589) ICDR Rules, Art. 15(2) ("The Tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.").

590) LCIA Rules, Art. 23(1) ("The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any obligation to the initial or continuing existence, validity of effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail *ipso jure* the non-existence, invalidity or ineffectiveness of the arbitration clause.").

591) 2010 UNCITRAL Rules, Art. 23(1); 2012 Swiss Rules, Art. 21(2) (tracking UNCITRAL Rules); 2012 CIETAC Rules, Art. 5(4); 2013 HKIAC Rules, Art. 19(2); 2013 SIAC Rules, Art. 25(2) (tracking 1976 UNCITRAL Rules).

592) This is examined in greater detail below. *See*Chapter 5*et seq.*

593) 2012 ICC Rules, Art. 6(9); LCIA Rules, Art. 23(1); 2013 SIAC Rules, Art. 25(2).

594) *See*§7.02[F]; §§7.03[E][5][b]-[c].

595) *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry Case of 9 July 1984*, XVIII Y.B. Comm. Arb. 92 (1993). The tribunal reasoned: "the arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract. The subject of an arbitration agreement (clause) is distinguished from the subject of a material-legal contract....The subject of the agreement is the obligation of the parties to submit the examination of a dispute between a plaintiff and defendant to arbitration.... Predominant in the literature is the recognition of the autonomy of an arbitration agreement, its independence in relation to the contract. Such is the point of view of the overwhelming majority of Soviet authors who have expressed themselves on this subject." *Id.* at 97. The Soviet arbitral tribunal's decision was upheld by the Bermuda Court of Appeal, in a lengthy opinion that squarely affirmed the presumption that arbitration clauses are separable from the underlying contracts with which they are associated. *Sojuznefteexport v. JOC Oil Ltd*, XV Y.B. Comm. Arb. 384, 407 (Bermuda Ct. App. 1989) (1990). *See*Chapter 7.

596) *See*Chapter 7 (especially §7.02[C]; §7.03).

597) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 98.

598) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 97.

599) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 97-98.

600) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 94-95.

601) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 94-95.

602) *See, e.g.*,*Interim Award in ICC Case No. 7263*, XXII Y.B. Comm. Arb. 92, 100 (1997); *Award in ICC Case No. 6503*, 122 J.D.I. (Clunet) 1022 (1995); *Final Award in ICC Case No. 6248*, XIX Y.B. Comm. Arb. 124, 125 (1990) ("principle of severability has long been recognized...with respect to main contracts which were found void"); *Award in ICC Case No. 5943*, 123 J.D.I. (Clunet) 1014 (1996); *Interim Award in ICC Case No. 4145*, XII Y.B. Comm. Arb. 97, 100 (1987); *Award in Bulgarian Chamber of Commerce and Industry Case No. 88/1972 of 23 June 1973*, IV Y.B. Comm. Arb. 189 (1979); *Award in CMAP Case No. 9726 of 18 March 2003*, XXVII Y.B. Comm. Arb. 13, 16 (2003) (principle of autonomy of arbitration agreement applies even where there is no underlying contract); *Award in Arbitral Tribunal of the Netherlands Oils, Fats and Oilseeds Trade Association Case of 10 September 1975*, II Y.B. Comm. Arb. 156 (1977); *Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Repub., Ad Hoc Award of 12 April 1977*, VI Y.B. Comm. Arb. 89, 96 (1981) ("widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination"); *Texaco Overseas Petroleum Co. v. Libyan Arab Repub., Preliminary Ad Hoc Award on Jurisdiction of 27 November 1975*, IV Y.B. Comm. Arb. 177 (1979); *BP Exploration Co. v. Gov't of the Libyan Arab Repub., Ad Hoc Award on Merits of 10 October 1973*, V Y.B. Comm. Arb. 143 (1980).

603) *Interim Award in ICC Case No. 4145*, XII Y.B. Comm. Arb. 97, 100 (1987).

604) *Final Award in ICC Case. No. 10329*, XXIX Y.B. Comm. Arb. 108, 115 (2004). *See also Award in ICC Case No. 11761*, quoted in M. Buehler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* ¶6-93 (3d ed. 2008) (rejecting argument that termination of underlying contract terminated arbitration clause: "it contradicts the well-established doctrine of separability"); *Interim Award in ICC Case No. 9517*, discussed in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 54 (2001) (termination of underlying contract did not terminate arbitration clause: "to return a negative answer would lead to the absurd result that the most serious disputes arising 'in connection with' the substantive contract could not be dealt with by the chosen method of dispute resolution"); *Interim Award in ICC Case No. 7929*, XXV Y.B. Comm. Arb. 312, 316 (2000) ("An arbitration clause constitutes a separate and autonomous agreement between the parties, which survives any termination of the main agreement in which it is contained, unless the arbitration agreement as such is expressly terminated.").

605) *Elf Aquitaine Iran v. Nat'l Iranian Oil Co., Preliminary Ad Hoc Award of 14 January 1982*, XI Y.B. Comm. Arb. 97, 103-04 (1986).

606) *See, e.g.*,*Final Award in ICC Case No. 7626*, XXII Y.B. Comm. Arb. 131, 138-39 (1997) ("The issue before us, then, resolves into one of deciding whether or not the parties agreed to this arbitration clause. This issue can only be resolved in the context of our more general consideration as to whether one or both of the Agreements are binding on P and A, the parties to this arbitration."); *Preliminary Award in ICC Case No. 6401*, 7(1) Mealey's Int'l Arb. Rep. B-1, B-13 to B-14 (1992) ("There may be instances where a defect going to the root of an agreement between the parties affects both the main contract and the arbitration clause."); Shackleton, *Arbitration Without A Contract*, 17(9) Mealey's Int'l Arb. Rep. 25 (2002); Svernlov & Carroll, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8(4) J. Int'l Arb. 37, 42 (1991) ("The doctrine of separability as to voidable agreements therefore seems well settled in international commercial arbitration practice. Few cases have, however, considered the separability of an arbitration agreement in a void contract. Comments by the sole arbitrator in *Elf Aquitaine* indicate that separability would not be recognized in such a case. The number of cases discussing initial invalidity is, however, clearly insufficient to make any generalizations, leading to the conclusion that the question of the separability of arbitration clauses in agreements alleged never to have been entered into is presently unresolved in international commercial arbitration practice.").

607) *See, e.g.*,*Final Award in ICC Case No. 10329*, XXIX Y.B. Comm. Arb. 108, 115 (2004); *Award in ICC Case No. 6367*, discussed in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 54 (2001) (arbitration agreement exists and is valid even if underlying contract did not come into effect); *Award in ICC Case No. 5943*, 123 J.D.I. (Clunet) 1014 (1996); *Interim Award in ICC Case No. 4145*, XII Y.B. Comm. Arb. 97, 100 (1987); *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry Case of 9 July 1984*, XVIII Y.B. Comm. Arb. 92, 94-95 (1993); *Elf Aquitaine Iran v. Nat'l Iranian Oil Co., Preliminary Ad Hoc Award of 14 January 1982*, XI Y.B. Comm. Arb. 97, 102 (1986) ("autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations"); *Texaco Overseas Petroleum Co. v. Libyan Arab Repub., Preliminary Ad Hoc Award on Jurisdiction of 27 November 1975*, IV Y.B. Comm. Arb. 177, 179 (1979) (tribunal rejected argument by Libyan government that nationalization had rendered concession agreements void and arbitration clauses within those concession agreements were therefore also invalid).

608) The topic of competence-competence is discussed below. *See*Chapter 7*et seq*.

609) *See*§3.03.

610) *See*§3.03[A][1]; §§3.03[A][2][a]-[g].

611) *See*§3.03[A][2][b][ii](3); §§3.03[A][2][c]-[e].

612) Svernlov & Carroll, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8(4) J. Int'l Arb. 37, 49 (1991). *See also*§3.02[E]; Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 Ford. Urb. L.J. 167, 195-96 (1999) ("donning their magician's robes, a majority of Justices [in *Prima Paint*] pretended that the fraud arguably invalidating a contract has no effect on the validity of an arbitration clause within the contract"); Mayer, *The Limits of Severability of the Arbitration Clause*, in A. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 261 (ICCA Congress Series No. 9 1999); Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 131 (1996) ("separability doctrine is legal fiction" that deprives arbitration of its consensual basis).

613) S. Schwebel, *International Arbitration: Three Salient Problems* 1 (1987) (describing critics).

614) *See*§§3.03[A]*et seq*.

615) *See also*§3.03[A][2][b][ii].

616) *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000).

617) Examples where this has occurred are not uncommon and are discussed above. *See*§3.03[A][2][b][ii](3); §§3.03[A][2][c]-[d]; *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477 (9th Cir. 1991); *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 754-55 (7th Cir. 1994); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); A. Samuel, *Jurisdictional Problems in International Commercial Arbitration* 174 (1989) ("[I]t can happen that, during contractual negotiations, the arbitral clause is unequivocally accepted by both parties and then a dispute arises as to whether agreement was ever reached over the substantive contract. In such a situation, it is submitted that the dispute concerned should be referred to arbitration for both theoretical and practical reasons."). Equally, there will be many instances where the parties did *not* conclude an arbitration agreement, separately and without regard to the underlying contract. *See*§3.03[A][2][b][ii](3).

618) *See*§3.03[A][2][b][ii](2) & §§7.03[E][5][b]-[c] (United States); §3.02[B][3][f] & §3.03[A][2][c] (England); §3.02[B][3][a] & §3.03[A][2][f] (Germany); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (U.S. S.Ct. 2006); *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords); *Judgment of 23 May 1991*, III ZR 144/90 (German Bundesgerichtshof).

619) *See*§3.03[A][2][b][ii](2); §3.03[A][2][c]; §3.03[A][2][f].

620) *See*§3.03[A][2][b][ii](2); §3.03[A][2][c]; §3.03[A][2][f]. There are certain defenses that cannot readily be formulated, based upon the same facts, for both the underlying contract and the arbitration agreement. These include unconscionability and indefiniteness, where, by definition, different contractual provisions are at issue in challenges to the underlying contract and arbitration agreement.
621) *See*§3.03[A][2][b][ii](2); §3.03[A][2][c]; §3.03[A][2][f].
622) *See*§3.03[A][2][b][ii](3); §§3.03[A][2][c] & [g]; §§3.03[C][2][f]-[g]; §5.04[D][7][d].
623) *See*§3.03[A][2][b][ii](3); §3.03[A][2][c]; §3.03[A][2][f]; §5.04[D][8].
624) *Fiona Trust & Holding Corp.* [2007] UKHL 40, ¶17. *See also Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891, ¶29 (English Ct. App.) ("*non est factum* or the sort of mistake which goes to the question whether there was any agreement ever reached"), *aff'd*, [2007] UKHL 40 (House of Lords).
625) *See*§3.03[A][2][b][ii](3); §§3.03[A][2][c] & [g].
626) *See also*§3.03[A][2][b][ii](3); §§3.03[A][2][c] & [g].
627) *See*§3.03[A][2][b][ii](3). In principle, parties would not ordinarily choose to conclude an arbitration agreement without, or in advance of, concluding an associated commercial contract.
628) *See*§3.02[B][3][f].
629) *See*§3.03[A][5]; S. Schwebel, *International Arbitration: Three Salient Problems* 1 (1987).
630) *See*§3.03[A][5]; S. Schwebel, *International Arbitration: Three Salient Problems* 1 (1987) (describing critics).
631) *See*§3.03[A][2][a]; §3.03[A][2][b][ii](3); §3.03[A][2][g]; §3.03[A][5]; §3.03[D]; §5.04[A]; §§5.04[D][7][a]-[c]; §5.06[C][7].
632) *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, ¶17 (House of Lords) (where party claims forgery of signature on underlying contract "the ground of attack is not that the main agreement was invalid. It is that the signature of the arbitration agreement, as a 'distinct agreement [§7],' was forged").
633) These various flaws are discussed in detail below. *See*Chapter 5*et seq*.
634) *See*§3.01; §§3.03[A][2][a]-[b]; §§3.03[B] & [F]. Issues of competence-competence are discussed in greater detail below. *See*Chapter 7*et seq*.
635) That is mandatorily required by Article II of the New York Convention and Article 8 of the UNCITRAL Model Law (and equivalent provisions of other national arbitration statutes). *See*§3.03[A][2][b][iv]; §7.02[F]; §7.03[E][5][c].
636) *See*Chapter 7*et seq*.
637) *See*§7.03[E][5].
638) *See*§3.03[A][2][b][ii](2) & §7.03[E] (United States); §3.02[B][3][f] & §7.03[F] (England); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (U.S. S.Ct. 2006); *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER (Comm) 891 (English Ct. App.), *aff'd*, [2007] UKHL 40 (House of Lords).
639) *See*§3.03[A][2][b][ii](2).
640) *See*§3.03[A][2][b][ii](1); §3.03[A][2][b][iv]; §§3.03[A][2][c] & [g].
641) *See*§7.03[I][3].
642) *See*§7.03.
643) *See*§3.03[F]; §7.02[F]. This has consequences, most importantly, for the possibility of judicial review of the arbitral award on questions regarding the validity or existence of the underlying contract or arbitration agreement. *See*§7.03[E][5]; §7.03[I].
644) *See*§§4.02[A]-[B].
645) *See*§3.02[E]; §3.03[A][5].
646) There are limited instances in which the arbitration agreement is necessarily subject to a different law than the underlying commercial contract. These involve the application of the substantive legal rules of the New York Convention (or other international arbitration conventions) to arbitration agreements. *See*§2.01[A][1][a]; §4.04[A][1][b]. The terms of these instruments are applicable only to agreements to arbitrate, and not to other types of agreements.
647) *See*§4.04[A][2][d]; §4.04[B][6][a].
648) *See*§4.02; §4.04[B][1].
649) *See*§§4.04[A]-[B]; §4.04[B][6][d]; §5.06[A][2]; §6.05.
650) The choice-of-law issues that arise from international arbitration agreements are discussed in detail below. *See*Chapter 4. They are discussed separately in connection with various substantive issues relating to international arbitration agreements (*e.g.*, capacity, formation, validity). *See*§4.04; §4.05; §4.06; §4.07.
651) *See*§3.01; §4.02.
652) *See*§1.02[A]; §1.05; §§3.02[B][1]-[2]; §3.02[B][3][f].
653) *See*Chapter 5*et seq*. As discussed above, one premise of historic rules denying effect to arbitration agreements was the notion that such agreements were of a different nature from, and subject to different legal rules than, other types of contracts. *See*§1.01[A][4]; §§1.01[B][4]-[5]; §1.04[B][2].
654) *See*§1.01[A][4] (Roman law); §1.01[B][5] (19th century U.S. law); §1.01[B][4] (19th century French law).
655) *See*§2.01[A]; §5.01[B].
656) *See*§5.02[A][2] (especially §§5.02[A][2][h]-[i]); New York Convention, Arts. II(1), (2); European Convention, Art. I(2)(a).
657) *See*§2.01[A]; §5.01[B][2]. New York Convention, Arts. II(1), (3); European Convention, Arts. V(1), VI(2).

658) That is true, for example, under the UNCITRAL Model Law (*see*§§5.02[A][5][a]-[b]); in the United States, where the FAA prescribes special rules with regard to the validity of arbitration agreements (*see*§5.01[C][2]; §5.02[A][5][c]); in Switzerland, where the Swiss Law on Private International Law prescribes special rules regarding the form and validity of international arbitration agreements (*see*§5.01[C][3]; §5.02[A][5][d]); in England (*see* §5.01[B][5]; §5.02[A][5][e]); and in France (*see* §5.01[C][4]).

659) *All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, Award in USSR Chamber of Commerce & Industry of 9 July 1984*, XVIII Y.B. Comm. Arb. 92, 97-98 (1993); §7.02[D].

660) *Sojuznefteexport*, XVIII Y.B. Comm. Arb. at 97.

661) *See*§4.02; *Preston v. Ferrer*, 552 U.S. 346, 363 (U.S. S.Ct. 2008); *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir. 2001); *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477 (9th Cir. 1991); *Harbour Assur. Co. (U.K.) Ltd v. Kansa Gen. Int'l Ins. Co.* [1992] 1 Lloyd's Rep. 81 (QB) (English High Ct.), *aff'd*, [1993] 3 All ER 897 (English Ct. App.); *Judgment of 24 March 1976, Hermansson v. AB Asfalbelaeggnigar*, 1976 NJA 125 (Swedish S.Ct.).

662) *See*§4.04[A][4][c].

663) *See*§§3.03[B]-[C].

664) *See*§§5.02*et seq*.

665) *See*§§5.02*et seq*.

666) *See*§§5.04[D][3]-[5].

667) *See*§§5.04[D][1]-[2].

668) *See*§5.06[C][5].

669) *See*§5.04[D][7].

670) *See*§5.06[C][7].

671) *See* §5.06[C][6].

672) *See*§5.06[C][7].

673) *See*§5.06[C][8].

674) *See*§3.03[A][2][b][ii](2).

675) The circumstances giving rise to such invalidity are discussed in detail below. *See*§5.06.

676) There is substantial authority, under various national laws, that a party's repudiation of its arbitration agreement brings that agreement to an end (at least if the counter-party accepts the repudiation). *See*§5.06[C][7].

677) There are limited circumstances in which the specific terms of the parties' agreement to arbitrate can become obsolete or impossible to perform. *See*§5.06[C][8]. In many cases, this will not result in the invalidity of the parties' basic agreement to arbitrate, which can be given effect through alternative terms. Nonetheless, there are circumstances in which the parties' agreement to arbitrate will become ineffective or incapable of being performed. *See*§5.06[C][8].

678) *See*§§3.02[B][3][c] & [i].

679) Schwebel, *Anti-Suit Injunctions in International Arbitration: An Overview*, in E. Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration* 13 (2005) ("The contractual right of an alien to arbitration of disputes arising under a contract to which it is party is a valuable right, which often is of importance to the very conclusion of the contract.").

Under many national laws, the invalidity or illegality of a fundamental term of an agreement can result in the invalidity of the overall agreement. *See Restatement (Second) Contracts* §184(1) (1981) ("If less than all of an agreement is unenforceable under the rule stated in §178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange."); German BGB, §139 ("If a part of an agreement is invalid, then the overall agreement is invalid, if it cannot be assumed that it would have been concluded without the invalid part.").

680) *See*§5.04[D][7][f].

681) *See*§7.02[F].

682) N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶2.97 (5th ed. 2009). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 453 (2d ed. 2013) ("The doctrine of separability resolves the conundrum perceived by some of how a tribunal possesses jurisdiction when the arbitration clause that allegedly confers jurisdiction is part of a contract that is allegedly null."); Trukhtanov, *The Proper Law of Arbitration Agreement – A Farewell to Implied Choice?*, 2012 Int'l Arb. L. Rev. 140, 142 ("[A] habit has grown of relying on separability for purposes far removed from preservation of arbitrators' jurisdiction in circumstances where the principal contract is ineffective, invalid or non-existent. Separability is becoming almost a licence to ignore the rest of the contract and view the arbitration clause as a free-standing agreement.").

683) *See*§7.02[F].

684) *See*§7.02[F].

685) *See*Chapter 7*et seq*.

686) European Convention, Arts. V(3), VI(3) (national courts ordinarily "shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made"); §7.02[A][2].

687) UNCITRAL Model Law, Art. 16(1) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."); §3.02[B][3][e]; §7.02[B][1]; §7.03[A].

688) *See*§3.02[B][3]; §§7.03[I]*et seq.* discussing power of arbitral tribunals to consider jurisdictional challenges to the existence and validity of the arbitration agreement itself.

689) As discussed below, these considerations include the view adopted in most developed legal systems, that it is procedurally efficient to permit at least some challenges to arbitral jurisdiction to be decided initially by the arbitrators. These factors also include the general international acceptance by national legislatures and courts, as well as business enterprises, of the principle that an arbitral tribunal possesses a separate category of jurisdiction to address and decide issues concerning its own jurisdiction, separable from its jurisdiction to resolve substantive disputes. This conception of the "separability" of a tribunal's jurisdiction is conceptually-related to the separability doctrine, but involves additional and distinct considerations. *See*§§7.02[A]-[B] & [F].

690) *See*§7.03[A][2][b]; §7.03[B][1].

691) *See*§§7.03[C]-[H].

692) *See*§7.03.

693) Further, there will also be cases where the separability presumption and competence-competence principle intersect: in particular, as discussed below, an arbitral tribunal may be competent to initially consider allegations that impeach both the underlying contract and the arbitration agreement. *See*§§3.03[A][2][b][i]-[ii]; §§3.03[A][2][c], [e]-[f]. In these cases, significant issues are raised regarding the preclusive effects of its award on these matters. *See*§7.03[A][5][b]; §7.03[E][7][a]; §7.03[I][5]. That is, if a tribunal considers a claim that no underlying contract or arbitration agreement was ever formed, issues as to the *res judicata* effect of the negative jurisdictional award will arise. In principle, the tribunal's negative jurisdictional award should be binding and preclusive on all the parties.

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Chapter 23: Form and Contents of International Arbitral Awards

[Chapter 23] (1)

P 3013 An arbitral award possesses particular legal significance, conferred by both international arbitration conventions and national law. Concurrent with producing ● these legal effects, most national laws require that arbitral awards satisfy a number of important legal requirements, as to form, content and other matters. This Chapter addresses the categories of international arbitral awards, the form requirements applicable to arbitral awards, the requirement for a "reasoned" arbitral award, the possibility of majority and other non-unanimous awards, dissenting, concurring and other separate opinions, and the types of relief typically granted in arbitral awards. The subjects of annulment and recognition of international arbitral awards, as well as the *res judicata* effects of awards, are discussed in separate Chapters below. (2)

§ 23.01 CATEGORIES OF INTERNATIONAL ARBITRAL AWARDS (3)

Most national laws and institutional arbitration rules provide for a variety of different types of arbitral "awards," (4) including final awards, partial awards, interim awards, consent awards and default awards. Each of these categories of arbitral award is discussed below. Unfortunately, there is some inconsistency in the usage of these various terms; as discussed below, different authorities, and different legal systems, sometimes adopt different meanings for the same term, or the same meaning for different terms, requiring that these labels be used with care. (5)

[A] Final Awards

The term "final award" is used in a number of different senses, and has often led to confusion. It is important to avoid such confusion by being clear about those different meanings.

First, as discussed above, all arbitral awards can be regarded as "final," in the sense that they finally resolve a particular claim or matter with preclusive effect. (6) Even awards granting provisional relief can be considered to be "final," notwithstanding the fact that they will be superseded by subsequent relief, because they finally dispose of a particular request for relief. (7) Much the same is true with regard to interim awards that decide a particular issue (*e.g.*, choice of applicable law) without granting or denying a party's
P 3014 underlying claim. (8) In this sense, every award rendered during the course of an ● arbitration, before its final conclusion, is "final" because of the preclusive effect that it enjoys. (9)

Second, as also discussed below, some international arbitration conventions and national arbitration statutes provide for the recognition of only "final" awards, and not of other, "non-final" awards. (10) Used in this sense, a "final" award refers only to those awards that have achieved a sufficient degree of finality in the arbitral seat (most obviously, by being granted confirmation or *exequatur*) or that are no longer subject to appeal or annulment in the arbitral seat. (11) Typically, only after an award has been granted *exequatur*, or after appeals from the award have been rejected (or become untimely), is it categorized as "final." (12) (The categorization of an award as "final," in this sense, should not be confused with the categorization of an award as "binding," as generally required for recognition of awards under the New York Convention. (13))

Third, and also confusingly, there is a further usage of the term "final" in connection with arbitral awards. The concept of a "final award" must be distinguished from an "award" that is "final," with the latter two terms being used together in the sense of an award no longer being subject to judicial review. As its name suggests, the term "final award" refers to the last award in an arbitration, which disposes of all (or all remaining) claims and terminates the tribunal's mandate. (14) This is a "final" award in the sense used by Article 32(1) of the UNCITRAL Model Law. (15) A "final" award in this sense is also to be distinguished from "partial awards," which "finally" resolve part (but not all) of the parties' claims, and which may become sufficiently "final" for recognition, in each case without terminating the arbitration. (16)

Most national legislation is consistent with this terminology; (17) these are also the formulae used in most institutional rules. (18) Under this approach, a "final award" is the
P 3015 ● award that disposes of either all the parties' claims or all the parties' remaining claims in the arbitration. Both such a "final award" and earlier "partial awards" are "final," and may be capable of recognition and enforcement, but only a "final award" concludes the arbitration and renders the tribunal *functus officio*. (19)

It follows from the above that an arbitral tribunal should not purport to make a "final

award" unless it has considered and disposed of all the parties' claims in the arbitration (including claims for costs and interest). If a tribunal fails to resolve all the parties' claims, then its final award will be subject to annulment or non-recognition on grounds of *infra petita* or otherwise. (20) Alternatively, under some national laws, the award may be subject to an application for remission to the tribunal for disposition of the remaining claims or the tribunal may be authorized to issue an "additional award." (21)

[B] Partial Awards

A "partial award" is an arbitral decision that finally disposes of part, but not all, of the parties' claims in an arbitration, leaving some claims for further consideration and resolution in future proceedings in the arbitration. (22) As to the claims that it disposes of, a partial award may become final and binding on the parties and may be recognized and enforced (or annulled). (23) Under many national laws, a "partial" award differs from an "interim" award in that it finally decides and disposes of a particular claim (*e.g.*, awards damages for a particular breach of contract), while an interim award decides an issue (*e.g.*, choice of law, liability) relevant to disposing of a claim, but does not finally dispose of the claim. (24)

P 3016 ● Many national laws provide expressly that an arbitral tribunal has the power to make partial awards (absent contrary agreement). (25) For example, the Swiss Law on Private International Law provides that "unless the parties have agreed otherwise, the arbitral tribunal may make partial awards." (26) Other arbitration statutes are similar. (27)

Institutional rules also generally provide for the possibility of partial awards. Article 34(1) of the 2010 UNCITRAL Rules provides that, "[t]he arbitral tribunal may make separate awards on different issues at different times." (28) Other institutional rules are similar. (29) There is no question but that such provisions validly grant the arbitrators authority to make partial awards, even in the absence of statutory authorization; this is merely an application of the parties' more general procedural autonomy. (30)

Moreover, even in the absence of statutory authorization or institutional rules permitting partial awards, a tribunal has the power to take such an approach (except in the case of contrary agreement by the parties). (31) This authority is inherent in the arbitrators' mandate to resolve the parties' dispute in an efficient manner. (32) Only clear and unambiguous language should be permitted to produce the unusual and inefficient result of denying arbitrators the authority to make partial awards.

P 3017 ● Partial awards are typically used for separate determinations of specified claims, with other claims reserved for further proceedings. (33) For example, a tribunal might render an award rejecting the claimant's contractual claims or upholding such claims and awarding damages, while leaving for subsequent proceedings the parties' noncontractual claims. Alternatively, a tribunal might deal with some of the parties' contractual claims, while leaving other contractual claims for later proceedings.

There are many circumstances where partial (or interim) awards are important to a constructive and efficient arbitral procedure. As with partial or interlocutory decisions in judicial proceedings, such awards allow a tribunal to decide a complex case in steps, enabling it and the parties to focus on and resolve issues sequentially, rather than in a single decision. (34) This sometimes has very significant advantages in terms of efficiency and speed.

On the other hand, if the parties' arbitration agreement excludes partial awards, and requires a single award disposing of the entire dispute, that agreement must be given effect. (35) In practice, parties generally do not exclude the possibility of partial awards in their arbitration agreements (and, on the contrary, do the opposite, by incorporating institutional rules that provide for partial awards). (36) In the rare cases that this approach is considered, it is usually in an effort to ensure a "fast-track" process that resolves all disputes in a single, concentrated proceeding.

It is also conceivable that a tribunal would abuse its authority to make a partial award (or refuse to make a partial award). (37) In general, a challenge on this basis would be exceedingly difficult to sustain.

P 3018 ● A tribunal's decision whether or not to bifurcate proceedings, and to resolve certain issues before others, usually turns on minute assessments of efficiency that are the domain of the arbitral tribunal, where national courts should virtually never interfere. Some institutional rules encourage the use of partial awards in certain instances (particularly jurisdictional issues). (38) Even in these cases, however, it is highly unlikely (and undesirable) that a tribunal's exercise of its procedural discretion would be second-guessed by a national court.

The overwhelming trend of modern arbitration legislation, and national court decisions, has been to permit the recognition and enforcement of partial awards that finally dispose of a particular, discrete aspect of a dispute (*e.g.*, a particular set of claims), even if other aspects of the dispute remain to be decided in further arbitral proceedings. (39) The decisive issue is whether the parties' arbitration agreement permits bifurcation and partial awards (which, as discussed above, is the case absent express contrary agreement). (40)

The same analysis applies to annulment proceedings under most national laws, including the UNCITRAL Model Law: a partial award, like other forms of awards, is subject to annulment under Article 34 of the Model Law. In one commentary's words, "[s]etting aside proceedings under Article 34 are admissible against all types of arbitral awards,
P 3019 irrespective of whether they completely terminate the proceedings or are ● awards finally determining certain claims only." (41) Among other things, separate awards on costs may be the subject of annulment proceedings. (42)

[C] Jurisdictional Awards

As discussed above, national arbitration legislation, institutional rules and customary practice recognize the arbitrators' authority to consider and decide jurisdictional disputes involving challenges to the existence, validity and scope of a putative agreement to arbitrate. (43) There is uncertainty regarding the characterization of the arbitrators' jurisdictional rulings and, in particular, whether or not the tribunal's decision is characterized as an "award," rather than an "order" or "direction." (44)

Positive jurisdictional decisions (upholding an arbitral tribunal's jurisdiction) are generally subject to interlocutory judicial review. (45) Nonetheless, it is unclear whether those decisions are "awards," subject to annulment and recognition, or interim rulings that are either not subject to immediate judicial review or subject only to specialized judicial review (for example, under Article 16(3) of the UNCITRAL Model Law). (46) As discussed above, the better view is that positive jurisdictional rulings are properly characterized as awards, generally subject to annulment, recognition and enforcement like other awards, but national court authority on the subject remains divided. (47)

Similarly, courts in a few jurisdictions have held that negative jurisdictional rulings are "non-awards," (48) while other courts have held that, although constituting an "award," a negative jurisdictional decision cannot be the subject of judicial review in an annulment proceeding. (49) As discussed above, these decisions are unpersuasive; the better view is that negative jurisdictional decisions should be categorized in the same manner as positive jurisdictional rulings, namely, as awards.

[D] Interim Awards

As noted above, national law, institutional rules and arbitral practice also provide for "interim awards," also sometimes referred to as "interlocutory" awards. (50) As with other
P 3020 ● terminology in this field, there is sometimes unfortunate confusion about the meaning of this phrase. (51)

As a practical matter, the term "interim award" is often used synonymously with "partial award," in the sense that an award is made, disposing of certain claims for relief, prior to disposition of all the issues (*i.e.*, the award is made at an interim stage in the arbitration). In this usage, an interim award is no different than a partial award. (52)

The term "interim award" is sometimes used more narrowly to refer to an award that does not dispose finally of a particular claim (*e.g.*, one of several claims for damages arising from several alleged breaches of contract), but instead decides a preliminary issue relevant to disposing of such claims (*e.g.*, choice of law, liability, construction of a particular contractual provision). In this sense, an award is "interim" because it is a step towards disposing of a portion of the parties' claims (like a partial award), but does not purport to make a final decision either granting or rejecting those claims.

The phrase "interim award" is also used with respect to decisions granting provisional relief. (53) In this sense, an award is "interim" because it is subject to subsequent revision
P 3021 ● by the arbitral tribunal, either in the final award or in a revised decision on provisional measures. (54) In this usage, an "interim award" is distinguishable from a "partial award" in that the former does not provide final resolution of part of the dispute, but resolution of all of a claim for provisional relief, subject to later revision.

There is little point to debating this terminology at length. The better practice is to explain with precision what is meant by a reference to an "interim award," and in particular whether the award grants provisional relief, finally decides a particular issue, or does something else. Confusion could be reduced by use of a reference such as "interim award of provisional relief," which specified clearly what the tribunal's decision entailed.

Some legal systems do not permit applications to annul (or recognize) interim awards, although they do permit applications to annul (and recognize) partial awards. That is true of Austria, where judicial decisions have consistently held that interim awards of provisional relief are not subject to annulment or recognition; (55) Germany, where similar results have been reached; (56) and Australia, where the Queensland Supreme Court held that an interim award of provisional relief "is not an 'arbitral award' within the meaning of the Convention nor a 'foreign award.'" (57)

As discussed above, however, the better view of the New York Convention, as well as national arbitration legislation, is that interim awards of provisional relief "finally" dispose of requests for such relief and should be capable of recognition and enforcement in national courts, like other awards granting relief. (58) The same conclusion applies to a tribunal's reasoned decision regarding a significant legal and factual issue (*e.g.*, liability,

choice of law). (59)

[E] Consent Awards

P 3022 Parties not infrequently arrive at agreements to settle ongoing arbitrations. Indeed, one of the perceived benefits of the arbitral process is that the arbitration can be structured so as to encourage settlement and that the confidentiality and (sometimes) collegiality of the arbitral process can facilitate settlement efforts. (60)

[1] Reasons for Consent Awards

If parties succeed in reaching a negotiated resolution of their dispute(s), one option is to simply dismiss the arbitration, recording the terms of the settlement in an agreement to this effect. Alternatively, however, parties may wish to obtain a "consent award" (or "award on agreed terms"), which records some or all of the terms of their settlement. (61)

A consent award is often perceived as providing a greater degree of certainty and enforceability than a simple settlement agreement: in particular, a consent award may be capable of being enforced as an award (*e.g.*, if it contains a payment obligation), (62) rather than requiring suit for breach of contract. (63) A consent award may also have practical benefits, such as conferring a degree of formality on the parties' settlement agreement. (64)

P 3023 Many arbitration statutes expressly allow for the possibility of consent awards. (65) Article 30(1) of the UNCITRAL Model Law provides that, if the parties reach a settlement during the arbitration, the tribunal "shall … if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms." (66) Similar provisions exist in other arbitration legislation, (67) or are accepted by national court decisions. (68) Most institutional rules also provide that arbitral tribunals may make consent awards if requested to do so by the parties. (69) Both national laws (70) and institutional rules (71) provide that any general requirement that arbitral awards be "reasoned" does not apply to consent awards.

[2] Arbitral Tribunal's Power to Make Consent Award

The prevailing approach of both institutional rules (72) and national law (73) is to permit an arbitral tribunal to make a consent award if requested to do so by the parties, but not to expressly require the arbitrators to do so. On the contrary, most national statutes and institutional rules leave the arbitrators with the choice of whether or not to make a consent award when requested by the parties to do so. The UNCITRAL Model Law is representative, with Article 30(1) granting the arbitrators discretion to make (or not to make) a consent award if requested by the parties during the course of an arbitration. (74)

An arbitral tribunal has the authority to make a consent award only if the parties commenced an arbitration regarding an actual dispute. The authority to make a consent award does not extend to cases where the parties settle a dispute and then subsequently commence an arbitration solely for the purpose of recording the settlement as a consent award. (75) Some courts have explained this result on the basis that no "dispute" exists to
P 3024 be referred to arbitration where a claim is settled before arbitral proceedings are initiated. (76) In Model Law jurisdictions, a few states have amended Article 30 to permit the making of consent awards where a settlement agreement is reached in the course of conciliation or mediation proceedings. (77)

Article 30(1) of the Model Law does not impose formalistic restrictions on the arbitrators' consideration of requests to make consent awards. One arbitral tribunal granted the parties' request to reopen proceedings for the purpose of recording a settlement agreement and make it in the form of a consent award. (78) That is an appropriate exercise of the arbitrators' procedural discretion and is fully consistent with Article 30(1).

On the other hand, Article 30(1) imposes minimal formal requirements for a consent award: in order for Article 30(1) to apply, a tribunal must "record" the parties' settlement "in the form of an arbitral award on agreed terms"; in turn, Article 30(2) incorporates the generally-applicable formal requirements of Article 31. (79) It is not sufficient that parties merely conclude a settlement agreement; rather, the tribunal must take the further, affirmative action of recording that settlement in an instrument satisfying the formal requirements of an award. Consistent with the language of Article 30(1), some Model Law courts have held that only a settlement agreement, which has been recorded in the form of an award on agreed terms pursuant to the formal requirements of Article 30(2) and that stated it was an award on its face, could be recognized under Article 36; a mere record of the settlement is insufficient. (80)

[3] Arbitral Tribunal's Power to Refuse to Make Consent Award

It is sometimes suggested that the tribunal is subject to the parties' agreement and should therefore be obliged, absent illegality, to make a consent award if so requested by the parties. That misconceives an arbitral tribunal's adjudicatory role: the parties are free to settle their claims as they wish, but they are not free to require that the tribunal exercise its own authority to approve that settlement.

A tribunal may consider that a consent award would improperly affect the rights of third parties, or public interests, which had not been (and could not be) spoken for in the arbitration. In these circumstances, the issuance of a consent award might be considered as giving effect to a private settlement to the detriment of either other parties or the law. The drafting history of the Model Law suggests that an arbitral tribunal could refuse to make a consent award in cases of fraud, illegality, or gross unfairness. (81) Judicial authority in Model Law jurisdictions is similar. (82)

P 3025 It is unclear whether these concerns warrant refusing to make a consent award. In principle, the arbitral tribunal's mandate extends to the issuance of a consent award, resolving the parties' dispute (which is the fundamental objective of the arbitral process). Only where there is a compelling reason for declining to make an award, including a consent award, may a tribunal properly do so: the objective of international arbitrations is to resolve disputes, which is what consent awards accomplish, and tribunals should in principle endeavor to advance this objective by making such awards. (83)

In practice, tribunals rarely decline to make consent awards. The fundamental purpose of arbitration is to provide a means for resolving disputes and tribunals are not only obliged, but almost always willing, to contribute to this objective insofar as possible, including by making a consent award. Only if there are well-founded bases for refusing to approve a settlement – such as indications of fraud, corruption, or violation of applicable mandatory law (*e.g.*, exchange controls, money-laundering regulations, competition laws) should a tribunal refuse a request for a consent award. (84)

[4] Legal Status of Consent Awards

If a consent award is made, questions may arise as to whether it is to be treated as an arbitral award for purposes of the New York Convention (or other international treaties) and national arbitration legislation. There is little authority on the topic.

The New York Convention does not address the question of whether a consent award qualifies as an "arbitral award" for purposes of Article V. (85) Although a consent award is
P 3026 intended as an award (in that it is a formal written instrument made and signed by the arbitrators that finally disposes of the parties' claims and terminates the arbitration), (86) it arguably lacks the adjudicative character required of an "award" (in that it is not the product of adversarial proceedings and is not "reasoned" (87)).

The better view is that a consent award should be regarded as an award, within the meaning of the Convention and national arbitration legislation (including the UNCITRAL Model Law), insofar as the rights of the parties to the arbitration are concerned. (88) Parties are fully entitled to settle their claims, including in arbitration, (89) and if they do so in the form of a consent award, after having previously presented their respective positions in an adversarial process, that award should be fully binding and enforceable on the parties to the arbitration.

This is confirmed by the text of most national arbitration statutes. Article 30(2) of the Model Law is representative, providing that a consent award "has the same status and effect as any other award on the merits of the case." (90) This text leaves no doubt but that consent awards are subject to recognition, confirmation and enforcement in the same manner as other arbitral awards. (91) Conversely, a consent award should also in principle be subject to annulment, again like other awards. (92)

Nevertheless, great care should be taken in recognition and enforcement of consent awards insofar as third party rights are arguably affected. In general, an award will only have preclusive effects on the parties to the arbitration. (93) There may be unusual
P 3027 circumstances, however, where a consent award is alleged to affect third parties; in these circumstances, recognition of the award under international arbitration conventions and/or arbitration statutes should be subject to particular scrutiny.

[F] Default Awards

As discussed above, arbitral proceedings sometimes involve one party's failure or refusal to appear and present its case in the arbitration. (94) A party's default does not prevent the arbitral tribunal from considering the parties' claims and resolving their dispute. On the contrary, most national arbitration legislation (95) and judicial authority (96) provides that arbitral tribunals may make default awards and that such awards are subject to recognition (and annulment), just as contested awards are. The fact that a party refuses to participate in arbitral proceedings, and an award is rendered against it in its absence, has also repeatedly been held not to constitute a denial of procedural rights under either Article V(1)(b) of the New York Convention or developed arbitration statutes. (97)

As discussed above, most institutional rules provide for default proceedings and awards if one party refuses to participate in the arbitration. (98) Even without express authorization from national law or institutional rules, a tribunal has the inherent authority to conduct proceedings in the absence of one party and to make a default award. (99) Doing so is an essential element of adjudicatory power and is necessary in order to ensure an effective arbitral process which one party cannot frustrate or obstruct through a refusal to participate.

As also discussed above, an arbitral tribunal may not simply accept the non-defaulting

party's claims, without independently reviewing them and an evidentiary record. (100) In
P 3028 this regard, a default proceeding in an arbitration is in concept no different from a proceeding in which both parties participate: the tribunal must afford both parties the opportunity to present their cases and then make an award based upon the evidence that has been submitted and the law. (101) That award then has precisely the same status and effects as an award made after proceedings in which both parties participated. (102)

[G] Additional Award

As discussed below, many arbitration statutes and institutional rules provide for the making of "additional awards" (sometimes also referred to as "complementary" or "supplemental" awards), after what was intended as the final award is made. (103) These additional awards are made, at the request of a party, when a tribunal's final award mistakenly fails to dispose of a claim that had been asserted in the arbitration. An additional award is treated no differently from other "awards," (104) and is subject to applications for annulment and to recognition and enforcement. (105)

[H] Corrections and Interpretations

As also discussed below, many arbitration statutes and institutional rules provide for the possibility of corrections or interpretations by an arbitral tribunal of its award(s). (106) These corrections and interpretations should themselves have the same status as an award (107) and should be capable of annulment, recognition and enforcement under both international arbitration conventions and national law. (108)

P 3029 ●

[I] Termination of Arbitral Proceedings Without Award

Arbitrations are occasionally concluded without an arbitral award. This is typically because the parties agree to settle their dispute (but without a consent award) or because the claimant abandons its claims.

[1] National Arbitration Legislation

Most national arbitration regimes permit the arbitral tribunal to terminate the arbitration without an award in limited circumstances. Article 32(2) of the Model Law provides for the termination of arbitral proceedings by "order" if: (a) the claimant withdraws its claims, "unless the respondent objects thereto and the arbitral tribunal recognized a legitimate interest on his part in obtaining a final settlement of the dispute"; (b) the parties agree to terminate the proceedings; or (c) the continuation of the arbitration has "become unnecessary or impossible." (109) This provision is more detailed than the broadly similar UNCITRAL Rules (discussed below). (110)

Other arbitration legislation is usually silent concerning the termination of arbitral proceedings without an award. (111) For the most part, however, national law provides results comparable to those under the Model Law. That is, the arbitrators may – in limited cases of settlement, impossibility and claimant's withdrawal of its claims – terminate the arbitral proceedings without an award. (112)

The consequences of termination of the arbitration for the parties' claims are generally governed by national law. In principle, there is nothing that should prevent either party from reasserting its claims or counterclaims in a new arbitration; the parties' arbitration agreement remains in effect, notwithstanding termination of the arbitration, (113) and applies to any further claims by either party.

Ordinarily, national law would not prevent either party from reasserting previously-asserted claims or counterclaims. The arbitration (which had been terminated) would not produce an award, capable of being recognized or having preclusive effects; at the same
P 3030 time, termination of the arbitration does not itself ordinarily produce preclusive ● effects. (114) Rather, termination of the arbitration would merely be a withdrawal of both parties' claims and defenses without prejudice to their being reasserted in subsequent proceedings.

[2] Institutional Arbitration Rules

Most institutional rules make express provision for the termination of arbitral proceedings without an award. The 2010 UNCITRAL Rules provide for the arbitral tribunal to "issue an order for the termination of the arbitral proceedings" if the parties agree upon a settlement (115) or if "the continuation of the arbitral proceedings becomes unnecessary or impossible." (116) These provisions allow the tribunal, in appropriate cases, to terminate the arbitration and the arbitrators' mandate without making an award.

Similarly, the LCIA Rules provide for the arbitral tribunal to be "discharged" and "the arbitration proceedings concluded" in the event of a settlement between the parties. (117) The ICC Rules also (impliedly) contemplate termination of arbitral proceedings in the case of a settlement that is not recorded in a consent award. (118) Neither the LCIA Rules nor the ICC Rules provide expressly for the termination of arbitral proceedings, without an award, in other circumstances.

Even absent express authorization in institutional rules for termination of an arbitration,

however, such a power is implicit in the tribunal's procedural authority. (119) The tribunal has the authority, if the parties do not pursue their claims or agree to settle their dispute, to terminate the arbitration.

§ 23.02 FORMAL REQUIREMENTS FOR INTERNATIONAL ARBITRAL AWARDS

Like an arbitration agreement, (120) an international arbitral award must satisfy specialized form requirements. Unless these requirements are complied with, the award is potentially subject to annulment, in the place of arbitration, or, less clearly, non-recognition, in other jurisdictions. As discussed below, the form requirements applicable
P 3031 to international arbitral awards are generally set forth in the arbitration ● legislation of the arbitral seat, (121) and the parties' arbitration agreement, including any applicable institutional rules.

[A] No Form Requirements in International Arbitration Conventions

In contrast to their treatment of arbitration agreements, (122) international arbitration conventions do not generally impose form requirements with respect to arbitral awards. (123) As discussed above, it is implicit in most arbitration conventions that an award will be a written instrument made by the arbitrators: (124) in particular, Article IV(1)(a) of the New York Convention requires presentation of a "duly authenticated original award or a duly certificated copy thereof" as a condition of recognition, presupposing the existence of a written instrument. (125) This provision would presumably allow a Contracting State to deny recognition to a foreign "award" that was not in writing, although oral awards are virtually never made in international arbitration practice. (126)

Although international arbitration conventions do not prescribe form requirements for arbitral awards, they also do not expressly forbid Contracting States from doing so. As discussed below, national arbitration legislation routinely imposes formal requirements on locally-seated arbitrations, (127) and there is no suggestion that the New York Convention (or other international arbitration conventions) were intended to forbid this. (128)

P 3032 ● The New York Convention arguably does not permit Contracting States to impose form requirements on foreign awards as a requirement for recognition (as distinguished from a basis for annulment). That conclusion would rest on the fact that Article V includes no exception based on a failure to satisfy formal requirements of the recognition state (or otherwise). (129)

Consistent with this conclusion, states have in practice virtually never invoked the form requirements of the arbitral seat (or of the judicial enforcement forum) as grounds for denying recognition to foreign arbitral awards. (130) A potential exception involves the requirement that awards be reasoned, (131) although most courts have been prepared to recognize unreasoned awards if this was permitted in the arbitral seat. (132)

[B] Form Requirements in National Arbitration Legislation

Many national laws prescribe mandatory form requirements for international arbitral awards. In general, these provisions require a written and (almost always) reasoned instrument, signed by some or all of the arbitrators, which is dated. In some cases, these requirements are mandatory and parties are not capable of altering them by agreement. In general, these requirements are non-controversial and readily complied with, thus giving rise to few issues of interpretation.

[1] Parties' Autonomy to Alter Form Requirements

The UNCITRAL Model Law is representative of most national arbitration statutes' treatment of form requirements. It provides that an award (a) "shall be made in writing," (133) (b) "shall be signed by the arbitrator or arbitrators," (134) (c) "shall state its date and the place of arbitration," (135) and (d) "shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms." (136) With the exception of the requirement for a reasoned award, these form requirements are mandatory under the Model Law. (137) Although every jurisdiction imposes its own particular form requirements for awards made locally, most other arbitration legislation is broadly similar. (138)

P 3033 ● In the United States, the FAA does not impose any express form requirement(s), although it presumes that awards will be written. (139) This is in contrast to certain U.S. state law requirements (likely preempted by the FAA) that contain form requirements. (140)

In some jurisdictions, the parties' autonomy to agree upon the form requirements applicable to the award is expressly recognized. In contrast to the generally mandatory provisions of the UNCITRAL Model Law, §52(1) of the English Arbitration Act, 1996, provides that "the parties are free to agree on the form of the award." (141) Absent agreement, the English Arbitration Act provides (like the Model Law) that the award shall be in writing, signed and reasoned, and shall provide the date of the award and seat of the arbitration. (142) This approach, giving effect to the parties' agreement, is to be preferred and, where statutory language will permit, other national arbitration statutes should be interpreted

to produce the same result.

[2] Writing and Signature, Place and Date Requirements

For the most part, the form requirements for arbitral awards under national law are readily satisfied and non-controversial. As noted above, most national laws simply require a writing, signature, date and place. Not surprisingly, little debate has arisen concerning these requirements, which are almost always satisfied.

P 3034 [a] Writing and Signature

It is not unusual or controversial that awards must generally be in writing. (143) This is essential both to ensure due reflection by the arbitral tribunal and to record with (hopeful) clarity precisely what the tribunal has decided, both for the parties and for any subsequent judicial enforcement or annulment proceedings. (144)

In some national legal systems, all of the arbitrators are required to sign the award. (145) Where such a requirement exists, it is ordinarily a matter of mandatory law, which prevails over inconsistent institutional rules. (146) Although early authority was sometimes to the contrary, (147) there is no requirement that the arbitrators all sign the award at the same time or when they are physically located in the same place. (148) There is also no requirement that all of the pages of the award be signed and, instead, only a requirement that the final page of the award be signed. (149)

P 3035 Interpreted literally, and without exceptions, the requirement for a signed award by all the members of a multi-person tribunal would give a dissenting arbitrator the wholly-inappropriate power to block the making of an award, by refusing to sign the award. This is not the intention or the effect of such statutory requirements. The real purpose of the signature requirement is to ensure personal attention and responsibility (150) and to provide an evidentiary record.

As discussed below, in most jurisdictions, the award may, if necessary, be signed by either a majority of the arbitrators (151) or by the chairman alone. (152) Where one arbitrator refuses to sign the award, an explanation of the refusal is generally required (from the majority or chairman of the tribunal). (153) National courts have adopted relatively lenient approaches to the requirements for an explanation for the lack of a signature, (154) although there are occasional exceptions (particularly when the arbitrator whose signature is missing did not participate in the tribunal's deliberations). (155)

P 3036 The requirement that the absence of a signature be explained (contained in Article 32(3) of the 1976 UNCITRAL Rules, as well as a number of national arbitration statutes) was misused in the Iran-U.S. Claims Tribunal, which saw "numerous attempts by Iranian judges to turn this rule on its head. In many cases, the Iranian judges insisted on supplying their own statement of reasons for why they refused to sign an award, with the apparent aim of invalidating the award and undermining the Tribunal's legitimacy." (156)

[b] Place

As discussed elsewhere, the place where the award is made can have significant legal consequences, including in determining the forum for an annulment action. (157) To minimize uncertainties, most arbitration legislation requires arbitrators to confirm the place of the arbitration by specifying it in the award; (158) similarly, many arbitration statutes also provide that the award will be deemed to have been made at the place of the arbitration. (159) Consistent with this, it is common practice for arbitrators to specify the location of the arbitral seat on the face of the award, regardless where they sign the award.

As discussed elsewhere, the place where an award is physically signed has been held, in a few older decisions, as affecting the place where the award is "made" for purposes of the New York Convention and some national arbitration statutes. (160) More recent authority almost universally deems that the award is made in the arbitral seat, as selected by the parties' agreement, regardless where it is physically signed by each of the arbitrators. (161)

[c] Date

P 3037 As noted above, most arbitration legislation requires that awards be dated. The date on which the award is made may have consequences for the commencement of the time period for seeking to correct, annul, or confirm the award under applicable national law. (162)

[3] Reasons for Award

The requirement that arbitral awards state their reasons, which is imposed by most developed arbitration statutes, has provoked more discussion than other formal requirements. This requirement typically involves questions more readily considered to be matters of substance, and not form, and is addressed separately below. (163)

[4] Consequences of Noncompliance With Statutory Form Requirements

As noted above, statutory form requirements for arbitral awards are often mandatory. In many instances, failure to satisfy a formal requirement (*e.g.*, to sign or date the award or indicate the place of arbitration) will be capable of invalidating the award in a subsequent annulment proceeding. (164) Such errors are readily capable of correction, where applicable arbitration legislation or institutional rules permit, and this is obviously the preferable course to annulling an otherwise valid award. (165) In many other jurisdictions, arbitration legislation does not provide for annulment based on technical formal defects in the award. (166)

As noted above, states have virtually never relied upon noncompliance with form requirements for arbitral awards as grounds for denying recognition to foreign awards. (167) The only arguable exception is the requirement that for reasoned awards, (168) and, even here, most courts have recognized unreasoned awards if the law of the arbitral seat permitted such awards. (169)

P 3038

[C] Form Requirements Under Arbitration Agreement and Institutional Rules

Arbitral awards must also comply with any form requirements set forth in the parties' arbitration agreement. In general, arbitration clauses themselves do not expressly impose specific or additional form requirements. (170) Nevertheless, institutional rules typically do prescribe form requirements for arbitral awards, although these usually do not differ materially from those set forth in the Model Law.

The UNCITRAL Rules track precisely the form requirements of the Model Law, (171) as do most other modern institutional rules. (172) In contrast, some institutional rules impose more detailed form requirements (which are not generally difficult to satisfy). (173) Noncompliance with these requirements may expose the award to annulment or non-recognition on the grounds that the parties' agreed arbitral procedures were not complied with. (174)

[D] Language of Award

Typically, parties will specify (through their arbitration agreement) the language of the arbitration, which will impliedly extend to the award. (175) Where the parties have not selected the language of the arbitration, the tribunal will do so, again generally impliedly encompassing the language of the award. (176) In both instances, failure to make the award in the requisite language may constitute a defect of form and provide a basis for annulment or non-recognition of the award. (177)

It is possible that national law in the arbitral seat would impose language requirements on the award. (178) If this were the case, the award would be exposed to annulment or non-recognition if it were not in the required language (subject to arguments that, where the parties had otherwise agreed, national law was contrary to Articles II and V(1)(d) of the New York Convention). (179)

P 3039

§ 23.03 REQUIREMENT THAT INTERNATIONAL ARBITRAL AWARDS BE REASONED (180)

It is now a nearly universal principle that, unless otherwise agreed, international arbitral awards must set forth the reasons for the tribunal's decision, as well as containing a dispositive section specifying the relief ordered by the tribunal. This requirement for a reasoned award is reflected in international arbitration conventions, national law and institutional rules, and plays a central role in the international arbitral process.

[A] Requirements for Reasoned Award in International Arbitration Conventions

The New York Convention (like the Inter-American Convention) does not expressly address the subject of reasoned awards. In contrast, Article VIII of the European Convention provides that the parties "shall be presumed to have agreed that reasons shall be given for the award," except where: (a) the parties "expressly declare" to the contrary, or (b) the parties "have assented to an arbitration procedure under which it is not customary to give reasons for awards" and neither party requests reasons. (181) This provision is expressive of the expectations of parties in most contemporary international contexts, and (absent contrary agreement) can be regarded as a general principle of law in the context of international commercial arbitration. (182)

P 3040

[B] Requirement for Reasoned Award in National Arbitration Legislation

Historically, there was no universal rule under many national laws that arbitral awards be reasoned. (183) The traditional rule under English common law was that unreasoned awards were enforceable and the practice of making unreasoned awards was common. (184) Consistent with this, English, U.S., Indian and Hong Kong courts historically did not require that arbitral awards state the arbitrators' reasons for their award. (185) Nonetheless, modern arbitration legislation in most developed jurisdictions – save the United States – has superseded the common law rule and expressly requires that arbitrators give reasons for awards made within national territory, unless otherwise agreed by the parties. (186)

Article 31(2) of the UNCITRAL Model Law is representative of contemporary arbitration legislation, providing that "the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given." (187) Under the Model Law, reasoned awards are the default rule, unless the parties affirmatively agree to the
P 3041 contrary. (188) Other arbitration legislation is similar, (189) while some statutes go ● further, mandatorily requiring reasons to be given in all cases (regardless of the parties' agreement). (190) Similarly, leading institutional rules almost uniformly require reasoned awards, either on a mandatory basis (191) or absent contrary agreement. (192)

The requirement for reasoned awards rests on contemporary assessments of the demands of the adjudicative process. A leading English authority expressed the rationale as follows:

> "By the end of the judgment the whole of the judge's thinking on the facts and the law should have been laid bare, that all who run may read. It should be fair to assume that he has not been led to his decision by matters he has not mentioned. No cards regarded by him as significant should remain face downwards or in the pack. His decision may later be held to have been right or wrong, but at least there should be no real doubt what he decided or why." (193)

Simply put, it is regarded as an essential aspect of the judicial process – and the related
P 3042 adjudicative process of arbitration (194) – that the decision-maker be required to ● explain his or her reasons. This is necessary in order to constrain the power of the decision-maker (reducing the risk of arbitrary, whimsical, or lazy decisions), to enhance the quality of the decision-making process (by requiring thoughtful, diligent analysis) and to provide the parties with the opportunity not only to be heard, but to hear that their submissions have been considered and how they have been disposed of. (195)

Indeed, a reasoned decision, explaining how legal rules apply to factual determinations, is the essence of adjudication, distinguishing it from legislative, executive and other forms of decision-making. (196) These considerations are more, not less, important in the context of arbitral decisions, as compared to judicial decisions, because arbitrators do not have the training, institutional responsibilities and discipline, or appellate oversight, of national court judges. (197)

It has been suggested that the requirement for reasoned awards conflicts with the arbitrator's independence and ability creatively and flexibly to resolve commercial disputes:

> "When we talk about the arbitrator's freedom from reasoned awards, it will frequently be the case that we are really talking about his freedom from over-broad rules or time-honoured categories that might otherwise appear to dictate a result he would prefer to avoid. This is, then, a freedom that makes possible an arbitrator's flexibility in decision-making and a maximum attention to context." (198)

Although there is practical force to this observation, it mischaracterizes the essential character of international commercial arbitration, which is an adjudicative process in which arbitrators apply the law. If parties wish to give an arbitrator "freedom from over-broad rules or time-honoured categories," they agree to arbitration *ex aequo et bono*, which grants arbitrators that freedom from legal rules. If parties do not do so, however, then the arbitrators' mandate is to apply the law – hopefully with a strong sense of the parties' commercial setting and objectives – with the requirement for reasons serving to guarantee the diligence and quality of that adjudicatory process.

[C] Content of Requirement for Reasoned Award Under National Arbitration Legislation

The requirement for reasons under most national arbitration legislation does not demand that the arbitrators write a learned article on the issues in dispute, nor deliver
P 3043 an award of any particular length. Indeed, in some instances, longer is not better, but ● worse, by tending to obscure the real issues and bases for decision. (199) The essential requirement is that the tribunal identify the issues that were dispositive in the dispute and explain, concisely, the thought-process underlying its decision.

There are various formulations for what constitutes a reasoned award. (200) One of the most satisfactory is:

> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award.'" (201)

This requirement for a concisely-reasoned award can be regarded as expressing the parties' presumptive expectations in any contemporary international commercial arbitration. Indeed, a well-reasoned Australian decision adopts precisely this view under the UNCITRAL Model Law:

> "The Model Law, Art. 31(2) ... [does] not say that the arbitrator must deal with every substantial argument put forward by the contending parties. Nor [does it] state that the arbitrator should state the evidence from which he or she draws his or her findings of fact and give reasons for preferring some evidence over other evidence. The reasons required are those for making the award. To the extent that a crisp summary of that is required, I would adopt the statement of principle of Donaldson LJ in *Bremer v Westzucker* [quoted above]." (202)

P 3044 ● Among other things, there is no requirement that a "reasoned" award list the evidence that the parties submit or discuss how the tribunal evaluates each item of evidence. (203) Some courts have also held that an arbitral award need not satisfy the same standard of reasoning as a national court judgment, on the basis that arbitration is designed to settle disputes expeditiously. (204)

The requirement for a reasoned award is also not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards. (205) As discussed below, in a limited number of jurisdictions, awards made in locally-seated arbitrations may be annulled if they are internally-contradictory. (206) This requirement focuses on the dispositive portions, rather than the reasoning, of the award and should not be seen as a form of requirement for clear or consistent reasoning.

It is essential that the requirement for reasons not be turned into a vehicle for substantive review of the arbitral award. Reasons can be short and concise or they can be ill-phrased, unpersuasive and unreflective; but they are still reasons. As long as the award demonstrates that the arbitrators have applied their understanding of the law to their understanding of the facts, the requirement for reasons is satisfied. (207)

It is important to note that, in most developed jurisdictions, the requirement for a reasoned award is not mandatory: parties are free to contract out of this requirement and to agree to the arbitrators' provision of an unreasoned award. (208) This reflects the parties' general autonomy with regard to the arbitral procedure, (209) including with regard to fundamental procedural safeguards of the adjudicative process.

There is no reason to criticize this recognition of the parties' procedural autonomy: where commercial parties choose to dispense with the costs, delays and formalities of reasoned awards, and to encourage the informality and compromise that may sometimes
P 3045 accompany unreasoned awards, it is virtually always appropriate to permit ● this. (210) Thus, where statutory language will allow, arbitration legislation should be interpreted to permit parties to agree to unreasoned arbitral awards. Based on similar analysis, where parties have so agreed, an unreasoned foreign award should be recognized; that is true even if local law in the judicial enforcement forum ordinarily requires reasoned arbitral awards in locally-seated arbitrations. (211)

There are a limited number of industries and/or institutional settings where reasoned arbitral awards are not the rule. So-called "quality" arbitrations, where the quality of commodities are assessed, traditionally do not involve reasoned awards; this is understandable because of the nature of the decision, the need for expedition and the ongoing relations among the parties concerned. In these circumstances, unreasoned awards should be permitted even absent express agreement permitting an unreasoned award (on the basis of clear evidence demonstrating the parties' implied expectations). (212)

Some national legal systems provide for the annulment of awards that violate statutory requirements that awards be reasoned. (213) Courts in other states, including some states that require reasoned awards, have held that an award's lack of reasons is not grounds for annulment. (214) The rationale for these decisions is that the lack of reasoning, although a violation of statutory requirements for arbitral awards, is not sufficiently fundamental to warrant annulling an award.

[D] No General Requirement for Reasoned Award Under U.S. Domestic Federal Arbitration Act

A significant exception to the general international consensus presumptively requiring reasoned awards is the United States, where older authority has preserved the historic common law rule permitting unreasoned awards. (215) A 1960 opinion of the U.S. Supreme Court is representative, remarking in dicta that "[a]rbitrators have no obligation to the court to give their reasons for an award." (216) Similarly, U.S. courts have generally held that unreasoned awards are valid and enforceable (provided that applicable institutional rules or the parties' agreement do not require a reasoned award). (217)
P 3046 Where the parties' agreement or applicable institutional rules provide for a ● reasoned award, as is generally the case, (218) U.S. courts will demand compliance with this requirement. (219)

In many respects, the domestic U.S. approach to reasoned awards is the mirror-image of the UNCITRAL Model Law and most other contemporary arbitration legislation. Under both approaches, the parties are free to agree to either reasoned or unreasoned awards; the difference between the two approaches is that the domestic U.S. default rule is to

permit unreasoned awards, while the UNCITRAL Model Law's default rule is to require reasoned awards.

The U.S. domestic approach is out of line with contemporary international views and should not be applied in international arbitrations (including international arbitrations seated in the United States). In international arbitrations, reasoned awards are customary and represent the implied expectations of the parties: that is reflected in the essentially unanimous approach of institutional rules (220) and national arbitration legislation, (221) presumptively requiring reasoned awards. This is supported by the parties' presumptive desire to avoid potential uncertainties with regard to the enforcement of unreasoned awards outside the United States. Given these considerations, the presumptive default rule in international arbitrations seated in the United States and elsewhere should be that reasoned awards are required, absent contrary agreement.

[E] Recognition of Unreasoned Arbitral Awards

Significant questions arise concerning the recognition and enforcement of an unreasoned
P 3047 foreign award that is made in a place where local law permits unreasoned ● awards (*e.g.*, the United States). There is substantial authority for the proposition that unreasoned awards will be recognized and enforced in foreign courts, even in states that require reasoned awards in arbitrations seated on their territory, provided that unreasoned awards were permitted in the arbitral seat. (222) Where the parties to a foreign arbitration have agreed, expressly or impliedly, that awards may be unreasoned, it is particularly difficult to see what grounds would exist for denying recognition of an unreasoned foreign award. (223)

Even where a recognition court requires that foreign awards be reasoned, courts proceed from the premise that different legal systems adopt different approaches to the arbitral process, (224) including with regard to the methods of drafting awards. (225) In one court's words, "[i]n the case of foreign arbitral awards, it must be borne in mind that the deciding arbitrators come from different legal cultures and follow the customs of their procedural systems when writing reasons." (226)

P 3048 ● Although there is force to these conclusions, unreasoned awards sometimes attract objections under Article V(2)(b)'s public policy exception where the parties have not affirmatively agreed to waive a statement of reasons by the arbitrators (as can occur under the FAA): in these instances, an unreasoned award arguably deprives the parties, without their agreement, of a fundamental procedural protection. A few national courts have denied recognition of unreasoned awards in these circumstances. (227) Other courts are also likely to be attracted by the notion, underlying these decisions, that a statement of reasons is an expected, vitally-important aspect of the adjudicative process, upon which parties should be permitted to insist, absent express contrary agreement. (228)

The better view is that unreasoned awards should not be subject to non-recognition where the parties have expressly or impliedly agreed that no reasons are required or where unreasoned awards are permitted under the law of the arbitral seat. The requirement for reasons does not rise to the level of a mandatory international requirement; where parties have accepted unreasoned awards, either directly or by choice of an arbitral seat that does not require reasoned awards, there is no justification for imposing a different result. Similarly, there is generally no basis for concluding that national public policy permits non-recognition of an award under Article V(2)(b) of the New York Convention; if the parties have agreed, in a foreign-seated arbitration where such agreements are permitted, to forego reasons, that agreement should not ordinarily violate another state's public policies.

Conversely, where the parties have agreed upon a reasoned award, either directly or by choice of the arbitral seat, the failure to provide one will ordinarily be grounds for non-recognition. That will generally be true under Article V(1)(d) of the Convention, providing for non-recognition of awards where the arbitrators did not apply the parties' agreed arbitral procedures. (229)

§ 23.04 MAJORITY AWARDS AND AWARDS BY PRESIDING ARBITRATOR

Virtually all arbitration legislation and institutional rules provide, in cases of multi-person tribunals, for non-unanimous decisions by the arbitrators. This typically permits majority awards, but can also include awards by the presiding arbitrator acting alone.
P 3049 Although possible, both of these avenues are exceptions, with the vast majority ● of all international arbitral awards being unanimous awards, signed by all members of the tribunal. (230)

[A] Majority Awards

Almost all modern arbitration legislation permits awards to be made by a majority of the arbitrators (*i.e.*, non-unanimous or majority awards). (231) Article 29 of the UNCITRAL Model Law is representative: "In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all of its members." (232) Arbitration legislation in other jurisdictions also

provides that an award may be made by less than all the members of the arbitral tribunal. (233) If not all the arbitrators sign an award, national law generally requires that a statement of the reasons for the omitted signatures be included in or appended to the award. (234)

In most arbitration statutes, the principle permitting majority awards is subject to contrary agreement, although in practice this seldom occurs. (235) Similar provisions for
P 3050 ● majority awards exist in many institutional rules. (236) As discussed above, the dynamics of an arbitral tribunal's decision-making are affected significantly by provisions granting the majority of the arbitrators (or, as discussed below, the chairman alone) the right to make an award, without the concurrence of a co-arbitrator (or both co-arbitrators). (237)

Institutional rules sometimes require that all members of the arbitral tribunal sign the award. (238) Where such a rule exists, an arbitrator is contractually required to sign the award even if he or she dissents from its conclusions. (239) A refusal to fulfill this obligation would subject the arbitrator to challenge and removal. (240)

[B] Awards by Presiding Arbitrator

There are instances in which all three arbitrators may have different views about the appropriate resolution of a dispute (for example, regarding quantum of monetary relief or where more than two claims or types of relief are sought). Where this occurs, there may be no majority at all, and instead only three different views. In this event, and as discussed above, some arbitration statutes (241) and institutional rules (242) provide for the decisive position to be that of the presiding arbitrator, with the presiding arbitrator being authorized to make an award alone. In contrast, other arbitration statutes (243) and institutional rules (244) do not provide for awards by the presiding arbitrator alone (instead either expressly or impliedly requiring a majority award).

P 3051 ● As discussed above, the existence of such a provision obviously also further affects the dynamics of the tribunal's decision-making and deliberations, by vesting the chairman with power to proceed alone, notwithstanding the disagreement of both co-arbitrators. (245) If no such provision exists, then deliberations must continue until a majority can be formed; until a majority exists for a particular position, there can be no award, which increases the co-arbitrators' influence materially vis-à-vis the presiding arbitrator. (246)

[C] Alleged Nonexistence of Majority Award

In legal regimes requiring a majority award, there have been instances in which awards have been challenged on the grounds that there was supposedly no "majority" award – even though two arbitrators signed a final award. This has occurred, for example, when one arbitrator in the "majority" has appended a separate or concurring opinion to the award, stating that he or she believed that the correct result should have been different from that of the final award (*e.g.*, that more or different relief should have been granted or that an alternative ground should have been relied upon). (247) In one case, for example, a co-arbitrator joined the presiding arbitrator in making a majority award, while stating in a concurrence that he had agreed because deliberations were required
P 3052 to continue "until a majority, and probably a compromise ● solution has been reached. … I concur … in order to form a majority so that an award can be rendered." (248)

A distinguished commentator commented on this practice, with grudging acceptance, as follows:

> "so much of the judicial and arbitral process is characterized by judges and arbitrators voting to form a majority rather than voting to express what each of them may see as the optimum judgment. In a collective body, there is very frequently a process of accommodation of differing views, sometimes sharply differing views. The result may be consecration of the least common denominator. That may not be a noble result, but it is a practical result. It is better than no result." (249)

This conclusion is clearly correct. There is no requirement that an arbitrator agree with all, or even any, of the reasoning in an award; nor is there any requirement that the arbitrator be happy with the result he or she accepts, nor believe that it is the best or fairest outcome. All that is important, for these purposes, is that the arbitrator voluntarily sign the award. That is confirmed, in very clear terms by the possibility of arbitrators signing an award while appending a dissenting or concurring opinion or statement. (250)

Some arbitration legislation also deals expressly with circumstances where an arbitrator refuses to take part in a vote on a decision by the members of the tribunal (which is different from taking part in a vote, but then dissenting from the tribunal's decision). The German version of the Model Law provides that, in such instances, and with advance notice to the parties, the majority of the tribunal can make an award without the third arbitrator's participation. (251)

Even absent such express statutory authorization, a majority of a tribunal would generally be held to have the authority to make an award without the participation of the third arbitrator, provided that he or she had been given sufficient opportunities to deliberate

and participate in a vote. (252) (The related subject of a "truncated tribunal," where an arbitrator resigns, is discussed above. (253))

P 3053 ● **§ 23.05 SEPARATE, CONCURRING AND DISSENTING OPINIONS** (254)

An almost inevitable consequence of the possibility of majority awards is the possibility of "separate" or "dissenting" views by individual members of the arbitral tribunal. One mechanism for indicating disagreement or dissent is for the arbitrator simply to decline to sign the award in question. (255) Under most modern arbitration legislation, this will not prevent the award from being final, or from being an "award," but will signify the arbitrator's personal disagreement with his colleagues' conclusions. (256)

Nevertheless, consistent with the tradition of requiring reasoned awards, and often for reasons of professional pride, some arbitrators wish to go further and explain the reasons for their dissent. This is sometimes expressed in the form of a separate or dissenting statement or opinion, which is often annexed to the tribunal's award. (257)

Notably, a dissenting or concurring opinion is not part of the award, nor is it another or independent award; rather, it is merely a separate statement by the dissenting arbitrator, without any of the legal consequences of an award. (258) Separate, dissenting
P 3054 ● and concurring opinions are common in both litigation and arbitration in some legal systems; (259) they are somewhat less common in international commercial arbitration, particularly in civil law regimes.

Dissenting or separate opinions were historically customary in state-to-state practice. The 1899 Hague Convention for the Pacific Settlement of International Disputes provided expressly for dissenting opinions, allowing "[t]hose members who are in the minority [to] record their dissent when signing" the award. (260) Nonetheless, dissenting opinions are unusual or forbidden in many domestic legal systems and, more recently, there have been reservations about such opinions in international arbitration. (261)

[A] Treatment of Separate, Concurring, or Dissenting Opinions Under National Law and Institutional Rules

Most arbitration legislation is silent on the subject of separate or dissenting opinions, although a few such statutes expressly permit dissenting opinions. (262) That is true of the UNCITRAL Model Law, whose provisions make no mention of dissenting, concurring, or other separate opinions. (263)

During the drafting of the UNCITRAL Model Law, proposals were made to specifically permit dissenting opinions, but insufficient need was seen to do so. (264) That is apparently because it was clear that dissenting opinions were permissible (absent
P 3055 contrary agreement), even without express statutory authorization, but not to be ● encouraged. In jurisdictions where local arbitration legislation does not expressly permit separate or dissenting opinions, judicial or academic authority often approves the practice. (265)

A number of institutional arbitration rules provide for dissenting or separate opinions, (266) although there are some notable exceptions, including the UNCITRAL Rules (267) and ICC Rules. (268) Even where institutional rules provide for the possibility of a dissenting or separate opinion, it is sometimes suggested, usually by civil law practitioners, that such an opinion may only be attached to an award or issued separately if the majority of the tribunal permits it. (269) In some instances, tribunals have refused to release a dissenting opinion, notwithstanding the dissenting arbitrator's request that they do so. (270)

Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the tribunal's related obligation to make a reasoned award. (271) Although there are legal systems where dissenting or separate opinions are either not permitted or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators and diverse tribunals. (272)

P 3056 ● Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his or her adjudicative mandate, particularly in circumstances where a reasoned award is required. (273) Only clear and explicit prohibitions should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process and can provide a valuable check on arbitrary or indefensible decision-making.

[B] Criticisms of Separate, Concurring and Dissenting Opinions

It has been suggested by some authors that the confidentiality of the arbitral tribunal's deliberations (274) forbids any separate or dissenting opinion, because this would reveal that the tribunal was non-unanimous. (275) This view is generally rejected in more recent authority (276) and, in any event, is misconceived.

The confidentiality of the arbitral deliberations does not extend to a formal statement of an arbitrator's views concerning the claims submitted to the tribunal; indeed, the same

argument would prevent an arbitrator from refusing to do anything other than sign an
P 3057 award with which he or she disagrees, which is both unacceptable and not the ● law. (277) It would also be contrary to both historic practice (278) and the tradition of reasoned awards (279) for an arbitrator to be forbidden to express his or her views on the matters he or she has been mandated to consider and make a reasoned decision on.

The fact that arbitrators are permitted to issue dissenting or separate opinions does not mean that they should – or even are entitled to – issue *any* dissenting or separate opinion that they choose. In a substantial number of cases, an arbitrator will eventually "go along" with his or her colleagues on a tribunal, where on reflection his or her disagreements are equivocal, caveated, or not strongly-held. Doing so is not an abdication of the arbitrator's responsibilities or independence, but an application of his or her obligations of collegiality and open-mindedness. (280)

Moreover, not unlike the making of arbitral awards, the making of a dissenting opinion is a serious act, that implicates the arbitrator's personal duties of impartiality, confidentiality, collegiality and diligence. (281) These duties require that any separate or dissenting opinion respect the secrecy of the arbitral deliberations (*i.e.*, not disclose or comment upon statements allegedly made during deliberations or prior drafts of awards), respect the collegiality of the arbitral tribunal (*i.e.*, not make offensive or personal comments or accusations) and respect the arbitrator's duties of impartiality (*i.e.*, not adopt a partisan approach merely advocating one party's position). (282) A failure to respect these obligations is a breach of the arbitrator's obligations to the parties and his or her fellow arbitrators. (283)

P 3058 ● There have inevitably been instances where the foregoing principles were not observed (albeit often in politically-charged circumstances). Classic examples include various of the separate and/or dissenting opinions issued by members of the Iran-United States Claims Tribunal, (284) by members of bilateral investment treaty tribunals (285) and by members of state-to-state arbitral tribunals. (286) These opinions have sometimes included harsh personal accusations and overt efforts to undermine the validity and enforceability of the award. (287)

It has been correctly observed that it is very often party-nominated arbitrators who issue dissenting opinions of this nature. In the words of one practitioner:

> "Certain arbitrators, so as not to lose the confidence of the company or the state which appointed them, will be tempted, if they have not put their point of view successfully in the course of the tribunal's deliberations, systematically to draw up a dissenting opinion and to insist that it be communicated to the parties." (288)

P 3059 ● Although there are exceptions to this general rule, in which a presiding arbitrator dissents from an award made by the two party-nominated co-arbitrators, (289) they are unusual. The substantial majority of all dissenting opinions are issued by party-nominated co-arbitrators, in favor of the position of the party that nominated them.

It is important to be clear about what is proper, and what is improper, for a separate or dissenting opinion to do. There should be nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion and insisting that it be communicated to the parties."

If an arbitrator believes that the tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he or she may express that view. There is nothing wrong – and on the contrary, much that is right – with such a course as part of the adjudicatory process in which the tribunal's conclusion is explained in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process and the requirement for a reasoned award.

Any experienced practitioner will also have seen cases where a decision-maker's views changed – sometimes radically – in the course of deliberations, including after receiving a draft dissent. One of the reasons for requiring a written, reasoned award is precisely to force the tribunal to articulate its conclusions and reasoning in black-and-white.

In a surprising number of cases, views that were expressed confidently in oral discussions "just won't write": equally, views that are expressed in a draft award will, in some instances, not withstand the force of a careful dissenting opinion. For these reasons, a diligent co-arbitrator will not merely voice – but also write – his objections, in a respectful effort to persuade. Doing so is in no way inappropriate, but is a fundamental element of arriving at a reasoned – and correctly-reasoned – award.

It is sometimes said that, having expressed his or her views in writing, but failed to persuade his or her colleagues, an arbitrator should withdraw and not issue a dissenting opinion. That ignores the fact that the possible eventual publication of a dissenting opinion is one of the reasons that an arbitrator's views are considered carefully and given respect by the other members of the tribunal.

At least as important, this view also ignores the fact that the very concept of a reasoned award by a multi-member tribunal permits a statement of different reasons – if different

members of the tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both present their case and hear the reasons for the tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process.

P 3060 At the same time, a process that includes dissenting views also enhances the quality of the tribunal's deliberations and ultimate award, resulting in more diligent and ● focused attention to difficult issues. In some cases, dissents or disagreements coupled with the possibility of a dissenting opinion result in more nuanced or qualified majority (or unanimous) awards that deal with the parties' dispute in a more careful or balanced manner. All of this materially enhances, rather than detracts from, the international arbitral process. (290)

Finally, dissenting and separate opinions must be directed only towards explaining the reasons for the arbitrator's conclusions, and not towards obstructing recognition and enforcement of the award. An arbitrator's duties of collegiality require that he or she accept the tribunal's award as such – even where he or she issues a dissenting opinion – and not seek to overturn or undermine it. (291) Accordingly, save in the most exceptional cases, a separate or dissenting opinion may not identify or comment on alleged biases of the tribunal, or purported procedural errors or similar matters. These are matters that a party seeking to annul an award may raise, but they should not be advocated by an arbitrator. (292)

Equally, an arbitrator who intends to issue a dissent has no right to delay notification of the tribunal's award to the parties. Instances sometimes arise in practice where an arbitrator (often the co-arbitrator appointed by the party whose claims or defenses are about to be rejected by the majority) seeks to delay the process of finalizing the award. This tactic was firmly rejected by a Swedish Court of Appeal decision:

> "when two arbitrators are agreed upon the outcome of the dispute, the third arbitrator cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others as to the correctness of his opinion. The dissenting arbitrator is thus not afforded any opportunity to delay the writing of the award." (293)

This language can be read as going too far, at least as literally formulated, by suggesting that there is little, if any, scope for an arbitrator ever objecting to inadequate deliberations. If two members of an arbitral tribunal prevented the third member from any meaningful opportunity to present his or her objections to their joint view, serious
P 3061 questions would be raised about the regularity and fairness of the ● arbitral process and resulting award. (294) An arbitrator has no right unreasonably to delay the issuance of the award, and would breach his or her duties by attempting to do so, (295) but he or she does have the right to a meaningful opportunity to meet with, and attempt to persuade, the other members of the tribunal. (296)

Some commentators have suggested that the prevalence of dissenting opinions by party-nominated co-arbitrators, typically supporting the position of the party that nominated them, suggests bias and, more broadly, defects in the system of party-appointed arbitrators. (297) In fact, the vast majority of all international arbitrations do not involve dissenting (or separate) opinions, (298) and there are not insignificant numbers of cases where a presiding arbitrator dissents from an award by the two co-arbitrators. (299)

More fundamentally, it is in no way surprising that co-arbitrators, selected by each party independently, would have views about legal, commercial and cultural issues that made the co-arbitrators more likely to be responsive to his or her nominating party; that is one of the main objectives of parties in selecting co-arbitrators. (300) As discussed in greater detail elsewhere, there is nothing at all that is surprising or objectionable about this result. (301)

§ 23.06 TIME LIMITS, SERVICE AND PUBLICATION OF INTERNATIONAL ARBITRAL AWARDS

National law, institutional rules and/or arbitration agreements often prescribe requirements with regard to time limits for making an award, service and notification of an award and related matters. (302) Like formal requirements, these requirements are generally non-controversial and capable of being readily satisfied, but require attention and diligence by the tribunal.

P 3062 ● [A] Time Limits for Making Awards

As discussed above, most national arbitration statutes contains no provision regarding the time limits for making an award. (303) This leaves the timing of an award within the parties' procedural autonomy or, absent agreement, the arbitrators' general procedural discretion. (304)

In contrast, a few (usually older) arbitration statutes prescribe time limits within which an arbitral tribunal, seated within national territory, must make its final award. (305) For example, the French Code of Civil Procedure provides that a final award in a domestic

arbitration must be made within six months of the constitution of the tribunal. (306) A limited number of other arbitration statutes are similar. (307) These legislative time limits are typically vestiges of historic statutory codes mandating the arbitral procedures.

Statutory time limits apply only to arbitrations seated within national territory, not to arbitrations seated abroad; that is virtually always true as a matter of straightforward statutory construction and, in any event, follows from the territorial limitations of national arbitration legislation. (308) A statutory time limit might also, exceptionally, apply to an arbitration seated abroad, if the parties had chosen the relevant jurisdiction's law as the procedural law of the arbitration. (309) In many instances, statutory time limits will apply, or be interpreted to apply, only to domestic, and not to international, arbitrations, even if they are locally-seated. (310)

Some institutional rules prescribe deadlines for the making of an award. (311) Less frequently, the parties' arbitration agreement may prescribe a time limit for making an award. (312)

P 3063 ● Most national arbitration legislation gives effect to such agreements, (313) as an element of the parties' more general procedural autonomy. (314) As one French decision explains:

> "the principle that the time-limit fixed by the parties, either directly or by reference to arbitration rules, cannot be extended by the arbitrators themselves is a requirement of both domestic and international public policy, in that it is inherent in the contractual nature of arbitration." (315)

Further, some jurisdictions also adopt statutory mechanisms for either the tribunal or local courts to extend a contractual time limit. That is the case in France, (316) England, (317) Belgium (318) and elsewhere. (319)

The consequences of violation of the parties' agreed time limit vary. In some jurisdictions, such violations may be excused (for example, on the theory that "time was not of the essence" (320)), while in other jurisdictions the violation of a time limit will result in the invalidity and potential annulment of the award. (321)

P 3064 ● **[B] Delivery, Service and Notification of Awards**

Once an arbitral award has been made, it must be provided to the parties in some fashion: if this does not occur, it is impossible to see how the parties could be bound by or able to challenge the award's (unknown) terms.

Despite the practical importance of publication of an award, there are generally no provisions in international arbitration conventions regarding the delivery, service, or notification of awards to the parties. That is true for the New York Convention, (322) as well as the European and Inter-American Conventions.

In contrast, most national arbitration legislation prescribes some sort of requirement for delivery, notification and/or service of arbitral awards on the parties. In virtually all developed legal systems, the arbitrators are statutorily required to communicate the award to the parties.

Thus, the UNCITRAL Model Law provides "after the award is made, a copy signed by the arbitrators ... shall be delivered to each party." (323) Many other arbitration statutes make similar provision, for awards to be "delivered," (324) "transmitted," (325) "communicated," (326) or "notified" (327) to the parties.

Under the English Arbitration Act, 1996, the parties are "free to agree on the requirements as to notification of the award," (328) failing which "the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made." (329) Characteristically, the FAA is silent on the topic, although U.S. courts have generally held that in the absence of agreement by the parties, awards should be served on parties according to the applicable arbitration rules or other methods permitted by law. (330)

P 3065 ● It appears clear in most developed legal systems that a signed and dated award, complying with all relevant formalities, is still an "award" even if not yet communicated to the parties: most national arbitration statutes provide that the "award" shall be communicated or delivered, not that delivery is one of the formal requirements for an "award." (331) (An arguable exception is Switzerland, where an award only becomes "final" upon communication to the parties. (332)) As discussed below, however, it appears that an award may be altered by a tribunal up until the moment that it is communicated to the parties. (333)

The delivery or communication of an award to the parties often has significant procedural consequences under national arbitration legislation: in particular, it frequently triggers the time period for applying to correct or modify the award (334) and for filing an application to annul the award. (335) In the case of final awards, the delivery

P 3066 ● or communication of the award also defines when a tribunal becomes *functus officio*. (336)

Most arbitration legislation either requires or assumes that the arbitrators themselves will arrange for delivery or notification of the award to the parties. In practice, however, this duty is often delegated (without controversy) to either an arbitral institution in accordance with its institutional rules (337) or to another third party (*e.g.*, a secretary, barrister's clerk, or delivery firm).

National arbitration statutes almost uniformly require that the award be delivered to both (or all) of the parties, and not to only one of them. (338) Even where not expressly provided by statute, this is an implied, but mandatory, requirement. It reflects the general equality of the parties, as well as specific concerns that the parties have equal opportunities to challenge or seek correction or modification of awards. (339) Arbitration legislation also generally provides that awards will be delivered only to the parties, and not to others, consistent with general expectations regarding the confidentiality of the arbitral process. (340)

National arbitration statutes sometimes also contain provisions regarding the mode of delivery of an award to the parties, including delivery by hand, mail, courier, or otherwise. (341) It is this type of delivery, however defined, that provides the starting point for calculating time periods (for applications to correct, modify, or annul an award).

Arbitral institutions or arbitral tribunals sometimes informally provide the parties with copies of the award (whether denominated as advance copies, courtesy copies, or otherwise) in a means other than the statutorily-defined manner. (342) Informal provision of awards to both parties in this manner is entirely proper, but generally does not suffice to trigger applicable statutory time periods for applications to annul or correct the award. (343)

P 3067 It is very common in international arbitration (indeed, almost the rule) that the award will need to be delivered to persons residing outside the country where the arbitral seat is located. That raises the question whether there is any requirement for "service abroad" of an award in accordance with national (344) or international (345) requirements for serving documents in national court litigation abroad.

Although there is surprisingly little authority on the issue, the correct view is clearly that there is no requirement that an award be served abroad pursuant to either national or international requirements of this nature. That is not because awards are not "extrajudicial" documents, to which instruments such as the Hague Service Convention apply, but instead because national arbitration legislation uniformly provides only that awards must be "delivered" or "communicated," and not "served," which are the topics regulated by such instruments. This is in keeping with the practical, commercially-oriented objectives of the arbitral process and should preclude arguments based upon alleged noncompliance with national or international service requirements. (346)

Institutional arbitration rules almost invariably address the question of delivery or notification of an award. Such rules typically provide that the arbitral institution itself, rather than the arbitrators, will notify the award to the parties. (347)

Most national laws do not expressly provide for the validity of these forms of notification, (348) although in practice they have not raised any questions. Given the central role of party autonomy in defining arbitral procedures, (349) there should be no question regarding the validity of delivery provisions established by institutional rules.

P 3068 ### [C] Registration of Awards

Some legal systems continue to require that an award made in a locally-seated arbitration be "registered" or "deposited" with a local court or notary. (350) This provision was more frequent under older arbitration legislation, and was related to the requirement for confirmation or *exequatur* of the award. (351) The decisive trend over the past half-century has been away from such requirements and instead towards simply notifying the parties of the making of the award. (352)

§ 23.07 RELIEF GRANTED IN ARBITRAL AWARDS (353)

The most critical aspect of any arbitral award is the relief that it grants. In many cases, this is a straightforward matter, which gives rise to few difficulties. If one party seeks amounts due in payment for goods or services, or satisfaction of a debt or guarantee, then there will typically be little basis for disagreement over the nature of the relief or the tribunal's power to grant it. In other cases, involving requests for injunctive or declaratory orders, some forms of monetary damages (*e.g.*, punitive or double/treble damages), or interim measures, disputes can arise regarding the tribunal's power to award such relief and the appropriate standards for doing so.

[A] Arbitrators' Powers With Regard to Relief

The remedial powers of an international arbitral tribunal are defined in the first instance by the parties' arbitration agreement. This is an element of the parties' general autonomy, with respect to both the arbitrators' jurisdiction (354) and the arbitral procedures, (355) given effect by both the New York Convention and virtually all national arbitration legislation. (356)

In principle, the parties should be free to confer authority on the arbitrators to grant any form of civil remedy calculated to resolve the parties' dispute. (357) It is of course,
P 3069 elementary that a tribunal may only order relief against the parties to the arbitration, consistent with the consensual status of the arbitral process. (358) There may also be exceptional limits on the arbitrators' remedial authority, arising from the nonarbitrability and public policy doctrines (discussed elsewhere), (359) but the general rule is that the arbitral tribunal's remedial powers are defined by the parties' arbitration agreement, given effect by the Convention and national law.

In a few jurisdictions, arbitration legislation affirmatively provides arbitral tribunals the same remedial authority as local courts, expressly incorporating the powers of national courts. (360) In principle, these statutory provisions should be regarded as non-mandatory (*e.g.*, subject to limitations or extensions by the parties). Other legislation expressly permits parties to agree upon the arbitral tribunal's remedial authority, while providing default rules regarding remedial authority; the default provisions of these statutes again generally provide arbitral tribunals with the same authority with regard to monetary payments, declaratory relief, injunctive relief, specific performance and rectification as local courts. (361)

In contrast, most arbitration legislation is silent with regard to the arbitrators' remedial powers, generally treating this as a matter for the parties' agreement, which is held presumptively to grant the arbitrators very broad remedial authority. Moreover, in many jurisdictions, the arbitrators' remedial powers are treated as an aspect of the substantive dispute between the parties. As a consequence, there will generally be no proper basis for judicial review of an arbitral tribunal's exercise of its remedial authority, beyond the review applicable generally to the arbitrator's substantive decisions. (362)

Thus, under most national arbitration regimes, it is well-settled that arbitrators have broad discretion in fashioning relief. Indeed, it is frequently said that "arbitrators have
P 3070 broad powers to grant relief that a court could not," (363) that "arbitrators have broad discretion in fashioning remedies and 'may grant equitable relief that a Court could not'" (364) and that "[i]n selecting appropriate measures, the arbitrators are not limited to the remedies known in the procedural law of the country of the seat." (365) Some authorities suggest that arbitral tribunals have broader authority with regard to remedies than with regard to resolution of the parties' substantive dispute regarding liability. (366)

Most authorities also hold that arbitrators possess broad inherent remedial authority. (367) In the words of one Canadian decision:

> "the analysis of the powers granted to an arbitrator under an arbitration agreement should also be made through a generous and liberal vision which is more in line with the modern interpretation of conventional arbitration." (368)

These views reflect in part judicial deference to the arbitrators' commercial expertise, which is considered peculiarly well-suited to fashioning workable and practical remedies, as well as the discretion accorded to first instance courts in remedial matters in many legal systems. These views also accord with commercial parties' presumptive
P 3071 intentions, being to grant the arbitrators broad powers to fully and satisfactorily resolve their dispute in a practical manner. There are occasional anomalous decisions to the contrary, suggesting that arbitrators' remedial authority is inherently narrow and limited, but these are aberrations. (369)

Some authorities recognize the arbitrators' authority to grant remedies not requested expressly by either party (subject to procedural protections against "surprise decisions"). In one court's words:

> "judges are not limited to resolving disputes by simply choosing between two options presented by the parties. Rather, we are often required to use our judgment and to craft a different remedy. For example, a party might seek an injunction and provide specific terms to the court. The court, however, may decide to delete, amend, or add terms before issuing an order. Arbitrators generally have broader discretion in ruling on an issue submitted to them, since they are usually relieved of the procedural and substantive strictures placed upon courts by legislative enactments and binding precedent." (370)

Despite this, relief ordered by an arbitrator can potentially be challenged in either annulment or recognition proceedings on the grounds that it exceeds the arbitrator's authority (an "excess of authority"), particularly where a tribunal grants relief fundamentally different from that sought by either party (371) or where a tribunal exercises an authority that the parties' arbitration agreement clearly denies it. (372) Given the presumptive breadth of the arbitrator's remedial powers, such challenges are difficult to sustain: as discussed below, national courts have concluded that most purported "excess of authority" challenges to an arbitrator's remedial orders are nothing more than (groundless) substantive objections to the tribunal's decision on the merits. (373)

As discussed elsewhere, there are limited categories of relief that arbitral tribunals may not be permitted to award, on the grounds that it involves nonarbitrable matters. (374) These categories are, under most national laws and the New York Convention, very

limited and exceptional, encompassing only matters such as criminal penalties (*e.g.*, fines, imprisonment), regulatory approvals (*e.g.*, merger approval, securities offerings), declarations of bankruptcy, grants of intellectual property rights and the like. (375)

P 3072 ● **[B] Awards of Monetary Damages**

Most arbitral awards involve determinations that a specified monetary sum is payable by one party to another. There is no question but that, unless agreed otherwise, arbitrators have the power to make an award of monetary damages. (376) That authority extends to practical aspects and logistics of payment (*e.g.*, timing, means). (377)

Most national laws grant arbitral tribunals the power to denominate an award in any currency for which the parties' contract and/or the governing law provides. (378) Section 48 of the English Arbitration Act, 1996, is specific in this regard, providing that the arbitrators may "order the payment of a sum of money in any currency." (379) Other legal systems can be expected to adopt similar approaches, either by legislative or judicial solutions.

In general, the question of the currency of an award is a question of substantive law, governed by the terms of the parties' contract and the applicable law. (380) A tribunal's application of these authorities should be subject to the same deference in annulment and recognition actions as its other substantive decisions. (381)

[C] Awards of Injunctive and Declaratory Relief

International arbitration conventions and national arbitration statutes are generally silent on the arbitral tribunal's authority to order injunctive or declaratory relief; there
P 3073 are a few exceptions, but these are unusual. (382) Nonetheless, national courts have ● repeatedly upheld international arbitral awards that order injunctive or declaratory relief if the parties' agreement, or the institutional rules that it incorporates, supply a basis for such authority. (383) Indeed, arbitral institutions report that a substantial percentage of all disputes involve requests for specific performance or declaratory relief. (384)

Even absent an express agreement conferring such powers, courts have routinely upheld grants of injunctive relief, including specific performance of contractual obligations. (385) This conclusion has been reached under the UNCITRAL Model Law, (386) as well as by common law courts (where specific performance is an exception) (387) and civil law
P 3074 courts. (388) International arbitral awards affirm the same ● remedial power on the part of the arbitrators, both in the commercial (389) and investor-state (390) contexts.

Among other things, national courts have upheld awards that required: (i) a company to stop using its name and to transfer certain patents and other intellectual property rights;
P 3075 (391) (ii) specific performance of a contract to take delivery of coal; (392) (iii) ● specific performance of a contract to deliver cotton; (393) (iv) drawing on proceeds of a letter of credit; (394) (v) making staged payments of a damages award; (395) (vi) making an interim payment into an escrow account as security for a final award; (396) (vii) fixing prices for disputed products for one year and obtaining the tribunal's approval for future prices; (397) (viii) specific performance to complete a construction project; (398) (ix) ordering the transfer of property (including a business); (399) (x) ordering the reinstatement of corporate officers or other "formative" legal acts; (400) (xi) ordering the grant of a royalty-free license to intellectual property; (401) (xii) ordering an accounting; (402) and (xiii) ordering the extension of contractual time periods. (403) Similarly, awards frequently – even routinely – grant declaratory or injunctive relief. (404)

P 3076 ● It has been suggested that arbitrators should not be permitted to exercise the power to order specific performance, or other forms of injunctive relief, because they lack the authority to supervise compliance with their award. (405) This view has attracted no discernible judicial (or arbitral) support, although there is force to concerns about adequate oversight of long-term remedies.

Rather, the correct analysis is that, absent express language to the contrary, the parties' agreement to arbitrate contemplates that the arbitrators will have the authority to award injunctive and declaratory relief, including orders of specific performance. That authority is recognized as an essential and inherent (406) element of remedial authority in virtually all developed legal systems and materially enhances the efficacy of the arbitral process; absent clear agreement to the contrary, this remedial authority is an element of the parties' agreement to arbitrate and the tribunal's powers. (407) For the same reasons, arbitration agreements are interpreted broadly with respect to the arbitrators' authority to grant injunctive and declaratory relief. (408) (As discussed in detail elsewhere, both the New York Convention and national arbitration legislation require giving effect to the parties' agreements to arbitrate, which extends to agreements concerning the arbitrators' remedial powers. (409))

In some cases, it may be appropriate for an arbitral tribunal that orders some form of continuing injunctive relief to retain jurisdiction over the parties' dispute. Some national courts have held that there is in principle no obstacle to this and that the retention of jurisdiction is not contrary to the *functus officio* doctrine. (410) In other cases, disputes over compliance with declarative or injunctive relief granted in an award can be resolved

in a new arbitration or in judicial enforcement proceedings. In virtually no case, however, is it appropriate for the possibility of difficulties in enforcement, against a party that might refuse to comply with its obligations under the award, to justify withholding otherwise appropriate relief.

P 3077 ● **[D] Awards of Punitive, Exemplary, or Statutory Damages** (411)

In some legal systems (generally in the common law world), punitive or exemplary damages have long been among the remedies available to a claimant in a civil litigation. In principle, punitive and exemplary damages are also available in international arbitral proceedings, although in practice awards of punitive damages are unusual. (412) Despite the infrequency with which they are awarded, punitive damages claims in international arbitration raise a number of difficult issues.

A leading U.S. authority describes punitive damages as "sums awarded, apart from any compensatory or nominal damages, usually ... because of particularly aggravated misconduct on the part of the defendant." (413) The availability of punitive or exemplary damages has been well-settled at common law for centuries, (414) and remains a significant feature of tort remedies in many common law systems. (415) Punitive damages
P 3078 are most widely available in the United States, where such relief is awarded in ● commercial and contract cases, (416) as well as in defamation, assault and similar cases of aggravated torts.

Some legal systems have also enacted legislation providing for multiple or statutory damages in particular categories of cases, generally calculated as a multiple of the claimant's actual damages. Such legislation is, again, most common in the United States, where double or treble damages are available for either violations of statutory protections or deliberate, willful misconduct. (417) Multiple damages are typically provided for by legislation regarding competition, fair trade and similar types of market conduct.

Punitive or exemplary damages have historically been much less common in civil law jurisdictions. The basic principle of civil relief in most such jurisdictions is to compensate the injured party for damage suffered, which is generally held to either implicitly or explicitly preclude punitive or exemplary damages. (418) In some civil law jurisdictions, the unavailability of punitive damages is said to rise to the level of public policy, and courts have refused to recognize and enforce foreign judgments granting punitive damages. (419)

On the other hand, some civil law regimes recognize the concept of "moral damages" which are available, among other things, to victims of personal injury, sexual harassment and violations of civil rights. (420) Moral damages are occasionally sought, particularly in
P 3079 cases involving state or state-related parties. (421) At the same time, there ● are recent indications that some civil law jurisdictions may be revising historic prohibitions and making provision for awards of punitive damages in at least some circumstances. (422)

Even in jurisdictions where national courts may award punitive damages, there have been substantial doubts concerning the power of arbitrators to award such relief. In the United States, New York courts historically held, as a matter of New York state law, that arbitrators were precluded by considerations of public policy from awarding punitive damages, which were regarded as exclusively the province of state courts. (423) This rule was reflected, among other things, in a leading New York decision titled *Garrity v. Lyle Stuart, Inc.* (424)

The *Garrity v. Lyle Stuart* theory was a variation of the nonarbitrability doctrine, (425) which emphasized that punitive damages were intended to serve principally public, not private, interests:

> "An arbitrator has no power to award punitive damages, even if agreed upon by the parties," because the "freedom of contract does not embrace the freedom to punish, even by contract." (426)

Other authorities relied on the confidentiality or privacy of most arbitral awards (reducing the deterrent effect of punitive damage awards), the asserted lack of judicial safeguards that would accompany arbitral consideration of punitive damages and the perceived anomaly of "private" arbitrators awarding "public" penalties. (427)

These doubts as to the authority of arbitrators to award punitive damages, as a matter of U.S. law, were resolved decisively in favor of the arbitrability of punitive damage claims
P 3080 by the U.S. Supreme Court in *Mastrobuono v. Shearson Lehman Hutton,* ● *Inc.* (428) There, the Court held that the domestic FAA preempted New York's state law public policy forbidding the arbitrability of punitive damages claims. (429)

The Supreme Court treated New York's rule that arbitrators could not award punitive damages as an instance of a state law refusal to give effect to an agreement to arbitrate (specifically, an agreement to arbitrate punitive damage claims); according to the Supreme Court, that state law rule was preempted by the FAA's requirement that arbitration agreements be recognized and enforced in accordance with their terms. (430) The Court also held that the general New York choice-of-law agreement in the parties' contract did not have the effect of incorporating New York's public policy against the

arbitrability of punitive damage claims into the parties' arbitration agreement, relying on the "federal policy favoring arbitration [and requiring that] ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration." (431)

Applying *Mastrobuono*, U.S. lower courts have repeatedly held that particular arbitration agreements (and institutional rules (432)) provide for the arbitration of punitive
P 3081 damages claims. (433) These decisions have not generally addressed the ● treatment of arbitration agreements incorporating institutional rules commonly used in the international commercial context, but the same results should apply. (434) For example, in *Fahnestock & Co. v. Waltman*, the appellate court held that the general language of the AAA Commercial Rules, which provided that arbitrators may award "any remedy which [is] just and equitable and within the scope of the agreement," evidenced an intention that punitive damages claims would be pursued in the arbitration. (435)

As noted above, punitive damages are arguably contrary to public policy in some civil law jurisdictions, (436) with the possible result that arbitral tribunals seated in those jurisdictions may not validly make awards of punitive damages (including when putatively authorized to do so by applicable substantive law and the arbitration agreement). This was the conclusion of an arbitral tribunal seated in Switzerland, applying New York law pursuant to a New York choice-of-law clause:

> "Damages that go beyond compensatory damages to constitute a punishment of the wrongdoer (punitive or exemplary damages) are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages as such." (437)

P 3082 ● Similarly, a number of commentators have suggested that at least some civil law jurisdictions would not recognize arbitral awards of punitive damages, again on public policy grounds. (438)

The better view is that an arbitral tribunal may (and must) give effect to mandatory laws and public policies: (439) that extends to public policies forbidding punitive damages. As discussed above, however, the application of mandatory laws and public policies requires a conflict-of-laws analysis, (440) and not merely automatic application of the public policies of the arbitral seat.

In principle, it is difficult to see why the public policy of the arbitral seat should apply to a transaction having no connection to the place of arbitration: more appropriate is application of the public policy of the jurisdiction most closely connected to the parties' dispute. Where applicable conflicts rules provide for application of a public policy forbidding punitive damages, then an arbitral tribunal should refuse to award such damages. (441)

Similar analysis applies to the recognition of awards of punitive damages. As discussed below, applying Article V(2)(b) of the New York Convention, the courts of a Contracting State may exceptionally deny recognition to an award of punitive damages based on a local public policy; again, however, it is difficult to see why a recognition forum's public policy would by its own terms apply to a transaction having no material connection to the forum. Of course, non-recognition of an award of punitive damages in one state does not imply non-recognition in other states. (442)

[E] Awards Imposing Penalties or Sanctions

Arbitral tribunals sometimes attempt to impose "penalties" on parties to the arbitration, typically as sanctions for noncompliance with interim measures or procedural rulings of the tribunal. For example, if a party is ordered provisionally to provide security, for its counter-party's claims or costs, but refuses to do so, the tribunal may impose monetary sanctions (for example, daily or weekly fines, payable until security is posted). (443)

P 3083 ● As with punitive damages, there is controversy regarding arbitrators' authority to impose penalties. It is sometimes suggested that "private" arbitrators lack the power to impose "public" sanctions, which must be reserved to national courts. (444)

The better view is that this distinction misunderstands the arbitral function – which entails the arbitrators' authority to apply mandatory laws and public policies and to impose "public" sanctions. Provided that the parties' arbitration agreement grants the arbitral tribunal authority to impose penalties, there should be no mandatory prohibition against such authority. That is particularly true with regard to sanctions for noncompliance with a tribunal's procedural rulings or interim measures: there is no reason that arbitrators should not have the authority to ensure compliance with their rulings and the absence of such power would materially detract from the efficacy of the arbitral process.

Consistent with this view, most recent national court authority affirms the general authority of arbitral tribunals to impose penalties on parties to an arbitration. (445) In one U.S. court's words, "the authority to sanction inheres in the comprehensive arbitral authority": "the underlying purposes of arbitration, *i.e.*, efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney's fees, are

appropriately viewed as a remedy within an arbitrator's authority to effect the goals of arbitration." (446) Authorities from civil law jurisdictions also generally uphold arbitrators' authority to impose penalties. (447)

Disputes sometimes arise as to whether, assuming that arbitrators may in principle impose penalties, a particular arbitration agreement grants the arbitrators the power to
P 3084 impose penalties or sanctions (or, alternatively, particular types of penalties or ● sanctions). Some courts have required that agreements granting arbitrators authority to impose sanctions must be express or particularly clear. (448) Even where a tribunal may be empowered to order sanctions in principle, it may not be permitted to order particular types or categories of sanctions or penalties. (449)

The better view is that, although it is essential that the parties' arbitration agreement authorize the imposition of penalties, that authority may be, and generally should be, implied. (450) The authority to impose penalties or sanctions contributes materially to an efficient and effective arbitral process and, absent contrary indications, reasonable commercial parties should be assumed to have intended that such authority be available.

[F] Choice of Law Governing Relief

As discussed above, the choice of law governing issues of relief and remedial authority has produced divergent approaches. In many civil law jurisdictions, the law governing issues of remedies and relief is the substantive law governing the parties' dispute. (451) In contrast, in some common law jurisdictions, remedies were historically governed by the law of the forum. (452) Arbitral awards take differing approaches to the subject of the law governing issues of remedies and relief, with the weight of authority applying the law governing the parties' substantive claims. (453)

The better view is that issues concerning the arbitral tribunal's authority and jurisdiction are governed by the law of the arbitral seat (or, in the rare cases where a foreign procedural law is chosen, the procedural law of the arbitration (454)), while issues concerning the substantive standards for granting relief and the quantum and character of relief are governed by the substantive law applicable to the parties' underlying claims. This treatment of the law governing the arbitrators' remedial powers is consistent with
P 3085 the treatment of other issues concerning the arbitrators' ● authority (*e.g.*, interim relief (455) and competence-competence (456)). It is also consistent with the treatment of choice-of-law analysis concerning awards of legal costs and interest. (457)

In all of these settings, the tribunal's authority is best regarded as governed by the law of the arbitral seat, because it is that law that has the closest connection to the arbitral process and questions concerning the arbitrators' powers. At the same time, the substantive standards governing relief are most appropriately governed by the law of the underlying dispute, because that law has the closest relationship to the parties' commercial relationship, the liability determination and the remedies for that determination.

In almost all cases, the law of the arbitral seat will generally give effect to the parties' agreement to arbitrate, providing the arbitral tribunal with the authority conferred upon them by the parties. If the law of the arbitral seat contained mandatory limitations on the arbitrators' authority, those restrictions would need to be considered in light of the New York Convention's requirement that Contracting States recognize and enforce all the material terms of the parties' arbitration agreement, including provisions regarding the arbitrators' authority. (458) In the absence of any express or implied agreement by the parties regarding the arbitrators' remedial authority, the law of the arbitral seat is the source of default rules which define the tribunal's powers. (459)

In contrast, the law governing the standards for granting relief and the quantum and character of relief are closely related to the substantive law governing the parties' underlying claims. That is consistent with contemporary choice-of-law rules in most developed jurisdictions (460) and with the weight of arbitral authority. (461) This analysis also ensures that issues of relief are governed by the same law as issues of liability, which are often related.

P 3086 ● § 23.08 AWARDS OF COSTS OF ARBITRATION AND LEGAL REPRESENTATION (462)

International arbitration can be expensive, in large part because of the fees of the parties' legal representatives. (463) As discussed below, international arbitral tribunals generally possess, and exercise, the authority to award the prevailing party in an arbitration the costs of the arbitration, including its legal costs. The standards for making awards of costs of legal representation and related expenses are of corresponding importance.

[A] Awards of Costs of Arbitration Under National Arbitration Legislation

National arbitration legislation frequently contains provisions addressing the allocation
P 3087 of costs in the arbitral proceedings. These provisions generally grant the ● arbitrators authority to make an award of the costs of the arbitration, including legal costs, usually

without specifying standards governing the exercise of such authority. (464)

As discussed below, virtually all developed legal regimes will give effect to the parties' agreement with regard to awards of legal costs in international arbitration. (465) That is true where the parties agree that the arbitrators shall have the power to make such awards, as well as where they agree to exclude the possibility of such awards. (466) This is simply an application of the broader principle of party autonomy in the context of international arbitration (467) and should raise no questions of enforceability. (One limited exception is England, where parties are precluded from agreeing, prior to the dispute arising, that one party pay "the whole or part of the costs of the arbitration in any event," regardless of the outcome. (468))

In general, a decision by the arbitral tribunal ordering one party to pay the arbitration costs, including the costs of legal representation, is an "award" within the meaning of the New York Convention and national arbitration legislation, including the UNCITRAL Model Law. That is because the arbitrators' decision finally resolves a claim by one party against the other (specifically, that one party is entitled to repayment by the other party of amounts spent during the arbitration). This decision falls squarely within the definition of an "award," and "'Awards on Costs" are routinely and properly treated as "awards" for purposes of annulment, recognition and enforcement. (469)

P 3088 In contrast, a decision by an arbitral tribunal that the parties are jointly liable to the members of the tribunal for payment of its fees and expenses has been held not to constitute an "award," on the theory that it does not resolve claims between the parties and instead resolves a claim by the arbitrator(s) against the parties. (470) The same result has been reached with regard to an arbitral tribunal's decision regarding the amount of its own fees. (471)

[1] Costs of Legal Representation Under UNCITRAL Model Law

The UNCITRAL Model Law does not expressly address the question of the costs of legal representation. There were proposals during the drafting of the Model Law for a provision that would have authorized the arbitrators to request a deposit from the parties for the tribunal's fees and expenses, and to fix the amount of such fees and expenses. (472) Even these relatively limited proposals were not pursued, and the Model Law's final text, and the 2006 Revisions, are silent on the entire subject of the allocation of the costs of the arbitration.

Nonetheless, there is no question but that, absent contrary agreement, the Model Law permits arbitrators to make awards of the costs of the arbitration and legal costs. (473) A number of states that have adopted the Model Law have added provisions regarding awards of the costs of arbitration. (474)

P 3089 **[2] Costs of Arbitration Under English Arbitration Act**

In England, the Arbitration Act, 1996, provides the tribunal with authority to award legal costs, (475) as well as (relatively unusual) standards for exercising such authority. (476) Specifically, §61(2) of the Act provides that, absent contrary agreement, "the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs." (477)

Unusually for national law on the subject, this provision is binding on arbitral tribunals seated in England (absent contrary agreement). (478) Arbitral tribunals are nonetheless able to vary the general principle that costs follow the event dependent on the facts of each arbitration and the conduct of the parties. (479)

[3] Costs of Arbitration Under Other National Arbitration Legislation

Many arbitration statutes, including those in the United States, France and Switzerland, are silent on the topic of awards of legal costs in international arbitration. It is clear, however, that arbitral tribunals seated in most such jurisdictions – for example, France (480) and Switzerland (481) – are fully authorized to make awards of legal costs. (482) This
P 3090 reflects a general principle that, absent contrary indication in the parties' agreement, international arbitrators should be presumed to have the authority to make an award of the costs of legal representation as part of their overall remedial powers. It is also clear that the tribunal in an international arbitration need not apply local rules regarding awards of legal costs in domestic litigation. (483)

[4] Costs of Arbitration Under U.S. Federal Arbitration Act

Like the Model Law, the FAA is silent regarding the costs of the arbitration and the parties' legal representation. In contrast to most other jurisdictions, a number of U.S. courts have held that arbitrators lack the power in an arbitration seated in the United States under the FAA to award legal fees incurred in the arbitration unless the parties have expressly conferred this authority on the tribunal. (484) These decisions, rendered principally in domestic U.S. arbitrations, reflect the "American Rule" against fee-shifting in U.S. civil litigations. (485)

In contrast, and more recently, a number of U.S. courts have taken a broader view and

P 3091 concluded that arbitrators have implied authority to award attorneys' fees. (486) U.S. courts have reached this result even in states where local law provides that arbitrators have the authority to allocate responsibility for the arbitrators' fees, but not to award attorneys' fees. (487)

In international arbitrations seated in the United States, any relevant provisions of institutional arbitration rules or the parties' arbitration agreement should, and will, be given full effect. The "American rule" regarding costs of legal representation clearly does not rise to the level of U.S. public policy, so as to forbid a tribunal's exercise of its authority under the parties' arbitration agreement or applicable institutional rules to award legal costs. (488) Rather, the presumptive rule in international arbitrations seated in the United States should be that, absent contrary agreement, the tribunal will have the authority to award the costs of legal representation.

Moreover, the "American Rule" should generally have little influence on the standards adopted by international arbitral tribunals seated in the United States for awarding legal costs. That is particularly true under the UNCITRAL Rules and LCIA Rules, which provide generally for awards of at least some legal costs to the prevailing party. (489)

Even where institutional rules provide no express standards for awarding legal costs (as under the ICC Rules), the "American Rule" should have little effect on the relevant standards for awarding costs in an international arbitration. That is because the rule is designed specifically for domestic U.S. litigation, not international arbitration between commercial parties, where different expectations and considerations apply.

Even where the parties have agreed that their underlying contract or other commercial relations are governed by the substantive law of a U.S. state, whose domestic law includes the "American rule," an arbitral tribunal seated in the United States (or elsewhere) should not be bound by the American rule, and particularly not as a matter of jurisdiction or authority. Again, the American rule is meant specifically for domestic litigation and is not encompassed in general choice-of-law clauses, which should be interpreted to address the parties' underlying contract and commercial dealings. Nonetheless, although this is the better view, there is some contrary U.S. lower court authority. (490)

There is recent U.S. judicial authority holding that, notwithstanding provisions in an arbitration agreement generally excluding awards of costs for legal representation,
P 3092 arbitrators have inherent authority to makes such awards in cases of bad faith during the arbitral proceedings. (491) This analysis is well-reasoned: absent clear language to the contrary, arbitrators should be presumed to have been granted the authority to award costs and other appropriate sanctions for bad faith conduct during or associated with the arbitral process. However, where the parties have clearly and unequivocally excluded such authority, it is difficult under either the New York Convention or national arbitration legislation to justify overriding their agreement to authorize costs awards.

A U.S. court should also recognize and enforce foreign arbitral awards of legal costs, notwithstanding the "American rule." (492) As already noted, the "American rule" is not a principle of public policy, and therefore does not require or permit a U.S. court to deny recognition to a foreign costs award. If the arbitration agreement and the law applicable in the arbitration permit an award of the costs of legal representation, no excess of authority argument can be sustained; even if applicable law does not provide for costs to be awarded, a tribunal's award of costs should generally be considered a substantive error, not an excess of authority or jurisdiction. (493)

The costs of legal representation can also be awarded by U.S. courts with respect to costs incurred in actions to vacate or enforce arbitral awards. The general rule under the FAA appears to be that refusals to pay an award must be in bad faith before attorneys' fees
P 3093 for confirmation or vacatur proceedings are awardable. (494) Provisions in an arbitration agreement regarding the costs of legal representation are generally not applicable to fees incurred in subsequent enforcement litigation, although this is an issue of interpretation. (495)

[B] Awards of Costs of Arbitration Under Institutional Rules

Most institutional rules expressly grant arbitral tribunals the power to award the costs of legal representation. (496) In addition, arbitration agreements sometimes specifically address the issue of the costs of legal representation. (497) Virtually all modern arbitration legislation gives effect to the provisions of institutional rules and the parties' arbitration agreement concerning the tribunal's power to make an award of legal costs and the amount of such award. (498)

The 2010 UNCITRAL Rules provide the arbitral tribunal with the authority, and duty, to "fix the costs of arbitration" in its award. (499) The costs of arbitration are defined to include the "legal and other costs incurred by the parties in relation to the arbitration," but only "to the extent that the tribunal determines that the amount of such costs is reasonable." (500) The UNCITRAL Rules also provide that "the costs of the arbitration shall in principle be borne by the unsuccessful party or parties," (501) except that, in fixing the costs of legal representation, "the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the

circumstances of the case." (502) These provisions grant arbitrators broad discretion with regard to awards of legal costs, starting from the principle that the prevailing party will be entitled to its costs. (503)

P 3094 ● The 2012 ICC Rules provide that the final award "shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties." (504) The "costs of the arbitration" are defined to include the "reasonable legal and other costs incurred by the parties for the arbitration." (505)

Unlike the UNCITRAL Rules, the 1998 ICC Rules did not further prescribe standards for awarding legal costs, (506) leaving this to the tribunal's discretion and any relevant rules of national (or other) law. The 2012 ICC Rules provide somewhat more guidance, providing that, "[i]n making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner." (507) Under the ICC Rules, the arbitrators' fees and expenses are fixed by the ICC Court (rather than the arbitrators), while the allocation of such fees and expenses between the parties is made by the arbitrators. (508)

The LCIA Rules provide for the arbitral tribunal to "determine the proportions in which the parties shall bear all or part of the arbitration costs" (509) (as fixed by the LCIA Court), as well as to "order in its award that all or part of the legal or other costs incurred by a party be paid by another party." (510) The LCIA Rules prescribe a general standard that, absent contrary agreement, the tribunal shall "make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to [the tribunal] that in the particular circumstances this general approach is inappropriate." (511) The LCIA Rules reflect the general English approach towards legal costs (*e.g.*, the prevailing party is presumptively entitled to its costs (512)), while authorizing the tribunal to adopt a different standard if appropriate in particular circumstances.

The overriding theme of these, and other, (513) institutional rules is to grant the arbitral tribunal broad powers to award legal costs, according to standards established by the arbitrators; the exercise of these powers is left largely to the arbitrators, with general
P 3095 references to the degree of a party's success on its claims and the ● reasonableness of a party's legal expenses. (514) All leading institutional rules also expressly confirm the arbitrators' authority to "apportion" legal costs, allowing awards of less than 100% of a party's reasonable costs. (515)

Even where applicable institutional rules do not expressly grant the arbitral tribunal power to award legal costs, the parties' arbitration agreement should be interpreted to impliedly grant such authority. (516) That follows from the overwhelming weight of authority in developed jurisdictions, (517) and from the basic principle that a commercial party's right to compensation for wrongful damage in a business dispute must include the costs of righting that damage. (518) An implied agreement granting the arbitrators power to award the costs of the arbitration, including legal costs, is a natural and inherent aspect of the tribunal's authority (absent contrary agreement).

[C] Awards of Costs of Arbitration in International Arbitral Practice

As a practical matter, arbitrators in international cases routinely award the costs of legal representation, usually without discussing questions of applicable law or detailed substantive analysis. Most arbitral awards either rely exclusively on grants of discretion (or other standards) pursuant to applicable institutional rules, (519) or simply award a
P 3096 "reasonable" or "appropriate" amount. (520) Given this general lack of analysis, some ● commentators have concluded that "[t]he awarding of arbitration costs and attorney's fees in international arbitrations is often arbitrary and unpredictable." (521)

Where the parties' agreement addresses the subject of legal costs, tribunals will virtually always purport to give effect to its terms. (522) More frequently, however, the parties will not have addressed the subject of legal costs, or will have simply granted the tribunal discretion to make an award of legal costs.

In exercising their discretion, international arbitral tribunals have often made some award of the costs of legal representation to the "prevailing party." (523) In doing so, arbitrators generally take into account the extent to which that party recovered what it initially claimed, the extent to which each party's position was substantively reasonable, the extent to which a party's conduct needlessly complicated the proceedings, and similar factors. (524) In the words of one award:

P 3097 > ● "The [1998 ICC] Rules do not contain any rules or criteria for the decision that the Tribunal must take [regarding costs]. The decision is left to the discretion of the arbitrator. Nevertheless, the results of the arbitration play a predominant role in the exercise of this discretion by the arbitrator. A party who loses his case is, in principle, ordered to pay the costs of the arbitration. However, other criteria can be taken into account, and notably the manner in which the case was conducted and the costs caused by reckless or abusive requests or delaying tactics." (525)

In general, arbitral tribunals do not require, and prefer for the parties not to present, detailed documentary or other evidence about their respective costs. Although tribunals may demand more extensive evidence, summary statements of the costs billed by and paid to legal representatives are ordinarily sufficient. (526)

Despite the tendency of tribunals to award at least a measure of legal costs to the prevailing party, some authorities question the existence of any "costs follow the event" or "loser pays" rule. (527) As one very experienced practitioner explains:

P 3098

> "Arbitrators may consider it too draconian to impose the burden of an opponent's attorney fees on a losing party, and thereby create a system that could chill the assertion of claims unreasonably, without evidence of additional culpability in a particular case. Some claims are deservedly brought, even if they are largely unsuccessful for sound factual or legal reasons that emerge after an airing by adversarial process." (528)

Despite these views, a study of ICC awards made between 1989 and 1991 reports that where claimants were largely successful, they were awarded a substantial portion of the arbitration costs in most cases (*i.e.*, in 39 of 48 cases) and a substantial portion of their legal costs in about half of all cases (*i.e.*, in 24 of 38 cases). (529) Where claimants were partially successful, or where both parties obtained relief, the arbitrators typically ordered the parties to bear their own legal costs and shares of the arbitration costs; (530) in some cases, however, claimants were awarded a proportion of their legal costs relative to the extent of their success vis-à-vis their claims. (531) Finally, in ICC cases where claimants obtained substantially less than half of the amounts claimed, or where the respondent recovered larger amounts than the claimant, tribunals generally have either left the arbitration and legal costs with the party that incurred them or ordered the unsuccessful claimant to pay some or all of the respondents' costs. (532)

P 3099

Where one of the parties was uncooperative or inefficient, it was less likely to recover its costs (or its full costs); (533) in some cases, a party that has adopted unnecessary litigation tactics has been held liable for costs. (534) On the other hand, where there was a good faith basis for the parties' differing positions, ICC tribunals were more likely to leave the parties to bear their own costs. (535)

Awards of legal fees and costs may be different in specialized settings where particular expectations or considerations exist. For example, a study of investment arbitrations between 1990 and 2006 concluded that only 13 of 54 final awards required one party to contribute to a counter-party's legal fees and costs. (536) It is unclear what justifies this approach, although it appears to be reflected in the weight of investment arbitration authority to date.

Some practitioners have proposed more principled and systematic approaches to the award of legal costs in international arbitration. One approach proposes a "loser pays" principle, adjusted to take account of numerous considerations, including efficiency of proceedings, difficulty of issues and the like. (537) Other approaches have suggested focusing only on degree of success and efficiency of proceedings, with the motto, "keep it simple." (538) These proposals have substantial merit; it is unsatisfactory that awards of legal costs, which can entail millions or tens of millions of dollars or Euro in some cases, be unpredictable and based purely on discretion. (539) Even if the precise terms of these proposals are not adopted, the underlying concept of a more reasoned, principled approach to costs decisions is clearly to be favored.

[D] Choice of Law Governing Costs of Legal Representation

P 3100

A potentially significant issue relating to awards of legal costs in international arbitration is the choice of the law governing the tribunal's power to make a costs award and the standards governing the award of costs. There is little question that the arbitrators' power to make a costs award is governed by the procedural law of the arbitration (typically, that of the seat of the arbitration). That is consistent with the treatment of the arbitrators' power to order provisional measures, (540) disclosure (541) and other forms of relief, (542) and no other national legal system is a plausible candidate to govern this issue. (If a national law refused to give effect to the parties' agreement granting the arbitrators power to award the costs of the arbitration, this would, for reasons discussed elsewhere, likely be inconsistent with Articles II and V(1)(d) of the New York Convention. (543))

The law governing the substantive standards for awards of legal costs is not necessarily the same as that governing the tribunal's authority to make a costs award. (544) In particular, a serious argument can be made that the substantive law governing the parties' underlying contract (or dispute) should provide the standard for awards of legal costs. (545) This body of law arguably has the closest connection to the parties' presentation of their respective claims, and could therefore appropriately be applied to determine their rights to reimbursement of the costs of such presentation; that would be particularly true where the parties had contractually selected the law governing their agreement. (546)

P 3101

Despite this, the better view is that the standards governing awards of legal costs should be international standards, developed in light of the particular nature and needs of

international arbitration. (547) That is because domestic rules regarding legal costs are designed with domestic litigation systems and legal professions in mind; these rules have little direct relevance to the international arbitral process, involving *sui generis* procedures, specialized objectives and lawyers from different jurisdictions. Rather, arbitral tribunals should develop international standards, appropriate to the commercial arbitration context, to ensure that parties are fully compensated for all reasonable costs of successfully vindicating their rights and that efficient, cooperative conduct in the dispute resolution process is rewarded.

These objectives are largely reflected in leading institutional rules and arbitral authority applying these rules. In particular, as discussed below, these rules generally specify *sui generis* standards, without reference to national law. (548) These standards typically provide that (a) the prevailing party is presumptively entitled to a costs award; (b) only reasonable costs will be reimbursed; and (c) expenses that were inefficient or unnecessary will not be reimbursed, while costs resulting from the need to respond to unreasonable or uncooperative actions will be recoverable. (549) The application of these standards is discussed below.

[E] Costs of Legal Representation in Proceedings Resulting in Negative Jurisdictional Awards

The award of costs by an arbitral tribunal in or following an award denying jurisdiction over the claimant's claims presents conceptual challenges. (550) In such cases, the tribunal has determined that it lacks jurisdiction, thereby ruling for the respondent and rejecting the claimant's claims. (551) Ordinarily, under the general rule that the prevailing party is entitled to its legal costs, (552) the respondent would have the right to obtain an award of the reasonable expenses it incurred in procuring the negative jurisdictional award.

Nonetheless, it is sometimes argued that the tribunal's determination that it lacked jurisdiction disables it from making an award of costs in favor of either party. If the tribunal holds that there was no valid arbitration agreement between the parties, (553)
P 3102 ● then there is uncertainty as to what empowers the tribunal to make an award that one party pay the other party's legal costs.

In some instances, the parties may have expressly accepted the tribunal's authority to make a jurisdictional determination (for example, by signing ICC Terms of Reference without reservation); in these cases, there should be no dispute regarding the arbitral tribunal's power to make an award of costs. (554) Even in other instances, however, there should be no true difficulty in ordering costs against an unsuccessful claimant. The claimant's submission of the parties' jurisdictional dispute to the arbitral tribunal constitutes a submission by the claimant to the tribunal's competence-competence to rule on its own jurisdiction and an incident of this competence-competence is the power to make a costs award in favor of the prevailing party. That makes both analytical and practical sense, and is the approach generally adopted in international arbitration practice. (555)

§ 23.09 AWARDS OF INTEREST (556)

Under most national laws, interest on sums awarded as damages may be recovered in civil actions. (557) The same is generally true in international arbitration, where interest is routinely requested and recovered.

P 3103 ● The availability and rate of interest in an international arbitration can have substantial practical importance. Major arbitrations can take a number of years to resolve, involving disputes arising some years earlier. With market rates of interest accruing, the ultimate interest award can exceed the principal amount in dispute. In one celebrated arbitration during the 1980s, the principal award was $83 million, to which $96 million in interest (in 1980s dollars) was added. (558)

[A] Awards of Interest Under National Arbitration Legislation

Many arbitration statutes are silent on the subject of awards of interest by arbitral tribunals. The UNCITRAL Model Law contains no provisions regarding interest, nor do the FAA, Swiss Law on Private International Law, or French Code of Civil Procedure.

A number of states that have adopted the Model Law have modified the statute, to include an express authorization for the arbitrators to award interest, but typically without specifying any standards governing such awards. The typical formulation in such legislation is "[u]nless otherwise agreed by the parties, the arbitral tribunal may award interest." (559) Some statutes address pre-award interest and post-award interest separately. (560)

Even in the absence of express statutory authority, there should be no doubt concerning the authority of an arbitral tribunal to award interest. (561) The authority to award interest is an inherent element of a tribunal's adjudicatory authority and is implicitly contained within the terms of agreements to arbitrate, at least absent contrary indication by the parties.

Institutional rules do not ordinarily address the subject of interest, including the
P 3104 UNCITRAL and ICC Rules. One exception involves the LCIA Rules which provide ● that the tribunal may award compound interest. (562) Again, even absent express authorization in institutional rules, the parties' implied agreement ordinarily includes the power to award interest.

Interest is potentially awardable by an international arbitral tribunal on a variety of legal grounds. Applicable substantive law may permit the award of interest as an element of compensatory damages. (563) Alternatively, statutory provisions of national law concerning pre-judgment or post-judgment interest, typically designed for application in litigations in the arbitral seat, may be deemed applicable by an arbitral tribunal.

Most national legal systems have enacted statutory provisions regulating awards of interest in domestic litigations. These provisions typically establish statutory interest rates that are payable, either on "pre-judgment" liabilities or "post-judgment" awards of monetary damages. (564) These provisions are generally not, by their terms, applicable in international arbitral awards, although tribunals sometimes either apply them or look to them by analogy. (565) (As discussed below, statutory interest provisions may be applicable to judgments confirming arbitral awards, in which case they may have direct application to interest in connection with international arbitral awards. (566))

The parties' arbitration agreement must, of course, encompass interest claims in order for the arbitrators to be able to make a valid award of interest. In virtually all cases, an arbitration agreement applicable to an underlying claim will be interpreted to encompass claims for interest in connection with that claim. The conclusion is almost always (correctly) assumed without discussion.

[B] Choice of Law Governing Awards of Interest

Requests for an award of interest raise choice-of-law issues. (567) In particular, as in other contexts, questions arise as to the tribunal's authority to award interest and the standards governing the exercise of such authority.

As to the tribunal's authority or power to award interest, there is a substantial argument
P 3105 for applying the law governing the arbitration agreement, on the rationale ● that the arbitrators' authority derives from the agreement to arbitrate. (568) An alternative approach would be to apply the law of the arbitral seat – on the theory that most questions regarding the arbitrators' authority are governed by the law of the seat, including competence-competence, authority to grant provisional measures and authority to order disclosure. (569)

Although there is room for debate, the better view appears to be that, absent contrary agreement, questions concerning the arbitrators' authority to award interest are better regarded as subject to the law of the arbitral seat. It is that law which is generally regarded as having the closest connection to questions of the tribunal's powers and which should ordinarily be applicable to questions regarding the arbitrators' authority. (570)

It is correct that most questions regarding the arbitrators' authority to award interest will be resolved by reference to the parties' arbitration agreement, and the authority granted by that agreement to the tribunal. Nonetheless, given the general role of the arbitral seat in defining the tribunal's authority, the provisions of the parties' arbitration agreement dealing with the authority to award interest should be interpreted under the law of the arbitral seat. (571)

In almost all cases, the law of the arbitral seat will give full effect to the parties' agreement regarding the arbitrators' authority, including to award interest. Despite this, some national laws may contain mandatory prohibitions against interest awards (by either courts or arbitrators), (572) or mandatory rules concerning the availability or rate of any interest awards. (573) These sorts of prohibitions are arguably inconsistent with the New York Convention's requirement that Contracting States recognize and enforce the material provisions of agreements to arbitrate, including provisions concerning the arbitral tribunal's authority. (574)

As to the standards governing awards of interest, several possibilities exist for the law
P 3106 governing a party's right to interest: (a) the substantive law governing the parties' ● underlying dispute; (b) the law of the arbitral seat (or, if different, the procedural law of the arbitration); (c) the law of the currency in which an award is sought; or (d) an "international" standard. (575) There is no consensus as to which of these options is preferred: "international tribunals ... furnish precedents for almost any decision one might wish to make in regard to interest." (576)

In many civil law jurisdictions, rules concerning interest are regarded as "substantive" for conflict-of-law purposes. (577) In other jurisdictions, including the United States, (578) rules governing interest may be deemed "procedural" or are governed by the law of the arbitral seat. The interplay between differing national laws dealing with interest, as well as national characterizations of interest rules and national choice-of-law rules, can be metaphysical in their theoretical complexity.

Notwithstanding these potential by-ways, arbitrators have in practice generally looked to the substantive law governing the parties' underlying claims for standards regarding
P 3107 interest. (579) At the same time, other approaches also exist, including application of a ● "reasonable" rate based on international practice, (580) the law of the arbitral seat (581) and the law of the jurisdiction in whose currency payment is due (*i.e.*, if the payment obligation is in U.S. dollars, U.S. law should apply). (582)

Application of the arbitral seat's law is especially likely where that law contains mandatory prohibitions or requirements concerning interest. (583) Conversely, if the applicable substantive law governing the parties' contract forbids awards of interest, arbitrators also have often not awarded it. (584)

The better view is to apply, as discussed above, the law of the arbitral seat to the question of the arbitrators' authority to award interest, and not the law of the contract. (585) The better view is also, absent contrary agreement, to apply the law of the currency in which any award is made to determine the substantive standards, including the applicable interest rates, for any award of interest; this approach is particularly true where a tribunal applies a statutory interest rate (which is often fixed by reference to the currency in question (and the rate of inflation of that currency)). Whatever law is applied, however, it is essential to take into account the fact that statutory interest rates are almost always linked to a particular currency (that of the state whose law specifies the interest rate), and that it generally makes no sense to apply that interest rate to other currencies.

P 3108 ● In some jurisdictions, the confirmation of an award has the effect of merging the award into the local court judgment, with the consequence that local statutory interest rates applicable to local judgments may become applicable. (586) In these jurisdictions, "the law governing interest for the post-judgment period will most likely be the law of the enforcement jurisdiction." (587)

In the United States, for example, the confirmation of an award (foreign or domestic) will merge the award into the U.S. judgment, making the applicable U.S. statutory rate for judgments applicable. (588) Parties are able, by express agreement, to provide for alternative interest rates, but U.S. courts have been demanding in requiring clear agreement upon a different rate than the statutory rate generally-applicable to judgments. (589)

[C] Awards of Interest by International Arbitral Tribunals

In practice, international arbitral tribunals are generally inclined to grant interest and, less clearly, to do so at a rate approximating market rates of interest during the period in question for the relevant currency. (590) They do so, at the end of the day, because interest often represents an essential element of the damage suffered by the aggrieved party. As an early judicial decision held:

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to
> P 3109 repair all the damages that accrue naturally from their breach. ... Every one ● who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties." (591)

There is controversy whether simple interest or compound interest should be awarded by arbitral tribunals. Some national arbitration legislation specifically authorizes awards of compound interest. (592) Nonetheless, there is authority for the proposition that only simple interest should ordinarily be available. (593) The better view is that, in order to fully compensate a successful party for its loss, compound interest should ordinarily be permitted. Typically, the commercial loss suffered by a business will be compound interest, reflecting the fact that most businesses would be in a position to earn compound interest or to otherwise realize compound return on their investments.

International arbitral tribunals often award interest for both the period prior to their award and for periods after the award but prior to payment. A few older awards concluded that the tribunal lacked the power to grant post-award interest, on the theory that it was then *functus officio*. (594) The more general practice, however, is to award interest until the date of payment of the award or, less commonly, the date of a judgment confirming the award. (595) As noted above, in some jurisdictions, national law may prescribe a different (statutory) rate of interest for post-judgment interest than for pre-award or pre-judgment interest. (596)

[D] Enforcement of Awards of Interest in National Courts

In general, national courts will enforce arbitrators' interest awards, even where the award
P 3110 is made under foreign law, and regardless whether the applicable rates exceed ● those under national law. (597) Awards of interest are subject to public policy prohibitions against "penal" or "usurious" interest, as well as to other generally-applicable grounds for challenging arbitral awards, but these ordinarily do not result in non-enforcement of

awards of interest. (598) Arbitral decisions refusing to award interest will also generally be upheld, as with the arbitrators' general authority to resolve the parties' substantive dispute, even if applicable law generally requires awards of interest by local courts. (599) National courts have also upheld awards of interest even where the parties' contract and submissions did not specifically request it. (600)

[E] Awards of Interest in Connection With International Arbitrations by National Courts

National courts may themselves sometimes award additional interest, both for the post-award/pre-judgment period, the post-judgment period, and (less clearly) the pre-award period. In general, national courts have applied their own law, rather than the law of the seat of the arbitration or another national law, to determine the entitlement to interest on a foreign award. (601)

P 3111 ● Most national courts have rejected requests that they grant pre-award interest that the arbitrators have refused to award. (602) These decisions correctly conclude that a request for an award of interest generally falls within the scope of the parties' arbitration agreement and therefore may not be pursued in a national court. In contrast, one U.S. decision has granted pre-award interest, albeit in unusual circumstances where the tribunal arguably invited a judicial interest award. (603)

As described above, arbitrators sometimes render awards that establish an interest rate that applies until payment of the award, which can include post-judgment, as well as post-award/pre-judgment, interest. National courts have generally enforced such awards as to the post-award/pre-judgment interest provisions. (604)

As to post-judgment interest, some courts have refused to enforce awards of post-judgment interest by arbitrators, holding instead that post-judgment interest is provided for by statutory provisions in the enforcement forum; these decisions have sometimes ordered payment of interest for the post-judgment period at the statutory interest rate.
P 3112 (605) Some authorities have declared broadly that, "under US law an ● arbitrator will not be recognised as having authority to award interest for the post-judgment period." (606) Where the parties' contract provides for a post-judgment interest rate, however, it is doubtful that this generalization should be accepted; in that case, the arbitrators' jurisdiction should ordinarily extend to interpretation and application of the parties' agreement, including for post-judgment periods. (607)

Post-award/pre-judgment interest has been awarded by some national courts when tribunals have not addressed the issue. (608) Similarly, some courts have ordered post-judgment interest when the arbitral tribunal has not done so. (609) ●
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References

1) For commentary, *see* Arroyo, *Dealing With Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437 (2008); Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int'l 141 (1988); Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7 (2013); Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of A Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 579 (1984-1985); Chiu, *Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead*, 13 Sing. Acad. L.J. 461 (2001); Cole, *Authority and International Arbitration*, 70 La. L. Rev. 801 (2010); Cuniberti, *The Law Governing the Modality of Arbitral Awards*, 25 Arb. Int'l 347 (2009); Delvolvé, *Essai sur la Motivation des Sentences Arbitrales*, 1989 Rev. arb. 149; Dunaud & Kostytska, *Declaratory Relief in International Arbitration*, 29 J. Int'l Arb. 1 (2012); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1389-1412 (1999); Gaitis, *International and Domestic Arbitration Procedure: The Need for A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int'l Arb. 1 (2004); Grabundzija, *Partial Arbitral Awards in International Commercial Arbitration*, 8(2) Transnat'l Disp. Mgt (2011); Hunter, *Final Report on Interim and Partial Awards*, 1(2) ICC Ct. Bull. 26 (1990); ICC, *Final Report on Dissenting and Separate Opinion of the ICC Commission on International Arbitration*, 2(1) ICC Ct. Bull. 32 (1991); Jarvin, *Non-Pecuniary Remedies: The Practices of Declaratory Relief and Specific Performance in International Commercial Arbitration*, in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2006* 167 (2007); Knoepfler & Schweizer, *Making of Awards and Termination of Proceedings*, in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* 160 (1989); Lévy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 Arb. Int'l 35 (1989); L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* (2008); Malinvaud, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 209 (ICCA Congress Series No. 14 2009); Mosk & Ginsburg, *Dissenting Opinions in International Arbitration*, 15(4) Mealey's Int'l Arb. Rep. 26 (2000); Mourre, *Judicial Penalties and Specific Performance in International Arbitration*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 53-73 (2008); Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?*, 29 Arb. Int'l 89 (2013); Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int'l 223 (2004); Rees & Rohn, *Dissenting Opinions: Can They Fulfil A Beneficial Role?*, 25 Arb. Int'l 329 (2009); Reichert & Murphy, *Enforceability of Foreign Arbitral Decisions*, 67 Arb. 369 (2001); M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* (ASA Spec. Series No. 30 2011); Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004); Schwebel, *May the Majority Vote of An International Arbitral Tribunal Be Impeached?*, 13 Arb. Int'l 145 (1997); Shore & Figueroa, *Dissents, Concurrences and A Necessary Divide Between Investment and Commercial Arbitration*, Global Arbitration Review (1 December 2008); Smit, *Judgments and Arbitral Awards in A Foreign Currency: A Means of Dealing With Currency Fluctuations in International Adjudication*, 7 Am. Rev. Int'l Arb. 21 (1996); Trittman, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders?*, 20 J. Int'l Arb. 225 (2003); van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821 (2010); van Houtte, *The Delivery of Awards to the Parties*, 21 Arb. Int'l 177 (2005); Werner, *Dissenting Opinions – Beyond Fears*, 9(4) J. Int'l Arb. 23 (1992); Wong, *The Misapprehension of Moral Damages in Investor-State Arbitration*, in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (2013).

2) *See* Chapters 25-27.

3) For commentary, *see* Hunter, *Final Report on Interim and Partial Awards*, 1(2) ICC Ct. Bull. 26 (1990); Knoepfler & Schweizer, *Making of Awards and Termination of Proceedings*, in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* 160 (1989); Trittman, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders?*, 20 J. Int'l Arb. 225 (2003).

4) As discussed above, arbitral "awards" must be distinguished from other categories of arbitral decisions, including "orders" or "directions." *See* §22.02[B][3][d]. Similarly, as also discussed above, "arbitral" awards must be distinguished from the results of other dispute resolution processes, including mediation, expert determination and conciliation. *See* §22.02[B].

5) *See* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 734 (2d ed. 2013) ("as the *travaux préparatoires* indicate, the terms 'interim award,' 'interlocutory award,' and 'partial award,' were meant to be used broadly and even interchangeably"); Gaitis, *International and Domestic Arbitration Procedure: The Need for A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 Am. Rev. Int'l Arb. 1, 65-66 (2004).

6) *See* §§22.02[B][3][c]-[d].

7) *See* §17.03[A]; §22.02[B][3][e].

8) *See*§§22.02[B][3][c] & [e].
9) Some instruments that are denominated "awards," but which only tentatively address particular issues without resolving the parties' claims, are not properly regarded as arbitral awards. *See*§22.02[B][3][d].
10) *See*§26.05[C][7]. This is true with regard to the Geneva Convention and a number of bilateral arbitration treaties. *See*§1.01[C][2]; §26.03[A]; §26.05[C][7].
11) *See*§26.05[C][7].
12) *See*§26.03[B][4]; §26.05[C][7].
13) *See*§1.02[B][5]; §22.02[B][3][c]; §26.05[C][7].
14) *Restatement (Third) U.S. Law of International Commercial Arbitration* §1-1, comment n (Tentative Draft No. 2 2012) ("All awards by definition set forth a 'final and binding' determination on the merits of a claim, defense, or issue. There is, however, only one final award.").
15) *See*UNCITRAL Model Law, Art. 32(1) ("The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article."); §23.01[A]; §26.05[B].
16) *See*§23.01[B].
17) *See, e.g.*, UNCITRAL Model Law, Arts. 32(1), 33-35; English Arbitration Act, 1996, §58(1); Belgian Judicial Code, Art. 1713; Japanese Arbitration Law, Arts. 39, 43, 45.
18) *See, e.g.*, 2010 UNCITRAL Rules, Art. 34(1) ("The arbitral tribunal may make separate awards on different issues at different times."), Art. 34(2) ("All awards ... shall be final and binding on the parties."); 1976 UNCITRAL Rules, Art. 32(1) ("In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards."); 2012 ICC Rules, Art. 2(v) (defining award to include "an interim, partial or final Award"), Art. 34(6) ("Every Award shall be binding on the parties" and "the parties undertake to carry out any Award without delay"); LCIA Rules, Art. 26(7) ("The Arbitral Tribunal may make separate awards at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal."); 2013 HKIAC Rules, Arts. 34(1)-(3). *See also*§23.01[B].
19) *See*§24.02.
20) *See*§25.04[F][3][b]; §26.05[C][4][h].
21) *See*§24.05[A].
22) *Restatement (Third) U.S. Law of International Commercial Arbitration* §1-1(w) (Tentative Draft No. 2 2012) ("A 'partial award' is an arbitral award that disposes of some, but not all, of the claims, defenses, or issues before the arbitral tribunal. A partial award does not include an order addressing scheduling, procedural, or evidentiary matters.").
23) *See*E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1357 (1999); Grabundzija, *Partial Arbitral Awards in International Commercial Arbitration*, 8(2) Transnat'l Disp. Mgt (2011); Kurkela, *Partial "Milestone" Awards and Lost Future Profits: Would It Take Part of the Challenge Away?*, 30 ASA Bull. 51 (2012); Pinna, *L'annulation d'une sentence arbitrale partielle*, 2008 Rev. arb. 615; Riegler, in S. Riegler *et al.* (eds.), *Arbitration Law of Austria: Practice and Procedure* §607, ¶5 (2007); Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 210 (1977) ("partial" award "related to part of a case which could be settled immediately"); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1061, ¶12 (22d ed. 2002). *Compare Judgment of 23 February 1999, Econerg Ltd v. Nat'l Elec. Co.*, XXV Y.B. Comm. Arb. 678 (Bulgarian S.Ct. App.) (2000) (apparently not regarding partial award as final).
24) *See*§§23.01[B] & [D]; Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 210 (1977) ("interim" award is "to bring the case closer to a solution"; "partial" award "related to part of a case which could be settled immediately"; distinction is unimportant, because arbitrators are entitled to make "any kind of award they deem appropriate for the conduct of the arbitration").
25) The UNCITRAL Model Law does not expressly provide for partial awards. It does, however, recognize that multiple awards are possible. *See*UNCITRAL Model Law, Arts. 33(3), (5). As discussed below, because the arbitral tribunal's authority to make partial or interim awards is inherent, they may do so even without express authorization.
26) Swiss Law on Private International Law, Art. 188. *See* Wirth, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 188, ¶¶11 *et seq.* (2000).
27) *See, e.g.*, English Arbitration Act, 1996, §47; German ZPO, §§301, 1042; Belgian Judicial Code, Art. 1713; Netherlands Code of Civil Procedure, Art. 1049; Swedish Arbitration Act, §29; Chinese Arbitration Law, Art. 55; Indian Arbitration and Conciliation Act, Art. 31(6); Dominican Republic Arbitration Law, Art. 36(1); Peruvian Arbitration Law, Art. 54.

28) 2010 UNCITRAL Rules, Art. 34(1). The 1976 UNCITRAL Rules provided that, "in addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards." 1976 UNCITRAL Rules, Art. 32(1).

The 2010 UNCITRAL Rules were drafted to avoid "qualifications regarding the nature of the award such as 'final', 'interim', or 'interlocutory'": Article 34(1) "clarifies that the arbitral tribunal may render awards on different issues during the course of the proceedings. It is based on Article 26.7 of the Rules of the London Court of International Arbitration." *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, UNCITRAL Working Group II, Forty-Ninth Session*, U.N. Doc. A/CN. 9/WG.II/WP.151/Add.1, 13, ¶23 (2008).

29) *See, e.g.*, 2012 ICC Rules, Art. 2(v) (defining "award" as including "an interim, partial or final award"); LCIA Rules, Art. 26(7) ("The Arbitral Tribunal may make separate awards on different issues at different times."); 2012 CIETAC Rules, Art. 48; 2010 NAI Rules, Art. 44; 2010 SCC Rules, Art. 38; WIPO Rules, Art. 62(a).

30) *See*§15.02[C].

31) *See, e.g., Photopaint v. Smartlens*, 335 F.3d 152 (2d Cir. 2003); *Hart Surgical, Inc. v. UltraCision*, 244 F.3d 231 (2d Cir. 2001); *Halliburton Energy Servs., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 775 (S.D. Tex. 2008); *Gulf Petrol Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F.Supp.2d 783, 794 (N.D. Tex. 2003); *Judgment of 8 March 1988, Sociétés Sofidif v. OIAETI*, 1989 Rev. arb. 481 (French Cour de cassation civ. 1e); *Judgment of 25 June 1992*, XXII Y.B. Comm. Arb. 619 (Austrian Oberster Gerichtshof) (1997). *Compare*N. Blackaby *et al.* (eds.), *Redfern and Hunter on International* Arbitration ¶9.23 (5th ed. 2009).

32) *See*§15.02; §15.03.

33) *See* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 736 (2d ed. 2013) (Iran-US Claims Tribunal used partial awards on jurisdiction, liability, damages and costs); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 37 (2d ed. 2005).

34) *See*§15.07[D][1]; §15.08[N]; Brower, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 Va. J. Int'l L. 971 (1994-1995); I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective* 36 (1993) ("The authorization for 'partial' awards suggests a lower degree of finality than separate final awards on different issues."); Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 Int'l Tax & Bus. L. 368, 369 (1986).

35) If the tribunal disregards that agreement, its award(s) will be subject to annulment and non-recognition (under Article V(1)(d) of the New York Convention). *See* §25.02[C][3][a]; §26.05[C][5][b]; *Assoc'd Corset & Brassiere Mfrs v. Corset & Brassiere Workers*, 16 N.Y.S.2d 736, 736 (N.Y. Sup. Ct. 1939) ("The award of the arbitrator was void in that he failed to pass on all the matters submitted to him for determination and there was no consent to a partial award."); *Judgment of 8 March 1988, Sociétés Sofidif v. OIAETI*, 1989 Rev. arb. 481 (French Cour de cassation civ. 1e).

36) Only an express agreement excluding partial awards should suffice to produce this result. The almost universal approach of national arbitration legislation and institutional rules, permitting partial awards, reflects both the parties' expectations and efficiency considerations. Only where an agreement explicitly requires a different result should this approach be abandoned. *See Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 234 (2d Cir. 2001); *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16 (1st Cir. 2001); *Hyosung (Am.) Inc. v. Tranax Techs. Inc.*, 2010 WL 1853764, at *5 (N.D. Cal.); *Mitsubishi Heavy Indus., Ltd v. Stone & Webster, Inc.*, 2009 WL 3169973, at *5 (S.D.N.Y.); *Halliburton Energy Servs., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 741 (S.D. Tex. 2008); *Andrea Doreen, Ltd v. Bldg Material Local Union 282*, 250 F.Supp.2d 107 (E.D.N.Y. 2003); K. Lionnet & A. Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* ¶6 II 3(a)(2) (3d ed. 2005); Wirth, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 188, ¶13 (2000).

37) For example, a party might argue that its rights were prejudiced by being prevented from submitting certain evidence or seeking certain discovery at early stages of a proceeding, because of the tribunal's decision to bifurcate; alternatively, a party might claim that a refusal to bifurcate proceedings imposed unnecessary expense on it. *See* W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶19.03 (3d ed. 2000) ("For the most part ... the arbitrator has discretion whether to make an intermediate decision by way of procedural decision, with the result to be incorporated in the final award as part of the tribunal's ratio descendi, or to make an interim award which creates a definitive title.").

38) *See, e.g.*, 1976 UNCITRAL Rules, Art. 21(4) ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question ..."). The 2010 UNCITRAL Rules amended this article to provide that, "the arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court." 2010 UNCITRAL Rules, Art. 23(3). *See also*§§7.05[C] & [E].

39) *See, e.g.*, U.S. FAA, 9 U.S.C. §16(a)(D) (referring to confirmation of "award or partial award"); English Arbitration Act, 1996, §§47, 66; Swiss Law on Private International Law, Arts. 188, 190; *Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191 (2d Cir. 1991) (partial award enforced); *Metallgesellschaft AG v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986) (same); *The Home Ins. Co. v. RHA/Pa. Nursing Homes*, 127 F.Supp.2d 482 (S.D.N.Y. 2001) (same); *Corporate Printing Co. v. N.Y. Typographical Union No. 6*, 1994 WL 376093 (S.D.N.Y.) (same). *Compare Kerr-McGee Refining Corp. v. M/T Triumph*, 924 F.2d 467, 471 (2d Cir. 1991) (award determining some, but not all, damages claims not "final"). *See* J.-L. Delvolvé, J. Rouche & G. Pointon, *French Arbitration Law and Practice* ¶¶303, 558 (2003); Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1 (2005); Patocchi & Jermini, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 194, ¶8 (2000); Voit, in H.-J. Musielak (ed.), *Kommentar zur Zivilprozessordnung* §1061, ¶3 (5th ed. 2007).

40) *See*§23.01[B].

41) UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 137 (2012).

42) *VV v. VW*, [2008] SLR 929 (Singapore High Ct.). *See also Tang Boon Jek Jeffrey v. Tan Poh Leng Stanley*, [2001] 3 SLR 237 (Singapore Ct. App.); *Maruna v. Lopatka*, [2002] BCSC 1084 (B.C. S.Ct.).

43) *See*§7.02; §7.03.

44) *See*§7.03[A][4]; §22.02[B][3][f].

45) *See*§7.03[A][4].

46) *See*§7.03[A][4]. *See also Judgment of 12 November 2010*, Case No. Ö 2301-09, ¶13 (Swedish S.Ct.) ("In the current case the arbitrators ruled on their jurisdiction in an 'Award on Jurisdiction.' This is not an arbitral award which can be challenged under Section 34 of the Arbitration Act. In the Swedish terminology it is a decision on jurisdiction during an ongoing arbitration (cf. Section 27(3) of the Act).").

47) *See*§7.03[A][4]; §22.02[B][3][f].

48) *See*§22.02[B][3][f].

49) *See*§7.03[A][4][c].

50) *See*§23.01[D]; Netherlands Code of Civil Procedure, Art. 1049 ("arbitral tribunal may render a final award, a partial final award, or an interim award").

51) *See Judgment of 25 June 1992*, XXII Y.B. Comm. Arb. 619, 621 (Austrian Oberster Gerichtshof) (1997) ("Interim awards (*Zwischenschiedssprüche*) on the merits concerning partial requests for determination differ from such formal decisions, because they involve a settlement of the merits. ... It is irrelevant that it does not settle [Claimant's] request for performance in a final manner. Further, the fact that no party requested this decision does not affect the decision's nature as a decision on the merits."); Peters & Koller, *The Award and the Courts – The Notion of Arbitral Award: An Attempt to Overcome A Babylonian Confusion*, 2010 Austrian Y.B. Int'l Arb. 161 ("In practice, two different applications of the terms 'interim' or 'interlocutory' awards can be distinguished: while the first one refers to the issue resolved by the decision, the second describes the nature of the decision itself."). *See also Tang Boon Jek Jeffrey v. Tan Poh Leng Stanley*, [2001] 3 SLR 237 (Singapore Ct. App.); *MCIS Ins. Bhd v. Assoc'd Cover Sdn Bhd*, [2001] 2 MLJ 561 (Kuala Lumpur High Ct.); Chiu, *Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead*, 13 Sing. Acad. L.J. 461 (2001); Trittman, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders?*, 20 J. Int'l Arb. 225, 258-60 (2003).

52) N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.19 (5th ed. 2009); Chiu, *Final, Interim, Interlocutory or Partial Award: Misnomers Apt to Mislead*, 13 Sing. Acad. L.J. 461 (2001); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶24-24 (2003); UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 137 (2012) ("A controversial issue is whether setting aside proceedings are admissible against an award that merely determines preliminary questions of the claim. There is no uniform terminology for such awards. They are in practice often referred to as 'interim awards' or sometimes as 'partial awards.'").

Arbitral tribunals and national courts are often inconsistent in their terminology, referring to arbitral decisions that decide some of the issues relevant to a claim (*e.g.*, liability, choice of law) as "partial" awards, rather than "interim" awards. *See, e.g., Mitsubishi Heavy Indus., Ltd v. Stone & Webster, Inc.*, 2009 U.S. Dist. LEXIS 91199, at *13-20 (S.D.N.Y.) ("partial" award on liability issues not "final").

53) *See*§17.02[A]; §22.02[B][3][e]; *Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000); *Yasuda Fire & Marine Ins. Co. of Europe v. Cont'l Cas. Co.*, 37 F.3d 345, 348 (7th Cir. 1994); *Pac. Reins. v. Ohio Reins.*, 935 F.2d 1019, 1022-23 (9th Cir. 1991); *Hyosung (Am.) Inc. v. Tranax Techs. Inc.*, 2010 WL 1853764, at *1 (N.D. Cal.); *Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F.Supp.2d 899, 908 (N.D. Ill. 2008); *S. Seas Navigation Ltd v. Petroleos Mexicanos*, 606 F.Supp. 692, 694 (S.D.N.Y. 1985); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 867 (1989).

54) *See*§17.02[G][4]; §17.03[A].

55) *See Judgment of 14 June 2005*, 2 Ob 136/05x (Austrian Oberster Gerichtshof) (due to its non-final character, interim award may not be challenged in absence of agreement to that effect); *Judgment of 25 June 1992*, XXII Y.B. Comm. Arb. 619, 627 (Austrian Oberster Gerichtshof) (1997) ("The first court correctly denied that this interim decision (Zwischenentscheid) could be challenged separately."). *Contra* A. Reiner, *Das neue Österreichische Schiedsrecht – SchiedsRÄG 2006* §611, ¶¶190-91 (2006); Riegler, in S. Riegler *et al.* (eds.), *Arbitration Law of Austria: Practice and Procedure* §611, ¶10 (2007).

56) *Judgment of 10 May 2007*, 2007 SchiedsVZ 278, 278 (Oberlandesgericht Frankfurt) (rejecting application to annul award finding liability but leaving issue of damages open: "An arbitral award for the purpose of this section [German ZPO, §1059] is a decision of the arbitral tribunal which disposes comprehensively and finally of a dispute or a separable portion of a dispute. So-called interim awards, which only deal with individual issues such as admissibility of the claim, preliminary substantive issues or the basis of a claim, at least in those cases where an arbitral tribunal still has to decide on the amount due, do not fall within this category.").

57) *Resort Condominiums Int'l Inc. v. Bolwell*, XX Y.B. Comm. Arb. 628, 642 (Queensland S.Ct. 1993) (1995).

58) *See*§17.03[A].

59) *See*§§22.02[B][3][e] & [g].

60) *See*§1.02[B][9].

61) Kreindler, *Settlement Agreements and Arbitration in the Context of the ICC Rules*, 9(2) ICC Ct. Bull. 22 (1998); Tchakoua, *The Status of the Arbitral Award by Consent: The Limits of the Useful*, 2002 RDAI/IBLJ 775.

62) *See*§23.07[B].

63) In some jurisdictions, settlement agreements enjoy special legal status and can be enforced reasonably expeditiously. *See, e.g.*, French Civil Code, Art. 2052(1); German ZPO, §§796a, 1053; Costa Rican Arbitration Law, 2011, Art. 30(2); Dominican Arbitration Law, Art. 35(2); Peruvian Arbitration Law, Art. 50(1). Nevertheless, recording a settlement as an award grants it the protections of the New York Convention (and national arbitration legislation).

64) *See*N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.34 (5th ed. 2009) (suggesting that consent award may be easier for state entity to pay than settlement agreement).

65) The New York Convention and other leading arbitration conventions are silent on the question of consent awards.

66) UNCITRAL Model Law, Art. 30(1). *See* H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 822-25 (1989).

67) *See, e.g.*, English Arbitration Act, 1996, §51; German ZPO, §1053; Belgian Judicial Code, Art. 1712(1); Austrian ZPO, §605; Singapore International Arbitration Act, 2012, §18; Hong Kong Arbitration Ordinance, 2013, Art. 66; Chinese Arbitration Law, Art. 49; Japanese Arbitration Law, Art. 38(1); Korean Arbitration Act, Art. 31; Australian International Arbitration Act, 2011, Schedule 2, Art. 30; Indian Arbitration and Conciliation Act, Art. 30(2); Malaysian Arbitration Act, §32; Costa Rican Arbitration Law, 2011, Art. 30(1); Peruvian Arbitration Law, Art. 50(1).

68) *See Mazza v. Dist. Council of N.Y.*, 2007 WL 2668116, at *1, 10 (E.D.N.Y.) (consent award by arbitral tribunal given same preclusive effect as consent judgment issued by court); *Dawes v. Treasure & Son Ltd* [2010] EWHC 3218 (TCC) (English High Ct.); *Halifax Life Ltd v. Equitable Life Assur. Soc'y* [2007] EWHC 503 (Comm) (English High Ct.); *Benaim (U.K.) Ltd v. Davies Middleton & Davies Ltd* [2004] EWHC 737 (TCC) (English High Ct.).

69) *See, e.g.*, 2010 UNCITRAL Rules, Art. 36(1); 2012 ICC Rules, Art. 32; LCIA Rules, Art. 26(8); ICSID Rules, Rule 43(2); 2013 HKIAC Rules, Art. 36(1); 2010 SCC Rules, Art. 39(1); 2013 SIAC Rules, Art. 28(8); 2013 VIAC Rules, Art. 38.

70) UNCITRAL Model Law, Art. 30(1); English Arbitration Act, 1996, §52(4).

71) 2010 UNCITRAL Rules, Art. 36(1) ("The arbitral tribunal is not obliged to give reasons for such an award."); 1976 UNCITRAL Rules, Art. 34(1); LCIA Rules, Art. 26(8); 2013 HKIAC Rules, Art. 36(1).

72) *See, e.g.*, 2010 UNCITRAL Rules, Art. 36(1); 1976 UNCITRAL Rules, Art. 34(1); 2012 ICC Rules, Art. 32; ICDR Rules, Art. 29(1); LCIA Rules, Art. 26(8).

73) *See, e.g.*, English Arbitration Act, 1996, §51(2); Belgian Judicial Code, Art. 1712(1); Chinese Arbitration Law, Art. 49; Japanese Arbitration Law, Art. 38(1); Costa Rican Arbitration Law, 2011, Art. 30; Peruvian Arbitration Law, Art. 50(1).

74) UNCITRAL Model Law, Art. 30(1) ("If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms."). *See also* *Summary Record of the 151st Meeting of the UNCITRAL, Eighth Session*, U.N. Doc. A/CN.9/SR.167, 203 (1975) ("arbitrators should be left free to decide whether they agreed or refused to record a settlement in the form of an arbitral award [because otherwise] arbitrators [would be] at the mercy of possible abuses by the parties"). *See also* *Draft on Arbitral Procedure Prepared by the International Law Commission at Its Fourth Session*, U.N. Doc. A/CN.4/59, Art. 22, II Y.B. I.L.C. 60, 65, (1952) ("The tribunal may take note of the conclusion of a settlement reached by the parties. At the request of the parties, it may embody the settlement in an award.").

75) That is clear under Article 30 of the Model Law, whose text addresses cases where "during arbitral proceedings, the parties settle the dispute." *See* UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 124 (2012) ("Article 30 only applies if arbitral proceedings have commenced and the final award has yet to be made. Where a full and final settlement of any claim has been reached before arbitral proceedings have commenced, a dispute no longer subsists to be referred to arbitration. It follows that such an agreed settlement may not be made in the form of an award under Article 30. ... In contrast, where the parties have commenced the arbitral proceedings and subsequently enter into a settlement agreement (prior to oral hearing), the dispute over the existence of a settlement agreement still falls under the jurisdiction of the arbitral tribunal.")

76) *Nathani Steels Ltd v. Assoc'd Constr.*, (1995) Supp 3 SCC 324 (Indian S.Ct.).

77) *See, e.g.*, Indian Arbitration and Conciliation Act, Arts. 73, 74.

78) *Ad Hoc Award in CRCICA Case No. 497/2006 of 17 February 2006*, CLOUT Case 779, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/75.

79) UNCITRAL Model Law, Art. 30(2) ("An award on agreed terms shall be made in accordance with the provisions of Article 31 and shall state that it is an award.").

80) *Judgment of 14 March 2003*, 20 Sch 01/02 (Oberlandesgericht Frankfurt) (formal requirements applicable to consent award not satisfied by settlement agreement); *Judgment of 28 June 1999*, 3 Sch 01/99 (Oberlandesgericht Frankfurt).

81) *Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 30, ¶2 (1985) (consent award may be refused "in case of suspected fraud, illicit or utterly unfair terms"). *See also* *Draft on Arbitral Procedure Prepared by the International Law Commission at Its Fourth Session*, U.N. Doc. A/CN.4/59, Art. 22, comment (2), II Y.B. I.L.C. 60, 65 (1952) ("The use of the word 'may' in article 22 is important, as it leaves the tribunal free to embody the settlement reached in an award or not. It is, in fact, necessary that the tribunal should be able to verify the legality and effective scope of the agreement. It cannot be compelled, even by an agreement between the parties to give binding force to an illegal or a purely fictitious settlement.").

82) *See, e.g., Kiyue Co. v. Aquagen Int'l Pte Ltd*, [2003] 3 SLR 130 (Singapore High Ct.) (controlling shareholder commenced arbitration against subsidiary and then influenced subsidiary to agree not to contest merits of claim: "It is manifestly wrong for a controlling shareholder to sue its subsidiary and then order it not to defend. On this fact alone, equity is against it. And that is not all. It appears that the company had received legal advice to the effect that the claim ought to be resisted.").

83) If third parties are allegedly adversely affected by a consent award they will generally be free to challenge its effects, on the grounds that the award does not bind nonparties. Equally, awards that are contrary to public policy would be subject to non-recognition in subsequent national court proceedings. *See* §26.05[C][9]. Nonetheless, there can be cases of fraud or illegality where the existence of other potential remedies does not alter the desirability of refraining from making a consent award that involves or facilitates illegal or wrongful conduct. Tribunals should properly refuse to make a consent award only where there are serious and credible grounds for doing so.

84) *See, e.g., Iran v. U.S.A., Decision No. DEC 8-A1-FT of 17 May 1982*, 1 Iran-US C.T.R. 144, 152-53 (1981) (arbitrators "should not attempt to review the reasonableness of the settlement in the place of the arbitrating parties"); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 785 (2d ed. 2013) ("It is not the task of the arbitrators to investigate the parties' reasons for settlement.").

85) Other arbitration conventions are also silent on the subject.

86) *See* §22.02[B][3][c]; §23.01[E].

87) *See* §1.05[A]; §2.02[C][4]; §23.02[B]; §23.03[E].

88) *See, e.g., Judgment of 2 November 2000*, 2001 WM 104 (German Bundesgerichtshof). *See also* E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1366 (1999); Newmark & Hill, *Can A Mediated Settlement Become An Enforceable Arbitration Award?*, 16 Arb. Int'l 84 (2000).

89) This is confirmed by the terms of the UNCITRAL Model Law and other national arbitration legislation, as discussed above. *See* §23.01[E][1]. Indeed, the arbitrators' duties arguably include the duty to propose settlement to the parties. *See* §13.04[D].

90) UNCITRAL Model Law, Art. 30(2).

91) As a practical matter, there will ordinarily be no need for recognition and enforcement of consent awards (because the parties will have just concluded a settlement agreement, with which they are presumptively content).

92) *See, e.g., Judgment of 2 November 2000*, 2001 WM 104 (German Bundesgerichtshof) (applicant alleged that forged annual reports had been submitted to induce party to agree to settlement which formed basis of consent award). *See also* UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 137 (2012) ("The mere fact that a party consented to an award on agreed terms pursuant to Article 30 does not prohibit it from applying for the setting aside of the award under Article 34.").

Again, it is unlikely as a practical matter that parties will seek to annul a consent award, that they have just concluded. Moreover, given that the consent award is based on the parties' agreement, it is unlikely that there will be substantive grounds for annulling the award. Challenge on grounds of fraud, public policy, or nonarbitrability would seem more plausible than other potential grounds for challenge. *See* Brekoulakis & Shore, *UNCITRAL Model Law, Chapter VI, Article 30*, in L. Mistelis (ed.), *Concise International Arbitration* 639 (2010) ("award on agreed terms should be open to challenge by either party on grounds that pertain to public policy, which parties cannot waive"). One court has held that the invalidity of the settlement agreement, on which a consent award is based, does not necessarily invalidate the award itself, which is subject only to annulment and non-recognition under Articles 34, 35 and 36 of the Model Law. *See Judgment of 2 November 2000*, 2001 WM 104 (German Bundesgerichtshof).

93) *See* §27.01[A].

94) *See* §15.08[HH].

95) *See* §15.08[HH]; UNCITRAL Model Law, Art. 25; English Arbitration Act, 1996, §41. *See also* §25.04[B][4]; §26.05[C][4].

96) *See, e.g., Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140-41 (7th Cir. 1985); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 118 (6th Cir. 1953); *Real Color Displays, Inc. v. Universal Applied Tech. Corp.*, 950 F.Supp. 714, 716-17 (E.D.N.C. 1997); *Oh Young Indus. Co. v. E & J Textile Group, Inc.*, 2005 WL 2470824, at *3 (Cal. Ct. App.) ("if parties agree to arbitration before an entity whose rules permit proceedings in the absence of one of the parties ... arbitration may proceed at a party's request without recourse to the courts for an order to compel arbitration, provided that the other party has adequate notice and an opportunity to participate"); *Judgment of 13 September 2007*, 2008 Rev. arb. 313 (Paris Cour d'appel); *Judgment of 14 February 1985*, 1987 Rev. arb. 325 (Paris Cour d'appel); *Judgment of 8 June 1967*, II Y.B. Comm. Arb. 234 (Landgericht Bremen) (1977); *Judgment of 8 August 1990*, XVII Y.B. Comm. Arb. 545 (Italian Corte di Cassazione) (1992) (enforcing default award and rejecting argument that domestic provisions regarding recognition of default judgments apply to arbitral awards); *Hainan Mach. Imp. & Exp. Corp. v. Donald & McArthy Pte Ltd*, XXII Y.B. Comm. Arb. 771 (Singapore High Ct. 1995) (1997).

97) *See* §25.04[B]; §26.05[C][3]. *See also* N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.31 (5th ed. 2009) ("The importance of ensuring that the defaulting party is given, and is seen to have been given, a full and proper opportunity of presenting its case to the arbitral tribunal is clear.").

98) *See* §15.08[HH]; 2010 UNCITRAL Rules, Art. 30; 2012 ICC Rules, Arts. 23(3), 26(2); 2013 AAA Rules, Rule 31; LCIA Rules, Art. 15(8); ICSID Rules, Rule 45.

99) *See* §15.08[HH].

100) *See* §15.08[HH]. *See also* N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.30 (5th ed. 2009) ("In effect, the tribunal takes on itself the burden of testing the assertions made by the active party; and it must call for such evidence and legal argument as it may require to this end. The task of an arbitral tribunal is not to 'rubber stamp' claims that are presented to it. It must make a *determination* of these claims. If one of the parties is not there to help, the arbitral tribunal must make this determination on its own.") (emphasis in original).

101) *See* §15.08[HH].

102) For a rare decision refusing to recognize a default award, *see Victrix SS Co. v. Salen Dry Cargo AB*, 825 F.2d 709, 713-14 (2d Cir. 1987) (refusing to enforce default award against bankrupt company, on grounds that payment of award would undermine foreign policy of equal distribution of assets from bankrupt estate); Style & Reid, *The Challenge of Unopposed Arbitrations*, 16 Arb. Int'l 219 (2000).

103) *See* §24.05.

104) UNCITRAL Model Law, Art. 33(5) ("The provisions of Article 31 [concerning the form and contents of an award] shall apply to a correction or interpretation of the award or to an additional award."); English Arbitration Act, 1996, §57(6) ("Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree."); German ZPO, §1058(1) ("Any party may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. §1054 shall apply to a correction or interpretation of the award or to an additional award."); Netherlands Code of Civil Procedure, Art. 1061(4) ("An additional award shall be regarded as an arbitral award ..."); Austrian ZPO, §610; Singapore International Arbitration Act, 2012, §43; Costa Rican Arbitration Law, 2011, Art. 33(3); Ugandan Arbitration and Conciliation Act, §34 ("A party may, within thirty days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.").

105) *See*§24.05[B]. *See also* Brekoulakis & Shore, UNCITRAL Model Law, Chapter VI, Article 33, in L. Mistelis (ed.), *Concise International Arbitration* 643, 643 (2010) ("additional awards are autonomous and therefore they can be challenged or enforced independently from the main award").

106) *See*§§24.03[B]-[C].

107) *See, e.g.*, UNCITRAL Model Law, Art. 33(5); English Arbitration Act, 1996, §57(7); German ZPO, §1058; Netherlands Code of Civil Procedure, Art. 1060(5); Austrian ZPO, §610; Swedish Arbitration Act, §32; Costa Rican Arbitration Law, 2011, Art. 33(1), (2); Peruvian Arbitration Law, Art. 60(2).

108) *See*§24.03; §24.04.

109) UNCITRAL Model Law, Art. 32(2). *See also* German ZPO, §1056(2); Austrian ZPO, §608(2); Danish Arbitration Act, §32(2); Japanese Arbitration Law, Art. 40; Costa Rican Arbitration Law, 2011, Art. 32(2); Peruvian Arbitration Law, Art. 60(2).

110) *See*§23.01[I][2].

111) That is true of the U.S. FAA and French Code of Civil Procedure.

112) German ZPO, §1056; Münch, in G. Lüke & P. Wax (eds.), *Münchener Kommentar zur Zivilprozessordnung* §1056, ¶9 (2d ed. 2001); J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶455 (2d ed. 2007). *See also*§13.04[E].

113) *See*F. Schwarz & C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* ¶25-009 (2009) ("order as such does not prevent the parties from reasserting their claim"); von Schlabrendorff & Sessler, *Making of the Award and Termination of the Proceedings*, in K. Böckstiegel *et al.* (eds.), *Arbitration in Germany: The Model Law in Practice* 412 (2007) ("parties are free to agree on the commencement of new arbitral proceedings").

114) B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1431 (2d ed. 2010) ("an order for the termination of the proceedings does not constitute a decision on the merits of dispute and is, thus, not final and binding on the parties"); Söderlund, *A Comparative Overview of Arbitration Laws*, 20 Arb. Int'l 73, 81 (2010) ("The English and the Russian Acts (in conformity with the general approach) reserve the award for any decision on a substantive issue, while any termination of the proceedings without any review of the merits will be described as a 'termination order' or the like.").

115) 2010 UNCITRAL Rules, Art. 36(1); 1976 UNCITRAL Rules, Art. 34(1).

116) 2010 UNCITRAL Rules, Art. 36(2); 1976 UNCITRAL Rules, Art. 34(2).

117) LCIA Rules, Art. 26(8).

118) 2012 ICC Rules, Art. 32. *See*Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 311 (2d ed. 2005).

119) *See*N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.01 (5th ed. 2009); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶¶19.02, 25.06 (3d ed. 2000).

120) *See*§5.02.

121) *See, e.g.*, UNCITRAL Model Law, Arts. 1(2), 31; English Arbitration Act, 1996, §§2, 3, 52; Netherlands Code of Civil Procedure, Art. 1058; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Arts. 1, 3(1), 39; Korean Arbitration Act, Art. 32; Australian International Arbitration Act, 2011, Schedule 2, Art. 31; Malaysian Arbitration Act, §33; Costa Rican Arbitration Law, 2011, Arts. 1(2), 31; Peruvian Arbitration Law, Art. 55.

122) *See*§2.03[H]; §5.02[A][2].

123) *See*§22.02[B][3][b]. Article IV of the New York Convention also provides that a party seeking to enforce an award shall provide "the original agreement referred to in Article II or a duly certified copy thereof." New York Convention, Art. IV. *See*§22.02[B][3][b]; §26.01[A][1].

124) *See*§22.02[B][3][b]; New York Convention, Art. IV(1)(a).

125) *See* Otto, in H. Kronke *et al.* (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* Art. IV, 152 (2010) ("An arbitration award not in written format would not be enforceable under the New York Convention, even if permitted under the applicable *lex arbitri*.").

Nonetheless, oral arbitral awards were historically valid at common law in England. R. Merkin, *Arbitration Law* ¶¶18.19 (1991 & Update August 2013) (citing *Oates v. Bromhill* [1794] 87 Eng. Rep. 931 (English K.B.); *Cocks v. Macclesfield* [1562] 2 Dyer 218 (English K.B.)).

126) For example, an oral (or, less clearly, unsigned) award would encounter objections in recognition proceedings in most jurisdictions.

127) *See*§23.02[B][1].

128) Nonetheless, if a Contracting State imposed discriminatory or idiosyncratic form requirements as a condition of confirmation or non-annulment of international arbitral awards made locally, the Convention should be interpreted as forbidding such a practice. This would parallel similar obligations of neutrality and non-discrimination under the Convention regarding arbitration agreements and arbitral procedures. *See*§4.04[A][1][b][v]; §4.04[A][2][j][v]; §4.05[A][2]; §4.07[B][3]; §4.08; §11.03[C][1][c][vi]; §12.01[B]; §12.01[B][2][a]; §12.04[B][7]; §12.04[E]; §15.04[A][1][a]. Moreover, if a Contracting State refused to give effect to the parties' agreement with regard to the formal requirements for an award, this would likely be contrary to Articles II and V(1)(d) of the Convention. These provisions require giving effect to the material terms of the parties' arbitration agreement. *See*§2.01[A][1][a]; §5.01[B][2]; §5.04[D][1][a]; §11.03[B]; §12.02[B] (especially §12.01[B][2][b]; §14.03[A]; §15.02[A]; §15.04[A][1][a]; §17.02[A][2]; §17.04[B][3]; §18.02[A]; §23.02[A]; §23.07[F]; §25.02[B]; §26.04[A].

129) *See*§26.03[B][5]; §26.05[A].

130) Formal requirements in national arbitration legislation have been applied in annulment actions to awards made locally, but not as grounds for non-recognition of awards made abroad. *See*§25.02[C]; §26.05[C][13].

131) *See*§23.03.

132) *See*§23.03[E].

133) UNCITRAL Model Law, Art. 31(1).

134) UNCITRAL Model Law, Art. 31(1).

135) UNCITRAL Model Law, Art. 31(3).

136) UNCITRAL Model Law, Art. 31(2).

137) H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 837 *et seq.* (1989).

138) *See, e.g.*, French Code of Civil Procedure, Art. 1481 ("The arbitral award shall state: the full names of the parties, as well as their domicile or corporate headquarters; if applicable, the names of the counsel or other persons who represented or assisted the parties; the names of the arbitrators who made it; the date on which it was made; the place where the sentence was made."), Art. 1482(2) ("The award shall state the reasons upon which it is based."); Swiss Law on Private International Law, Art. 189 (award must be in writing, reasoned, signed and dated); German ZPO, §1054; Belgian Judicial Code, Art. 1713; Netherlands Code of Civil Procedure, Art. 1057(4) ("In addition to the decision, the award shall contain in any case: (a) the names and addresses of the arbitrator or arbitrators; (b) the names and addresses of the parties; (c) the date on which the award is made; (d) the place where the award is made; (e) the reasons for the award, unless the award concerns merely the determination only of the quality or condition of goods ... or the recording of a settlement ..."); Austrian ZPO, §606; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Australian International Arbitration Act, 2011, Schedule 2, Art. 31; Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39; Korean Arbitration Act, Art. 32; Malaysian Arbitration Act, §33; Venezuelan Commercial Arbitration Law, Arts. 29, 30.

139) U.S. FAA, 9 U.S.C. §§9, 13(b) (requiring submission of copy of award). *See also* U.S. FAA, 9 U.S.C. §§10, 207 (not prescribing rules regarding form of award).

As discussed elsewhere, a few U.S. courts have (relying on archaic language in §9) held that an award is not subject to confirmation unless the parties' agreement to arbitrate provides that a judgment may be entered upon the arbitrators' award (a so-called "entry-of-judgment" provision). *See*§25.10.

140) *See, e.g.*, New Jersey Statutes Annotated 2A:24-7 (to obtain court confirmation, arbitral award must be in writing and verified).

141) English Arbitration Act, 1996, §52(1). *See* R. Merkin, *Arbitration Law* ¶18.21 (signature), ¶¶18.22 to 18.23 (date), ¶¶18.30 to 18.31 (seat) (1991 & Update August 2013).

142) English Arbitration Act, 1996, §52. *See* R. Merkin, *Arbitration Law* ¶¶18.17 to 18.32 (1991 & Update August 2013).

143) Nonetheless, as noted above, oral awards were historically valid and capable of enforcement in some jurisdictions (notably, England). *See*§23.02[B][2]. There was also no historical requirement in some jurisdictions (again, England) that arbitral awards be signed, although parties were entitled to demand that a signature be provided. R. Merkin, *Arbitration Law* ¶18.21 (1991 & Update August 2013) (citing *Everard v. Paterson* [1816] 6 Taunt. 625 (English Ct. Common Pleas); *Columbel v. Columbel* [1676] 2 Mod. Rep. 77 (English K.B.)).

144) D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 745 (2d ed. 2013) ("The requirement of a written award contained in Article 34(2) is an obvious necessity. No doubt the arbitrators will express the terms of the award and their underlying reasoning more clearly and precisely in written form, especially where the dispute involves complex issues. Likewise, the parties will better understand their rights and obligations under the award when they are memorialized in a written product. Moreover, a written award is a common prerequisite for enforcement of the award in court proceedings, where it can serve as the primary record of the arbitral proceedings.").

145) *Report of the UNCITRAL on the Work of Its Ninth Session*, U.N. Doc. A/31/17, Annex II, ¶163, VII Y.B. UNCITRAL 66, 78 (1976) ("all the arbitrators, including an arbitrator who dissented from the award should be required to sign the award"); *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 178 (1976) (arbitrators must sign award "in order to make clear that all the arbitrators participated in the arbitral proceedings and in the making of the award").

146) *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, UNCITRAL, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 178 (1976) ("In some jurisdictions the applicable arbitration law may require that an arbitral award be signed by all the arbitrators before it becomes valid and enforceable; in such a case the applicable national law would prevail over the provision" of the UNCITRAL Rules.).

National law that overrode the parties' agreement would in turn be subject to the provisions of Articles II(3) and V(1)(d) of the New York Convention. *See*§11.03[C][1][c][ii]; §26.05[C][5][b][viii].

147) R. Merkin, *Arbitration Law* ¶18.21 (1991 & Update August 2013) (citing *Little v. Newton* [1841] 2 Man. & G. 351 (English Ct. Common Pleas); *Thomas v. Harrop* [1823] 1 Sim. & St. 524 (English Vice-Ch. Ct.)).

148) *Euro'n Grain & Shipping Ltd v. Johnston* [1982] 3 All ER 989 (English Ct. App.) (historic rule "unnecessary and undesirable"); *Bank Mellat v. GAA Dev. Constr. Co.* [1988] 2 Lloyd's Rep. 44 (QB) (English High Ct.).

149) *Judgment of 30 March 2010, P & T Architects & Eng'rs Ltd v. Nakheel PJSC*, DWT/0022/2010 (Dubai World Special Tribunal) (rejecting argument that, under Dubai law, every page of award must be individually signed by arbitrators; holding that pages of award were numbered sufficiently to satisfy signature requirement). *Cf. Judgment of 8 May 2011*, Case No. 2009/310, Cassation No. 156/2009 (Dubai Ct. Cassation) ("[If] grounds are contained in papers separate from the paper in which the order is written, all of those papers must be signed by all of the arbitrators who issue the award, in addition to the final paper containing the order, otherwise the award will be void. Such voidness is a matter of public order.").

150) As discussed above, an arbitrator may not delegate his adjudicative responsibilities. *See*§13.04[A][6].

151) *See, e.g.*, UNCITRAL Model Law, Art. 31(1); English Arbitration Act, 1996, §52(3); French Code of Civil Procedure, Arts. 1513(1)-(2) ("Unless the arbitration agreement provides otherwise the award shall be made by majority decision. It shall be signed by all the arbitrators."; "However, if a minority among them refuses to sign, the others shall so state in the award."); German ZPO, §1054(1); Netherlands Code of Civil Procedure, Art. 1057(3); Austrian ZPO, §606; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39(1); Korean Arbitration Act, Art 32(1); Australian International Arbitration Act, 2011, Schedule 2, Art. 31(1); Malaysian Arbitration Act, §33(2); Costa Rican Arbitration Law, 2011, Art. 31(1); Peruvian Arbitration Law, Art. 55(1); Venezuelan Commercial Arbitration Law, Art. 29.

As discussed below, the Model Law and other arbitration statutes make provision for the refusal of an arbitrator (in the case of tribunals with multiple members) to sign the award. In general, this refusal will not affect the award's validity, although it must be noted and explained. *See*§23.05. Leading institutional rules are similar. *See*§23.05.

152) *See, e.g.*, French Code of Civil Procedure, Art. 1513(3); Swiss Law on Private International Law, Art. 189 (requiring only signature of chairman); ICDR Rules, Art. 27.

For an example of an award made following such a procedure, *see Award in ICC Case No. 3881*, 113 J.D.I. (Clunet) 1096 (1986); *Award in ICC Case No. 1703, "RAKTA" v. Parsons & Whittemore Overseas Co.*, reprinted in J. Wetter (ed.), *The International Arbitral Process: Public and Private* Vol. V, 361 (1979). *See also*§23.04[B].

153) UNCITRAL Model Law, Art. 32(4); *D. Frampton & Co. v. Thibeault*, [1988] F.C.J. No. 305 (Canadian Fed. Ct.).

154) *See, e.g., D. Frampton & Co. v. Thibeault*, [1988] F.C.J. No. 305 (Canadian Fed. Ct.).

155) *See Judgment of 5 December 2008, Bursa Büyüksehir Belediyesi v. Güris Insaat VE Mühendislik AS*, Case No. C07/166HR (Dutch Hoge Raad) (annulling award where one of three arbitrators did not participate in deliberations or drafting award, for medical reasons, but drafted dissent that was attached to award signed by other two arbitrators because signature of all three arbitrators was mandatory requirement and dissenting opinion did not form part of award). The decision is very likely wrong. The dissenting arbitrator's failure to attend the deliberations, putatively for medical reasons, but be able to review the award and prepare a dissent, strongly suggest that he had a full opportunity to take part in the tribunal's deliberations, but chose to express his views as a dissent; in these circumstances, the absence of the dissenting arbitrator's signature should not provide grounds for annulment or non-recognition.

156) D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 749-50 (2d ed. 2013). *See also id.* at 826-34 (examples of statements of reasons for refusing to sign award).

157) *See* §11.01 (especially §11.01[B][2]); §11.03[D][1]; §22.04.

158) *See* §23.02[B][1].

159) *See, e.g.*, UNCITRAL Model Law, Art. 31(3); English Arbitration Act, 1996, §53; German ZPO, §1054(3); Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Japanese Arbitration Law, Art. 39(4); Korean Arbitration Act, Art. 32(3); Australian International Arbitration Act, 2011, Schedule 2, Art. 31(3); Malaysian Arbitration Act, §33(2); Costa Rican Arbitration Law, 2011, Art. 31(3); Venezuelan Commercial Arbitration Law, Art. 30.

Institutional rules are generally similar. *See, e.g.*, 2010 UNCITRAL Rules, Art.18(2); 2012 ICC Rules, Art. 31(3); ICDR Rules, Art. 27(3); LCIA Rules, Art. 26(1); 2013 HKIAC Rules, Art. 14(2), 34(5); 2010 SCC Rules, Art. 20(3); 2013 VIAC Rules, Art. 36(2). *See also* §11.03[B]; §11.03[D][2][j]; §22.02[E][1].

160) *See* §22.02[E][1][a][i](3), p. 2949.

161) *Judgment of 30 March 2010, P & T Architects & Eng'rs Ltd v. Nakheel PJSC*, DWT/0022/2010 (Dubai World Special Tribunal) (Article 212(5) of Dubai Law of Civil Procedure, requiring that award state "the place at which it was issued," refers to place where award was made available to parties, not place where award was made; Article 212(5) satisfied because arbitral institution was based in Dubai and institution's rules and correspondence made clear that award was issued in Dubai).

162) *See* §25.08; UNCITRAL Model Law, Art. 34(3); U.S. FAA, 9 U.S.C. §§9, 10; English Arbitration Act, 1996, §70(3); French Code of Civil Procedure, Art. 1519(2); Chinese Arbitration Law, Art. 59; Japanese Arbitration Law, Art. 44(2).

Institutional rules are to the same effect. *See, e.g.*, 2010 UNCITRAL Rules, Art. 34(4); ICDR Rules, Art. 27(3); LCIA Rules, Art. 26(1). *See also* 2012 ICC Rules, Art. 31(3) ("The Award shall be deemed to be made at the place of the arbitration and on the date stated therein.").

163) *See* §23.03.

164) *See, e.g.*, English Arbitration Act, 1996, §68(2)(h); Belgian Judicial Code, Arts. 1713(5) (formal requirements), 1717 (annulment); Netherlands Code of Civil Procedure, Art. 1065(1)(d); Brazilian Arbitration Law, Art. 32. *Contra Judgment of 10 November 2005*, 4P.154/2005, ¶3.1 (Swiss Federal Tribunal) (lack of signature of one arbitrator not *per se* ground for annulment but just indication that arbitrator has not participated in deliberations); §25.02[C]. *Compare* §26.05[C][13], pp. 3712-13.

165) *See* §23.01[H]; §§24.03[B]-[C].

166) *See, e.g.*, UNCITRAL Model Law, Art. 34(2); U.S. FAA, 9 U.S.C. §10; French Code of Civil Procedure, Art. 1483 (domestic arbitration), Art. 1520; Hong Kong Arbitration Ordinance, 2013, Art. 81(1); Chinese Arbitration Law, Art. 70; Japanese Arbitration Law, Art. 44; Korean Arbitration Act, Art. 36(3); Australian International Arbitration Act, 2011, Schedule 2, Art. 34(2); Malaysian Arbitration Act, §7(4).

167) Formal requirements in national arbitration legislation have been applied in annulment actions to awards made locally, but not as grounds for non-recognition of awards made abroad. *See* §25.05[C]; §26.05[C][13].

168) *See* §23.03.

169) *See* §23.03[E].

170) One exception concerns language, where the arbitration clause may provide the language of the arbitration and the award. *See* §1.04[E][6]; §12.04[D][3]. Arbitration agreements may also address the question of who must sign the award, whether a majority vote is acceptable, and how the award must be delivered to the parties.

171) 2010 UNCITRAL Rules, Art. 34; 1976 UNCITRAL Rules, Art. 32(4). The Rules provide that if the award is not signed by all arbitrators then the award must state why any arbitrator has refused to sign it. They also permit the presiding arbitrator alone to sign the award where there is no majority.

172) *See, e.g.*, ICDR Rules, Art. 27; LCIA Rules, Art. 26(1); 2013 AAA Rules, Rule 46; 2012 Swiss Rules, Art. 32; 2012 CIETAC Rules, Art. 47; DIS Rules, §34; 2013 HKIAC Rules, Art. 34; ICAC Rules, Art. 37; 2013 VIAC Rules, Art. 36; WIPO Rules, Art. 62.

173) ICSID Rules, Rule 47; 2012 CIETAC Rules, Art. 47(4).

174) *See* §25.04[C] (especially §25.04[C][4]); §26.05[C][5] (especially §26.05[C][5][b]).

175) *See* §1.04[E][6]; §12.04[D][3].

176) *See* §1.04[E][6]; §12.04[D][3].

177) *See*§25.05[C]; §26.05[C][13].
178) Van Houtte, *Conduct of Arbitral Proceedings*, in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* 113, 117 (1989) (arbitral awards in various Middle Eastern jurisdictions must be rendered in official language of arbitral seat).
179) *See*§11.05[B][3]; §23.02[B][4].
180) For commentary, *see* Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int'l 141 (1988); Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of A Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 579 (1984-1985); Delvolvé, *Essai sur la Motivation des Sentences Arbitrales*, 1989 Rev. arb. 149; Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. Int'l Disp. Sett. 55 (2010); Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633 (1995); Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4(1) J. Int'l Arb. 27 (1987).
181) European Convention, Art. VIII. The ICSID Convention is to the same effect. ICSID Convention, Art. 48(3). In neither instance is the requirement for reasoned awards mandatory: parties are free to agree to an arbitral process culminating in an unreasoned award, but are presumed to have intended the contrary. Human rights conventions also arguably require that arbitrators state the reasons for their awards. *See* European Convention on Human Rights, Art. 6; *Hiro Balani v. Spain*, [1994] No. 18064/91 (E.C.H.R.); *Van de Hurk v. Netherlands*, [1994] No. 16034/90 (E.C.H.R.).
182) The requirement for reasoned awards is also common in state-to-state settings. *See* Statute of the International Court of Justice, Art. 56 ("The judgment shall state the reasons on which it is based."); 1907 Convention for the Pacific Settlement of International Disputes ("1907 Hague Convention"), Art. 79 ("The Award must give the reasons on which it is based."). *See also Gov't of Sudan v. Sudan People's Liberation Movement/Army, Final Award in PCA Case of 22 July 2009*, ¶531 ("To meet the minimum requirement, an award should contain sufficient ratiocination to allow the reader to understand how the tribunal reached its binding conclusions (regardless of whether the ratiocination might persuade a disengaged third party that the award is substantively correct). As to the substantive issue, awards may be set aside for failure to state reasons where conclusions are not supported by any reasons at all, where the reasoning is incoherent or where the reasons provided are obviously contradictory or frivolous.").
183) The requirement for reasoned awards appears to have had its principal origins in civil law systems. UNCITRAL, *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 178 (1976) (requirement for reasoned award "reflect[s] the law in many jurisdictions, particularly countries with a civil law system, to require that arbitral awards incorporate the reasons for the decision reached by the arbitrators"). *Compare Draft on Arbitral Procedure Prepared by the International Law Commission at Its Fourth Session*, U.N. Doc. A/CN.4/60, Art. 24(2), II Y.B. I.L.C. 60, 65 (1952) ("The award shall include a full statement of reasons.").
184) *See* Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int'l 141, 145 (1988); R. Merkin, *Arbitration Law* ¶18.45 (1991 & Update August 2013). *See also* Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of A Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 579 (1984-1985).
185) *See, e.g., United Steelworkers of Am. v. Enter. Wheel Car Corp.*, 363 U.S. 593, 598 (U.S. S.Ct. 1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); *Tame Shipping Ltd v. Easy Navigation Ltd, The "Easy Rider"* [2004] EWHC 1862 (Comm) (English High Ct.) ("It is undoubtedly the case that by the time of the passing of the Arbitration Act, 1979 there was a well-established practice among arbitrators of publishing their reasons in 'confidential' form in those cases where the parties had not asked for the award to be stated in the form of a special case."); Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int'l 141, 145 (1988); R. Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* 232 (1997).
186) *See, e.g.*, UNCITRAL Model Law, Art. 31(2); English Arbitration Act, 1979, §1(6); English Arbitration Act, 1996, §52(4); Québec Code of Civil Procedure, Art. 945(2); British Columbia International Commercial Arbitration Act, §31(3); Indian Arbitration and Conciliation Act, Art. 31(3); New Zealand Arbitration Act, Schedule 1, Art. 31(2). *See generally* Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of A Common Law of International Transactions*, 23 Colum. J. Transnat'l L. 579 (1984-1985); A. van den Berg, *The New York Arbitration Convention of 1958* 380-81 (1981).
187) UNCITRAL Model Law, Art. 31(2). The provision excludes consent awards from the requirement that reasons be given for the award. *Ibid. See*§23.01[E][1].
188) *See Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, Art. 31, ¶3 (1985); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 838 (1989).

189) *See, e.g.*, English Arbitration Act, 1996, §52(4); Swiss Law on Private International Law, Art. 189(2); German ZPO, §1054; Netherlands Code of Civil Procedure, Arts. 1057(e), 1065(1)(d) (annulment of award if "award is not signed or does not contain reasons in accordance with the provision of Article 1057"); Austrian ZPO, §606(2); Norwegian Arbitration Act, §36; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39(2); Korean Arbitration Act, Art. 32(2); Australian International Arbitration Act, 2011, Schedule 2, Art. 31; Malaysian Arbitration Act, §33(3); Costa Rican Arbitration Law, 2011, Art. 31(2); Peruvian Arbitration Law, 2008, Art. 56(1); Venezuelan Commercial Arbitration Law, Art. 30; Egyptian Arbitration Law, Art. 43(2) ("The arbitral award shall state the reasons upon which it is based unless the parties to arbitration have agreed otherwise or the law applicable to the arbitral proceeding does not require the award to be supported by reasons ..."). *See also*French Code of Civil Procedure, Art. 1506 (duty to give reasons in domestic awards (Art. 1482(2)) applies to international arbitration, "unless the parties have agreed otherwise").

190) *See, e.g.*, French Code of Civil Procedure, Art. 1482; Belgian Judicial Code, Art. 1713(4); Russian Arbitration Law, Art. 31(2) (omitting Model Law phrase "unless otherwise agreed by the parties"); Ukrainian Arbitration Law, Art. 31(2); Brazilian Arbitration Law, Art. 26. *See*Delvolvé, *Essai sur la Motivation des Sentences Arbitrales*, 1989 Rev. arb. 149; M.-C. Rondeau-Rivier, *JurisClasseur Procédure Civile*, Fasc. 1042, ¶¶47-50 (1996).

191) *See, e.g.*, 2012 ICC Rules, Art. 31(2); ICSID Rules, Rule 47(1)(i); 2012 CIETAC Rules, Art. 47(3); 2013 HKIAC, Art. 34(4); ICAC Rules, Art. 41(1); 2010 NAI Rules, Art. 49(2)(e).

192) *See, e.g.*, 2010 UNCITRAL Rules, Art. 34(3); 1976 UNCITRAL Rules, Art. 32(3); ICDR Rules, Art. 27(2); LCIA Rules, Art. 26(1); 2013 HKIAC Rules, Art. 34(4); 2013 VIAC Rules, Art. 36(1); WIPO Rules, Art. 62(c).

The United States and United Kingdom initially opposed the 1976 UNCITRAL Rules' proposed requirement for reasoned awards. After debate, the Rules were drafted to require reasons, except where the parties agreed otherwise (either expressly or by implication). UNCITRAL, *Summary Record of the Tenth Meeting of the Committee of the Whole (II), Ninth Session*, U.N. Doc. A/CN.9/9/C.2/SR.10, 8, ¶¶62, 64, 65, 73-75 (1976).

193) Bingham, *Reasons and Reasons for Reasons*, 4 Arb. Int'l 141, 145 (1988). *See also* Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 366 (1978) ("Adjudication is ... a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."); Helfer & Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 320 (1997) ("Reasons should explain why and how a particular conclusion was reached. To reason in this context, means to give reasons for a particular result, regardless of the logic or mode of reasoning underlying those reasons."); Shapiro, *The Giving Reasons Requirement*, 1992 U. Chi. Legal F. 179, 181 ("in the Western tradition, the very concept of political authority ... implies the capacity to give reasons").

194) *See*§1.05[A]; §2.02[C][4]; §13.04; §23.03[E].

195) D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 801 (2d ed. 2013) ("Among the most important obligations that the arbitral tribunal owes the parties is the rendering of a coherent, accurate and complete award.").

196) The requirement for a reasoned award arguably encourages principled decision-making, by making it more difficult to adopt unprincipled compromise decisions.

197) *Compare* M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 313 (2d ed. 2008) ("Providing legal reasons is often the most difficult part of drafting the Award, which often turns out to be the weakest part of the Award. ... Some view the weaknesses in legal reasoning as in part a result of the fact that most ICC Awards are not published and when they are published it is often without the names of the arbitrators who participated in drafting them.").

198) Rau, *On Integrity in Private Judging*, 14 Arb. Int'l 115, 148 (1998).

199) For a sharply-critical view of lengthy awards, *see Mohsen Asgari Nazari v. Islamic Repub. of Iran, Dissenting and Concurring Opinion of Howard Holtzmann in Award in IUSCT Case No. 559-221-1 of 24 August 1994*, 30 Iran-US C.T.R. 163, 168-69 (1994) ("I also write separately to call attention to the Tribunal's growing tendency to write Awards that are overly long and excessively detailed – a tendency that, regrettably, this Award exemplifies. ... A plea for brevity must, in principle, be brief. ... The issue is not a choice of literary style. At stake is the efficient use of the Tribunal's limited time, funds and facilities – resources which are, in my view, endangered by the present practice in drafting awards.").

200) *See, e.g., Starrett Housing Corp. v. Islamic Repub. of Iran, Concurring Opinion of Howard H. Holtzmann in Interlocutory Award in IUSCT Case No. ITL 32-24-1 of 20 December 1983*, 4 Iran-US C.T.R. 159, 179-80 (1983) ("That calls for an explanation of the Tribunal's views, but it is not a requirement that an award regurgitate every unsupported allegation in every pleading and argument. The purpose of an award is to express and explain the decision of the Tribunal, not to serve as vehicle for polemics of any party."); *Bay Hotel & Resort Ltd v. Cavalier Constr. Co.*, [2001] UKPC 34 (Turks & Caicos Islands Privy Council) (rejecting claim that skeletal award was unreasoned); *Navigation Sonamar Inc. v. Algoma Steamships Ltd*, [1987] R.J.Q. 1346 (Québec S.Ct.); *Trave Schiffahrtsgesellschaft mbH & Co. KG v. Ninemia Maritime Corp.* [1986] QB 802, 807 (QB) (English High Ct.) (reasoned award is "one which states the reasons for the award in sufficient detail for the court to consider any question of law arising therefrom"); Knoepfler & Schweizer, *Making of Awards and Termination of Proceedings*, in P. Sarcevic (ed.), *Essays on International Commercial Arbitration* 160 (1989) ("Reasons should be comprehensible to the parties.").

201) *Bremer Handelsgesellschaft v. Westzucker* [1981] 2 Lloyd's Rep. 130, 132-33 (English Ct. App.).

202) *Gordian Runoff Ltd v. Westport Ins. Corp.*, [2010] NSWCA 57 (NSW Ct. App.) (rejecting requirement for reasons imposed in prior Australian authority (*Oil Basins*) and holding that arbitrators were not required to provide reasons equivalent to those of a court). *Compare Oil Basins Ltd v. BHP Billiton Ltd*, [2007] VSCA 255 (Vict. Ct. App.) (in domestic arbitration, arbitral tribunal was required to provide reasons equivalent to those of a domestic court).

203) *See, e.g.*,*Judgment of 16 December 2004*, 2005 Rev. arb. 217 (Paris Cour d'appel) (tribunal has no obligation to list all evidence it considers).

204) *Judgment of 3 April 2007*, Case No. 123/119 (Cairo Ct. App.).

205) If an award reaches a badly wrong result, it may be exposed to annulment in states where judicial review of the substance of arbitrators' decisions is available. *See* §§25.02[D][1]-[2]. In these instances, annulment results from the arbitral tribunal's erroneous conclusions, rather than an absence of reasons in the award.

206) *See*§25.05[B], pp. 3358-60.

207) This requirement is discussed in greater detail below. *See*§25.04[D][5].

208) *See*§23.03[B]; UNCITRAL Model Law, Art. 31(2); English Arbitration Act, 1996, §52(4); Swiss Law on Private International Law, Art. 189(2); Netherlands Code of Civil Procedure, Art. 1057(e); Norwegian Arbitration Act, §36; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39(2); Korean Arbitration Act, Art. 32(2); Australian International Arbitration Act, 2011, Schedule 2, Art. 31; Malaysian Arbitration Act, §33(3)(a).

In contrast, a few states impose a mandatory requirement for a reasoned award. *See*§23.03[B]. Legislation in the arbitral seat overriding the parties' agreement for an unreasoned award is likely not inconsistent with the New York Convention, but an unreasoned award would generally be recognized notwithstanding such mandatory requirements. *See*§12.02[B]; §14.03; §15.02[A]; §15.04[A][1][a]; §23.02[A]; New York Convention, Art. V(1)(d).

209) *See*§11.03[B]; §15.02.

210) That is particularly true given the parties' freedom to agree to *amiable compositeur* and arbitration *ex aequo et bono*. *See*§19.07. If parties are free to agree to resolution of their dispute without reference to strict legal principles, it is very difficult to see why they cannot waive a statement of the legal reasoning justifying the award.

211) *See*§23.03[E], pp. 3046-48.

212) This is consistent with the approach of the European Convention. *See*§23.02[B][2][c]; European Convention, Art. VIII.

213) *See*§25.04[D][5].

214) *See*§25.04[D][5], pp. 3046-48. *Compare*§23.03[E]; French Code of Civil Procedure, Art. 1520; *Judgment of 22 November 1966, Gerstlé v. Merry Hull*, 94 J.D.I. (Clunet) 631 (French Cour de cassation civ. 1e) (1967); *Judgment of 21 August 1990*, DFT 116 II 373, 375 (Swiss Federal Tribunal); Berti & Schnyder, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 190, ¶77 (2000).

215) *See*§23.03[B].

216) *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (U.S. S.Ct. 1960).

217) *See, e.g., Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204 n.4 (U.S. S.Ct. 1956); *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006); *Stark v. Sandberg, Phoenix & von Gontard, PC*, 381 F.3d 793, 802 (8th Cir. 2004); *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004); *El Dorado Sch. Dist. v. Cont'l Cas. Co.*, 247 F.3d 843, 847 (8th Cir. 2001); *Eljer Mfg Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("an arbitrator is simply not required to state the reasons for his decision"); *A.G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1403 (9th Cir. 1992); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 412 (5th Cir. 1990); *Virgin Islands Nursing Ass'ns Bargaining Unit v. Schneider*, 668 F.2d 221, 223 (3d Cir. 1981) (rejecting argument that court should "exercise [its] supervisory power to enunciate a new requirement that arbitrators file written opinions, or, at least, findings of fact"); *Repub. of Argentina v. BG Group plc*, 715 F.Supp.2d 108, 124 (D.D.C. 2010) ("[The arbitrator's] failure to provide an explanation for his decision is hardly evidence of nefarious intent on his part, especially given the well-settled principle that arbitrators have no obligation to disclose the basis upon which their awards are made."), *rev'd on other grounds*, 665 F.3d 1363 (D.C. Cir. 2012); *Vitarroz Corp. v. G. Willi Food Int'l Ltd*, 637 F.Supp.2d 238, 247 (D.N.J. 2009); *Dunhill Franchisees Trust v. Dunhill Staffing Sys., Inc.*, 513 F.Supp.2d 23, 32 (S.D.N.Y. 2007) ("Arbitrators are not required to give reasoned analysis for their decisions, or any particular aspect of them."). *See also* Rau, *On Integrity in Private Judging*, 14 Arb. Int'l 115, 149 (1998) ("It is striking that by contrast to the judicial forum, arbitration shares with other processes of private settlement two major characteristics: both a tendency to look for intermediate solutions – responsive to the uniqueness of each dispute – and the absence of any need to justify the outcome.").

218) *See*§23.03[B].

219) *See Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008) (arbitrator had "satisfied his obligation to render a reasoned award"); *Choice Hotels Int'l, Inc. v. Patel*, 2004 WL 57658, at *6 (D. Md.) (AAA Rules, which governed arbitration, provided that "the arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate").

220) *See*§23.03[B].

221) *See*§23.03[B].

222) *See*§26.05[C][3][d]; *Judgment of 29 January 1958*, 1958 Rev. arb. 123, 125 (Nancy Cour d'appel) (1958) ("failure to give reasons, although contrary in principle to French procedure is not contrary to French international public policy, if it is permitted by the foreign law"); *Judgment of 15 December 2009*, I-4 Sch 10/09 (Oberlandesgericht Düsseldorf) (refusing to deny recognition of unreasoned award; institutional rules agreed by parties did not require reasoned award); *Inter-Arab Inv. Guar. Corp. v. Banque Arabe et Int'l d'Investissements*, XXII Y.B. Comm. Arb. 643, 651-52 (Brussels Tribunal de Première Instance) (1997) (rejecting objections to recognition of allegedly unreasoned foreign award, on grounds that law of judicial enforcement forum (requiring reasoned awards) was not applicable to foreign awards and that requirement for reasoned award was not a principle of public policy), *aff'd*, *Judgment of 24 January 1997*, XXII Y.B. Comm. Arb. 643, 655 (Brussels Cour d'appel) (1997); *Judgment of 24 November 1994*, XXI Y.B. Comm. Arb. 635 (Rotterdam Rechtbank) (1996) (unreasoned award recognized where parties did not request reasons); *Judgment of 2 May 1980, Efxinos Shipping Co. v. Rawi Shipping Lines Ltd*, VIII Y.B. Comm. Arb. 381 (Genoa Corte d'Appello) (1983); *Judgment of 8 October 1977, Bobbie Brooks, Inc. v. Lanificio Walter Banci*, IV Y.B. Comm. Arb. 289, 292 (Florence Corte d'Appello) (1979) ("fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by foreign legislative and judicial authorities").

223) If the parties have expressly agreed upon an unreasoned award, there is no basis for denying recognition of an award under Article V(1)(d) of the New York Convention. *See*§11.03[B]; §11.05[B][3]; §26.05[C][3][d]. Nor is there a basis for denying recognition of an unreasoned foreign award under Article V(2)(b), particularly in states where parties are free to agree upon an unreasoned award in locally-seated arbitrations. *See*§23.03[B]. Put simply, if parties are free to agree to unreasoned awards in a local arbitration, it is impossible to see why local public policy would forbid them from doing so in a foreign arbitration.

224) *See*§15.02[B]; §§15.06[A]-[B]; §26.03[B]; §26.05[C][3][d].

225) *See, e.g.*,*Judgment of 30 September 1999*, XXXI Y.B. Comm. Arb. 640, 648 (Hanseatisches Oberlandesgericht Bremen) (2006) (foreign arbitral award was scantily-reasoned ("would hardly meet the requirements of German domestic procedural public policy"), but not grounds for non-recognition under Article V(2)(b)); *Judgment of 10 July 2002*, XXVIII Y.B. Comm. Arb. 821, 825 (Vardo Enforcement Ct.) (2003) ("arbitral tribunals in some countries have different traditions for wording awards than Norwegian arbitral tribunals ... an award lacking a clear dispositive part, which is a characteristic of Norwegian awards, should be enforced in Norway if its conclusions are evident"); *The Bay Hotel & Resort Ltd v. Cavalier Constr. Co.*, [2001] UKPC 34 (Turks & Caicos Islands Privy Council). *See also* Wells, *French and American Judicial Opinions*, 19 Yale J. Int'l L. 81, 92 (1994) ("Rather than a reasoned and candid essay, an opinion in the highest courts [in France] is a terse and opaque summary of the outcome and the reasons for it.").

226) *Judgment of 30 September 1999*, XXXI Y.B. Comm. Arb. 640, 648 (Hanseatisches Oberlandesgericht Bremen) (2006).

227) *See, e.g., Mut. Shipping Corp. v. Bayshore Shipping Co., The Montan* [1985] 1 Lloyd's Rep. 189 (English Ct. App.) (unreasoned award contrary to English public policy); *Domotique Secant Inc. v. Smart Sys. Tech. Inc.*, [2005] Can. LII 36874 (Québec S.Ct.) (refusing to recognize unreasoned U.S. award); *Judgment of 3 April 1987*, XVII Y.B. Comm. Arb. 529 (Italian Corte di Cassazione) (1992) (public policy requires non-recognition of award with insufficient and illogical reasons). *See*Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4(1) J. Int'l Arb. 27 (1987). *But see* Brekoulakis & Shore, UNCITRAL Model Law, Chapter VI, Article 31, in L. Mistelis (ed.), *Concise International Arbitration* 640, 640-41 (2010) ("Reasoning is part of the required form of an award. However, the reasoning of an award should not be considered a public policy requirement.").

228) *See*§23.03[B].

229) *See*§25.04[C][1].

230) M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 308 (2d ed. 2008) ("Many, if not most Awards rendered in ICC arbitrations are rendered by unanimity."). *See also* Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7 (2013).

231) French Code of Civil Procedure, Arts. 1480, 1513; German ZPO, §1052(1); Chinese Arbitration Law, Arts. 53, 54; Indian Arbitration and Conciliation Act, Arts. 29(1), 31(2); New Zealand Arbitration Act, Schedule 1, Arts. 29, 31(1); Iranian International Commercial Arbitration Law, Arts. 29, 30(1). *See also*2010 UNCITRAL Rules, Arts. 33(1), 34(4); LCIA Rules, Arts. 26(3), (4).

232) UNCITRAL Model Law, Art. 29. Article 31(2) provides that the award may be signed by only a majority of the arbitrators, provided that the reason for the omitted signature(s) is stated. UNCITRAL Model Law, Art. 31(2). *See*§23.02[B][2][a].

233) Some arbitration legislation provides for majority decisions unless otherwise agreed by the parties. *See*French Code of Civil Procedure, Art. 1513; Swiss Law on Private International Law, Art. 189(2); German ZPO, §1052(1); Belgian Judicial Code, Art. 1713(3); Netherlands Code of Civil Procedure, Art. 1057(1); Austrian ZPO, §604; Italian Code of Civil Procedure, Art. 823; New Zealand Arbitration Act, Schedule 1, Art. 29.

Other legislation simply provides for majority decisions, without reference to the parties' agreement. *See*English Arbitration Act, 1996, §52(3); Chinese Arbitration Law, Art. 53; Japanese Arbitration Law, Art. 37(2). *See also*Hong Kong Arbitration Ordinance, 2013, Art. 65; Korean Arbitration Act, Art. 30; Australian International Arbitration Act, 2011, Schedule 2, Art. 29; Malaysian Arbitration Act, §31(1); Costa Rican Arbitration Law, 2011, Art. 29; Peruvian Arbitration Law, Art. 52(1); Iranian International Commercial Arbitration Law, Art. 29.

234) *See, e.g.*, UNCITRAL Model Law, Art. 31(2); German ZPO, §1054(1); Austrian ZPO, §606; Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 53; Japanese Arbitration Law, Art. 39(1); Korean Arbitration Act, Art. 32(1); Indian Arbitration and Conciliation Act, Art. 31(2); Australian International Arbitration Act, 2011, Schedule 2, Art. 31(1); New Zealand Arbitration Act, Schedule 1, Art. 31(1); Malaysian Arbitration Act, §33(2); Iranian International Commercial Arbitration Law, Art. 30(1); Costa Rican Arbitration Law, 2011, Art. 31(1); Venezuelan Commercial Arbitration Law, Art. 29. *See also* the institutional rules cited in §23.04[A].

235) *See* statutes cited in §23.04[A]. Agreements requiring unanimity among the arbitrators would obviously alter significantly the dynamics of decision-making by the tribunal. Such provisions are virtually never encountered.

236) *See, e.g.*, 2010 UNCITRAL Rules, Art. 33(1); 2012 ICC Rules, Art. 31(1); ICDR Rules, Art. 26(1); LCIA Rules, Art. 26(3); 2012 CIETAC Rules, Arts. 47(5), (6); 2013 HKIAC Rules, Art. 32(1); 2010 SCC Rules, Art. 35(1); 2013 SIAC Rules, Art. 28(5); 2013 VIAC Rules, Art. 35(1).

237) *See*§13.07.

238) *See, e.g.*, 2012 GAFTA Rules, Art. 9:1.

239) *See, e.g., Cargill Int'l SA v. Sociedad Iberica de Molturacion SA* [1998] 1 Lloyd's Rep. 489 (English Ct. App.).

240) *See*§12.06[C]; §12.07[B]; §13.04[E]; §13.05[D].

241) *See*§13.07[A][3]; English Arbitration Act, 1996, §20(4); French Code of Civil Procedure, Art. 1513(3); Swiss Law on Private International Law, Art. 189(2); Belgian Judicial Code, Art. 1711(3); Chinese Arbitration Law, Art. 53.

242) *See, e.g.*, 2012 ICC Rules, Art. 31(1); LCIA Rules, Art. 26(3); Euro-Arab Chambers of Commerce Rules of Conciliation, Arbitration and Expertise, Art. 24(2); 2013 HKIAC Rules, Art. 32(1); 2013 SIAC Rules, Art. 28(5).

Article 46 of the former International Arbitration Rules of the Zurich Chamber of Commerce adopts a similar approach, but restricted the chairman's discretion by providing that an award in favor of the prevailing party can be neither less than the lowest proposal made by the co-arbitrators, nor greater than the highest proposal.

243) *See, e.g.*, German ZPO, §1052(1) ("In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members."); Japanese Arbitration Law, Art. 39(1).

244) *See, e.g.*, 2010 UNCITRAL Rules, Art. 33(1); ICDR Rules, Art. 26(1). *See also*UNCITRAL, *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 178 (1976) ("If a majority of the arbitrators fail to agree on an award, the arbitral tribunal must resolve the deadlock in accordance with the relevant law and practice at the place of arbitration.").

While the UNCITRAL Working Group considered amending Article 31(1), as it appeared in the 1976 version of the UNCITRAL Rules, it ultimately retained paragraph (1) with the replacement of the word "three" by the words "more than one." *Report of Working Group II (Arbitration and Conciliation), Fifty-First Session*, U.N. Doc. A/CN.9/684, ¶¶52-62 (2009).

245) *See*§13.07[A][3]. *See also*§§23.04[B]-[C].

246) *See* Schwebel, *May the Majority Vote of An International Arbitral Tribunal Be Impeached?*, 13 Arb. Int'l 145, 152-53 (1997).

247) For examples of cases where an arbitrator went along with the presiding arbitrator's views, in order to form a majority, *see Starrett Housing Corp. v. Islamic Repub. of Iran, Concurring Opinion of Howard H. Holtzmann in Interlocutory Award in IUSCT Case No. ITL 32-24-1 of 19 December 1983*, 4 Iran-US C.T.R. 159 (1983) ("I concur with reluctance in the Interlocutory Award in this case. I do so in order to form a majority for the key finding that the Government of the Islamic Republic of Iran has expropriated property of the Claimants in Iran. ... In view of the many errors in the Interlocutory Award, it would be easier to dissent from it than to concur in it. ... My colleague, Judge Kashani having dissented, I am faced with the choice of joining the President in the present Interlocutory Award despite its faults, or accepting the prospect of an indefinite delay in progress towards a final decision of this case."); *Am. Int'l Group, Inc. v. Islamic Repub. of Iran, Concurring Opinion of Richard M. Mosk in Award in IUSCT Case No. 93-2-3 of 19 December 1983*, 4 Iran-US C.T.R. 111, 111-12 (1983) ("I concur in the Tribunal's Award in order that a majority can be formed. ... This Award represents a 'compromise solution' in which I have joined so that some award could be issued. Otherwise, this case heard almost a year ago, would remain undecided."); *Economy Forms Corp. v. Islamic Repub. of Iran, Concurring Opinion of Howard H. Holtzmann in Award in IUSCT Case No. 55-165-1 of 14 June 1983*, 3 Iran-US C.T.R. 42, 55 (1983) ("Why then do I concur in this inadequate Award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which 'something is better than nothing.'"); *RayGo Wagner Equip. Co. v. Iran Express Terminal Corp., Concurring and Dissenting Opinion of Richard M. Mosk in Award in IUSCT Case No. 30-16-3 of 18 March 1983*, 2 Iran-US C.T.R. 141 (1983) (co-arbitrator attached concurring opinion indicating his personal views differed from majority); *Granite State Mach. Co. v. Islamic Repub. of Iran, Award in IUSCT Case No. 18-30-3 of 15 December 1982*, 1 Iran-US C.T.R. 442, 450-51 (1982). *See also Ad Hoc Award of 31 July 1989* (I.C.J.), reprinted in *Case Concerning the Arbitral Award of 31 July 1989*, [1991] I.C.J. Rep. 53, 59-61 (chairman appended declaration stating his separate opinion, while also signing majority award).

248) *Granite State Mach. Co. v. Islamic Repub. of Iran, Concurring Opinion of Richard M. Mosk in Award No. 18-30-3 of 15 December 1982*, 1 Iran-US C.T.R. 442, 450-51 (1982).

249) Schwebel, *May the Majority Vote of An International Arbitral Tribunal Be Impeached?*, 13 Arb. Int'l 145, 153 (1997).

250) *See*§23.05. In some cases, an arbitrator will sign an award, notwithstanding also appending an opinion that dissents or concurs, in whole or in part; in other cases, an arbitrator may refuse entirely to sign the award.

251) German ZPO, §1052(2); Austrian ZPO, §604. The requirement for advance notice applies only to awards, not procedural orders.

252) *See*§13.04[B]; §15.03; §15.08[KK].

253) *See*§12.07.

254) For commentary, *see*Arroyo, *Dealing With Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437 (2008); ICC, *Final Report on Dissenting and Separate Opinion of the ICC Commission on International Arbitration*, 2(1) ICC Ct. Bull. 32 (1991); Lévy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 Arb. Int'l 35 (1989); Luiso, *In tema di ricusazione degli arbitri e di dissenting opinion*, 2 Rivista dell' Arbitrato 496 (1992); Mosk & Ginsburg, *Dissenting Opinions in International Arbitration*, 15(4) Mealey's Int'l Arb. Rep. 26 (2000); Redfern, *Dangerous Dissents*, 71 Arb. 200 (2005); Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int'l 223 (2004); Rees & Rohn, *Dissenting Opinions: Can They Fulfil A Beneficial Role?*, 25 Arb. Int'l 329 (2009); Smit, *Dissenting Opinions in Arbitration*, 15(1) ICC Ct. Bull. 37 (2004); Werner, *Dissenting Opinions – Beyond Fears*, 9(4) J. Int'l Arb. 23 (1992).

255) *Compare*UNCITRAL, *Summary Record of the Eleventh Meeting of the Committee of the Whole (II), Ninth Session*, U.N. Doc. A/CN.9/9/C.2/SR.11, ¶40 (1976) ("There was no reason for an arbitrator who disagreed with the majority decision not to sign the award; his signature would not signify his agreement with the majority decision, but would simply render the award valid. If, however, the arbitrator was physically unable to sign the award, his failure to sign should not invalidate the award.").

256) *See, e.g.*, UNCITRAL Model Law, Art. 31(1) ("In arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the tribunal shall suffice, provided that the reason for any omitted signature is stated."); French Code of Civil Procedure, Arts. 1480(3), 1513(2); German ZPO, §1054(1); Netherlands Code of Civil Procedure, Art. 1057(3); Austrian ZPO, §606(1); Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Chinese Arbitration Law, Art. 54; Japanese Arbitration Law, Art. 39(1); Korean Arbitration Act, Art. 32(1); Indian Arbitration and Conciliation Act, Art. 31(2); Malaysian Arbitration Act, §33(2); Costa Rican Arbitration Law, 2011, Art. 31(1); Peruvian Arbitration Law, Art. 55(1); Iranian International Commercial Arbitration Law, Art. 30(1).

257) For examples of dissenting or separate opinions, *see*TME Int'l, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 473-357-1 of 12 March 1990, XVI Y.B. Comm. Arb. 349 (1991); *Société d'Economie Mixte Guineo v. Martin Marietta Aluminium, Inc., Partial Ad Hoc Award of 12 September 1986 & Final Ad Hoc Award of 21 December 1988*, XV Y.B. Comm. Arb. 11, 21, 29 (1990). *See also*Arroyo, *Dealing With Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437 (2008) (discussing possibilities as to how tribunal may proceed if arbitrator submits dissenting opinion).

258) *See B v. A* [2010] 2 CLC 1, 11 (QB) (English High Ct.) ("[the Dissenting Opinion] is not in my view formally part of the Award of the Tribunal") (citing *Final Report on Dissenting and Separate Opinions Prepared by A Working Party of the ICC Commission on International Arbitration*); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶19.06 (3d ed. 2000) ("A dissenting opinion is thus extraneous to *the* award.") (emphasis in original); Rees & Rohn, *Dissenting Opinions: Can They Fulfil A Beneficial Role?*, 25 Arb. Int'l 329, 339 (2009) ("A dissenting opinion does not form part of the award itself; it is merely an independent opinion which remains foreign to the award and which neither affects the ruling nor the reasons.").

259) *See*§23.05[A].

260) *See* 1899 Convention for the Pacific Settlement of International Disputes (First Hague Conference), Art. 52(2); Statute of the International Court of Justice, Art. 57; ILC Model Rules on Arbitral Procedure, 1958, Art. 28(2) ("Unless otherwise provided in the compromis, any member of the tribunal may attach his separate or dissenting opinion to the award."). *See also* ICSID Rules, Rule 47(3) (any member of tribunal "may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent"). *Compare* 1907 Hague Convention, Art. 79 (no reference to dissent); *Appellate Body Report: United States-Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R, ¶631 (2005) (first dissenting opinion in WTO proceedings).

261) *See, e.g.*, Holtzmann & Donovan, *National Report for USA (2005)*, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* 1, 50 (1984 & Update 2005) ("In practice, arbitrators in US domestic arbitrations do not write opinions stating the reasons for their dissents, just as they do not write opinions stating the reasons for their awards."); Lévy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 Arb. Int'l 35 (1989); Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int'l 223, 224 (2004) ("In Continental Europe, dissenting opinions were traditionally unknown."). *See also* van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821, 824 (2010).

262) *See, e.g.*, Québec Code of Civil Procedure, Art. 945; Spanish Arbitration Act, 2011, Art. 37(3); Chinese Arbitration Law, Art. 53; Bulgarian Law on International Commercial Arbitration, Art. 39(1); Brazilian Arbitration Law, Art. 24(2).

263) UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 126 (2012) ("Model Law neither requires nor prohibits 'dissenting opinions'").

264) H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 837, 856 (1989).

265) *See, e.g.*, Blessing, *The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism*, 5(2) J. Int'l Arb. 9, 67 (1988); P. Sanders & A. van den Berg, *The Netherlands Arbitration Act 1986* Art. 33 (1987).

266) *See, e.g.*, ICSID Rules, Rule 47(3); 2012 CIETAC Rules, Art. 47(5).

267) 2010 UNCITRAL Rules, Arts. 34(3), (4).

The drafters of the 1976 UNCITRAL Rules rejected a proposal to prohibit dissenting opinions. UNCITRAL, *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session*, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 178 (1976) (original draft of UNCITRAL Rules contained prohibition on dissenting opinions, which was deleted during drafting).

The Iran-United States Claims Tribunal adopted the UNCITRAL Rules with an amendment to expressly permit dissenting and separate opinions. Iran-US Claims Tribunal Rules of Procedure, Art. 32 ("any arbitrator may request that his dissenting vote and the reasons therefore be recorded").

268) The 2012 ICC Rules do not expressly address the question of dissenting opinions. A working group considered the subject, issuing a final report in 1988 that recognized the possibility (and practice) of dissenting opinions in ICC arbitrations. ICC, *Final Report on Dissenting and Separate Opinion of the ICC Commission on International Arbitration*, 2(1) ICC Ct. Bull. 32 (1991).

269) *See, e.g.*, Hausmaninger, *Rights and Obligations of the Arbitrator With Regard to the Parties and the Arbitral Institution – A Civil Law Viewpoint*, in ICC, *The Status of the Arbitrator* 47 (ICC Ct. Bull. Spec. Supp. 1995); ICC, *Final Report on Dissenting and Separate Opinion of the ICC Commission on International Arbitration*, 2(1) ICC Ct. Bull. 32 (1991).

270) *Noble China Inc. v. Lei*, (1998) 42 O.R.3d 69 (Ontario Super. Ct.) (rejecting application to annul award, but ordering release of dissenting opinion; also refusing to admit into evidence in annulment proceeding dissenting arbitrator's affidavit regarding tribunal's deliberations and refusal to release dissenting opinion).

271) *See*§23.03; *Interim Award in ICC Case No. 3879*, XI Y.B. Comm. Arb. 127 (1986); *Ad Hoc Award of 29 December 1993*, 9(12) Mealey's Int'l Arb. Rep. A-1 (1994). The obligation of the arbitrators to provide a reasoned explanation for an adjudicative decision almost inevitably implies that members of the tribunal who are unable to agree with all or important parts of the decision have to state this in the award, together with their reasons for dissenting.

272) The process of constituting an international arbitral tribunal is discussed above. *See*§12.03[A]. One may also fairly question whether prohibitions on dissenting opinions are fully consistent with the model of an adjudicative process.

273) E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1399-1402 (1999); La Spada, in T. Zuberbühler, C. Müller & P. Habegger (eds.), *Swiss Rules of International Arbitration: Commentary* Art. 43, ¶18 (2005).

Some authorities have suggested that a dissenting opinion is permitted only where the parties have expressly authorized it. *See* Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1052, ¶5 (26th ed. 2007) ("A dissenting opinion is only admitted given express permission in the parties' arbitration agreement."); J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶1018 (2d ed. 2002) ("It is necessary to require a corresponding agreement of the parties for a dissenting opinion to be admissible."). The correct approach is the converse, treating dissenting opinions as an inherent aspect of the adjudicative process unless affirmatively excluded.

274) Some French judicial decisions held that dissenting opinions were inconsistent with the confidentiality of the arbitrators' deliberations. *Judgment of 15 October 1991, Affichage Giraudy v. Consorts Judlin*, 1991 Rev. arb. 643, 647 (Paris Cour d'appel), Note, Jarrosson ("The secrecy of deliberation is not just a traditional legal rule."); *Judgment of 9 November 1945*, 1946:1 Gaz. Pal. 22 (French Cour de cassation civ. Soc.) (arbitrators required to maintain secrecy of deliberations and therefore are not allowed to reveal arbitrators' votes). *See*§13.04[C]; §15.08[JJ]; §20.06 for a discussion of the secrecy of the arbitrators' deliberations.

275) *See* Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1052, ¶5 (26th ed. 2007) ("Absent different agreement by the parties, the arbitrators have to keep the secrecy of deliberations (including the voting result). ... A dissenting opinion is only admitted given express permission in the parties' arbitration agreement."); J. Robert, *L'arbitrage: Droit interne, Droit international privé* ¶360 (5th ed. 1983) ("Although it is customary under a certain number of foreign laws, notably Anglo-Saxon, the dissenting opinion is prohibited in French domestic law since it violates the secrecy of the tribunal's deliberations."). For a comprehensive discussion, *see*Arroyo, *Dealing With Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437, 457-58 (2008).

276) Despite earlier French judicial authority questioning dissenting opinions, more recent French authority rejects this view. *Judgment of 9 October 2008*, 2009 Rev. arb. 352, Note, Betto & Canivet (Paris Cour d'appel) ("secrecy of the arbitrators' deliberations, which is not a cause of annulment of the award neither under international nor under domestic law, does not prevent the expression of dissenting or separate opinions"). *See also*Arroyo, *Dealing With Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA Bull. 437, 459 (2008) ("scientific debate [about dissenting opinions in international arbitration] has become stale and redundant").

277) *See*§23.04[A]. *See also* Rees & Rohn, *Dissenting Opinions: Can They Fulfil A Beneficial Role?*, 25 Arb. Int'l 329, 337-38 (2009) ("As long as the dissenting opinion is restricted to issues of evaluation of facts and/or interpretation of the applicable law, and as long as it does not reveal who said what and when and for what reason, there is no violation of confidentiality. Only when the real substance of the tribunal's deliberations is revealed, *i.e.*, the views expressed individually by the arbitrators, their thought processes and the remarks made in the bargaining process through which they tried to reach unanimity or finally formed a majority, would it constitute a violation of the rule of secrecy.").

278) *See*§23.05[A].

279) *See*§23.03.

280) Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26 J. Int'l Arb. 337, 346, n.37 (2009) ("Most unanimous decisions are unanimous because the arbitrators actually agree on the material points. However, a decision may be unanimous even though material differences of opinion exist within the tribunal. This is because some arbitrators are reluctant (usually for reasons of professional courtesy and a desire to protect the secrecy of deliberations) to issue dissenting opinions, or even highlight points of disagreement in the text of a decision. As a result, an arbitrator who disagrees with the majority will sometimes nevertheless agree to sign on to a decision once the issues are discussed and it becomes clear that his view will not carry the day.").

281) *See*§13.04; W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶19.06 (3d ed. 2000) ("The view of the present authors is that while dissenting opinion may exceptionally be justified, they are generally to be discouraged."). As discussed below, these duties are particularly weighty with respect to co-arbitrators, nominated by one of the parties. *See*§23.05[B], p. 3058 n. 288.

282) *See*§12.05[B]; §13.04[A][1].

283) *See* Redfern, *Dangerous Dissents*, 70 Arb. 200, 204 (2005) ("reprehensible" dissent "does not merely disagree with his or her colleagues on issues of fact or law, or on their reasoning, but instead takes the opportunity of issuing a dissenting opinion to attack the way in which the arbitration itself was conducted"); Schwartz, *The Rights and Duties of ICC Arbitrators*, in ICC, *The Status of the Arbitrator* 67, 84 (ICC Ct. Bull. Spec. Supp. 1995) ("Even if an arbitrator disagrees with the decisions of his or her co-arbitrators and ultimately with the award rendered, it is therefore not proper for the arbitrator to attempt to sabotage the decisions of the majority.").

284) For examples of dissenting opinions that have revealed the confidential aspects of the tribunal's deliberations, *see Unidyne Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 551-368-3 of 10 November 1993*, 29 Iran-US C.T.R. 349, 355-56 (1993); *Phillips Petroleum Co. v. Islamic Repub. of Iran, Award in IUSCT Case No. 425-39-2 of 29 June 1989*, 21 Iran-US C.T.R. 256 (1989); *Granger Assocs. v. Islamic Repub. of Iran, Award in IUSCT Case No. 320-184-1 of 20 October 1987*, 16 Iran-US C.T.R. 317, 332 (1988) ("It is also wrong for my colleagues to confirm the improper actions of the Claimant in pestering the Chamber Clerk ..."; "It is completely unjustifiable to contend, as my colleagues do ..."; "My colleagues have gone a long way in their speculation ..."); *RayGo Wagner Equip. Co. v. Star Line Iran Co., Award No. 20-17-3 of 15 December 1982*, 1 Iran-US C.T.R. 424 (1981).

285) *See, e.g., Eureko BV v. Repub. of Poland, Partial Ad Hoc Award of 19 August 2005, Dissenting Opinion* ¶6, available at ita.law.uvic.ca ("This confusion is still visible throughout the Tribunal's reasons and probably contributed to a certain extent to its decision."; "both inaccurate and groundless"); *CME Czech Repub. BV v. Czech Repub., Partial Ad Hoc Award of 13 September 2001, Dissenting Opinion* ¶4 ("The mistakes and errors in the legal conclusions have been basically [produced] by the fact that the two arbitrators seem to have firstly agreed upon the final decision as it is expressed in the Award and only thereafter they looked for the arguments to the favor of the Claimant.").

286) *See, e.g., Abyei Arbitration, Dissenting Opinion of Judge Al-Khasawneh in PCA Case No. GOS-SPLM 53,391 of 22 July 2009* ("The question therefore, and it is a disquieting one, is why does a Tribunal, provided with all the available evidence and guided through it by learned counsel on both sides, and moreover provided with the benefit of hindsight that all reviewing bodies have, and in a position to assess the evidence before it comprehensively, elect, instead, to look at reality not in a holistic manner but in a disconnected way, making wild flights of fancy on the basis of misinterpreted sentences taken out of context so as to make dead men say what they never said or intended?").

287) *See, e.g., A v. B* [2010] EWHC 1626, ¶13 (Comm) (English High Ct.) ("The dissenting arbitrator issued a Dissenting Opinion of some 19 pages. It is expressed in unusually trenchant terms. ... The dissenting arbitrator was highly critical of her colleagues. They had, she said, decided to ignore the parties' agreement to submit the SPA to Spanish law and had in an arbitrary fashion proceeded to decide the dispute "*ex aequo et bono*.").

288) M. de Boisséson, *Le droit français de l'arbitrage interne et international* ¶781 (2d ed. 1990). *See also* Rees & Rohn, *Dissenting Opinions: Can They Fulfil A Beneficial Role?*, 25 Arb. Int'l 329, 336 (2009) ("possibility of issuing a dissenting opinion provides the minority arbitrator with an easy way out of the deliberations as soon as he suspects that he cannot prevail with his opinion, and some arbitrators might even feel pressure to please and support the party that appointed them and to disclose that support"); van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821, 825 (2010).

289) *Tokios Tokelés v. Ukraine, Dissenting Opinion by Chairman Prosper Weil in Decision on Jurisdiction in ICSID Case No. ARB/02/18 of 29 April 2004*, 20 ICSID Rev. Foreign Inv. L.J. 205, 245 (2005) ("The chairman of an arbitral tribunal dissenting from a decision drafted by his two colleagues: this is not a frequent occurrence.").

290) Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7, 27 (2013) ("dissenting opinions play a critical role in fostering the legitimacy of international arbitration").

291) *See also* van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821, 828 (2010) ("a dissent should not be a platform for preparing for annulment").

292) It is theoretically possible that an arbitrator will witness improprieties in the course of the arbitral proceedings, which go to the integrity of the proceeding. In that event, the arbitrator might properly raise these matters in a dissenting or separate opinion. Doing so would be an exceptional action, restricted to extraordinary circumstances with any such comments being accordingly limited.

293) *Judgment of 15 May 2003, Czech Repub. v. CME Czech Repub. BV*, Case No. T 8735-01 (Svea Ct. App.), reprinted in S. Jarvin & A. Magnusson (eds.), *International Arbitration Court Decisions* 663, 678-79 (2006). The court also discussed the process of deliberations, emphasizing the need for flexibility, cost-effectiveness and freedom to fix deadlines for presenting views. *See also*§15.08[JJ]; §25.04[B][4]; §26.05[C][3][d].

294) *See, e.g., Bank Mellat v. GAA Dev. & Constr. Co.* [1988] 2 Lloyd's Rep. 44 (QB) (English High Ct.) (obligation to deliberate with dissenting arbitrator is dispensed with only where it would be futile); *Re Pering & Keymer* [1835] 3 Ad. & El. 245 (English K.B.) (annulling award because dissenting arbitrator was not given opportunity to present views to other arbitrators).

295) *See*§25.04[B][4]; §26.05[C][3][d].

296) *See*§13.07[A][2] and §15.08[JJ] for a discussion of the arbitrators' rights and duties during deliberations and the role of the presiding arbitrator in deliberations.

297) Paulsson, *Moral Hazard in International Dispute Resolution*, 8(2) Transnat'l Disp. Mgt 12 (2011); van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821, 825 (2010) ("That nearly 100 percent of the dissents [in investment arbitration] favour the party that appointed the dissenter raises concerns about neutrality.").

298) *See* Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7 (2013); C. Rogers, *Ethics in International Arbitration* (2014).

299) *See* Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7 (2013).

300) *See*§12.03[A][2].

301) *See*§12.03[A][2].

302) International arbitration conventions do not address the issue of time limits for awards.

303) *See, e.g.*, UNCITRAL Model Law; U.S. FAA; English Arbitration Act, 1996; Swiss Law on Private International Law.

304) *See*§15.02[B]. Some legislation expressly confirms this discretion. *See, e.g.*, Netherlands Code of Civil Procedure, Art. 1048 ("The arbitral tribunal is free to determine the time when the award shall be made."); Peruvian Arbitration Law, Art. 53 ("The controversy must be notified and decided according to the time established by the parties, by the arbitral rules, or in default, by the arbitral tribunal.").

305) *See*§15.08[O]; §25.04[D][3]; §26.05[C][5][c].

306) French Code of Civil Procedure, Art. 1463(1). This time limit may be extended by agreement or by a French court. French Code of Civil Procedure, Art. 1463(2). The limit does not apply in international arbitration. French Code of Civil Procedure, Art. 1506.

Historically, English arbitration legislation imposed a three-month limit for the making of an award. English Arbitration Act, 1950, §13. The English Arbitration Act, 1996, abrogated this limitation.

307) *See, e.g.*, Belgian Judicial Code, Art. 1713(2) (six months); Italian Code of Civil Procedure, Art. 820 (domestic arbitration) (time limit of 240 days unless otherwise agreed); Brazilian Arbitration Law, Art. 23 (time limit of six months unless otherwise agreed).

308) *See*§11.03[C][2]; §11.03[D][2][b].

309) *See*§11.05[B][2]; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1382 (1999).

310) That is the case in France. Article 1463 of the French Code of Civil Procedure only applies to domestic arbitrations and not to international arbitration (*see* Art. 1506). *See also**Judgment of 15 June 1994, Sonidep v. Sigmoil*, 1995 Rev. arb. 88 (French Cour de cassation civ. 1e) (under earlier French legislation); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1384 (1999) (same). *Compare*Belgian Judicial Code, Art. 1680(3).

311) *See, e.g.*, 2012 ICC Rules, Art. 30(1) (six months, subject to extensions); 2012 LMAA Terms, Art. 20 (six weeks); 2010 SCC Rules, Art. 37; 2013 SIAC Rules, Art. 5(2)(d) (expedited procedure).

Most institutional rules are to the contrary, containing no time limits (including the UNCITRAL, ICDR and LCIA Rules). *See also*§15.08[O]; §25.04[C][5]; §26.05[C][5].

312) *See*§15.08[O]; G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 104-05 (4th ed. 2013).

313) *See, e.g., Art & Sound Ltd v. W. End Litho Ltd* [1992] 1 EG 110 (Ch) (English High Ct.); *Bradley & Sons v. Telefusion Ltd* [1981] 259 EG 337 (Ch) (English High Ct.); *Judgment of 16 June 1976, Dame Krebs v. Milton Stern*, 1977 Rev. arb. 269 (French Cour de cassation civ. 1e); *Judgment of 22 January 1982, Appareils Dragon v. Construimport*, 1982 Rev. arb. 91 (Paris Cour d'appel).

314) *See*§15.02[B].

315) *Judgment of 15 June 1994, Communauté urbaine de Casablanca v. Degrémont*, 1995 Rev. arb. 88, 88 (French Cour de cassation civ. 1e).

316) French Code of Civil Procedure, Art. 1463(2) (applicable in both domestic and international arbitration); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1387 (1999).

As discussed above, under French law, the extension of time limits must result from judicial action or the parties' agreement. *See, e.g., Judgment of 18 October 2001*, 2002 Rev. arb. 899 (French Cour de cassation civ. 2e), Note, Betto (allowing a tacit extension).

317) English Arbitration Act, 1996, §50. The possibility of judicial extension can be excluded by agreement.

318) Belgian Judicial Code, Art. 1680(3).

319) *See, e.g.*, Italian Code of Civil Procedure, Art. 820 (arbitral tribunal may extend deadline once).

320) *Art & Sound Ltd v. W. End Litho Ltd* [1992] 1 EG 110 (Ch) (English High Ct.); *Bradley & Sons v. Telefusion Ltd* [1981] 259 EG 337 (Ch) (English High Ct.).

321) For decisions under Article 1484 (domestic arbitration) and Article 1502 (international arbitration) of the former French New Code of Civil Procedure, *see**Judgment of 19 November 2009*, 2011 Rev. arb. 152 (Paris Cour d'appel); *Judgment of 22 September 1995, Dubois et Vanderwalle v. Boots Frites BV*, 1996 Rev. arb. 101 (Paris Cour d'appel); *Judgment of 17 January 1984, Bloch et Fils v. Delatrae Mockfjaerd*, 1984 Rev. arb. 498 (Paris Cour d'appel); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1388 (1999).

The revised French arbitration statute does not explicitly provide that an award shall be set aside if it was rendered outside the statutory time limit. Instead, the new provisions state that "an award may … be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction" or where "(3) the arbitral tribunal ruled without complying with the mandate conferred upon it." French Code of Civil Procedure, Art. 1492 (domestic), Art. 1520 (international). *See* Derains & Kiffer, *National Report for France (2013)*, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* 1 (1984 & Update 2013). *See also*§25.04[C][5], pp. 3267-68.

322) *Judgment of 21 February 1978*, X Y.B. Comm. Arb. 418 (Austrian Oberster Gerichtshof) (1985) ("Proof of notification of the claim and of the arbitral award to the respondent is, according to Art. IV of the Convention, not a requirement for an application for enforcement."). *See* van Houtte, *The Delivery of Awards to the Parties*, 21 Arb. Int'l 177 (2005).

323) UNCITRAL Model Law, Art. 31(4). *See* H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 856 (1989); P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* 123 (2d ed. 2004).

324) *See, e.g.*, Finnish Arbitration Act, §37; Italian Code of Civil Procedure, Art. 825; Indian Arbitration and Conciliation Act, Art. 31(5); New Zealand Arbitration Act, Schedule 1, Art. 31(4); Brazilian Arbitration Law, Art. 29; Iranian International Commercial Arbitration Law, Art. 30(4).

325) *See, e.g.*, German ZPO, §1054(4); Netherlands Code of Civil Procedure, Art. 1058(1)(a); Austrian ZPO, §606(4).

326) Swiss Law on Private International Law, Art. 190 ("The award is final from the time when it is communicated.").

327) Belgian Judicial Code, Art. 1713(8); Costa Rican Arbitration Law, 2011, Art. 31(4); Venezuelan Commercial Arbitration Law, Art. 31.

328) English Arbitration Act, 1996, §55(1). In practice, this permits the parties to agree that an arbitrator may inform the parties that the award is available to be collected or that such a procedure can be impliedly agreed from common practice.

329) English Arbitration Act, 1996, §55(2); R. Merkin, *Arbitration Law* ¶18.32 (1991 & Update August 2013).

330) *See Dist. Council 1707 v. Hope Day Nursery, Inc.*, 2006 WL 17791, at *3 (S.D.N.Y.) (applying AAA Labor Arbitration Rule 40 that "[p]arties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to the party at its last known address or to its representative; personal service of the award; or the filing of the award in any other manner that is permitted by law"); *Skaarup Shipping Corp. v. Sea Marshall Navigation, Ltd*, 1995 WL 110371, at *1-2 (S.D.N.Y.) (applying service of award provision in Society of Maritime Arbitrators arbitration rules as agreed by parties, such that "[p]arties shall accept as legal delivery of the award (a) the placing of the award or a true copy thereof in the mail by the arbitrator(s), addressed to such party at his last known address or to his attorney, or (b) personal service of the award").

U.S. courts generally construe "notice" in contracts according to its ordinary meaning. *Detroit Coil Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 580 (6th Cir. 1979) ("The term 'notified,' as used in the Agreement, must be given its ordinary meaning in the absence of evidence indicating that the parties to this contract intended to expand or otherwise deviate from that meaning. The word 'notified,' in its ordinary usage, means the completed act of bringing information to the attention of another."). Where issues of service or notification raise due process concerns, courts apply "the forum state's standards of due process," which requires notice "reasonably calculated, under all the circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, 1992 WL 122712, at *4 (D.D.C.) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (U.S. S.Ct. 1950)). *See also Geotech Lizenz AG v. Evergreen Sys., Inc.*, 697 F.Supp. 1248, 1263 (E.D.N.Y. 1988).

331) Indeed, as noted above, the Model Law provides "[a]fter an award is made," it shall be delivered to the parties. UNCITRAL Model Law, Art. 31(4).

Different national arbitration statutes deal differently with the question whether an "original" or a signed "copy" of the award is to be delivered to the parties. *Compare* German ZPO, §1054(4) (originals of award delivered to parties) *and* Belgian Judicial Code, Art. 1713(8) (same) *and* Austrian ZPO, §606(4) (same) *and* Italian Code of Civil Procedure, Art. 825 (same) *with* English Arbitration Act, 1996, §55 (one original with signed copies) *and* Netherlands Code of Civil Procedure, Art. 1058(1) (same) *and* Swedish Arbitration Act, §31(3) (same). There is no apparent substantive difference between these approaches, save arguably in the extremely unlikely case of differences in different versions of signed originals.

332) Swiss Law on Private International Law, Art. 190. *See* Berti & Schnyder, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 190, ¶¶6 *et seq.* (2000).

333) *See* §24.02.

334) *See, e.g.*, UNCITRAL Model Law, Art. 33(1) ("Within thirty days of receipt of the award ..."); French Code of Civil Procedure, Art. 1486(1); Netherlands Code of Civil Procedure, Art. 1060(1); Japanese Arbitration Law, Art. 41(2); §§24.03[A]-[B].

335) *See, e.g.*, UNCITRAL Model Law, Art. 34(3) ("three months from the date on which the party making that application had received the award"); French Code of Civil Procedure, Art. 1494(2), 1519; Swiss Law on Private International Law, Art. 190(3) ("time-limit runs from the communication of the decision"); Hong Kong Arbitration Ordinance, 2013, Art. 81(1); Chinese Arbitration Law, Art. 59; Japanese Arbitration Law, Art. 44(2) ("from the date on which the party making the application had received the notice by the sending of a copy of the arbitral award"); Korean Arbitration Act, Art. 36(3); Australian International Arbitration Act, 2011, Schedule 2, Art. 34(3); Malaysian Arbitration Act, §7(4); Peruvian Arbitration Law, Art. 64 ("twenty days from the notification of the award"); Venezuelan Commercial Arbitration Law, Art. 43 ("five working days following the notification of the award or of the decision that corrects, clarifies or completes it"). *See also*§24.02[B]. *Compare*English Arbitration Act, 1996, §70(3) (date award was rendered).

336) UNCITRAL Model Law, Art. 32(1); French Code of Civil Procedure, Art. 1485; Hong Kong Arbitration Ordinance, 2013, Art. 68; Japanese Arbitration Law, Art. 40(1); Korean Arbitration Act, Art. 33(1); Australian International Arbitration Act, 2011, Schedule 2, Art. 32(1); Malaysian Arbitration Act, §34(1).

337) *See, e.g.*, 2012 ICC Rules, Art. 34; ICDR Rules, Art. 27; LCIA Rules, Art. 26; DIS Rules, §36; 2013 VIAC Rules, Art. 36(5). *Compare* 2012 Swiss Rules, Art. 32(6).

338) *See, e.g.*, UNCITRAL Model Law, Art. 31(4); English Arbitration Act, 1996, §55(2); German ZPO, §1054(4); Netherlands Code of Civil Procedure, Art. 1058(1)(a); Austrian ZPO, §606(4); Hong Kong Arbitration Ordinance, 2013, Art. 67(1); Japanese Arbitration Law, Art. 39(5); Korean Arbitration Act, Art. 32(4); Australian International Arbitration Act, 2011, Schedule 2, Art. 31(4); Malaysian Arbitration Act, §33(5); Venezuelan Commercial Arbitration Law, Art. 31.

339) *See*§15.04[B][2]; §25.04[B][1]; §26.05[C][3][a].

340) *See*Chapter 20 (especially §20.03[D]).

341) French Code of Civil Procedure, Art. 1484(3) (domestic arbitration), Art. 1519(3) (international arbitration); Finnish Arbitration Act, §37.

342) This is increasingly common with the widespread usage of emails and fax transmissions.

343) *See, e.g.*, Belgian Judicial Code, Arts. 1678(1), 1716. *See also* van Houtte, *The Delivery of Awards to the Parties*, 21 Arb. Int'l 177, 180-81 (2005).

344) These requirements can be complex and highly-formalistic. For the U.S. position, *see* G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 871-81 (5th ed. 2011).

Equally complex and formalistic are European requirements. EC Regulation 1348/2000. As discussed above, similar issues are sometimes raised in connection with other formal written instruments in the arbitral process (*e.g.*, service of the Request for Arbitration). *See*§15.08[KK].

345) The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents is the principal example of an international treaty regulating cross-border service of process in national court proceedings. *See* G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 875-77 (5th ed. 2011). The Convention provides for service via a Central Authority mechanism, with alternative means where Member States have not objected. *Id.* at 876-77. In general, the formalities and delays that attend service under the Hague Service Convention make it unsuitable for international arbitration. *See also*§15.08[B].

346) *Compare* van Houtte, *The Delivery of Awards to the Parties*, 21 Arb. Int'l 177, 184-85 (2005).

347) *See, e.g.*, 2012 ICC Rules, Art. 34(1) ("The Secretariat shall notify to the parties the text signed by the Arbitral Tribunal."); ICDR Rules, Art. 27(5) ("Copies of the award shall be communicated to the parties by the administrator."); LCIA Rules, Art. 26(5) ("The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties."); 2013 VIAC Rules, Art. 36(5) ("The award shall be served on the parties by the Secretary General.").

348) One exception is the English Arbitration Act, 1996, §55(1), which recognizes the parties' autonomy to agree upon modes of notification of the award. This express recognition reflects the implied understanding that exists under other national legal systems.

349) *See*§15.02.

350) Belgian Judicial Code, Art. 1713(8); Netherlands Code of Civil Procedure, Art. 1060; Korean Arbitration Act, Art 32(4).

351) *See*§1.01[C][2]; §1.04[A][1].

352) For example, the revised Spanish Arbitration Act abandoned the historic requirement that the award be deposited with a notary, which had resulted in awards being set aside when not complied with. *See* Mullerat, *Spain Joins the Model Law*, 20 Arb. Int'l 139, 146 (2004).

353) For commentary, *see* Y. Derains & R. Kreindler, in ICC Dossiers, *Evaluation of Damages in International Arbitration* (2006); Jarvin, *Non-Pecuniary Remedies: The Practices of Declaratory Relief and Specific Performance in International Commercial Arbitration*, in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2006* 167 (2007); L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* (2008); M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* (ASA Spec. Series No. 30 2011); Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004).

354) *See*§1.02[B][6].

355) *See*§15.02.

356) *See*§11.03[B]; §12.01; §12.02[A]; §12.04[D]; §12.05[C]; §15.02; §17.02[C]; §17.04[D]; §18.02[B][2]. A Contracting State's refusal to give effect to the parties' agreement regarding an arbitral tribunal's remedial authority would potentially be contrary to Articles II and V(1)(d) of the New York Convention.

357) Requests for certain forms of relief (*e.g.*, criminal sanctions, purported declarations of bankruptcy) would be considered nonarbitrable in most jurisdictions. *See*§6.01.

358) *See* Part I; §2.02; §10.01[A]; §16.02[D]; §17.02[A][5][a].

359) *See* §6.04; §23.07[D]; §25.04[G]; §26.05[C][10].

360) *See, e.g.*, Singapore International Arbitration Act, 2012, §12(5) (providing arbitrators power to award any remedy or relief that could be ordered by Singapore court if dispute had been subject of civil proceedings in such court and power to award interest).

361) *See, e.g.*, English Arbitration Act, 1996, §48 (permitting parties to agree upon tribunal's remedial authority, but prescribing default powers). Section 48 provides that an arbitral tribunal may, absent contrary agreement: (a) order payment of money; (b) grant declaratory relief; (c) grant the same relief as an English court with regard to injunctive relief and rectification; and (d) grant specific performance (except for contracts relating to land). *See* R. Merkin, *Arbitration Law* ¶18.55 (1991 & Update August 2013). *See also*Hong Kong Arbitration Ordinance, 2013, Art. 70 (similar to England but denying arbitrators power to order specific performance of contracts relating to land or any interest in land).

362) *See*§19.03; §26.05[C][12].

363) *Avraham v. Shigur Express, Ltd*, 1991 WL 177633, at *4 (S.D.N.Y.). *See also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (U.S. S.Ct. 1960); *Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."); *Todd Shipyards Corp. v. Cunard Line Ltd*, 943 F.2d 1056, 1064 (9th Cir. 1991) ("Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies."); *Chameleon Dental Prods., Inc. v. Jackson*, 925 F.2d 223, 226 (7th Cir. 1991); *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 (5th Cir. 1990); *Resilient Floor v. Welco Mfg Co.*, 542 F.2d 1029, 1032 (8th Cir. 1976); *David Co. v. Jim Miller Constr., Inc.*, 444 N.W.2d 836, 842 (Minn. 1989) (broad remedial authority).

364) *Konkar Maritime Enters., SA v. Compagnie Belge d'Affretement*, 668 F.Supp. 267, 271 (S.D.N.Y. 1987). *See also Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1002 (Cal. 1994) ("The principle of arbitral finality [and] the practical demands of deciding on an appropriate remedy for breach ... dictate that arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies, and that judicial review of their awards must be correspondingly narrow and deferential."); Revised Uniform Arbitration Act, §21, comment 3 (2000) ("traditional, broad right of arbitrators to fashion remedies ... generally, their authority to structure relief is defined and circumscribed not by legal principle or precedent but by broad concepts of equity and justice").

365) K. Berger, *International Economic Arbitration* 339 (1993). *See also* Munoz, *The Power of Arbitrators to Make Pro Futuro Orders*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 118 (ASA Spec. Series No. 30 2011) ("arbitrators have the broadest autonomy to frame non-pecuniary orders, the criteria of substantive law notwithstanding"); Noussia, *Punitive Damages in Arbitration: Panacea or Curse?*, in M. Moser & D. Hascher (eds.), 27 J. Int'l Arb. 277, 283 (2010) ("arbitral tribunal may in certain respects have wider powers than those of a judge, because the tribunal's powers flow from, inter alia, the arbitration agreement"); Platte, in S. Riegler *et al.* (eds.), *Arbitration Law of Austria: Practice and Procedure* §593, ¶11 (2007) ("An arbitral tribunal with its seat within Austria may issue those types of interim measures known to Austrian law. The arbitral tribunal is not however limited to these types of measures. It may also grant interim measures of a type unknown to Austrian law.").

366) *See, e.g., Harper Ins. Ltd v. Century Indem. Co.*, 819 F.Supp.2d 270, 277 (S.D.N.Y. 2011) ("Petitioners conflate the question of whether an *issue* was presented to the arbitrators with the question of whether a *potential remedy* was presented to the arbitrators. It is indisputable that arbitrators have no authority to rule on an issue not submitted to them. However, there is no parallel per se rule that it is beyond the authority of the arbitrators to issue a remedy directed to an issue squarely before them unless it was requested by one of the parties. The case law presented by petitioners only supports the former, uncontested, rule of law.") (emphasis in original).

367) *See, e.g., Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Serv. Employees Int'l Union v. Local 1199 N.E.*, 70 F.3d 647 (1st Cir. 1995) (arbitral tribunal has inherent remedial authority); *United Elec. Radio & Mach. Workers of Am. v. Honeywell, Inc.*, 522 F.2d 1221 (7th Cir. 1975) (arbitral tribunal has inherent remedial authority); *Vogel v. Simon*, 201 N.Y.S.2d 877 (N.Y. Sup. Ct. 1960) (arbitral tribunal has inherent remedial authority).

368) *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.*, [2012] QCCA 385 (Québec Ct. App.).

369) *See, e.g., Shoprite Checkers (Pty) Ltd v. Comm'n for Conciliation Mediation & Arbitration*, [2006] ZALC 56, ¶8 (South African Labour Ct.) ("The commissioner is required to 'establish picketing rules' and not issue an award with brief reasons. Arbitration lacks the flexibility that is required for determining picketing rules.").

370) *Harper Ins. Ltd v. Century Indem. Co.*, 819 F.Supp.2d 270, 277 (S.D.N.Y. 2011) ("LMCs' position essentially asks us to ... find that the arbitrators necessarily exceeded the scope of their authority by fashioning relief not specifically requested, even though the relief was ordered to remedy an issue they concede was submitted to the Panel. Such a holding is fundamentally at odds with the role of the courts in reviewing arbitration awards. ... [A] reviewing court simply asks whether the award 'draws its essence from the agreement to arbitrate' or has a 'barely colorable justification.'") (quoting *Banco de Seguros*, 344 F.3d at 260).

371) *See*§25.04[F][3][a]; §26.05[C][4][c][i].

372) *See*§25.04[F][3][c]; §26.05[C][4][c][ii].

373) *See*§25.04[F][3][h]; §26.05[C][12].

374) *See* §6.02; §23.07[A].

375) *See* §6.02; §§23.07[D]-[E].

376) *See, e.g.*, English Arbitration Act, 1996, §48; Singapore International Arbitration Act, 2012, §12(5); Hong Kong Arbitration Ordinance, 2013, Art. 70.

377) R. Merkin, *Arbitration Law* ¶¶18.57 to 18.60 (1991 & Update August 2013).

378) Smit, *Judgments and Arbitral Awards in A Foreign Currency: A Means of Dealing With Currency Fluctuations in International Adjudication*, 7 Am. Rev. Int'l Arb. 21 (1996).

379) English Arbitration Act, 1996, §48(4); *Kinetics Tech. Int'l v. Cross Seas Shipping Corp.* [2001] 2 Lloyd's Rep. 313, 313 (Comm) (English High Ct.) (award is to be made in "currency which most justly expressed the loss which has been sustained by the claimants"); R. Merkin, *Arbitration Law* ¶18.60 (1991 & Update August 2013).

At common law, English courts held that arbitral awards made in London (or abroad) could be expressed in currencies other than pounds sterling and that such awards could be enforced in England; this was true even at a time when English courts were only able to issue judgments in pounds sterling. *Jugoslavenska Oceanska Plovidba v. Castle Inv. Co.* [1974] QB 292 (English Ct. App.) (award made in USD in London enforced; USD amount converted to sterling as of date of award).

380) *See, e.g., Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (House of Lords).

In some legal systems, an award may in some circumstances be required to be converted into local currency for enforcement purposes. *See Judgment of 30 May 2006, 3 Ob 98/06t (Austrian Oberster Gerichtshof) (forced sale of real property).*

381) *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (House of Lords); *Miliangos v. George Frank (Textiles) Ltd* [1976] AC 443 (House of Lords); *Jugoslavenska Oceanska Plovidba v. Castle Inv. Co.* [1974] QB 292 (English Ct. App.).

382) The English Arbitration Act, 1996, provides that an arbitral tribunal has the power to grant declaratory and injunctive relief (in the latter case, generally to the same extent as an English court). English Arbitration Act, 1996, §48(5) (relief arbitral tribunal may order is generally identical to remedies available in English courts (with exception of contracts concerning land)); Irish Arbitration Act, §26 ("Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land."); Singapore International Arbitration Act, 2012, §12(1); Hong Kong Arbitration Ordinance, 2013, Art. 70. *See* R. Merkin, *Arbitration Law* ¶¶18.55, 18.71 to 18.72 (1991 & Update August 2013).

383) *See*§25.04[F][3][h]; §26.05[C][4]; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) ("The arbitrators' power to award equitable relief is also well established."); *Brown v. Coleman Co.*, 220 F.3d 1180, 1183-84 (10th Cir. 2000) (same); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) ("The Agreement here does not provide any specific limitations on the power of arbitrators under Rule 43 [of the AAA Rules, granting that power to award 'any remedy or relief which the arbitrator deems just and equitable'], and we are required to give deference to the arbitrators' interpretation of the Rule and Agreement unless they have clearly exceeded their authority."); *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982); *Eyewonder, Inc. v. Abraham*, 2010 WL 3528882 (S.D.N.Y.) (arbitrator's award of injunctive relief was not excess of authority; parties' agreement authorized such relief); *Staklinski v. Pyramid Elec. Co.*, 160 N.E.2d 78, 79 (N.Y. 1959) ("The power of an arbitrator to order specific performance in an appropriate case has been recognized from early times."); *Nearctic Nickel Mines Inc. v. Canadian Royalties Inc.*, [2012] QCCA 385 (Québec Ct. App.) ("an order of specific performance within a commercial dispute can legally be issued by an arbitrator"). *See also*Dunaud & Kostytska, *Declaratory Relief in International Arbitration*, 29 J. Int'l Arb. 1 (2012); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1305 *et seq.* (1999); Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1041, ¶6 (26th ed. 2007); K.-H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* 312 (6th ed. 2000).

384) LCIA, *Registrar's Report* (2012) (29% of LCIA arbitrations in 2012 and 31% in 2011 sought declaratory relief or specific performance).

385) A number of courts have held that the New York Convention applies to awards granting declaratory or injunctive relief (as well as to monetary awards). *See*Adamas Mgt & Servs. Inc. v. Aurado Energy Inc., XXX Y.B. Comm. Arb. 479 (New Brunswick Q.B. 2004) (2005); *IPOC Int'l Growth Fund Ltd v. LV Fin. Group Ltd*, XXXIII Y.B. Comm. Arb. 408, ¶50 (B.V.I. Ct. App. 2008) (2008) (nothing in Convention or implementing legislation "that indicates that purely declaratory Convention awards are excluded" from Convention's recognition provisions); *LV Fin. Group Ltd v. IPOC Int'l Growth Fund Ltd*, [2006] Bda LR 69 (Bermuda Comm. Ct.). *See also*§25.04[F][3][h].

386) *See, e.g., Judgment of 28 September 2004*, 4 Ob 142/04t (Austrian Oberster Gerichtshof); *NSW Racing v. TAB*, [2002] NSWSC 742, ¶26 (N.S.W. S.Ct.) ("The words used to confer power to resolve the dispute confer almost unlimited flexibility in the method of its resolution. For this reason, I think that the arbitrator has been given power to grant an injunction."); *AED Oil Ltd v. Puffin Fpso Ltd*, [2010] VSCA 37, ¶20 (Victoria Ct. App.) ("We think the Model Law gives an arbitrator appointed under that law power to make an order in the nature of an injunction and if necessary, a declaration.") (quoting *Electra Air Conditioning BV v Seeley Int'l Pty Ltd*, [2008] FCAFC 169, ¶44 (Australian Fed. Ct.)).

387) *See, e.g., Restatement (Second) Contracts* §366, comment a (1981); *McNeil v. Magee*, 16 F.Cas. 326, 330 (D. Mass. 1829); *Grossman v. Ilowitz*, 898 N.Y.S.2d 621, 623 (N.Y. App. Div. 2010); *Greenspan v. Ladt, LLC*, 111 Cal.Rptr.3d 468, 496 (Cal. Ct. App. 2010); *950 Corbindale, LP v. Kotts Capital Holdings Ltd P'ship*, 316 S.W.3d 191, 196 (Tex. Ct. App. 2010) ("provision giving the arbitrator authority to 'award compensatory damages only' does not foreclose an arbitrator's ability to grant declaratory relief"); *McFin. Ltd v. City Fed. Sav. & Loan Ass'n*, 279 N.W.2d 507 (Wis. Ct. App. 1979); *In re Staklinski/Pyramid Elec. Co.*, 180 N.Y.S.2d 20, 26 (N.Y. App. Div. 1958), *aff'd*, 160 N.E.2d 78 (N.Y. 1959); *Freydberg Bros. Inc. v. Corey*, 31 N.Y.S.2d 10, 11 (N.Y. Sup. Ct. 1941), *aff'd mem.*, 32 N.Y.S.2d 129 (N.Y. App. Div. 1941); *Ethiopian Oilseeds & Pulses Exp. Corp. v. Rio del Mar Foods Inc.* [1990] 1 Lloyd's Rep. 86 (QB) (English High Ct.).

388) *Judgment of 7 April 1994, Lechevalier v. Société Croisière Loisir et Commc'ns Internationale*, 1996 Rev. arb. 61 (Paris Cour d'appel) (ordering rescission of yacht sale contract against partial refund of purchase price); K.-H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* 209 (6th ed. 2000).

In the words of one commentator, "specific performance is so widely available in legal systems that it can be considered a general principle of law." Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 6 (ASA Spec. Series No. 30 2011). *See also*Dunaud & Kostytska, *Declaratory Relief in International Arbitration*, 29 J. Int'l Arb. 1 (2012); Malinvaud, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 210 (ICCA Congress Series No. 14 2009) (discussing non-pecuniary remedies available in commercial arbitration, including judicial penalties and specific performance); Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004).

389) *See, e.g.*,*Texaco Overseas Petroleum Co. v. Libyan Arab Repub., Ad Hoc Award of 19 January 1977*, IV Y.B. Comm. Arb. 177, 184-86 (1979) ("*restitutio in integrum* is ... the normal sanction for non-performance of contractual obligations and ... is inapplicable only to the extent that restoration of the status quo ante is impossible"); *Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Repub., Ad Hoc Award of 12 April 1977*, VI Y.B. Comm. Arb. 89, 105 (1981) (recognizing power to order specific performance, but declining to do so); *BP Exploration Co. v. Gov't of the Libyan Arab Repub., Ad Hoc Award on Merits of 10 October 1973*, V Y.B. Comm. Arb. 143, 150 *et seq.* (1980) (same). *See also* Malinvaud, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 210-16 (ICCA Congress Series No. 14 2009) (discussing non-pecuniary remedies available in commercial arbitration, including judicial specific performance); Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 16 (ASA Spec. Series No. 30 2011) (concluding, based on review of reports from leading arbitral institutions, that "international arbitral tribunals first of all accept that, as a matter of principle, they have the power to grant [non-monetary relief] and that, in the right circumstances, they are prepared to exercise these powers"), 127-207 (summaries of awards of non-monetary relief by Chamber of Arbitration of Milan, Geneva Chamber of Commerce, German Institution of Arbitration, VIAC, ICC, ICDR/AAA, Kuala Lumpur Regional Centre for Arbitration and LCIA).

390) *See, e.g.*, *Case Concerning the Factory at Chorzów*, PCIJ Series A, No. 13, 20 (P.C.I.J. 1928) ("The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation of law, once and for all and with binding force as between the parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."; "The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."); ILC, *Memorandum on Arbitral Procedure, Prepared by the Secretariat*, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 167 (1950); Malinvaud, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 217-28 (ICCA Congress Series No. 14 2009) (restitution and satisfaction in investment arbitration).

391) *Engis Corp. v. Engis Ltd*, 800 F.Supp. 627, 631 (N.D. Ill. 1992); *Young v. Deschler*, 110 N.Y.S.2d 220 (N.Y. Sup. Ct. 1952) (order of specific performance of non-competition clause). *See also* Chappuis, *A Comparative Overview on Performance as A Remedy: A Key to Divergent Approaches*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 51 (ASA Spec. Series No. 30 2011) (collecting awards granting injunctions prohibiting certain conduct).

392) *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (relying on Rule 43 of AAA Rules).

393) *Marion Mfg Co. v. Long*, 588 F.2d 538, 541 (6th Cir. 1978).

394) *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 689 F.2d 301, 306 (2d Cir. 1982).

395) *Carte Blanche (Singapore) Pte Ltd v. Carte Blanche Int'l, Ltd*, 888 F.2d 260, 266 (2d Cir. 1989).

396) *See, e.g.*, *Pac. Reins. Mgt Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1023-24 (9th Cir. 1991); *Blue Sympathy Shipping Co. v. Serviocean Int'l SA*, 1994 WL 597144, at *1 (S.D.N.Y.). *Contra Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972).

397) *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219-20 (5th Cir. 1990).

398) *Grayson-Robinson Stores, Inc. v. Iris Constr. Co.*, 168 N.E.2d 377 (N.Y. 1960) (order of specific performance to finish construction of mall).

399) *Gen. Fuse Co. v. Sightmaster Corp.*, 162 N.Y.S.2d 630 (N.Y. Sup. Ct. 1957) (order of specific performance to transfer business). *See also* Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 18-19 (ASA Spec. Series No. 30 2011) (collecting awards ordering transfers of property and other affirmative conduct).

400) *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159 (N.Y. 1959) (order of specific performance to reinstate managing director of company). *See also* Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 25 (ASA Spec. Series No. 30 2011) (collecting awards granting "formative actions," such as creation, transformation, or termination of legal relationship).

401) *Advanced Micro Devices v. Intel Corp.*, 885 P.2d 994 (Cal. 1994) (upholding award ordering granting free license to use product (despite absence of such license in parties' contract)).

402) *Puerto Rico Maritime Shipping Auth. v. Star Lines Ltd*, 454 F.Supp. 368, 375 (S.D.N.Y. 1978) (confirming award requiring an accounting).

403) *Brown v. Coleman Co.*, 220 F.3d 1180, 1182 (10th Cir. 2000) (tribunal did not exceed power by granting equitable relief of extending time in which wrongfully terminated employee's stock options could be exercised).

404) *Watkins-Johnson v. Bank Saderat Iran, Award in IUSCT Case No. 429-370-1 of 28 July 1989*, 22 Iran-US C.T.R. 218 (1989). For ICSID arbitrations, *see Enron Corp. & Ponderosa Assets, LP v. Argentine Repub., Decision on Jurisdiction in ICSID Case No. ARB/01/3 of 14 January 2004*, ¶81 ("in addition to declaratory powers, [the Tribunal] has the power to order measures involving performance or injunction of certain acts"); *Saudi Arabia v. Arabian Am. Oil Co. (Aramco), Ad Hoc Award of 23 August 1958*, 27 I.L.R. 117, 145 (1963). *See also* Mourre, *Judicial Penalties and Specific Performance in International Arbitration*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 53-73 (2008); Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 24 (ASA Spec. Series No. 30 2011) (collecting awards granting declaratory relief).

405) Elder, *The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes*, 13 Arb. Int'l 1 (1997). *Contra* Munoz, *The Power of Arbitrators to Make Pro Futuro Orders*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 91 (ASA Spec. Series No. 30 2011).

406) *See*§9.02[I]; §15.02.

407) *See* Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 4 (ASA Spec. Series No. 30 2011) ("Why specific performance as a remedy in arbitration? The answer is simple: this is what the parties have agreed.").

408) *See, e.g., Freydberg Bros., Inc. v. Lewis Corey*, 31 N.Y.S.2d 10, 11 (N.Y. Sup. Ct. 1941) (relying on broad arbitration clause to hold arbitrators had authority to grant specific performance); *Telia Sonera AB v. Hilcourt Docklands Ltd* [2003] EWHC 3353 (English High Ct.) (limitations on remedial authority of arbitrators interpreted narrowly). *See also* Munoz, *The Power of Arbitrators to Make Pro Futuro Orders*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 118 (ASA Spec. Series No. 30 2011) ("arbitrators enjoy a wide power to make non-pecuniary orders, committing the parties' future activities").

409) *See*§2.01[A]; §5.01[D]; §9.02[I]; §23.07[A].

410) *See, e.g., Dreis & Krump Mfg Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 802 F.2d 247, 250 (7th Cir. 1986); *Engis Corp. v. Engis Ltd*, 800 F.Supp. 627, 632 (N.D. Ill. 1992).

411) For commentary, *see* Davis, *A Proposed Framework for Reviewing Punitive Damage Awards of Commercial Arbitrators*, 58 Alb. L. Rev. 55 (1994); Derains, *Intérêts moratoires, dommages-intérêts compensatoires et dommages punitifs devant l'arbitre international*, in *Etudes offertes à Pierre Bellet* 100 (1991); Donahey, *Punitive Damages in International Commercial Arbitration*, 10(3) J. Int'l Arb. 67 (1995); Farnsworth, *Punitive Damages in Arbitration*, 7 Arb. Int'l 3 (1991); Gotanda, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, 7(1) Transnat'l Disp. Mgt 3 (2010); Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 Harv. Int'l L.J. 59 (1997); Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 Colum. J. Transnat'l L. 508 (2007); Jones, *Punitive Damages as An Arbitration Remedy*, 4(2) J. Int'l Arb. 35 (1987); Larsen, *Punitive Damages in International Commercial Arbitration: Adapting U.S. Policy to International Norms*, in R. Lillich & C. Brower (eds.), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* 245 (1994); Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 Arb. Int'l 95, 105-09 (2006); Noussia, *Punitive Damages in Arbitration: Panacea or Curse?*, 27 J. Int'l Arb. 277 (2010); Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?*, 29 Arb. Int'l 89 (2013); Stipanowich, *Punitive Damages in Arbitration:* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. Rev. 953 (1986); Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 Ford. L. Rev. 529 (1994).

412) Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado About Nothing?*, 29 Arb. Int'l 89, 103 (2013) ("punitive arbitral awards are either inexistent or extremely rare").

413) D. Dobbs, *Handbook on the Law of Remedies* 204 (1973). *See*Noussia, *Punitive Damages in Arbitration: Panacea or Curse?*, 27 J. Int'l Arb. 277 (2010) ("Punitive damages are awarded in addition to compensatory damages. Because of their role to punish and deter a tortfeasor whose conduct is grossly negligent, willfully malicious, criminally indifferent or in reckless disregard for the rights of others from similar actions, they are action-oriented, tortfeasor-oriented and mostly prospective"); L. Schlueter & K. Redden, *Punitive Damages* §2.2(A)(1) (1995).

414) H. McGregor, *McGregor on Damages* §§309-11 (1980); L. Schlueter & K. Redden, *Punitive Damages* §22.1 (1995).

415) Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 Harv. Int'l L.J. 59, Appendix III (1997) (punitive damages available in Australia, Canada, England, New Zealand, Northern Ireland, Ireland and United States).

416) J. Ghiardi *et al., Punitive Damages Law and Practice*§4.01 (1996); Noussia, *Punitive Damages in Arbitration: Panacea or Curse?*, 27 J. Int'l Arb. 277 (2010); L. Schlueter & K. Redden, *Punitive Damages* 369 *et seq.* (1995).

417) *See, e.g.*, 15 U.S.C. §15(a) (treble damages for antitrust violations); 18 U.S.C. §1964(c) (treble damages for RICO violations).

418) *See generally* Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 Harv. Int'l L.J. 59, Appendix II (1997) (in most civil law jurisdictions, no punitive damages except only for limited, aggravated torts); Noussia, *Punitive Damages in Arbitration: Panacea or Curse?*, 27 J. Int'l Arb. 277, 282-83 (2010) ("In civil law countries, the concept of punitive damages is scarcely known.").

419) *Judgment of 4 June 1992*, 1992 WM 1451 (German Bundesgerichtshof); *Judgment of 19 January 2007, P.J. v. Fimez*, Case No. 1183 (Italian Corte di Cassazione); *Judgment of 15 October 2001*, 37 Riv. Dir. Int'l Priv. Proc. 1021 (Venice Corte d'Appello) (2002). *Compare Judgment of 1 February 1989*, 1991 BJM 31 (Basel-Stadt Zivilgericht) (recognizing judgment for punitive damages), *appeal dismissed, Judgment of 12 July 1990*, DFT 116 II 376 (Swiss Federal Tribunal); Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 Arb. Int'l 95, 108 (2006). *See also**Final Award in ICC Case No. 5946*, XVI Y.B. Comm. Arb. 97 (1991).

420) *See, e.g.*, French Civil Code, Art. 1382; German BGB, §253; Austrian Civil Code, §§1325*et seq.*

421) *See, e.g., Tadonki v. Secretary Gen. of the United Nations, Award in UNDT Case No. UNDT/NBI/2009/36 of 26 February 2013* (awarding $50,000 in moral damages); *Joseph Charles Lemire v. Ukraine, Award in ICSID Case No. ARB/06/18 of 28 March 2011* ("as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but … moral damages can be awarded in exceptional cases, provided that [1] the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; [2] the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and [3] both cause and effect are grave or substantial."); *Award in ICSID Case No. ARB/05/17 of 6 February 2008, Desert Line Projects LLC v. Repub. of Yemen*, 1(2) Int'l J. Arab Arb. 350 (2009) (tribunal awarded $1,000,000 for moral damages: "It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them."); *Award in ICSID Case No. ARB/77/2 of 8 August 1980, Benvenuti & Bonfant v. People's Repub. of the Congo*, VIII Y.B. Comm. Arb. 144, 151 (1983) ("the measures to which Claimant has been subject and the suit that was the consequence thereof [made it] equitable to award it the amount of CFA 5,000,000 for moral damages"). *See also* Wong, *The Misapprehension of Moral Damages in Investor-State Arbitration*, in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (2013).

422) A preliminary draft law revising the French law on civil liability, the so-called "Catala Project," was submitted to the French Minister of Justice on 22 September 2005. The revised Article 1371 intends to introduce the concept of punitive damages into French law: "One whose fault is manifestly premeditated, particularly when aiming for monetary gain, may be ordered to pay punitive damages besides compensatory damages." *See* Gotanda, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, 7(1) Transnat'l Disp. Mgt 3 (2010). *See also**Judgment of 13 November 2001, Miller Imp. Corp. v. Alabastres Alfredo, SL*, in Jablonski, *Translation and Comment: Enforcing U.S. Punitive Damages Awards in Foreign Courts – A Recent Case in the Supreme Court of Spain*, 24 J. L. & Comm. 225, 231-43 (2005) (enforcing U.S. punitive damages judgment); Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 Colum. J. Transnat'l L. 508 (2007).

423) *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976). *See* Stipanowich, *Punitive Damages in Arbitration:* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. Rev. 953 (1986); Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 Ford. L. Rev. 529 (1994).

424) *Garrity*, 353 N.E.2d at 797.

425) *See*Chapter 6 (especially §6.02.).

426) *Garrity*, 353 N.E.2d at 797 ("The law does not and should not permit private persons to submit themselves to punitive sanction of the order reserved to the State.").

427) Davis, *A Proposed Framework for Reviewing Punitive Damage Awards of Commercial Arbitrators*, 58 Alb. L. Rev. 55 (1994).

428) *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (U.S. S.Ct. 1995).

429) *Mastrobuono*, 514 U.S. at 52.

430) *Mastrobuono*, 514 U.S. at 58. The Court reasoned: "we think our decisions in *Allied-Bruce, Southland* and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issue to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Id.* at 58. *See also*§6.03[C][4].

431) *Mastrobuono*, 514 U.S. at 61, 68-69. The Court also relied on the parties' agreement upon the NASD Code, which provided generally that the arbitrators could include damages and other relief, without qualifications.

432) Some institutional rules exclude awards of punitive or exemplary damages. *See, e.g.*, ICDR Rules, Art. 28(5); ARIAS-UK Rules, Art. 14(2)(2).

433) *See Lagstein v. Certain Underwriters at Lloyd's London*, 607 F.3d 634 (9th Cir. 2010) (district court erred in concluding that amount of punitive damages awarded demonstrated manifest disregard of law); *OurLink, LLC v. Goldberg*, 2011 WL 9076, at *3 (N.D. Tex.) ("arbitrators presumptively enjoy the power to award [punitive damages] unless the arbitration contract unequivocally excludes punitive damage claims"); *Sanders v. Gardner*, 7 F.Supp.2d 151, 170-79 (E.D.N.Y. 1998) (analyzing and applying *Mastrobuono* in confirming $10,000,000 punitive damages award); *Tucker v. Scott*, 1997 WL 151509, at *4 (S.D.N.Y.) (allowing punitive damages claims to go forward); *Prudential Sec. Inc. v. Laurita*, 1997 WL 109438, at *5 (S.D.N.Y.) (denying petition for stay to prevent arbitrator from awarding punitive damages in light of *Mastrobuono*); *Kidder, Peabody & Co. v. Marriner*, 961 F.Supp. 50, 54 (S.D.N.Y. 1997) (finding *Mastrobuono* does not bar arbitrators from awarding punitive damages and denying stay of arbitration); *Cowen & Co. v. Tecnoconsult Holdings Ltd*, 1996 WL 391884, at *5 (S.D.N.Y.) (denying application to prevent arbitrators from awarding punitive damages in light of *Mastrobuono*); *A.S. Goldmen & Co. v. Bochner, M.D.*, 1996 WL 413676, at *1 (S.D.N.Y.) (denying petition to stay arbitration pending claims for punitive damages, based on *Mastrobuono*); *PaineWebber, Inc. v. Richardson*, 1995 WL 236722, at *2-3 (S.D.N.Y.) (denying stay of arbitration as it relates to punitive damages in light of *Mastrobuono*); *Americorp Sec., Inc. v. Sager*, 656 N.Y.S.2d 762, 764 (N.Y. App. Div. 1997) (reversing stay of arbitration because arbitration clause did not unequivocally exclude punitive damages claim); *Mulder v. Donaldson, Lufkin & Jenrette*, 648 N.Y.S.2d 535, 538 (N.Y. App. Div. 1996) ("In sum, the decision of the Supreme Court in *Mastrobuono* makes it unmistakably clear that, with respect to arbitration proceeding governed by the FAA which preempts the *Garrity* rule, the arbitration of punitive damage claims is required except where the parties have unequivocally agreed otherwise."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler*, 651 N.Y.S.2d 38, 39 (N.Y. App. Div. 1996) (reversing lower court stay of arbitration of punitive damages claim because choice-of-law provision was ambiguous, as in *Mastrobuono*, and therefore strong federal policy favoring arbitration included deciding punitive damages award); *Prudential Sec. Inc. v. Pesce*, 642 N.Y.S.2d 466, 468 (N.Y. Sup. 1996) (leaving punitive damages issue to arbitrators because *Mastrobuono* preempts *Garrity* rule). *See also Lee v. Chica*, 983 F.2d 883, 887 (8th Cir. 1993) ("when the choice of law provision in an arbitral clause incorporates the rules of the AAA, some circuits have held, and we agree, that AAA arbitrators may grant any remedy or relief including punitive damages"); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989) ("it would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award").

434) *See, e.g.*, 2010 UNCITRAL Rules, Art. 34(1); 2012 ICC Rules, Arts. 21(1), 23(c); LCIA Rules, Art. 16.

For an argument that these rules should not be interpreted as authorizing consideration of punitive damage claims (because of the atypical character of punitive damages internationally), even under *Mastrobuono*'s rule that arbitration agreements should be construed in favor of extending to claims of punitive damages, *see* Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 Harv. Int'l L.J. 59, 78-81 (1997).

435) *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 519 (2d Cir. 1991).

436) *See*§23.07[D], pp. 3078-79.

437) *Final Award in ICC Case No. 5946*, XVI Y.B. Comm. Arb. 97, 113 (1991). This award has been criticized on the grounds that, while punitive damages are against Swiss (national) public policy, the grounds for setting aside under Article 190(2)(c) of the Swiss Law on Private International Law relate only to transnational public policy. If the parties chose a law which provides for punitive damages, an arbitral tribunal sitting in Switzerland should be entitled to award such damages. *See* B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1604 (2006); Schlosser, *Right and Remedy in Common Law Arbitration and in German Arbitration Law*, 4(1) J. Int'l Arb. 27, 32-33 (1987). *Compare*Donahey, *Punitive Damages in International Commercial Arbitration*, 10(3) J. Int'l Arb. 67 (1995) ("Generally, the principle of party autonomy would be thought to apply where the parties have, by their agreement, expressly empowered the arbitral tribunal to award punitive damages."); Larsen, *Punitive Damages in International Commercial Arbitration: Adapting U.S. Policy to International Norms*, in R. Lillich & C. Brower (eds.), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* 245, 274 (1994).

438) *See* Rostock-Jensen & Mikkelsen, *Denmark*, in L. Garb & J. Lew (eds.), *Enforcement of Foreign Judgments* 1, 6-7 (2013); Yamauchi & Kobayashi, *Japan*, in L. Garb & J. Lew (eds.), *Enforcement of Foreign Judgments* 1, 4 (2013). *See also*§26.05[C][9][h][viii].

439) *See*§19.03[B][1].

440) *See*§19.03[D][3][e]; §19.04[B][5][b].

441) Ordinarily, the tribunal's decision will be a substantive one, not a jurisdictional determination. For reasons analogous to those identified by the U.S. Supreme Court in *Mastrobuono*, claims for punitive damages falling within the scope of the parties' arbitration agreement should be subject to arbitration. *See*§9.02[I]; §23.07[D].

442) *See*§25.11, p. 3390.

443) *See, e.g., Certain Underwriters at Lloyd's v. Argonaut*, 264 F.Supp.2d 926, 943 (C.D. Cal. 2003) (tribunal order: "Petitioners, jointly and severally, are ordered to pay Respondent, in addition to the amount set forth in Interim Order No. 2, the additional sum of $10,000.00 for every day that they [Certain Underwriters] are not in compliance with that Order, commencing on January 17, 2003, the first day following the date on which payment was to have been made or letter or credit established."). *See also Superadio LP v. Winstar Radio Prods. LLC*, 844 N.E.2d 246, 254 (Mass. 2006) (party sanctioned for failing to comply with discovery orders).

444) *Pac. Reins. Mgt Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991) ("Arbitrators have no power to enforce their decisions. Only courts have that power.").

445) *See, e.g., Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009); *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2d Cir. 1988); *Certain Underwriters at Lloyd's v. Argonaut*, 264 F.Supp.2d 926, 943 (C.D. Cal. 2003) ("there is no categorical ban to an arbitrator's imposition of sanctions for non-compliance with his or her orders"; "in light of the strong public policy favoring expeditious arbitration the parties should not be barred from consensually conferring such power on the arbitrator; enforcement via sanctions by the arbitrator is likely to be more efficient than mandating judicial review and enforcement in every instance"); *Polin v. Kellwood Co.*, 103 F.Supp.2d 238 (S.D.N.Y. 2000) (upholding award of legal costs as sanction for outrageous conduct and refusal to respond to panel's questions by claimant's counsel); *Konkar Maritime Enters., SA v. Compagnie Belge D'Affretement*, 668 F.Supp. 267, 274 (S.D.N.Y. 1987) ("it was not improper for the Panel to consider respondent's failure to comply with its interim order" in assessing 85% of costs against party that ignored tribunal's order to provide security). *Compare Grynberg v. BP Exploration Operating Ltd*, 92 A.D.3d 547, 548 (N.Y. App. Div. 2012) (affirming lower court's ruling vacating award of $3 million in sanctions because it was punitive in nature and thus violation of New York public policy).

446) *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 n.2 (2d Cir. 2009).

447) *See, e.g.*, Malinvaud, *Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 210 (ICCA Congress Series No. 14 2009) (judicial penalties available in commercial arbitration); Mourre, *Judicial Penalties and Specific Performance in International Arbitration*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 60 (2008) ("[T]here is no reason to consider that an arbitral tribunal should be deprived of jurisdiction to liquidate the penalty it has ordered. As a matter of fact … this is not a matter that relates to the enforcement of the penalty but rather to the determination of the final amount in respect to which the creditor will be entitled to seek enforcement.").

448) *Inter-Chem Asia 2000 Pte Ltd v. Oceana Petrochem.*, 373 F.Supp.2d 340, 356-58 (S.D.N.Y. 2005) ("[T]he parties' agreement did not explicitly grant the Arbitrator power to afford any remedy available in courts. … [If] the Arbitrator had inherent authority to sanction DiDonna [it] would directly contradict the principle that an arbitrator's authority is circumscribed by the agreement of the parties."); *Certain Underwriters at Lloyd's v. Argonaut*, 264 F.Supp.2d 926, 944 (C.D. Cal. 2003) ("potential for conflict with FAA policy counsels in favor of requiring that any intent of the parties to afford contempt-like power on the arbitrator must be clearly evident").

449) *Inter-Chem Asia 2000 Pte Ltd v. Oceana Petrochem.*, 373 F.Supp.2d 340, 356-58 (S.D.N.Y. 2005).
450) *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("broad arbitration clause ... confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and ... such a sanction may include an award of attorney's fees or arbitrator's fees").
451) Schneider, *Non-Monetary Relief in International Arbitration: Principles and Practice*, in M. Schneider & J. Knoll (eds.), *Performance as A Remedy: Non-Monetary Relief in International Arbitration* 43 (ASA Spec. Series No. 30 2011) ("In civil law countries, the rights and the remedies that flow from them, as a matter of principle, are regulated in the substantive law.").
452) L. Collins (ed.), *Dicey, Morris and Collins on The Conflict of Laws* ¶7-011 (15th ed. 2012); D. Dobbs, *Law of Remedies* §§1.1, 1.6 (2d ed. 1993).
453) Y. Derains & R. Kreindler, in ICC Dossiers, *Evaluation of Damages in International Arbitration* 87 (2006).
454) N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.100 (5th ed. 2009).
455) *See*§17.02[F].
456) *See*§7.04.
457) *See*§23.08[D]; §23.09[B].
458) *See*§5.01[B]; §15.02[A]; §15.04[B].
459) *See, e.g.*, Irish Arbitration Act, §26 ("Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.").
460) *See*§17.02[F]; §19.03[H][3], p. 2670 n. 297; *Restatement (Second) Conflict of Laws* §207 (1971) ("measure of recovery for a breach of contract is determined by the local law of the state selected [by the parties to govern the contract]").
461) *See*§19.03[H][3].
462) For commentary, *see* Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475 (2013); Chartered Institute of Arbitrators, *Costs of International Arbitration Survey* (2011); Frank, *Rationalizing Cost Awards in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769 (2011); Goldstein, *Some Thoughts About Costs in International Arbitration*, 3 Int'l Arb. News 16 (2003); Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations*, in M. Fernández-Ballesteros & D. Arias (eds.), *Liber Amicorum Bernardo Cremades* 539-55 (2010); Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitration*, 21 Mich. J. Int'l L. l 1 (1999); Gurry, *Fees & Costs*, 6 World Arb. & Med. Rep. 227 (1995); Hanotiau, *The Parties' Costs of Arbitration*, in ICC Dossiers, *Evaluation of Damages in International Arbitration* 213 (2006); Hanotiau, *The Parties' Costs of Arbitration*, 7(1) Transnat'l Disp. Mgt (2010); Kreindler, *Final Rulings on Costs: Loser Pays All?*, 7(1) Transnat'l Disp. Mgt 1 (2010); Kreindler, *Die Kostenentscheidung im Schiedsgerichtsverfahren aus US-amerikanischer Sicht*, 7(1) Transnat'l Disp. Mgt (2010); O'Reilly, *Rethinking Costs in Commercial Arbitration*, 69(2) Arb. 122 (2003); Power & Konrad, *Costs in International Commercial Arbitration – A Comparative Overview of Civil and Common Law Doctrines*, 2007 Austrian Arb. Y.B. 261; Rosell, *Arbitration Costs as Relief and/or Damages*, 28 J. Int'l Arb. 115 (2011); Rubino Sammartano, *Costs Awards in Arbitration*, 28 J. Int'l Arb. 113 (2011); Schwartz, *The Costs of ICC Arbitration*, 4(1) ICC Ct. Bull. 8 (1993); Smit & Robinson, *Cost Awards in International Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 Am. Rev. Int'l Arb. 267 (2009); Smith, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 Va. J. Int'l L. 749 (2011); Wetter & Priem, *Costs and Their Allocation*, 2 Am. Rev. Int'l Arb. 249 (1991).
463) *See* Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475 (2013) ("Attorney fees in significant commercial arbitrations, on the other hand, regularly run into the millions of dollars on each side."); Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations*, in M. Fernández-Ballesteros & D. Arias (eds.), *Liber Amicorum Bernardo Cremades* 541 (2010) ("The costs of international arbitration are two-fold and consist of the costs of the proceeding and the costs of the parties. The proceeding's costs generally include administrative fees, tribunal fees, and costs associated with the tribunal. The parties' costs are principally comprised of legal costs: attorneys' fees, expert fees and related expenses."); Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitration*, 21 Mich. J. Int'l L. 1, 3 (1999); Rosell, *Arbitration Costs as Relief and/or Damages*, 28 J. Int'l Arb. 115, 115 (2011) ("costs of proceeding in the dispute resolution process ... include not only the amount that a party will have to pay at the end of the arbitration but also, for example, the litigation costs which would be generated if procedural issues had to be resolved prior to the arbitration or if parallel arbitration and/or litigation were engaged during the arbitration proceedings").

464) Some national courts have held that arbitral tribunals have an obligation to consider costs claims before terminating their mandate and the arbitration. *See, e.g., Casata Ltd v. Gen. Distribs. Ltd*, [2006] NZSC 8, ¶110 (N.Z. S.Ct.) ("[O]n the true meaning of cl 6(1)(a) of the Second Schedule an arbitral tribunal which is bound by that provision may not end its jurisdiction until after it has addressed the parties' costs in the arbitration. ... [T]he tribunal in general should first determine those issues in an interim award, reserving the final determination on costs until it has given the parties an opportunity to be heard. If a party seeks costs, the tribunal must determine that question, either making an award of costs or deciding not to do so. In the latter case, or if no party seeks costs, the statutory default provision in cl 6(1)(b) will apply.").

465) *See*E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1162, 1255 (1999); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶24-78 (2003); R. Merkin, *Arbitration Law* ¶18.77 (1991 & Update August 2013).

466) *See, e.g., Severtson v. Williams Constr. Co.*, 220 Cal.Rptr. 400, 406 (Cal. Ct. App. 1985); *Judgment of 19 December 1996, Société Qualiconsult v. Groupe Lincoln*, 1998 Rev. arb. 121, 124 (Paris Cour d'appel) ("arbitrators have ... the power to decide on the costs except where otherwise stipulated in the arbitration agreement"); *Judgment of 16 February 1993, Brega Oil Mktg Co. v. Techint Compagnie et Tecnica Internazionale SpA*, 13 ASA Bull. 57, 61-62 (Vaud Ct. App.) (1995) (ICC tribunal seated in Switzerland not required to apply Swiss law to issue of costs of arbitration); G. Keutgen & G. Dal, *L'arbitrage en droit belge et international Tome I: Le droit belge* ¶¶510 *et seq.* (2d ed. 2006); Voit, in H.-J. Musielak (ed.), *Kommentar zur Zivilprozessordnung* §1057, ¶¶1, 2, 4, 6 (5th ed. 2007); Wirth, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 189, ¶¶53-55, 60 (2001).

467) *See*§15.02.

468) English Arbitration Act, 1996, §60; R. Merkin, *Arbitration Law* ¶18.77 (1991 & Update August 2013). *See also Virdee v. Virdi* [2003] EWCA Civ 41 (English Ct. App.) (agreement excluded costs of legal representation); *Shashoua v. Sharma* [2009] EWHC 957 (Comm) (English High Ct.) (§60 is mandatory); *Mansfield v. Robinson* [1928] All ER 69, 71-73 (QB) (English High Ct.).

469) *See, e.g.,Judgment of 16 October 2012*, DFT 4A_314/2012 (Swiss Federal Tribunal); B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶1492 (2d ed. 2010).

470) *Judgment of 10 November 2010*, DFT 136 III 597, 603 (Swiss Federal Tribunal) (rejecting argument that arbitral tribunal's "Interim Award," holding parties jointly liable for tribunal's fees, was not an award: "[A]ccording to the majority of legal writing the arbitral tribunal has no authority to issue an enforceable decision as to the fees it may derive from the arbitration agreement (*receptum arbitri*). This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one's own case. The decision on costs in an arbitral award is therefore nothing else as a rendering of account which does not bind the parties or a circumscription of the arbitrators' private law claim based on the arbitration agreement on which in case of dispute the State Court will have to decide.").

471) *Judgment of 24 October 2008*, XXXIV Y.B. Comm. Arb. 533 (Oberlandesgericht Frankfurt) (2009) (denying recognition of portion of award regarding costs of arbitration, as arbitrators are prohibited from determining their own costs and fees, except when agreed between parties and arbitrators).

472) H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 1118-19 (1989) ("Commentary on Matters Not Addressed in the Final Text").

473) Bühler, *Awarding Costs in International Commercial Arbitration: An Overview*, 22 ASA Bull. 249, 252-53 (2004); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 1119 (1989).

474) *See, e.g.*, English Arbitration Act, 1996, §61(1); German ZPO, §1057(1) (unless agreed otherwise, tribunal shall allocate costs, including those incurred by parties necessary for pursuit of claims); Austrian ZPO, §§609(1), (4) (unless agreed otherwise, tribunal shall decide on allocation of costs, taking into account circumstances of case, including particularly outcome of proceedings); British Columbia International Commercial Arbitration Act, §31 (same); Singapore International Arbitration Act, 2012, §12 (unless award otherwise directs, costs directed by award to be paid shall be taxable by Registrar); Hong Kong Arbitration Ordinance, 2013, Art. 57 ("Unless otherwise agreed to by the parties, an arbitral tribunal may direct that the recoverable costs … are limited to a specific amount"), Art. 74 (tribunal may award costs that are "reasonable," including costs incurred in preparation prior to the commencement of the proceeding, unless otherwise agreed to by the parties); Australian International Arbitration Act, 2011, §27 (parties authorized to agree that tribunal may make award of legal costs, including fixing its own fees and expenses); Russian Arbitration Law, Art. 31(2) (award shall contain amount of arbitrators' fee and its apportionment); Bermuda International Conciliation and Arbitration Act, §32 (tribunal may make award of legal costs, including fixing its own fees and expenses); Mexican Commercial Code, Arts. 1454-1456; Nigerian Arbitration and Conciliation Decree, §§49, 50.

475) English Arbitration Act, 1996, §61(1) ("The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties."); R. Merkin, *Arbitration Law* ¶18.75 (1991 & Update August 2013).

476) English Arbitration Act, 1996, §61(2); R. Merkin, *Arbitration Law* ¶18.75 (1991 & Update August 2013).

477) English Arbitration Act, 1996, §61(2). *See Newfield Constr. Ltd v. John Lawton Tomlinson* [2004] EWHC 3051 (TCC) (English High Ct.) (annulling costs award because it ignored which party genuinely prevailed); Chartered Institute of Arbitrators, *Guidelines for Arbitrators on Making Orders Relating to the Costs of Arbitration*, 69 Arb. 130, 132 (2003) ("If a Claimant recovers a monetary award, he is normally regarded as successful since he had to bring the arbitration in order to recover the sum in question. The 'event' is the recovery of money. It is normally no ground for depriving the Claimant of his costs that the amount recovered is less than that claimed unless the recovery is so small that it can be regarded as nominal or derisory.").

478) *See, e.g., Newfield Constr. Ltd v. John Lawton Tomlinson* [2004] EWHC 3051, ¶¶28, 34, 36 (TCC) (English High Ct.); *Fence Gate Ltd v. NEL Constr. Ltd* [2001] 82 ConLR 41(TCC) (English High Ct.); R. Merkin, *Arbitration Law* ¶¶18.80 to 18.82 (1991 & Update August 2013).

479) *Fence Gate Ltd v. NEL Constr. Ltd* [2001] 82 ConLR 41(TCC) (English High Ct.); N. Blackaby *et al., Redfern and Hunter on International Arbitration* ¶9.99 (5th ed. 2009); R. Merkin, *Arbitration Law* ¶¶18.80 to 18.82 (1991 & Update August 2013).

480) Y. Derains & L. Kiffer, *National Report for France (2013)*, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* 1, 64 (1984 & Update 2013); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1255 (1999).

481) B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1477 (2006); Wirth, in S. Berti *et al.* (eds.), *International Arbitration in Switzerland* Art. 189, ¶¶51-61 (2001).

482) Austrian ZPO, §609 (arbitral tribunals authorized to make awards of legal costs); Swedish Arbitration Act, §37(2); Finnish Arbitration Act, §49; Singapore International Arbitration Act, 2012, §21; Hong Kong Arbitration Ordinance, 2013, Art. 74.

483) *Judgment of 16 February 1993, Brega Oil Mktg Co. v. Techint Compagnie et Tecnica Internazionale SpA*, 13 ASA Bull. 57, 61-62 (Vaud Ct. App.) (1995).

484) *See, e.g., McNabb v. Riley*, 29 F.3d 1303, 1306-07 (8th Cir. 1994); *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210, 214 (1st Cir. 1982) (vacating award of attorneys' fees); *Irving v. Ebix, Inc.*, 2010 WL 3168429, at *4 (S.D. Cal.); *Prudential-Bache Sec., Inc. v. Depew*, 814 F.Supp. 1081, 1082-84 (M.D. Fla. 1993); *C.T. Shipping, Ltd v. DMI (U.S.A.) Ltd*, 774 F.Supp. 146, 152-53 (S.D.N.Y. 1991); *Sammi Line Co. v. Altamar Navigation SA*, 605 F.Supp. 72, 73-74 (S.D.N.Y. 1985) (relying on "traditional American rule" to conclude that agreement not addressing power to award attorneys' fees did not permit such award); *Transvenezuelan Shipping Co. v. Czarnikow-Rionda Co.*, 1981 U.S. Dist. LEXIS 10059, at *2 (S.D.N.Y.) (vacating award of attorneys' fees as exceeding arbitrators' authority where parties' agreement provided for discretion to apportion "expenses and costs of the arbitration," but was silent as to attorneys' fees); *Koenigsberg v. Zinn*, 381 N.Y.S.2d 248 (N.Y. App. Div. 1976). *See also* Revised Uniform Arbitration Act, §21(b) (2000) ("An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.").

485) *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (U.S. S.Ct. 1975); *Prudential-Bache Sec, Inc. v. Tanner*, 72 F.3d 234, 242-43 (1st Cir. 1995); *Prudential-Bache Sec., Inc. v. Depew*, 814 F.Supp. 1081, 1082 (M.D. Fla. 1993) (in context of arbitration, observing that "[l]itigants in the United States must follow the so-called 'American rule' for attorneys' fees," and that "[a] litigant cannot collect attorneys' fees from the losing party unless a statute or contract provides for the award, or the losing party willfully disobeyed a court order or brought suit in bad faith").

486) *See, e.g., Wells Fargo Bank v. WMR e-Pin LLC*, 653 F.3d 702, 713-14 (8th Cir. 2011); *Gen. Sec. Nat'l. Ins. Co. v. Aequicap Program Administrators*, 785 F.Supp.2d 411, 418 (S.D.N.Y. 2011) (broad scope of arbitration agreement provided tribunal "inherent authority" to award attorney's fees); *Zimmer v. Scott*, 771 F.Supp.2d 905, 908 (N.D. Ill. 2011); *Eyewonder, Inc. v. Abraham*, 2010 WL 3528882 (S.D.N.Y.) (arbitrator's award of attorneys' fees was not excess of authority; parties' agreement authorized such award); *MCT Shipping Corp. v. Sabet*, 497 F.Supp. 1078, 1083 (S.D.N.Y. 1980) (confirming award of attorneys' fees); *Commercial Metals Co. v. Int'l Union Marine Corp.*, 1973 A.M.C. 515 (S.D.N.Y. 1972); *J.R. Snyder Co. v. Soble*, 226 N.W.2d 276, 278 (Mich. App. 1975).

487) *See* New York Civil Practice Law and Rules, §7513 (arbitrator fees, but not attorneys' fees, may be allocated in the final award); *Gen. Sec. Nat'l Ins. Co. v. Aequicap Program Admin.*, 785 F.Supp.2d 411, 423 (S.D.N.Y. 2011) (despite New York C.P.L.R. §7513, permitting only awards of arbitrators' fees, arbitral tribunal had authority to award attorneys' fees incurred by prevailing party in arbitration; award of fees not vacated).

488) *Contra* authorities cited §23.08[A][4], p. 3091 n. 490.

489) *See*§23.08[B].

490) *See, e.g., Asturiana de Zinc Mktg Inc. v. LaSalle Rolling Mills, Inc.*, 20 F.Supp. 670, 674-75 (S.D.N.Y. 1998) (arbitrator is not authorized to award costs of legal representation in AAA arbitration seated in New York, under contract governed by New York law); *CIT Project Fin., LLC v. Credit Suisse First Boston, LLC*, 2004 WL 2941331, at *4 (N.Y. Sup. Ct.) (arbitrators lack authority to award attorneys' fees notwithstanding incorporation of AAA International Rules).

491) *Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 87 (2d Cir. 2009) ("recognizing a bad faith exception to the general 'American Rule' that each party bears its own attorney's fees"; interpreting clause providing that each party will bear own attorney's fees as not precluding arbitrators' award of attorney's fees as sanction for bad faith conduct); *Chase Bank USA, NA v. Hale*, 859 N.Y.S.2d 342, 346 (2008) ("where arbitrators find a claim to have been brought in bad faith, they may, in the exercise of their broad powers to fashion remedies, award attorneys' fees").

492) *Aasma v. Am. SS Owners Mut. Protection & Indem.*, 238 F.Supp.2d 918, 921-22 (N.D. Ohio 2003) (rejecting argument that foreign award should not be recognized because it awarded legal costs: "[T]he parties' agreement established that the arbitration was to be conducted in accordance with the [English] Arbitration Act 1996. Sections 59-64 of the Act specifically provide for the awarding of costs and set forth default provisions in the absence of an agreement between the parties as to costs."); *Employers Ins. Warsau v. Banco Seguros del Estado*, 34 F.Supp.2d 1115, 1122 (E.D. Wis. 1999); *Compagnie des Bauxites de Guinee v. Hammermills Inc.*, 1992 WL 122712, at *7 (D.D.C.).

493) If the substantive and procedural law differ, difficulties may arise. Suppose the arbitration is conducted in England, with English law as the procedural law, but the parties' underlying dispute is governed by New York law. English law permits (arguably requires) awards of legal costs; New York law arguably does not. If the tribunal awards the costs of legal representation, would a U.S. court enforce the award? As a matter of principle, the arbitrators' award rests on a choice-of-law decision concerning the respective scope and priority of the curial and substantive laws, and that conflicts decision should not be reviewable in a recognition action in U.S. courts. *See*§19.03[H][3].

494) *See, e.g., Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986); *Gelco Corp. v. Baker Indus., Inc.*, 779 F.2d 26, 28 (8th Cir. 1985); *Rhonda Enters. SA v. Projector SA*, 2009 WL 290537 (S.D.N.Y.) (awarding sanctions for fees and costs for non-meritorious attempts to vacate arbitral award); *Nitron Int'l Corp. v. Golden Panagia Maritime, Inc.*, 1999 WL 223155, at *3 (S.D.N.Y.) (awarding attorney's fees for cost of recognition proceedings; fees available, despite American rule, where award debtor "refused to abide by the arbitrator's decision without justification"); *C.T. Shipping, Ltd v. DMI (U.S.A.) Ltd*, 774 F.Supp. 146, 155 (S.D.N.Y. 1991); *Hunt v. Commodity Haulage Corp.*, 647 F.Supp. 797, 799 (E.D.N.Y. 1986) (awarding attorney's fees because party refused to comply with award without justification); *Supermkts Gen. Corp. v. Local 919*, 645 F.Supp. 831, 836 (D. Conn. 1986) (refusing to award attorneys' fees for party's action to vacate award because challenge was not in bad faith); *Jarrell v. Wilson Warehouse Co.*, 490 F.Supp. 412, 417 (M.D. La. 1980) (same); *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104, 110 (N.D. Ill. 1980) (refusing to award fees because defendant's opposition was not "without justification").

495) *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986).

496) *See*§23.08[B]. Some institutional rules contain limits on the amount of costs for legal representation that may be awarded. The Rules of the Court of Arbitration of the Polish Chamber of Commerce limit recovery of legal costs (to the costs of the arbitration proceedings and fees for one legal representative) to 100,000 Polish zloty [approximately USD 30,000]. Polish Chamber of Commerce Court of Arbitration Rules, Art. 43(4). These sorts of provisions are unusual and most institutional rules contain no such limits.

497) *See Final Award in ICC Cases Nos. 7385 and 7402*, XVIII Y.B. Comm. Arb. 68, 78 (1993); *Koch Shipping, Inc. v. Antco Shipping Ltd, Award in SMA Case No. 2219 of 4 March 1986*, XII Y.B. Comm. Arb. 169, 172 (1987); *Ad Hoc Award of 27 May 1991*, XVII Y.B. Comm. Arb. 11, 26-27 (1992); G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 91-93 (4th ed. 2013).

498) *See*§23.08[A].

499) 2010 UNCITRAL Rules, Art. 40(1); 1976 UNCITRAL Rules, Art. 38.

500) 2010 UNCITRAL Rules, Art. 40(2)(e). *See also* 1976 UNCITRAL Rules, Art. 38(2)(e).

501) 2010 UNCITRAL Rules, Art. 42(1). *See also* 1976 UNCITRAL Rules, Art. 40(1).

502) 2010 UNCITRAL Rules, Art. 42(1). *See* 1976 UNCITRAL Rules, Art. 40(2). *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 870 (2d ed. 2013) ("neither the [UNCITRAL] Rules nor the *travaux preparatoires* provide any guidance on the meaning of [Article 42(1)]"); UNCITRAL, *Summary Record of the Thirteenth Meeting of the Committee of the Whole (II), Ninth Session*, U.N. Doc. A/CN.9/9/C.2/SR.13, ¶20 (1976) (for legal costs, "no principle of compensation would be laid down").

503) The tribunal's discretion with regard to other costs of arbitration (*e.g.*, the arbitrators' expenses and fees) is more limited, with Article 42(1) providing only that these costs "shall in principle be borne by the unsuccessful party." *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 846 (2d ed. 2013) ("Legal and other costs are considered under Article 40 only if the arbitral tribunal determines that the amount of such costs is 'reasonable.'"); 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) (initial proposal allowing legal costs only where "arbitrators deem that legal assistance was necessary under the circumstances of the case" was deleted as unnecessarily restrictive).

504) 2012 ICC Rules, Art. 37(4). *See also* 1998 ICC Rules, Art. 31(3).

505) 2012 ICC Rules, Art. 37(4). *See also* 1998 ICC Rules, Art. 31(3).

506) W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶21.04 (3d ed. 2000); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 366 (2d ed. 2005) ("This wording is intended to permit the arbitrators the greatest possible discretion.").

507) 2012 ICC Rules, Art. 31(5).

508) 2012 ICC Rules, Art. 37(1); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 357-58 (2d ed. 2005). *See also* 1998 ICC Rules, Art. 31(1).

509) LCIA Rules, Art. 28(2).

510) LCIA Rules, Art. 28(3).

511) LCIA Rules, Art. 28(4).

512) *See*§23.08[A][2]; R. Merkin, *Arbitration Law* ¶18.79 (1991 & Update August 2013).

513) *See, e.g.*, ICDR Rules, Art. 31; 2013 HKIAC Rules, Art. 33; 2013 VIAC Rules, Art. 37; WIPO Rules, Art. 72.

514) *See, e.g.*, 2010 UNCITRAL Rules, Art. 40(2)(e); 1976 UNCITRAL Rules, Art. 38(1)(e); 2012 ICC Rules, Art. 37(1); LCIA Rules, Art. 28(3); DIS Rules, §35(1) ("costs incurred by the parties and which were necessary for the proper pursuit of their claim or defence"); 2013 VIAC Rules, Art. 7 ("determine the amount of the appropriate costs of the parties"). *See*Rosell, *Arbitration Costs as Relief and/or Damages*, 28 J. Int'l Arb. 115, 116 (2011) ("[T]he arbitrators must determine the items that form part of the recoverable party costs and fix the resulting amounts on the basis of their discretion. The costs must have been incurred by a party for the purpose of the arbitration, and they must be 'reasonable' or 'necessary.' The test of reasonableness requires the arbitrators to determine whether the activities for which the costs were incurred were necessary in light of the complexity of the case, and, in the case of an affirmative answer, if the amounts claimed were reasonable.").

515) *See, e.g.*, 2010 UNCITRAL Rules, Arts. 40(1), 42(1); 2012 ICC Rules, Art. 37(3); LCIA Rules, Art. 28(2).

516) M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 361 (2d ed. 2008) ("In opting out of national courts with international arbitration, the parties are agreeing to pay the costs associated with international arbitration.").

517) *See*§23.08[A].

518) *See*§23.08[C].

519) *See, e.g.*,*Final Award in ICC Case No. 7006*, XVIII Y.B. Comm. Arb. 58 (1993); *Beckman Instruments, Inc. v. Overseas Private Inv. Corp., Award in AAA Case No. 16 199 00209 87G of 20 February 1988*, XIV Y.B. Comm. Arb. 73, 81 (1989); *Final Award in NAI Case No. 1930 of 12 October 1999*, XXVI Y.B. Comm. Arb. 181, 196-97 (2001); *Econet Wireless Ltd v. First Bank of Nigeria, Ad Hoc Award of 2 June 2005*, XXXI Y.B. Comm. Arb. 49, 64-65 (2006); *Himpurna Cal. Energy Ltd v. PT (Persero) Perusahaan Listruik Negara, Final Ad Hoc Award of 4 May 1999*, XXV Y.B. Comm. Arb. 13, 106-07 (2000). *See also*Rosell, *Arbitration Costs as Relief and/or Damages*, 28 J. Int'l Arb. 115, 115 (2011) ("While the institutional rules can provide general directions on the apportionment of costs, they usually do not provide much guidance as to how costs should be assessed or allocated.").

520) *See, e.g.*,*Final Award in ICC Case No. 11670*, 22 ASA Bull. 333, 341-42 (2004); *Final Award in ICC Case No. 6752*, XVIII Y.B. Comm. Arb. 54, 57 (1993); *Final Award in ICC Case No. 6527*, XVIII Y.B. Comm. Arb. 44, 53 (1993); *Final Award in ICC Case No. 5460*, XIII Y.B. Comm. Arb. 104 (1988); *Award in CRCICA Case No. 20/1990 of 22 April 1992*, in M. Alam Eldin (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* 29, 38, 41 (2000); *William J. Levitt v. Islamic Repub. of Iran, Award in IUSCT Case No. 520-210-3 of 29 August 1991*, 28 Iran-US C.T.R. 145, ¶¶125-27 (1991); *Himpurna Cal. Energy Ltd v. PT (Persero) Perusahaan Listruik Negara, Final Ad Hoc Award of 4 May 1999*, XXV Y.B. Comm. Arb. 13, 106-07 (2000).

521) Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations*, in M. Fernández-Ballesteros & D. Arias (eds.), *Liber Amicorum for Bernado Cremades* 539 (2010); Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitrations*, 21 Mich. J. Int'l L. 1, 2 (1999). *See also* Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475 (2013) ("Arbitrators may and regularly do either (1) apportion costs, including attorney fees, based on some version of their perception of the extent of success on the merits ... ; (2) determine which is the 'prevailing' party, without much regard for the degree of its success, and award that party all or substantially all of the costs; or (3) leave each party to bear its own attorney fees and split the other costs of arbitration (sometimes called the purely 'procedural' costs) more or less evenly between the parties. But there are no rules or general principles by which to determine when a tribunal should or will apply one or another of these approaches."); Smith, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 Va. J. Int'l L. 749, 750 (2011) ("[I]n recent years, ICSID and UNCITRAL tribunals have reached widely divergent results that are inconsistent with the application of a steady costs-application regime. Rather, these outcomes result from the variable application of multiple factors. The result is a regime in which victorious claimants are substantially more likely to recover some measure of legal fees or arbitral costs than victorious respondents. However, this outcome is nothing more than a tendency. Depending on the other circumstances of the case – particularly excessive filings, wholly unmeritorious claims, or fraud – respondents can and do recover large amounts of expenses from losing claimants.").

522) *Final Award in ICC Case No. 6320*, XX Y.B. Comm. Arb. 62, 108-09 (1995); *Banque Arabe et Int'l d'Inv. v. Inter-Arab Inv. Guarantee Corp., Ad Hoc Award of 17 November 1994*, XXI Y.B. Comm. Arb. 13, 38 (1996).

523) *See*§23.08[C]; *S.D. Myers, Inc. v. Gov't of Canada, Final Award on Costs in NAFTA Case of 30 December 2002*, available at www.naftaclaims.com (successful claimant, who has been "forced to go through the process in order to achieve success, ... should not be penalised by having to pay for the process itself"); Smit & Robinson, *Cost Awards in International Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 Am. Rev. Int'l Arb. 267 (2009) ("loser pays [principle]" is "well suited to international commercial arbitration"). *Compare*UNCITRAL, *Summary Record of the Thirteenth Meeting of the Committee of the Whole (II), Ninth Session*, U.N. Doc. A/CN.9/9/C.2/SR.13, 2-4 (1976) (noting opposition to rule that legal costs can be recovered by prevailing party, as contrary to state practice and disfavoring less affluent).

524) *See, e.g.*,*Award in ICC Case No. 8486*, XXIVa Y.B. Comm. Arb. 162, 172 (1999) ("According to general principles, the costs of the arbitration must be borne by the party which loses the arbitration"; "the arbitral tribunal must take into account for its decision on costs not only the result of the proceedings but also the behaviour of the parties during the proceedings"); *Final Award in ICC Case No. 7006*, XVIII Y.B. Comm. Arb. 58, 67 (1993) (listing factors; awarding all fees because of respondent's procedural misconduct); *Final Award in ICC Case No. 6527*, XVIII Y.B. Comm. Arb. 44, 53 (1993) (no award of fees, because prevailing party claimed "excessive" damages); *Final Award in ICC Case No. 6363*, XVII Y.B. Comm. Arb. 186, 211 (1992) (awarding all fees because claimant prevailed "in substance"); *Final Award in ICC Case No. 5759*, XVIII Y.B. Comm. Arb. 34, 43 (1993) (percentage corresponding to success); *Final Award in ICC Case No. 4629*, XVIII Y.B. Comm. Arb. 11 (1993) (awarding 90% of all fees because of respondent's delaying tactics); Rosell, *Arbitration Costs as Relief and/or Damages*, 28 J. Int'l Arb. 115, 117-18 (2011).

525) *Final Award in ICC Case No. 11670*, 22 ASA Bull. 333 (2004). *See also* M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 373-81 (2d ed. 2008) (relevant considerations in awarding legal costs); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 870-75 (2d ed. 2013) (factors relevant to costs awards).

As discussed above, the 2012 ICC Rules identify the same criteria in Article 31(5): "In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."

526) M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 377 (2d ed. 2008) ("Tribunals are reluctant to review in detail the time spent by lawyers in preparing the case."); J. Waincymer, *Procedure and Evidence in International Arbitration* 1294 (2012) ("Many arbitrators would appear to simply accept a general fee note from counsel."); Wehrli, *Contingency Fees/Pactum de Talnario "Civil Law Approach"*, 26 ASA Bull. 241, 254 (2008) ("[P]arties do not have to give full evidence on the parties' costs and therefore have only a limited duty to substantiate. In practice, the proceedings relating to the parties' costs are a kind of '*summary proceeding*' and the decision is based on prima facie evidence.") (emphasis in original). Summaries detailing monthly charges, broken down by individual lawyers' rates and time spent, plus expenses, is ordinarily sufficiently detailed.

527) Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475, 479 (2013) ("in practice, many American arbitrators tend to apply 'loser pays' only to the procedural costs and not to attorney fees"); Frank, *Rationalizing Cost Awards in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769, 777-78 (2011) ("When tribunals did make decisions, they did not regularly cite to any legal authority (*i.e.*, citing less than one authority on average) to justify the result. Where tribunals offered reasons, justifications diverged across categories. Although the literature suggests cost decisions are often based on a pure 'loser-pays' approach or a desire to punish inappropriate behavior, these were not the most frequent rationales. ... Tribunals were most likely to rationalize their decisions using the parties' relative success and equitable considerations. They were unlikely to base their decisions expressly on concerns related to the public interest, party equality, stare decisis, or settlement efforts.").

528) Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475, 479 (2013).

529) *See, e.g.*,*Final Award in ICC Case No. 10188*, XXVIII Y.B. Comm. Arb. 68 (2003) (75/25% allocation of arbitration costs and legal costs, based upon relative success); *Final Award in ICC Case No. 8528*, XXV Y.B. Comm. Arb. 341, 348 (2000) (claimant prevailed, holding that respondent bears 80% of arbitration costs and 60% of claimant's legal costs); *Final Award in ICC Case No. 8445*, XXVI Y.B. Comm. Arb. 153 (2001) (awarding 75% of arbitration costs and legal costs, based on substantial success on merits of claimant's claims); *Interim Award in ICC Case No. 7645*, XXVI Y.B. Comm. Arb. 130 (2001) (awarding costs of arbitration in proportion to percentage of success on amounts claimed (96/4%); reducing costs of legal representation "if only a modest proportion" because prevailing party was represented by two firms); ICC, *Statistics Concerning Awards of Legal Costs*, 4 ICC Ct. Bull. 43 (1993). *See also*Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 371-73 (2d ed. 2005).

530) Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 371-73 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *Secretariat's Guide to ICC Arbitration* 407 (2012).

531) Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 371-73 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *Secretariat's Guide to ICC Arbitration* 407 (2012).

532) *See, e.g.*,*Final Award in ICC Case No. 9466*, XXVII Y.B. Comm. Arb. 170, 180 (2002) (given relative success of each party, "costs of the arbitration [shall] be borne by the parties in equal proportions (50/50) and ... each party shall bear its own legal costs"); *Final Award in NAI Case No. 1930 of 12 October 1999*, XXVI Y.B. Comm. Arb. 181, 196 (2001) ("The practice of international arbitral tribunals vary widely. ... [T]here are no rigid rules. ... [C]laimant succeeded only in relation to a small proportion of its total claims. ... [T]he Tribunal awards that each party shall bear its own costs of legal assistance."). *See also*Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 371-73 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *Secretariat's Guide to ICC Arbitration* 407 (2012).

533) *See, e.g.*,*Final Award in ICC Case Nos. 6515 and 6516*, XXIVa Y.B. Comm. Arb. 80, 139 (1999) ("The tribunal is reluctant to award costs in favor of either party. Not only has the claimant ... not fully succeeded, but the dispute in this instance is one that could have been handled in a more commercially effective manner. ... Neither party has contributed in any way to lessening the number or complexity of the issues to be resolved by the tribunal[;] on the contrary, each has contributed to inflate this arbitration in particular by raising numerous procedural issues. Therefore, the tribunal has no difficulty in deciding that each party shall bear an equal share of the costs of the arbitration ... and bear the legal costs ... that it has incurred."); UNCITRAL, *Summary Record of the Thirteenth Meeting of the Committee of the Whole (II), Ninth Session*, U.N. Doc. A/CN.9/9/C.2/SR.13, ¶4 (1976) (delaying tactics would justify award of legal costs).

534) D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 871-72 (2d ed. 2013).
535) Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 371-73 (2d ed. 2005).
536) Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C.L. Rev. 1, 69 (2007). *See also* C. Schreuer *et al.*, *The ICSID Convention: A Commentary* 1229 (2d ed. 2009) ("practice of ICSID tribunals in apportioning costs is neither clear nor uniform"); Smith, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 Va. J. Int'l L. 749, 779 (2011) ("When respondents recovered costs, it was frequently in cases of abuse of process, fraud, or other such misconduct by claimants.").
537) Smit & Robinson, *Cost Awards in International Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 Am. Rev. Int'l Arb. 267 (2009).
538) Carter, *A Kiss For Arbitration Costs Allocation*, 23 Am. Rev. Int'l Arb. 475 (2013) ("One could call what now tends to be the norm the 'Keep It Simple Solution' (hereinafter, 'KISS') for cost allocation problems, and I see no convincing reason to change it. ... There are no multi-factor analyses to be conducted, just a pair of questions to be answered: does degree of success or inefficiencies merit shifting procedural costs, and does party/attorney conduct call for a shifting of attorney fees?").
539) Some practitioners have also usefully suggested that arbitral tribunals discuss allocation of costs at the outset of arbitral proceedings. Smit & Robinson, *Cost Awards in International Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20 Am. Rev. Int'l Arb. 267 (2009) (recommending that arbitrators discuss cost allocation with counsel at beginning of arbitration).

540) *See*§11.03[D][2][i]; §17.02[A].
541) *See*§11.03[D][2][c]; §16.02[A].
542) *See*§11.03[D][2][h]; §23.07[F].
543) *See*§11.03[C][1][c][v]; §16.02[A]; §17.02[A][5]. Thus, annulment of an award of legal costs in the arbitral seat should not, where the parties' agreement provided for such awards, prevent recognition of the award elsewhere. *See*§11.03[C][1][c]; §25.04[D][6].
544) The same distinction is drawn with regard to a tribunal's power to order disclosure and provisional measures, on the one hand, and the standards governing such relief, on the other hand. *See*§16.02[A]; §17.02[A][5]; §17.02[G][2].
545) *Nucor Corp. v. Gen. Bearing Corp.*, 423 S.E.2d 747, 748-49 (N.C. 1992) (where agreement included North Carolina choice-of-law clause, court applied North Carolina statute that "specifically prohibits arbitrators from awarding attorneys' fees unless 'the agreement to arbitrate' which compelled the parties to arbitration says otherwise"); *Grynberg v. BP Exploration Operating Ltd*, 2010 WL 5137912 (N.Y. Sup.) (substantive law governing contract also governed whether to award attorney's fees: "[w]here an arbitration agreement expressly invokes state rules, those rules govern the arbitration"), *rev'd on other grounds*, 938 N.Y.S.2d 439 (N.Y. App. Div. 2012); P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* ¶701 (2d ed. 1989) (law applicable to arbitration agreement determines allocation of costs). *But cf. PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) ("[A] choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees. Therefore, [the appellant] cannot rely on the New York choice-of-law provision to prevent [the appellee] from seeking in arbitration a remedy that is not foreclosed by the Agreement."); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Odyssey Am. Reins. Corp.*, 2009 WL 4059183, at *1, 8 (S.D.N.Y.) (agreement for New York-seated arbitration provided: "The arbitrators and umpire are relieved from all judicial formality and may abstain from the strict rules of the law; however, punitive damages shall not be awarded. They shall settle any dispute under the Contract according to an equitable rather than a strict legal interpretation of its terms"; court held that "New York law prohibiting an arbitral award of attorneys' fees is not applicable in the instant case").
546) *See*§19.04[A][6].
547) Relatively few awards appear to have adopted this analysis. For one example, *see**Award in Paris Chamber of Arbitration of 8 March 1996*, XXII Y.B. Comm. Arb. 28 (1997) (applying "*lex mercatoria*").
548) *See*§23.08[B].
549) For example, if a party rejects a settlement offer of X and goes on to obtain an award of X (or less than X), it generally should not be entitled to amounts expended after rejecting the settlement offer, and should instead be liable for the other party's costs for that period.
550) Aeberli, *Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Route Map*, 21 Arb. Int'l 253, 271-72 (2005); Kröll, *Recourse Against Negative Decisions on Jurisdiction*, 20 Arb. Int'l 55, 69-70 (2004).
551) *See*§7.03[A][5][b]; §7.03[F]. By definition, the respondent will have contested the tribunal's jurisdiction. If not, then there will have been a waiver of jurisdictional objections. *See* §7.05[A][5].
552) *See*§23.08[C].

553) Where the tribunal decides that there was a valid arbitration agreement (or this is not contested), but that the dispute is outside the scope of that agreement, then the difficulties concerning the tribunal's power to make a costs award should not exist. In these cases, generally-applicable standards regarding the tribunal's power to award costs apply without controversy.

554) *See, e.g.*,*Final Award in ICC Case No. 9302*, XXVIII Y.B. Comm. Arb. 54, 67 (2003) (dismissing arbitration on jurisdictional grounds, but ordering costs split: "The issue of jurisdiction was a complex one, the outcome of which was difficult to predict. ... [B]oth parties operated in good faith in the genuine belief that different rules governed their relationship. ... [B]oth parties have fully cooperated in the arbitration, and acted, through their counsel, in a highly professional manner, which the tribunal appreciated."); *Montague v. Commonwealth Dev. Corp.*, XXVI Y.B. Comm. Arb. 744, 749 (Queensland S.Ct. 1999) (2001) (rejecting argument that tribunal lacked power, after concluding that there was no valid arbitration agreement, to award costs against unsuccessful claimant: "there was clearly an agreement ... that the preliminary jurisdictional point ... should be determined in the arbitration and ... that the arbitrator should make a decision with respect to the cost of the arbitration on this issue").

555) Bühler, *Awarding Costs in International Commercial Arbitration: An Overview*, 22 ASA Bull. 249, 258-59 (2004); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 108-09 (2d ed. 2005). *See also* Austrian ZPO, §609(2) ("Upon application of respondent, the arbitral tribunal may also decide upon the obligation of the claimant to reimburse the costs of the proceedings, if it has declared itself as not competent on the grounds that there is no arbitration agreement.").

556) For commentary, *see* Branson & Wallace, *Awarding Interest in International Commercial Arbitration: Establishing A Uniform Approach*, 28 Va. J. Int'l L. 919 (1988); Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int'l L. 40 (1996); Gotanda, *A Study of Interest*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 170 (2008); Gotanda, *Compound Interest in International Disputes*, 2004 Oxford U. Comp. L. Forum; Gotanda, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, 7(1) Transnat'l Disp. Mgt 1 (2010); Gotanda, *When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates Under Article 78 CISG*, 13 Vindobona J. Int'l Comm. Law & Arb. 229 (2009); Hammoud & Secomb, *Interest in ICC Arbitral Awards*, 15(1) ICC Ct. Bull. 53 (2004); Hunter & Triebel, *Awarding Interest in International Arbitration: Some Observations Based on A Comparative Study of the Laws of England and Germany*, 6(1) J. Int'l Arb. 7 (1989); Note, *The Provision of Compound Interest Under International Law*, 95 Am. J. Int'l L. 633 (2001); Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25; Wetter, *Interest as An Element of Damages in the Arbitral Process*, 5 Int'l Fin. L. Rev. 20 (1986).

557) F. Mann, *The Legal Aspect of Money* 70-71 (5th ed. 1992).

558) *Kuwait v. Am. Independent Oil Co., Ad Hoc Award of 24 March 1982*, 21 Int'l Legal Mat. 976, 1042 (1982).

559) British Columbia International Commercial Arbitration Act, §31(7). *See also*English Arbitration Act, 1996, §§49(3), (4) (authority to award simple or compound interest (i) "in respect of any period up to the date of the award" and (ii) "from the date of the award (or any later date) until payment"); Singapore International Arbitration Act, 2012, §12(4) ("may award interest (including interest on a compound basis)"); Hong Kong Arbitration Ordinance, 2013, Arts. 79, 80 ("Unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate. ... Interest is payable on the judgment rate, except when the award otherwise provides."); Australian International Arbitration Act, 2011, §§25, 26 (tribunal may award simple interest until date of award and interest at reasonable rate from date of award until specified later date); Malaysian Arbitration Act, §33(6) ("Unless otherwise provided in the arbitration agreement, the arbitral tribunal may award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization; and determine the rate of interest."); Bermuda International Conciliation and Arbitration Act, §31 (same).

560) *See*§23.09[A].

561) Berger, *General Principles of Law in International Commercial Arbitration: How to Find Them – How to Apply Them*, 5 World Arb. & Med. Rev. 97, 130-36 (2011) (practice of international tribunals "to award interest goes back to the famous '*Alabama*' Award of 1872").

562) LCIA Rules Art. 26(6). *See also Westminster Constr. Corp. v. PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977); *Matter of Burke*, 191 N.Y. 437, 440 (N.Y. 1908); Gotanda, *Compound Interest in International Disputes*, 2004 Oxford U. Comp. L. Forum; Note, *The Provision of Compound Interest Under International Law*, 95 Am. J. Int'l L. 633 (2001).

563) *See, e.g.*, Branson & Wallace, *Awarding Interest in International Commercial Arbitration: Establishing A Uniform Approach*, 28 Va. J. Int'l L. 919 (1988); D. Dobbs, *Remedies* 164-81 (1973).

564) Statutory rates of interest vary, of course, from nation to nation. In the United States, 28 U.S.C. §1961 provides for a market rate of interest. In other jurisdictions, a fixed rate is established, which may bear little relation to market rates. *See, e.g.*, New York Civil Practice Law and Rules §§5001, 5004 (6%). In other nations, a rate calculated by reference to some specified premium above market rates is established to deter delays in payment. *See* Wetter, *Interest as An Element of Damages in the Arbitral Process*, 5 Int'l Fin. L. Rev. 20, 22 (1986).

565) *See*§23.09[C].

566) *See*§23.09[E].

567) *See* Giardina, *Issues of Applicable Law and Uniform Law on Interest: Basic Distinctions in National and International Practice*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 131 (2008).

568) *See*N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.75 (5th ed. 2009) (referring to German conflict of law rules as an example).

569) *See*§16.02[A]; §17.02[E]; §23.07[F]; §23.08[D]; *Judgment of 30 June 2004*, 2004 Rev. arb. 738 (French Cour de cassation civ. 1e) (law governing default interest was procedural law of arbitration); Chabot, *Intérêts moratoires dus sur la condamnation prononcée par une sentence arbitrale*, 2004 JCP E 1860. *Compare**Dr. Horst Reineccius v. Bank for Int'l Settlements, Final Award in PCA Case of 19 September 2003*, XXVIII Y.B. Comm. Arb. 100, 151-52 (2003) (law governing rates of interest was law of state with closest contacts to case); *Guinea v. Maritime Int'l Nominees Establishment – MINE (Liechtenstein), Decision on Application for Annulment in ICSID Case No. ARB/84/4 of 14 December 1989*, XVI Y.B. Comm. Arb. 40, 45, 51 (1991) (law governing rates of interest was law designated in contractual choice-of-law provision).

570) *See*§11.03[D].

571) This is a specialized application of the principle of *depecage*, discussed above. *See*§11.05[A][2].

572) That is the case in some Middle Eastern states, where neither local courts nor arbitrators may award interest. *See* Saleh, *Interest and Public Policy From Recognition and Enforcement of Foreign Arbitral Awards in the Arab Middle East*, in J. Lew (ed.), *Contemporary Problems in International Arbitration* 348, 349 (1986). The consistency of such provisions with Articles II and V(1)(d) of the New York Convention is open to debate.

573) French Civil Code, Art. 1153(1) (interest at statutory rate).

574) *See*§15.02[A].

575) As discussed above, differing laws potentially apply to the tribunal's power to order disclosure, provisional measures and costs, on the one hand, and the standards for granting such relief, on the other. *See*§16.02[A]; §17.02[E]; §23.07[F]; §23.08[D]; §23.09[B], p. 3107 n. 580.

576) *McCollough & Co. v. Ministry of Post, Tel. & Tel., Award in IUSCT Case No. 225-89-3 of 22 April 1986*, XII Y.B. Comm. Arb. 316, 328 (1987) (Brower, J., dissenting).

577) *See* Hunter & Triebel, *Awarding Interest in International Arbitration: Some Observations Based on A Comparative Study of the Laws of England and Germany*, 6(1) J. Int'l Arb. 7 (1989); Wetter, *Interest as An Element of Damages in the Arbitral Process*, 5 Int'l Fin. L. Rev. 20, 22 (1986).

578) *Compare Restatement (Second) Conflict of Laws* §207, comment e (1971) *with Klaxon Co. v. Stentor Elec. Mfg Co.*, 313 U.S. 487 (U.S. S.Ct. 1941). *See also* J. Story, *Commentaries on the Conflict of Laws* 395, 405-06 (8th ed. 1883) ("as a general rule ... the *lex loci contractus* will, in all cases, govern as to the rule of interest").

579) *See, e.g.*,*Final Award in ICC Case No. 6531*, XVII Y.B. Comm. Arb. 221, 223-34 (1992) (applying French statutory rates of interest because French law governed agreement; French arbitral seat); *Award in ICC Case No. 6281*, XV Y.B. Comm. Arb. 96 (1990) (applying Yugoslav statutory interest rules where Yugoslav law governed contract; rates apparently based on historical market rates, with 7.25% to accrue from date of award until payment); *Final Award in ICC Case No. 6230*, XVII Y.B. Comm. Arb. 164, 175-76 (1992) (applying Swiss statutory interest rules, which looked to official discount rates at place of payment, because Swiss law governed contract; Swiss arbitral seat); *Final Award in ICC Case No. 6162*, XVII Y.B. Comm. Arb. 153, 162 (1992) (applying 5% statutory Egyptian rate of interest because contract was governed by Egyptian law, notwithstanding higher market rates; Swiss arbitral seat); *Final Award in ICC Case No. 5485*, XIV Y.B. Comm. Arb. 156, 173 (1989) (applying Spanish statutory rates of interest because Spanish law governed agreement; French arbitral seat); *Award in ICC Case No. 4237*, X Y.B. Comm. Arb. 52, 59-60 (1985) (applying English law, granting arbitrator discretion regarding interest, because English law governed contract; French arbitral seat); *Award in ICC Case No. 2637*, II Y.B. Comm. Arb. 153 (1977) (applying statutory French interest rate where French law governed contract; Swiss arbitral seat); *AGIP SpA v. People's Repub. of the Congo, Award in ICSID Case No. ARB/77/1 of 30 November 1979*, 21 Int'l Legal Mat. 726, 731, 739 (1982); *RJ Reynolds Tobacco Co. v. Islamic Repub. of Iran, Award in IUSCT Case No. 145-35-3 of 6 August 1984*, 7 Iran-US C.T.R. 181, 191-92 (1984) (applying law governing contract to availability of interest); *Rexnord Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 21-132-3 of 10 January 1983*, 2 Iran-US C.T.R. 6, 12 (1983) (applying substantive law of contract to interest rate); *Ad Hoc Award of 27 May 1991*, XVII Y.B. Comm. Arb. 11, 26-27 (1992) (applying 5% statutory Swiss rate of interest because contract was governed by Swiss law; New York arbitral seat); *Libyan Am. Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Repub., Ad Hoc Award of 12 April 1977*, VI Y.B. Comm. Arb. 89, 115-16 (1981) (applying Libyan interest rates). *See also* Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 25 ("As to the pre-award time period, it is now generally accepted that arbitrators usually apply the substantive law of the contract.").

580) *Asian Agric. Prods. Ltd v. Democratic Socialist Repub. of Sri Lanka, Award in ICSID Case No. ARB/87/3 of 27 June 1990*, 30 Int'l Legal Mat. 577, 625 (1991) (applying "long established rule of international law" that "it is just and reasonable to allow interest at a reasonable rate"); *McCollough & Co. v. Ministry of Post, Tel. & Tel., Award in IUSCT Case No. 225-89-3 of 22 April 1986*, XII Y.B. Comm. Arb. 316, 321-22 (1987).

581) Hunter & Triebel, *Awarding Interest in International Arbitration: Some Observations Based on A Comparative Study of the Laws of England and Germany*, 6(1) J. Int'l Arb. 7 (1989).

582) *See, e.g.*,*Final Award in ICC Case No. 5460*, XIII Y.B. Comm. Arb. 104, 109 (1988) (applying statutory rate of interest prescribed by Austrian law to debt in Austrian currency, notwithstanding applicability of English law to contract and English arbitral seat); *Award in ICC Case No. 2930*, IX Y.B. Comm. Arb. 105, 107-08 (1984) (awarding interest at Swiss statutory rate because payment was due in Swiss currency, notwithstanding fact that law governing contract was Yugoslav); Giardina, *Issues of Applicable Law and Uniform Law on Interest: Basic Distinctions in National and International Practice*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 131, 141 (2008); Kleiner, *Money in Private International Law: What Are the Problems? What Are the Solutions?*, 2009 Y.B. Private Int'l L. 595, 595-96 (2009) ("[A]pplication of the law applicable to the obligation for the determination of the rate of interest is a blind solution and disregards the connection that should be respected between interest and the currency in which the interest must be paid. Accordingly, the application of the *lex monetae* should be applied in order to assess the rate of interest.").

583) *See*§23.09[A].

584) *See, e.g.*,*Second Interim Award in ICC Case No. 5277*, XIII Y.B. Comm. Arb. 80, 89-90 (1988) (refusing to award interest, notwithstanding contractual provision for such, because parties' chosen law had been Islamized and forbids interest awards); *Award in ICC Case No. 4606, Parker Drilling Co. v. Sonatrach*, described in Branson & Wallace, *Awarding Interest in International Commercial Arbitration: Establishing A Uniform Approach*, 28 Va. J. Int'l L. 919, 937 *et seq.* (1988) (denying interest because applicable (Algerian) substantive law contained no provision for interest); *Final Ad Hoc Award of 20 November 1987*, XIV Y.B. Comm. Arb. 47, 51, 68 (1989) (refusing to award interest under contract governed by Saudi law).

585) *See*§23.09[B], p. 3105.

586) Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 25 ("[A]n arbitration award upon court confirmation is considered to be 'merged' into and superseded by the judgment. As a result, the post-judgment interest rate will be the same as that applicable to court judgments.").

587) Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 25.

588) *Parsons & Whittemore Alabama Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *Banque Nat'l De Paris v. 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154 (N.Y. App. Div. 1998); *Marine Mgt, Inc. v. Seco Mgt, Inc.*, 176 A.D.2d 252, 253 (N.Y. App. Div. 1991), *aff'd*, 600 N.E.2d 627 (1992). *See* J. Gotanda, *Supplemental Damages in Private International Law* §3.4 (1988) ("an arbitral award is enforced in a country as a court judgment, interest then accrues at the domestic rate applicable to civil judgments in that country, instead of at the rate set forth in the original award"); Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 25 ("law governing interest for the post-judgment period will most likely be the law of the enforcement jurisdiction").

589) *Retirement Accounts, Inc. v. Pacst Realty LLC*, 49 A.D.3d 846, 847 (N.Y. App. Div. 2008) ("Where there is a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied, the contractual interest rate is the proper rate to be applied."); T. Oehmke, *Commercial Arbitration* §124:2 (2003 & Update 2013) ("Parties may 'contract out' of statutory interest rates if their agreement expresses the parties' intent to deviate from a post-judgment interest rate set by statute.").

590) *See generally* the awards cited in §23.09[C]. *See also*N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶9.81 (5th ed. 2009); Branson & Wallace, *Awarding Interest in International Commercial Arbitration: Establishing A Uniform Approach*, 28 Va. J. Int'l L. 919, 920, 924 (1988); J. Ralston, *International Arbitral Law and Procedure* 82-83 (1910); Senechal & Gotanda, *Interest as Damages*, 47 Colum. J. Transnat'l L. 491 (2009) (arguing that tribunals fail to adequately compensate for loss because risk-free U.S. Treasury bills and LIBOR rates fail to account for greater risk and return that investors would usually seek in their investments).

591) *Spalding v. Mason*, 161 U.S. 375, 396 (U.S. S.Ct. 1896) (quoting *Curtis v. Innerarity*, 47 U.S. 146, 154 (U.S. S.Ct. 1848)). *See also* Senechal, *Present-Day Valuation in International Arbitration: A Conceptual Framework for Awarding Interest*, in L. Lévy & F. De Ly (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration* 219 *et seq.* (2008) ("award of interest should be a significant element in full compensation to reflect the lapse of time between the original injury and the decision of the arbitral tribunal").

592) English Arbitration Act, 1996, §§49(3), (4) ("The Tribunal may award simple or compound interest."); Singapore International Arbitration Act, 2012, §12(4) ("may award interest (including interest on a compound basis)"); Hong Kong Arbitration Ordinance, 2013, Arts. 79, 80 ("Unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate. ... Interest is payable on the judgment rate, except when the award otherwise provides."). *Compare*Australian International Arbitration Act, 2011, §§25, 26 (tribunal may award simple interest until date of award and interest at reasonable rate from date of award until specified later date).

593) *RJ Reynolds Tobacco Co. v. Islamic Repub. of Iran, Award in IUSCT Case No. 145-35-3 of 6 August 1984*, 7 Iran-US C.T.R. 181, 191-92 (1984) ("The Tribunal ... does not find that there are any special reasons for departing from international precedents which normally do not allow the awarding of compound interest."). *See also* Gotanda, *Compound Interest in International Disputes*, 2004 Oxford U. Comp. L. Forum; Note, *The Provision of Compound Interest Under International Law*, 95 Am. J. Int'l L. 633 (2001). *But see* LCIA Rules, Art. 26(6).

594) Lillich, *Interest in the Law of International Claims in Essays in Honor of Voitto Saario and Toivo Sainio* 51, 57 (1983).

595) *See*§23.09[C], p.3109 n. 592.

596) *See*§23.09[A].

597) *See Waterside Ocean Navigation Co. v. Int'l Navigation Ltd*, 737 F.2d 150, 153-54 (2d Cir. 1984) ("we do not see why pre-judgment interest should not be available in actions brought under the Convention"); *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F.Supp. 172, 182 (S.D.N.Y. 1990); *Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd*, 659 F.Supp. 426, 429 (S.D.N.Y. 1987) (confirming award made in Geneva under Swiss procedural law), *aff'd*, 828 F.2d 117 (2d Cir. 1987); *Brandeis Intsel, Ltd v. Calabrian Chem. Corp.*, 656 F.Supp. 160, 170 (S.D.N.Y. 1987); *Al-Haddad Bros. Enter., Inc. v. M/S Agapi*, 635 F.Supp. 205, 210 (D. Del. 1986) (enforcing foreign award, which included 15% pre-award interest *per annum*); *Judgment of 9 January 1995, Inter Maritime Mgt SA v. Russin & Vecchi*, XXII Y.B. Comm. Arb. 789, 797-98 (Swiss Federal Tribunal) (1997) (compound interest not violation of public policy).

598) For rare exceptions, *see Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980) (vacating award of "penal" interest); *Judgment of 26 January 2005*, XXX Y.B. Comm. Arb. 421 (Austrian Oberster Gerichtshof) (2005) (denying recognition to portion of award granting interest, on grounds that annual interest rate of 73% violates Austrian public policy). *See*§26.05[C][9][h][vii]. *Compare Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera Indus. y Comercial*, 745 F.Supp. 172, 182 (S.D.N.Y. 1990) ("We find no merits in ISEC's claim that the interest component of the Award is penal in nature."); *Brandeis Intsel Ltd v. Calabrian Chem. Corp.*, 656 F.Supp. 160, 170 (S.D.N.Y. 1987) (absent showing that interest award was, under English law, "penal only and relate[d] to the punishing of public wrongs as contradistinguished from the redressing of private injuries," award was not contrary to U.S. public policy); *Am. Constr. Mach. & Equip. Corp., Ltd v. Mech. Constr. of Pakistan Ltd*, 659 F.Supp. 426, 428 (S.D.N.Y. 1987) (giving effect to interest rate of 17%).

599) *See, e.g., Millmaker v. Bruso*, 2008 WL 4560624 (S.D. Tex.) (although pre-judgment interest is mandatory in breach of contract cases under New York law, arbitrators had discretion to award or not award interest); *Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper*, 2007 WL 2285936 (S.D.N.Y.) (same).

600) *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 475 N.W.2d 704, 711 (Mich. 1991) (arbitrators committed no substantial or material error in including pre-award interest in their award, even though parties' contract was silent concerning right to interest); *Westminster Constr. Corp. v. PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977) ("arbitrators may award interest, even if not claimed, unless otherwise specifically provided by the parties' in the agreement").

601) *See, e.g., Sarhank Group v. Oracle Corp.*, 2004 U.S. Dist. LEXIS 2493 (S.D.N.Y.) (U.S. law governs availability of post-award, pre-judgment interest on foreign award; law of arbitral seat irrelevant); *Suraleb, Inc. v. Prod. Ass'n Minsk Tractor Works*, 1996 WL 3523747 (N.D. Ill.) (U.S. federal common law governs availability of post-award, pre-judgment interest on foreign award); *Judgment of 30 June 2004, Inter-Arab Inv. Guarantee Corp. v. Bail Recouvrement*, 2005 Rev. arb. 645, 646 (French Cour de cassation civ. 1e) (French law governs right to interest on awards made in Jordan when enforcement is sought in France: "when the dispute has arisen out of the enforcement in France of an arbitral award declared enforceable, when the arbitral tribunal did not rule on the issue and can no longer be petitioned, the law governing post-award interest, which flows automatically from the order to pay, is the law of enforcement, here French law").

602) *See, e.g., Schlobohm v. Pepperidge Farm, Inc.*, 806 F.2d 578, 581 (5th Cir. 1986) ("where the parties made an agreement intended to avoid court litigation by resolving the entire dispute through arbitration, intervention by the court to award additional relief would be inconsistent with the language and policy of the [FAA]"); *Dealer Computer Servs., Inc. v. Johnson Ford Lincoln Mercury Nissan, Inc.*, 2010 WL 2991064, at *4 (S.D. Tex.); *Millmaker v. Bruso*, 2008 WL 4560624 (S.D. Tex.); *Diaz v. Cruz*, 926 N.E.2d 1182, 1184 (Mass. App. Ct. 2010); *Levin & Glasser, PC v. Kenmore Prop., LLC*, 896 N.Y.S.2d 311, 313 (N.Y. App. Div. 2010); *Levin & Glasser, PC v. Kenmore Prop., LLC*, 70 A.D.3d 443, 445-46 (N.Y. App. Div. 2010) (court lacked authority to add pre-award interest in connection with confirming award "[g]iven that arbitrators had authority to award pre-award interest and made no such award"); *Sansone v. Metro. Prop. & Liability Ins. Co.*, 572 N.E.2d 588, 589-90 (Mass. App. Ct. 1991); *Creative Builders, Inc. v. Avenue Dev. Inc.*, 715 P.2d 308, 312 (Ariz. App. 1986) ("trial judge may not modify an award so as to grant pre-award interest"); *Kermacy v. First Unitarian Church*, 361 S.W.2d 734, 735 (Tex. Civ. App. 1962) ("appellant's claim for interest prior to the date of the award of the arbitrators was merged in the award"); *Penco Fabrics Inc. v. Louis Bogopulsky, Inc.*, 146 N.Y.S.2d 514 (N.Y. App. Div. 1955). *Compare Finger Lakes Bottling Co. v. Coors Brewing Co.*, 2010 WL 4104690, at *4 (S.D.N.Y.) (granting pre-award interest because arbitrator concluded that issue was "beyond the scope of the arbitration").

603) *Schlobohm v. Pepperidge Farm, Inc.*, 806 F.2d 578, 581 (5th Cir. 1986).

604) *See, e.g., Newmont USA Ltd v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1277 (10th Cir. 2010); *IHX (U.K.) Ltd v. Ashapura Minechem Ltd*, 2009 WL 3169541, at *3 (S.D.N.Y.); *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F.Supp. 172, 181 (S.D.N.Y. 1990); *Am. Constr. Mach. & Equip. Corp. v. Mech. Constr. of Pakistan, Ltd*, 659 F.Supp. 426 (S.D.N.Y. 1987), *aff'd*, 828 F.2d 117 (2d Cir. 1987). *See also Foley Co. v. Grindsted Prods., Inc.*, 662 P.2d 1254, 1263 (Kan. 1983).

One court has said, however, that an arbitral tribunal would have "lacked authority to decide the ... question of prejudgment interest on the amount confirmed by the district court judgment," by which the court meant post-award/pre-judgment interest. *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986).

605) *See, e.g., Carte Blanche (Singapore) Pte Ltd v. Carte Blanche Int'l, Ltd*, 888 F.2d 260, 268 *et seq.* (2d Cir. 1989). *Contra French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 907 (9th Cir. 1986).

606) Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 25.

607) *Newmont USA Ltd v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1274 (10th Cir. 2010) ("no reason why an arbitration panel with authority to decide a contractual dispute cannot also determine whether the contract in question includes language stating the parties' intent to bypass §1961").

608) *See Bhd of Locomotive Eng'rs & Trainmen v. Long Island R.R. Co.*, 340 F.Appx 727, 730 (2d Cir. 2009) ("it was within the District Court's authority in enforcing the action to require the payment of postaward prejudgment interest"); *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd*, 737 F.2d 150, 153-54 (2d Cir. 1984); *Parsons & Whittemore Alabama Mach. & Serv. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1485 (11th Cir. 1984); *Abondolo v. H. & M.S. Meat Corp.*, 2008 WL 2047612, at *3 (S.D.N.Y.); *P.M.I. Trading v. Farstad Oil*, 2001 WL 38282, at *3 (S.D.N.Y.) ("Absent persuasive argument to the contrary, post-award, prejudgment interest is available for judgments rendered under the Convention and is presumed to be appropriate."); *Creative Builders, Inc. v. Ave. Dev., Inc.*, 715 P.2d 308, 313-14 (Ariz. App. 1986). *See also McCabe Hamilton & Renny Co., Ltd v. Int'l Longshore & Warehouse Union, Local 142, AFL-CIO*, 557 F.Supp.2d 1171, 1178 (D. Haw. 2008) ("This court concludes that the circumstances of this case do not warrant an award of prejudgment interest."); *Trustees of Lawrence Academy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 821 F.Supp. 59, 63 (D.N.H. 1993) (court has power to award post-award interest); *Bergesen v. Joseph Muller Corp.*, 548 F.Supp. 650, 651 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983); *Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980).

609) *See, e.g., Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1447 (11th Cir. 1998) (post-award interest "should normally be awarded when damages have been liquidated by an international arbitration award"); *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd*, 737 F.2d 150, 155-55 (2d Cir. 1984) (confirming English award and granting post-award, pre-judgment interest); *P.M.I. Trading Ltd v. Farstad Oil, Inc.*, 2001 WL 38382, at *3 (S.D.N.Y.) ("post-award, prejudgment interest is available for judgments rendered under the Convention and is presumed to be appropriate"); *Al-Haddad Bros. Enter., Inc. v. M/S Agapi*, 635 F.Supp. 205, 210 (D. Del. 1986) ("Federal courts have the power to grant such post-award, pre-judgment interest when enforcement of foreign arbitral awards is sought."). *See also* Reisberg & Pauley, *An Arbitrator's Authority to Award Interest on An Award Until "Date of Payment": Problems and Limitations*, 2013 Int'l Arb. L. Rev. 25, 28 ("United States courts have long held that the courts in confirming international arbitration awards may add an award of interest for the post-award, pre-judgment time period under federal law at rates set by the court as a matter within its discretion.").

AA-52

KeyCite Yellow Flag - Negative Treatment
Distinguished by Boston Chicken Inc. v. Boston Pizza International Inc., Trademark Tr. & App. Bd., November 17, 1999

955 F.2d 875
United States Court of Appeals,
Fourth Circuit.

GUINNESS PLC; Guinness America, Incorporated, Plaintiffs–Appellees,
v.
Thomas Joseph WARD,
Defendant–Appellant. (Two Cases)

Nos. 90–1869, 90–1870.
|
Argued May 9, 1991.
|
Decided Jan. 28, 1992.
|
As Amended March 10, 1992.

Synopsis

European corporation sought recognition and enforcement of foreign money judgment entered by High Court of Justice in London, England resulting from defendant's alleged breach of fiduciary duty during takeover battle. Judgment debtor counterclaimed alleging that settlement had been reached and breached by judgment creditor and that judgment creditor was estopped from denying existence of such settlement. The United States District Court for the District of Maryland, Norman Park Ramsey, J., granted summary judgment for judgment creditor. Judgment debtor appealed. The Court of Appeals, Hallanan, District Judge, sitting by designation, held that: (1) judgment debtor could raise postjudgment settlement as defense in enforcement proceeding under Maryland Uniform Foreign Money-Judgments Recognition Act, if settlement would render judgment unenforceable in rendering jurisdiction, and (2) judgment debtor was judicially estopped from raising postjudgment settlement in enforcement proceeding inasmuch as he pursued appeal in British courts without informing British courts of existence and breach of settlement.

Affirmed.

West Headnotes (17)

[1] **Judgment** Defenses

Judgment debtor is entitled to raise postjudgment settlement as defense in enforcement proceeding under Maryland Uniform Foreign Money-Judgments Recognition Act, if settlement would render judgment unenforceable in rendering jurisdiction. Md.Code, Courts and Judicial Proceedings, §§ 10–701 et seq., 10–702, 10–703, 10–704.

2 Cases that cite this headnote

[2] **Judgment** Judgments of Courts of Foreign Countries

Cause of action brought by corporation against former director alleging breach of fiduciary duty was not repugnant to Maryland's public policy so as to preclude recognition of English judgment under Maryland Uniform Foreign Money-Judgments Recognition Act. Md.Code, Courts and Judicial Proceedings, §§ 10–701 et seq., 10–704(b)(2).

3 Cases that cite this headnote

[3] **Judgment** What law governs

Provision of Maryland Uniform Foreign Money-Judgments Recognition Act requiring foreign judgment be enforceable "where rendered" requires recognition court to focus on law of the rendering country in determining effect of postjudgment settlement on continued enforceability of foreign money-judgment; thus, if appropriate court of rendering country has not addressed issue of whether judgment is still enforceable under its law, recognition court is required to examine and apply law of foreign country in this regard. Md.Code, Courts and Judicial Proceedings, § 10–702.

6 Cases that cite this headnote

[4] **Judgment** Defenses

Provision of Maryland Uniform Foreign Money-Judgments Recognition Act that foreign judgment is enforceable in same manner as judgment of sister state which is entitled to full faith and credit permitted judgment debtor to raise postjudgment settlement as defense to enforcement of foreign money-judgment. Md.Code, Courts and Judicial Proceedings, § 10–703.

6 Cases that cite this headnote

[5] **Judgment** Defenses

Judgment debtor may raise postjudgment settlement under provision of Maryland Uniform Foreign Money-Judgments Recognition Act making foreign judgments enforceable only to extent of sister state judgments which are entitled to full faith and credit as defense not to recognition of foreign judgment but rather to its enforcement or degree thereof. Md.Code, Courts and Judicial Proceedings, § 10–703.

6 Cases that cite this headnote

[6] **Judgment** Judgments of Courts of Foreign Countries

Judgment Foreign judgment as cause of action in general

Under Maryland Uniform Foreign Money-Judgments Recognition Act, questions of whether judgment should be recognized are distinct and separate inquiries from those concerning whether such judgment once recognized is entitled to enforcement. Md.Code, Courts and Judicial Proceedings, § 10–701 et seq.

5 Cases that cite this headnote

[7] **Judgment** Statutory provisions

Maryland Uniform Enforcement of Foreign Judgments Act is applicable to foreign country judgment once such judgment has been found to be entitled to recognition under Maryland Uniform Foreign Money-Judgments Recognition Act. Md.Code, Courts and Judicial Proceedings, §§ 10–701 et seq., 10–702, 10–703, 10–704, 11–801, 11–802(a, b), 11–805(b); Uniform Foreign Money-Judgments Recognition Act, §§ 1 et seq., 3.

7 Cases that cite this headnote

[8] **Judgment** Defenses

Under Uniform Enforcement of Foreign Judgments Act, any defenses ordinarily available to enforcement of Maryland judgment and, accordingly, a sister state judgment which is entitled to full faith and credit, is also available to enforcement of foreign country judgment which is entitled to recognition under Maryland Uniform Foreign Money-Judgments Recognition Act and, thus, enforceable in same manner as sister state judgment which is entitled to full faith and credit pursuant to Recognition Act. Md.Code, Courts and Judicial Proceedings, §§ 10–703, 10–704, 11–801, 11–802(a, b), 11–805(b); Uniform Foreign Money-Judgments Recognition Act, §§ 1 et seq., 3.

13 Cases that cite this headnote

[9] **Contracts** What law governs

Contracts What law governs

Contracts What law governs

Under Maryland law, lex loci contractus approach is followed such that while law of forum governs remedy for breach of contract, law of place of contracting governs questions regarding nature, validity and construction of contract unless such law would violate strong public policy.

2 Cases that cite this headnote

[10] **Judgment** Judgments of Courts of Foreign Countries

Judgment debtor's attempt to enforce postjudgment settlement in enforcement action involving foreign judgment was not barred by res judicata due to his failure to assert alleged settlement as defense or counterclaim to original action before English high court alleging breach of fiduciary duty; attempt to enforce alleged settlement was entirely different cause of action

from claim of breach of fiduciary duty and could not have been raised as defense or counterclaim because it did not exist prior to entry of final judgment on breach of fiduciary duty claim.

5 Cases that cite this headnote

[11] **Judgment** What constitutes distinct causes of action

Litigation to establish validity and existence of postjudgment settlement is based on separate cause of action from that decided by judgment and does not involve attempt by parties to relitigate matters which were or could have been decided in prior proceedings.

1 Cases that cite this headnote

[12] **Estoppel** Defense or objection inconsistent with previous claim or position in general

Judgment debtor was judicially estopped from raising postjudgment settlement as defense in enforcement proceeding under Maryland Uniform Foreign Money-Judgments Recognition Act, where judgment debtor pursued appeal in British courts in original action, without informing British courts of existence of settlement or seeking continuance or stay of appeals pending determination of validity of settlement and its breach by plaintiff. Md.Code, Courts and Judicial Proceedings, § 10–702.

16 Cases that cite this headnote

[13] **Federal Courts** Mode and sufficiency of presentation

Even if the plaintiff had not specifically raised applicability of judicial estoppel doctrine in its reply in further support of its motion for summary judgment on counterclaim, its close relationship to other directly contested issues rendered its usage as alternative basis for affirmance by Court of Appeals appropriate.

9 Cases that cite this headnote

[14] **Constitutional Law** Foreign judgments

Fact that one or more remedies granted by English High Court in *Mareva* injunction may have been excessive by American notions did not necessarily establish that English High Court was biased against defendant or that relevant procedures relating to entry of high court final judgment did not comport with requirements of due process, particularly where defendant was permitted to immediately confront entry of injunction and did so through British counsel within two days from such entry and obtained several modifications and additional time to comply. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[15] **Injunction** Freezing or protecting assets pending litigation

Under English law, *Mareva* injunction is designed to prevent defendant from dissipating or hiding his assets at outset of case thus making any judgment subsequently rendered against him either worthless or difficult to enforce.

4 Cases that cite this headnote

[16] **Judgment** Judgments of Courts of Foreign Countries

Use of ex parte application for temporary restraining order by English high court did not automatically result in violation of due process so as to make high court's judgment unenforceable under Maryland Uniform Foreign Money-Judgments Recognition Act. U.S.C.A. Const.Amends. 5, 14; Md.Code, Courts and Judicial Proceedings, § 10–701 et seq.; Fed.Rules Civ.Proc.Rule 65(b), 28 U.S.C.A.

[17] **Federal Civil Procedure** Civil rights cases in general

Mere placement by judgment creditor and his British barrister of conclusory allegations and speculative assertions into affidavits or declarations on motion for summary judgment without further legitimate support clearly did not suffice to raise genuine issue of material fact with respect to issue of whether English judicial

proceedings violated principles of due process so as to render English judgment unenforceable. U.S.C.A. Const.Amends. 5, 14.

33 Cases that cite this headnote

Attorneys and Law Firms

***877** Thomas Joseph Ward, Sr., Ward, Lazarus & Grow, Washington, D.C., argued (Harold R. Bruno, III, on brief), for defendant-appellant.

Rebecca Ellen Swenson, Arnold & Porter, Washington, D.C., argued (Richard J. Wertheimer, on brief), for plaintiffs-appellees.

Before HALL, Circuit Judge, HALLANAN, District Judge for the Southern District of West Virginia, sitting by designation, and KELLAM, Senior District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

HALLANAN, District Judge:

Defendant–Appellant Thomas Joseph Ward [hereinafter referred to as "Ward"] appeals from the district court's grant of summary judgment for the Plaintiffs–Appellees Guinness PLC and Guinness America, Incorporated, [hereinafter collectively referred to as "Guinness"] on Guinness' complaint and Ward's counterclaim.

I.

Guinness initiated this action on February 9, 1988, in the United States District Court for the District of Maryland seeking ***878** recognition and enforcement of a foreign money judgment entered by the High Court of Justice in London, England, [hereinafter referred to as "High Court"] in favor of Guinness and against Ward in the amount of 5.2 million pounds sterling plus interest. The English judgment resulted from litigation against Ward for his alleged part in a financial scandal arising out of perhaps the largest takeover battle in English history.

In April of 1986, Guinness, a major European beer and alcohol producer and worldwide distributor, succeeded in a takeover of a Scottish competitor, Distillers PLC. Within a year's time, however, what initially appeared as a great triumph for Guinness turned to tragedy as investigations by various British regulatory and law enforcement agencies uncovered a financial scandal involving the top echelons of Guinness' management. By January, 1987, Ernest Saunders, Guinness' Chairman and Chief Executive Officer, and Oliver Roux, its Chief Financial Officer, as well as others, had been forced to leave Guinness and were replaced by new management.

Ward, the senior partner of the Washington, D.C., law firm of Ward, Lazarus & Grow and a practicing attorney for over 20 years, served as a director for Guinness as well as a legal advisor at the time of Guinness' takeover of Distillers PLC. On March 18, 1987, Guinness issued a writ against Ward and Ernest Saunders in the High Court and applied for what is known in England as a *Mareva* injunction. More specifically, Guinness contested a 5.2 million pounds sterling payment which Ward and Saunders allegedly had arranged for Guinness to make to a company incorporated in the Isle of Jersey and known as Marketing and Acquisition Consultants LTD. [hereinafter referred to as "MAC"] after discovering that MAC was controlled by Ward and that the payment had been made for Ward's benefit.

Guinness contends that a *Mareva* injunction is similar to a temporary restraining order and that it sought such an injunction due to its fear that Ward and Saunders would remove or otherwise dissipate the payment or alienate the proceeds thereof. A *Mareva* injunction was granted *ex parte* by Mr. Justice Warner of the High Court on the same day that such injunction was requested.

The injunction prohibited Ward and Saunders from removing or dissipating the payment or alienating any proceeds obtained therefrom. The injunction also prohibited Ward and Saunders from removing or dissipating their assets except insofar as they exceeded the value of 5.2 million pounds sterling and directed them to transfer the payment or any property acquired thereby which was in the control of the Court to Guinness' solicitors. [1] Guinness agreed to abide by any subsequent order regarding damages Ward might be held to have sustained as a result of the injunction.

The restrictions were to remain effective until March 25, 1987, or until further order of the court. Ward and Saunders

were also directed to swear an affidavit by March 25, 1987, revealing the whereabouts of the payment or any property acquired thereby, the nature and date of every transaction involving the payment, and the value, nature and location of any assets within the court's jurisdiction. Furthermore, Ward and Saunders were to take all reasonable steps to discover the whereabouts of the payment or property acquired thereby and to bring such payment or property within the court's jurisdiction.

Ward and Saunders were permitted to apply immediately after receiving notification of the injunction's entry to the High Court for relief or modification of its terms. Saunders appeared before the High Court on March 19, 1987, while Ward appeared through English counsel[2] the next day. Through such appearances Ward and ***879** Saunders were successful in obtaining several modifications of the injunction as well as additional time in which to serve defenses and respond to the reporting obligations.

On April 1, 1987, Ward submitted an affidavit with exhibits to the High Court. In addition to challenging the propriety of the *Mareva* injunction and conceding his control over MAC and receipt of the payment, Ward contended that such payment had been proper and made pursuant to a contingent fee agreement under which he was to receive for his legal services a fee of $^1/_5$ of 1% of the value of the takeover bid in the event that Guinness' takeover of Distillers PLC was successful.

An additional hearing was held before the High Court between April 8 and April 14, 1987, on the question of whether the orders granting the *Mareva* injunction and subsequent modifications should be extended through the trial or until further order. Ward appeared at such hearing through his English counsel and was so represented throughout the remainder of the High Court litigation. On May 13, 1987, Ward filed a counterclaim with the High Court in which he asserted a claim for the reasonable value of the legal services he allegedly performed on behalf of Guinness.

Guinness responded by filing a motion for summary judgment against Ward on May 15, 1987, and a motion for judgment on admissions against Ward on July 1, 1987. On July 17, 1987, the Vice Chancellor of the High Court granted Guinness' motion for judgment concluding that Ward's receipt of the payment via MAC was unlawful under the English Companies Act of 1985 and constituted a breach of the fiduciary duties which Ward owed Guinness as a Guinness director. Ward timely appealed the High Court judgment to the British Court of Appeal.

Guinness then initiated a suit in the District of Columbia involving in part an attorney's lien which Ward's law firm had asserted against Guinness due to alleged non-payment of legal fees. Ward contends that "[d]uring the pendency of that suit and [his] British appeal, Guinness and [he] engaged in negotiations aimed at achieving a 'global settlement' of all of the disputes." Ward further contends that such negotiations resulted in an agreement which settled all of the parties' disputes in London, the Isle of Jersey[3] and Washington, D.C.

Guinness allegedly, however, disavowed and repudiated this agreement only to shortly thereafter begin negotiations with Ward anew. As stated by the district court below concerning the new negotiations

> [t]here is no dispute that the parties indeed entered into settlement negotiations. The settlement discussed by the parties provided that Ward would be entitled to retain sufficient assets necessary to meet his large debts, certain specified major assets, and $100,000.00 of liquid assets, and Guinness would receive the remainder of Ward's assets. Guinness, however, refused to assent to any settlement until it had some idea of the nature of Ward's assets that it would be receiving under the agreement. Thus, Guinness insisted that Ward provide full documentation of his assets and liabilities.
>
> Ward, however, was unwilling to simply disclose to Guinness extensive financial information concerning the nature and location of his assets, with Guinness being permitted thereafter to refuse to consummate the settlement. Ward feared that Guinness would acquire financial information, refuse to settle, and then begin collection on the assets identified by Ward.
>
> The parties negotiated for an extensive period of time, eventually entering into a letter agreement on October 12, 1987. According to Ward, the "letter agreement ... outlined the terms of the settlement and the procedures that would be followed in consummating the agreement." In accordance with the agreement, Ward made a series of financial disclosures concerning his assets. The date on which Guinness could back out of ***880** the Settlement Agreement based on Ward's financial disclosures passed without Guinness withdrawing. Although agreeing to the settlement generally as outlined, Guinness modified the agreement, reserving certain exceptions or limited reasons

based on which Guinness could subsequently properly refuse to consummate the settlement. Specifically, because Ward had agreed to transfer shares of a corporation, the value of which was not obvious from the mere description of that asset, Guinness wanted to obtain additional information about the corporation. At that point, Guinness could still refuse to consummate the settlement, but only if Ward's financial disclosures proved untrue, or if, following the subsequent disclosure of the identity [sic] corporation, Guinness was unsatisfied with the asset.

Towards the end of November, 1987, Guinness needed shares of stock in Richter Brothers that were subject to the valid lawyer's lien of Ward Lazarus. Guinness represented that if Ward Lazarus immediately transferred the Richter Brothers' stock for an advance payment of $100,000.00 on outstanding legal fees, the agreement would in fact be consummated, and that if Ward Lazarus refused, the agreement would not be consummated. On this basis, Ward Lazarus transferred the Richter Brothers stock.

After Guinness received information about the corporations to be transferred and decided to proceed, subject only to confirming the accuracy of the information, an initial draft of the final settlement papers were circulated on December 3, 1987. Guinness, on advice of lead American counsel, refused to consummate [sic] settlement unless a revision was made to the tax refund portion of the agreement. The revision was made and a final agreement existed with the one caveat being that Guinness would first be permitted to visit the corporation, owned in part by Ward, that would be transferred to Guinness. One of Guinness' American counsel visited the corporation and confirmed the representations made to Guinness to that date.

Counsel for Guinness then informed counsel for Ward that he would travel to London to secure the official Board approval of the agreement. However, after arriving in London, counsel for Guinness informed counsel for Ward that Guinness was no longer willing to consummate the agreement. Ward contends that Guinness "breached" the agreement to conform to the desires of the British government.

As to the parties' pending litigation, the preliminary letter agreement reached by the parties had provided that

> Ward will dismiss with prejudice all counterclaims asserted against Guinness in the High Court litigation and Guinness (i) will take such steps as are necessary and agreed upon by the parties to render the High Court judgment against Ward unenforceable, and to preclude further proceedings by Guinness against Ward and M.A.C. in the Jersey action, including, but not limited to, wherever possible and not inconsistent with the last sentence of this paragraph, dismissal without prejudice and a covenant not to enforce the High Court judgment against Ward....

Guinness commenced this action in the United States District Court for the District of Maryland on February 9, 1988, seeking recognition and enforcement of the British High Court money judgment pursuant to the Maryland Uniform Foreign Money–Judgments Recognition Act, Md.Cts. & Jud.Proc.Code Ann. § 10–701, *et seq.* Ward responded on April 25, 1988, by filing an answer containing numerous defenses and a three count counterclaim.

Among Ward's various defenses, those relevant to this appeal include contentions that the High Court judgment was not entitled to recognition and enforcement due to the post judgment settlement, or, as also referred to by Ward, accord and satisfaction, reached by the parties resolving their disputes; that if the parties had not actually consummated a binding settlement, Guinness' statements and actions during the negotiations and Ward's reliance upon them invoked the applicability of the doctrines ***881** of promissory estoppel, equitable estoppel and unclean hands; and that due to *ex parte* contacts between Guinness and the British High Court and the excessive requirements imposed by the *Mareva* injunction, Ward was denied a fair and impartial tribunal and proceedings comporting with the requirements of due process. Ward's allegations that a settlement had been reached and breached by Guinness, or, in the alternative, that the doctrine of promissory estoppel should prevent Guinness from denying the existence of such a settlement also constituted two counts of Ward's three count counterclaim.

Because of Guinness' alleged breach of the settlement, Ward contends that he continued his appeal of the High Court judgment through the British appellate courts, rather than dismissing it pursuant to the settlement, so as to mitigate his potential damages. Oral argument was held before the British Court of Appeal from April 26 to April 28, 1988. On May 10, 1988, the Court of Appeal affirmed the High Court judgment and concluded that Ward did breach his fiduciary duty as a Guinness director by failing to disclose his interest in the MAC payment to Guinness' full board of directors. Although the Court of Appeal also denied Ward's request for leave to appeal to the House of Lords, Ward successfully petitioned the House of Lords for such leave and oral argument was heard on his appeal between October 30 and November 7, 1989. On February 8, 1990, the Law Lords unanimously affirmed the Court of Appeal's affirmance of the High Court judgment on the grounds that the payment to MAC was *ultra vires* Guinness' articles of association. It is undisputed that Ward never informed the High Court, Court of Appeal or House of Lords of the settlement allegedly reached during the pendency of his appeal to the Court of Appeal.

On July 7, 1988, Guinness filed a motion for summary judgment on its complaint before the district court. Guinness supported its motion with the affidavit of its British counsel, Richard Alan Field, Q.C., who represented it in the English proceedings. Ward then filed a cross-motion for summary judgment on Guinness' complaint which he supported with his own declarations as well as those of his British counsel who represented him in the English proceedings and his American counsel who represented him in the district court.

Rejecting Ward's various defenses, the district court granted Guinness summary judgment on its complaint on August 24, 1990. More specifically, the court concluded that a post judgment accord and satisfaction is not one of the bases under the Maryland Uniform Foreign Money–Judgments Recognition Act upon which a court could refuse to recognize and enforce a foreign money judgment. The court also concluded, without explanation but apparently on grounds of *res judicata,* that "[a]fter Guinness failed to consummate the Settlement Agreement and proceeded to defend against Ward's appeals, it was incumbent upon Ward to notify the Court of Appeal of the alleged breach." Furthermore, the court concluded that Ward had failed to raise a genuine issue of material fact supporting his contention that the High Court judgment should not be recognized and enforced because it was not rendered by a fair and impartial tribunal utilizing procedures compatible with the requirements of due process of law.

In light of its victory, Guinness next moved for summary judgment on Ward's counterclaim on September 5, 1990. The district court granted Guinness' motion for summary judgment on October 2, 1990, concluding that the doctrine of *res judicata* precluded Ward from raising the alleged post judgment settlement as a counterclaim in the recognition and enforcement proceeding since Ward could have raised it during the British litigation.[4] Ward timely appealed the district court's orders granting summary judgment. By Order entered on December 4, 1990, his appeals were consolidated.

***882** II.

Ward essentially raises three issues on appeal, the first two of which are closely related insofar as they both address rulings of the district court regarding Ward's right to raise the alleged post judgment settlement of the parties' disputes.

More specifically, Ward contends in his first issue on appeal that the district court erred in concluding as a matter of law that a Maryland recognition court would not consider as a defense a post judgment settlement in determining whether a foreign money judgment should be recognized and enforced because it is not one of the express bases set forth in the Maryland Uniform Foreign Money–Judgments Recognition Act for nonrecognition. He then argues in his second and related issue on appeal that the district court also erred in ruling that he was barred by the doctrine of *res judicata* from raising the post judgment settlement as a defense and counterclaim to Guinness' action for recognition and enforcement of the High Court judgment.

Ward addresses as error in his third and final issue on appeal the district court's finding that he had failed to raise a genuine issue of material fact to support his contention that the High Court judgment is not entitled to recognition and enforcement under the Maryland Uniform Foreign Money–Judgments Recognition Act, § 10–704(a)(1), because it was neither rendered by a fair and impartial tribunal nor was he afforded procedures compatible with the requirements of due process of law.

Our analysis of the issues, to be presented, *infra,* leads us to the following conclusions: As to Ward's first issue on appeal, we disagree with the district court's interpretation

and application of the Maryland Uniform Foreign Money–Judgments Recognition Act to the extent that it holds as a matter of law that a post judgment settlement cannot be raised in any fashion under the Act as a defense to the recognition and/or enforcement of a foreign money judgment. As to Ward's second issue on appeal, however, we agree that Ward should be estopped and/or precluded from raising the alleged post judgment settlement reached during the pendency of his British appeal as a defense and counterclaim to Guinness' action seeking recognition and enforcement of the High Court judgment due to his failure to notify the British Court of Appeal of such settlement. However, we base our decision on the related but distinct ground of judicial estoppel rather than on the doctrine of *res judicata.* In regard to Ward's third and final issue on appeal, we believe that the district court correctly concluded that Ward failed to raise a genuine issue of material fact concerning his contention that the High Court judgment is not entitled to recognition and enforcement because it was neither rendered by a fair and impartial tribunal nor was he accorded procedures comporting with the requirements of due process.

III.

We begin our analysis of the issues presented by noting that on appeal we review *de novo* a district court's grant of summary judgment. *Higgins v. E.I. DuPont de Nemours & Co.,* 863 F.2d 1162, 1167 (4th Cir.1988). Fed.R.Civ.P. 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As noted by the district court, the standards for granting summary judgment are generally well defined. *See Celotex Corp. v. Catrett, Inc.,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In assessing a motion for summary judgment, a court "must perform a dual inquiry into the *genuineness* and *materiality* of any purported factual issues." *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir.1985). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly ***883** preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510. While "[g]enuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross,* 759 F.2d at 364; *accord Goldberg v. B. Green & Co., Inc.,* 836 F.2d 845, 848 (4th Cir.1988); *Felty v. Graves–Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir.1987); *Ash v. United Parcel Service, Inc.,* 800 F.2d 409, 411–12 (4th Cir.1986). Thus, upon reviewing all evidence presented regarding any alleged genuine issue of material fact:

> [t]he judge must ask himself not whether he thinks the evidence unmistakably favored one side or the other but whether a fair-minded jury could return a verdict for the [nonmovant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; it must be evidence on which the jury could reasonably find for the [nonmovant].

Anderson, 477 U.S. at 252, 106 S.Ct. at 2512.

Of course, however, when examining the record the court must be ever mindful that all justifiable inferences must be drawn in favor of the nonmoving party for "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge". *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513. But where a faithful examination of the record establishes that no genuine issue of material fact exists, this Circuit has noted "the affirmative obligation of the trial judge to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty,* 818 F.2d at 1128 (quoting *Celotex Corp.,* 477 U.S. at 323–24, 106 S.Ct. at 2552–53).

Mindful of the above noted standards applicable to the entry of summary judgment, we now turn to the applicable substantive law. Inasmuch as the district court's jurisdiction was invoked on diversity of citizenship grounds, we must look to the substantive law of the forum state to determine the merits of this action. *Andes v. Versant Corp.,* 878 F.2d 147, 150 (4th Cir.1989); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4473 (noting that while sound reasons exist in this area of the law for the creation

of federal law applicable to federal and state courts alike, majority of federal courts sitting with diversity jurisdiction refer questions regarding the effects of foreign judgments to the choice of law principles followed by the state in which the court sits).

We note as a preliminary matter that "[t]he Full Faith and Credit Clause of Article IV § 1 of the Constitution of the United States does not apply to foreign judgments." *Andes,* 878 F.2d at 149. The effect to be given foreign judgments has therefore historically been determined by more flexible principles of comity. The United States Supreme Court defined comity in *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895), as the

> recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.

As noted previously, however, Maryland has adopted the Uniform Foreign Money–Judgments Recognition Act. The Act, which became effective in Maryland on June 1, 1963, "applies to a foreign judgment [5] that is final, conclusive, and enforceable where rendered even though an appeal is pending or it is subject to appeal." § 10–702. The Act does, however, provide a number of grounds, some mandatory and others discretionary, for nonrecognition which are listed in § 10–704 as follows:

(a) A foreign judgment is not conclusive if:

> ***884** (1) The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> (2) The foreign court did not have personal jurisdiction over the defendant; [6]
>
> (3) The foreign court did not have jurisdiction over the subject matter; or
>
> (4) The judgment was obtained by fraud.

(b) A foreign judgment need not be recognized if:

> (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) The cause of action on which the judgment is based is repugnant to the public policy of the State;
>
> (3) The judgment conflicts with another final and conclusive judgment;
>
> (4) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute was to be settled out of court; [7] or

(5) In the case of jurisdiction based only on service, the foreign court was a seriously inconvenient forum for the trial of the action.

§ 10–703 of the Act provides that:

> Except as provided in § 10–704, a foreign judgment meeting the requirements of § 10–702 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

The Maryland Court of Special Appeals has stated that

> the Uniform Foreign Money–Judgments Recognition Act was intended to promote principles of international comity by assuring foreign nations that their judgments would, under certain well-defined circumstances, be given recognition by courts in states which have adopted the Uniform Act. As reciprocity is generally an important

> consideration in determining whether the courts of one country will recognize the judgments of the courts of another ... the certainty of recognition of those judgments provided for by the Act will hopefully facilitate recognition of similar United States' judgments abroad.... The Act, therefore delineates a *minimum* of foreign judgments which *must* be recognized in jurisdictions which have adopted the Act, and in no way constitutes a *maximum* limitation upon foreign judgments which *may* be given recognition apart from the Act.

Wolff v. Wolff, 40 Md.App. 168, 389 A.2d 413, 417 (1978), *aff'd,* 285 Md. 185, 401 A.2d 479 (1979); *accord Bank of Montreal v. Kough,* 430 F.Supp. 1243, 1249 (N.D.Cal.1977), *aff'd,* 612 F.2d 467 (9th Cir.1980) ("[t]he purpose of the Uniform Act was to create greater recognition of the state's judgments in foreign nations ... by informing the foreign nations of particular situations in which their judgments would definitely be recognized").

With this understanding of the Act, we now turn to Ward's first issue on appeal.

A.

[1] Ward essentially raises two arguments in support of his contention that the ***885** district court erred in ruling that as a matter of law Maryland courts would not consider a post judgment settlement in determining whether a foreign money judgment should be recognized and enforced under the Maryland Uniform Foreign Money–Judgments Recognition Act.

Ward's first argument raises the contention that those bases in the Act which are set forth as grounds for nonrecognition should not be interpreted to be an exclusive list. He then contends, alternatively, in his second argument that even if such list is exclusive, the Act provides an explicit basis upon which the district court should have refused to recognize and enforce the High Court judgment in light of the post judgment settlement—the applicability requirement set forth in § 10–702 that the foreign judgment be "final, conclusive and enforceable where rendered."

More specifically, as to his first argument, Ward contends that the list of grounds for nonrecognition set forth in the Act is meant to establish those factors relating to the nature and character of the foreign proceedings which will either render the foreign judgment nonconclusive or give the recognition court discretion to decline the requested recognition and that such list was not meant to prohibit a party from raising those grounds potentially common to every suit, such as a post judgment settlement, which are not based on the foreign nature of the proceedings.

Furthermore, Ward alleges in support of his first argument that the district court's narrow construction of the Act ignores the fundamental principle that comity does not require the recognition of a foreign judgment which contravenes the public policy of the state in which the recognition court sits. Ward specifically contends in this vein that recognizing and enforcing the High Court judgment would be in direct contravention of Maryland's strong public policy favoring the settlement of lawsuits. *See Welsh v. Gerber Products,* 315 Md. 510, 555 A.2d 486, 493 (1989); *David v. Warwell,* 86 Md.App. 306, 309, 586 A.2d 775, 777 (1991).

Guinness responds to Ward's first argument by raising the statutory canon of construction that "[w]here a statute expressly provides for certain exclusions, others should not be inserted." *Pennsylvania Nat. Mutual Casualty Ins. Co. v. Gartelman,* 288 Md. 151, 416 A.2d 734, 737 (1980). Because the Act carefully delineates several specific grounds for nonrecognition, Guinness accordingly argues that the district court correctly determined that any excluded ground, including a post judgment settlement, is irrelevant to the question of whether the High Court judgment should be recognized and enforced.

Unfortunately, neither the parties' research nor that of ours has uncovered a reported Maryland decision specifically addressing the question of whether additional grounds for nonrecognition other than those specifically provided by the Act may be entertained by a recognition court. We do believe, however, that the Maryland Court of Special Appeals' decision in *Wolff* provides some useful guidance as to how the Maryland appellate courts would view the question. As noted above, the *Wolff* court stated that the purpose of the Uniform Act is to achieve greater recognition of domestic judgments in foreign countries, i.e., reciprocity,

by providing those countries with notice of "a *minimum* of [their] judgments which *must* be recognized in jurisdictions which have adopted the Act." *Wolff,* 389 A.2d at 417. It would certainly appear doubtful that this goal could be accomplished if recognition courts were permitted to routinely expand the bases for nonrecognition beyond those specifically enumerated in the Act. Thus, we tend to believe that the Maryland appellate courts would at the very least be extremely hesitant to entertain grounds for nonrecognition other than those specifically provided in the Act, except perhaps in the most exceptional of cases.

As to Ward's argument that such a narrow construction would ignore the legal principle that comity does not require the recognition and enforcement of a foreign judgment which violates the public policy of the recognition state, we note that the Maryland Court of Appeals has stated that ***886** "[d]eclarations of the public policy of the State is normally the function of the legislative branch of government; in discerning that policy, courts consider, as a primary source, statutory ... provisions." *Jones v. Malinowski,* 299 Md. 257, 273 n. 4, 473 A.2d 429 (1984). Thus, to the extent that the Maryland legislature would desire to elevate Maryland's public policy in achieving recognition of domestic judgments by foreign courts through the means of providing notice to foreign countries of a minimum of their judgments which must be recognized by Maryland courts by statutorily narrowing the grounds for nonrecognition of foreign judgments at the expense of other policies of public concern, it would certainly appear competent to do so.

[2] Moreover, the Act does provide a limited public policy exception in § 10–704(b)(2) which provides that a foreign judgment need not be recognized if "[t]he cause of action on which the judgment is based is repugnant to the public policy of the State." Inasmuch as causes of action based on breach of fiduciary duty are accepted and common in the State of Maryland, it clearly appears that the cause of action brought by Guinness against Ward in the High Court is not repugnant to Maryland's public policy. Therefore, Ward cannot rely upon the limited public policy exception to recognition provided in the Act and in our view cannot attempt to create a broader one.

A review of the Maryland Act as a whole, however, convinces us that the Maryland Court of Appeals would hold that it was not the intent of the Maryland legislature in enacting the Act to totally prohibit a foreign judgment debtor from raising a post judgment settlement as a defense to a recognition and enforcement action brought by the judgment creditor. More specifically, we conclude that two separate provisions of the Act provide means for a judgment debtor to raise a post judgment settlement, one of which is that provision raised by Ward in his second argument.

As noted above, Ward contends in his second argument that that portion of the applicability provision of the Act, § 10–702, which requires that the foreign judgment be "final, conclusive, and enforceable where rendered" enables him to raise the post judgment settlement. Ward argues in this regard that the post judgment settlement extinguished the High Court judgment by operation of the law governing settlement agreements. Therefore, Ward argues that the High Court judgment was no longer "enforceable where rendered" at the time of the recognition and enforcement proceedings.

The potential effect of a post judgment settlement in extinguishing the judgment and cause of action upon which such judgment was based has long been recognized in this country. *See County of Dakota v. Glidden,* 113 U.S. 222, 225, 5 S.Ct. 428, 429, 28 L.Ed. 981 (1885). More recently, the Maryland Court of Appeals noted "[i]n *Clark v. Elza,* 286 Md. 208, 406 A.2d 922 (1979), ... that there are two somewhat similar, but legally distinct, methods by which parties to an action can resolve their dispute through compromise. They may enter into either a 'substitute contract' or an 'executory accord.' " *Hauswald Bakery v. Pantry Pride Enterprises, Inc.,* 78 Md.App. 495, 553 A.2d 1308, 1311 (1989).

The *Clark* Court, which was faced with "the question of whether an executory oral agreement to settle a pending law suit may be raised as a defense to prevent a plaintiff from pursuing his original cause of action," *Clark,* 286 Md. at 210, 406 A.2d at 923, further explained that

> "[t]he term 'accord executory' is and always has been used to mean an agreement for the future discharge of an existing claim by a substituted performance. In order for an agreement to fall within this definition, it is the promised performance that is to discharge the existing claim, and not the promise to render such performance. Conversely, all agreements for a future discharge by a substituted performance are accords executory. It makes no difference whether or not the existing claim is liquidated or unliquidated, undisputed or disputed, except as these factors bear upon the sufficiency of the consideration for some ***887** promise in the new agreement. It makes no difference whether or not a suit has already been brought to enforce the original claim; or whether that claim arises out of an alleged tort or contract or quasi-contract...." [6

> *Corbin on Contracts* § 1268 at 71 (1962)] ... On the other hand, where the parties intend the new agreement itself to constitute a substitute for the prior claim, then this substituted contract immediately discharges the original claim. Under this latter type of arrangement, since the original claim is fully extinguished at the time the agreement is made, recovery may only be had upon the substituted contract....
>
> It is often extremely difficult to determine the factual question of whether the parties to a compromise agreement intended to create an executory accord or a substituted contract. However, unless the evidence demonstrates that the new agreement was designed to be a substitute for the original cause of action, it is presumed that the parties each intended to surrender their old rights and liabilities only upon performance of the new agreement. In other words, unless there is clear evidence to the contrary, an agreement to discharge a pre-existing claim will be regarded as an executory accord. *Porter v. Berwyn Fuel & Feed,* 244 Md. 629, 639, 224 A.2d 662 (1966); 15 *Williston on Contracts* § 1847 (3d ed. Jaeger 1972).

Clark, 286 Md. at 214, 406 A.2d at 925–26 (citations omitted).

The *Clark* Court specifically rejected those cases holding that an executory accord is unenforceable and not a bar to a suit on the prior claim, stating that

> the modern view, and in our judgment the better view, is summarized by 6 *Corbin, supra,* § 1274, p. 104, as follows:
>
> > "An accord executory does not itself operate as a discharge of the previous claim, for the reason that it is not so intended or agreed. In nearly every case, however, the parties intend that the duty created by the previous transaction shall be suspended during the period fixed for performance of the accord. As long as the debtor has committed no breach of the accord, therefore, the creditor should be allowed to maintain no action for the enforcement of the prior claim. His right of action should be held to be suspended as the parties intended."

This is also the position adopted by the Restatement of Contracts, Vol. II, § 417 (1932):

"§ 417. AN ACCORD; ITS EFFECT WHEN PERFORMED AND WHEN BROKEN.

Except as stated in §§ 142, 143 with reference to contracts for the benefit of third persons and as stated in § 418, the following rules are applicable to a contract to accept in the future a stated performance in satisfaction of an existing contractual duty, or a duty to make compensation:

(a) Such a contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective nonperformance.

(b) If such a contract is performed, the previously existing duty is discharged.

(c) If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract.

(d) If the creditor breaks such a contract, the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific enforcement of the contract is practicable, he acquires an alternative right to the specific enforcement thereof. If the contract is enforced specifically, his original duty is discharged...."

Thus, an executory accord does not discharge the underlying claim until it is performed. Until there is a breach of the accord or a justifiable change of position based upon prospective non-performance, the original cause of action is suspended. As long as the "debtor" ... neither breaches the accord nor provides a reasonable basis for concluding that he will not perform, the "creditor" ... has ***888** no right to enforce the underlying cause of action.

* * * * * *

> ... [i]t is logical to hold that executory accords are enforceable. An executory accord is simply a type of

> bilateral contract. As long as the basic requirements to form a contract are present, there is no reason to treat such a settlement agreement differently than other contracts which are binding. This is consistent with the public policy dictating that courts should "look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony." *Chertkof v. Harry C. Weiskittel Co.,* 251 Md. 544, 550, 248 A.2d 373, 377 (1968), *cert. denied,* 394 U.S. 974, 89 S.Ct. 1467, 22 L.Ed.2d 754 (1969).

Clark, 286 Md. at 215–219, 406 A.2d at 926–28. [8]

The Maryland Court of Special Appeals in discussing the requirements for a valid accord and satisfaction, i.e., an accord which has been performed or executed, has held that

> "Accord and satisfaction is a method of discharging a contract or cause of action, whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the 'accord' being the agreement, and the 'satisfaction' its execution or performance."

Jacobs v. Atlantco Ltd. Partnership, 36 Md.App. 335, 340–341, 373 A.2d 1255 (1977) (quoting 1 C.J.S., *Accord and Satisfaction,* § 10).

The Maryland Court of Special Appeals has further held that "[e]ven a judgment, which is an undisputed liquidated claim, may be settled by means of an accord and satisfaction." *Barry Properties, Inc. v. Blanton & McCleary,* 71 Md.App. 280, 525 A.2d 248, 251, *cert. denied,* 310 Md. 490, 530 A.2d 272 (1987); *accord Air Power, Inc. v. Omega Equipment Corp.,* 54 Md.App. 534, 538–39, 459 A.2d 1120 (1983). Of course,

> a claim which is liquidated and undisputed[, such as a judgment,] is not discharged by acceptance of a lesser sum tendered in full settlement.... This is so because "[a] mere agreement to accept less than the real debt would be a *nudum pactum." Geiser v. Kershner,* 4 G. & J. 305, 310. "But if in addition to the part payment there be some other collateral consideration such as in law is sufficient to support a contract, then the agreement to relinquish the residue is not a *nudum pactum.*" *Prudential Ins. Co. v. Cottingham,* 103 Md. 319, 63 A. 359 (1906).
>
> It is equally well settled, however, that even in the case of a liquidated claim, "an acceptance of part of the amount in satisfaction of the whole will bar a recovery of the remainder if the settlement is supported by some consideration additional or collateral to the partial payment. 'Anything which would be a burden or inconvenience to the one party or a possible benefit to the other' may constitute such a consideration; ... and the compromise of a disputed claim is a familiar and favored basis for an accord and satisfaction." (Citations omitted.) *Scheffenacker v. Hoopes,* 113 Md. 111, 115, 77 A. 130 (1910).

Air Power, 459 A.2d at 1122–23 (citations omitted).

[3] To the extent that a judgment debtor could establish that a foreign judgment would no longer be enforceable where rendered due to a post judgment settlement we agree that the Act by its very terms would not be applicable to the judgment. Accordingly, we believe that a judgment debtor may appropriately raise a post judgment settlement in this manner as a defense to the recognition and enforcement of a foreign money judgment under the Maryland Act. We stress, however, that in determining the effect of a post judgment ***889** settlement on the continued enforceability of the judgment the "where rendered" language of this provision would appear to require a recognition court to focus on the law of the rendering country in making such determination. Thus, if an appropriate court of the rendering country has not addressed the issue of whether the judgment is still enforceable under its law, the recognition court would need to examine and apply the law of the foreign country in this regard.

[4] **[5]** The other provision of the Uniform Recognition Act which we believe permits a foreign judgment debtor to raise a post judgment settlement as a defense is that portion of § 10–703 which provides that a "foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." While this provision could perhaps be narrowly construed to only state that those same enforcement remedies and procedures available for sister state judgments shall be used to enforce foreign money-judgments which are entitled to recognition, we believe in light of the statutory language taken as a whole and the Maryland law existing at the time of the statute's enactment,

that the most reasonable interpretation of the provision not only encompasses the above stated narrow procedural aspects but also indicates that a foreign money judgment entitled to recognition is only enforceable to the same extent that a sister state judgment entitled to full faith and credit would be under the same circumstances. Thus, we believe that any defenses and counterclaims which could be raised regarding the judgment's enforcement, as opposed to its recognition, if the judgment was that of a sister state and entitled to full faith and credit may also be raised against the enforcement of the foreign judgment. Accordingly, we find that a foreign judgment debtor may raise a post judgment settlement under § 10–703 as a defense not to the recognition of the judgment but rather to its enforcement or degree thereof. [9]

[6] Maryland courts have recognized that "questions of whether a court should recognize a foreign decree, and whether it should go further and use equitable remedies to enforce a decree once recognized are, of course, two separate and distinct lines of inquiry." *Wolff,* 389 A.2d at 415 n. 3. And while the Uniform Recognition Act provides a basis in law for enforcing foreign money judgments which are entitled to recognition thereunder, nowhere does the Act dictate that where such a judgment is entitled to recognition it must automatically and unconditionally be enforced. Thus, we believe Maryland courts would continue to acknowledge that under the Act questions of whether a judgment should be recognized are distinct and separate inquiries from those concerning whether such a judgment once recognized is entitled to enforcement. [10]

***890** In *Coane v. Girard Trust Co.,* 182 Md. 577, 583, 35 A.2d 449, 452 (1944), the Maryland Court of Appeals was confronted with an action on a Pennsylvania judgment entitled to full faith and credit and noted that

> [a] defendant in an action based on a judgment against him may file a special plea setting up the defense of complete or partial release, or payments made since the rendition of the judgment. 2 Poe, *Pleading and Practice,* sec. 404C; 3 *Freeman on Judgments,* 5th Edition, sec. 1461; *Dyal v. Dyal,* 65 Ga.App. 359, 16 S.E.2d 53 (1941).

Consistent with the *Coane* Court's ruling, the Maryland Court of Special Appeals has more recently noted that a judgment debtor seeking to enforce a post judgment accord and satisfaction need not bring a separate contract action but rather can raise such settlement in the action to enforce the judgment. The Court concluded that such a procedure was consistent with Maryland Rules of Procedure which permitted a judgment debtor to establish by motion that a judgment has been satisfied. Moreover, the Court held that a judgment debtor may so attempt to show that the judgment has been satisfied in either the court in which proceedings to enforce the judgment are pending or in the court which rendered the judgment. *Barry Properties,* 525 A.2d at 253–54.

While it is true as contended by Guinness that the *Barry Properties* case did not deal explicitly with a foreign money judgment sought to be recognized and enforced under the Uniform Recognition Act, it is also true that such case in no way suggests that its reasoning is solely limited to Maryland judgments. Moreover, as noted above, the rationale of *Barry Properties* appears to be consistent with that in *Coane* which did involve a sister state judgment entitled to full faith and credit. Inasmuch as a foreign money judgment entitled to recognition under the Act is enforceable in the same manner as a sister state judgment entitled to full faith and credit, we see no persuasive reason to conclude that the *Coane* and *Barry Properties* cases, and the rationale expressed therein, are irrelevant to our present determination.

We believe that this conclusion is further buttressed by Maryland's adoption of the Uniform Enforcement of Foreign Judgments Act, Md.Code Ann., Courts and Jud.Proc. Art., § 11–801 *et seq.,* which became effective in Maryland on July 1, 1987. *See Weiner v. Blue Cross of Maryland, Inc.,* 730 F.Supp. 674, 677 (D.Md.1990), *aff'd,* 925 F.2d 81 (4th Cir.), *cert. denied,* 502 U.S. 816, 112 S.Ct. 69, 116 L.Ed.2d 43 (1991). The Uniform Enforcement Act was generally adopted to streamline and make uniform among the those states adopting it the procedure for enforcing foreign judgments. In *Weiner,* then District Judge Niemeyer noted that

> [u]nder the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first. The suit on the judgment was an independent action....

* * * * * *

***891** When originally written, the Uniform Enforcement of Foreign Judgments Act was not intended to alter the rights of debtors vis-a-vis their judgment creditors. As stated in the Commissioner's Prefatory Note to the Uniform Enforcement of Foreign Judgments Act of 1948, "By this act procedure is made available under which the judgment creditor can effectively obtain relief and at the same time *adequate protection is given the judgment debtor to present any defense that can now be interposed to an action on such judgment.*" 9A U.L.A. at 474 (1965) (emphasis supplied). It would thus appear that the Act was designed as a facilitating device....

When the Uniform Enforcement Act was revised in 1964, the procedure was modified to parallel that established by 28 U.S.C. § 1963, which allows a prevailing party to enforce a federal district court judgment by registering it in another federal district. *See* Commissioner's Prefatory Note 9A U.L.A. at 486–87 (1965)....

* * * * * *

While the Uniform Enforcement Act eliminates the need for filing of a complaint and following other procedures, it does not purport to alter any substantive rights or defenses that otherwise would be available either to the judgment creditor or the judgment debtor if suit were filed to enforce that foreign judgment....

Id. at 676–77 (citations omitted).

§ 11–802(a) of the Uniform Enforcement Act addresses the proper procedure and location for the filing of a foreign judgment. § 11–802(b) then discusses the effect of a properly filed foreign judgment stating that "[a] filed foreign judgment *has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed.*" (Emphasis added).

It should be noted that the Uniform Enforcement Act defines "foreign judgment" differently than does the Uniform Recognition Act. § 11–801 of the Uniform Enforcement Act provides that a " 'foreign judgment' means a judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in this State." As noted previously, the full faith and credit clause of the United States Constitution does not apply to the judgments of a foreign country. *Andes,* 878 F.2d at 149. Accordingly, based on this factor a number of courts in other jurisdictions adopting the Uniform Enforcement Act have held that the Act does not apply to foreign country judgments as opposed to sister state or federal court judgments. *See Multibanco Comermex, S.A. v. Gonzalez,* 129 Ariz. 321, 630 P.2d 1053 (1981); *Medical Arts Building Limited v. Eralp,* 290 N.W.2d 241, 246 (N.D.1980); *Biel v. Boehm,* 94 Misc.2d 946, 406 N.Y.S.2d 231, 233 (N.Y.Sup.Ct.1978).

[7] Unfortunately, there appears to be no reported Maryland case discussing whether the Maryland Uniform Enforcement Act applies to foreign country judgments. Accordingly, if a determination of this issue was necessary to this appeal we would be faced with the task of faithfully predicting how the highest court of Maryland would decide the issue. In that event, had Maryland not adopted the Uniform Recognition Act, we would certainly agree that under Maryland law the Uniform Enforcement Act is inapplicable to a judgment of a foreign country. However, Maryland has adopted the Uniform Recognition Act, and, as noted above, such Act provides that a judgment of a foreign country which is entitled to recognition is enforceable in the same manner as a sister state judgment entitled to full faith and credit. Inasmuch as Maryland has adopted the Uniform Enforcement Act to provide the manner in which a sister state judgment is enforceable, we see no persuasive reason to conclude that the Uniform Enforcement Act is not applicable to a foreign country judgment once such judgment has been found to be entitled to recognition under the Uniform Recognition Act.

In such instance, the two Acts, or at least relevant portions thereof, would appear to be complementary rather than mutually ***892** exclusive. *See Hennessy v. Marshall,* 682 S.W.2d 340 (Tex.Ct.App.1984). Moreover, the Commissioner's Comment following Section 3 of the Uniform Recognition of Foreign Money–Judgments Act[11] provides that "[t]he method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act" and accordingly would appear to establish that this position is at least consistent with the understanding of the Commissioner of the Uniform Recognition Act. Uniform Foreign Money–Judgments Recognition Act, 13 U.L.A. 261, 265 (1986); *Accord* Von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States,* 6 Law & Policy in International Business 37, 72–73 (1974).

[8] We need not, however, conclusively determine this issue nor the corollary issue of whether Guinness erred in failing to seek enforcement of the High Court judgment under Maryland's adoption of the Uniform Enforcement Act for Maryland's Uniform Enforcement Act provides in § 11–805(b) that a "judgment creditor retains the right to bring an action to enforce a judgment instead of proceeding under this subtitle." Nonetheless, we believe that in regard to our analysis set forth above concerning Ward's second argument, the language of § 11–805(b) of the Uniform Enforcement Act when it is remembered that the Act was designed merely as a facilitating device and was not intended to alter any substantive rights or defenses which would otherwise be available to a judgment creditor or judgment debtor in an action for enforcement of a foreign judgment, supports our conclusion that any defenses ordinarily available to the enforcement of a Maryland judgment, *see Barry, supra,* and accordingly a sister state judgment which is entitled to full faith and credit, *see Coane, supra,* is also available to the enforcement of a foreign country judgment which is entitled to recognition under the Uniform Recognition Act and thus enforceable in the same manner as a sister state judgment which is entitled to full faith and credit pursuant to § 10–703.

Accordingly, to the extent that the district court concluded as a matter of law that a judgment debtor cannot raise a post judgment settlement under Maryland's Uniform Recognition Act as a defense or counterclaim to the recognition and/or enforcement of a foreign money judgment because such a ground is not one of the express bases listed in § 10–704 of the Act as grounds for nonrecognition, we believe it erred in ignoring the possible applicability of the above quoted sections.

Upon examining the record before us, it appears that while noting that the parties had definitely engaged in settlement negotiations in the case *sub judice* and in fact had entered into a tentative letter agreement, in light of its holdings that Ward could not raise such a settlement under the Uniform Recognition Act and was furthermore barred by *res judicata* from doing so, the district court never decided whether the parties had ever reached a binding settlement agreement, whether it be a substitute contract, executory accord or accord and satisfaction,[12] written or oral. A review of the record indicates that it is not sufficiently developed in this regard for this Court to determine the issue.

[9] Evidence regarding many necessary factual details is absent from the record, not the least of which is information as to the location where a binding settlement ***893** was allegedly reached.[13] Nor is it apparent from the record whether any party discussed before the district court the effect of a post judgment settlement on the underlying judgment under English law. As noted above, inasmuch as § 10–702 contains the language "where rendered," this question would appear to be critical to a determination of Ward's claim that the High Court judgment is not entitled to either recognition or enforcement under the Uniform Recognition Act because it is no longer enforceable where rendered.

Thus, if this were the sole issue on appeal regarding the right of Ward to raise the alleged post judgment settlement as a defense and counterclaim to Guinness' action seeking recognition and enforcement of the High Court judgment, there would be a basis upon which to remand the case to the district court for further proceedings. However, we now turn to Ward's second and related issue on appeal which we believe is dispositive of Ward's right to raise the post judgment settlement.

B.

[10] The district court concluded that Ward was barred by the doctrine of *res judicata*[14] from raising the alleged post judgment settlement both as a defense and counterclaim because he could have raised such settlement in the British courts. The district court concluded that part of its August 24, 1990, order addressing Ward's contentions regarding the post judgment settlement by stating that

> [t]he purpose of the Maryland Uniform Foreign MoneyJudgment Act is to facilitate recognition of foreign judgments. To permit parties to relitigate the merits of the foreign proceeding would completely contravene the purpose of the Act. The Court finds that the issues which Ward raises regarding the alleged agreement are the type of issues which should not be litigated in the recognition court, but rather should have been addressed to the court rendering the decision on the merits. Ward's proposed collateral attack on the British judgment is precisely the type of relitigation of the foreign judgment the Act was intended to prevent. Accordingly, the Court must decline to deny summary judgment on the basis on [sic] the alleged settlement.

The district court reiterated a portion of the above quote in its October 2, 1990, order granting summary judgment for

Guinness on Ward's counterclaim and then stated that "[a] matter is res judicata if it was or could have been brought in a prior litigation. This Court's August 24 Order leads clearly to the conclusion that Ward's counterclaim should have been brought in the prior proceeding."

We disagree with the district court's application of the doctrine of *res judicata* to the case *sub judice* for the following reasons.

In addressing principles of estoppel by judgment, the United States Supreme Court has stated that

> [s]imply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered ***894** and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195 (1877). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948). *See Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 375, 378, 60 S.Ct. 317, 319, 320, 84 L.Ed. 329 (1940).

Nevada v. United States, 463 U.S. 110, 129–30 [103 S.Ct. 2906, 2917–18, 77 L.Ed.2d 509] (1983) (footnote omitted); *accord Allen v. McCurry,* 449 U.S. 90, 94 [101 S.Ct. 411, 414, 66 L.Ed.2d 308] (1980); *Federal Deposit Ins. Corp. v. Jones,* 846 F.2d 221, 234–35 (4th Cir.1988); *Kenny v. Quigg,* 820 F.2d 665, 669 (4th Cir.1987); *Welsh,* 555 A.2d at 489; *MPC, Inc. v. Kenny,* 279 Md. 29, 32, 367 A.2d 486 (1977); *Alvey v. Alvey,* 225 Md. 386, 390, 171 A.2d 92 (1961).

English Courts have long subscribed to a similar definition of *res judicata,* noting that

> [t]he plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Henderson v. Henderson, 3 Hare 100, 115 (1843); [15] *see Bank of Montreal v. Kough,* 612 F.2d 467, 472 (9th Cir.1980).

It appears clear in this case, however, that Ward could not have raised the alleged settlement agreement before the High Court prior to its entry of judgment for such agreement did not occur until after the judgment had been entered. This Circuit has noted that

> ... a prior judgment "cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case." *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 328, 75 S.Ct. 865, 868, 99 L.Ed. 1122 (1955); *see also Harnett* [*v. Billman*], 800 F.2d [1308] at 1313 [4th Cir.1986), *cert. denied* [480] U.S. [932], 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987)] (existence of present claim at time of prior suit is determinative for res judicata purposes).

Kenny, 820 F.2d at 669. Clearly, Ward's attempt to enforce an alleged post judgment settlement is an entirely different cause of action from that asserted by Guinness against Ward in the High Court for alleged breach of fiduciary duty and could not have been raised as a defense or counterclaim to Guinness' action in that regard because it did not exist prior to the entry of final judgment on that claim. *See id.* [16]

***895** As stated by the United States Supreme Court in *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 275, 56 S.Ct. 229, 233, 80 L.Ed. 220 (1935), "[a] cause of action on a judgment is different from that upon which the judgment was entered." *Accord Huron Holding Corp. v. Lincoln Mine Operating Co.,* 312 U.S. 183, 194, 61 S.Ct. 513, 518, 85 L.Ed. 725 (1941). The Court then noted that

> ... [i]n a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be

> resisted only on the grounds ... that *it has ceased to be obligatory because of payment or other discharge....*

Milwaukee County, 296 U.S. at 275, 56 S.Ct. at 233 (citations omitted) (emphasis added); *accord Sun First Nat. Bank v. Gainsville, 75 LTD.,* 155 Ga.App. 70, 270 S.E.2d 293, 296 (1980); *Bahr v. Bahr,* 85 S.D. 240, 180 N.W.2d 465, 467 (1970); *Crescent Hat Co. v. Chizik,* 223 N.C. 371, 26 S.E.2d 871, 872 (1943).

We believe that the factors in this case which have caused confusion among the parties and the district court are the pendency of Ward's appeal before the British Court of Appeal at the time the alleged settlement was reached and his subsequent decisions to continue his appeal when Guinness breached the alleged settlement agreement and to not inform the British appellate courts of such settlement. We believe that these factors when combined do indeed lead to Ward being estopped or precluded from raising the alleged settlement agreement in this litigation but we do not believe that they technically do so on *res judicata* grounds.

In attempting to show why we reach this conclusion we note our initial belief that had Ward completed his unsuccessful appeals through the British appellate system, or had his time to appeal the High Court judgment run without his ever doing so, before the parties ever reached a binding settlement agreement there could certainly be no argument that *res judicata* would bar him from asserting the alleged post judgment settlement as a defense and/or counterclaim [17] to a subsequent attempt by Guinness to have the judgment recognized and enforced in Maryland. Clearly, under this set of facts Ward's attempt to raise the post judgment settlement would not be a collateral attack on the High Court judgment. As noted by the Maryland Court of Special Appeals in *Barry Properties,* such an attempt

> ... does not constitute a prohibited collateral attack on the judgment. A collateral attack on a judgment is "an attempt to impeach the judgment by matters dehors the record ... to avoid, defeat, or evade it or deny its force and effect, in some incidental proceeding not provided by law for the purpose of attacking it." *Klein v. Whitehead,* 40 Md.App. 1, 20–21, 389 A.2d 374 (1978). *See Board v. Baden Volunteer Fire Dept.,* 257 Md. 666, 670–71, 264 A.2d 844 (1970). The validity of the confessed judgment has never been assailed in those proceedings. Appellant merely seeks to have it declared satisfied. The proceedings, therefore, are in recognition of the judgment. *See Rehm v. Fishman,* 395 S.W.2d 251, 256 (Mo.1965).

***896** *Barry Properties,* 525 A.2d at 254. [18]

We now turn to the question of whether Ward's attempt to raise the post judgment settlement becomes a prohibited collateral attack due to the fact of his pending appeal in the British system. Our research reveals that a post judgment settlement of the litigants' relevant disputes reached during the pendency of an appeal will generally result in at least the dismissal of the appeal. Where a post judgment settlement truly renders the parties' disputes moot, this Circuit as well as Maryland State appellate courts have not hesitated to not only dismiss the parties' appeal but also have vacated the judgment on appeal and remanded the case with instructions for the trial court to dismiss the case. *See Kennedy v. Block,* 784 F.2d 1220, 1222–24 (4th Cir.1986) (This Court noting that "[t]he Constitution authorizes federal courts to hear cases and controversies, U.S. Const. art. III, § 2, and by that limitation forbids the consideration by federal courts of matters that have become moot. *Powell v. McCormack,* 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 1950 n. 7, 23 L.Ed.2d 491 (1969). '[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *Id.* at 496, 89 S.Ct. at 1951."); *Area Development Corp. v. Free State Plaza, Inc.,* 254 Md. 269, 254 A.2d 355 (1969) (Maryland Court of Appeals holding that a post judgment settlement rendered the case moot); *Lloyd v. Board of Supervisors of Elections,* 206 Md. 36, 111 A.2d 379, 381 (1954) (Maryland Court of Appeals holding that question of mootness is generally based in Maryland on rule of decision that courts generally "... do not sit to decide abstract questions of law," as opposed to being based on constitutional principles); *see also Federal Data Corp. v. SMS Data Products Group, Inc.,* 819 F.2d 277 (Fed.Cir.1987); *Nestle Co., Inc. v. Chester's Market, Inc.,* 756 F.2d 280 (2d Cir.1985). In such a case, the vacated judgment generally has no *res judicata* effect. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 3533.10 and 4433.

Other courts routinely dismiss the appeal but refuse to vacate the underlying judgment. For instance, the Seventh Circuit has held that

> [a] settlement while the case is on appeal is a reason why the losing party no longer wants the judgment

> reversed. The case is neither more nor less moot than it would be if the loser were satisfied with the judgment and complied without appealing. Cf. *CFTC v. Chicago Board of Trade,* 701 F.2d 653, 657 (7th Cir.1983). Compliance does not require the judgment to be set aside; compliance in part (the upshot of a settlement) should not be treated differently.... [*United States v.*] *Munsingwear*[, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)] holds that the judgment in a moot case should be vacated to relieve the parties of collateral consequences when they were unable to obtain appellate review. [In the case of a post judgment settlement pending appeal, appellants are] not disabled from obtaining review; they have simply chosen, for reasons they deem sufficient, to forego the entitlement they possess.

Matter of Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1301 (7th Cir.1988). The Seventh Circuit also concluded in *Memorial Hosp.* that lower court decisions as public acts of public officials are not the parties' property and therefore may not properly be used as bargaining chips in the process of settlement. Rather, the Seventh Circuit stated that if parties desire to avoid the potential stare decisis and preclusive effects of such judgments they need only settle before such decisions are rendered. *Id.* at 1302.

More flexible approaches, however, have been adopted by a number of courts. An example of one of these approaches is found in the Ninth Circuit which, when ***897** confronted with the post judgment settlement, dismisses the appeal and remands the case to the lower court to determine whether its judgment should be vacated by balancing the various equities and hardships presented. *See National Union Fire Ins. Co. v. Seafirst Corp.,* 891 F.2d 762, 765–69 (9th Cir.1989).

As noted previously, the parties have not specifically discussed the effect under British law of a post judgment settlement on the underlying judgment. We note, however, that such a settlement will apparently at least normally result in the dismissal of the appeal. *See National Benzole Co., LTD. v. Gooch* [1961] 3 All E.R. 1097; Halsbury's Laws of England (4th Edition) volume 37, paragraph 692. In fact, as early as 1914, the British Court of Appeal via Lord CozensHardy MR held that "I wish it to be clearly understood that when a case is settled it is the duty of the solicitors to inform the court forthwith." *Wheatley v. Lumley Brick LTD* [1914] WN 346 (the case had been stood over for settlement and when the hearing date arrived no one appeared on either side).

This case, of course, presents the additional factor of the parties not agreeing as to whether a binding settlement was ever reached. As correctly noted by Ward, American appellate courts are courts of limited jurisdiction and are normally bound by the record before them. Accordingly, unless otherwise expressly provided such as by statute, such courts do not act as trial courts and will not normally litigate new matters. *See also Commissioners of Vienna v. Phillips Packing Co., Inc.,* 207 Md. 12, 113 A.2d 89, 92 (1955); Halsbury's Laws of England (4th Edition) volume 37, paragraphs 677 and 693. This, of course, however, does not mean that a party may not present evidence to an appellate court concerning a post judgment settlement, such as a signed settlement agreement, for the United States Supreme Court has long held that appellate courts are "... compelled, as all courts are, to receive evidence dehors the record affecting their proceeding in a case before them on error or appeal." *Glidden,* 113 U.S. at 225, 5 S.Ct. at 430; *see* Halsbury's Laws of England (4th Edition) volume 37, paragraph 693.

Where the existence or validity of such a settlement, however, is legitimately contested by one of the parties, appellate courts, of course, will not normally act as a court of original jurisdiction and litigate the matter. Rather the appropriate course in such an instance would appear to be that of continuing or staying the appeal so that a competent court may decide the issue. *See Board of Liquidation v. Louisville & N.R. Co.,* 109 U.S. 221, 226–27, 3 S.Ct. 144, 448–49, 27 L.Ed. 916 (1883); *Glidden,* 113 U.S. at 226–27, 5 S.Ct. at 430. This approach appears to be consistent with that taken by British appellate courts. *See National Benzole* 3 All E.R. at 1099 ("If this had been a case where the defendant could have advanced that he wished to impeach that agreement on some recognized grounds, this court might have thought some steps could be taken to leave open the appeal until that matter had been adjudicated on ..."); *Lees v. Motor Insurers' Bureau* [1953] 1 WLR 620, 97 Sol Jo 298, CA (British Court of Appeal noting that the proper order to enter where the parties had reached a post judgment settlement would be one staying the appeal pending enforcement of the agreement); Halsbury's Laws of

England, (4th edition) volume 37(3), paragraphs 4128 and 4129.

[11] It appears clear from the willingness of appellate courts to continue and stay appeals so that the existence and validity of post judgment settlements may be litigated, that such litigation is not barred by the underlying judgment. Rather as stressed above litigation to establish the validity and existence of a post judgment settlement is based on a separate cause of action from that decided by the judgment and does not involve an attempt by the parties to relitigate matters which were or could have been decided in the prior proceeding. The fact that the existence of such a settlement may affect the judgment and its continuing effect does not change the reality that such settlement is based on a separate cause of action which could not ***898** have been litigated prior to judgment because of its nonexistence.

As noted previously, the Maryland Court of Special Appeals held in *Barry Properties* that a judgment debtor may raise an alleged accord and satisfaction to establish that a judgment has been satisfied and/or rendered unenforceable in either the rendering court or the enforcing court. It does not appear that the *Barry Properties* Court was faced with a situation where a pending appeal concerning the merits of the judgment existed in the rendering system. However, it is both the majority position among the federal courts and the position adopted by § 10–702 of the Maryland Uniform Recognition Act that the existence of a pending appeal does not render a judgment unenforceable nor suspend its preclusive effects absent a party obtaining a stay from either the rendering or enforcing court. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4433; *see also* Halsbury's Laws of England (4th Edition) volume 37, paragraph 699. And while an appellate court faced with the task of deciding a direct appeal on the merits of a judgment and contemplating continuing or staying such appeal for purposes of permitting litigation concerning the existence or validity of an alleged post judgment settlement may certainly have an interest concerning where and when such litigation is conducted, the affect of this interest on the propriety of the enforcing court litigating the issue would appear to rest more appropriately on principles of comity and the orderly administration of justice recognized by the enforcing court than on the doctrine of *res judicata.*

Whether conducted in English courts or the district court, the litigation of whether a post judgment settlement exists which should be enforced would not have involved a relitigation of issues decided by the High Court or otherwise consisted of an attack on the correctness or validity of the High Court judgment. *See Andes,* 878 F.2d at 149 ("Here, no one seeks to relitigate the bank's claims against Versant or to inquire into anything actually adjudged by the English Court."). Thus, Guinness' argument that procedures existed in England for Ward to attempt to stay or enjoin enforcement of the judgment pending litigation in the High Court, or another appropriate body, concerning the settlement's existence or validity does not convince us that Ward is now barred by the doctrine of *res judicata* due to his failure to utilize those procedures. Accordingly, we believe that the district court erred in concluding that Ward was barred from raising the alleged post judgment settlement as a defense and counterclaim by the doctrine of *res judicata.*

[12] With the above discussion in mind, however, we believe that the more appropriate ground for Ward's estoppel or preclusion becomes apparent. There is no dispute in this case that Ward was to dismiss his appeal in light of the settlement. *See Wood v. Virginia Hauling Co.,* 528 F.2d 423, 425 (4th Cir.1975) ("A settlement agreement by definition should end litigation."); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 3533.2 and 3533.10. Ward contends that he continued his appeal through the British appellate courts once Guinness breached the settlement for the purpose of mitigating his damages. The requirement that a party mitigate his damages is a fundamental principle of contract law which needs no discussion here. However, we are not here dealing with an ordinary contract action where only the equities concerning the contracting parties or their beneficiaries are involved. Rather, a third party of eminent concern is involved here—an appellate court with limited jurisdiction and powers of review.

Had a settlement been found to exist in this case it appears clear that no dispute would have remained for the exercise of appellate power. By failing to notify the British appellate courts of the alleged settlement so that they could determine what action on their part was appropriate, such as continuing or staying the appeal, we believe that Ward acted inconsistently in such a degree and manner to offend the judicial process and properly preclude him from now raising the alleged post judgment settlement.

***899** That an estoppel can arise because of a prior inconsistent claim or position taken in a judicial proceeding is clear. A party cannot have its cake and eat it too. Although there are several species of estoppel, the court is here dealing with what is generally known as judicial

estoppel or the doctrine of preclusion against inconsistent positions. This type of estoppel protects interests different from those protected by equitable estoppel, the type referred to in 31 C.J.S. Estoppel § 117a (1964),.... Equitable estoppel is designed to protect any adversary who may be prejudiced by the attempted change of position. On the other hand, judicial estoppel, or preclusion against inconsistent positions, is designed to protect the integrity of the courts and the judicial process.

An exposition of the modern doctrine of judicial estoppel based upon preclusion against inconsistent positions is found in 1B Moore, Federal Practice, § 0.405[8], at 765–768 (2d ed. 1971) as follows:

> "Even where the facts will not permit the application of res judicata, collateral estoppel, or the election rule against inconsistent remedies, a party may be precluded by a prior position taken in litigation from later adopting an inconsistent position in the course of a judicial proceeding. Though the preclusion doctrine is sometimes referred to as 'judicial estoppel' or 'estoppel by oath,' and though it is frequently expressed in language sounding of estoppel in pais, numerous cases illustrate the existence of a doctrine forbidding inconsistent positions, usually as to facts, which operates independently of equitable estoppel."

Many cases forbidding inconsistent positions in judicial proceedings may be grouped conveniently into two classes: those where a party seeks to contradict his own sworn statements made in prior litigation in which he was a party or a witness; and those where the prior inconsistent position was not taken under oath.... Both types of preclusion seem to fall, generically, within a universal judicial reluctance to permit litigants to 'play fast and loose' with courts of justice according to the vicissitudes of self-interest.

* * * * * *

The preclusion rule has been held to operate regardless of whether the prior inconsistent position was successfully maintained; and irrespective of reliance by, or prejudice to, the party invoking it. Strangers, as well as parties to the proceeding in which the prior inconsistent position was taken, may take advantage of the preclusion. (Citations omitted.)

Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1177–78 (D.S.C.1975); *Accord Federal Deposit,* 846 F.2d at 234; *Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166–67 (4th Cir.1982); [19] *United Virginia Bank/Seaboard National v. B.F. Saul Real Estate Investment Trust,* 641 F.2d 185, 190 (4th Cir.1981); *Scarano v. Central R. Co.,* 203 F.2d 510, 512–13 (3d Cir.1953).

[13] We believe that Ward in continuing his appeal through the British appellate courts, without informing them of the alleged settlement and seeking a continuance or stay of the appeals, was inherently and explicitly informing them that no events had occurred which would render such appeals improper. In doing so while at the same time and thereafter attempting to raise the post judgment settlement in the recognition and enforcement proceedings here in issue, we conclude that he was clearly "playing fast and loose" and "blowing hot and cold" with the judicial process to such a degree as to violate the "essential integrity" of that process. [20] We, therefore, ***900** conclude that Ward is judicially estopped [21] from raising such alleged post judgment settlement in the recognition and enforcement proceedings. [22]

We now turn to the final issue on appeal.

C.

[14] As noted previously, Ward contends as his third issue on appeal that the district court erred in holding that he had failed to raise a genuine issue of material fact to support his contention that the High Court judgment is not entitled to recognition and enforcement under the Maryland Uniform Recognition Act because it was not rendered by a fair and impartial tribunal which utilized procedures compatible with the requirements of due process of law. *See* § 10–704(a)(1). Ward essentially raises on appeal two of the several arguments he relied upon before the district court to establish that the

British proceedings where violative of the requirements of due process.

Both of these arguments focus on the *Mareva* injunction issued by Mr. Justice Warner of the High Court. First, Ward contends that the *ex parte* nature of the injunction's entry establishes that it was violative of due process, while, secondly, arguing that the excessive remedies granted in such injunction violated due process.

As noted by Guinness,

> the Uniform Act does *not* require that the procedures employed by the foreign tribunal be *identical* to those employed in American courts. The statute simply requires that the procedures be "*compatible* with the requirements of due process of law." ... (emphasis supplied). The drafters of the Uniform Act made it clear that "a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Unif. Foreign Money–Judgments Recognition Act § 4 comment, 13 U.L.A. 268 (1986).

Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 687 (7th Cir.1987) (citation and footnote omitted); *see also Hilton,* 159 U.S. at 205, 16 S.Ct. at 159. "The polestar is whether a reasonable method of notification is employed and reasonable opportunity to be heard is afforded to the person affected." *Somportex LTD. v. Philadelphia Chewing Gum Corp.,* 453 F.2d 435, 443 (3d Cir.1971), *cert. denied,* 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972).

[15] Consistent with contentions of Guinness, the *Mareva* injunction originated in the case of *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A. "the Mareva",* [1980] 1 All E.R. 213, and is designed to prevent a defendant from dissipating or hiding his assets at the outset of a case thus making any judgment subsequently rendered against him either worthless or difficult to enforce. *See* Halsbury's Laws of England (4th Edition) volume 37, paragraphs 362 and 363. As such, it would appear to be similar to the procedure of obtaining a temporary restraining order utilized in our federal system pursuant to Fed.R.Civ.P. 65(b).

[16] ***901** We find Ward's contention that the *ex parte* nature of Guinness' action in obtaining the *Mareva* injunction violated principles of due process and predisposed the remaining proceedings against him to be without merit. An *ex parte* application for a temporary restraining order is also permitted in our system, accordingly the very fact that such a procedure was used does not automatically result in a violation of due process. *See* Rule 65(b) ("A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from the specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.").

[17] Rather, a party when confronted with a proper motion for summary judgment on such issue must present "evidence" sufficient to demonstrate the existence of a genuine issue of material fact in such regard. We make no intimations as to what means might have been available for Ward to demonstrate such a genuine issue of material fact, but we do note that the mere placement by Ward and his British barrister of conclusory allegations and speculative assertions into affidavits or declarations without further legitimate support clearly does not suffice. *See Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510; *Ross,* 759 F.2d at 364.

We likewise conclude that Ward's argument that he has demonstrated a genuine issue of material fact concerning § 10–704(a)(1) of the Uniform Recognition Act by contending that the remedies granted by the *Mareva* injunction, set forth earlier in the opinion, in addition to the *ex parte* procedures used to obtain the injunction, violated fundamental principles of due process and created a serious injustice is without merit. As noted by the district court, we are here asked to recognize and enforce the British High Court final judgment and not the *Mareva* injunction issued at the outset of the High Court litigation. The fact that the one or more of the remedies granted in the *Mareva* injunction may have been excessive by American notions will not necessarily establish that the High Court was biased nor that the relevant procedures leading to the entry of the High Court final judgment did not comport with the requirements of due process.

Moreover, the record establishes that Ward was permitted to immediately confront the entry of the injunction and did so through British counsel within 2 days from such entry. *See Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *North Georgia Finishing, Inc. v. Di–Chem, Inc.,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Arnett*

v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Calero–Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). Several modifications were successfully obtained and additional time to comply permitted. In fact, Ward did not comply in any material fashion with the requirements of the injunction until after he had so appeared. Additionally, he also subsequently informed the High Court that he had previously offered to voluntarily place the disputed payment in escrow. It is thus hard to conceive of a serious injustice being created by the *Mareva* injunction.

As to the remaining procedures in the High Court, Ward continued to be represented by British counsel at all times therein. We cannot find in the record any actions or omissions by the High Court in its proceedings which demonstrate that its procedures failed to comport with the requirements of due process. Furthermore, leave was granted to Ward by the High Court to appeal its judgment to the British Court of Appeal, while leave was also subsequently granted by the Law Lords to appeal the Court of Appeal's decision to the House of Lords even after the Court of Appeal had denied such leave. We, therefore, conclude that the district court correctly decided this issue.

***902** IV.

Accordingly, we affirm the judgments below, although we reach this conclusion in part by different reasoning. [23]

AFFIRMED.

All Citations

955 F.2d 875

Footnotes

1 In an effort to comply with the injunction, Ward transferred approximately $2 million to London. Ward contends that such amount was all that remained from the payment. The $2 million was placed in escrow once transferred to London.

2 Ward contends that he chose not to return to England and appear personally before the High Court so as to not jeopardize alleged meritorious defenses to any attempt to extradite him for statutory violations allegedly unique to England.

3 Prior to its initiation of the British High Court litigation, Guinness had also brought a suit against Ward and MAC in the Isle of Jersey, MAC's place of incorporation.

4 The district court entered an order certifying its August 24, 1990, order pursuant to Fed.R.Civ.P. 54 on August 31, 1990. Ward subsequently filed a motion to reconsider the August 24 and 31 orders which was denied on October 11, 1990.

5 § 10–701(b) defines “foreign judgment” as “any judgment of a foreign state granting or denying recovery of a sum of money. It does not mean a judgment for taxes, fine, or penalty, or a judgment for support in matrimonial or family matters.”

6 § 10–705 proceeds to list a number of instances upon which a foreign judgment may not be refused recognition for lack of personal jurisdiction.

7 The district court noted in its order granting summary judgment on Guinness' complaint that Ward had not relied on this provision as a ground for refusing the High Court judgment recognition. We note that if given an ordinary and reasonable construction such provision would indeed appear not to apply to the facts of this case for that part of the High Court litigation involved in the judgment at issue was clearly not contrary to any agreement to settle the parties' dispute out of court inasmuch as such litigation had ended by the entry of the judgment prior to the creation of the alleged settlement agreement. Rather under the facts of the present case it is this litigation, i.e., the Maryland proceedings seeking recognition and enforcement of the High Court judgment, which is contrary to an alleged agreement to settle out of court. *See New Central Jute Mills Co. v. City Trade & Indus., LTD.,* 65 Misc.2d 653, 318 N.Y.S.2d 980, 985 (N.Y.Sup.Ct.1971).

8 We note as a preliminary matter that English Courts also look with favor on litigants' settlement of their disputes. *See* Halsbury's Laws of England (4th Edition) volume 37, paragraphs 382, 383, and 391.

9 While the goal of reciprocity might arguably not be advanced as far without mandatory enforcement, we nonetheless believe that such goal as well as the principles of comity are still sufficiently served by the fact that judgments which are not enforceable might still be entitled, if consistent with the Act's criteria, to recognition; for a finding of recognition establishes that such judgment is conclusive between the parties and will be given *res judicata* and collateral estoppel effect by the recognition court. Additionally maintaining the distinction between recognition and enforceability would also appear to enable courts to more adequately balance the interests of the rendering and recognition courts where such interests are arguably conflicting by allowing the recognition court to both respect principles of comity through recognition of the foreign judgment but yet avoid unnecessarily the subserviency of its own laws and public policies otherwise applicable regarding

the enforcement of such judgments. Thus, in close cases the ability of a recognition court to recognize a foreign judgment but yet refuse to enforce it might lead to the recognition of greater numbers of foreign judgments and correspondingly fewer instances of recognition courts broadly and expansively interpreting the Uniform Recognition Act's grounds for nonrecognition at the expense of unnecessarily endangering the goal of reciprocity behind the Act.

10 In *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 65 B.R. 466 (S.D.N.Y.1986), *aff'd,* 825 F.2d 709 (2d Cir.1987), the United States District Court for the Southern District of New York was faced with the question of whether it should recognize and enforce a British judgment, which was contrary to Swedish Bankruptcy proceedings, under New York's version of the Uniform Recognition Act. The district court initially noted that "... comity cannot require enforcement of a foreign judgment where a domestic judgment would not be enforced." *Victrix,* 65 B.R. at 469. After determining that the Second Circuit would extend comity to the Swedish Bankruptcy proceedings, the district court concluded that the English judgment would not be entitled to enforcement stating that the "[p]laintiff argues that non-enforcement of the London judgment is itself a violation of comity. We disagree. While comity may require recognition of the London judgment—meaning that we may be required to give it res judicata and collateral estoppel effect—recognition is not the same as enforcement." *Id.* at 470. On appeal, without any express indication that it was reversing the district court's noted distinction between recognition and enforcement, and without any explanation for its conclusion, the Second Circuit noted that "[t]he Act requires a court to enforce a 'conclusive' and valid foreign money judgment subject to seven discretionary bases for nonenforcement, N.Y.Civ.Prac.L. & R. 5304(b)." *Victrix,* 825 F.2d at 715. To the extent that such statement was meant to reverse the distinction noted by the district court and to the further extent that such conclusion was not dictated by any significant distinction between the New York Uniform Recognition Act and the Maryland Uniform Recognition Act, we do not find the Second Circuit's conclusion persuasive.

11 § 3 of the Uniform Act is codified in Maryland as § 10–703 and provides, as set out above, in relevant part that "[t]he foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."

12 We do note that inasmuch as the alleged settlement agreement appears to have never been performed or executed, it is doubtful that an accord and satisfaction would initially be found. The fact that Ward has termed such agreement to be an accord and satisfaction would not be controlling over what the actual intent or actions of the parties demonstrate. If an executory accord was found to exist and specific performance ordered an accord and satisfaction would then exist once such accord was performed or executed.

13 This detail is particularly necessary for conflicts of law purposes. As to choice of law questions regarding contract issues, Maryland courts generally follow the lex loci contractus approach and thus hold that while the law of the forum governs the remedy for breach of contract, the law of the place of contracting governs questions regarding the nature, validity and construction of a contract unless such law would violate a strong public policy of Maryland. *Traylor v. Grafton,* 273 Md. 649, 660, 332 A.2d 651 (1975); *Bethlehem Steel Corp. v. G.C. Zarnas and Co., Inc.,* 304 Md. 183, 187–89, 498 A.2d 605, 607–08 (1985).

14 *Res judicata* effect has, of course, traditionally been afforded foreign country judgments entitled to recognition consistently with principles of comity. The Maryland Uniform Recognition Act, itself, codifies such principles by indicating in § 10–703 that "[e]xcept as provided in § 10–704, a foreign judgment meeting the requirements of § 10–702 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to *full faith and credit.*" (*Emphasis added*).

15 As noted previously, Guinness supported its motions for summary judgment in part with an affidavit of its British barrister. It is interesting to note that Guinness' barrister does not attempt to argue in such affidavit that Ward would now be barred from raising such post judgment settlement, as opposed to other defenses Ward raised to Guinness' complaint seeking recognition and enforcement, in England due to the doctrine of *res judicata,* but rather relies on distinct and separate election theories in such regard. Because we conclude for reasons to be discussed, *infra,* that judicial estoppel bars Ward from raising such post judgment settlement, we need not determine whether the election theories discussed by Guinness' barrister would also apply.

16 Guinness cites several cases including *Ingersoll Milling Machine Co. v. Granger,* 833 F.2d 680 (7th Cir.1987); *Porisini v. Petricca,* 90 A.D.2d 949, 456 N.Y.S.2d 888 (1982); and *Federal Deposit Insurance Corp. v. Jones,* 846 F.2d 221 (4th Cir.1988), the latter of which the district court found controlling, in support of its contention that the doctrine of *res judicata* would bar Ward from raising the post judgment settlement agreement in the district court. We will not discuss these cases in detail for we agree with Ward that such cases are distinguishable in that they all involved settlement agreements, or legal theories such as promissory or equitable estoppel resulting from the parties' actions or promises concerning alleged agreements, which existed prior to the entry of final judgment and thus either were or could have been raised in the prior proceeding before the court of original jurisdiction.

17 *See also Fairfax Countywide Citizens v. Fairfax County,* 571 F.2d 1299, 1305 (4th Cir.), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978); *Harman v. Pauley,* 678 F.2d 479, 481 (4th Cir.1982); *United States v. American Nat. Bank and Trust Co.,* 101 F.R.D. 770, 771–72 (N.D.Ill.1984) (Courts noting in cases involving a party's attempt to reopen a case pursuant to Fed.R.Civ.P. 60(b)(5) to enforce prejudgment settlements which resulted in dismissal of the cases that these attempts to enforce such settlements are normally separate causes of action and that the parties should more appropriately bring separate actions to so enforce in either an appropriate federal court, if grounds for jurisdiction exist, or state court; unless the terms of such settlements were expressly incorporated in the district court's dismissal order).

18 Although we believe that the alleged post judgment settlement is in recognition of the High Court's final judgment, for reasons to be discussed, *infra,* we believe that such agreement was in direct contradiction of Ward's right to appeal such judgment through the British appellate courts; thus, creating an appropriate situation for the application of the doctrine of judicial estoppel as opposed to *res judicata.*

19 This Court stated in *Zurich,* 667 F.2d at 1167, that "though perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, it is obviously more appropriate in that situation." We note here that Ward was successful in the pertinent aspect, i.e., he succeeded in appealing the High Court judgment through the British appellate system as opposed to succeeding in overturning the High Court judgment.

20 This Court also noted in *Zurich* that "[a]lthough this is a diversity case, we consider that federal law controls the application of judicial estoppel, since it relates to protection of the integrity of the federal judicial process. We think that neither 28 U.S.C. § 1738, the full faith and credit statute, nor *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), requires inquiry into the possible existence of a conflicting state rule." *Id.* at 1167 n. 4.

21 In *Zurich,* this Court noted that while the doctrine of judicial estoppel "... was not specifically raised either in the trial court or on appeal, we are satisfied that under the circumstances of its close relationship to the directly contested issue ... we may properly rely upon it as an alternative basis for affirmance." *Id.* at 1168 n. 5.

In the case *sub judice*, Guinness did raise the doctrine of judicial estoppel to the trial court in its reply in further support of its motion for summary judgment on Ward's counterclaim. The trial court, however, did not rely upon such ground in granting Guinness' motion. On appeal, Guinness has again raised the doctrine as an alternative ground for affirmance of the district court's judgments.

We note, however, that even if Guinness had not specifically raised the applicability of the doctrine, we, like the Court in *Zurich,* would, hold that its close relationship to other directly contested issues renders its usage as an alternative basis for affirmance appropriate.

22 We have examined the parties' other related arguments on this issue and conclude that they are either unavailing or unnecessary for our determination. *See* footnote 15, *supra.*

23 We wish to stress that nothing in this opinion is meant to prevent Ward from receiving credit at the time of the judgment's execution for any payment he has so far made to Guinness whether made pursuant to the *Mareva* injunction, the High Court's final judgment, the district court's final judgment, or the alleged settlement agreement. Any other conclusion would unjustly benefit Guinness.

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AA-53

238 Cal.App.4th 124
Court of Appeal, Second
District, Division 7, California.

Corey HAMBRICK, Plaintiff and Appellant,
v.
HEALTHCARE PARTNERS MEDICAL GROUP, INC. et al., Defendants and Respondents.

B251643
|
Filed June 1, 2015
|
Rehearing Denied June 17, 2015
|
Review Denied September 30, 2015

Synopsis

Background: Patient brought putative class action against a professional medical corporation and related entities for violation of the unfair competition law (UCL), common law fraudulent concealment, and violation of the false advertising law (FAL) in allegedly operating as a health care service plan without obtaining the license required by the Knox–Keene Health Care Service Plan Act. The Superior Court, Los Angeles County, No. BC492767, William F. Highberger, J., sustained demurrer without leave to amend under the doctrine of judicial abstention. Patient appealed.

Holdings: The Court of Appeal, Feuer, J., held that:

[1] trial court acted within its discretion in invoking the abstention doctrine as to the statutory causes of action;

[2] common law cause of action for fraudulent concealment was not subject to dismissal under abstention doctrine; and

[3] corporation and related entities owed no duty of disclosure supporting liability for fraudulent concealment.

Affirmed.

West Headnotes (27)

[1] Insurance Health care

Under the Knox–Keene Health Care Service Plan Act, a risk-bearing organization may accept per-patient payments under capitation agreements without becoming a health care service plan. Cal. Health & Safety Code §§ 1345(f)(1), 1348.6(b), 1375.4(g)(1)(B).

2 Cases that cite this headnote

[2] Evidence Official proceedings and acts

Court of Appeal would take judicial notice of memo prepared by the Financial Solvency Standards Board (FSSB) entitled "Overview of Risk–Sharing Arrangements" for the limited purpose of providing context to the parties' arguments, but not as a statement of the FSSB's or the Department of Managed Health Care's (DMHC) interpretation of the law, in patient's putative class action against a professional medical corporation and related entities for allegedly operating as a health care service plan without obtaining the license required by the Knox–Keene Health Care Service Plan Act. Cal. Health & Safety Code §§ 1345, 1347.15(a); Cal. Evid. Code §§ 452, 459.

[3] Appeal and Error Abuse of discretion

Appeal and Error Abstention

A trial court's decision to dismiss a lawsuit or a cause of action based on the doctrine of judicial abstention is reviewed for abuse of discretion; a trial court abuses its discretion when its decision exceeds the bounds of reason by being arbitrary, capricious, or patently absurd in light of the circumstances.

3 Cases that cite this headnote

[4] Appeal and Error Abstention

Unless there has been a clear miscarriage of justice in the dismissal of a lawsuit or a cause

of action based on the doctrine of judicial abstention, a reviewing court will not substitute its opinion for that of the trial court so as to avoid divesting the trial court of its discretionary power.

[5] **Appeal and Error** Abuse of discretion

Appeal and Error Review for Correctness or Error

Under the abuse of discretion standard of review, if the trial court is mistaken about the scope of its discretion, the mistaken position may be "reasonable," i.e., one as to which reasonable judges could differ, but if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law.

4 Cases that cite this headnote

[6] **Courts** Abstention

Under the abstention doctrine, a trial court may abstain from adjudicating a suit that seeks equitable remedies if granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.

[7] **Courts** Abstention

Abstention from adjudicating a suit that seeks equitable remedies may be appropriate if the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency, or if granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.

[8] **Courts** Abstention

Abstention from adjudicating a suit that seeks equitable remedies is generally appropriate only if there is an alternative means of resolving the issues raised in the plaintiff's complaint.

[9] **Courts** Abstention

Trial court acted within its discretion in applying the doctrine of judicial abstention to dismiss patient's putative class action claims against a professional medical corporation and related entities for violations of the unfair competition law (UCL) and false advertising law (FAL) in allegedly operating as a health care service plan without obtaining the license required by the Knox–Keene Health Care Service Plan Act, since the medical corporation did not fall within the definition of a "health care service plan" under the plain language of the Knox–Keene Act, patient's theory that the medical corporation operated as a health care service plan depended on whether it had assumed the "global risk" of hospital care under capitation agreements, the issue of what level of risk assumed by a medical group under a capitation agreement would cause it to be characterized as a health care service plan was a regulatory determination involving complex economic policy that should be made by the Department of Managed Health Care (DMHC) in the first instance, and the DMHC Director's authority to issue cease and desist orders or to seek an order from the superior court represented adequate alternative means of resolving the issues. Cal. Health & Safety Code §§ 1253(a), 1345(f)(1), 1392(a)(2).

2 Cases that cite this headnote

[10] **Courts** Abstention

While judicial abstention is not appropriate where resolution of the issues involves solely the judicial function of resolving questions of law based on facts before the court, abstention is appropriate where resolution of a case would require the court to assume general regulatory powers and determine complex economic policies.

[11] **Antitrust and Trade Regulation** In general; unfairness

Antitrust and Trade Regulation Source of prohibition or obligation; lawfulness

In prohibiting "unlawful" business practices, the Unfair Competition Law (UCL) "borrows" rules set out in other laws and makes violations of those rules independently actionable, but a business practice or act that does not violate a statute may also violate the UCL because the UCL proscribes "unfair" and "fraudulent" business practices. Cal. Bus. & Prof. Code § 17200.

3 Cases that cite this headnote

[12] **Antitrust and Trade Regulation** Advertising, marketing, and promotion

False advertising under the False Advertising Law (FAL) constitutes a fraudulent business practice under the Unfair Competition Law (UCL). Cal. Bus. & Prof. Code §§ 17200, 17500.

4 Cases that cite this headnote

[13] **Antitrust and Trade Regulation** Injunction

Antitrust and Trade Regulation Monetary Relief; Damages

The equitable remedies under the Unfair Competition Law (UCL) and False Advertising Law (FAL) are subject to the broad discretion of the trial court, and therefore, restitutionary or injunctive relief is not mandatory; rather, equitable considerations may guide the court's discretion in fashioning a remedy for a UCL violation. Cal. Bus. & Prof. Code §§ 17200, 17500.

5 Cases that cite this headnote

[14] **Implied and Constructive Contracts** Restitution

The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.

[15] **Antitrust and Trade Regulation** Particular cases

Co-payments, deductibles, and co-insurance payments made by patient to medical corporation, allegedly as a result of medical corporation's unfair business practices or false advertising, were properly characterized as restitution that could be recovered on patient's Unfair Competition Law (UCL) and False Advertising Law (FAL) claims. Cal. Bus. & Prof. Code §§ 17200, 17500.

[16] **Antitrust and Trade Regulation** Particular cases

Money paid by patient's health care service plan to medical corporation under a capitation agreement, allegedly as a result of medical corporation's unfair business practices or false advertising, was not recoverable by patient as restitution under Unfair Competition Law (UCL) and False Advertising Law (FAL), because the money was not money in which patient had an ownership interest or that was "lost by a plaintiff." Cal. Bus. & Prof. Code §§ 17200, 17500.

4 Cases that cite this headnote

[17] **Antitrust and Trade Regulation** Profits

Nonrestitutionary disgorgement of profits is not recoverable in a Unfair Competition Law (UCL) action. Cal. Bus. & Prof. Code § 17200.

[18] **Implied and Constructive Contracts** Unjust enrichment

Implied and Constructive Contracts Restitution

There are two types of disgorgement: "restitutionary disgorgement," which focuses on the plaintiff's loss, and "nonrestitutionary disgorgement," which focuses on the defendant's unjust enrichment.

[19] **Costs** Public interest and substantial benefit doctrine; private attorney general

An award under the private attorney general fee statute requires a showing that (1) the litigation enforced an important right affecting the public interest; (2) it conferred a significant benefit on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement, or enforcement by one public entity against another, were such as to make the award appropriate; the third element involves two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys. Cal. Civ. Proc. Code § 1021.5.

[20] **Insurance** Health care

The enforcement powers of the Department of Managed Health Care (DMHC) under the Knox–Keene Health Care Service Plan Act cover both licensed and unlicensed health care service plans. Cal. Health & Safety Code § 1391.

2 Cases that cite this headnote

[21] **Evidence** Official proceedings and acts

Court of Appeal would take judicial notice of cease and desist orders issued under the Department of Managed Health Care's (DMHC) authority to prevent unfair competition and false advertising by entities operating as health care service plans, in reviewing trial court's application of doctrine of judicial abstention to patient's action against a professional medical corporation and related entities for violation of the unfair competition law (UCL) and violation of the false advertising law (FAL) in allegedly operating as an unlicensed health care service plan. Cal. Health & Safety Code §§ 1386(b)(7), 1391; Cal. Evid. Code §§ 452(c), 459.

[22] **Insurance** Health care

The Knox–Keene Health Care Service Plan Act provision authorizing the director of the Department of Managed Health Care (DMHC) to bring an action in superior court or to request the Attorney General to bring an action to obtain injunctive and other "equitable relief" allows a court, upon the filing of such an action by the director or the Attorney General, to issue equitable relief including restitution. Cal. Health & Safety Code § 1392(a)(2).

[23] **States** Costs

The Knox–Keene Health Care Service Plan Act does not provide statutory authority for the director of the Department of Managed Health Care (DMHC) to award attorney fees. Cal. Health & Safety Code § 1340 et seq.

[24] **Courts** Abstention

The doctrine of judicial abstention was not a proper basis for the trial court to dismiss patient's fraudulent concealment cause of action in patient's putative class action against a professional medical corporation and related entities, regardless of whether the cause of action would qualify for class treatment, where the cause of action included a claim for damages.

[25] **Fraud** Fraudulent Concealment

The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact.

17 Cases that cite this headnote

[26] **Fraud** Duty to disclose facts

Professional medical corporation and related entities owed no duty to patient to disclose or obtain informed consent to their alleged

assumption of financial responsibility for patient's hospital care from patient's health care service plan on a capitation basis, and thus the nondisclosure did not give rise to fraudulent concealment liability, even if the corporation's assumption of financial responsibility led it to limit patient's access to hospital care to only those hospitals with which the medical corporation contracted, and to prohibit patient from accessing "better" hospitals that contracted with her health care service plan.

[27] **Antitrust and Trade Regulation** Costs and attorney fees

Costs Particular Actions or Proceedings

Trial court properly awarded costs to professional medical corporation and related entities upon dismissal of patient's action for violation of the unfair competition law (UCL), common law fraudulent concealment, and violation of the false advertising law (FAL) in allegedly operating as a health care service plan without obtaining the license required by the Knox–Keene Health Care Service Plan Act, even if the dismissal was on the "procedural" ground of judicial abstention. Cal. Civ. Proc. Code § 1032; Cal. Bus. & Prof. Code §§ 17200, 17500; Cal. Health & Safety Code § 1340 et seq.

See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 793 et seq.

**35 APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed. (Super. Ct. No. BC492767)

Attorneys and Law Firms

McMurray Henriks, Yana G. Henriks and Randy H. McMurray, Los Angeles, for Plaintiff and Appellant.

McDermott Will & Emery, Terese A. Mosher Beluris and Gregory R. Jones, Los Angeles, for Defendants and Respondents.

OPINION

**36 FEUER, J. *

INTRODUCTION

*132 Plaintiff Corey Hambrick (Hambrick) brought this class action alleging causes of action for violation of the unfair competition law (UCL; Bus. & Prof.Code, § 17200 et seq.), common law fraudulent concealment, and violation of the false advertising law (FAL; *id.,* § 17500) against defendants Healthcare Partners Medical Group, Inc. (MGI), Healthcare Partners, LLC (HCP-LLC), and DaVita Healthcare Partners, Inc. (DVHCP) (collectively HCP or the HCP defendants). [1] The premise underlying all of Hambrick's claims is that although HCP does not fall within the literal definition of a "health care service plan" [2] as defined in Health and Safety Code section 1345, subdivision (f)(1), [3] due to the level of risk it assumed, HCP operated as a health care service plan without obtaining the license required by the Knox-Keene Health Care Service Plan Act of 1975 [4] (Knox-Keene Act; § 1340 et seq.), and without meeting the regulatory mandates required of health care service plans.

*133 The trial court, relying on the doctrine of judicial abstention, sustained without leave to amend the demurrers filed by the HCP defendants and entered a judgment of dismissal. Hambrick appeals from the judgment, which includes an order awarding the HCP defendants costs.

Hambrick argues on appeal that HCP was required to have a license under the Knox-Keene Act because it accepted a level of "global risk" that transforms it from a medical "risk-bearing organization" under section 1375.4 to a "health care service plan" under section 1345. However, neither the Knox-Keene Act nor the regulations adopted by the Department of Managed Health Care (DMHC) defines the level of risk that would cause a medical entity like HCP to become a de facto health care service plan. We find that this determination of an acceptable risk level is a regulatory decision involving complex economic policy considerations that should be made by DMHC, the regulatory agency tasked with interpreting and enforcing the Knox-Keene Act.

We therefore conclude that the trial court acted within its discretion in invoking the abstention doctrine as to the

statutory causes of action but not as to the common law cause of action for fraudulent concealment. However, we find that Hambrick **37 failed to plead a claim for fraudulent concealment, and that she has failed to demonstrate how she could amend the operative complaint to cure the defect. We affirm the judgment of dismissal, including the order awarding costs.

FACTUAL AND PROCEDURAL BACKGROUND [5]

A. *The First Amended Complaint*

On January 25, 2013, Hambrick, on behalf of herself and others similarly situated, filed a first amended class action complaint for damages and equitable relief against the HCP defendants.[6] Hambrick alleges that MGI is a professional medical corporation and HCP-LLC is a wholly owned subsidiary *134 or affiliate of DVHCP, a Delaware corporation. MGI and HCP-LLC "operated in such a way as to make their individual identities indistinguishable, and are therefore the mere alter egos of one another."

As alleged, HCP operated as a health care service plan for nearly a decade without obtaining the license required by the Knox-Keene Act. Hambrick paid her medical premiums to a health care service plan other than HCP. However, HCP assumed the financial risk and responsibility for Hambrick's "institutional care" (hospital care)[7] and other health care services (e.g., physicians), and it paid for her care through contracts with health care service plans and other third parties. By assuming the financial risk for Hambrick's hospital care without a license, HCP purported to relieve Hambrick's health care service plan, which is legally responsible for her care, of any financial responsibility for her care.

HCP directed Hambrick's hospital care, limiting her access to hospital care to only those hospitals with which HCP contracted, and prohibiting her from accessing "better" hospitals that contracted with her health care service plan. In addition, HCP directed Hambrick's specialty care "to physicians who practice at the hospitals with which HCP contracts" and "away from better physicians who practice at hospitals with which HCP does not contract in order to avoid paying for high quality care." Hambrick alleges that she was entitled to use the better hospitals and physicians who contracted with the health care service plan to which she paid her premiums.

Hambrick further alleges that HCP purposefully limited her access to care for the **38 purpose of maximizing profits as a result of its "assumption of institutional financial risk without the required State license." By doing this, HCP "avoided a near decade of regulatory scrutiny of its operations, avoided paying the regulatory fees assessed by DMHC to all licensees, and avoided the numerous specific, consumer-protection mandates in the Knox-Keene Act such as the requirement to provide timely access to medically necessary care." In addition, HCP "reaped extraordinary profits in the billions of dollars by delaying and denying access to medically necessary care to its members."

Up until October 2012, Hambrick was an employee of MGI, and she was a patient of MGI from 2011 to 2012. While employed by MGI, Hambrick acquired personal knowledge that HCP "was paying claims for institutional/hospital care for claims for which HCP had assumed the responsibility for payment." MGI's physicians served as Hambrick's primary care *135 physicians (PCPs). She alleges that her "assigned PCPs failed to adequately diagnose or treat the source of [her] injury."[8] She was referred to at least two specialists with HCP's "network of contracted or employed staff physicians," each of whom "failed to accurately diagnose or treat [her] injuries."

In January, March and July 2012, Hambrick complained to MGI "that she was receiving inferior care from her assigned physicians, and protested both the quality of her care and the delays in accessing primary and specialist care." Hambrick alleges that HCP "delayed her access to care because [HCP] had assumed risk for hospital charges, even though they did not have the required State license that would allow them to assume the risk for such institutional care." In addition, she alleges "that the desire to avoid a hospital claim affected the decisions made by HCP which restricted HAMBRICK'S access to high quality specialists who practiced at hospitals with whom HCP did not contract."

Hambrick alleges further that HCP's "desire to avoid paying hospital claims it had agreed to become responsible for, caused HCP to deny HAMBRICK[ ] access to qualified specialists and physicians who could accurately diagnose and treat her, because those physicians might admit HAMBRICK to HCP's non-preferred hospitals. HAMBRICK ultimately was forced to purchase her own insurance and to seek care outside of [MGI] in order to timely access care."

Hambrick defines the purported class as "[a]ll patients for whom HCP assumed financial responsibility for the institutional care of, or directed the institutional care of" and "[a]ll HCP patients treated by HCP while HCP is or was controlled or owned by non-physician shareholders."

In the first cause of action for violation of the UCL, Hambrick alleges that HCP violated numerous statutory provisions, including those in the Knox-Keene Act, and that HCP's actions constituted fraudulent and unfair business practices under the UCL. Hambrick alleges that HCP profited by ignoring the requirements of California law, including the requirements for financial reserves applicable to health care service plans. Hambrick also alleges that HCP profited by denying access to care and providing inferior care. Hambrick seeks disgorgement of "ill-gotten gains" and "an injunction prohibiting [HCP] from violating California law."

The second cause of action for fraud and "concealment" alleges that "Plaintiffs and [the HCP defendants] were in a relationship of trust," and that the HCP defendants ****39** had a duty "to disclose to their patients all material ***136** information a reasonable patient would want to know before consenting to treatment." The HCP defendants concealed that they had illegally assumed financial responsibility for hospital care and that this would affect the physicians and hospitals to which HCP would direct plaintiffs. HCP further concealed that it was not licensed as a health care service plan or hospital, "and therefore was not lawfully permitted to accept hospital risk or direct hospital care, and that Plaintiffs would not be afforded all the protections afforded to consumers by a Knox-Keene licensed entity."

The complaint further alleges that plaintiffs "reasonably relied upon [the HCP defendants] to seek their fully informed consent, and to treat them consistent with good professional practice and medical standards." Hambrick alleges that she was injured because she received deficient care from the physicians and hospitals to which she was referred instead of the physicians and hospitals that contracted with the health care service plans to which she paid her premiums. She alleges as damages "physical injuries, emotional injuries, loss of income, future medical expenses, [and] co-pays or co-insurance payments to the hospitals." Hambrick also seeks punitive damages against HCP pursuant to Civil Code section 3294.

Hambrick's third cause of action is for violation of the FAL. She alleges that the HCP defendants "advertise, including through their website www.healthcarepartners.com, that they are committed to the guiding principle of coordinated care," that the services provided by HCP "are 'patient centered,' " and that HCP "will always strive for the highest quality outcomes." HCP concealed its unlicensed status, the financial arrangements by which it was obligated to pay for Hambrick's care, and the fact that "Plaintiffs would not be afforded the other consumer protections provided by the Knox-Keene Act."

Contrary to its representations, HCP "did not provide to Plaintiffs coordinated care intended to achieve the highest quality outcomes. Instead, [the HCP defendants] managed their patients' and Plaintiffs' care in a manner designed to delay or deny physician, specialist and hospital care necessary to properly diagnose and treat Plaintiffs' conditions." The HCP defendants' advertisement and representations were made with knowledge that they "had assumed full financial risk without a Knox-Keene license and without the financial reserves required of licensed health plans." Hambrick alleges that HCP made the representations with the intent to induce patients and health plan members to use HCP for their services, and that HCP knew it was misleading them. Hambrick alleges as damages the premiums paid to HCP, co-pays, deductibles, and co-insurance payments paid to HCP.

***137** In her third cause of action, Hambrick seeks to "disgorge [the HCP defendants] of all unjust gains," including "all capitation [9] paid to [the HCP defendants], and all co-pays, deductibles and co-insurance payments paid to [the HCP defendants]" and for injunctive relief, including to "enjoin ****40** [the HCP defendants] from their misleading advertising."

B. *Demurrers*

On March 20, 2013, MGI filed a demurrer to the first amended complaint and a motion to strike. MGI also sought a protective order staying discovery. MGI demurred on the grounds that Hambrick failed to state facts sufficient to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)) and that the court lacked jurisdiction (*id.*, § 430.10, subd. (a)). In its points and authorities, MGI argued that the doctrine of judicial abstention required dismissal of all claims or, in the alternative, the court should invoke the doctrine of primary jurisdiction to allow the DMHC to make a licensing decision.

MGI also argued that each cause of action failed to state a claim. MGI challenged the fraudulent concealment cause

of action on the ground Hambrick failed to plead a duty to disclose, justifiable reliance, causation and recoverable damages. Finally, MGI argued that plaintiffs lacked standing to bring a cause of action for false advertising on the basis that they had not alleged that they saw MGI's advertising or relied on it in selecting MGI's physicians.

On April 12, 2013, HCP-LLC and DVHCP filed a separate demurrer raising the same issues raised by MGI in its demurrer. In their demurrer, HCP-LLC and DVHCP also argued that the claims against them should be dismissed because Hambrick failed adequately to plead any alleged wrongdoing or secondary liability on their part. HCP-LLC and DVHCP also sought a protective order.

Hambrick opposed both demurrers, as well as MGI's motion to strike. In her opposition to the demurrers, Hambrick acknowledged that "not ... all capitated medical groups accepting professional risk are health plans," but argued that HCP's "direct or indirect acceptance of hospital capitation constitutes unlicensed health plan operation" and is a "*per se* violation of the Knox-Keene Act."

138 C. *Trial Court's Ruling

On June 21, 2013 the trial court sustained MGI's demurrer without leave to amend as to all three causes of action, adopting in its entirety its previously issued tentative decision. Addressing MGI's request that it invoke the doctrine of judicial abstention, the trial court observed:

"Consumer cases involving challenges to the conduct of health care plans, health care insurers and health care providers, commonly brought as class action claims under [the UCL], have presented the judicial abstention issue in many different factual contexts. The trial court rulings and appellate rulings thereon do not present a tidy pattern with an easily ascertainable test for when judicial abstention should or should not be applied. This, in its own way, would appear to demonstrate why there are a range of reasonable rulings which can be made in a given factual and legal context to either abstain or not abstain according to the trial court's best evaluation of (a) the complexity of the issue(s) presented, (b) its/their overlap with issues committed to the primary jurisdiction of the regulatory authority and (c) the possibility that inconsistent directions will be given to the regulated entity if the [c]ourt acts in tandem with the authorized regulator's continuing exercise of its power to direct specific conduct.

"The class action case here is pled under Business [and] Professions Code [sections] 17200 and 17500 and as a common law claim for fraud, but common-law fraud claims, as such, hardly ever qualify for class treatment. The real nub of the case, ****41** therefore, is the equitable UCL claim and [FAL] claim pled on behalf of a putative class. The [c]ourt finds in the exercise of its discretion after reviewing the argument of all parties that this is a suitable case for the application of judicial abstention. Each cause of action requires the [c]ourt to decide whether or not [MGI] is a health plan that was required to have been licensed under the [Knox-Keene Act]. To determine whether or not [MGI] is or is not in compliance with health maintenance organization licensing laws requires a detailed analysis of complex corporate structures, of risk allocation via service provider 'cap[it]ation' contracts of the cost of providing medical care, and many related factual and legal issues."

After a consideration of applicable case law and authorities cited by plaintiffs, the trial court was "not persuaded that it should allow this case to proceed in this forum." It therefore sustained MGI's demurrer without leave to amend. The court did not reach MGI's argument that plaintiffs failed to state facts sufficient to state their causes of action.

As to the demurrer filed by HCP-LLC and DVHCP, the trial court noted that "[e]ach of the three causes of action as against each of these two ***139** co-defendants ... would require the [c]ourt to deal with the same licensing issue presented by the direct claim of plaintiffs against [MGI]. Thus for the same reasons that abstention will be applied as to the claims against [MGI], the [c]ourt determines that it is prudent to abstain as to the interrelated claims against these two parties."

In light of its ruling on the demurrers, the trial court declared MGI's motion to strike, as well as the motions for a protective order staying discovery, to be moot.

On July 19, 2013, the trial court entered judgment in favor of the HCP defendants, awarded them costs, and dismissed the action with prejudice. Thereafter, the HCP defendants filed a memorandum of costs. Hambrick moved to tax costs, arguing that the HCP defendants were not prevailing parties in light of the trial court's decision to abstain and that the HCP defendants failed to itemize their costs. The HCP defendants then filed a restated memorandum of costs. The trial court denied the motion to tax costs.

This timely appeal by Hambrick from the judgment of dismissal, including its award of costs, followed.

DISCUSSION

A. *Overview of the Knox-Keene Act*

1. Provisions of the Act

The Knox-Keene Act "provides the legal framework for the regulation of California's individual and group health care [service] plans" by the DMHC. (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1215, 172 Cal.Rptr.3d 823.) The Legislature's "intent and purpose" in enacting the Knox-Keene Act was "to promote the delivery and the quality of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan...." (§ 1342.)

The DMHC "has charge of the execution of the laws of this state relating to health care service plans and the health care service plan business including, but not limited to, those laws directing the department to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees." (§ 1341, subd. (a).) The chief officer of the DMHC is the Director of the DMHC. (Id., subd. (b).) "The director shall be responsible for the performance of all ***140** duties, the ****42** exercise of all powers and jurisdiction, and the assumption and discharge of all responsibilities vested by law in the department...." (Id., subd. (c).)

The Knox-Keene Act defines a " '[h]ealth care service plan' " as "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." (§ 1345, subd. (f)(1).) The term " '[p]erson' " includes a medical corporation or association. [10] (Id. subd. (j).) " 'Basic health care services' " encompass "[p]hysician services, including consultation and referral," "[h]ospital inpatient services and ambulatory care services," "[d]iagnostic laboratory and diagnostic and therapeutic radiologic services," "[h]ome health services," "[p]reventative health services," "[e]mergency health care services," and "[h]ospice care." (Id. subd. (b)(1)-(7).)

Health care service plans must be licensed by the DMHC in order to operate in California. (§ 1349; *Viola v. Department of Managed Health Care* (2005) 133 Cal.App.4th 299, 309, 34 Cal.Rptr.3d 626; *Imbler v. PacifiCare of Cal., Inc.* (2002) 103 Cal.App.4th 567, 570, 126 Cal.Rptr.2d 715.) Section 1349 provides: "It is unlawful for any person to engage in business as a plan in this state or to receive advance or periodic consideration in connection with a plan from or on behalf of persons in this state unless such person has first secured from the director a license ...," or the person is exempt from regulation. [11]

A licensed health care service plan may contract with a "risk-bearing organization" for the provision of health care services. (§ 1375.4; Cal.Code Regs., tit. 28, § 1300.75.4 et seq.) A risk-bearing organization includes "a professional medical corporation, other form of corporation controlled by physicians and surgeons, a medical partnership, ... or another lawfully organized group of physicians that delivers, furnishes, or otherwise arranges ***141** for or provides health care services," other than a health care service plan, "that does all of the following: [¶] (A) Contracts directly with a health care service plan or arranges for health care services for the health care service plan's enrollees. [¶] (B) Receives compensation for those services on any capitated or fixed periodic payment basis. [¶] (C) Is responsible for the processing and payment of claims made by providers for services rendered by those providers on behalf of a health care service plan that are covered under the capitation or fixed periodic payment made by the plan to the risk-bearing organization ...." (§ 1375.4, subd. (g).) [12]

****43** The central issue in this case is whether HCP is a health care service plan under section 1345, subdivision (f)(1), or a risk-bearing organization under section 1375.4, subdivision (g). Only the former requires a Knox-Keene license. As we discuss below, the question of the proper characterization of HCP can only be determined by making a policy determination as to the acceptable level of risk a medical group may accept before being required to obtain a license as a health care service plan.

2. Characterization of HCP Under the Knox-Keene Act

Hambrick has not asserted in the trial court or on appeal that HCP meets the statutory definition of a health care service plan as one that "undertakes to arrange for the provision of health care services to subscribers or enrollees ... in return for a prepaid or periodic charge paid by or on behalf of

the subscribers or enrollees." (§ 1345, subd. (f)(1).) Indeed, Hambrick alleges that she made payments for medical care to an organization other than HCP, which in turn made payments to HCP for her medical care.

Instead, in her opening brief, Hambrick argues that "MGI is assuming global healthcare risk and so is acting as a health plan." When asked at oral argument on what basis a court should determine whether HCP is a health care service plan under section 1345, subdivision (f)(1), or a medical group serving as a risk-bearing organization under section 1375.4, subdivision (g), Hambrick's counsel responded that this determination can be made by reviewing HCP's contracts to determine whether it is accepting "global risks." Counsel argued: "You can have capitation agreements but not to the point that you are accepting global risk without a license."

When asked where the court would find a definition of unacceptable global risk, Hambrick's counsel responded that the court should look at the ***142** definition in section 1349.2, subdivision (a)(3), for the definition of fee-for-service. This section currently provides that one of the conditions for a health care service plan that provides health care *for public entities* to be exempt from the licensing requirements is that "providers are reimbursed solely on a fee-for-service basis, so that providers are not at risk in contracting arrangements." (Id., subd. (a)(3).)

[1] It is not the case, however, that a risk-bearing organization cannot accept any per-patient payments under capitation agreements without becoming a health care service plan. Rather, as we discuss above, licensed health care service plans may contract with risk-bearing organizations that "[r]eceive[ ] compensation for those services on any capitated or fixed periodic payment basis." [13] (§ 1375.4, subd. (g)(1)(B).) Similarly, section 1348.6, subdivision (b), allows a health care service plan to make payments to a physician group, including "general payments, such as capitation payments." [14]

****44** Further, as our colleagues in the Fourth District have held, "the Legislature has specifically approved of various risk-shifting arrangements including capitation payments." (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 162, 114 Cal.Rptr.2d 109, fn. omitted; accord, *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 789, 114 Cal.Rptr.2d 623 (*Desert Healthcare*).) "Similarly, administrative regulations contemplate the contractual shifting of financial risk from health plans to other risk-bearing entities." (*California Medical Assn.*, *supra,* at p. 162, 114 Cal.Rptr.2d 109.)

[2] Alternatively, Hambrick appears to be requesting that this court consider a prior version of section 1349.3 that was repealed effective January 1, 2002, and thus is not applicable here. The only reference in the record to the former section 1349.3 is the memorandum entitled, "Overview of Risk-Sharing Arrangements," which was prepared by the Financial Solvency Standards Board (FSSB) [15] for a January 29, 2002 meeting of the DMHC (FSSB ***143** Memo), which document has been referenced by both parties in their briefs and oral argument. [16] The FSSB Memo states as to section 1349.3, after acknowledging that it has been repealed: "This provision restated the general proposition, that a health plan may not contract with anyone but a licensed health care plan 'for the assumption of financial risk with respect to the provision of both institutional and non-institutional health care services and any other form of global capitation.' "

We are not aware of any current provision of the Knox-Keene Act or the DMHC regulations that defines "global risk" or states that a risk-bearing organization taking on global risk thereby is transformed into a health care service plan. Rather, it appears that Hambrick seeks for the court to consider the now-repealed section 1349.3, as interpreted by the FSSB Memo, to find that HCP, by entering into "global capitation" agreements with a health care service plan, is itself a health care service plan.

The challenge for Hambrick, however, is that neither the repealed section of the Knox-Keene Act nor the FSSB Memo is controlling law on the definition of a health care service plan. Moreover, even if the court were to find that a medical group accepting "global risk" must have a license under the Knox-Keene Act as a health care service plan, nowhere does the Knox-Keene Act or DMHC's regulations define what level of risk would cause a risk-bearing organization to become a health care service plan. Rather, this is a regulatory decision that would need to be made ****45** by the DMHC in deciding whether HCP needs a license. Having the court decide the level of acceptable risk that a medical group may bear without becoming a health care service plan would cause the court to wade into the complex economic policy and regulatory framework that are better left to the DMHC.

B. *The FSSB Memorandum*

In support of her opposition to the demurrers, Hambrick asked the trial court to take judicial notice of the FSSB Memo. It does not appear from the record that the trial court ruled on this request. At oral argument, however, counsel for both sides referred repeatedly to the document. When asked to what an entity would refer when determining whether it needed a license, counsel for the HCP defendants responded in part by referring to the FSSB Memo. Similarly, in the HCP defendants' brief they cite to the FSSB Memo.

***144** Because both parties relied on the document at oral argument and it can be found on the DMHC's Web site (www.dmhc.ca.gov), [17] we take judicial notice of the document on appeal, but only to the extent it gives meaning to the parties' arguments. (Evid.Code, §§ 452, 459; see *Sierra Pacific Holdings, Inc. v. County of Ventura* (2012) 204 Cal.App.4th 509, 512, fn. 1, 138 Cal.Rptr.3d 865 [taking judicial notice of Federal Aviation Administration advisory circular pursuant to Evid.Code, §§ 452, subd. (b), 459]; *Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 886, fn. 1, 38 Cal.Rptr.3d 78 [taking judicial notice of notice of agenda for water district's board meeting and a notice to landowners pursuant to Evid.Code, § 452, subds. (b) & (h)]; *Empire Properties v. County of Los Angeles* (1996) 44 Cal.App.4th 781, 788, fn. 2, 52 Cal.Rptr.2d 69 [taking judicial notice of 1979 report of the task force of property task administration pursuant to Evid.Code, §§ 452, subd. (h), 459].)

According to the FSSB Memo, its purpose was "to facilitate a more focused discussion regarding some common forms of risk arrangements and certain regulatory policy issues they raise." Thus, the FSSB Memo was never adopted by either the FSSB or DMHC as a guidance document for when a medical group would be characterized as a health care service plan. The FSSB Memo provides: "Although it is unlawful for any person to engage in the business of a health plan or to undertake to arrange for the provision of health care services in return for prepaid or periodic consideration without first securing a Knox-Keene license, [under section] 1349, health care providers operating within the scope of their license are impliedly exempt from this requirement. Based on this implied exemption, health plans contract with a variety of health care providers on a prepaid or periodic basis who then become responsible for furnishing actual health care services to health plan enrollees .... (... § 1375.4[, subd.] (a)(1).) If a plan maintains capitation or risk-sharing contracts, it must ensure that each contracting provider has the administrative and financial capacity to meet its contractual obligations. [California Code of Regulations, title 28, section] 1300.70[, subdivision] (b)(2)(H)(1)." (Fn. & italics omitted.)

The FSSB Memo further explains that "[t]he bulk of health plan delegation involves contracting with risk-bearing organizations" as that term is defined in section 1375.4, subdivision (g)(1). "Risk arrangements usually fall within one of three basic ****46** structures: full risk, shared risk or global risk arrangements." "Full risk ('dual risk') contracting is often used to describe the situation where a health plan enters into multiple capitation agreements to shift the majority of the risk for the provisions of health care services to providers. Typically, a health plan will capitate a hospital to provide, arrange ***145** and pay for institutional risk, which typically includes a combination of hospital, skilled nursing and hospice care. The health plan also capitates a physician network that is closely associated with the hospital to provide, arrange and pay for professional risk, which typically includes physician and ancillary provider services. Either or both of these capitation arrangements may include additional risk arrangements for home health care, ambulance, durable medical equipment, corrective appliances, pharmacy, and injectibles."

Next, the FSSB Memo states that the term "[s]hared risk contracting is often used to describe the situation where a health plan enters into a capitation agreement with a physician organization to render professional services, but does not enter into a capitation arrangement with a hospital. In these situation[s] the health plan 'retains' the institutional risk, but requires the provider organizations to participate in ... one or more risk arrangements relating to the provision of institutional services...."

Finally, the FSSB Memo explains that "[g]lobal risk contracting" occurs "where a health plan enters into a capitation agreement with only one health care provider to shift the entire risk for the provision of both institutional and professional health care services to a single entity.... *This type of contracting is limited to organizations that have secured a Knox-Keene license or a Knox-Keene license with waivers.*" (Italics added, fn. omitted.)

In discussing a possible approach to evaluating the "appropriateness" of current risk arrangements, the FSSB Memo observes that "[c]onsideration of risk sharing arrangements is a complex topic" that "is complicated further by a statutory/regulatory structure that provides limited guidance." The memorandum continues: "Historically,

licensed health care providers were impliedly exempted from the [s]ection 1349 licensure requirements for services falling within the scope of their professional health care license. Unfortunately, little regulatory guidance evolved to define the scope of health care services that appropriately fell within the licensure of each individual health care professional.

"Partially in response to the increasing scope of delegated financial risk for the provisions [*sic*] of health care services and partially in response to a number of well publicized medical group bankruptcies, the Legislature, as part of the enactment of [Senate Bill No.] 260 enacted ... [s]ection 1349.3. This provision restated the general proposition, that a health plan may not contract with anyone but a licensed health care plan 'for the assumption of financial risk with respect to the provision of both institutional and non-institutional health care services and any other form of global capitation.'

"While [s]ection 1349.3 contained a sunset clause automatically repealing this provision on January 1, 2002, the import of this section—that whenever a ***146** physician organization is placed at financial risk for 'institutional' health care services, it has wandered into the area of 'global' capitation, which is a prohibited activity—remains current law. As such, additional guidance as to the meaning of 'institutional[,'] 'non-institutional' and 'forms of global risk' is still needed." (Italics omitted.)

The memo then suggests "two threshold questions" as a "starting point" for the ****47** FSSB "to study the 'appropriateness' of risk arrangements": "(1) what constitutes institutional services; and (2) when has financial risk for institutional services been contractually assigned to a provider organization."

With respect to the first question, the FSSB Memo observes that "[c]urrent regulatory interpretation suggests that health plans cannot delegate the assumption of financial risk for 'institutional' services to medical groups without effectively engaging in the prohibited practice of 'global capitation.' Before determining whether the risk associated with a given category of costs has been 'passed' to a provider thereby creating a form of global risk, one must delineate which cost categories constitute institutional care."

The FSSB Memo then notes that "[a]rguably, the brightest line for institutional risk is direct facility charges for both inpatient and outpatient services. Beyond this bright line appears a large gray area." It then suggests that "[o]ne possible criterion for determining if a service category should be classified as institutional versus non-institutional would be to look to the physician organization's licensure. Specifically, any service for which the physician is licensed to perform would constitute non-institutional risk; all remaining categories would default into the institutional category...."

After suggesting possible resolutions for the question of what constitutes an institutional risk, the FSSB Memo turns to the second threshold question, noting that "[o]nce a determination is made regarding what constitutes institutional services, a determination must be made as to whether or not the financial risk associated with providing those services has been contractually assumed by a provider organization."

C. *The Trial Court Acted Within Its Discretion in Invoking the Judicial Abstention Doctrine as to Hambrick's UCL and FAL Causes of Action*

1. Standard of Review

[3] **[4]** A trial court's decision to dismiss a lawsuit or a cause of action based on the doctrine of judicial abstention is reviewed for abuse of discretion. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482, 104 Cal.Rptr.3d 545 (*Arce*); accord, ***147** *Acosta v. Brown* (2013) 213 Cal.App.4th 234, 244, 152 Cal.Rptr.3d 340 (*Acosta*).) A trial court abuses its discretion when its decision exceeds the bounds of reason by being arbitrary, capricious or patently absurd in light of the circumstances. (*People ex rel. Owen v. Media One Direct, LLC* (2013) 213 Cal.App.4th 1480, 1484, 153 Cal.Rptr.3d 636; *People ex rel. Brown v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1567, 133 Cal.Rptr.3d 99.) "Unless there has been a clear miscarriage of justice, a reviewing court will not substitute its opinion for that of the trial court so as to avoid divesting the trial court of its discretionary power." (*Medical Bd. of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 628, 170 Cal.Rptr.3d 540.) " 'When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Arce, supra,* at p. 482, 104 Cal.Rptr.3d 545, quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479, 243 Cal.Rptr. 902, 749 P.2d 339.)

[5] "It must be remembered, however that '[t]he scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action...." Action that transgresses the confines of the applicable principles of law is outside the scope of

****48** discretion and we call such action an "abuse" of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be "reasonable", i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law.' [Citation.]" (*Acosta, supra,* 213 Cal.App.4th at p. 258, 152 Cal.Rptr.3d 340; accord, *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1361, 137 Cal.Rptr.3d 293 [" '[a] trial court's decision that rests on an error of law is an abuse of discretion' "] (*Klein*).) [18]

2. The Abstention Doctrine

[6] **[7]** **[8]** Under the abstention doctrine, "a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.' [Citation.]" (*Arce, supra,* 181 Cal.App.4th at p. 496, 104 Cal.Rptr.3d 545.) Abstention may also be appropriate if " 'the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency,' " or if " 'granting injunctive relief would be unnecessarily burdensome for the trial ***148** court to monitor and enforce given the availability of more effective means of redress.' " (*Ibid.*; accord, *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 138, 157, 102 Cal.Rptr.3d 615 (*Blue Cross*).) In addition, as we held in *Klein,* "abstention is generally appropriate only if there is an alternative means of resolving the issues raised in the plaintiff's complaint." (*Klein, supra,* 202 Cal.App.4th at p. 1369, 137 Cal.Rptr.3d 293.)

Many courts have addressed the question whether abstention is appropriate in the context of UCL or FAL claims for violation of the Knox-Keene Act. In *Arce,* we considered whether the trial court abused its discretion by abstaining from adjudicating a UCL claim that Kaiser violated the Knox-Keene Act and Mental Health Parity Act by categorically denying plan members with autism spectrum disorders coverage for behavioral and speech therapy. In holding that the trial court was well-equipped to determine whether Kaiser's denial violated the Knox-Keene Act, we found that "the Legislature already has made the relevant policy determinations in mandating that health care plans provide coverage for the medically necessary treatment of autism under the same terms and conditions applied to other medical conditions." (*Arce, supra,* 181 Cal.App.4th at p. 501, 104 Cal.Rptr.3d 545.) Therefore, the determination of whether the therapies at issue were " 'health care services' " under the Mental Health Parity Act and the Knox-Keene Act "are issues of statutory interpretation that are well suited for adjudication by the courts." (*Ibid.*)

Further, we found that "resolution of the UCL claim would not call upon the court to engage in individualized determinations of medical necessity for each putative class member, but rather to perform the basic judicial functions of contractual and statutory interpretation. To determine ****49** whether Kaiser systematically breached its health plan contract by denying coverage for applied behavior analysis therapy and speech therapy for autism spectrum disorders, the trial court would need to interpret the relevant terms of the contract, and decide whether the therapies are or are not covered services." (*Arce, supra,* 181 Cal.App.4th at p. 499, 104 Cal.Rptr.3d 545.) We noted further that the interpretation of contracts "is primarily a judicial function." (*Id.* at p. 500, 104 Cal.Rptr.3d 545.)

We also concluded that the other traditional grounds for invoking the abstention doctrine did not apply. Specifically, we found that "there is no indication that granting injunctive or declaratory relief in this action would be unnecessarily burdensome for the trial court." (*Arce, supra,* 181 Cal.App.4th at p. 500, 104 Cal.Rptr.3d 545.) It addition, resolution of Arce's UCL claim "would not call upon the court to determine complex issues of economic or health policy" (*id.,* at p. 500, 104 Cal.Rptr.3d 545); nor would it "require the trial court to assume or interfere with the functions of an administrative agency" (*id.* at p. 501, 104 Cal.Rptr.3d 545).

Similarly, in *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 102 Cal.Rptr.3d 615, this district upheld the trial court's ***149** decision declining to abstain from adjudication of a lawsuit brought by the city attorney seeking relief under the UCL and FAL for Blue Cross's postclaims underwriting practices, alleging violation of the Knox-Keene Act. The court affirmed the trial court's decision, finding that "the city attorney is asking the court to perform an ordinary judicial function, namely, to grant relief under the UCL and the FAL for business practices that are made unlawful by statute. The relief requested by the city attorney will not interfere with the functions of either the [Department of Insurance] or the DMHC, including the relief that those agencies have already secured by settlements." (*Id.* at p. 1258, 102 Cal.Rptr.3d 615.)

In this case, by contrast, HCP does not fall within the definition of a "health care service plan" under the plain language of the Knox-Keene Act in section 1345, subdivision (f)(1), because Hambrick paid her premiums to an unidentified health care service plan, not to HCP. Hambrick does not argue otherwise, but maintains that HCP nevertheless is required to be licensed under the Knox-Keene Act because it assumed the global risk of institutional or hospital care. The parties appear to agree that a determination of whether HCP operates as a health care service plan depends on whether it has assumed the "global risk" of hospital care under capitation agreements it has with the unidentified health care service plan to which Hambrick paid her premiums.

In contrast to *Arce* and *Blue Cross,* this determination has not been made by the Legislature. Nowhere in the Knox-Keene Act is there a definition of what level of risk assumed by a medical group under a capitation agreement would cause it to be characterized as a health care service plan. Neither has the DMHC provided any guidance in its regulations. Rather, Hambrick asks us to make this determination by relying upon the FSSB Memo, which has never been formally adopted by the FSSB or the DMHC.

We find that the determination of the level of financial risk under a capitation agreement that causes a "risk-bearing organization" under section 1375.4, subdivision (g), to become a "health care service plan" under section 1345 is precisely the type of regulatory determination involving complex economic policy that should be made by the DMHC in the first instance. ****50** This issue of the transfer of risk under capitation agreements from a health care service plan to a medical group was squarely before the court in *Desert Healthcare, supra,* 94 Cal.App.4th 781, 114 Cal.Rptr.2d 623.

In *Desert Healthcare,* our colleagues in the Fourth District held: "The instant case is a perfect example of when a court of equity should abstain. Desert Healthcare essentially argues that PacifiCare abused the capitation ***150** system by transferring too much risk to its intermediary without adequate oversight. In order to fashion an appropriate remedy for such a claim, be it injunctive or restitutionary, the trial court would have to determine the appropriate levels of capitation and oversight. Such an inquiry would pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in. As such, there is no proper role for the court of equity to play in the instant dispute." [19] (*Desert Healthcare, supra,* 94 Cal.App.4th at pp. 795–796, 114 Cal.Rptr.2d 623.)

Other courts have similarly abstained from adjudicating UCL and FAL claims for violations of the Knox-Keene Act and similar health care laws where determination of the claims would require the court to assume the regulatory powers of the designated administrative agency. (See, e.g., *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1306, 64 Cal.Rptr.3d 250 [abstention upheld as to UCL claims for insufficient nursing hours per patient under applicable health care law] (*Alvarado*); *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301, 22 Cal.Rptr.2d 20 [abstention upheld as to UCL claims for third party liability provisions alleged to be unlawful under Knox-Keene Act]; see *Acosta, supra,* 213 Cal.App.4th at p. 251, 152 Cal.Rptr.3d 340 [trial court did not abuse its discretion in invoking the abstention doctrine where petitioners were "asking the trial court to replicate administrative responsibilities imposed by law on the [Department of Labor]" to devise, monitor and enforce the Social Security Act timeliness requirements].)

In *Samura,* a health care plan member brought UCL claims against Kaiser for third-party liability provisions in service agreements that the member alleged violated the Knox-Keene Act. The First District reversed the trial court's order issuing an injunction, finding that the acts were not specifically made unlawful under the Knox-Keene Act. (*Samura v. Kaiser Foundation Health Plan, Inc., supra,* 17 Cal.App.4th at p. 1301, 22 Cal.Rptr.2d 20.) Accordingly, the court held, "[i]n basing its order on these provisions [in the Knox-Keene Act], the trial court assumed a regulatory power over [the defendants] that the Legislature has entrusted exclusively ****51** to the Department of Corporations.... [T]he ***151** courts cannot assume general regulatory powers over health maintenance organizations through the guise of enforcing Business and Professions Code section 17200." (*Id.* at pp. 1301–1302, 22 Cal.Rptr.2d 20.)

Similarly, in *Alvarado,* the plaintiff filed a class action alleging causes of action under the UCL and FAL against skilled nursing and intermediate care facilities to require the facilities to comply with statutory requirements for the minimum number of nursing hours per nursing patient. The statute required the State Department of Health Care Services to adopt regulations setting forth the minimum number of hours per patient required in each type of facility. (*Alvarado, supra,* 153 Cal.App.4th at p. 1303, 64 Cal.Rptr.3d 250.)

Our colleagues in Division Three affirmed the trial court's reliance on the abstention doctrine, finding that "[a]djudicating this class action controversy would require the trial court to assume general regulatory powers over the health care industry through the guise of enforcing the UCL, a task for which the courts are not well equipped. [Citation.]" (*Alvarado, supra,* 153 Cal.App.4th at pp. 1303–1304, 64 Cal.Rptr.3d 250.) In reaching this conclusion, the court detailed the complex factors that it would need to analyze to determine whether a particular facility was providing the required number of nursing hours. The court concluded that this was "a task better accomplished by an administrative agency than by trial courts." (*Id.* at p. 1306, 64 Cal.Rptr.3d 250.)

3. Hambrick Has Failed to Show That the Trial Court Abused Its Discretion in Abstaining from Adjudicating Her UCL and FAL Claims.

[9] Hambrick urges us to follow this district's holding in *Blue Cross* by finding that the trial court would perform solely a judicial function in resolving her UCL and FAL claims. (See *Blue Cross of California, Inc. v. Superior Court, supra,* 180 Cal.App.4th 1237, 102 Cal.Rptr.3d 615.) Hambrick cites to section 1349 as support for her argument that "the Legislature has already made the policy determination that an entity engaging in specific types of practices must be licensed under the Knox-Keene Act in order to engage in those practices." However, section 1349 states only that it is unlawful to engage in business as a health care service plan without first obtaining a Knox-Keene Act license from the Director of the DMHC. [20] It sheds no light on the circumstances under which a medical group that does not fall within the definition of a health care service plan under section 1349, but which contracts with a health care ***152** service plan to assume the risk of institutional or other medical care, must obtain a license under the Knox-Keene Act. Indeed, other than the FSSB Memo, which does not have the force of law, Hambrick has not cited any statutory provision or regulation that would guide a trial court's resolution of this issue.

[10] As we discuss above, while abstention is not appropriate where resolution of the issues involves solely the judicial function of resolving questions of law based on facts before the court (see *Arce, supra,* 181 Cal.App.4th at p. 478, 104 Cal.Rptr.3d 545; ****52** *Blue Cross of California, Inc. v. Superior Court, supra,* 180 Cal.App.4th at p. 1242, 102 Cal.Rptr.3d 615), abstention is appropriate where resolution of a case would require the court to assume general regulatory powers and determine complex economic policies (see *Alvarado, supra,* 153 Cal.App.4th at pp. 1295–1296, 64 Cal.Rptr.3d 250; *Desert Healthcare, supra,* 94 Cal.App.4th at p. 785, 114 Cal.Rptr.2d 623).

In this case, the determination of whether HCP was required to be licensed would, as the trial court aptly noted, "require[ ] a detailed analysis of complex corporate structures, of risk allocation via service provider 'cap[it]ation' contracts of the cost of providing medical care, and many related factual and legal issues." The court therefore would be required to determine complex economic policy within the context of the managed health care system. This is a task properly left to the Director of the DMHC. Any contrary conclusion would require the trial court to assume the functions of the Director of the DMHC and effectively usurp the director's powers.

D. ***Hambrick Has an Alternative Forum to Resolve Her Claims*** [21]

As we note above, "abstention is generally appropriate only if there is an alternative means of resolving the issues raised in the plaintiff's complaint." (*Klein, supra,* 202 Cal.App.4th at p. 1369, 137 Cal.Rptr.3d 293.) However, our decision in *Klein* rested on different circumstances. There, we held that there was no alternative remedy for Klein's claims under the UCL and Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) for Chevron's failure to compensate for temperature variations in retail motor fuel, which resulted in consumers receiving less motor fuel, as measured by mass and energy, than they would receive if Chevron adjusted for temperature increases. Chevron argued that the court should abstain in light of a report by the California Energy Commission analyzing the costs and benefits of implementing fuel pumps at retail stations that would remedy the temperature variations. (*Ibid.*)

***153** We found that "[t]he fact that the Legislature has required an agency to investigate remedies to a potentially problematic business practice is not, standing alone, sufficient to support judicial abstention." (*Klein, supra,* 202 Cal.App.4th at p. 1369, 137 Cal.Rptr.3d 293.) We concluded that "to abstain from deciding the issues plaintiffs have raised in their complaint means that those issues will remain unresolved unless the Legislature decides to intervene, which may never occur." (*Id.* at p. 1370, 137 Cal.Rptr.3d 293.)

In reaching our holding, we distinguished four prior cases in which the courts upheld abstention after finding there were adequate alternative remedies. (See *Klein, supra,* 202 Cal.App.4th at p. 1371, 137 Cal.Rptr.3d 293, citing to *Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 567–568, 53 Cal.Rptr.2d 878 [abstention appropriate where Legislature had addressed problem of availability of earthquake insurance and expressed intent to continue to address issue]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1365–1366, 83 Cal.Rptr.3d 588 [abstention appropriate in light of ongoing administrative proceedings to address killing of birds by wind turbine electric generators]; *Alvarado, supra,* 153 Cal.App.4th at p. 1305, 64 Cal.Rptr.3d 250 [Legislature intended the State Department of Health Care Services (DHCS) to enforce statute mandating nursing hours per patient];[22] *Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 642, 39 Cal.Rptr.3d 62 [abstention proper where Legislature established regulatory framework to address "complex statutory arrangement of requirements and incentives involving participants in the beverage container recycling scheme" administered ****53** by Department of Conservation] .)

As the First District held in *Center for Biological Diversity,* "[t]he courts are available to review the responses of those agencies, but they are not available to supersede their role in the regulatory process." (*Center for Biological Diversity, Inc. v. FPL Group, Inc., supra,* 166 Cal.App.4th at p. 1372, 83 Cal.Rptr.3d 588; see also *Willard v. AT & T Communications of California, Inc.* (2012) 204 Cal.App.4th 53, 60, 138 Cal.Rptr.3d 636 [finding no abuse of discretion where trial court abstained from deciding UCL claims based on alleged ***154** excessive fees for unpublished telephone numbers where pricing involved complex economic policy issues and plaintiffs could seek relief from Public Utilities Commission].)

Contrary to the facts in *Klein,* as we discuss below, the DMHC both has the power to enforce the Knox-Keene Act, and has repeatedly issued cease and desist orders that require health care service plans to obtain the required licenses, enjoin deceptive and misleading business practices and advertising, and order restitution. We therefore find that this case more closely tracks the facts in *Wolfe, Shamsian, Alvarado,* and *Center for Biological Diversity* in ensuring that Hambrick will have a remedy for her claims.

We next turn to the remedies available under the UCL and FAL, and those that can be ordered or sought by the DMHC.

1. Available Remedies Under the UCL and FAL

[11] Section 17200 of the Business and Professions Code prohibits "unfair competition," which means and includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...." (Bus. & Prof.Code, § 17200; *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370, 159 Cal.Rptr.3d 672, 304 P.3d 163 (*Zhang*); *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, 131 Cal.Rptr.2d 29, 63 P.3d 937.) In prohibiting "unlawful" business practices, "the UCL ' "borrows" ' rules set out in other laws and makes violations of those rules independently actionable." (*Zhang, supra,* at p. 370, 159 Cal.Rptr.3d 672, 304 P.3d 163; accord, *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 396, 159 Cal.Rptr.3d 693, 304 P.3d 181; *Korea Supply, supra,* at p. 1143, 131 Cal.Rptr.2d 29, 63 P.3d 937; *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 610, 172 Cal.Rptr.3d 218.) A business practice or act that does not violate a statute may also violate the UCL ****54** because the UCL proscribes "unfair" and "fraudulent" business practices. (*Zhang, supra,* at p. 370, 159 Cal.Rptr.3d 672, 304 P.3d 163; *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 644, 72 Cal.Rptr.3d 903.)

[12] Business and Professions Code section 17500 of the FAL "prohibits the dissemination in any advertising media of any 'statement' ... 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210, 197 Cal.Rptr. 783, 673 P.2d 660.) False advertising under the FAL constitutes a fraudulent business practice under the UCL. (*Zhang, supra,* at p. 370, 159 Cal.Rptr.3d 672, 304 P.3d 163; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312, fn. 8, 93 Cal.Rptr.3d 559, 207 P.3d 20; *Committee on Children's Television, Inc., supra,* at p. 210, 197 Cal.Rptr. 783, 673 P.2d 660.)

***155** The UCL and FAL provide for only equitable relief, specifically injunctive relief and restitution. (See Bus. & Prof.Code, §§ 17203,[23] 17535.[24]) Further, " '[t]he restitutionary remedies of section[s] 17203 and 17535 ... are identical and are construed in the same manner.' " (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539,

1548, 172 Cal.Rptr.3d 25, citing *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177, fn. 10, 96 Cal.Rptr.2d 518, 999 P.2d 706; accord, *Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163; *Lyles v. Sangadeo–Patel* (2014) 225 Cal.App.4th 759, 769, 171 Cal.Rptr.3d 34.) [25]

Our Supreme Court has "made it clear that 'an action under the UCL "is not an all-purpose substitute for a tort or contract action." [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. As we have said, the "overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition." [Citation.] Because of this objective, the remedies provided are limited.' [Citation.] Accordingly, while UCL remedies are 'cumulative ... to the remedies or penalties available under all other laws of this state' (Bus. & Prof.Code, § 17205), they are narrow ****55** in scope." (*Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163.)

[13] Further, the equitable remedies under the UCL and FAL "are subject to the broad discretion of the trial court." (*Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163.) Therefore, "restitutionary or injunctive relief is not mandatory; rather, equitable considerations may guide the court's discretion in fashioning a remedy for a UCL violation." (***156** *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1015, 112 Cal.Rptr.3d 607, citing *Cortez v. Purolator Air Filtration Products Co., supra,* 23 Cal.4th at p. 180, 96 Cal.Rptr.2d 518, 999 P.2d 706.) As the court held in *Zhang,* "[t]he UCL does not *require* 'restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court "*may* make such orders or judgments ... as may be necessary to prevent the use or employment ... of any practice which constitutes unfair competition ... or as may be necessary to restore ... money or property." ' [Citation.]" (*Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163, citing *Cortez, supra,* at p. 180, 96 Cal.Rptr.2d 518, 999 P.2d 706.)

a. *Injunctive Relief*

In her UCL and FAL causes of action, Hambrick seeks injunctive relief prohibiting the HCP defendants from violating the Knox-Keene Act, the UCL and FAL and other statutory provisions. Hambrick specifically seeks to enjoin the HCP defendants from operating without a Knox-Keene license and to "enjoin [the HCP defendants] from their misleading advertising." It is undisputed that injunctive relief is available under both the UCL and the FAL. (See Bus. & Prof.Code, §§ 17203, 17535.)

b. *Restitution*

Hambrick seeks "restitution and disgorgement of all excess profits and ill-gotten gains." Specifically, Hambrick seeks to recover "all capitation paid to [the HCP defendants], and all co-pays, deductibles and co-insurance payments" she paid to the HCP defendants.

[14] As noted above, both the UCL and FAL provide for recovery of restitution. However, Hambrick's request for relief goes beyond the scope of restitution. Our Supreme Court has defined restitution as "the return of money or other property obtained through an improper means to the person from whom the property was taken. [Citations.] 'The object of restitution is to restore the status quo by *returning to the plaintiff* funds in which he or she has an ownership interest.' [Citation.]" (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 614, 112 Cal.Rptr.3d 876, 235 P.3d 171.)

As the court held in *Zhang,* restitution under the UCL " 'is confined to restoration of any interest in "money or property, real or personal, which may have been *acquired* by means of such unfair competition." ... A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.' [Citation.]" (*Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163.)

[15] **[16]** Co-payments, deductibles, and co-insurance payments made by Hambrick to HCP as a result of its unfair business practices or false advertising are ***157** properly characterized as restitution that may be recovered on Hambrick's UCL and FAL claims. (*Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163.) However, with respect to Hambrick's claim to recover money paid by the unidentified ****56** health care service plan to HCP under a capitation agreement, this is not recoverable by Hambrick as restitution because this is not money in which Hambrick has an ownership interest or that was "lost by a plaintiff." (*Ibid.*)

[17] **[18]** Similarly, "nonrestitutionary disgorgement of profits"[26] is not recoverable in a UCL action. (*Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at p. 1152, 131 Cal.Rptr.2d 29, 63 P.3d 937.) In the absence of an "indicat[ion] that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits" (*id.* at p. 1147, 131 Cal.Rptr.2d 29, 63 P.3d 937), "disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution." (*Id.* at p. 1145, 131 Cal.Rptr.2d 29, 63 P.3d 937; accord, *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 229, 145 Cal.Rptr.3d 340; see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 121, 96 Cal.Rptr.2d 485, 999 P.2d 718 ["disgorgement into a fluid recovery fund is not a remedy available" in a representative UCL action].)

c. *Attorneys Fees*

Hambrick also seeks to recover attorneys fees under Code of Civil Procedure section 1021.5. The courts have consistently held that attorneys fees are not recoverable in a UCL or FAL action. (*Rose v. Bank of America, N.A., supra,* 57 Cal.4th at p. 399, 159 Cal.Rptr.3d 693, 304 P.3d 181; *Zhang, supra,* 57 Cal.4th at p. 371, 159 Cal.Rptr.3d 672, 304 P.3d 163; *Korea Supply Co. v. Lockheed Martin Corp., supra,* 29 Cal.4th at pp. 1144, 1148, 1150, 131 Cal.Rptr.2d 29, 63 P.3d 937.) However, while Hambrick cannot recover attorneys fees under the UCL or FAL, "a prevailing plaintiff may seek attorney fees as a private attorney general under Code of Civil Procedure section 1021.5" in an appropriate case. (*Zhang, supra,* at p. 371, fn. 4, 159 Cal.Rptr.3d 672, 304 P.3d 163; accord, *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1179, 121 Cal.Rptr.2d 79.)

[19] "[A]n award under [Code of Civil Procedure] section 1021.5 requires a showing that (1) the litigation enforced an important right affecting the public interest; (2) it conferred a significant benefit on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement (or enforcement by one public entity against another) ***158** were such as to make the award appropriate. [Citation.] Since the statute states the criteria in the conjunctive, each element must be satisfied to justify a fee award. [Citation.] ... [¶] The third element, the necessity and financial burden requirement, involves two issues: ' " 'whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys.' " ' [Citation.]" (*Children & Families Com. of Fresno County v. Brown* (2014) 228 Cal.App.4th 45, 55, 174 Cal.Rptr.3d 874.)

Thus, while Code of Civil Procedure section 1021.5 provides a potential basis for Hambrick to recover her attorneys fees, ****57** she would need to meet the three elements necessary to recover attorneys fees under Code of Civil Procedure section 1021.5 in addition to prevailing on her UCL or FAL claims.

We next turn to the remedies available to Hambrick through the Director of the DMHC.

2. Powers of the Director of the DMHC

a. *Injunctive Relief*

Section 1391, subdivision (a)(1), provides that "[t]he director [of the DMHC] may issue an order directing a plan, solicitor firm, or any representative thereof, a solicitor, or any other person to cease and desist from engaging in any act or practice in violation of the provisions of this chapter, any rule adopted pursuant to this chapter, or any order issued by the director pursuant to this chapter." Further, if a written request for hearing is not filed within 30 days of the date the order is served, "the order shall be deemed a final order of the director and shall not be subject to review by any court or agency, notwithstanding subdivision (b) of Section 1397." (Id., subd. (a)(2).)

[20] Hambrick argues that the director only has power to regulate a licensed plan under the Knox-Keene Act, and therefore cannot issue injunctive relief against an unlicensed plan. However, a review of the director's enforcement powers under section 1391 shows that the director's authority covers both licensed and unlicensed plans. For example, subdivision (c) of section 1391 provides: "If a timely request for a hearing is made by an unlicensed plan, the director may stay the effect of the order to the extent that the order requires the cessation of operation of the plan or prohibits acceptance of new members by the plan...." Section 1391, subdivision (b), sets different rules applicable to a request for a hearing by a licensed plan.

The Director of DMHC specifically has the authority to prevent unfair competition and false advertising. Section 1386, subdivision (b)(7), provides ***159** that the director

may take disciplinary action, including suspending or revoking a plan's license or assessing administrative penalties where a "plan has engaged in any conduct that constitutes fraud or dishonest dealing or unfair competition, as defined by Section 17200 of the Business and Professions Code." Section 1360 similarly prohibits "the use of any advertising or solicitation which is untrue or misleading...." (Id., subd. (a).)

[21] Indeed, the Director of the DMHC has issued numerous cease and desist orders to entities operating as health care service plans without a Knox-Keene license, enjoining their operation and false advertising practices. (See, e.g., *In the Matter of International Association of Benefits,* DMHC No. 04-459, Cease and Desist Order (July 29, 2009); *In the Matter of Prudent Choice, LLC,* DMHC No. 04-460, Cease and Desist Order (July 29, 2009); *In the Matter of First Choice Health Care Inc.,* DMHC No. 06-124, Cease and Desist Order (Apr. 10, 2006); *In the Matter of The Capella Group, Inc., d/b/a Care Entrée,* DMHC No. 04-312, Cease and Desist Order (July 15, 2005); *In the Matter of United Family Healthcare Group,* DMHC No. 04-374, Cease and Desist Order (July 15, 2005).) [27]

****58** b. *Restitution*

The Director of DMHC has consistently ordered restitution as part of the cease and desist orders the director has issued to address false and deceptive business or advertising practices. For example, in *In the Matter of First Choice Health Care, Inc., supra,* DMHC No. 06-124 in addition to enjoining First Choice's deceptive advertising practices, the court ordered First Choice to "refund all monies to demanding members without undue delay." (Cease and Desist Order, at p. 7.) Similarly, in *In the Matter of International Association of Benefits, supra,* DMHC No. 04-459 the director ordered that respondent "shall make refunds ... to any enrollee who indicates a desire to cancel his or her membership, or to any enrollee who meets the legal standard for rescission." (Cease and Desist Order, at p. 7; see *In the Matter of Prudent Choice, LLC, supra,* DMHC No. 04-460 at p. 7 [ordering refunds to "any enrollee who indicates a desire to cancel his or her membership"]; *In the Matter of The Capella Group, Inc., supra,* DMHC No. 04-312 at p. 8 ["[r]espondent shall refund all monies to demanding members without undue delay"].)

The director has cited as authority for its orders its enforcement authority under section 1391, subdivision (a)(1), and the intent and purpose of the ***160** Knox-Keene Act, as set forth in sections 1341 and 1342, subdivision (c), to "[p]rosecut[e] malefactors who make fraudulent solicitations or who use deceptive methods, misrepresentations, or practices which are inimical to the general purpose of enabling a rational choice for the consumer public."

The Knox-Keene Act also authorizes the director to bring an action in superior court or to request the Attorney General to bring an action to obtain injunctive and other "equitable relief." Specifically, section 1392, subdivision (a)(1), provides, "[w]henever it appears to the director that any person has engaged, or is about to engage, in any act or practice constituting a violation of any provision of this chapter, any rule adopted pursuant to this chapter, or any order issued pursuant to this chapter, the director may bring an action in superior court, or the director may request the Attorney General to bring an action to enjoin these acts or practices or to enforce compliance with this chapter, any rule or regulation adopted by the director pursuant to this chapter, or any order issued by the director pursuant to this chapter, or to obtain any other equitable relief." In addition, "[i]f the director determines that it is in the public interest, the director may include in any action authorized by paragraph (1) a claim for any ancillary or equitable relief and the court shall have jurisdiction to award this additional relief." (Id., subd. (a)(2).)

[22] We interpret section 1392 to allow a court, upon the filing of an action by the director or the Attorney General under section 1392, to issue "equitable relief," including restitution. Accordingly, Hambrick may recover restitution (in this case, co-payments, deductibles, and co-insurance payments made by Hambrick to HCP) either as part of a cease and desist order issued by the director or in a superior court action filed by the director or the Attorney General, where restitution is in the public interest.

c. *Attorneys Fees*

[23] The Knox-Keene Act does not provide statutory authority for the Director of the DMHC to award attorneys fees.

3. Hambrick Has an Alternative Means of Resolving the Issues Raised in Her Complaint.

As we discuss above, the director has the authority to issue cease and desist ****59** orders or to seek an order from the superior court granting both injunctive relief and restitution.

While Hambrick also seeks disgorgement of profits, this is not available under either the UCL or FAL. Likewise, while the director does not have authority to award attorneys fees to Hambrick, attorneys fees are also not available under the UCL or FAL. While Hambrick ***161** potentially could obtain attorneys fees under the private attorney general statute, Code of Civil Procedure section 1021.5, the speculative possibility of Hambrick obtaining fees under that statute cannot alone support this court wading into the complex regulatory issues that should be determined by the director.

E. *The Trial Court Abused Its Discretion in Abstaining from Adjudicating Hambrick's Second Cause of Action for Fraudulent Concealment, But Properly Dismissed the Cause of Action for Failure to State a Claim*

1. A Trial Court May Not Abstain Where Damages Are Sought

[24] Hambrick correctly contends that the trial court should not have relied upon the judicial abstention doctrine to dismiss her second cause of action for fraudulent concealment because it included a claim for damages. Only when equitable relief is the sole relief sought may the trial court invoke the doctrine of judicial abstention. [28] (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 625, 145 Cal.Rptr.3d 709.)

In her second cause of action for fraudulent concealment, Hambrick alleges that "Plaintiffs suffered damages caused thereby including but not limited to physical injuries, emotional injuries, loss of income, future medical expenses, co-pays or co-insurance payments to the hospitals." The prayer in the first amended complaint seeks "[s]pecial and general damages according to proof for JANDRES and each member of the Class," "[f]or other such relief the court deems just and proper," and for "[p]unitive damages." Because Hambrick seeks legal damages resulting from the HCP defendants' alleged fraud, we conclude the trial court abused its discretion by invoking the doctrine of judicial abstention with respect to the second cause of action. [29] (See *Shuts v. Covenant Holdco LLC, supra,* 208 Cal.App.4th at p. 625, 145 Cal.Rptr.3d 709.)

***162** 2. Hambrick Failed to State a Cause of Action for Fraudulent Concealment

Our determination that the abstention doctrine does not apply to Hambrick's cause of action for fraudulent concealment ****60** does not end our inquiry on appeal. An appellate court will " 'affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. [Citation.]' [Citation.]" (*Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544, 551, 153 Cal.Rptr.3d 865.)

"In reviewing the sufficiency of a complaint against a demurrer, we 'treat[ ] the demurrer as admitting all material facts properly pleaded,' but we do not 'assume the truth of contentions, deductions or conclusions of law.' [Citation.] We liberally construe the pleading to achieve substantial justice between the parties, giving the complaint a reasonable interpretation and reading the allegations in context. [Citations.] When a demurrer is sustained, we must determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. [Citation.]" (*Arce, supra,* 181 Cal.App.4th at pp. 481–482, 104 Cal.Rptr.3d 545; accord, *Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700–701, 181 Cal.Rptr.3d 674; *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1402, 150 Cal.Rptr.3d 618.)

[25] "The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff sustained damage as a result of the concealment or suppression of the fact. [Citation.]" (*Graham v. Bank of America, N.A., supra,* 226 Cal.App.4th at p. 606, 172 Cal.Rptr.3d 218.)

In their demurrers, the HCP defendants argued that Hambrick failed to allege adequately the elements of duty to disclose, reliance and causation and, therefore, did not adequately plead a cause of action for common law fraud. We first turn to whether Hambrick adequately pleaded a duty to disclose.

[26] According to Hambrick, HCP arranged for her medical and institutional care pursuant to contracts it had with the health care service plan to which Hambrick paid her periodic premiums, and therefore had a duty to disclose its relationship with the health care service plan to Hambrick. Specifically, Hambrick alleges that the HCP defendants "had illegally, directly or indirectly, ***163** assumed financial responsibility for Plaintiffs' hospital care and that such assumption of risk would affect the physicians, specialists, facilities and hospitals to which [the HCP defendants] would

direct Plaintiffs" and that "[t]he information concerning [the HCP defendants'] financial assumption of hospital risk, and how such assumption restricted and delayed Plaintiff's access to care, was material information a reasonable patient would want to have in making a treatment decision."

These allegations do not establish a duty to disclose on the part of HCP. Hambrick cites no authority for the proposition that a risk-bearing organization that contracts with a health care service plan has a duty to disclose its financial arrangement with the plan to subscribers for whom it arranges medical and hospital services. Hambrick's reliance on informed consent cases involving an individual physician's duty to disclose to a patient information material to the decision whether to undergo treatment is misplaced. (See, e.g., *Arato v. Avedon* (1993) 5 Cal.4th 1172, 23 Cal.Rptr.2d 131, 858 P.2d 598; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 271 Cal.Rptr. 146, 793 P.2d 479.) Although in her first amended complaint Hambrick makes reference to a ****61** treating physician's duty to disclose to his or her "patients all material information a reasonable patient would want to know before consenting to treatment," HCP is not Hambrick's doctor, and this is not an informed consent case.

Because we conclude that Hambrick failed to allege the requisite duty to disclose we need not determine if she adequately pleaded the elements of reliance and causation.

3. The Trial Court Properly Denied Leave to Amend

Hambrick contends that to the extent a pleading defect exists, the trial court should have granted leave to amend. "When a demurrer is sustained without leave to amend, we must also decide whether there is a reasonable possibility that the defect can be cured by amendment. [Citation.] If the complaint can be cured, the trial court has abused its discretion in sustaining without leave to amend. [Citation.]" (*Arce, supra,* 181 Cal.App.4th at p. 482, 104 Cal.Rptr.3d 545.) The plaintiff has the burden of demonstrating how the complaint can be amended to cure any defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, 6 Cal.Rptr.3d 457, 79 P.3d 569; *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 36, 180 Cal.Rptr.3d 474.) " ' "The assertion of an abstract right to amend does not satisfy this burden." ' [Citation.]" (***164** *Graham v. Bank of America, N.A., supra,* 226 Cal.App.4th at p. 619, 172 Cal.Rptr.3d 218.) The required showing may be made in the trial court or the reviewing court. (*Annocki, supra,* at pp. 36–37, 180 Cal.Rptr.3d 474.)

Because Hambrick has failed to make a showing that she can cure the defect in her second cause of action by amendment, we conclude that leave to amend was properly denied.

F. ***The Trial Court Properly Awarded the HCP Defendants Costs***

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b); *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 737–738, 122 Cal.Rptr.3d 590.) A prevailing party includes "a defendant in whose favor a dismissal is entered." (Code Civ. Proc., § 1032, subd. (a)(4).)

Hambrick challenges the trial court's award of $4,765 in costs to the HCP defendants. She argues that the HCP defendants were not "prevailing parties" because the trial court's dismissal of the action was a procedural ruling rather than a determination on the merits. Hambrick does not cite to any California authority, instead relying on the Ninth Circuit's decision in *Elwood v. Drescher* (9th Cir.2006) 456 F.3d 943. In *Elwood,* the court held that the parties in whose favor the case was dismissed on the basis of abstention under the *Younger* doctrine [30] were not prevailing parties entitled to attorneys fees under section 1988 of Title 42 of the United States Code. (*Elwood, supra,* at p. 948.) *Elwood* involved interpretation of a federal statute not at issue here, and the decision is not binding on this court. (*Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 657, 178 Cal.Rptr.3d 685.)

[27] As our colleagues in the Fifth District in *Brown v. Desert Christian Center, supra,* 193 Cal.App.4th 733, 122 Cal.Rptr.3d 590 observed, "[n]othing in the wording of [Code of Civil Procedure section 1032] indicates that a defendant's right to recover costs is limited to certain *types* of dismissals.... Since the Legislature has not distinguished between types ****62** of dismissal in the statute, we will not read such a restriction into it." (*Id.* at p. 738, 122 Cal.Rptr.3d 590.) In *Brown,* the court held that where the trial court dismissed the case on the basis of subject matter jurisdiction raised as an affirmative defense, the defendants were the prevailing parties. (*Id.* at p. 741, 122 Cal.Rptr.3d 590.) We agree with the reasoning in the *Brown* decision, and conclude that the trial court properly awarded the HCP defendants costs pursuant to Code of Civil Procedure section 1032.

***165 DISPOSITION**

The judgment of dismissal, including the order awarding costs, is affirmed. HCP, HCP-LLC and DVHCP are awarded their costs on appeal.

We concur:

PERLUSS, P.J.

ZELON, J.

All Citations

238 Cal.App.4th 124, 189 Cal.Rptr.3d 31, 15 Cal. Daily Op. Serv. 7008, 2015 Daily Journal D.A.R. 7307

Footnotes

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 The complaint refers to "Health Care Partners Medical Group, Inc." as HCP and elsewhere refers to all three defendants collectively as HCP. For example, the complaint alleges in different sections that MGI or HCP operated without a license and assumed the financial risk of hospital and specialty care. For simplicity, we will refer to HCP as the entity required to have a license and the entity that assumed the financial risk. Where we can tell that an allegation is directed only at MGI, for example, referring to Hambrick's employer and medical group network of doctors, we will refer only to MGI.

2 Health care service plans are commonly referred to as health maintenance organizations or HMOs. (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1456, fn. 2, 130 Cal.Rptr.3d 756; *Watanabe v. California Physicians' Service* (2008) 169 Cal.App.4th 56, 59, fn. 3, 86 Cal.Rptr.3d 374.) We will use the statutory term "health care service plan" and the shortened term "health plan" interchangeably in this opinion.

3 All further statutory references are to the Health and Safety Code, unless otherwise indicated.

4 The Knox-Keene Act was amended in 2002. Citations in this opinion are to the amended Act.

5 Because this appeal challenges the trial court's order sustaining a demurrer, we assume the truth of all facts properly pleaded in the first amended complaint, as well as reasonable inferences derived from those facts. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100, 171 Cal.Rptr.3d 189, 324 P.3d 50; *Van Horn v. Department of Toxic Substances Control* (2014) 231 Cal.App.4th 1287, 1292, 180 Cal.Rptr.3d 416.) We do not, however, " 'assume the truth of contentions, deductions or conclusions of fact or law.' " (*Loeffler, supra,* at p. 1100, 171 Cal.Rptr.3d 189, 324 P.3d 50; *Rosolowski v. Guthy–Renker LLC* (2014) 230 Cal.App.4th 1403, 1410, 179 Cal.Rptr.3d 558.)

6 The first amended complaint names Juan Carlos Jandres (Jandres) as a plaintiff. Jandres has not appealed from the adverse judgment and thus is not a party to this appeal. We therefore omit the factual allegations pertaining to Jandres. While Hambrick also brings this action on behalf of similarly situated plaintiffs, in this opinion we will only address Hambrick's claims.

7 Section 127575, subdivision (e), defines " '[i]nstitutional provider services' " as "services, equipment, and supplies ... provided by an institution, site, or facility through which [medical] services are provided." Because the definition excludes " 'professional health care services,' " hospital care is typically referred to in the Knox-Keene context as "institutional care."

8 Hambrick did not specify the nature of her injury in the operative complaint.

9 The term " 'capitation' basis ... means the [health plan's] reimbursement rate is calculated on a per capita basis, with a flat rate paid for each individual enrolled in the plan during a particular time period." (*Solorzano v. Superior Court* (1992) 10 Cal.App.4th 1135, 1141, 13 Cal.Rptr.2d 161; see also Cal.Code Regs., tit. 28, § 1300.76, subd. (f) [" 'capitated basis' means fixed per member per month payment or percentage of premium payment wherein the provider assumes the full risk for the cost of contracted services without regard to the type, value or frequency of services provided"].)

10 Section 1345 defines a " '[p]erson' " to include "any person, individual, firm, association, organization, partnership, business trust, foundation, labor organization, corporation, limited liability company, public agency, or political subdivision of the state." (Id. subd. (j).)

11 In order to obtain a license to operate as a health care service plan, an organization must submit an application in conformity with lengthy requirements of section 1351 and California Code of Regulations, title 28, section 1300.51. Section 1353 provides that "[t]he director shall issue a license to any person filing an application pursuant to this article, if the director, upon due consideration of the application and of the information obtained in any investigation, including, if necessary, an onsite inspection, determines that the applicant has satisfied the provisions of this chapter and that, in the

judgment of the director, a disciplinary action pursuant to Section 1386 would not be warranted against such applicant. Otherwise, the director shall deny the application."

12 Section 1300.75.4, subdivision (d)(2), of title 28 of the California Code of Regulations defines a "[r]isk-shifting arrangement" as "a contractual arrangement between an organization and a plan under which the plan pays the organization on a fixed, periodic or capitated basis, and the financial risk for the cost of services provided pursuant to the contractual arrangement is assumed by the organization."

13 HCP appears to argue that it is more properly characterized as a risk-bearing organization. At oral argument, HCP's counsel argued: "Not all risk-bearing organizations are health care service plans, and health care service plans are not easily or readily defined by the statute."

14 Section 1348.6, subdivision (b), provides that contracts between a health care service plan and a physician group or physician may include "incentive plans that involve general payments, such as capitation payments, or shared-risk arrangements that are not tied to specific medical decisions involving specific enrollees or groups of enrollees with similar medical conditions...."

15 The Legislature established the FSSB in 1999 in section 1347.15. (Stats. 1999, ch. 529, § 1 (Sen. Bill No. 260).) Subdivision (a) of section 1347.15 provides: "There is hereby established in the [DMHC] the [FSSB] composed of eight members...." The stated purpose of the FSSB is to "(1) Advise the director on matters of financial solvency affecting the delivery of health care services. [¶] (2) Develop and recommend to the director financial solvency requirements and standards relating to plan operations, plan-affiliate operations and transactions, plan-provider contractual relationships, and provider-affiliate operations and transactions. [¶] (3) Periodically monitor and report on the implementation and results of the financial solvency requirements and standards." (Id. subd. (b).)

16 As we discuss below, we take judicial notice of the FSSB Memo for the limited purpose of providing context to the parties' arguments, but not as a statement of FSSB's or DMHC's interpretation of the law.

17 http://www.dmhc.ca.gov/Portals/0/AbouttheDMHC/FSSB/Meetings/a020129_info.pdf (as of June 1, 2015).

18 Hambrick contends that the demurrer was based on speculative arguments and matters outside the four corners of the first amended complaint or not subject to judicial notice. However, the trial court's decision to sustain the HCP defendants' demurrers without leave to amend was not based on a determination that Hambrick failed to plead her three causes of action, but rather on the factors underlying the abstention doctrine. Hambrick cites no authority for the proposition that in deciding whether to abstain the trial court was limited to the four corners of the first amended complaint.

19 In *Desert Healthcare,* the owner of a hospital sued PacifiCare, a health care service plan licensed under the Knox-Keene Act. Similar to the arrangement alleged here, PacifiCare contracted with Desert Physicians Association (DPA) to provide medical services to subscribers of PacifiCare. Pursuant to their "capitation agreement," "PacifiCare paid DPA a flat fee per person to provide physicians and obtain hospital services for PacifiCare's subscribers." (*Desert Healthcare, supra,* 94 Cal.App.4th at p. 785, 114 Cal.Rptr.2d 623.) DPA, in turn, contracted with Desert Healthcare to obtain hospital services for PacifiCare's subscribers. (*Ibid*.) After DPA filed for bankruptcy and extinguished its debts, Desert Healthcare sought to recover millions of dollars it had spent for hospital services provided to subscribers of PacifiCare. (*Ibid*.) Desert Healthcare asserted UCL claims based on the Knox-Keene Act against PacifiCare based on "PacifiCare's practice of requiring waivers from its providers and refusing to pay claims for which it had received premiums." (*Id.* at pp. 785–786, 114 Cal.Rptr.2d 623, fn.omitted.)

20 Hambrick also relies on section 1253, subdivision (a). Section 1253 is not part of the Knox-Keene Act. It is a general licensing statute that requires a person or entity operating a health facility in California to obtain a license enabling it to do so. (See §§ 1250, 1251, 1253, subd. (a).) Because Hambrick at no time alleged that HCP operated a "health facility," her reliance on section 1253 is misplaced.

21 Pursuant to our March 6, 2015 request, the parties submitted letter briefs discussing the remedies the director of the DMHC may order for violations of the licensing provisions of the Knox-Keene Act.

22 The court in *Alvarado* also noted that if the DHCS failed to act, the plaintiffs were free to pursue a writ of mandate to compel DHCS to comply with its duty to enforce the nursing hours mandate in section 1276.5. (*Alvarado, supra,* 153 Cal.App.4th at p. 1306 & fn. 5, 64 Cal.Rptr.3d 250 ["[n]othing in this opinion is intended to preclude plaintiff from pursuing appropriate writ relief pursuant to the Code of Civil Procedure to compel the DHCS ... to enforce the requirement that 'the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours"].) Similarly, here the Legislature intended for the DMHC to exercise its regulatory authority under sections 1349 and 1391 to insure that health care service plans obtain licenses under the Knox-Keene Act and, if it fails to carry out this enforcement authority, review by a writ of mandate may likewise be available to Hambrick.

23 Business and Professions Code section 17203 provides: “Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition....”

24 Business and Professions Code section 17535 provides: “Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.”

25 Because the UCL and FAL provide for the same remedies, we will focus on remedies under the UCL, which have been addressed more frequently by the courts.

26 “Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. [Citations.] There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. [Citation.]” (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1482, 171 Cal.Rptr.3d 548, fn. omitted.)

27 On our own motion, we take judicial notice of these cease and desist orders submitted to the court with HCP's letter brief. (Evid.Code, §§ 452, subd. (c), 459; *Taiheiyo Cement U.S.A., Inc. v. Franchise Tax Bd.* (2012) 204 Cal.App.4th 254, 267, fn. 5, 138 Cal.Rptr.3d 536 [court may take judicial notice of orders of administrative agencies]; *Klein, supra,* 202 Cal.App.4th at p. 1360, fn. 6, 137 Cal.Rptr.3d 293 [same].)

28 In its written ruling, the trial court stated that “common-law fraud claims ... hardly ever qualify for class treatment” and that “[t]he real nub of the case ... is the equitable UCL claim and [FAL] claim.” At the hearing on the demurrers, the trial court noted, “Well, in a hyper-technical sense you could get damages for the fraud claim, but because the particularity of the elements of common law fraud, fraud claims in truth really never shape up for class actions....” Whether the fraud claim would qualify for class treatment is not relevant to whether the trial court had discretion to abstain from deciding the merits of the claim.

29 At oral argument, counsel for the HCP defendants maintained that Hambrick did not seek legal damages in the second cause of action because her name was not specifically included in the prayer. As to the second cause of action, the prayer sought “[s]pecial and general damages according to proof for JANDRES and each member of the Class,” “[f]or other such relief the court deems just and proper,” and “[p]unitive damages.” We consider the absence of Hambrick's name from the prayer to be an oversight, in that the second cause of action alleges that the HCP defendants' conduct “was a substantial factor in causing JANDRES, HAMBRICK and Plaintiffs' damages.”

30 *Younger v. Harris* (1971) 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669.

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76 Cal.App.4th 970, 90 Cal.Rptr.2d 743, 99 Cal. Daily Op. Serv. 9561, 1999 Daily Journal D.A.R. 12,265

KENDALL-JACKSON WINERY, LTD., Petitioner,
v.
THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; E. & J. GALLO WINERY, Real Party in Interest.

No. F033305.
Court of Appeal, Fifth District, California.
Dec. 3, 1999.

SUMMARY

In a malicious prosecution action by a winemaker against a competitor based on an underlying action against plaintiff for trademark infringement, trade dress violations, and unfair business practices, the trial court granted plaintiff summary adjudication on defendant's unclean hands defense. The unclean hands defense was based on two types of alleged marketing misconduct: plaintiff's undue influence over shelf schematics and other retailer merchandising activity, and its movement of a competitor's wines to create product adjacencies. (Superior Court of Stanislaus County, No. 153296, Hugh Rose III, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its order granting plaintiff's motion for summary adjudication of defendant's unclean hands affirmative defense and to enter a new order denying the motion. The court held that the equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to misconduct that bears on the defendant's decision to file the prior action. Plaintiff's alleged misconduct violated the letter and the spirit of the Alcoholic Beverage Control Act, and supported a defense of unclean hands. The gist of the underlying lawsuit was that plaintiff attempted to capitalize on defendant's success as the market leader in premium wine sales by using a variety of unfair marketing strategies, and a jury could find that plaintiff's inequitable conduct occurred in the transaction related directly to the matter before the trial court-the marketing of plaintiff's wine to compete with defendant's wine-and affected the equitable relationship between the litigants. It was not necessary that plaintiff's unclean hands conduct have directly affected defendant's decision to file and pursue the underlying lawsuit. The court held that the unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action, but is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of the claim. (Opinion by Thaxter, Acting P. J., with Harris and Buckley, JJ., concurring.) ***971**

HEADNOTES

Classified to California Digest of Official Reports

(1)
Summary Judgment § 4--Propriety--Affirmative Defense.
Summary adjudication of an affirmative defense is properly granted when there is no triable issue of material fact as to the defense, and the moving party is entitled to judgment on the defense as a matter of law. In a case of the defense of unclean hands, a plaintiff has to show there is no evidence to support the defendant's unclean hands affirmative defense. Once plaintiff meets that burden, the burden shifts to defendant to set forth specific facts showing a triable issue of material fact exists as to the defense. On review, the court independently assesses the correctness of the trial court's ruling, applying the same legal standard as the trial court. It construes plaintiff's papers strictly and defendant's liberally and resolves any doubts as to the propriety of granting the motion in favor of defendant.

(2)
Equity § 6.2--Principles and Maxims--Unclean Hands.
The defense of unclean hands arises from the maxim, one who comes into equity must come with clean hands. The doctrine demands that a plaintiff act fairly in the matter for which he or she seeks a remedy, and must come into court with clean hands and keep them clean, or relief will be denied, regardless of the merits of the claim. The defense is available in legal as well as equitable actions. Applicability of the doctrine of unclean hands is a question of fact. The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the court's, rather than the opposing party's, interests. The doctrine promotes justice by making a plaintiff answer for his or her own

misconduct in the action. It prevents a wrongdoer from enjoying the fruits of his or her transgression.

(3)
Equity § 6.2--Principles and Maxims--Unclean Hands--Scope.
Not every wrongful act constitutes unclean hands, but the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct, is sufficient cause to invoke the doctrine. The misconduct that brings the clean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects ***972** the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. There is a three-pronged test to determine the effect to be given to the plaintiff's unclean hands conduct. Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries.

(4a, 4b, 4c, 4d)
Malicious Prosecution § 8--Actions--Defense-- Unclean Hands--Relation of Conduct to Underlying Suit--Wine Marketing Practices:Equity § 6.2--Unclean Hands.
In a malicious prosecution action by a winemaker against a competitor based on an underlying action against plaintiff for trademark infringement, trade dress violations, and unfair business practices, the trial court erred in granting plaintiff summary adjudication on defendant's unclean hands defense. The unclean hands defense was based on two types of alleged marketing misconduct: plaintiff's undue influence over shelf schematics and other retailer merchandising activity, and its movement of a competitor's wines to create product adjacencies. That misconduct violated the letter and the spirit of the Alcoholic Beverage Control Act, and supported a defense of unclean hands. The gist of the underlying lawsuit was that plaintiff attempted to capitalize on defendant's success as the market leader in premium wine sales by using a variety of unfair marketing strategies, and a jury could find that plaintiff's inequitable conduct occurred in the transaction related directly to the matter before the court-the marketing of plaintiff's wine to compete with defendant's wine-and affected the equitable relationship between the litigants. It was not necessary that plaintiff's unclean hands conduct have directly affected defendant's decision to file and pursue the underlying lawsuit.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 431; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, §§ 9, 10.]

(5)
Alcoholic Beverages § 4--Alcoholic Beverage Control Act--Restrictions on Tied-house Arrangements.
The comprehensive statutory scheme restricting tied-house arrangements in the distribution of alcoholic beverages (Bus. & Prof. Code, §§ 25500-25512) seeks to avoid the evils and excesses of disorderly marketing conditions that plagued the alcoholic beverage industry prior to prohibition. The tied-house prohibitions target two particular dangers: the ability of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the ***973** overly aggressive marketing techniques of larger alcoholic beverage concerns. The statutes sought to remove the manufacturer's influence over the retailer, which could result in preference for the manufacturer's product. Under the statutory scheme, all levels of the alcoholic beverage industry must remain separate; producers are not to be involved with, or exercise influence over, retailers. Thus, no supplier can lawfully directly or indirectly, give anything of value to any retailer except as authorized by the Alcoholic Beverage Control Act. Providing services in the form of rearranging a retailer's displays is prohibited, as is interfering with the product display of competing sellers inside retail outlets.

(6)
Equity § 6.2--Principles and Maxims--Unclean Hands--Scope:Malicious Prosecution § 8--Actions.
The unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of the claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it. Thus, any evidence of the plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation. The equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to

misconduct that bears on the defendant's decision to file the prior action.

(7)
Malicious Prosecution § 8--Actions--Unclean Hands.
The fundamental interest protected by the malicious prosecution tort is freedom from unjustifiable and unreasonable litigation. But, malicious prosecution is a disfavored action. Constitutional principles, as well as strong public policy, favor open access to the courts for the resolution of conflicts and the redress of grievances. This strong public policy, coupled with the equitable principles underlying the doctrine of unclean hands-to protect the integrity of the court and ensure a just result-bode in favor of a broad application of the doctrine in malicious prosecution actions. ***974**

COUNSEL
Ropers, Majeski, Kohn & Bentley, Daniel E. Alberti, Mark G. Bonino, Mary A. Kiker and Kathryn C. Curry for Petitioner.
No appearance for Respondent.
Blecher & Collins, Maxwell M. Blecher, Steven J. Cannata; Damrell, Nelson, Schrimp, Pallios & Ladine, Roger M. Schrimp; Orrick, Herrington & Sutcliffe, George A. Yuhas and Laurie Chambers for Real Party in Interest.

THAXTER, Acting P. J.

The doctrine of unclean hands does not deny relief to a plaintiff guilty of any past misconduct; only misconduct directly related to the matter in which he seeks relief triggers the defense. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 10, p. 686.) The trial court found that Kendall-Jackson Winery, Ltd. (Kendall-Jackson), the defendant in a malicious prosecution action, had no relevant evidence that the plaintiff, E. & J. Gallo Winery (Gallo), acted with unclean hands in relation to its claim and ordered summary adjudication for the plaintiff on Kendall-Jackson's unclean hands defense. The novel issue presented is this: When "unclean hands" is raised as an affirmative defense to a malicious prosecution claim, is the relevant misconduct limited to that which affected the defendant's decision to file and pursue the prior lawsuit? We hold it is not; misconduct in the particular transaction or connected to the subject matter of the litigation that affects the equitable relations between the litigants is sufficient to trigger the defense.

We issue a writ of mandate directing the trial court to vacate its order granting summary adjudication for real party in interest on petitioner's unclean hands affirmative defense and to enter a new order denying the motion.

Facts and Procedural History

Kendall-Jackson has a reputation for producing high quality, mid-priced varietal wines. In 1994, Kendall-Jackson was selling over $100 million worth of Vintner's Reserve wine a year, and its chardonnay was the number one selling chardonnay in the United States. (*Kendall-Jackson Winery* v. ***975** *E. & J. Gallo Winery* (9th Cir. 1998) 150 F.3d 1042, 1045.) Gallo is the largest wine producer in the world. But, unlike Kendall-Jackson, Gallo has a reputation for producing lower priced, nonpremium wines. (*Ibid.*)

During the 1990's, the market for nonpremium wines declined rapidly. Gallo researched how best to enter the premium wine market. Much of its research was directed at the success of the market leader-Kendall-Jackson Vintner's Reserve. Gallo learned that consumers associate the name "Gallo" with "jug wine" and that a colorful grape leaf design attracts consumers. In accord with these results, Gallo introduced in the fall of 1995 a line of premium wine, Turning Leaf, that featured a leaf motif and did not use the Gallo name. (*Kendall-Jackson Winery v. E. & J. Gallo Winery*, *supra*, 150 F.3d at p. 1045.)

In April 1996, Kendall-Jackson sued Gallo for damages and injunctive relief on causes of action for trademark infringement, trade dress violations and unfair business practices. Kendall-Jackson alleged that Gallo's Turning Leaf wine label and overall appearance mimicked its successful Vintner's Reserve wines. While the lawsuit alleged unfair marketing practices in retail displays, the litigation focused on the label and packaging similarities rather than marketing strategies. (*Kendall-Jackson Winery v. E. & J. Gallo Winery*, *supra*, 150 F.3d 1042.) Gallo denied employing unlawful marketing practices and resisted disclosing material related to its marketing strategies. The court found for Gallo on the trademark infringement and unfair competition claims. After a 12-day trial, a jury found for Gallo on the trade dress infringement and "palming off" claims. Judgment for Gallo was affirmed on appeal. (*Ibid.*)

In September 1997, Gallo filed this action against Kendall-Jackson for malicious prosecution and intentional interference with contract. Gallo alleged that Kendall-Jackson had filed and prosecuted the federal action without probable cause and for the improper purpose of harassing a competitor. In addition, Kendall-Jackson had induced Chris Lynch, Gallo's former director of marketing, to breach his confidentiality agreement with Gallo. Kendall-Jackson used the confidential information obtained "to file a facially

plausible, but knowingly false lawsuit against Gallo." Among the defenses raised by Kendall-Jackson's answer was an allegation that Gallo's claims were barred by the doctrine of unclean hands.

In response to Gallo's interrogatory requesting each fact supporting the defense, Kendall-Jackson stated:

(1) Kendall-Jackson has learned that Gallo has numerous representatives working for chain stores who are involved with shelf schematics for the ***976** stores or are otherwise involved with moving wine products. Alternatively, Gallo representatives have directed non-Gallo employees to make schematic changes for Gallo.

(2) Gallo employs a technique which it calls "piggy-back adjacencies." The technique involves training its distributor/salesperson to place an inferior, lower priced Gallo product adjacent to a higher priced category leader. The category leader's display attracts the consumer's attention. When the consumer reaches for the well-known product, he or she will see the lower priced Gallo product, and may buy that product instead.

(3) Gallo employees have admitted moving Turning Leaf wines next to Kendall-Jackson wines, which would require them to move a non-Gallo product in violation of federal and state regulations.

Kendall-Jackson identified a number of documents that described conduct supporting its unclean hands defense. The documents contain direct and circumstantial evidence showing that Gallo used its influence to have retailers place Turning Leaf wine next to Kendall-Jackson Vintner's Reserve wine. The documents also reflect that Gallo representatives or employees moved Kendall-Jackson products, provided free labor to retailers in exchange for favorable product placement, prepared shelf schematics for retailers, maintained offices in some retailers' stores, wore retailer badges while stocking product, removed Kendall-Jackson wines from a retail store, participated in retailer resets which involved handling a competitor's product, and interfered with Kendall-Jackson's marketing displays. While most of the documents were generated during the federal litigation (1996-1997), many reflected or implied ongoing unclean hands conduct since 1994.

Kendall-Jackson designated Michael Haarstad, its director of marketing, as the person most knowledgeable about the facts supporting its unclean hands defense. Gallo deposed Haarstad. According to Gallo, Haarstad confirmed that the documents produced were the only evidence known to Kendall-Jackson that support its defense, and Haarstad was unaware of any Gallo misconduct relating to Turning Leaf wine that occurred prior to the filing of the infringement action. In fact, Haarstad's testimony provided considerably more evidence regarding Gallo's purportedly illegal or improper marketing strategies in relation to Kendall-Jackson.

At one point in his deposition, Haarstad stated he did not recall any unclean hands conduct by Gallo concerning Turning Leaf before the federal lawsuit was filed. Later, however, he stated that between 1994 and 1996, he was generally aware of Gallo's influence over, and inappropriately close ***977** working relationship with, chain stores. After the lawsuit was filed and Kendall-Jackson elicited written information from employees in the field, he became aware of the depth and scope of the improper activity. Haarstad also testified that he had received oral reports from the field regarding inappropriate Gallo adjacencies from 1994 through the period when Turning Leaf was introduced.

Motion for Summary Adjudication

Gallo moved for summary adjudication on Kendall-Jackson's unclean hands defense. Gallo admitted for purposes of the motion that the "actions described in [Kendall-Jackson]'s unclean hands documents took place." Gallo contended, however, it was entitled to judgment on the defense because the conduct identified was not directly related to its malicious prosecution claim. According to Gallo, in a malicious prosecution action, the plaintiff's unclean hands conduct must have affected the defendant's decision to file and pursue the underlying lawsuit. Thus, only unclean hands conduct known to the defendant at the time it filed the underlying suit is relevant. Because Kendall-Jackson's documents describing the misconduct were generated after Kendall-Jackson filed the underlying action, they were irrelevant, and Kendall-Jackson had no evidence to support its defense.

Gallo also argued that further discovery would not cure the evidentiary defects. Because the unclean hands conduct had to affect Kendall-Jackson's decision to file the infringement action, only unclean hands conduct known to Kendall-Jackson at that time could be used to support its defense.

Kendall-Jackson opposed the motion on procedural and substantive grounds.

The trial court granted the motion for summary adjudication. It found that Kendall-Jackson had no relevant evidence that Gallo acted with unclean hands in relation to its malicious prosecution or inducing breach of contract claims. The court denied Kendall-Jackson's request to continue the matter for further discovery, finding no showing of due diligence.

Kendall-Jackson filed a petition for writ of mandate challenging those orders. This court issued an order to show cause.

Discussion

Summary Adjudication/Standard of Review

(1) Summary adjudication of an affirmative defense is properly granted when there is no triable issue of material fact as to the defense, and the ***978** moving party is entitled to judgment on the defense as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f)(1).) In this case, moving party Gallo had to show there was no evidence to support Kendall-Jackson's unclean hands affirmative defense. (Code Civ. Proc., § 437c, subd. (*o*)(2).) Once Gallo met that burden, the burden shifted to Kendall-Jackson to set forth specific facts showing a triable issue of material fact existed as to the defense. (*Ibid.*) On review, we independently assess the correctness of the trial court's ruling, applying the same legal standard as the trial court. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 82 [82 Cal.Rptr.2d 497].) We construe Gallo's papers strictly and Kendall-Jackson's liberally and resolve any doubts as to the propriety of granting the motion in favor of Kendall-Jackson. (*Jacobs v. Universal Development Corp.* (1997) 53 Cal.App.4th 692, 697 [62 Cal.Rptr.2d 446].)

Gallo Failed to Establish It Was Entitled to Judgment on the Unclean Hands Affirmative Defense

Unclean Hands

(2) The defense of unclean hands arises from the maxim, " ' "He who comes into Equity must come with clean hands." ' " (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059 [272 Cal.Rptr. 250] (*Blain*).) The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. (*Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, 814-815 [65 S.Ct. 993, 997-998, 89 L.Ed. 1381]; *Hall v. Wright* (9th Cir. 1957) 240 F.2d 787, 794-795.) The defense is available in legal as well as equitable actions. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728 [39 Cal.Rptr. 64] (*Fibreboard*); *Burton v. Sosinsky* (1988) 203 Cal.App.3d 562, 574 [250 Cal.Rptr. 33].) Whether the doctrine of unclean hands applies is a question of fact. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 639 [76 Cal.Rptr.2d 615].)

The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the court's, rather than the opposing party's, interests. (*Fibreboard*, *supra*, 227 Cal.App.2d at p. 727; *Gaudiosi v. Mellon* (3d Cir. 1959) 269 F.2d 873, 881.) The doctrine promotes justice by making a plaintiff answer for his own misconduct in the action. It prevents "a wrongdoer from enjoying the fruits of his transgression." ***979** (*Precision Co. v. Automotive Co.*, *supra*, 324 U.S. at p. 815 [65 S.Ct. at p. 998]; *Keystone Co. v. Excavator Co.* (1933) 290 U.S. 240, 245 [54 S.Ct. 146, 147-148, 78 L.Ed. 293].)

(3) Not every wrongful act constitutes unclean hands. But, the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine. (*DeRosa v. Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1395-1396 [262 Cal.Rptr. 370]; *Precision Co. v. Automotive Co.*, *supra*, 324 U.S. at pp. 814-815 [65 S.Ct. at pp. 997-998].)

The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. (*Fibreboard*, *supra*, 227 Cal.App.2d at pp. 728-729.) Courts have expressed this relationship requirement in various ways. The misconduct "must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants." (*Id.* at p. 728.) "[T]here must be a direct relationship between the misconduct and the claimed injuries ... ' "so that it would be inequitable to grant [the requested] relief." ' " (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846 [60 Cal.Rptr.2d 780].) "The issue is not that the plaintiff's hands are dirty, but rather ' " 'that the manner of dirtying renders inequitable the

assertion of such rights against the defendant.' " ' " (*Ibid.*) The misconduct must " ' "prejudicially affect ... the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief." ' " (*Ibid.*)

From these general principles, the *Blain* court gleaned a three-pronged test to determine the effect to be given to the plaintiff's unclean hands conduct. Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. (*Blain*, *supra*, 222 Cal.App.3d at p. 1060; accord, *Unilogic*, *Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618-621 [12 Cal.Rptr.2d 741]; *CrossTalk Productions*, *Inc. v. Jacobson*, *supra*, 65 Cal.App.4th at pp. 641-643.) (4a) We will analyze the parties' contentions under the three prongs.

A. *Analogous Case Law*

Two published cases have applied the doctrine of unclean hands as a defense to a malicious prosecution claim. In the first case, insurance agent ***980** Pond sold an INA (Insurance Company of North America) aircraft liability policy to Mission, whose president was Pond's longtime friend. The policy included minimum pilot training requirements that were the same as an earlier INA policy issued to Mission, but stricter than the requirements of Mission's current AAU (Associated Aviation Underwriters) policy. There was a series of meetings regarding the policy, resulting in Pond sending a letter to Mission agreeing to coverage. Regarding pilot minimums, the letter said, "same as before." Three days before Mission received the actual policy, one of its planes crashed due to pilot error, killing all aboard. (*Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 284-285, 291 [198 Cal.Rptr. 517] (*Pond*).)

In the resulting wrongful death actions, INA defended Mission under a reservation of rights on the ground that the deceased pilot did not meet the minimum training requirements enumerated in the INA policy. Mission contended that Pond and INA had agreed to replace the AAU policy with an INA policy with equivalent pilot minimums. Mission's position was bolstered by Pond's testimony that he had not explained to Mission what "same as before" referred to. As a result of the coverage ambiguity, INA settled the wrongful death suit. (*Pond*, *supra*, 151 Cal.App.3d at pp. 285-286.) INA then sought indemnity from Pond, alleging that Pond's negligent representation created an ambiguity that made INA potentially liable for an excluded claim. (*Id.* at p. 285.) During this litigation, discovery revealed that Pond had forwarded to Mission a letter from INA stating pilot minimums before Mission agreed to the coverage. On this evidence the trial court found that Pond had done nothing to mislead Mission regarding the pilot minimums and entered judgment for him on INA's indemnity claim. (*Id.* at p. 286.)

Pond sued INA for malicious prosecution. Discovery in this action revealed additional evidence that Pond had advised Mission of the actual pilot minimums and evidence indicating Pond had lied in the wrongful death litigation regarding his understanding of the intended pilot minimums. (*Pond*, *supra*, 151 Cal.App.3d at pp. 286, 290.) The appellate court affirmed summary judgment for INA on its unclean hands defense.

The equitable principles underlying the unclean hands doctrine did not require a finding that Pond was guilty of perjury, concealment, or other illegal conduct. Any unconscientious conduct connected with the controversy before the court was sufficient to warrant application of the unclean hands defense. Further, Pond's unclean hands conduct in the indemnity action was connected with and related to the malicious prosecution action because the indemnity suit was the basis of the malicious prosecution claim. (*Pond*, *supra*, 151 Cal.App.3d at pp. 286, 290-291.) ***981**

In the second case, Transamerica opened an escrow account for the sale of DeRosa's property to Lapitan. DeRosa executed a quitclaim deed and deposited it in escrow. A Transamerica employee gave the deed to Lapitan and her fianc Flint prior to the close of escrow and Lapitan recorded it. DeRosa asked Transamerica to return title to him. Transamerica commenced a quiet title action to do so. DeRosa became uncooperative, which resulted in Transamerica adding a fraud cause of action against him in the quiet title action. DeRosa prevailed on Transamerica's fraud claim and sued for malicious prosecution. (*DeRosa v. Transamerica Title Ins. Co.*, *supra*, 213 Cal.App.3d at pp. 1393-1395 (*DeRosa*).)

Transamerica raised an unclean hands defense and moved for summary judgment. In opposing the motion, DeRosa submitted a declaration stating he did not intend to defraud Transamerica. But, he acknowledged unconscientious conduct in the transaction. DeRosa had originally sold the property to Flint but agreed to be title owner of the property to enable Flint to avoid his creditors. Nevertheless, DeRosa considered Flint the true owner of the property and received regular payments from him on the purchase promissory note. Eventually, DeRosa tired of the arrangement and asked Flint to convey title to someone else. Flint agreed and the

Transamerica escrow was opened to effectuate the exchange. However, when Flint unilaterally sold the property to a third party using the quitclaim deed placed in the Transamerica escrow, DeRosa had Transamerica pursue an action to quiet title in him without revealing his true relationship with Flint to Transamerica. (*DeRosa*, *supra*, 213 Cal.App.3d at pp. 1395-1396.) The trial court granted Transamerica summary judgment on its unclean hands defense.

The appellate court rejected DeRosa's argument that the malicious prosecution action was unrelated to his conduct in assisting Flint to defraud his creditors and, therefore, the unclean hands doctrine should not apply. The malicious prosecution action arose from the quiet title action that Transamerica prosecuted on DeRosa's behalf. It was only because DeRosa concealed the true facts underlying the conveyance that Transamerica became involved and, subsequently, proceeded against DeRosa for fraud. The malicious prosecution action was directly related to DeRosa's unconscionable conduct in the underlying action. (*DeRosa*, *supra*, 213 Cal.App.3d at p. 1397.)

Under the analogous case law prong of the *Blain* test, a plaintiff's unclean hands conduct in the underlying action or in the transaction that was the subject of that action can preclude relief in a subsequent malicious prosecution suit. ***982**

B. *Nature of the Misconduct*

The second prong of the *Blain* test examines the nature of the misconduct. (*Blain*, *supra*, 222 Cal.App.3d at p. 1060.) Kendall-Jackson's unclean hands defense is based on two types of alleged marketing misconduct: Gallo's undue influence over shelf schematics and other retailer merchandising activity, and Gallo's movement of a competitor's wines to create product adjacencies.

Alcoholic Beverage Control Laws and Regulations

(5) California has a comprehensive statutory scheme restricting "tied-house" arrangements in the distribution of alcoholic beverages. (Bus. & Prof. Code, §§ 25500-25512.) The laws seek to avoid the "evils and excesses" of "disorderly marketing conditions" that plagued the alcoholic beverage industry prior to prohibition. (*California Beer Wholesalers Assn.*, *Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297, 487 P.2d 745].) The "tied-house" prohibitions target two particular dangers: the ability of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns. (*Ibid.*)

The Legislature recognized that small retailers were unable to cope with the pressures exerted by larger manufacturing interests. Thus, the statutes sought to remove the manufacturer's influence over the retailer, which could result in preference for the manufacturer's product. (*California Beer Wholesalers Assn.*, *Inc. v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 5 Cal.3d at pp. 407-408, & fn. 8.) Under the statutory scheme, all levels of the alcoholic beverage industry must remain separate; producers are not to be involved with, or exercise influence over, retailers. (*Id.* at pp. 407, 408.)

The Department of Alcoholic Beverage Control has adopted rules to enforce the statutory scheme. Section 106 of title 4 of the California Code of Regulations provides that no supplier shall, directly or indirectly, give anything of value to any retailer except as authorized by the Alcoholic Beverage Control Act. Providing services in the form of rearranging a retailer's displays is prohibited, as is interfering with the product display of competing sellers inside retail outlets. (*Turner v. Anheuser-Busch*, *Inc.* (1994) 7 Cal.4th 1238, 1258, fn. 12 [32 Cal.Rptr.2d 223, 876 P.2d 1022]; *Markstein Distributing Co. v. Rice* (1976) 65 Cal.App.3d 333, 338-339 [135 Cal.Rptr. 255].)

(1) *Gallo's undue influence over shelf schematics and other retailer activity*

Shelf schematics are product display plans that wine producers prepare and present to a retailer. The plans typically propose the amount of shelf ***983** space and location to be given to individual brands. Schematics are intended to assist the retailer to maximize revenues through product placement. Both Kendall-Jackson and Gallo provide shelf schematics to retailers. The practice is legal.

Kendall-Jackson contends that Gallo's use of schematics is illegal or improper because Gallo works too closely with retailers, provides goods or services of value in exchange for the retailer's use of Gallo schematics, and uses its considerable influence in the industry to achieve favorable shelf schematics. Kendall-Jackson's evidence disclosed that a number of Gallo representatives were employed by large supermarket chains, had offices in the chains or were provided with perquisites such as store badges which enabled them to move more freely about the retailer's premises than other wine

distributors. In addition, Gallo representatives or employees participated in restocking or stock resets for retailers in violation of Alcoholic Beverage Control regulations.

(2) *Gallo's movement of competitor's wines to create product adjacencies*

Product adjacencies are a marketing strategy whereby a wine producer attempts to have its brands displayed adjacent to the market leader brand in the relevant price segment. Adjacencies maximize the exposure of the adjacent brand. Product adjacencies are lawful and commonly used.

Kendall-Jackson contends Gallo's use of adjacencies is illegal and improper to the extent Gallo accomplishes adjacencies by physically moving a competitor's product. A wine distributor can ask a retailer to move a competitor's product, but the distributor cannot lawfully move the product. Kendall-Jackson's documents include direct and circumstantial evidence that Gallo distributors or employees moved bottles of Kendall-Jackson or another competitor to create product adjacencies between Kendall-Jackson Vintner's Reserve and Turning Leaf wines.

(4b) The nature of the misconduct indicated by Kendall-Jackson's evidence-Gallo's ties with retailers and movement of a competitor's product-violates the letter and the spirit of the Alcoholic Beverage Control Act. Such evidence supports a defense of unclean hands under the second prong of the *Blain* test. (*Hall v. Wright*, *supra*, 240 F.2d at p. 795 [unclean hands conduct need not constitute unfair competition under California law].) Gallo has not established that the proffered misconduct is insufficient as a matter of law to support an unclean hands affirmative defense. ***984**

C. *Relationship of the Misconduct to the Injuries*

The final prong of the *Blain* test requires examination of the relationship between the plaintiff's misconduct and the claimed injuries. (*Blain*, *supra*, 222 Cal.App.3d at p. 1060.) The misconduct that brings the unclean hands doctrine into play must relate directly to the transaction concerning which the complaint is made. It must infect the cause of action involved and affect the equitable relations between the litigants. (*Pond*, *supra*, 151 Cal.App.3d at p. 290.) Cases illustrating preclusive unclean hands conduct directly related to the transaction at issue include *Unilogic*, *Inc. v. Burroughs Corp.*, *supra*, 10 Cal.App.4th 612, 618, 621 (although defendant converted plaintiff's proprietary information during a failed joint project, plaintiff's unclean hands-bribery to obtain the contract, failure to disclose financial difficulties, and its own conversion of defendant's property-during the same joint project precluded relief); *Camp v. Jeffer*, *Mangels*, *Butler & Marmaro* (1995) 35 Cal.App.4th 620, 639 [41 Cal.Rptr.2d 329] (plaintiffs' suit for wrongful termination was barred by evidence they had lied on their job applications); and *Blain*, *supra*, 222 Cal.App.3d 1048, 1058, 1063 (doctrine of unclean hands precluded legal malpractice action based on injuries caused when physician-defendant followed the advice of his attorney to lie at a deposition; physician's emotional distress and inability to work as a physician were attributable to his own misconduct).

Cases illustrating misconduct not sufficiently related to the transaction to warrant application of the unclean hands doctrine include *Vacco Industries*, *Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 50, 52-53 [6 Cal.Rptr.2d 602] (plaintiff's wrongful discharge of defendant was immaterial in a suit seeking compensatory and injunctive relief for defendant's misappropriation of plaintiff's trade secrets: “If the conclusion were otherwise, every terminated employee could justify and defend charges of theft and misappropriation of his former employer's proprietary interests by establishing breach or wrongful termination of an express or implied employment contract.... Such a result finds no support in law or common sense”); *Murillo v. Rite Stuff Foods*, *Inc.* (1998) 65 Cal.App.4th 833, 845, 851-852 [77 Cal.Rptr.2d 12] (plaintiff's unclean hands use of falsified immigration documents to obtain employment was not related to and did not preclude her sexual harassment claim); *Fibreboard*, *supra*, 227 Cal.App.2d 675, 729 (employer's breach of union contract was not directly related to transaction before the court-employer's suit for damages due to union members' tortious conduct on the picket line); and *Germo Mfg. Co. v. McClellan* (1930) 107 Cal.App. 532, 541 [290 P. 534] (plaintiff's unfair practices in dealings with others were not related to its suit to enjoin former employees from using trade secrets).

Gallo contends that its alleged unclean hands conduct-illegal and improper marketing practices directed at Kendall-Jackson-is unrelated to the ***985** injuries it claims from having to defend against Kendall-Jackson's baseless and malicious infringement action. Gallo urges this court to apply a narrow rule in determining whether particular misconduct precludes a malicious prosecution claim. According to Gallo, the gist of a malicious prosecution action is that the prior lawsuit was filed maliciously and without probable cause. Therefore, in order to bear the requisite direct relationship to a malicious prosecution claim, the unclean hands conduct must

relate directly to the defendant's decision to file and pursue the prior litigation. Neither analogous case law nor the equitable principles underlying the unclean hands doctrine supports this narrow rule.

While the misconduct in *Pond* and *DeRosa* affected the defendant's decision to file the underlying lawsuit, neither court tied its application of the unclean hands doctrine to that fact. Rather, the courts looked at the larger picture and concluded that the plaintiff's misconduct had infected the malicious prosecution cause of action, or had related directly to the transaction concerning which the complaint was made-the underlying lawsuit. (*Pond*, *supra*, 151 Cal.App.3d at p. 290; *DeRosa*, *supra*, 213 Cal.App.3d at p. 1397.) Simply stated, permitting Pond or DeRosa to recover damages for defending the unsuccessful underlying actions was unjust because their misconduct had precipitated those actions and thus affected the equitable relations between the litigants in the malicious prosecution action. Neither *Pond* nor *DeRosa* supports Gallo's narrow application of the doctrine.

(6) Moreover, the unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it. (*Ford v. Buffalo Eagle Colliery Co.* (4th Cir. 1941) 122 F.2d 555, 563; 5 McCarthy on Trademarks and Unfair Competition (4th ed. 1997) § 31:45.) Thus, any evidence of a plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation. The equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to misconduct that bears on the defendant's decision to file the prior action.

(4c) Gallo contends additional considerations justify restricting the use of an unclean hands defense in a malicious prosecution action. Citing ***986** *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 570 [264 Cal.Rptr. 883], Gallo argues that to prove probable cause, the malicious prosecution defendant is limited to evidence known to him at the time he filed the prior action. He cannot introduce evidence to show probable cause that occurred after he filed the lawsuit. Permitting the defendant to present evidence that was unknown to him when he filed the prior suit or that occurred after he filed suit, under the guise of an unclean hands defense, would render the temporal probable cause limitation meaningless.[1] Gallo's argument is flawed in that it fails to recognize that unclean hands goes beyond the justification for filing the malicious prosecution suit; unclean hands concerns the far broader question of a party's misconduct in the matter. (*New Hampshire Ins. Co. v. Ridout Roofing Co*. (1998) 68 Cal.App.4th 495, 507 [80 Cal.Rptr.2d 286].)

Gallo next argues that permitting Kendall-Jackson to use evidence that it chose not to present in the prior action to mount an unclean hands defense to the malicious prosecution claim sanctions relitigation of tangential claims in the prior action. This contention is unpersuasive in the context of a malicious prosecution lawsuit, which in and of itself is a relitigation of the prior action. (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 353 [313 P.2d 123] [probable cause in a malicious prosecution action can be shown by proving that plaintiff committed the act charged in the underlying action even though a jury acquitted him or her of the charge]; *DeRosa*, *supra*, 213 Cal.App.3d at p. 1397 [although jury found for plaintiff on defendant's prior fraud claim, defendant's unclean hands defense based on the same fraudulent conduct precluded relief for plaintiff in his malicious prosecution action].)

(7) The fundamental interest protected by the malicious prosecution tort is freedom from unjustifiable and unreasonable litigation. (*Hufstedler*, *Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 65 [49 Cal.Rptr.2d 551].) But, malicious prosecution is a disfavored action. Constitutional principles, as well as strong public policy, favor open access to the courts for the resolution of conflicts and the redress of grievances. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 493 [78 Cal.Rptr.2d 142].) This strong public policy, coupled with the equitable principles underlying the doctrine of unclean hands-to protect the integrity of the court and ensure a just result-bodes in favor of a broad application of the doctrine in malicious prosecution actions. ***987**

(4d) Accordingly, Gallo's contention that the unclean hands conduct must relate directly to the defendant's decision to file and pursue the prior litigation in order to bear the requisite direct relationship to a plaintiff's malicious prosecution claim is without merit.

In the alternative, Gallo contends that even if the unclean hands evidence need not relate to Kendall-Jackson's decision to file the infringement lawsuit, Kendall-Jackson's evidence in this case does not relate directly to or "infect" the underlying infringement action or the malicious prosecution claim, as a matter of law. The contention has two components: (1) Kendall-Jackson's unclean hands defense is based on conduct that occurred long after the prior lawsuit was filed, and (2) the purported improper marketing practices have nothing whatsoever to do with Gallo's malicious prosecution claims or the prior infringement action.

Gallo's first contention fails on the evidence. Haarstad testified that he was aware of Gallo's unclean hands conduct in 1994, and the documents produced reflect or imply ongoing unclean hands conduct since before the infringement action was filed.

Gallo's second contention also fails. Kendall-Jackson's infringement action sought damages and to enjoin Gallo's use of its Turning Leaf label and packaging. The gist of the lawsuit was that Gallo attempted to capitalize on Kendall-Jackson's success as the market leader in premium wine sales by using a variety of unfair marketing strategies-similar label and trade dress, omitting the Gallo name from the bottle, placing Turning Leaf adjacent to Vintner's Reserve wine in store displays, and so forth. The theory of Kendall-Jackson's unclean hands defense is, although Gallo prevailed on the infringement claims, it is unfair to permit Gallo compensation for defending against Kendall-Jackson's claims because Gallo actually engaged in illegal and improper practices directed at Kendall-Jackson with respect to the marketing of Turning Leaf wines.

On the evidence presented, a jury could find that Gallo's unfair marketing strategies that targeted Kendall-Jackson's share of the premium wine market contributed to Kendall-Jackson's pursuit of the infringement action which, in turn, resulted in Gallo having to defend against Kendall-Jackson's unsuccessful allegations. A jury could find that Gallo's inequitable conduct occurred in the transaction related directly to the matter before the court-the marketing of Turning Leaf wine to compete with Vintner's Reserve wine-and affects the equitable relationship between the litigants. ***988**

Gallo argues the marketing practices that support the unclean hands defense were only tangentially at issue in, or indirectly related to, the subject matter of the infringement action. Gallo finds Kendall-Jackson's unclean hands evidence analogous to that in *Nutro Products*, *Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th 860 [5 Cal.Rptr.2d 41].

In *Nutro*, the trial court granted a preliminary injunction for the plaintiff-maker of Nutro Max pet food enjoining defendant-competitor's sale of Nutrix pet food. The appellate court rejected the defendant's claim that the motion should have been denied because the plaintiff engaged in misleading advertising and thus had unclean hands. The trial court, if it believed there had been misleading advertising, could have found the misconduct did not bear a sufficient relationship to the trademark infringement claim to mandate a finding of preclusive unclean hands. (*Nutro Products*, *Inc. v. Cole Grain Co.*, *supra*, 3 Cal.App.4th at p. 869.)

Gallo contends that Nutro's misleading advertising clearly bore some relationship to the issue of likelihood of confusion which was an element of the trademark infringement case. Nevertheless the court concluded such conduct did not bear a sufficient relationship to the infringement case to justify a conclusion of unclean hands. Gallo reads too much into the court's brief discussion of the issue and ignores the different procedural posture of *Nutro*. The *Nutro* court did not describe the misleading advertising. The deception may have involved an attribute of the product that was completely unrelated to the likelihood of confusion issue. Further, the issue on review was whether the unclean hands conduct, as a matter of law, mandated denial of relief for the plaintiff. In contrast, the issue here is whether there is a triable issue of fact as to whether Gallo's unclean hands conduct relates directly to the infringement action or affects the equitable relations between the litigants. *Nutro* does not support Gallo's position that the unclean hands conduct, as a matter of law, is not related directly to the infringement action.

For all of the reasons set forth above, Gallo did not establish that its unclean hands conduct is not directly related to the " 'transaction concerning which the complaint is made' " or does not affect the equitable relations between the parties as a matter of law. (*Pond*, *supra*, 151 Cal.App.3d at p. 290.) Accordingly, Gallo failed to meet its statutory burden of proving its entitlement to judgment as a matter of law and was not entitled to summary adjudication. In light of that conclusion, we need not address Kendall-Jackson's contention that the trial court abused its discretion by denying the request for continuance pursuant to Code of Civil Procedure section 437c, subdivision (h). ***989**

Disposition

Let a peremptory writ of mandate issue directing the trial court to vacate its order granting Gallo's motion for summary adjudication of Kendall-Jackson's unclean hands affirmative defense and to enter a new order denying the motion. The order to show cause is discharged and the stay of trial previously issued by this court is vacated.

Kendall-Jackson shall recovers its costs in this proceeding.

Harris, J., and Buckley, J., concurred.

A petition for a rehearing was denied January 3, 2000, and the opinion was modified to read as printed above. The petition of real party in interest for review by the Supreme Court was denied February 23, 2000. ***990**

Footnotes

1 Gallo asks the court to take judicial notice of Kendall-Jackson's opposition to Gallo's motion to compel production of documents in which Kendall-Jackson concedes that probable cause is based on information known when the underlying complaint was filed. Gallo apparently wants to point out Kendall-Jackson's opposing positions. The request is denied. Kendall-Jackson's position is immaterial to whether there is a triable issue of fact regarding the unclean hands affirmative defense.

AA-55

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS
Case No. 01-14-0000-9604

MERCK KGaA
(Claimant)

-v-

Internet Corporation for Assigned Names and Numbers
(Respondent)

FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Section I – Procedural History

1. The Claimant, Merck KGaA ("Merck"), of Frankfurter Straße 250 64293 Darmstadt, Germany, is represented in this matter by Bettinger Schneider Schramm, Cuvilliesstraße 14, 81679 Munich, Germany.

2. The Respondent, Internet Corporation for Assigned Names and Numbers ("ICANN"), of Suite 300 12025 E. Waterfront Dr., Los Angeles, CA 90094, USA, is represented in this matter by Jones Day, 555 South Flower Street Fiftieth Floor Los Angeles, CA 90071, USA.

3. A Notice of Independent Review dated July 17, 2014 was filed by Merck with the International Centre for Dispute Resolution, together with its Request.

4. ICANN filed its Response on August 29, 2014.

5. The Panel held a preliminary hearing call on April 1, 2015 and issued the following direction by email thereafter:

> ***Merck KGaA V. ICANN - Case 01-14-0000-9604***
>
> *The Preliminary Hearing Call in this matter took place at 9am, Pacific Time, on April 1, 2015, and was duly notified and convened. Counsel (Bettinger, with Gray, for Merck KGaA; LeVee for ICANN) for both parties made observations on the procedure to be adopted in this Independent Review Process. At the conclusion of the Preliminary Hearing Call the parties were asked whether there was anything further they wished to raise, and the answer from each side was no.*
>
> *The Panel (Dinwoodie, Matz, and Reichert) now, bearing these observations in mind together with the materials already filed by the parties to date,* ***issues the following directions****:*
>
> *1. Merck KGaA shall file its Reply Submission on May 20, 2015.*
>
> *2. ICANN shall file its Rejoinder Submission on July 8, 2015.*
>
> *3. A page limit of 20 pages applies to both Submissions (the page limit does not apply to matters such as tables of contents).*

4. The Submissions should only attach any additional evidentiary exhibit which is strictly necessary for the purpose of reply/rejoinder. Also, the parties must focus their Submissions on matters which are strictly for the purposes of reply/rejoinder, and not seek to reformulate the case as already presented.

5. If there is any dispute as to acronyms or other defined terms, the Submissions should clearly flag these in order that there is no misunderstanding.

6. As soon as possible after July 8, 2015, the Panel will communicate with the parties as to the next stages of this Independent Review Process.

As noted on the Preliminary Hearing Call by the ICDR representative, communications will now take place directly between the Panel and the parties, with a copy at all times to the ICDR.

For and on behalf of the Panel.

Klaus Reichert SC

6. On May 20, 2015, Merck filed its Reply.

7. On July 9, 2015, ICANN filed its Rejoinder.

8. On July 12, 2015, the Panel issued the following direction by email:

Dear Counsel,

The Panel has considered the submissions received.

Having considered the submissions made to date, do the parties wish to have an oral hearing? If the answer from a party is yes, we would like to know the likely duration of such a hearing, and whether there is a preference for it to be conducted in person, or by telephone.

Once we have received your responses to the foregoing we will consider the future conduct of this matter and revert to the parties.

We do not set a particular deadline for your responses, rather we ask that you reply as soon as possible.

Klaus Reichert

9. On July 14, 2015, ICANN indicated that it believed that a hearing by telephone would be useful.

10. On July 21, 2015, Merck indicated that a hearing would be unnecessary.

11. On July 21, 2015, the Panel issued the following direction by email:

> *Dear Counsel,*
>
> *Noting Article 4 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("the Procedures"), the Panel has determined that a telephone hearing will not be necessary.*
>
> *Noting Article 11 of the Procedures, we invite each side to submit their respective claims for costs by July 29, 2015. Thereafter an opportunity will be afforded to each side to comment on the claim for costs of the other.*
>
> *Klaus Reichert*

12. On July 28, 2015, Merck stated that ICANN should be held responsible for (a) the fees and expenses of the panelists, and, (b) the fees and expenses of the administrator, the ICDR.

13. On July 28, 2015, ICANN stated that Merck should be held responsible for costs (identifying the same headings as those identified by Merck).

14. On July 28, 2015, the Panel issued the following direction by email:

> *Dear Parties,*
>
> *Thank you both for your letters on costs.*
>
> *We now ask each side for any final observations they might wish to make on costs in light of the letters received today. The deadline is 4 August 2015.*
>
> *Klaus Reichert*

15. On July 31, 2015, Merck stated that it had no comment on ICANN's letter regarding costs. ICANN did not make any final observations on costs.

Section II – The Panel's Authority

16. The Panel's authority and mandate is as follows (from Article IV, Section 3.4 of ICANN's Articles of Incorporation and Bylaws):

> *Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a did the Board act without conflict of interest in taking its decision?;*
> *b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> *c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action [1] of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.

18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

[1] The Panel is of the view that inaction, depending upon the circumstances, may constitute an action within the meaning of Article IV, Section 3.4.

in focusing on three specific elements. The phrase "defined standard of review" undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word "consistent" as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.

19. The parties dwell in various ways on whether the Panel's approach is deferential or *de novo*. The Panel does not find this debate to be of assistance as it diverts attention from the precise parameters of its authority, namely, to do exactly what it is mandated to do by Article IV, Section 3.4.

20. Nothing in the language of Article IV, Section 3.4, suggests that there be any deference afforded to the contested action. Either the action was consistent with the Articles of Incorporation and Bylaws, or it was not.

21. Discussion as regards whether the Panel should engage in a *de novo* standard of review is also apt to mislead. However, it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.

22. In summary, the Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.

Section III – Analysis

23. The **first contested action**, as characterized and raised by Merck in paragraph 46 of the Request is:

> *The ICANN Board has accepted three expert determinations which suffer from palpable mistakes and manifest disregard of its own LRO standards, without due diligence and care to prevent the acceptance of such determinations, resulting in fundamental unfairness and a failure of due process for the Claimant.*

24. Merck says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

> *In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.

26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. ("MSD")) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.

27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word "Merck". As a result, Merck and MSD then filed a number of Legal Rights Objections ("LROs") against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck's complaint was the point that MSD apparently was not intending to limit, through

geo-targeting, the potential global reach of its applied-for domains. In contrast, Merck made explicit its intention to use geo-targeting.

28. By Determinations issued in July and September 2013, the Sole Panel Expert rejected the LROs. The following extract from LRO2013-0068 is reflective of the reasoning common to all:

> *The starting point of this case is that Objector and Applicant are both bona fide users of the MERCK trademark, albeit for different territories.*
>
> *The question is whether a bona fide trademark owner that owns trademark rights in certain countries but does not have rights to a certain trademark in all countries of the world, should for that reason be prevented from obtaining a gTLD. In the view of the Panel, such a proposition does not make sense. If the opposite view would be accepted, it would be expected from any trademark owner interested in a gTLD to have trademark registrations in all countries of the world as otherwise another party could register one trademark in an "uncovered" country and thus prevent the first trademark owner from applying for and using its own gTLD.*
>
> *In essence there should not be a significant difference between the criteria for the legal rights objection as included in the Guidebook on the one hand and the provisions included in the Uniform Domain Name Dispute Resolution Policy ("UDRP"). If the applicant for a new gTLD is bona fide, it will not be likely that one of the three criteria will be met. It might be that advantage of the distinctive character or the reputation of the objector's registered trademark is taken, but it is then likely not unfair. It might be that the distinctive character or reputation of the objector's registered trademark is being impaired, but it is likely justified. It might be that a likelihood of confusion between the Disputed gTLD String and the objector's mark is created, but it is not necessarily impermissible.*
>
> *Of course a rejection of the Objection does not preclude Objector from taking regular legal action should the use of the Disputed gTLD String by Applicant be infringing. It is, however, not for this Panel to anticipate on all the possible types of use Applicant could make of the Disputed gTLD.*
>
> *It is also not for this Panel to interpret the existing coexistence agreements and arrangements between the Parties. Should the application of a new gTLD allegedly violate any such agreement or arrangement, it will be for the Parties to settle their dispute by means of the dispute resolution provisions of the contracts governing their relationship or as provided under applicable law.*

For the aforementioned reasons the Panel rejects the Objection.

In reaching the above conclusion, the Panel has considered the following non-exclusive list of eight factors.

The Panel addresses each of them in turn:

i. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to Objector's existing mark.

[Sole Panel Expert analysis follows]

ii. Whether Objector's acquisition and use of rights in the mark has been bona fide.

[Sole Panel Expert analysis follows]

iii. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of Objector, of Applicant or of a third party.

[Sole Panel Expert analysis follows]

iv. Applicant's intent in applying for the gTLD, including whether Applicant, at the time of application for the gTLD, had knowledge of Objector's mark, or could not have reasonably been unaware of that mark, and including whether Applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

[Sole Panel Expert analysis follows]

v. Whether and to what extent Applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by Objector of its mark rights.

[Sole Panel Expert stated that this factor would be discussed together with the factor mentioned under vi.]

vi. Whether Applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by Applicant is consistent with such acquisition or use.

[Sole Panel Expert analysis follows]

vii. Whether and to what extent Applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by Applicant is consistent therewith and bona fide.

[Sole Panel Expert analysis follows]

viii. Whether Applicant's intended use of the gTLD would create a likelihood of confusion with Objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

[Sole Panel Expert analysis follows]

29. On September 23, 2013, Merck raised with WIPO a number of points of its concern with the contents of three of the Determinations. First, Merck noted that the Sole Panel Expert referenced intended geo-targeting by MSD, when in fact it was Merck which was intending to do so. Secondly, Merck stated that the Sole Panel Expert did not consider the three elements of the LRO Policy but rather those contained in the UDRP. In addition, Merck stated the following:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel. No court can review these decisions, and indeed even ICANN likely has limited powers to overturn a decision, even where it has been entered based on a wholly erroneous review of the submitted facts and evidence.

30. The Sole Panel Expert issued an Addendum dated September 24, 2013. As regards geo-targeting, he stated:

It is correct that the Expert Determinations under 6. (Discussion and Findings) under the heading Trademark Infringement, under non-exclusive factor viii, should not have included the following sentence:

> *"Applicant has made it clear that it will take all necessary measures, including geo-targeting, to avoid that Internet users in the territories in which Objector has trademark rights, will be able to visit websites that use the Disputed gTLD String."*

.....

Having noted this, the Panelist should make clear that, in reviewing LRO2013-0009, LRO2013-0010 and LRO2013-0011, he was in fact aware of the distinction in this regard, as reflected in the pleadings as cited and summarized in the Expert Determinations, between the latter three cases and cases LRO2013-0068 and LRO2013-0069 in relation to the competing applications at stake.

In any event, the Panelist considers it important to confirm that the above-mentioned sentence as such is immaterial to the conclusion which the Panelist reached in rejecting the Objections.

31. As regards his application of UDRP or LRO Policy, the Sole Panel Expert was of the view that, UDRP comparisons notwithstanding, he had applied the specific LRO criteria.

32. On February 27, 2014, ICANN informed Merck that it had updated the LRO Determinations together with the Sole Panel Expert's Addenda.

33. On March 13, 2014, Merck filed a Request for Reconsideration. It requested ICANN to reject the advice recorded in the Sole Panel Expert's Determinations, and "instruct a panel to make an expert determination that applies the standards defined by ICANN".

34. Merck's grounds for its Request for Reconsideration were summarized as follows:

In this case, the Expert Panel failed to take reasonable care in evaluating the parties' respective evidence and to make a correct application of the LRO standard developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its three LRO disputes.

35. On April 29, 2014, the Board Governance Committee of ICANN ("BGC") made its Determination dismissing the Request for Reconsideration. The initial part of that Determination summarized the reasons:

Merck Registry Holdings, Inc. applied for .MERCK and MSD Registry Holdings, Inc. applied for .MERCKMSD. The Requester, who also applied for .MERCK, objected to these applications and lost. The Requester claims that the Panel failed to comply with ICANN policies

and processes in reaching its determinations. Specifically, the Requester contends that the Panel:

(i) improperly interpreted the factors governing legal rights objections in light of "wholly inapplicable" Uniform Domain Name Dispute Resolution Policy ("UDRP") standards; and

(ii) failed to "accurately assess critical facts concerning the Parties' pleadings, leading to mis-attribution of party intent [concerning geo-targeting commitments] and a material misrepresentation of the parties' respective positions." (Request, §§ 6, 8, Pgs. 6, 18.)

With respect to the claims submitted by the Requester, there is no evidence that the Panel either applied the improper standard or failed to properly evaluate the parties' evidence. First, the Panel correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered the UDRP only as a means to further provide context to one of the eight factors. The Requester does not identify any policy or process that was violated in this regard. Second, after the Requester brought the Panel's mis-attribution of geo-targeting commitments to the attention of WIPO, the Panel issued an Addendum to the Determinations, confirming that the misstatement was "inadvertent," that the Panel "was in fact aware of the distinction," and that the misstatement was not material to the Determinations in all events. Because the Requester has failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC concludes that Request 14-9 be denied.

36. On April 29, 2014, the BGC held a meeting and the minutes note the following:

Reconsideration Request 14-9– Ram Mohan abstained from participation of this matter noting conflicts. Staff briefed the BGC regarding Merck KGaA's Request seeking reconsideration of the Expert Determinations, and ICANN's acceptance of those Determinations, dismissing Merck KGaA's legal rights objections to Merck Registry Holdings, Inc.'s application for .MERCK and MSD Registry Holdings, Inc.'s application for .MERCKMSD. After discussion and consideration of the Request, the BGC concluded that the Requester has not stated proper grounds for reconsideration because the Request failed to demonstrate that the expert panel acted in contravention of established policy or procedure. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction; the BGC still has the discretion, but is not required, to recommend the matter to the Board for consideration. Accordingly, the BGC concluded that its determination on Request 14-9 is final; no consideration by the NGPC is warranted.

37. In light of the foregoing, this Panel now analyses the first contested action for the purposes of the comparison exercise. Although in paragraph 48 of its Request Merck characterizes the challenged action as the "acceptance" of by the Board of the BGC determination, it is clear from the Request as a whole that the focus of the complaint is the decision of the BGC. While this Panel's focus is on the first contested action precisely as advanced by Merck (namely, "acceptance"), concomitant with that exercise will be an analysis (within the confines of this Panel's jurisdiction) of the BGC's Determination (noting ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.3(f)).

38. The question now arises as to whether the first contested action was consistent with Article I, Section 2.8, namely, was there a neutral and objective application, with integrity and fairness, by the Board of documented policies.

39. Assistance for this Panel is derived from the three elements defining the focus of the review in Article IV, Section 3.4, namely:

> *a did the Board act without conflict of interest in taking its decision?;*
> *b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
> *c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

40. The Panel takes each of the three factors, a-c, in turn.

41. Factor (a): Did the Board act without conflict of interest in taking its decision? The Panel finds that there is no evidence whatsoever to suggest that there was any conflict of interest. Merck suggests that ICANN had a conflict of interest due to the potential for a financial windfall in the event of there being an Auction of Last Resort. This is a submission made without evidence, is speculative, and is unfounded. Moreover, this Panel

does not consider that this Independent Review was initiated (or capable of being initiated) to challenge, in substance, the policy decision of ICANN in 2012 to include the Auction of Last Resort.

42. The Panel finds that the answer to question "a" is yes.

43. Factor (b): Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? In the Panel's assessment of the materials and arguments put before it, this appears to be at the heart of Merck's complaints.

44. Merck criticizes severely the manner by which the Sole Panel Expert dealt with the issue of geo-targeting. Merck also takes particular issue with the application (or otherwise, as it suggests) by the Sole Panel Expert of LRO standards. It claims that these failings caused a denial of due process. Put another way, Merck is contending that the Sole Panel Expert got it so badly wrong, the process should be run again.

45. Merck's criticisms of the Sole Panel Expert flow through into its complaints directed at the BGC.

46. Merck wanted the BGC to "reject the advice set forth in the Decisions, and instruct a panel to make an expert determination that applies the standards defined by ICANN". Merck effectively wanted the BGC to overturn the Sole Panel Expert's decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had "been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the panel's deliberations, and the panel elected to decide the case on inapplicable grounds".

47. However, this basis for requesting relief does not sit easily with Merck's own stated position on September 23, 2013, noted above, and repeated here for emphasis:

> *There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel....*

Merck plainly recognized that the sole recourse was by means of the Request for Reconsideration process (which Merck itself invoked). That process is of limited scope, with Article IV, Section 2.2, delineating that jurisdiction:

> *Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:*
>
> *a. one or more staff actions or inactions that contradict established ICANN policy(ies); or*
>
> *b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or*
>
> *c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.*

None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits.

48. The BGC recognized in its Determination that the Sole Panel Expert, in his Addenda, specifically noted the correct position as regards geo-targeting, and also that he further considered that his conclusions remained the same. In light of the Addenda, there is nothing to suggest that the Sole Panel Expert made his decision on the basis of incorrect facts. More importantly

for the purposes of this Review, the BGC analyzed whether he had done so.

49. Moreover, Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.

50. Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. Because this is not a basis for action by this Panel, the Panel answers question "b" with "yes".

51. Factor (c): Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? The Panel does not see that Merck has mounted any attack through this route other than inferentially by vague references to the auction process. As regards that particular decision, there is no evidence (or indeed any concrete allegation) that the BGC or Board members did not exercise independent judgment.

52. In summary, therefore, the Claimant's first contested action complaint is dismissed.

53. The **second contested action** as characterized and raised by the Claimant in paragraph 46 of the Request is:

> *The ICANN Board improperly disposed of the Claimant's RFR as the BGC violated its competency and independence in its evaluation of the application of the LRO standard. Further, its assessment was incorrect and failed to take into account the global use of the gTLD by Merck & Co. Additionally, the ICANN Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant. This results in discrimination and unfairness to, and failure of due process for, the Claimant.*

54. The Claimant says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

> *In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

55. The action of the Board, as precisely contested by Merck, is set out in paragraph 53 above. This particular action of the Board is developed by Merck as follows at paragraph 79 of the Request:

> *The BGC did not address the Claimant's concerns (i) competently, (ii) independently, and (iii) substantively on the basis of the Claimant's legal argument.*

56. Incompetence: Merck asserts, at paragraph 82 of the Request that the BGC was incompetent because it had no alternative but to engage "in impermissible substantive analysis and interpretation". Merck then states that the BGC should have taken steps to address its concerns by, citing prior ICANN examples, appointing an independent legal advisor, or "recommending that the ICANN Board take appropriate measures that the

BGC is incompetent to make". Drawing on these, Merck criticizes the fact that in some instances where there has been a prima facie erroneous determination ICANN provides for a review, whereas in others it does not. It says that this is a violation of the requirements of neutrality and fairness.

57. The Panel's attention is drawn by Merck to a document recording the Resolutions of the Meeting of the New gTLD Program Committee ("NGPC") on March 22, 2014, which notes that:

> *....the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

58. A professor of law in Paris was commissioned to provide advice, and this was incorporated into the decision of the NGPC.

59. The Panel's attention is also drawn to the Recommendation in relation to the Reconsideration Request 13-9 of October 10, 2013, made by the BGC. At the end of the Recommendation, the following is stated:

> *Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC.*

A proposed review mechanism is outlined thereafter.

60. Merck's arguments are unavailing. If this Panel were to find that the BGC and Board are incompetent to assess the propriety of a Panel determination under the LRO this would effectively require a referral or appeal process for LRO decisions. Such a mechanism was not included in the delegation,

challenge and dispute resolution process adopted by ICANN and it is not open to this Panel to create it.

61. As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board, once the Sole Expert had revised his original determination to reflect his complete basis for the decision, to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.

62. In conclusion, Merck was not discriminated against. These two examples, properly and fairly assessed, do not provide it with support for an allegation of discrimination.

63. Independence: Merck's complaint as to the lack of independence relies on the "Auction of Last Resort" argument which imputes to ICANN a financial interest, insinuating something improper. This is the same point, in substance, which was rejected by this Panel in paragraph 42 above. It is an argument which is speculative, and made without evidence to support it. In light of its dismissal above, it is also dismissed at this point.

64. Mischaracterization: Merck complains that the BGC mischaracterized its arguments. Merck describes its core concern as presented to the BGC as follows (paragraph 89 of the Request):

> *...did the LRO Panel fail to decide the case on the basis of the correct and applicable LRO Standard, which requires it to consider the potential use of the applied-for gTLD ....*

65. This complaint is identical in substance to the matters already addressed by the Panel in paragraphs 43-50 above. In effect, Merck is running the same argument here as before, and it is therefore dismissed.

66. In summary, therefore, the Claimant's challenge to the second contested action complaint is dismissed.

67. The **third contested action** raised by Merck in paragraph 46 of the Request:

> *As the result of the prior two violations, the ICANN Board has accepted without due diligence and care, a dysfunctional expert determination procedure within the New gTLD Program which has not provided for the possibility to review or overturn determinations on the basis of substantial errors or manifest disregard of the LRO Standards, despite the foreseeable and forewarned possibility of such, resulting in fundamental unfairness and a failure of due process for the Claimant.*

68. In light of the resolution of the first two contested actions against Merck, the Panel finds that this third contested action must also be dismissed. It is predicated for success upon the first two by use of the language "*[A]s the result of the prior two violations*".

Section IV – Costs

69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling US$97,177.08 shall be borne by entirely by Merck KGaA. Therefore, Merck KGaA shall reimburse ICANN the sum of US$48,588.54, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

Section V – Declaration

1. Merck has not succeeded in this Independent Review Process. ICANN is the prevailing party. As per paragraph 69, Merck must pay ICANN costs in the amount of USD $48,588.54.

This Final Declaration of the Independent Review Process Panel may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

December 10, 2015
Date

Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

Date

Graeme Dinwoodie, Panelist

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December 10, 2015 Date	A. Howard Matz, Panelist
Date	Graeme Dinwoodie, Panelist

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Date	Klaus Reichert, Panelist/ Chair
Date	A. Howard Matz, Panelist
December 10 2015 Date	Graeme Dinwoodie, Panelist

AA-56

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process (IRP) Panel

NAMECHEAP, INC.,

Claimant

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

ICDR Case No. 01-20-0000-6787

DECISION ON REQUEST FOR EMERGENCY RELIEF

Gary L. Benton,
Emergency Panelist

Date

20 March 2020

This is the Decision on a request for emergency relief in an Internet Corporation for Assigned Names and Numbers ("ICANN") Independent Review Process ("IRP") administered by the International Centre for Dispute Resolution ("ICDR") on a claim between Claimant Namecheap, Inc. ("Namecheap" or "Claimant") and Respondent ICANN ("ICANN" or "Respondent") pursuant to the ICDR International Arbitration Rules ("ICDR Rules") and the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) ("IRP Supplementary Procedures"). The request for emergency relief was made pursuant to ICDR Rules, Article 6, Emergency Measures of Protection.

I, THE UNDERSIGNED EMERGENCY PANELIST, having been designated as the Emergency Panelist under the ICDR Rules with respect to the IRP between Claimant Namecheap and Respondent ICANN, as provided for in the ICANN Bylaws and IRP Supplementary Procedures, and, accordingly, having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby DECIDE as follows:

I. INTRODUCTION

A) PARTIES

1. Claimant is Namecheap, Inc. ("Claimant" or "Namecheap"), a corporation organized under the laws of Delaware, USA.

2. Respondent is Internet Corporation for Assigned Names and Numbers (ICANN), a corporation organized under the laws of California, USA.

B) PARTY APPEARANCES AND REPRESENTATIVES

3. Claimant Namecheap appeared through and is represented by represented by Flip Petillion, Esq. and Jan Janssen, Esq. of the law firm Petillion in Huizingen, Belgium.

4. Respondent ICANN appeared through and is represented by Jeffrey A. LeVee, Esq., Kelly M. Ozurovich, Esq. and Eric P. Enson, Esq. of the law firm Jones Day in Los Angeles, California, USA.

C) REQUEST OVERVIEW

5. The dispute giving rise to this IRP arises from alleged breaches of the ICANN Articles of Incorporation ("AOI") and Bylaws with respect to the renewal provisions of the registry agreements for the .ORG, .INFO and .BIZ generic top-level domains (gTLDs), particularly with respect to price control provisions and with respect to a potential change of control of the .ORG Registry Operator.

6. Claimant Namecheap has limited its request for emergency relief to the .ORG gTLD registry. Namecheap seeks an order requiring Respondent ICANN (1) to stay all actions that further the change of the control of the .ORG registry operator to a for-profit entity during the pendency of the IRP and (2) to take all actions that are necessary to prevent the .ORG registry operator from charging fees that exceed the maximum fees that were applicable before the renewal execution of the 30 June 2019 .ORG Registry Agreement.

7. ICANN is a public benefit corporation. Its stated mission is to ensure the stable and secure operation of the Internet's unique identifier systems. ICANN is required to act for the interests of the global Internet community as a whole. Namecheap is an ICANN accredited .ORG Registrar. Public Interest Registry (PIR) is the .ORG Registry Operator. In anticipation of the 30 June 2019 expiration of the .ORG Registry Agreement between ICANN and PIR, ICANN negotiated a renewal with PIR. The proposed renewal was based on ICANN's base generic TLD Registry Agreement that excludes the historic price controls contained in prior versions of the .ORG Registry Agreements. The proposed Registry Agreement was submitted for public comment. ICANN received over 3700 responsive comments, including a substantial number opposing removal of price control provisions. ICANN Staff nonetheless concluded that removal of the price controls was appropriate and, following Board consultation, renewed .ORG Registry Agreement without price controls. Later, PIR requested that ICANN consent to a change of control of PIR's parent company from the Internet Society (ISOC) to

Ethos Capital, a for-profit entity. The request for approval on the change of control is pending. ICANN has provided notification that the deadline for approval has been extended to 20 April 2020.

8. Namecheap contends that ICANN's renewal of .ORG Registry Agreement without price control provisions and ICANN's change of control review process violate ICANN's AOI and Bylaws with respect to its Commitments and Core Values, including to "seek input from the public, for whose benefit ICANN in all events shall act" and to "ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent." Namecheap contends that ICANN failed to follow the required policy setting process, has not been open and transparent and has failed to consider material information concerning the nature of the .ORG gTLD when it renewed the .ORG Registry Agreement and in its current consideration of the change of control of PIR. Namecheap contends that it, its customers and the Internet community will suffer harm as a result of the removal of the price control provisions and an approval of the change of control.

9. ICANN contends that Namecheap has no standing to assert its claim and ICANN has not committed any violation of its AOI or Bylaws. ICANN contends that it has properly addressed the renewal, including giving due consideration to public comments and reporting thereon, and it properly concluded that removing the price control provisions was consistent with ICANN Commitments and Core Values, would advance having uniform registry agreements and would "promote competition in the registration of domain names." Further it contends that its investigation regarding the change of control request is being properly conducted. ICANN contends that an injunction as to the .ORG Registry Agreement or the change of control provision contained therein would be improper, Namecheap has not met its burden on this request and the balance of hardship weighs in favor of ICANN's positions.

10. As detailed in this Decision, the request for emergency relief is denied. Namecheap has raised serious questions but those questions do not rise to the level to justify the interim relief requested, particularly in considering the balance of harms. Namecheap may renew this request and present its full case on the merits to the IRP Panel.

D) PROVISION FOR IRP

11. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in the Emergency Relief Procedural Order No. 1 ("ER PO 1), this IRP is made in accordance with the ICANN AOI filed 3 October 2016 (Cl. RM-1) and the ICANN Bylaws dated 28 November 2019 (Cl. RM-2) , in particular, the Bylaws, Section 4.3 Independent Review Process for Covered Actions. The parties have agreed that these versions of the AOI and the Bylaws are deemed the governing documents with respect to the IRP and the emergency relief sought. As specified in the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018 ("IRP Supplementary Procedures"), the ICDR is the designated provider under the Bylaws.

E) DEMAND FOR IRP

12. This IRP was commenced by the submission of Claimant's form Notice of Independent Review dated 25 February 2020 ("IRP Notice"). The IRP Notice was submitted with Claimant's Request for Independent Review Process by Namecheap ("IRP Request"), Claimant Namecheap's Request for Emergency Arbitrator and Interim Measures of Protection ("Emergency Relief Request") and supporting submissions.

F) PLACE OF REVIEW

13. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, and in accordance with the place of review request in the IRP Notice, the place of review (seat) is Los Angeles, California, USA.

G) APPLICABLE LAW AND RULES

14. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, California law is the substantive law governing the interpretation of the AOI and Bylaws and the substantive law governing the issues in the IRP, and particularly this ICDR Rules, Article 6 proceeding.

15. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the Emergency Panelist has proceeded on the basis that the procedural law applicable to this proceeding is the U.S. Federal Arbitration Act and to the extent either party is of the view that a different procedural law applies and a determination thereon is material to the outcome of any issue addressed in the course of this Article 6 proceeding, they would be allowed to present their position accordingly. No such requests have been made.

16. As stipulated by the parties in the course of the Emergency Relief Preparatory Conference, and confirmed in ER PO 1, the ICDR International Arbitration Rules, contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 July 2014, and the IRP Supplementary Procedures, apply to this ICDR Rules, Article 6 proceeding.

H) APPOINTMENT OF THE PANELIST

17. The Emergency Panelist, Gary L. Benton, was duly appointed by the ICDR in accordance with the ICDR Rules including ICDR Rules, Article 6.

18. The ICDR duly formalized the appointment of the Emergency Panelist, notified all parties of such appointment and gave the parties an opportunity to object to the appointment in writing. No objection was made as to the appointment. The Emergency Panelist proceeded to conduct this Article 6 proceeding in accordance with the applicable laws and rules and accordingly serves as the Emergency Panelist in this IRP proceeding.

II. PROCEDURAL HISTORY

A) CLAIMANT'S IRP REQUEST AND EMERGENCY RELIEF REQUEST

19. In Claimant Namecheap's IRP Request, Namecheap contends that this dispute arises out of breaches of ICANN's AOI and Bylaws by the ICANN Board and staff by inter alia, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .ORG, .info and .biz generic top-level domains. In particular, the dispute relates to ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap contends that it is an ICANN-accredited registrar that is directly impacted by this decision. Namecheap further contends that, with respect to .ORG, the removal of the price control provisions is aggravated by the fact that the operation of .ORG risks being moved from a non-profit entity to a for-profit entity.

20. In Namecheap's Emergency Relief Request, Namecheap seeks a stay of all ICANN actions that further the change of control of the .ORG registry operator to a for-profit entity during the pendency of the IRP, including but not limited to, (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement. Namecheap also requests that, in order to maintain the status

quo, ICANN take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019. Namecheap contends this interim relief is warranted because (i) Namecheap and an important part of the Internet community will suffer irreparable harm barring such a stay and interim relief; (ii) Namecheap raises serious questions regarding ICANN's compliance with its AOI and Bylaws in (a) removing the price control provisions for the .ORG, .biz and .info gTLDs, and (b) the process for evaluating the .ORG registry operator's request for approving a change of control; and (iii) ICANN will suffer no harm should the interim relief request be granted. Namecheap contends that the balance of hardships weighs decidedly in favor of Namecheap.

21. No Answering Statement has been submitted in response to the IRP Request; however, ICANN denied the claim in the course of its appearances and briefing in this ICDR Article 6 proceeding.

B) EMERGENCY RELIEF PREPARATORY CONFERENCE and ER PO 1

22. A telephonic Emergency Relief Preparatory Conference ("ER Preparatory Conference") was conducted by the Emergency Panelist on 3 March 2020. Both parties were represented by counsel. The ICDR offered the parties the opportunity for transcription of the conference; no requests were made.

23. In the course of the ER Preparatory Conference, both parties made brief presentations on the merits and procedures.

24. Upon inquiry from the Emergency Panelist, the parties confirmed there were no jurisdictional objections as to the claims, administration by the ICDR or the appointment of Emergency Panelist. ICANN objected to the standing of Namecheap to assert claims.

25. In the ER Preparatory Conference, the Emergency Panelist and the parties addressed the governing law and rules as set forth earlier in this Decision. The Emergency Panelist and the parties addressed any need for disclosures, expert testimony, and other prehearing matters and hearing procedures. Upon inquiry from the Emergency Panelist, the parties also briefly discussed the status of the pending California Attorney General investigation reported by ICANN and ICANN's communications with PIR regarding the date for responding on the change of control request. The Panelist and the parties discussed the anticipated length of the emergency hearing and the parties agreed on the scheduling for ICANN's briefing and the date and time for the emergency hearing to be held on 14 March 2020 in anticipation that the Emergency Panelist's decision would be issued on or before 20 March 2020. No interim orders with respect to emergency relief were requested but ICANN agreed to provide notification if it intended to take any material action in advance of the planned issuance date of the Panelist's decision. (Following the hearing on the matter, counsel for ICANN provided notification that the deadline for ICANN's change of control decision had been extended to 20 April 2020.)

26. In the ER Preparatory Conference, it was addressed that Claimant made a request for costs in its request for emergency relief and the parties agreed that cost awards shall be reserved for determination by the IRP Panel.

27. A report on the ER Preparatory Conference was set forth in ER PO 1 dated 3 March 2020. The Panelist requested that the parties submit any objections within three days and no objections were received.

C) RESPONDENT'S OPPOSITION TO THE REQUEST FOR EMERGENCY RELIEF

28. On 11 March 2020, ICANN submitted its Opposition to Namecheap's Request for Emergency Panelist and Interim Measures of Protection. ICANN contended that both the Independent Review Process ("IRP") including the Emergency Relief Request should be dismissed on the ground

that Namecheap lacks standing; Namecheap has not identified (much less suffered) any material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of ICANN's AOI, Bylaws or other policies and procedures.

29. ICANN contends that the Emergency Relief Request seeks to require ICANN to amend unilaterally a contract between ICANN and PIR that has been in place since June 2019 by adding a price control provision and seeks to halt ICANN's evaluation of a proposed change of indirect control of PIR to Ethos Capital even though Namecheap is not a party to the .ORG registry agreement, Namecheap is not involved in the proposed change of control of PIR, and Namecheap has not established any harm that has or could result from ICANN's conduct. ICANN contends the Emergency Relief Request should be denied for four separate and independent reasons. First, Namecheap does not have standing to request the relief it seeks because it has not established any harm as a result of ICANN's conduct. Second, Namecheap has not identified any irreparable harm it would suffer in the absence of interim relief. Third, Namecheap has not carried its burden of demonstrating either a likelihood of success on the merits or sufficiently serious questions related to the merits. And, fourth, Namecheap has not and cannot demonstrate that the balance of hardships tips decidedly in its favor. Accordingly, ICANN asked that Namecheap's Request for Emergency Relief be denied.

30. There were no further prehearing activities.

D) EMERGENCY RELIEF REQUEST HEARING

31. As agreed by the parties during the ER Preparatory Conference, as confirmed in ER PO 1, and in further communications between the parties, as confirmed in correspondence submitted to the Emergency Panelist, the Emergency Relief Request Hearing was conducted by audio conference on 14

March 2020. The hearing lasted approximately three hours.[1] In addition to outside counsel for the parties, ICANN corporate counsel attended the hearing.

32. As agreed by the parties, the hearing consisted of oral argument by counsel and questions from the Emergency Panelist. No witness statements were provided in advance of the hearing and no witness examination was planned or conducted.[2] The evidentiary record consists of the documentary submissions, including reference materials, submitted by the parties with their briefing submissions. No objection was made to any of these documentary submissions. In addition to the evidentiary record, the Emergency Panelist has considered the pleadings, briefs and all arguments both oral and written offered by the parties.

33. As detailed previously herein, the parties reserved any costs submissions for consideration by the IRP Panel.

34. No post-hearing briefing was requested. Accordingly, the emergency hearing was initially closed on 14 March 2020.

35. On 16 March 2020, Claimant requested leave to submit ICANN's 15 March 2020 Response to its Request for Documentary Information. On the same date, ICANN agreed and provided the Response. The Emergency Panelist instructed there would be no briefing on the Request unless stipulated by counsel. As the Emergency Panelist has not been notified of any such stipulation, and no

[1] As requested by the parties, the hearing was recorded on Zoom with the understanding the recording would be made available to the parties for transcription upon request. As addressed during the hearing, due to a technical issue, approximately six minutes of Respondent's opening argument was not recorded. Respondent declined the invitation to restate or summarize its argument for the recording.

[2] During the course of Namecheap's argument, Namecheap offered to provide a two-page affidavit from its CEO as to its potential monetary harm. The affidavit was not provided to opposing counsel or the Emergency Arbitrator in advance of or during the hearing and ICANN objected to its admission on the ground it was untimely and would be prejudicial given the time restraints as it could require a responsive submission and a further hearing. The Emergency Arbitrator invited an offer of proof as to the contents of the affidavit. Thereafter, admission of the affidavit was denied; however, as detailed further herein, the Emergency Arbitrator accepts Claimant's position that it faces economic harm given that the price controls are no longer in place.

other request has been made to reopen the record, the Emergency Panelist has not considered correspondence regarding the Response submitted by the parties with and following transmission of the Response to the Emergency Panelist.

36. Accordingly, the emergency relief request hearing was deemed closed as of 16 March 2020.

37. On 18 March 2020, counsel for ICANN provided notice that the deadline for ICANN to respond to the PIR request for approval of change of control was extended to 20 April 2020.

III. ANALYSIS

A) JURISDICTION

38. As stipulated by the parties, jurisdiction is proper. Jurisdiction is provided for in the Bylaws and the ICANN IRP Supplementary Procedures. Claimant has submitted a Notice on its claim that was submitted to the ICDR in accordance with requisite procedures and the Emergency Panelist was appointed without objection. Respondent's standing defense is addressed herein separately.

B) MERITS CONTENTIONS

1. CLAIMANT'S CONTENTIONS

39. In its IRP Request, Namecheap alleges that a key driver leading to the creation of ICANN was to promote competition and consumer choice, and it was also required that ICANN's processes be "fair, open and pro-competitive" and "sound and transparent" to protect the Internet user community against capture by a self-interested faction. Request at 10. The U.S. Government's White Paper that led to the appointment of ICANN as the custodian of the DNS made it clear that the creation of a competitive environment was a key task. IRP Request at 11; Cl. ER Brief at 9.

40. Namecheap alleges that the 2002 reassignment of the .ORG gTLD to PIR was done following a policy development process by ICANN's policy making body, [then named] the DNSO, to

assist in the orderly selection of a successor to NSI. ICANN organized a request for proposals and created evaluation criteria for selecting the new registry operator. IRP Request at 13; Cl. ER Brief at 11.

41. Namecheap alleges that ISOC/PIR made important commitments including price controls on fees charged to accredited registrars so that fees would be as low as feasible consistent with the maintenance of good quality service and that PIR made commitments recognizing the unique public-interest focused nature of the .ORG and committed to be responsive to the non-commercial Internet community. On that basis, the .ORG Registry Agreement was entered between ICANN and PIR in 2002 and renewed in 2006 and 2013. IRP Request at 14-15. Cl. ER Brief at 12-13.

42. Namecheap alleges that in 2000, following recommendations from the DNSO, ICANN's Board introduced new gTLDs on a proof of concept basis, finding no need to impose price controls on the new sponsored gTLDs given their community purpose but imposing price controls on the new non-sponsored gTLDs such as .info and .biz. Thereafter, ICANN did not impose price controls under the New gTLD Program. Namecheap alleges this decision was supported by the expert report of Dennis Carlton that determined the existence of price controls in major legacy gTLDs limits the prices that new gTLDs can charge. IRP Request at 16-19

43. Namecheap alleges that on this basis, ICANN started contracting with New gTLDs under the terms of the ICANN base Registry Agreement for New gTLDs but continued to renew legacy gTLD Registry Agreements with price control provisions. IRP Request at 20.

44. Namecheap alleges that in March 2019, ICANN announced that it planned to renew .ORG and .info Registry Agreements along terms similar to the base Registry Agreement and without price controls. Specifically, in its public announcement, ICANN stated,

> In alignment with the base registry agreement, the price control provisions in the current .ORG agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG renewal agreement. Protections for existing registrants will remain in place, in line with the base

> registry agreement. This change will not only allow the .ORG renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.

IRP Request at 21, Annex 2; Cl. ER Brief at 14.

45. Namecheap contends that ICANN received over 3500 comments from a broad spectrum of the Internet community, including about 20% from Namecheap customers, all opposing the removal of price controls. Claimant contends ICANN rejected all these comments with a conclusory statement as follows:

> There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price control provisions in the .ORG Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

IRP Request at 23, Annexes 5-7; CL. ER Brief at 15. Namecheap contends these conclusions and the various pricing accommodations ignore significant information and turn a blind eye to budget planning for registrars and their customers. IRP Request at 24; Cl. ER Brief at 16-17.

46. The .ORG Registry Agreement was renewed without the price control provisions on 30 June 2019. IRP Request at 26-29; RM-29.

47. On 12 July 2019, Namecheap submitted a Request for Reconsideration to remove the price control requirement in .ORG, .INFO and .BIZ on the ground the decision was made in disregard

of ICANN's fundamental rules and obligations (Reconsideration Request 19-2).[3] IRP Request at 26-29. Namecheap also entered into a Cooperative Engagement Process with ICANN.

48. On 13 November 2019, it was announced that PIR was being sold to investment firm Ethos Capital. Namecheap suggests that the timing of the transaction and the involvement of former ICANN executives, including ICANN's former CEO, was suspicious and Claimant raised these concerns with ICANN as the alleged pricing policy violation would be exacerbated if ICANN were to allow PIR to be acquired by a for-profit company. Namecheap indicates that ICANN responded by saying that PIR's corporate structure was not relevant to the initial Reconsideration Request. IRP Request at 27-29; Cl. ER Brief at 20-22.

49. On 8 January 2020, Namecheap submitted a second Reconsideration Request and a document request with respect to the price controls and the ongoing change of control evaluation. (Reconsideration Request 20-1).[4] Namecheap alleges the document production revealed no information on the price controls and limited information on the change of control. IRP Request at 30-31, Annex 16-18; Cl. ER Brief at 23.

50. Namecheap alleges that on 23 January 2020, ICANN received a request from the Office of the Attorney General of the State of California regarding the proposed transfer to PIR asking to extend the deadline for approval on the change of control. The deadline was extended to 29 February 2020. IRP Request at 32-37; Cl. ER Brief at 26-28. (In course of this matter, ICANN provided notice that the extension was further extended until 20 March 2020, although it had requested additional time from PIR.

[3] The dispute was also considered by the ICANN Ombudsman, who concluded that contract renewal was delegated to staff and there was no violation of the AOI or Bylaws by the Board.

[4] The decision on Reconsideration Request 19-2 was scheduled for release following the hearing in this emergency relief request.

Following the emergency relief request hearing, counsel for ICANN provided notification that the deadline had been extended to 20 April 2020.)

51. As alleged, Namecheap urged ICANN to make clear to PIR that PIR's request for an indirect change of control cannot be processed until (i) the Attorney General terminated its investigation and authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN. If PIR cannot agree to a suspension of its request for approving the change of control, Namecheap wrote that ICANN should make clear to PIR that such approval is reasonably withheld. IRP Request at 35; Cl. ER Request at 29.

52. Namecheap alleges ICANN declined to provide Namecheap a timely response and, accordingly, Namecheap filed its IRP Request. IRP Request at 37-38; Cl. ER Brief at 30-31.

53. Namecheap contends that Namecheap, its clients and the Internet community will suffer irreparable harm in the emergency relief request is not granted. Namecheap contends there is no meaningful remedy if the status quo is not preserved. Namecheap cites to customer concern and the potential of unrestricted price increases in combination with .ORG being run by a nonprofit. Namecheap argues the change of control approval cannot be readily undone and the approval would frustrate the California Attorney General's investigation, risking a possible suspension or revocation of ICANN's corporate registration and resulting harm to Namecheap and others in the Internet community. Cl. ER Brief at 35-39.

54. Namecheap contends that there are serious questions with respect to the price control removal. Claimant alleges ICANN failed to take due account of the circumstances of the major legacy gTLDs by removing the price controls for .ORG, .info and .biz., resulting in prohibited disparate treatment in violation of its Bylaws, Article II(3). Claimant argues these legacy TLDs are not comparable to any new gTLD given their substantially larger domains under management (DUMs). Likewise, Claimant argues ICANN has provided no justification for disparate treatment for .com and .net gTLDs. Further, Claimant contends there are serious issues with ICANN's "after-the-fact" justification based on the 2002 "Preliminary Analysis" of Dennis Carlton, including that the report supports the conclusion legacy gTLD price controls should be maintained. IRP Request at 44-49; Cl. ER Brief at 44-49.

55. Namecheap also contends that the renewal violates the renewal clause of the 2014 Registry Agreement and is thereby contrary to the interest of the Internet community as a whole. Specifically, Section 4.2 appears to require that terms be similar for all legacy gTLDs and "terms of this Agreement regarding the price of Registry Services…shall remain unchanged." IRP Request at 48-50, RM 18, 27-28; Cl. ER Brief at 50.

56. Namecheap further contends that there are serious questions related to the change of control process. Namecheap contends the reassignment of .ORG to PIR/ISOC (and related endowment) in 2002 involved various commitments with respect to delegation to a non-profit organization and operation for the non-profit community. Namecheap contends that it fails to see how these commitments are compatible with a private investment firm and consideration of transition to a for-profit entity without involving the community breaches its obligation to apply documented policies neutrally, objectively and fairly. Additionally, Namecheap contends that ICANN is not open and transparent in its evaluation of the proposed change of control. IRP Request at 51-54; Cl. ER Brief at 41-43.

57. Namecheap also contends that ICANN will not suffer significant hardships or financial harm from a stay on the change of control and the balance of hardships decidedly tips in Namecheap's favor. Claimant contends that as ICANN has already requested an extension on the change of control decision a stay would not significant prejudice ICANN and that any prejudice caused by delay is counterbalanced by the advancement of the integrity of the IRP process. Cl. ER Brief at 52-54.

58. Based on the foregoing, Namecheap requests an order requiring ICANN to:

- stay all actions that further the change of control of the .ORG registry operator to a for profit entity during the pendency of the IRP, including but not limited to, staying all actions that would lead to (i) the renewal of any registry agreement for .ORG, (ii) the approval of any direct or indirect change of control of the .ORG registry operator or of any other assignment of the .ORG registry agreement;
- take all actions that are necessary to prevent that the .ORG registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .ORG registry agreement of 30 June 2019;
- ICANN pay costs and for any other relief that the Emergency Panelist may consider necessary or appropriate in the circumstances. Cl. ER Brief at 56.

2. RESPONDENT'S CONTENTIONS

59. In its Opposition Brief, ICANN contends that both the IRP and this Emergency Relief Request should be dismissed. ICANN contends that Namecheap lacks standing, has not identified (or suffered) and material harm; there is no indication of irreparable harm; and Namecheap has not identified any violation of the ICANN AOI, Bylaws or other policies and procedures. Opp. Brief at 1.

60. In background, ICANN explains that its mission, in its Bylaws, "is to ensure the stable and secure operation of the Internet's unique identifier systems" and ICANN is responsible for overseeing the technical coordination of the Internet's DNS on behalf of the Internet community. ICANN's Bylaws contain a number of "Core Values" to ensure ICANN is carrying out its mission, including encouraging ICANN to maintain a competitive DNS environment. Opp. Brief at 8, 10.

61. ICANN also observes that to remain accountable to the global Internet community, ICANN has established accountability mechanisms for review of the ICANN actions and decisions, one such mechanism being the IRP and only a "Claimant" as defined by the Bylaws can institute an IRP. Further ICANN observes that the Interim Supplementary Procedures allow a Claimant to request interim relief "to maintain the status quo until such time as the opinion of the IRP Panel is considered by ICANN. Opp. Brief at 11-12.

62. ICANN acknowledges PIR has been the registry operator for the .ORG gTLD since 2002 and the 2002 Registry Agreement, renewed in 2006 and 2013, contained a price control provision specifying the maximum price PIR may charge for registry services, and that many of the initial registry agreements for legacy TLDs contained price control provisions. Opp. Brief at 13-14.

63. ICANN contends that ICANN and its GNSO sought to introduce new competition into the DNS through new gTLDs and the Base Registry Agreement was developed simultaneously with the New gTLD Program. ICANN contends that the Base Registry Agreement does not contain price any price control provision but does contain price protections, including thirty day advance notice of price increases for new registration, six month advance notice of price increases for renewals and allowing initial registrants to renew for up to ten years prior to any price changes. Opp. Brief at 15-16.

64. ICANN contends that after finalizing the Base Registry Agreement, ICANN began working with legacy TLD registry operators to transition them to the Base Registry Agreement for consistency across all registry operators. Opp. Brief at 19.

65. ICANN contends that in anticipation of the 2019 expiration of the .ORG Registry Agreement, ICANN staff consulted with the ICANN Board and concluded that the .ORG Registry Agreement should substantially mirror the Base Registry Agreement. ICANN opened a public comment period, seeking input from the Internet community on the proposed agreement, including the price control provision. Opp. Brief at 20.

66. ICANN contends that it received mixed comments on the removal of the price control provision and ICANN analyzed the public comments and published a Report (RE-12).[5] As detailed, the Report explained that removing price control provisions is consistent with ICANN Core Values and these values guide ICANN to introduce and promote competition, where feasible and appropriate. Opp. Brief at 20-22.

67. ICANN contends that, in June 2019, the ICANN staff conferred again with the Board and decided to proceed with the Registry Agreement renewal as proposed. The renewed Registry Agreement does not contain price control provisions but it includes the pricing protections and Public Interest Commitments as to transparency and openness as afforded by the Base Registry Agreement. Opp. Brief at 24-25.

68. ICANN confirms that on 14 November 2019, PIR submitted a request for indirect change of control and informed ICANN that PIR's parent entity ISOC had entered into a purchase agreement with Ethos. In its submission to ICANN, PIR stated that PIR would remain the registry operator and

[5] ICANN contends that the number of unique public comments is difficult to quantify but the ICANN Ombudsman concluded that many of the comments seem to be clearly generated and were equivalent to spam. Id. at fn. 32; RE-13.

affirmed Ethos would further PIR's mission and values including its deep commitment to the community support. PIR also stated Ethos intended to create a PIR Stewardship Council to support PIR founding values. Opp. Brief at 26.

69. ICANN confirms that it has sought additional information from PIR. ICANN also confirms that it received a letter from the California Attorney General seeking information regarding the proposed change in control in order to "(a)nalyze the impact to the nonprofit community…" ICANN contends that it is cooperating with the Attorney General's investigation. ICANN further contends that in light of its own investigation and the Attorney General's investigation, additional extensions of time from PIR regarding the deadline to respond to the request and PIR granted an extension until 20 March 2020. Opp. Brief at 27-28.

70. ICANN also confirms that Namecheap submitted its 12 July 2019 Reconsideration Request, and the Request was denied by the Board Accountability Mechanics Committee ("BAMC") based on a finding that Namecheap failed to establish ICANN violated its AOI or Bylaws when it decided to not to include price controls in the renewed .ORG Registry Agreement.

71. ICANN contends that Namecheap is not a "Claimant" under the Bylaws and, accordingly, lacks standing to pursue the IRP, including this emergency relief request. ICANN contends Namecheap has neither offered evidence of a direct impact nor explained how it has been harmed. ICANN adds that Namecheap is not a party to the Registry Agreement and non-parties, including registrars, are expressly excluded as third-party beneficiaries. Opp. Brief at 36-38.

72. ICANN contends that Namecheap will not suffer irreparable harm in the absence of interim relief. It contends that Namecheap offers no evidentiary support and does not explain how it will be impacted negatively and fails to identify material harm that would occur as a result of the alleged potential unrestricted price increases or .ORG being run by a for-profit company. Opp. Brief at 39.

73. ICANN further contends that Namecheap is not seeking to maintain the status quo but is, instead, actually asking ICANN to unilaterally amend the .ORG Registry Agreement that has been in place for eight months. ICANN contends that a mandatory injunction is subject to a higher degree of scrutiny as it is disfavored by law.[6] Opp. Brief at 40 and fn. 65.

74. As to irreparable harm, ICANN contends that Namecheap's assertion of irreparable injury with respect to the California Attorney General's investigation is speculative and inappropriate as there is no evidence that ICANN will do anything other than cooperate with the investigation. Opp. Brief at 41 and fn. 69; Cl. Annex 17-18.

75. ICANN contends that Namecheap has not attempted to show likelihood of success on the merits and has not raised sufficiently serious questions that justify interim relief. ICANN contends that Namecheap's contention that PIR made commitments to public interest when it secured the right to operate .ORG are incompatible with operation by a private investment firm is not at issue because the purpose of an IRP is to consider whether ICANN complied with its charter documents not to evaluate third party conduct. Further ICANN contends that Namecheap has not provided evidence to support the contention that a private investment firm should not be involved in the operation of .ORG. Further, ICANN contends that despite any change of control, the obligation to comply with all provisions of the Registry Agreement, including Public Interest Commitments, is mandated. Opp. Brief at 43-45.

76. ICANN contends that Namecheap's argument that ICANN is not as open and transparent as it should be about the evaluation of PIR's request for change of control is deficient of facts and a review of the ICANN website shows ICANN has been extremely transparent in posting updates and correspondence. Opp. Brief at 46.

[6] ICANN also contends, in fn. 66, that Claimant's contention that IRP Panels have always granted request to preserve the status quo is misplaced because, in all the cited proceedings, claimants were challenging a decision to proceed to contracting/delegation.

77. ICANN contends that Namecheap's arguments regarding lack of price controls are similarly baseless because ICANN staff has involved "the Internet community and those most affected" by posting the proposed Registry Agreement for public comment, analyzed the comments and published a Report and consulted with the Board in making a decision. ICANN contends that it is not under a duty to yield to public comments but instead "make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment." ICANN argues that Namecheap's disagreement with ICANN's decision is not a basis for an IRP. Opp. Brief at 47-50.

78. ICANN contends that the removal of the price controls is not contrary to the policy requirement that the registry fee charged to accredited registrars be "as low as feasible consistent with the maintenance of good quality service" because price control provisions are not necessary to constrain pricing in a market with 1,200 other gTLDs that are not subject to price control provisions.[7] Opp. Brief at fn. 83. Further it contends that it is treating .ORG no differently than other legacy TLDs and all New gTLDs do not have price control provisions. ICANN contends that the absence of the price control provisions, not preservation of them, ensures consistency across the market in treating "like cases alike." Opp. Brief at 51.

79. ICANN contends that, contrary to Namecheap's position, the absence of price controls does not violate the renewal clause in Section 4.2 of the 2013 version of the Registry Agreement because the 2019 Registry Agreement supersedes the prior agreement, Section 8.6 specified that the parties can mutually agree to modify the agreement and ICANN and PIR have engaged in good faith negotiations regarding changes to the terms as required by the prior agreement. Opp. Brief at 52-54, RM-18.

[7] ICANN also rejects Namecheap's contention that ICANN's only justification for removal of the price controls is its "after-the-fact" reliance on the 2009 Dennis Carlton Report. ICANN contends the BAMC found numerous justifications for not including the price control provisions. Opp. Brief at fn. 85.

80. As to the balance of hardships, ICANN contends that Namecheap has failed to demonstrate the hardships tip decidedly in Namecheap's favor as Namecheap has not suffered any harm since the 2019 Registry Agreement was executed and it is unclear how Namecheap will be harmed by the proposed change of control. Opp. Brief at 55-56.

81. ICANN contends that, in contrast, it faces significant hardship if the requested interim relief is granted because Namecheap essentially asks ICANN to breach its contract with PIR and unilaterally add a price control provision, which could subject ICANN to legal claims. Opp. Brief at 57.

82. ICANN contends that, in regard to the change of control request, interim relief would result in real harm to ICANN by disrupting its processes and precluding it from considering the request in accordance with those processes. ICANN rejects Namecheap's argument that ICANN faces no hardship because it has already requested extensions because the IRP will last for months. Opp. Brief at 59-60. In oral argument, ICANN elaborated further that the delay may put at risk funding for the transaction as well as significant funding offered to support .ORG non-profit community-directed programs.

C) RELEVANT CHARTER PROVISIONS

83. ICANN's AOI, Article III, provides in pertinent part,

> [ICANN] shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets….

This provision requirement is reiterated in the Commitments provision in ICANN's Bylaws, Section 1.2.(a).

84. ICANN's Bylaws, Section 1.2.(a) Commitments, sets forth specific ICANN Commitments, including the following:

> (iv) Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
>
> (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and,
>
> (vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

85. ICANN Bylaws, Section 1.2.(b) Core Values, provides Core Values to guide decisions and actions of ICANN, including the following:

> (i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;
>
> (ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;
>
> (iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market…
>
> (iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

86. ICANN's Bylaws, Section 2.3 Non-Discriminatory Treatment, provides,

> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment

> unless justified by substantial and reasonable cause, such as the promotion of effective competition.

87. ICANN's Bylaws, Section 3.1 Open and Transparent, provides, in pertinent part,

> ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work.
> .

D. DISCUSSION

1. STANDARDS

88. The standard for interim relief in an IRP is set forth in the ICANN Bylaws and IRP Supplementary Procedures. The ICANN Bylaws, Article IV(3)(o), and the Supplementary Procedures, Article 10, provide:

> A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered […], in order to maintain the status quo. […] Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:
>
> (i) A harm for which there will be no adequate remedy in the absence of such relief;
> (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
> (iii) A balance of hardships tipping decidedly toward the party seeking relief.

89. As to consideration of the merits, a de novo review standard applies. See ICANN Bylaws, Section 4.3(i). ICANN Bylaws Section 4.3(i)(iii) provides "(f)or Claims arising out of the Board's

exercise of fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment."[8]

2. STANDING

90. A "Claimant" includes a legal entity that "has been materially affected by a "Dispute." Bylaws, Section 4.3(b)(i). "To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation." Id. "Covered Actions" are defined in the ICANN Bylaws as any actions or failures to act by or within ICANN committed by the Board…or Staff members that give rise to a Dispute." Bylaws, Section 4.3(b)(ii). "Disputes" are "Claims that Covered Actions constituted an action or inaction that violated the [AOI] or Bylaws…." Bylaws, Section 4.3(b)(iii). This includes Claims that Covered Actions exceeded the scope of the Mission. Id.

91. Namecheap is a legal entity that alleges ICANN has violated the ICANN AOI and Bylaws, including the transparency and openness requirements, and has exceeded the scope of its Mission in its consideration and action to renew the .ORG Registry Agreement without price control provisions and in its consideration of the change of control request. Namecheap has filed a written statement of the Dispute, constituting a Claims as to these Covered Actions. See Bylaws, Section 4.3(d).

92. As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary

[8] The parties addressed the appropriate standard upon inquiry from the Emergency Arbitrator in oral argument. Claimant argued the business judgment rule does not apply referring to cited cases. See, e.g. ICM Registry v. ICANN, ICDR Case No. 50,117 T 00224 08 (2010) (Cl. RM-3). However, the Bylaws, as amended, require application of the rule with respect to Board exercises of fiduciary judgment. Bylaws, Section 4.3(i)(3).

support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.

93. Likewise, as a result of the alleged violations of the change of control process, Namecheap is at risk of being exposed to decision-making by Ethos and PIR that potentially harms Namecheap's financial and other business interests. This is a harm that is directly and casually related to the alleged violation that ICANN has not followed proper procedure in consideration of the change of control request

94. Accordingly, Namecheap has standing for purposes of this Emergency Relief Request.[9] To be clear, in making this determination, there is no finding of any violation by ICANN or any third party. Rather, the finding, in response to ICANN's standing defense, is limited to the determination that Namecheap is a "Claimant" as defined in the Bylaws and has standing to assert its claims for purposes of this Emergency Relief Request. As with the entirety of this Decision, this finding does not bind the IRP Panel.

95. Accordingly, ICANN's request for summary dismissal of this ICDR Article 6 proceeding is denied.

3. FORM OF RELIEF REQUESTED – STATUS QUO

96. In accordance with the ICANN Bylaws and Supplementary Procedures, a Claimant may seek injunctive relief, and specifically may include a stay of the challenged ICANN action or decision

[9] Namecheap has also asserted its claim on behalf of its customers and the broader Internet community. Undoubtedly Namecheap .ORG customers and the broader Internet community have an interest in this matter. For purposes of standing, however, the determination that Namecheap as the Claimant has direct and causal harm, and therefore has standing, is all that is required.

until such time as the opinion of the IRP Panel is considered. ICANN Bylaws, Article IV(3)(o), and IRP Supplementary Procedures, Article 10.

97. Accordingly, prohibitory injunctions are expressly allowed to maintain the status quo and mandatory injunctions to change the status quo are not expressly prohibited in an IRP Process. ICANN correctly points out, however, that a mandatory injunction is subject to a higher degree of scrutiny and is disfavored by law. A stronger showing on the merits is required where the balance of harm does not sharply favor the moving party. See Opp. Brief at 40 and fn. 65.

98. Here, the parties dispute whether the requested relief as to the 30 June 2019 .ORG Registry Agreement (Cl. RM 29) is a mandatory or prohibitory injunction. In its request for interim relief, Namecheap asks that ICANN take actions to prevent PIR from charging registry fees that exceed the maximum fees allowed in the prior agreement. ICANN contends, given that the June 2019 .ORG Registry Agreement is already in place, this request is for mandatory relief.

99. ICANN is correct that the request as to the Registry Agreement is a mandatory injunction that would alter the status quo. The revised Registry Agreement has been in place since 30 June 2019, PIR has operating under that agreement and, accordingly, has been entitled to request price increases in accordance with the terms of the agreement.[10] Accordingly, a higher degree of scrutiny is required to alter the status quo.

100. Although ICANN could "take actions" with respect to PIR increasing fees, as a practical matter, those actions are more complex than would be required by a prohibitory injunction enjoining ICANN from entering into a renewal agreement without the price control provisions. Essentially,

[10] As addressed in oral argument, ICANN does not raise a defense on the ground that Namecheap's Emergency Relief Request is untimely. Indeed, Namecheap promptly filed its first Reconsideration Request shortly after it was announced ICANN and PIR entered into the June 2019 Registry Agreement. Thereafter, Namecheap engaged in good faith in the Cooperative Engagement Process and only initiated the IRP only after it became aware of the change of control request and the pending deadline.

Namecheap asks ICANN to renegotiate or terminate the renewed Registry Agreement or, at a minimum, engage PIR in not exercising rights it has under the Registry Agreement.

101. As to the request for relief requiring that ICANN stay all actions that further the change of control, including actions that lead to the renewal of any registry agreement for .ORG or the approval of the change of control, there appears to be no dispute this request is prohibitory in nature and seeks to preserve the status quo. Nonetheless, the request as stated is not entirely practical for at least two reasons. First, the renewal of the Registry Agreement that Namecheap seeks to enjoin has already occurred and, second, pursuant to the terms of the Registry Agreement, ICANN's failure to timely object to the change of control will constitute an approval of the change of control under the terms of the agreement. To avoid a change of control, ICANN must timely reject the change of control request. See Cl. RM 29, Sec. 7.5. Accordingly, this emergency relief request is properly read as a request for a prohibitory injunction enjoining ICANN from effecting an approval of the change of control during the pendency of this IRP.

4. HARM AND SUCCESS ON THE MERITS - REGISTRY AGREEMENT RENEWAL

102. As detailed above, Namecheap does face financial harm if registry prices are increased above those previously allowed by price protections. ICANN's response that prices have not been increased yet, PIR has committed to limit increases for several years and the base Registry Agreement price protections are in place, do not diminish the fact that Namecheap faces potential price increases. ICANN's suggestion that Namecheap does not know if will be harmed because it can pass on price increases to its customers similarly does not diminish the fact that Namecheap's costs may be increased beyond the prior price control levels during the term of the renewed Agreement. On this basis, Namecheap has demonstrated harm and urgency.

103. Further, Namecheap contends that the wrongdoing is not just the renewal but the process leading to the renewal by ICANN's failure to engage in an open and transparent process, failure to give

public commentary proper weight, and failure to give proper consideration to removal of the maximum price protections in processing and entering into the renewed Registry Agreement. ICANN rejects Namecheap's allegations and contends it has done no wrong.

104. Namecheap appears to base its request for interim relief on the requirement for serious questions as to the merits rather than likelihood of success on the merits. By relying on this lower standard, a greater showing in the balancing of harm is required.

105. As to the Registry Agreement renewal process, ICANN was open and transparent in posting the proposed Registry Agreement online and soliciting public commentary. The parties dispute the volume of comments for and against removal of the price controls and ICANN questions the integrity of the comments opposing removal of the cap.[11] The Staff report appears to fairly convey the context of comments from both sides although it does not acknowledge most were negative. Report, Cl. Annex 5. The Emergency Panelist accepts Namecheap's accounting that the comments were overwhelmingly against removal of price controls. Reconsideration Request, Cl. Annex 8. It is not surprising that most consumers would be opposed to lifting price caps.

106. Nonetheless, ICANN is correct that it is not obligated to blindly yield to public comment but must instead "make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment." With respect to the public comments, ICANN has sufficiently demonstrated for purposes of this emergency proceeding that it took the comments into consideration, even if it reached a determination contrary to the weight of the comments. Namecheap is correct that the Internet community would have been better served by a more

[11] The Ombudsman equated identical, computer generated comments to spam. With all due respect to the Ombudsman, unless it was determined that the comments came from the same sender, the comments nonetheless represent the views of many interested persons in the Internet community.

detailed explanation, particularly as to exactly how the price cap removal would be procompetitive with respect to .ORG. Nonetheless, the comments process was largely sufficient.

107. ICANN's compliance with the broader policy process is less clear. Namecheap contends the removal of price controls from legacy TLDs, particularly .ORG, rises to the level of a policy decision that should be considered by ICANN's policy making bodies and not made in the course of a Registry Agreement renewal. ICANN disagrees, suggesting the policy was already considered in the course of development of New gTLDs and the Base Registry Agreement.

108. To resolve this dispute, consideration must be given to important role of policymaking ICANN is obligated to undertake. In "recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization," including ICANN itself, ICANN is charged with "promoting the global public interest in the operational stability of the Internet…" See AOI, Article 2. Accordingly, the AOI requires that "(a)ny determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process. Id. The Bylaws further detail requirements for multistakeholder policy development. See, e.g., Bylaws, Sections 1.1(a)(i) and Annexes G-1 and G-2, 1.2(a), 1.2(b)(i). Moreover, the Bylaws establish various policymaking bodies, including the Generic Names Supporting Organization ("GNSO") to be responsible for developing and recommending to the Board substantive policies relating to gTLDs. Bylaws, Article 11.

109. ICANN contends that its action here is implementation of prior policy decision-making regarding gTLDs generally and it has satisfied its transparency and policymaking obligations. (See also Final Determination and Board resolution, Cl. Annex 11 and 12). Further, ICANN contends that it is satisfying Core Values and acting to maintain a competitive DNS environment through the removal of the price controls in the .ORG Registry Agreement. Principally, ICANN contends that the decision as to

removal of the price controls from the .ORG Registry Agreement is a contract administration matter, not a policy matter.

110. Namecheap has not pointed to any AOI or Bylaw requirement that compels decisions as to .ORG be made by policymaking bodies rather than the Board.[12] However, Namecheap contends that the removal of price controls from legacy gTLDs is a policy matter, and the policy determinations in creating the New gTLDs do not apply and expressly preclude removal of legacy gTLD price controls.

111. Although it may well be in the interest of the Internet community to have the decision as to removal of price controls from legacy gTLDs addressed as a policymaking matter, at this preliminary stage, it would be delving too far into a controverted merits issue for the Emergency Panelist to determine whether a new policymaking process was required. More to the point, it is not appropriate for the Emergency Panelist to reject the Board's decision-making as to the best course of action so long as the action is within the realm of reasonable business judgment.

112. On the latter point, on its face, the removal of price controls appears inconsistent with the policy requirement that registry fees be "as low as feasible consistent with the maintenance of good quality service." ICANN has offered limited support and explanation for its proposition that, with respect to .ORG, price control provisions are not necessary because there are 1,200 other gTLDs that are not subject to price controls. IRP Request at 23, Annexes 5-7. This summary conclusion does not clearly take into consideration market characteristics of the .ORG gTLD and its unique positioning in the non-profit community.[13] Neither party submitted expert economic analysis of market definition and product

[12] Namecheap notes that, in 2008, the ICANN Board adopted the GNSO recommendation that there should be a policy guiding registry agreement renewal. https://www.icann.ORG/resources/board-material/minutes-2008-01-23-en Any failure by ICANN staff to effectuate a renewal policy is not grounds to enjoin the renewal of the .ORG in this emergency proceeding.

[13] Nor, as Namecheap suggests, does it appear to take into account budget planning considerations of registrars and their customers.

substitution in support of its position.[14] Lacking expert analysis on the immediate question, there is no clear basis to conclude that the removal of price controls would favor or disfavor competition.

113. Relatedly, Claimant contends that ICANN's reliance on the Preliminary Analysis of Dennis Carlton with respect to New gTLDs is misplaced as it was not directed to .ORG and appears to rely on the existence of price controls for legacy gTLDs to support the conclusion that price controls should not be required for the New gTLDs.[15] ICANN rejects Namecheap's interpretation.[16]

114. Nonetheless, ICANN contends and articulated in the process additional reasons to remove the price control from the .ORG Registry Agreement. Apart from an economic analysis, the Board has articulated a preference to have uniformity among Registry Agreements. IRP Request at 21, Annex 2. ICANN contends that the revised .ORG Registry Agreement terms now track the New gTLD terms as well as recently revised legacy gTLD terms. In the Final Determination on the Reconsideration Request, ICANN stated that the base Registry Agreement, as a whole, benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end users. Reconsider Request 19-2. Namecheap is correct that, in announcing this position. ICANN did not articulate what benefits as to stability and security are to be gained or how it generates a more predictable environment for end users. Undoubtedly however, there is some administrative upside in implementing a single form Registry Agreement. On the whole, ICANN's reasoning comes across as bootstrapping, and it may conflict with the requirement to have the lowest price feasible, but it is an arguably reasonable business judgment.

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[14] In the course of questioning by the Emergency Arbitrator, ICANN's counsel stated he was unaware of any economic analysis specific to the .ORG gTLD.

[15] Namecheap's criticism that the Carlton analysis was an after-the-fact justification raised only in the Final Determination of Namecheap's Reconsideration Request (Cl. Annex 11 and 12) may be valid but it does not advance Namecheap's position. One of the purposes of the Reconsideration process is to allow the Board an opportunity to review its decisions and the fact that the Board finds further support for its decision does not diminish the decision.

[16] To ICANN's point, the Carlton Report does state that new gTLDs could "enhance consumer welfare by creating new products and fostering innovation, and promoting future competition" with .com and other TLDs.

115. It has not been fully detailed as to exactly what details were discussed with and considered by the Board for it to reach the conclusion that removal of the price control provisions from .ORG Registry Agreement. At this preliminary stage, however, it is sufficient that ICANN has given the subject consideration and reached a conclusion that is within the realm of a reasonable business judgment. To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance.[17]

116. Further, there is no showing that ICANN did not meet its obligation to make decisions by applying documented policies consistently, neutrally objectively and fairly, without singling out any particular party for discriminatory treatment. To the contrary, ICANN has made the case that it has policies favoring removal of price controls and application of the base Registry Agreement and it has applied those policies in this instance without singling out any particular party. The decision to remove the price controls directly affects all .ORG Registrars not Namecheap alone (and indirectly affects all .ORG domain customers). There is no showing that Namecheap has been singled out for discriminatory treatment.[18]

117. In sum, at this preliminary stage, it would be inappropriate to impose emergency interim relief where it appears the Board has acted in a neutral, objective and fair manner and has given reasoned consideration to whether it is appropriate to remove the price controls from the .ORG Registry Agreement. Given the record, the Emergency Panelist is not in a position to substitute his judgment for that of the Board as to whether removing the price controls for .ORG is procompetitive or advances other stated policy interests.

[17] See Vistaprint Ltd. v. ICANN, ICDR Case No 01-14-000-6505 at 187 (2015) (RM-4).
[18] The removal of price controls in the renewal of the .ORG Registry Agreement may harm the .ORG Internet community but there is no showing that any particular party was discriminated against.

118. Finally, Claimant's position that 2013 Registry Agreement, Section 4.2, compels that price control provisions be included in the 2019 Registry Agreement is misplaced. ICANN is correct that parties to an agreement remain free to revise terms in the course of amendments or renewals. However, the inclusion of Section 4.2 does suggest that price control provisions were of particular import and, in that regard, as a matter of contracting practice, additional scrutiny would be justified in revising or eliminating the provisions.

119. In summary, ICANN conducted a public comments process with respect to renewal of the .ORG Registry Agreement but there are serious questions whether ICANN was required to do more in engaging the .ORG community with respect to policymaking in removing the price controls. As well there are open questions as to whether its business judgment that eliminating price controls in the .ORG Registry Agreement was reasonable. Namecheap may ultimately prevail after fuller examination by the IRP Panel. At this preliminary stage, however, the evidence presented does not rise to the level to conclude Namecheap has a likelihood of success on the merits with respect to renewal of the .ORG Registry Agreement and price controls. Moreover, given the balance of harms discussed further herein, the questions presented do not rise to the level to justify interim relief.

5. HARM AND SUCCESS ON THE MERITS – APPROVAL OF CHANGE OF CONTROL

120. ICANN rejects the tie asserted by Namecheap between the removal of the price controls from the Registry Agreement and the risk that a change of control will lead to further harm. Although these are two separate actions, Namecheap is justified in asserting that its claims regarding these actions are related.

121. ICANN has demonstrated that it is engaging in due diligence to evaluate the change of control request. In assessing whether to approve the change of control ICANN is obligated to consider whether the change is in the public benefit. In doing so, ICANN should consider whether it has been

provided all required and requisite information, including information as to Ethos Capital, including its corporate management and ownership structure, financial situation and business plans, to make a proper assessment as to whether a change of control is reasonable and in the public benefit. At present, there is no indication that ICANN will approve the change of control request if it is unjustified. Namecheap is correct that the change of control approval cannot be readily undone but that alone is not a ground for enjoining ICANN from engaging in its duties.

122. As to the merits, here too, Namecheap seeks to meet the lower standard that it has raised serious questions on the merits.

123. Namecheap has correctly pointed out that operation by a non-profit corporation was a major factor in the original grant to PIR.[19] Presumably PIR's nonprofit status was given consideration in renewals as well. However, Namecheap has not pointed to any requirement that compels continuing control by a non-profit corporation. Here again, Namecheap raises a proper question as to whether this is a matter for policymaking rather than contract renewal.

124. Without an express policy requiring that the .ORG Registrar be controlled by and operated as a non-profit corporation, this is just one factor, among many, that ICANN would be expected to properly consider in evaluating the change of control request. ICANN appears to be proceeding reasonably on that basis.[20]

125. Similarly, Namecheap is correct that PIR made commitments to support the non-profit community and that was a factor in the original grant. Presumably, its ongoing contractual and non-

[19] The DNSO Final Report of the .org Task Force, Section 1 Characteristics of the Organization to Administer, provides in pertinent part, "1a. The **initial delegation** of the .org TLD should be to a non-profit organization that is noncommercial in orientation and the initial board of which includes substantial representation of noncommercial .org registrants." (emphasis added). See Cl. RM-10.

[20] See, e.g., 13 February 2020 ICANN counsel letter to PIR counsel, Cl. Annex 23.

contractual commitments to support the community were given consideration in the course of renewals. This is a proper topic of inquiry by ICANN in the course of its due diligence on the change of control request and if ICANN is aware of evidence that PIR, under control by Ethos, will not support its community commitments, ICANN would be expected to take such facts into consideration in evaluating the request.

126. Further, ICANN must consider whether Ethos and PIR will honor PIR contractual commitments if the change of control is approved. At present, PIR has the right to make price increases subject to the terms of the renewed Registry Agreement. According to ICANN, PIR has announced, through pending Public Interest Commitments (PICs), that it will limit price increases for several years to the maximum levels previously allowed. Namecheap may well be correct that, following approval, Ethos and PIR may not be inclined to honor these obligations. ICANN, in evaluating the change of control request, is properly enabled to take that possibility into consideration by asking for appropriate contractual commitments. Further, ICANN remains free to reject the request for change of control if it is not satisfied with PIR responses or determines more time for evaluation is required.[21] Compelling ICANN to reject the approval outright does not appear justified based on the record presented.[22]

127. Likewise, there is no basis to compel ICANN to reject the request now in response to the investigation by the California Attorney General. Namecheap contends that ICANN risks losing its California non-profit status if it approves the change of control. The record does not support that to be an imminent risk justifying interim relief. The evidence suggests that ICANN is cooperating in the

[21] While ICANN is correct that the purpose of the IRP process is to consider whether ICANN has complied with its charter documents not to evaluate third party conduct, ICANN is clearly obligated to consider both conduct by Ethos and PIR, and persons related to them, for purposes of making its decision on change of control. Any suggestion that Ethos is not a subject of the change of control evaluation because it is not the contract party would be misplaced and constitute a failure on the part of ICANN.

[22] Further, without evidence of wrongdoing by ICANN, Namecheap's suspicions regarding the timing of the announcement and role of former ICANN executives do not justify interim relief. These too are matters ICANN is enabled to investigate.

investigation. Should the California Attorney General determine more time is required, it can make the request of ICANN and, if ICANN refuses, the Attorney General has legal remedies available to it. It does not require Namecheap to provide those remedies through this interim relief request.

128. Namecheap appears correct that various communications have not been made public by ICANN in the course of ICANN's evaluation of the change of control request and with respect to the Attorney General's investigation[23]; however, enjoining ICANN from approving the change of control, if that is what it ultimately choses to be the appropriate course, is not the proper remedy.[24] As a general proposition, ICANN should require full disclosure from PIR and has every reason to be open and transparent in its review process. A refusal by PIR to fully disclose would, presumably, be a strong ground for ICANN to reject PIR's change of control request.

129. As with the related question of removal of the price controls, Namecheap may ultimately prevail on the merits. However, at this stage, ICANN is engaged in the approval process and Namecheap has not established significant harm, the likelihood of success on the merits or sufficiently serious questions on the merits justifying interim relief with respect to the ICANN's review process.

130. In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel. Further this preliminary assessment of the merits has no bearing on the Attorney General's investigation.[25]

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[23] At Claimant's request, the hearing was reopened to receive ICANN's 15 March 2020 Response to Claimant's Document Information Request regarding the Attorney General's investigation. The Report shows various communications have been withheld. The Emergency Arbitrator has not been asked to evaluate what has been withheld. ICANN is properly entitled to take reasonable steps to protect proprietary business information and attorney-client privileged communications. ICANN has not justified why all PIR responses to ICANN inquiries have not been posted for public review.

[24] A more proper remedy, if there was wrongdoing, may be for the removal or reprimand of involved ICANN participants.

[25] To be clear, this decision on the Interim Relief Request does not resolve the merits to be fully addressed by the IRP Panel and has no bearing on the Attorney General's investigation.

6. BALANCING OF HARDSHIPS

131. Namecheap contends the balance of hardships decidedly tips in its favor. ICANN disagrees.

132. Namecheap does not fully address the balance of hardships as to the Registry Agreement renewal in its brief. Namecheap has argued that it may be harmed by price increases during the course of the IRP but ICANN argues PIR has committed not to raise prices above previously allowed levels for three years. Accordingly, on the present record, Namecheap has limited, if any, immediate risk of significant harm during the course of the IRP.

133. ICANN contends that it may suffer considerable harm if the requested mandatory injunction is ordered and ICANN is effectively ordered to amend, breach or terminate the 2019 Registry Agreement. Whether PIR would willingly agree to revise the Registry Agreement if ICANN is enjoined is speculation at this point. PIR has operated under the agreement for eight months and has engaged in significant business planning during that period.[26] Accordingly, ICANN's suggestion that ICANN will suffer legal challenges and potential disruption with respect to the .ORG registry is credible.

134. On the whole, the balance of hardships as to enjoining ICANN with respect to the renewal of the .ORG Registry Agreement and price control provisions tips in favor of ICANN.

135. As to the change of control decision, Namecheap is correct that it may suffer harm if ICANN wrongly approves the change of control request. It may be difficult to undo the approval. However, as detailed above, there will be no undue harm if ICANN properly engages in the requisite decision-making process..

[26] On the other hand, Ethos Capital and PIR are presumably on notice of this IRP and the Attorney General's investigation and would reasonably already be factoring into their business planning the risk of an adverse ruling by the IRP or action by the Attorney General that would preclude or require reversal of the change of control.

136. Namecheap contends that ICANN will not suffer significant hardships from a stay as to the change of control because it has already requested an extension and any prejudice caused by delay is counterbalanced by the integrity of the IRP process. ICANN responds that the extension is for a brief period (until April) not until the final determination by the IRP Panel and there is already integrity to the process.

137. Although ICANN has not submitted evidence to support its position that it will be harmed, it makes a reasonable argument that an extended delay would interfere with the PIR acquisition and could affect PIR funding, operations and community support, resulting in harm to ICANN, particularly as to the .ORG gTLD and with support for non-profit community.[27]

138. ICANN also makes the argument that an injunction would disrupt its processes and preclude it from considering the request in accordance with its processes. This is a given; however, the integrity of the change of control review process is a larger concern. ICANN is required to balance the competing interests in favor and against approval within the framework of an open, transparent, objective and fair review process that serves the public benefit.

139. On the whole, there is limited basis to question the integrity of ICANN's review process. The balance of hardships as to enjoining a change of control decision tips in favor of ICANN.

IV. COSTS AND FEES

140. As stipulated by the parties, and confirmed in ER PO 1, any costs and fees requests are to be assessed and allocated by the IRP Panel. Accordingly, no costs are awarded.

[27] ICANN asked in oral argument that the hardship to Ethos Capital, ISOC and PIR also be considered. However, those entities are not parties to this IRP (nor have they asked to intervene or appear as amici.). Accordingly, the analysis here is focused on balancing hardship between Namecheap and ICANN. Nonetheless, the interests of the global Internet community as a whole bear weight in the process.

V. CONCLUSION

141. Namecheap has not attempted to demonstrate and has not demonstrated a likelihood of success on the merits. Namecheap has, however, sought to demonstrate and has raised serious questions as to the merits, particularly as to (1) any obligation by ICANN to engage in policymaking with respect to the removal of price controls on registry services for legacy gTLDs including .ORG; (2) ICANN's decision-making process in renewing the .ORG Registry Agreement without the historic price controls; and, (3) any obligation by ICANN to engage in policymaking with respect to direct or indirect operation of the .ORG registry by entities other than non-profit entities. Although these questions are raised, the balance of hardships with respect to the requested interim relief tips in favor of ICANN. Accordingly, the request for interim relief is denied. The merits are appropriately further addressed by the IRP Panel to be appointed in this proceeding.[28]

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[28] Although the requested interim relief is denied, the Emergency Arbitrator recognizes that the role of ICANN as a public benefit corporation, its transparency and openness, and the .ORG gTLD are matters of considerable importance to the global Internet community, including both parties. Accordingly, the Emergency Arbitrator encourages further discussion and, as provided for in the IRP Supplemental Procedures, urges the parties to participate in conciliation discussions for the purpose of attempting to narrow the issues and, ideally, reach a sound resolution of this matter.

DECISION

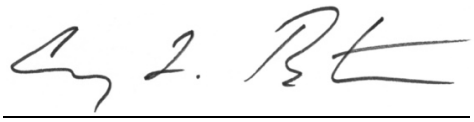
For the reasons stated above, I decide as follows**:**

A. Claimant Namecheap, Inc.'s request for interim relief is denied.

B. As stipulated by the parties, any award of costs and fees is to be decided by the IRP Panel and, accordingly, no costs or fees are awarded at this time.

This Decision is an Interim Order and does not constitute an IRP Decision or settlement of the claim submitted in this IRP. In accordance with the ICDR Arbitration Rules, this Decision may be accepted, rejected or revised by the duly appointed IRP Panel.

I hereby certify this Decision was made in Los Angeles, California, United States of America.



20 March 2020
Date

Gary L. Benton, Emergency Panelist

AA-57

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Wilson Arlington Co. v. Prudential Ins. Co. of America, 9th Cir.(Cal.), August 27, 1990

69 Cal.2d 33, 442 P.2d 641, 69
Cal.Rptr. 561, 40 A.L.R.3d 1373

PACIFIC GAS AND ELECTRIC
COMPANY, Plaintiff and Respondent,
v.
G. W. THOMAS DRAYAGE & RIGGING
COMPANY, INC., Defendant and Appellant.

S. F. No. 22580.
Supreme Court of California
July 11, 1968.

HEADNOTES

(1)
Evidence § 397--Extrinsic Evidence--Evidence in Aid of Interpretation-- Evidence of Meaning of Instrument.
The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

See **Cal.Jur.2d,** Evidence, § 275 et seq; **Am.Jur.2d,** Evidence, § 1069.

(2)
Contracts § 127--Interpretation and Effect--Intention of Parties.
The intention of the parties as expressed in the contract is the source of contractual rights and duties, and a court must ascertain and give effect to this intention by determining what the parties meant by the words they used; the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument is justified only if it is feasible to determine the meaning the parties gave to the words from the instrument alone.

See **Cal.Jur.2d,** Contracts, § 120; **Am.Jur.2d,** Contracts, § 244.

(3)
Words and Phrases--'Word.'
A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. ***34**

(4)
Contracts § 146--Interpretation and Effect--Surrounding Circumstances.
The meaning of a writing can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words; and the exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.

(5)
Contracts § 127--Interpretation and Effect--Intention of Parties.
Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose; and rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties, including testimony as to the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.

(6)
Contracts § 161(3)--Interpretation and Effect--Functions of Court-- Ambiguities.
If the court decides, after considering all credible evidence offered to prove the intention of the parties, that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of such meanings is admissible.

(7)
Indemnity § 21--Actions--Evidence.
In an indemnitee's action against his indemnitor for damages for injury to plaintiff's property under the indemnity clause of a contract, the court committed reversible error in refusing to consider extrinsic evidence offered by defendant to show that the indemnity clause in the contract was not intended to cover

plaintiff's property, where, although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue, and where, since the indemnity clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property.

See **Cal.Jur.2d,** Indemnity, § 14; **Am.Jur.,** Indemnity (1st ed § 15).

(8)
Indemnity § 18--Actions--Defenses.
An indemnity clause phrased in general terms will not be interpreted to provide indemnity for consequences resulting from the indemnitee's own actively ***35** negligent acts, and if an indemnitee's own active negligence is a cause of the harm, the indemnitor is relieved of liability.

(9)
Evidence § 247(0.5)--Hearsay--Declarations in Papers and Documents-- Invoices, Bills and Receipts.
Invoices, bills, and receipts for repairs are hearsay and are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable; but if a party testifies that he incurred or discharged a liability for repairs, such documents may be admitted for the limited purpose of corroborating his testimony, and if the charges were paid, the testimony and documents are evidence that the charges were reasonable.

(10)
Indemnity § 21--Actions--Evidence.
In an indemnitee's action against his indemnitor for damages for injury to its property under an indemnity clause of a contract, use of invoices for repairs to the damaged property to prove that the specific repairs had been made was error, where no qualified witness was called to testify that the invoices accurately recorded the work done on the property, and there was no other evidence as to what repairs were made.

(11)
Indemnity § 21--Actions--Evidence.
An expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence; thus in an indemnitee's action against his indemnitor for damages for injury to its property under the indemnity clause of a contract, defendant's objections to the testimony of plaintiff's expert as to the reasonableness of charges for repairs to the property should have been sustained where the testimony was based on hearsay evidence inadmissible to prove that the repairs had been made.

SUMMARY

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William A. O'Brien, Judge. Reversed.

Action for damages for injury to property under an indemnity clause of a contract. Judgment for plaintiff reversed.

COUNSEL
Miller, Van Dorn, Hughes & O'Connor, Richard H. McConnell and Daniel C. Miller for Defendant and Appellant.
Richard H. Peterson, Gilbert L. Harrick and Donald Mitchell for Plaintiff and Respondent.

TRAYNOR, C. J.

Defendant appeals from a judgment for plaintiff in an action for damages for injury to property under an indemnity clause of a contract. ***36**

In 1960 defendant entered into a contract with plaintiff to furnish the labor and equipment necessary to remove and replace the upper metal cover of plaintiff's steam turbine. Defendant agreed to perform the work ‘at [its] own risk and expense‘ and to ‘indemnify‘ plaintiff ‘against all loss, damage, expense and liability resulting from ... injury to property, arising out of or in any way connected with the performance of this contract.‘ Defendant also agreed to procure not less than $50,000 insurance to cover liability for injury to property. Plaintiff was to be an additional named insured, but the policy was to contain a cross-liability clause extending the coverage to plaintiff's property.

During the work the cover fell and injured the exposed rotor of the turbine. Plaintiff brought this action to recover $25,144.51, the amount it subsequently spent on repairs. During the trial it dismissed a count based on negligence and thereafter secured judgment on the theory that the indemnity provision covered injury to all property regardless of ownership.

Defendant offered to prove by admissions of plaintiff's agents, by defendant's conduct under similar contracts entered into with plaintiff, and by other proof that in the indemnity clause the parties meant to cover injury to property of third parties only and not to plaintiff's property. [1] Although the trial court observed that the language used was 'the classic language for a third party indemnity provision' and that 'one could very easily conclude that ... its whole intendment is to indemnify third parties,' it nevertheless held that the 'plain language' of the agreement also required defendant to indemnify plaintiff for injuries to plaintiff's property. Having determined that the contract had a plain meaning, the court refused to admit any extrinsic evidence that would contradict its interpretation.

When the court interprets a contract on this basis, it determines ***37** the meaning of the instrument in accordance with the '... extrinsic evidence of the judge's own linguistic education and experience.' (3 Corbin on Contracts (1960 ed.) [1964 Supp. § 579, p. 225, fn. 56].) The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. (9 Wigmore on Evidence (3d ed. 1940) § 2461, p. 187.) This belief is a remnant of a primitive faith in the inherent potency [2] and inherent meaning of words. [3]

(1) The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 520-521 [67 Cal.Rptr. 761, 439 P.2d 889]; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]; *Hulse v. Juillard Fancy Foods Co.* (1964) 61 Cal.2d 571, 573 [39 Cal.Rptr. 529, 394 P.2d 65]; *Nofziger v. Holman* (1964) 61 Cal.2d 526, 528 [39 Cal.Rptr. 384, 393 P.2d 696]; *Coast Bank v. Minderhout* (1964) 61 Cal.2d 311, 315 [38 Cal.Rptr. 505, 392 P.2d 265]; *Imbach v. Schultz* (1962) 58 Cal.2d 858, 860 [27 Cal.Rptr. 160, 377 P.2d 272]; *Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 210 [10 Cal.Rptr. 819, 359 P.2d 251].)

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained. ***38**

Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. [4] Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant.

(2) In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. [5] A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. (3) 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, ...' (*Pearson v. State Social Welfare Board* (1960) 54 Cal.2d 184, 195 [5 Cal.Rptr. 553, 353 P.2d 33].) The meaning of particular words or groups of words varies with the '... verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). ... A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, *The Interpretation of Words and the Parol Evidence Rule* (1965) 50 Cornell L.Q. 161, 187.) (4) Accordingly, the meaning of a writing '... can only be found by interpretation ***39** in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended. [Citations omitted.]' (*Universal Sales Corp. v. California Press Mfg. Co., supra,* 20 Cal.2d 751, 776 (concurring opinion); see also, e.g., *Garden State Plaza Corp. v. S. S. Kresge Co.* (1963) 78 N.J. Super. 485 [189 A.2d 448, 454]; *Hurst v. W. J. Lake & Co.* (1932) 141 Ore. 306, 310 [16 P.2d 627, 629, 89 A.L.R. 1222]; 3 Corbin on Contracts (1960 ed.) § 579, pp. 412-431; Ogden and Richards, The Meaning of Meaning, *op.cit supra* 15; Ullmann, The Principles of Semantics, *supra,*

61; McBaine, *The Rule Against Disturbing Plain Meaning of Writings* (1943) 31 Cal.L.Rev. 145.)

(5) Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, [6] but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.

Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to ***40** prove the intention of the parties. [7] (Civ. Code, § 1647; Code Civ. Proc., § 1860; see also 9 Wigmore on Evidence, *op. cit. supra,* § 2470, fn. 11, p. 227.) Such evidence includes testimony as to the 'circumstances surrounding the making of the agreement ... including the object, nature and subject matter of the writing ...' so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.' (*Universal Sales Corp. v. California Press Mfg. Co., supra,* 20 Cal.2d 751, 761; *Lemm v. Stillwater Land & Cattle Co., supra,* 217 Cal. 474, 480-481.) (6) If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, 'is fairly susceptible of either one of the two interpretations contended for ...' (*Balfour v. Fresno C. & I. Co.* (1895) 109 Cal. 221, 225 [41 P. 876]; see also, *Hulse v. Juillard Fancy Foods Co., supra,* 61 Cal.2d 571, 573; *Nofziger v. Holman, supra,* 61 Cal.2d 526, 528; *Reid v. Overland Machined Products, supra,* 55 Cal.2d 203, 210; *Barham v. Barham* (1949) 33 Cal.2d 416, 422-423 [202 P.2d 289]; *Kenney v. Los Feliz Investment Co.* (1932) 121 Cal.App. 378, 386-387 [9 P.2d 225]), extrinsic evidence relevant to prove either of such meanings is admissible. [8]

(7) In the present case the court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, ***41** the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property. [9] Accordingly, the judgment must be reversed.

(8) Two questions remain that may arise on retrial. On the theory that the indemnity clause covered plaintiff's property, the trial court instructed the jury that plaintiff was entitled to recover unless all of '... the following conditions [were found] to exist:

'1. That Pacific Gas and Electric Company continued to ***42** maintain independent operation on the premises whereon the installation of the cover was in progress;

'2. That the damage to the turbine was unrelated to the Defendant G. W. Thomas Drayage & Rigging Company, Inc.'s performance;

'3. That the plaintiff was guilty of active, affirmative negligence; and

'4. That such active negligence related to a matter over which the plaintiff exercised exclusive control.'

The instruction was based on certain guidelines discussed in *Goldman v. Ecco-Phoenix Elec. Corp.* (1964) 62 Cal.2d 40, 45-46 [41 Cal.Rptr. 73, 396 P.2d 377]; *Harvey Machine Co. v. Hatzel & Buehler, Inc.* (1960) 54 Cal.2d 445, 448 [6 Cal.Rptr. 284, 353 P.2d 924]; and *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.* (1962) 202 Cal.App.2d 99, 112-113 [20 Cal.Rptr. 820]. Those cases do not hold, however, that all four conditions specified in the instruction must exist for the indemnitor to be relieved of liability. It is sufficient if the indemnitee's own active negligence is a cause of the harm. As stated in *Markley v. Beagle* (1967) 66 Cal.2d 951, 952 [59 Cal.Rptr. 809, 429 P.2d 129], 'An indemnity clause phrased in general terms will not be interpreted ... to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts.'

To prove the amount of damages sustained, plaintiff presented invoices received from Ingersoll-Rand, the manufacturer and repairer of the turbine, the drafts by which plaintiff had remitted payment, and testimony that payment had been made. Defendant objected to the introduction of the invoices on the ground that they were hearsay. Subsequently, plaintiff called a mechanical engineer who qualified as an expert witness on the repair of turbines. On the basis of photographs of the damage after the accident, he testified that to repair

the turbine it was reasonable and necessary to dismantle it completely, magnaflux all parts, replace all blades in wheels that had been damaged, reassemble the rotor, balance it, 'indicate' it and centrifugate it. Similar repairs were listed in the invoices, and over objection the witness was allowed to testify that the amounts charged therefor were reasonable.

(9) Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or ***43** that the charges were reasonable. (*Plonley v. Reser* (1960) 178 Cal.App.2d Supp. 935, 937-939 [3 Cal.Rptr. 551, 80 A.L.R.2d 911]; *Menefee v. Raisch Improvement Co.* (1926) 78 Cal.App. 785, 789 [248 P. 1031].) If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony (*Bushnell v. Bushnell* (1925) 103 Conn. 583 [131 A. 432, 436, 44 A.L.R. 788]; *Cain v. Mead* (1896) 66 Minn. 195 [68 N.W. 840, 841]), and if the charges were paid, the testimony and documents are evidence that the charges were reasonable. (*Dewhirst v. Leopold* (1924) 194 Cal. 424, 433 [229 P. 30]; *Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49]; *Meier v. Paul X. Smith Corp.* (1962) 205 Cal.App.2d 207, 222 [22 Cal.Rptr. 758]; *Malinson v. Black* (1948) 83 Cal.App.2d 375, 379 [188 P.2d 788]; *Laubscher v. Blake* (1935) 7 Cal.App.2d 376, 383 [46 P.2d 836]. See also *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 81 [5 Cal.Rptr. 88].) Since there was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them.

(10) The individual items on the invoices, however, were read, not to corroborate payment or the reasonableness of the charges, but to prove that these specific repairs had actually been made. No qualified witness was called to testify that the invoices accurately recorded the work done by Ingersoll-Rand, and there was no other evidence as to what repairs were made. This use of the invoices was error. (*California Steel Buildings, Inc. v. Transport Indemnity Co.* (1966) 242 Cal.App.2d 749, 759 [51 Cal.Rptr. 797]. Accord, *Bushnell v. Bushnell, supra,* 103 Conn. 583 [131 A. 432, 436]; *Ferraro v. Public Service Ry. Co.* (1928) 6 N.J. Misc. 463 [141 A. 590]; *Nock v. Lloyd* (1911) 32 R.I. 313 [79 A. 832, 833].) An invoice submitted by a third party is not admissible evidence on this issue unless it can be admitted under some recognized exception to the hearsay rule. [10]

(11) Since plaintiff's expert's testimony as to the reasonableness of the charges was based on hearsay evidence inadmissible to prove that the repairs had been made, defendant's ***44** objections to it should have been sustained. '[A]n expert must base his opinion either on facts personally observed or on hypotheses that find support in the evidence.' (*George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 844 [205 P.2d 1037]. See also *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58 [45 Cal.Rptr. 129, 403 P.2d 385]; *Commercial Union Assur. Co. v. Pacific Gas & Electric Co.* (1934) 220 Cal. 515, 524 [31 P.2d 793]; *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 709 [342 P.2d 987]; 2 Jones on Evidence (5th ed. 1958) § 416, pp. 782-783.)

The judgment is reversed.

Peters, J., Mosk, J., Burke, J., Sullivan, J., and Peek, J.,* concurred.

McComb, J., dissented.

Footnotes

1 Although this offer of proof might ordinarily be regarded as too general to provide a ground for appeal (Evid. Code, § 354, subd. (a); *Beneficial etc. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 522 [297 P.2d 428]; *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 162-164 [195 P.2d 416]; *Douillard v. Woodd* (1942) 20 Cal.2d 665, 670 [128 P.2d 6]), since the court repeatedly ruled that it would not admit extrinsic evidence to interpret the contract and sustained objections to all questions seeking to elicit such evidence, no formal offer of proof was required. (Evid. Code, § 354, subd. (b); *Beneficial etc. Ins. Co. v. Kurt Hitke & Co., supra,* 46 Cal.2d 517, 522; *Estate of Kearns* (1950) 36 Cal.2d 531, 537 [225 P.2d 218].)

2 E.g., 'The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the words, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Precieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough. ...'

from Ullman, The Principles of Semantics (1963 ed.) 43. (See also Ogden and Richards, The Meaning of Meaning (rev. ed. 1956) pp. 24- 47.)

3 ' 'Rerum enim vocabula immutabilia sunt, homines mutabilia,' ' (Words are unchangeable, men changeable) from Dig. XXXIII, 10, 7, § 2, *de sup. leg.* as quoted in 9 Wigmore on Evidence, *op. cit. supra,* § 2461, p. 187.

4 'A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.' (*Hotchkiss v. National City Bank of New York* (S.D.N.Y. 1911) 200 F. 287, 293. See also *C. H. Pope & Co. v. Bibb Mfg. Co.* (2d Cir. 1923) 290 F. 586, 587; see 4 Williston on Contracts (3d ed. 1961) § 612, pp. 577-578, § 613, p. 583.)

5 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636; see also Code Civ. Proc., § 1859; *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 760 [128 P.2d 665]; *Lemm v. Stillwater Land & Cattle Co.* (1933) 217 Cal. 474, 480 [19 P.2d 785].)

6 Extrinsic evidence of trade usage or custom has been admitted to show that the term 'United Kingdom' in a motion picture distribution contract included Ireland (*Ermolieff v. R.K.O. Radio Pictures, Inc.* (1942) 19 Cal.2d 543, 549-552 [122 P.2d 3]); that the word 'ton' in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds (*Higgins v. California Petroleum etc. Co.* (1898) 120 Cal. 629, 630-632 [52 P. 1080]); that the word 'stubble' in a lease included not only stumps left in the ground but everything 'left on the ground after the harvest time' (*Callahan v. Stanley* (1881) 57 Cal. 476, 477-479); that the term 'north' in a contract dividing mining claims indicated a boundary line running along the 'magnetic and not the true meridian' (*Jenny Lind Co. v. Bower* (1858) 11 Cal. 194, 197-199) and that a form contract for purchase and sale was actually an agency contract. (*Body-Steffner Co. v. Flotill Products* (1944) 63 Cal.App.2d 555, 558-562 [147 P.2d 84]). See also Code Civ. Proc., § 1861; Annot., 89 A.L.R. 1228; Note (1942) 30 Cal.L.Rev. 679.)

7 When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible as tending to prove a meaning of which the language of the instrument is reasonably susceptible or inadmissible as tending to prove a meaning of which the language is not reasonably susceptible. In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike. (See Evid. Code, § 403.)

8 Extrinsic evidence has often been admitted in such cases on the stated ground that the contract was ambiguous (e.g., *Universal Sales Corp. v. California Press Mfg. Co., supra,* 20 Cal.2d 751, 761). This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning.

9 The court's exclusion of extrinsic evidence in this case would be error even under a rule that excluded such evidence when the instrument appeared to the court to be clear and unambiguous on its face. The controversy centers on the meaning of the word 'indemnify' and the phrase 'all loss, damage, expense and liability.' The trial court's recognition of the language as typical of a third party indemnity clause and the double sense in which the word 'indemnify' is used in statutes and defined in dictionaries demonstrate the existence of an ambiguity. (Compare Civ. Code, § 2772, 'Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person,' with Civ. Code, § 2527, 'Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event.' Black's Law Dictionary (4th ed. 1951) defines 'indemnity' as 'A collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.' Stroud's Judicial Dictionary (2d ed. 1903) defines it as a 'Contract ... to indemnify against a liability. ...' One of the definitions given to 'indemnify' by Webster's Third New International Dict. (1961 ed.) is 'to exempt from incurred liabilities.')

Plaintiff's assertion that the use of the word 'all' to modify 'loss, damage, expense and liability' dictates an all inclusive interpretation is not persuasive. If the word 'indemnify' encompasses only third-party claims, the word 'all' simply refers to all such claims. The use of the words 'loss,' 'damage,' and 'expense' in addition to the word 'liability' is likewise inconclusive. These words do not imply an agreement to reimburse for injury to an indemnitee's property since they are commonly inserted in third-party indemnity clauses, to enable an indemnitee who settles a claim to recover from his indemnitor without proving his liability. (*Carpenter Paper Co. v. Kellogg* (1952) 114 Cal.App.2d 640, 651 [251 P.2d 40]. Civ. Code, § 2778, provides: '1. Upon an indemnity against liability ... the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs ... the person indemnified is not entitled to recover without payment thereof; ...')

The provision that defendant perform the work 'at his own risk and expense' and the provisions relating to insurance are equally inconclusive. By agreeing to work at its own risk defendant may have released plaintiff from liability for any injuries to defendant's property arising out of the contract's performance, but this provision did not necessarily make defendant an insurer against injuries to plaintiff's property. Defendant's agreement to procure liability insurance to cover damages to plaintiff's property does not indicate whether the insurance was to cover all injuries or only injuries caused by defendant's negligence.

10 It might come in under the business records exception (Evid. Code, § 1271) if '... supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation.' (*California Steel Buildings, Inc. v. Transport Indemnity Co., supra,* 242 Cal.App.2d 749, 759.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

AA-58

65 S.Ct. 993
Supreme Court of the United States

PRECISION INSTRUMENT MFG. CO. et al.
v.
AUTOMOTIVE MAINTENANCE MACHINERY CO.

No. 377.
|
Argued Jan. 31 and Feb. 1, 1945.
|
Decided April 23, 1945.
|
Rehearing Denied May 21, 1945.
|
Petition for Clarification of Opinion Denied June 18, 1945.

See 325 U.S. 893, 65 S.Ct. 1189.

See 325 U.S. 843, 65 S.Ct. 1561.

Synopsis

Suit by the Automotive Maintenance Machinery Company against the Precision Instrument Manufacturing Company, Kenneth R. Larson, and Snap-On Tools Corporation for breach of contracts and for infringement of three patents relating to torque wrenches, which was consolidated with a suit by Snap-On Tools Corporation for a declaratory decree with respect to the same controversy, wherein the Automotive Maintenance Machinery Company filed a counterclaim seeking substantially the same relief as in the original action. To review a judgment of the Circuit Court of Appeals, 143 F.2d 332, affirming in part and reversing in part a judgment of the District Court dismissing the various complaints and counterclaims for want of equity, the defendants bring certiorari.

Judgment of the Circuit Court of Appeals reversed.

Mr. Justice ROBERTS and Mr. Justice JACKSON dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

West Headnotes (13)

[1] **Equity** Nature of unconscionable conduct

The equitable maxim that he who comes into equity must come with clean hands is a self-imposed ordinance closing doors of equity court to one tainted with inequitableness or bad faith relative to matter in which he seeks relief, however improper may have been the defendant's behavior.

490 Cases that cite this headnote

[2] **Equity** Nature of unconscionable conduct

Although equity does not demand that its suitors shall have led blameless lives, it requires that they shall have acted fairly and without fraud or deceit as to controversy in issue.

90 Cases that cite this headnote

[3] **Equity** He Who Comes Into Equity Must Come with Clean Hands

An equity court may exercise wide range of discretion in refusing to aid litigant coming into court with unclean hands.

93 Cases that cite this headnote

[4] **Equity** Nature of unconscionable conduct

Misconduct justifying equity court in refusing relief because of unclean hands need not necessarily be of such nature as to be punishable as a crime or as to justify legal proceedings, but any wilful act concerning cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for refusing relief.

143 Cases that cite this headnote

[5] **Equity** Nature of unconscionable conduct

The equitable doctrine that he who comes into equity must come with clean hands is of greater

importance where suit concerns public interests as well as private interests of litigants.

139 Cases that cite this headnote

[6] **Patents** Patents

A "patent" is a special privilege designed to serve public purpose of promoting progress of science and useful arts, it is affected with a public interest, and is an exception to general rule against monopolies.

57 Cases that cite this headnote

[7] **Patents** Misconduct by patentee in general

A patent infringement case must be measured by both public and private standards of equity in view of public's paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct.

147 Cases that cite this headnote

[8] **Equity** Nature of unconscionable conduct

Where in prior interference proceeding, plaintiff had become cognizant of facts indicating perjury in connection with the other application, failure of plaintiff to reveal such fraud to Patent Office and its action in entering into outside settlement whereby it secured perjured application, on which it eventually obtained patents, and whereby other parties agreed not to question validity of any patent that might be issued, justified denial, on ground of unclean hands, of relief sought by plaintiff in patent infringement and breach of contract suit.

144 Cases that cite this headnote

[9] **Equity** Nature of unconscionable conduct

Where information obtained by plaintiff indicated perjury in connection with other application involved in interference proceedings, fact that information might not have seemed sufficiently trustworthy to warrant submission of case to District Attorney or to Patent Office during pendency of interference proceedings did not preclude dismissal, on ground of unclean hands, of subsequent suit for breach of contract and infringement of patents based in part on perjured application obtained by plaintiff in settlement of interference proceedings.

119 Cases that cite this headnote

[10] **Equity** Nature of unconscionable conduct

Those who have application pending with Patent Office or who are parties to Patent Office proceedings have duty to report to it all facts concerning possible fraud or inequitableness underlying the application in issue, notwithstanding doubt as to sufficiency of proof thereof or nature of independent legal advice.

152 Cases that cite this headnote

[11] **Equity** Nature of unconscionable conduct

Although outside settlements of interference proceedings are not ordinarily illegal, clean hands doctrine precluded enforcement in equity of settlement entered into without revealing to Patent Office knowledge or reasonable belief of perjury in connection with other application.

21 Cases that cite this headnote

[12] **Equity** Nature of unconscionable conduct

Where information indicating perjury in connection with other application involved in interference proceedings was not revealed to Patent Office, but plaintiff entered into settlement whereby parties agreed not to question validity of any patent that might be issued, fact that action of other parties in seeking to obtain fraudulent patent may have been more reprehensible than that of plaintiff did not preclude denial of relief to plaintiff in patent infringement and breach of contract suit on ground of unclean hands.

122 Cases that cite this headnote

[13] **Patents**

Patents Reissue

US Patent 2,269,503, US Patent 2,279,792, US Patent 2,283,888. Cited.
US Patent RE22,219. Cited.

7 Cases that cite this headnote

Attorneys and Law Firms

****994** ***807** Mr. Casper W. Ooms, of Chicago, Ill., for petitioners.

Mr. Frank Parker Davis, of Chicago, Ill., for respondent.

Opinion

Mr. Justice MURPHY, delivered the opinion of the Court.

The respondent, Automotive Maintenance Machinery Company, charged in two suits that the various petitioners had infringed three patents owned by it relating to torque wrenches.[1] It was further asserted that the allegedly infringing acts also breached several contracts related to the patents. In defense, the petitioners claimed inter alia that Automotive possessed such 'unclean hands' ***808** as to foreclose its right to enforce the patents and the contracts.

The District Court, at the close of a consolidated trial on the sole issue of Automotive's alleged inequitable conduct, delivered an oral opinion holding that Automotive's hands were soiled to such an extent that all relief which it requested should be denied. This opinion was subsequently withdrawn at the request of one of the witnesses and is not a part of the record. At the same time, however, the court entered written findings of fact and conclusions of law, forming the basis for a judgment dismissing the various complaints and counterclaims 'for want of equity.' On appeal, the Circuit Court of Appeals reviewed the facts at length and concluded that the District Court's findings of fact were not supported by substantial evidence and that its conclusions of law were not supported by its findings. The judgment was accordingly reversed. 7 Cir., 143 F.2d 332. We brought the case here because of the public importance of the issues involved.

****995** The basic facts necessary to a determination of the vital issues are clear and without material dispute. In chronological order they may be summarized as follows:

In 1937 and prior thereto Automotive manufactured and sold torque wrenches developed by one of its employees, Herman W. Zimmerman. During this period Snap-On Tools Corporation was one of its customers for these wrenches. Automotive also had in its employ at this time one George B. Thomasma, who worked with Zimmerman and who was well acquainted with his ideas on torque wrenches. In November, 1937, Thomasma secretly gave information to an outsider, Kenneth R. Larson, concerning torque wrenches. Together they worked out plans for a new wrench, although Thomasma claimed that it was entirely his own idea.

After unsuccessfully trying to interest other distributors, Larson made arrangements to supply Snap-On with ***809** the new torque wrench. On October 1, 1938, Larson filed an application for a patent on the newly-developed wrench, which application had been assigned to Snap-On several days prior thereto.[2] Then in December, 1938, Larson, Thomasma and one Walter A. Carlsen organized the Precision Instrument Manufacturing Company to make the wrenches to supply Snap-On's requirements. All three received stock and were elected officers and directors of the new company. Manufacture of the wrenches began in January, 1939, and Precision succeeded in taking away from Automotive all of Snap-On's business. Thomasma continued to work for Automotive until the latter discovered his connection with Precision and discharged him in June, 1939. Thomasma's connection with Precision was also concealed from Snap-On during most of this period.

Subsequently on October 11, 1939, the Patent Office declared an interference between certain claims in Larson's pending patent application and those in one filed by Zimmerman. Automotive was the owner of Zimmerman's application. Shortly after the interference was declared, R. E. Fidler, Automotive's attorney, wrote to the president of the company that the 'whole situation confronting your opponents in this interference is quite messy, and I will be somewhat surprised if they fight the matter.' He further wrote that if there was a contest 'they surely will have a lot of explaining to do.'

In August, 1940, Larson filed his preliminary statement in the Patent Office proceedings. In it he gave false dates as to the conception, disclosure, drawing, description and reduction to practice of his claimed invention. These dates were designed to antedate those in Zimmerman's ***810** application by one to three years. Larson also claimed that he was the sole inventor of his wrench. When Fidler learned of this preliminary statement he immediately suspected that 'there must be something wrong with this picture' and suggested to Automotive's president that a 'very careful and thorough investigation' be made of the situation. The president agreed.

Fidler then employed several investigators who made oral reports to him from time to time. According to Fidler's memoranda of these reports, Fidler learned in great detail in August and September, 1940, the part that Thomasma played in the development of the Larson wrench and in the organization of Precision. He discovered that Thomasma claimed to have invented the wrench and that Larson 'was now trying to freeze him out.'

From October 24 to November 4, 1940, Larson and eight witnesses testified in the interference proceedings in support of his claims, corroborating his statements as to dates despite cross examination. The day before this testimony ended Thomasma met with Fidler and Automotive's president and stated that he had developed Larson's wrench and that Larson's patent application was a 'frame-up.' Fidler then procured from Thomasma an eighty-three page statement concerning these matters, which Thomasma swore to on November 15. As the District Court found, this statement or affidavit 'related in extensive detail the statements of Thomasma with respect to Larson's early work and disclosed such intimate knowledge thereof as to leave little doubt of the author's knowledge of the facts.'

With these facts before him, Fidler admitted ****996** that he 'personally was inclined to take the position that I should do something drastic' in the form of taking the matter up with the Patent Office or the District Attorney. He resolved his problem, however, by submitting it to an outside ***811** attorney. The latter advised him that his evidence was insufficient to establish Larson's perjury, that the Patent Office would not consider the matter until all proofs in the interference proceedings were in and that the District Attorney probably would not touch the situation while the interference proceedings were pending. Fidler followed his advise.

A few days later Fidler informed Larson's patent attorney, Harry C. Alberts, of the information disclosed in the Thomasma affidavit. Alberts admitted that 'it looked very much like Larson had given false testimony' and asked that further examination of Thomasma be made in his presence. Accordingly, on November 28, Thomasma was examined orally before Alberts, Fidler and officials of Automotive and Snap-On. Thomasma repeated substantially the same story as in his affidavit. Snap-On's president said that if the story were true 'the whole thing smells to the high heavens.' And Alberts remarked that under the circumstances he felt he would have to withdraw as Larson's attorney.

On the same day, Alberts and Snap-On's president confronted Larson and Carlsen with the Thomasma story and demanded an explanation. Larson refused to commit himself on the truth of Thomasma's account but finally admitted that 'my testimony is false and the whole case is false.' Alberts then withdrew as their attorney,[3] giving them the names of three other lawyers, including M. K. Hobbs. The fact that Alberts withdrew was communicated by him to Fidler.

Larson and Carlsen called on Hobbs the next day, November 29. They told him they were willing to concede ***812** priority in Zimmerman and wanted Hobbs to settle the interference proceedings.[4] Hobbs took the case on that basis, making no effort to inquire into the reasons for the concession since he considered that matter immaterial. Even when Fidler tried to tell him later about the perjury, Hobbs stopped him for he 'didn't want to hear the conflict in testimony.'

Hobbs immediately undertook to settle the interference proceedings. On December 2 he proposed a settlement which included a concession of priority by Larson, but this proposal was apparently not satisfactory to all those concerned. Meanwhile Fidler presented the facts to another disinterested lawyer and asked him whether he thought there was enough evidence to bring a conspiracy suit for damages or a criminal action. The lawyer, after admitting that he did not have the slightest doubt but that Thomasma was telling the truth, replied in the negative.

On December 13 Fidler submitted a draft agreement that he had prepared. This draft contained a recital that 'it has been determined by the parties hereto and their respective counsel that the party Zimmerman is the prior inventor of the subject matter involved in said Interference No. 77,565, as well as all other subject matter commonly disclosed in said Zimmerman and Larson applications.' But this draft was likewise unacceptable.

***813** For a time negotiations were broken off and resumption of the interference proceedings seemed imminent. One of the other attorneys for Automotive wrote a letter on December 19 to Alberts, who was still acting as attorney for Snap-On, stating that 'you must recognize that a large part of the ****997** testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth' and that 'you are holding up the issuance of the Zimmerman patent without the slightest justification.' Fidler, who had approved this letter, justified these remarks on the ground that 'they had told us Zimmerman was the prior inventor and

we hadn't yet received a concession of priority.' In reply to this letter, Alberts charged that Automotive's attorneys were using 'threatening accusations' and 'duress' and that they were threatening to 'unloose the dogs' unless they got everything they requested in the settlement.

Suddenly on the next day, December 20, negotiations were resumed and the parties quickly entered into three contracts, the first two of which are involved in this suit. These contracts, in the relevant parts, provided as follows:

(1) Under the Automotive and Precision-Larson agreement, Larson conceded priority in Zimmerman and Larson's application was to be assigned to Automotive. Automotive agreed to license Larson and Precision to complete their unfilled order from Snap-On to the extent of about 6,000 wrenches, with a royalty to be paid on the excess. Automotive released Precision, Larson and their customers from liability for any past infringement and gave Precision and Larson a general release as to all civil damages. Finally, Precision and Larson acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications.

(2) Under the Automotive and Snap-On agreement, Snap-On agreed to reassign the Larson application to Precision ***814** and acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications. Automotive also gave Snap-On the right to sell the 6,000 wrenches then on order from Precision and released Snap-On from any past liability or damages.

(3) Under the Snap-On and Precision-Larson agreement, Snap-On reassigned to Larson and Precision whatever title Snap-On had to the Larson application. Precision agreed to manufacture and deliver to Snap-On the 6,000 wrenches then on order. Snap-On also assented to the Automotive and Precision-Larson agreement.

The Larson application was accordingly assigned to Automotive on December 20, 1940. Automotive subsequently received patents on both the Larson and Zimmerman applications after making certain changes. Then Precision began to manufacture and Snap-On began to sell a new wrench. Automotive claimed that this was an infringement of its patents and a breach of the contracts of December 20, 1940. Thus the suit arose which is now before us.

[1] **[2]** The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.' Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while 'equity does not demand that its suitors shall have led blameless lives,' Loughran v. Loughran, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and ***815** without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) ss 397-399.

[3] **[4]** This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of ****998** conduct is sufficient cause for the invocation of the maxim by the chancellor.

[5] Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788, 62 S.Ct. 402, 405, 406, 86 L.Ed. 363.

[6] **[7]** In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are 'issues of great moment to the public.' Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250. See also Mercoid Corporation v. Mid-

Continent Investment Co., 320 U.S. 661, 665, 64 S.Ct. 268, 271, 88 L.Ed. 376; Morton Salt Co. v. Suppiger Co., supra; ***816** United States v. Masonite Corp., 316 U.S. 265, 278, 62 S.Ct. 1070, 1077, 86 L.Ed. 1461. A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and useful Arts.' At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. And when such measurements are made, it becomes clear that the District Court's action in dismissing the complaints and counterclaims 'for want of equity' was more than justified.

[8] The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury. Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent. Yet Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the Larson application itself, turned it into a patent and barred the other parties from ever questioning its validity. Such conduct does not conform to minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and contracts.

Automotive contends that it did not have positive and conclusive knowledge of the perjury until the pleadings ***817** in the instant proceedings were filed and until Larson admitted his perjury on pre-trial examination. It claims that prior thereto it only had Thomasma's affidavit and statements, which were uncorroborated and likely to carry little weight as against Larson and his eight witnesses. It is further pointed out that Fidler submitted what he knew of the facts to at least two independent attorneys, both of whom advised him that the evidence of perjury that he possessed was insufficient. From this it is argued, as the Circuit Court of Appeals held, that while Automotive was 'morally certain that Thomasma's story was true' there was no duty to report this uncorroborated information to either the District Attorney or the Patent Office.

[9] But Automotive's hands are not automatically cleansed by its alleged failure to possess sufficiently trustworthy evidence of perjury to warrant submission of the case to the District Attorney or to the Patent Office during the pendency of the interference proceedings. The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured. Yet it acted in complete disregard of that belief. Never for a moment did Automotive or its representatives doubt the existence of this fraud. Fidler suspected it soon after he knew of Larson's claims. His suspicions were confirmed by his hired investigators. Then Thomasma revealed such intimate and detailed facts concerning the ****999** perjury as to convince all who heard him, despite certain reservations entertained by some persons concerning his trustworthiness. Moreover, Fidler was well aware that Alberts threatened to withdraw as Larson's counsel if he discovered from Larson that Thomasma's story was true and that Alberts in fact did so withdraw. The suspected perjury was further confirmed by Larson's sudden willingness to concede priority after he learned of ***818** Thomasma's story and by the admissions by Alberts and Snap-On that Zimmerman 'was the prior inventor.' And the very fact that Fidler saw fit to submit his proof to outside attorneys for advice is an indication of the substantiality of his belief as to Larson's perjury. With all this evidence before it, however, Automotive pursued the following course of action:

[10] 1. It chose to keep secret its belief and allegedly unsubstantial proof of the facts concerning Larson's perjury. We need not speculate as to whether there was sufficient proof to present the matter to the District Attorney. But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. Cf. Crites, Inc. v. Prudential Ins. Co., 322 U.S. 408, 415, 64 S.Ct. 1075, 1079, 88 L.Ed. 1356. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency

of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.' Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, 322 U.S. 246, 64 S.Ct. 1001, 88 L.Ed. 1250.

[11] 2. Instead of pursuing the interference proceedings and proving the fact that Zimmerman's claims had priority ***819** over those asserted by Larson, Automotive chose to enter into an outside settlement with Larson, Precision and Snap-On, whereby Larson conceded priority. Outside settlements of interference proceedings are not ordinarily illegal. But where, as here, the settlement is grounded upon knowledge or reasonable belief of perjury which is not revealed to the Patent Office or to any other public representative, the settlement lacks that equitable nature which entitles it to be enforced and protected in a court of equity.

[12] 3. By the terms of the settlement, Automotive secured the perjured Larson application and exacted promises from the other parties never to question the validity of any patent that might be issued on that application. Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it without ever attempting to reveal to the Patent Office or to anyone else the facts it possessed concerning the application's fraudulent ancestry. Automotive thus acted to compound and accentuate the effects of Larson's perjury.

These facts all add up to the inescapable conclusion that Automotive has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of Larson and Precision may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims infected with fraud and perjury is too great to be overridden by such a consideration. Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects. Instead, Automotive acted affirmatively to magnify and increase those effects. Such inequitable conduct impregnated Automotive's entire cause of action and justified dismissal by resort to the unclean hands doctrine. Keystone Driller Co. v. General Excavator Co., supra.

***820** We conclude, therefore, that the evidence clearly supported the District Court's findings of fact and that these findings justified its conclusions of law. The court below erred in reversing its judgment.

Reversed.

****1000** Mr. Justice ROBERTS.

I think the writ should be dismissed or the judgment of the Circuit Court of Appeals affirmed. The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties. In my view it is not the function of this court to weigh the facts for the third time in order to choose between litigants, where appraisal of the conduct of each must affect the result.

Mr. Justice JACKSON is of the opinion that the judgment should be affirmed, as he takes the view of the facts set forth in the opinion of the court below. 143 F.2d 332, supra.

All Citations

324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381, 65 U.S.P.Q. 133

Footnotes

1 The three patents involved are No. 2,279,792, issued on April 14, 1942, to Kenneth R. Larson; No. 2,283,888, issued on May 19, 1942, to H. W. Zimmerman; and reissue No. 22,219, issued on November 3, 1942, to H. W. Zimmerman, based on original No. 2,269,503.

2 Snap-On agreed to file the patent application for Larson, who was without funds, and took an assignment of the Larson application as security for performance of the agreement to supply wrenches.

3 Alberts apparently never withdrew formally as Larson's attorney in the interference proceedings by filing a document to that effect in the Patent Office.

4 Both Larson and Carlsen testified that they told Hobbs of the perjury and of the predicament they were in, stating to him that they did not want to be turned over to the District Attorney. Hobbs, however, denied that they informed him of these matters. It was at the request of Hobbs that the District Court's oral opinion was withdrawn in order that, in the words of the District Court, it would not be 'construed as implying that Mr. Hobbs had willfully given false testimony or had been

guilty of professional misconduct.' The court further said that the record demonstrated 'that the witness Hobbs did not testify falsely.' Assuming that Hobbs gave no false testimony, however, we do not consider that fact to be of controlling significance in this case.

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Article
T. Leigh Anenson [1]

LIMITING LEGAL REMEDIES: AN ANALYSIS OF UNCLEAN HANDS

> [T]he clean hands doctrine . . . ought not to be called a maxim of equity because it is by no means confined to equity . . . . [2]
>
> Zechariah Chafee, Jr.

Introduction

Unclean hands is perhaps the most powerful and least containable defense that came from ancient courts of equity. Since the American Revolution, courts have been shooting off decisions on this equitable doctrine like Roman candles. [3] "Broader" [4] and "newer" [5] than other ***64** equitable defenses, discretionary dismissals [6] for unclean hands are not limited to illegality, but extend to any inequitable, unconscionable, or bad faith conduct that is connected to the case. [7] For reasons of court and party protection, judges have invoked unclean hands to preclude an assortment of common law and statutory causes of action. [8]

Zechariah Chafee, Jr. was the first scholar to undertake a comprehensive analysis of the defense in the United States. [9] In 1949, he remarked on the ***65** "astonishing number" of cases decided under the doctrine. [10] Even then, the broad coverage of unclean hands comprised myriad forms of misbehavior barring an array of state and federal claims. [11] Chafee's analysis focused solely on the defense in suits seeking equitable remedies, [12] and a long-standing treatise advises that it is not available in damages and other so called legal actions. [13] But adjudications in state and federal courts evidence the expansion of unclean hands into matters of legal relief. [14]

Indeed, in a case of first impression, the Michigan Supreme Court recently recognized unclean hands and dismissed a damages action. [15] Historically, other state supreme courts have limited its use to actions involving equitable relief. [16] In the federal court system, the United States Supreme Court has avoided the question of whether a court has authority to invoke an equitable defense like unclean hands to bar an action for damages. [17] As a result, the controversy continues in the intermediate appellate and trial courts of state and federal jurisdictions. [18]

***66** This Article examines the corpus of cases incorporating unclean hands into the common and statutory law. It provides for a fuller explanation of the defense in legal cases by looking more closely at its doctrinal underpinnings. [19] Through a description of the arguments and justifications in the debate over the legal status of unclean hands, this Article seeks to inform on this divisive issue and aid its resolution.

During the centuries following the merger of law and equity, there has been continuous and vigorous discussion about the relationship between these two traditions in the United States and the rest of the common law world. [20] These "fusion wars" advance diverse views about the role of law and equity in the current legal framework. [21] Battle lines have been drawn around an array of subjects like "property, choice of law . . . fiduciaries, unjust enrichment, [and] . . . remedies." [22] The equitable doctrine of "clean hands" is now included in that conversation.

The availability of unclean hands in damages actions has not been the subject of sustained analysis at an appellate level. It remains unresolved in many jurisdictions, with other courts addressing the issue in error or through ***67** oversight. [23] Courts have also been frustrated with the lack of doctrinal and theoretical scholarship considering the availability of unclean hands to bar legal claims. [24] This Article aims to end the arbitrariness and judicial extremes on the subject of unclean hands in an effort to unify this fragmented area of law. By studying the defense of unclean hands, it celebrates and cultivates one of law's most remarkable inventions-equity. [25]

Part I reviews court decisions that follow the conventional view that the equitable defense of unclean hands is limited to claims seeking equitable remedies. Part II explores the present decisional trend to consider the defense in cases seeking legal remedies. It studies how the cases are decided, how the precedents are used, and how the case law of unclean hands has evolved. It traces the incorporation process within and across state and federal jurisdictions.

Part III evaluates the future of unclean hands in light of the judicial justifications for and against the defense at law. It reveals how precedent and policy analysis dominate the thought processes of judges considering unclean hands and illustrates how the complex interplay between human facts and abstract laws that confounded ancient English chancellors continues to challenge contemporary American judges. This Part suggests that rather than denying the defense in legal actions in reliance on its ***68** historical pedigree, the trend of absorbing the equitable defense of unclean hands into the law will likely continue on the basis of policy.

This Article concludes by placing unclean hands in its broader equitable context. The cases applying the defense in actions seeking legal remedies are not only important for what they say, but also for what they represent. The laboratory that is unclean hands in damages actions could become a movement to eradicate the legal barrier to equity. To be sure, incorporating unclean hands into the law may help dissolve default notions of "law" and "equity" as unassailable symbols of an institution that has yet to grapple with its own coming of age. [26]

I. The Past: Unclean Hands Exclusive to Equity

Before discussing the growing body of law that recognizes unclean hands in lawsuits seeking legal remedies in Part II, and its implications for the future in Part III, this section surveys past court decisions rejecting unclean hands at law. Under these precedents, the defense is restricted to its traditional use in cases seeking equitable relief.

The two most recent jurisdictions to deny unclean hands in a lawsuit seeking damages did so almost a decade ago. The courts' approach demontrates a narrow outlook on the defense. In Fremont Homes, Inc. v. Elmer, [27] the Supreme Court of Wyoming supported its denial of the defense based on precedent considering unclean hands to solely ban equitable relief. [28] Correspondingly, the District of Columbia Court of Appeals in In re ***69** Estate of Barnes [29] was persuaded to deny the defense

because "we know of no authority for applying this 'maxim of equity' to a legal claim for money."[30] State supreme courts in Georgia,[31] Iowa,[32] Missouri,[33] and Pennsylvania[34] have reached similar conclusions, with high courts in Minnesota,[35] North Dakota,[36] and New Jersey[37] suggesting an identical outcome.

***70** The state supreme courts of Maine,[38] Mississippi,[39] and West Virginia,[40] to name a few, have refused to permit the defense of laches in legal cases.[41] Laches shared the same pre-merger procedural posture as unclean hands,[42] suggesting they would deny the latter defense for the same reasons.[43]

The status of unclean hands is arguably an open question in Alabama. In San Ann Tobacco Co., Inc. v. Hamm, the Alabama Supreme Court declared that unclean hands "may not constitute a defense at law,"[44] but that decision pre-dated the state's merger of law and equity in 1973.[45] In addition, the highest courts in Oregon[46] and Maryland[47] agreed to ***71** address the adoptability issue, but ultimately avoided it on appeal.[48]

The controversy concerning the common law recognition of unclean hands continues in the lower state courts.[49] Courts within New York[50] and Oregon[51] have reached different conclusions on the subject. Decisions ***72** from Texas,[52] Illinois,[53] Ohio,[54] Arizona,[55] Colorado,[56] and Massachusetts[57] have also refused to assimilate the defense of unclean hands. In the federal courts, the District Court for the Northern District of Illinois[58] along ***73** with the Third Circuit Court of Appeals[59] rejected the defense at law.

Consequently, notwithstanding post-merger criticism calling for the consideration of all equitable defenses to legal claims,[60] unclean hands has been traditionally dependent on equity jurisdiction.[61] But the customary reticence to recognizing unclean hands at law is changing. Courts recently have begun to absorb the defense. The next Part details its development into the law.

II. The Present Legal Development of Unclean Hands

The following analysis traces the doctrinal development of unclean hands into the state and federal law.

A. State Court Adoption of Unclean Hands

Courts from seven states have declared the doctrine of unclean hands available in an action at law.[62] Its absorption has occurred in dozens of cases ***74** from California, Oregon, Maryland, Michigan, New York, Connecticut, and Rhode Island.[63] With the exception of Michigan, all the incorporation decisions have been rendered by lower courts.[64] The Supreme Court of Michigan recently affirmed the dismissal of a case seeking damages where the litigant's unclean hands amounted to litigation misconduct.[65]

1. California.-California received unclean hands as part of the state common law almost fifty years ago.[66] As the earliest state to adopt the defense at law, it has the most cases on the subject.[67] Unlike Oregon and New York, discussed below, California courts are unanimous.[68] California courts of appeal have considered unclean hands in both tort and contract actions.[69] Decisions have made the defense available to preclude conversion, malicious prosecution, and legal malpractice, as well as to bar the foreclosure of a mechanic's lien.[70] While earlier opinions carefully considered whether ***75** to apply the defense on a claim-by-claim basis, later opinions broadly echo its applicability in all cases.[71]

The process of integration began with Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304. [72] In a case of "first impression," the appellate court questioned whether the equitable defense of unclean hands applies as a defense to a legal action. [73] It answered the question in the affirmative. [74] The court of appeals relied on language from prior Supreme Court of California cases interpreting the merger of law and equity. [75] While unclean hands was not at issue, these decisions declared that "under the system of Code pleading equitable defenses . . . may be set up in actions at law." [76] The court of appeals in Fibreboard, however, affirmed the denial of the defense because it found a lack of evidence to satisfy the doctrine's definitional elements. [77]

***76** Goldstein v. Lees [78] followed Fibreboard's ruling that unclean hands is available in a claim for damages. [79] It reversed the trial court ruling and applied the doctrine to deny an attorney recovery for services rendered in violation of professional ethics rules. [80] Pond v. Insurance Co. of North America [81] also followed Fibreboard in applying unclean hands to bar a claim for malicious prosecution. [82] The malicious prosecution cause of action in Pond was predicated on an unsuccessful indemnity suit filed by an insurer against an insurance agent arising out of a wrongful death action. [83] The agent knowingly withheld critical evidence and made other misrepresentations relevant to the insurer's defense in the underlying litigation that caused it to settle. [84] Because the agent's nondisclosures would have changed the outcome of the indemnity suit upon which he predicated his malicious prosecution claim, the court of appeals agreed with the trial court and barred his action for damages. [85]

Unilogic, Inc. v. Burroughs Corp. [86] further extended the application of unclean hands to a conversion claim. [87] The case involved a business dispute in which both sides claimed various tort and contract violations arising out ***77** of a failed joint project to develop new technology. [88] Unilogic alleged that Burroughs tortiously converted its new technology. [89] Burroughs claimed unclean hands based on Unilogic's failure to return certain proprietary software upon termination of the joint development project and its use of the software in attempting to sell products to Burroughs' competitors. [90]

In considering the availability of unclean hands to bar the legal claim of conversion, the court found there was "scant authority on the subject." [91] It noted that Pond and Goldstein cited Fibreboard with approval for the general proposition that "the unclean hands doctrine is not confined to equitable actions, but is also available in legal actions." [92] It then affirmed the trial court's decision to apply the defense because "Unilogic has not provided us with any reason, based on policy or otherwise, for holding that the unclean hands defense is never available in a legal action for conversion." [93]

Another line of California authority supporting the adoption of unclean hands began in Blain v. Doctor's Co. [94] Without discussing Fibreboard or its progeny, the court of appeals in Blain applied the defense to bar a legal malpractice action arising out of a medical malpractice lawsuit. [95] The client brought the claim against his attorney after relying on his counsel's advice to lie at his deposition. [96] In determining whether the perjury should constitute unclean hands, the court disregarded the application issue and focused on ***78** the policies of the doctrine. [97] Quoting Chafee, the court explained that the unclean hands standard "gets most of its qualities in a given group of cases from the substantive law of the particular subject." [98] It then discussed two out-of-state legal malpractice cases from Oregon and Pennsylvania arising from criminal convictions before affirming the trial court's dismissal on grounds of unclean hands. [99]

The Pennsylvania case of Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, [100] reviewed by the Blain court, applied a general legal principle of in pari delicto. [101] The Oregon case of Kirkland v. Mannis, [102] analyzed in Blain, used unclean hands without discussion of its application in an action for damages. [103]

***79** 2. Oregon.-Oregon appellate court decisions have not all aligned with Kirkland v. Mannis-some have reached the opposite conclusion. [104] In McKinley v. Weidner, [105] the same court had a chance to reconcile Kirkland with its prior ruling in Gratreak v. North Pacific Lumber Co. [106]

In Gratreak, decided before the distinction between law and equity had been abolished in Oregon, the court rejected the defense of unclean hands in a legal action. [107] Gratreak distinguished the California Court of Appeal's reading of the California merger in Fibreboard because it found that Oregon law did not allow unclean hands. [108] By contrast, Kirkland was arguably ***80** decided under the new Oregon Rules of Civil Procedure, which abolished all procedural distinctions between law and equity. [109] As such, the McKinley court could have conciled its two former decisions had it interpreted the new civil rules to allow unclean hands as a defense at law. [110] The court of appeals, however, chose not to square its prior opinions in this manner. Instead, it held that Kirkland's reliance on unclean hands was misplaced and that in pari delicto should have been used to reach the same result. [111]

The Oregon Supreme Court subsequently granted certiorari to decide the application of unclean hands in a different case, but decided the appeal on other grounds. [112]

3. Maryland.-Like Oregon, the highest court in Maryland also circumvented the issue of availability of unclean hands in legal actions. [113] The intermediate appellate court in Manown v. Adams, [114] however, found the defense applicable to an action at law despite its equitable roots. [115]

The plaintiff's legal action in Manown requested repayment for a series of loans. [116] Adams filed the action to recover the funds, and Manown asserted unclean hands because Adams failed to list the transfer of assets in his bankruptcy proceeding and divorce action. [117] Essentially, Manown claimed that Adams "defrauded both his wife and his creditors by hiding assets" in Manown's name and "perjured himself in the process." [118] Adams did not contest Manown's allegations, but instead asserted that unclean hands was immaterial in an action at law. [119]

The the trial and appellate courts disagreed. [120] The appellate court ***81** emphasized that unclean hands served to protect the court and to suppress illegal and fraudulent transactions. [121] The court then found such purposes to be furthered by the application of unclean hands in the case at bar. [122] It also relied on two cases from the high court in Maryland that applied the legal defense of in pari delicto as authority for the rule that unclean hands may be invoked to bar suits "at law and in equity." [123] The appellate court reasoned that "in pari delicto is merely a cognate principle to the unclean hands doctrine," which justified the analogy. [124] The court additionally held that the "general trend" of merging procedures at law and equity supported its decision. [125]

As discussed previously, the Maryland Court of Appeals [126] eschewed making a decision on the basis of the "clean hands" doctrine on further appeal and found instead that the bankruptcy trustee was the real party in interest. [127] The dissent criticized the unannounced shifting of doctrinal ***82** focus. [128] These justices opined that the code merger was procedural only. [129] Referencing pre-merger precedent from Maryland and the United States Supreme Court, the dissent concluded that unclean hands applies only in equity. [130]

4. New York.-Similar to the Maryland intermediate appellate decision of Manown v. Adams, two courts applying New York law found unclean hands applicable to legal relief by reference to the defense of in pari delicto. [131]

In Smith v. Long, [132] a New York appellate court allowed the defense of unclean hands to a legal claim when the plaintiffs attempted to perpetrate a fraud on the government. [133] The plaintiffs sought damages for the failure to transfer stock under a buy-back agreement arising out of the formation of a corporation gone awry. [134] The plaintiffs had transferred their stock to one of the defendants after the Small Business Administration (SBA) denied their application for a minority business enterprise, due in part to their ownership percentages. [135] The defendants asserted the claim should be barred under ***83** the doctrine of unclean hands because the plaintiffs had perpetrated a fraud on the SBA. [136] In reversing summary judgment for the plaintiff, the intermediate court of appeals declared that unclean hands was available in "law or equity." [137] Because the parties were allegedly accomplices in the same scheme, the court then defined the defense according to the parallel legal defense in pari delicto. [138] Subsequent decisions rendered under New York law have followed Smith and barred legal claims on the basis of unclean hands without discussion of the application issue. [139]

Applying New York law before the decision in Smith and its progeny, [140] the Second Circuit Court of Appeals also considered unclean hands to bar claims for legal relief when the parties engaged in illegal activities. [141] In Mallis v. Bankers Trust Co., [142] the plaintiffs brought an action under state and federal law to recover losses suffered from advancing money for the purchase of securities as a result of alleged misrepresentations by the defendant. [143] The defendant claimed that the plaintiffs also violated various state and federal laws in the securities transaction. [144] While ultimately reversing the lower court's decision in favor of the defendant, the court of appeals considered the defense of unclean hands against the pendant state common law claims of fraud and negligent misrepresentation. [145] It used the term in pari delicto in considering whether the same conduct barred the federal securities law claim. [146] Perhaps because the court equated the ***84** two defenses, [147] it did not address the applicability of unclean hands to legal remedies and cited as support only cases applying the doctrine to bar equitable relief. [148]

In contrast to Smith and Mallis, other New York courts have rejected unclean hands as a defense in actions at law. [149] Thus, akin to Oregon, [150] New York cases are divided on the legal incorporation of unclean hands after the merger. [151]

5. Michigan.-Rather than ruling the merger allows the universal use of unclean hands in legal and equitable remedies like some of the cases described above, Michigan courts have created an exception to the rule that unclean hands is inapplicable to legal claims in order to protect the judicial process. [152] Put simply, regardless of the relief requested, Michigan allows unclean hands on the basis of litigation misconduct in the case before the court. [153] In contrast to the Maryland case of Adams v. Manown, the California case of Blain v. Doctor's Co. (both involving perjury in previous litigation), [154] and the New York case of Smith v. Long (concerning other conduct possibly ***85** intended to defraud a government body), [155] Michigan's accommodation for unclean hands in damages actions is more closely connected to the court protection purpose of the defense. [156] In fact, Michigan courts have justified the departure from precedent precluding unclean hands in legal actions under their inherent authority. [157]

In Cummings v. Wayne County, [158] a personal injury case in which monetary damages were sought, the trial court dismissed the action because the plaintiff attempted "to extort favorable evidence by death threats" and resorted to vandalism during the trial. [159] Finding that such flagrant misconduct of witness-tampering posed a danger to the judicial process, the trial court found it had inherent authority to dismiss under the doctrine of unclean hands. [160] The appellate court agreed. [161]

It distinguished a prior decision that denied unclean hands in actions at law for the reason that substantive distinctions survived the procedural merger. [162] Citing Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., [163] the appellate court declared: "we do not believe that the [substantive-procedural] distinction prevents a court of law from invoking the 'clean hands doctrine' when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between

the parties." [164] The court emphasized that the doctrine of unclean hands "applies not only for the protection of the parties but also for the protection ***86** of the court." [165]

The court then quoted from Hazel-Atlas Glass Co. v. Hartford-Empire Co., [166] in which the United States Supreme Court invoked the historic power of equity to set aside a fraudulently begotten judgment: [167] "Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." [168] The majority opinion in Hazel-Atlas Glass did not discuss "unclean hands" as such, [169] but the ruling emphasized the same fundamental purpose of the doctrine by refusing to aid a litigant who had perpetrated "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." [170] In Cummings, the Michigan Court of Appeals also cited to Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., [171] a post-Hazel-Atlas Glass decision of the United States Supreme Court that specifically applied the doctrine of unclean hands to a suit in equity involving perjury in the patent process. [172]

The Cummings decision has been followed in other appellate cases in ***87** Michigan. [173] In fact, Cummings was recently cited with approval by the Michigan Supreme Court in Maldonado v. Ford Motor Co. [174] The Maldonado court upheld the dismissal of a legal action alleging employment discrimination based on a party and her counsel's pretrial publicity of evidence intended to taint the jury pool. [175] Quoting Cummings, the Michigan Supreme Court announced the universal applicability of unclean hands based on litigation misconduct:

> The authority to dismiss a lawsuit for litigant misconduct is a creature of the clean hands doctrine and, despite its origins, is applicable to both equitable and legal damages claims. The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. The clean hands doctrine applies not only for the protection of the parties but also for the protection of the court. [176]

The Michigan Supreme Court rooted the trial court's dismissal power in its judicial authority under the state constitution. [177]

6. Connecticut.-Unlike Michigan, the applicability of unclean hands to legal claims in Connecticut does not have the sanction of the state supreme court. Nevertheless, three cases from its trial courts declared unclean hands available in actions at law and denied motions to strike the defense. [178] ***88** Comparable to the intermediate appellate courts in California, [179] the Connecticut trial courts relied on the broad language of a case from their supreme court and declared it "well settled that equitable defenses or claims may be raised in an action at law." [180]

The attitude of the Connecticut courts also correlates to that of the California judiciary. [181] Rather than requiring the party asserting unclean hands to find cases applying the doctrine to damages, for instance, the court in First Fairfield Funding [182] placed the burden of case production on the party seeking to deny the defense. [183] In accepting the defense to ban legal claims for tortious interference with contract and unfair trade practices, the court reasoned:

> In support of its first claim, the plaintiff cites a number of cases which stand for the proposition that the defense of unclean hands is available as a ***89** defense in action[s] seeking equitable relief. What the cases relied upon by the plaintiff do not say, however, is that the defense of unclean hands is not available in actions at law. [184]

It further justified its decision on the basis that "[t]he integrity of the court is no less worthy of protection in action[s] at law, than in actions in equity." [185] Accordingly, the court put policy over pedigree when no precedent precluded the universal application of unclean hands. [186]

7. Rhode Island.-Like Connecticut, a Rhode Island opinion allowing unclean hands to be pled against legal claims occurred at the trial level. [187] Matching other state courts incorporating the defense into the law, [188] the ruling relied on the federal district court decision in Buchanan Home [189] as persuasive authority. [190]

The Rhode Island Superior Court decision in Bartlett v. Dunne [191] found that perjury warranted dismissal of a negligence claim for damages pursuant to unclean hands. [192] During the trial, plaintiff lied under oath regarding his alcohol consumption prior to accident. [193] Because the court found that the "[p]laintiff's deception [wa]s willful and [struck] at the very heart of the judiciary," it determined that a finding of contempt was insufficient and instead invoked unclean hands to dismiss the action. [194]

B. Federal Court Adoption of Unclean Hands

Federal courts have applied unclean hands to legal actions as a matter of federal law in both federal question and diversity cases. [195] As in state ***90** court jurisprudence, [196] some of the courts applied the defense without consideration of its application at law. [197] The following discussion analyzes federal courts of appeal and district court decisions from the Eleventh, Fourth, Ninth, Seventh, Sixth, and Fifth Circuits.

1. Eleventh Circuit.-The most recent decision considering the applicability of unclean hands at law comes from the Eleventh Circuit. In Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corp., [198] the District Court for the Southern District of Florida denied the plaintiff's renewed motion for class certification due in part to the potential availability of unclean hands as a defense to legal relief. [199]

Boca sued Tenet for federal civil RICO violations due to its charging practices. [200] Tenet claimed unclean hands based on Boca's own charging practices. [201] In concluding that the viability of "Tenet's unclean hands defense [was] more than a mere possibility," thus justifying an order to deny class certification, the district court reviewed recent decisions from the Eleventh Circuit. [202] "Although not definitive," the district court found that "the Eleventh Circuit's . . . pronouncements on this issue in Sikes v. Teleline, Inc., [203] and Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards [204] indicate[d] that it would be receptive to Tenet's argument." [205] The court noted that "[i]n Sikes, the Eleventh Circuit suggested that civil ***91** RICO claims based on illegal gambling were rare because 'plaintiffs may be barred from bringing such a claim by the "unclean hands" doctrine.'" [206] Moreover, citing a decision that applied the defense of in pari delicto (corresponding to rulings from the courts of Maryland and New York), the district court relied on Edwards, wherein the Eleventh Circuit held that this related legal defense applies in civil RICO actions. [207] Furthermore, (similar to the rationale of the lower courts in California and Connecticut), the district court dismissed Boca's argument that the "Eleventh Circuit has never found the availability of [an unclean hands] defense to a civil RICO claim," with the rejoinder that "it is equally clear that the Eleventh Circuit has not held otherwise." [208] In light of the foregoing, the court ruled unclean hands a viable defense to a civil RICO claim for damages. [209]

2. Fourth Circuit.-The most widely-cited opinion of unclean hands as a viable defense at law is Buchanan Home. [210] Sitting in diversity, the District Court for the District of South Carolina applied the doctrine to defeat claimed damages for warranty, tort, and contract violations. [211] A dealership ***92** sued Firestone for damages associated with customer dissatisfaction with

defects in a brand of its tires. Specifically, the plaintiff claimed that "it did not receive sufficient compensation for replacing and adjusting unserviceable Firestone 500 radial tires" under the terms of its dealership agreement. [212]

Firestone paid the dealer "a handling fee for each tire replaced and adjusted" to account for its time replacing and adjusting tires. [213] The dealer also received "billing credit" as reimbursement for the cost of the replacement tire taken from its inventory. [214] Receipt of the handling fee and billing credit was conditioned on the return of the replaced tire along with an adjustment form signed by the customer. [215]

The dealership, however, admitted to a scheme of defrauding Firestone out of thousands of dollars by falsifying and forging the adjustment forms. [216] The forms were necessary for Firestone to defend against the dealer's claims because recovery required a determination of how many legitimate warranty claims the plaintiff had to process. [217]

In granting Firestone's motion to dismiss the complaint on grounds of unclean hands, the district court emphasized that the overriding reason for the defense is to "protect the integrity of the court." [218] Because the dealership's presence in the courtroom suggested a "danger to the administration of justice," the district court applied the defense and barred its claims for monetary relief. [219]

In reaching its conclusion that manufacturing evidence constitutes unclean hands, the district court drew an analogy to Mas v. Coca-Cola Co., [220] where the Fourth Circuit Court of Appeals applied unclean hands pursuant to its equity jurisdiction. [221] In Mas, the federal appellate court stated:

> No court of equity [or court of law in this instance] ought to be required to listen to a man whose very presence suggests danger to the administration of justice and whose past conduct affecting the matter in litigation would ***93** cast doubt upon the ability of the court to ascertain from him the truth with respect thereto. [222]

As to its decision to apply unclean hands at law, the district court declared that "rights not suited for protection at equity should not be protected at law." [223] It also noted that Chafee and other twentieth century commentators had called for the end to any distinction between law and equity after the integration. [224] It explained: "Court opinions and commentaries since the procedural merger of law and equity in 1938 have expressed the view that the clean hands doctrine embodies a general principle equally applicable to damage actions . . . ." [225]

While the "court opinions" referenced by the district court are not directly on point, they do embody the idea of equal application of unclean hands in principle. For example, in Union Pacific Railroad Co. v. Chicago & North Western Railway Co., [226] the District Court for the Northern District of Illinois boldly proclaimed that "[t]he clean hands maxim is not peculiar to equity, but expresses a general principle equally applicable to damage actions." [227] However, the case concerned only equitable relief. In making the above statement, the court was attempting to justify its analogy to a case seeking damages that involved an illegal contract made in violation of securities laws. [228]

Additionally, the Fourth Circuit Court of Appeals decision in Tempo Music, Inc. v. Myers [229] arguably did not apply unclean hands to bar the legal claims asserted. [230] The case concerned a violation of federal copyright law, and the appellate court invoked unclean hands to defeat the request for equitable relief and equitable estoppel to estop the damages claim. [231] The district court in Buchanan Home, however, found Tempo Music to stand for the proposition that unclean hands applies "[w]hether designated as the ***94** principle underlying clean hands or as equitable estoppel." [232]

Citing Buchanan Home,[233] the District Court of Maryland, in Smith v. Cessna Aircraft Co.,[234] prevented the recovery of damages under unclean hands after the plaintiff lied during his deposition regarding his tax returns.[235] Among other damages, the plaintiff sought compensation for the income he lost while recuperating from injuries resulting from the crash of his plane.[236] Because the plaintiff's pre-trial perjury adversely affected an accurate assessment of potential liability, the court dismissed the claim relating to his lost income.[237]

3. Ninth Circuit.-Notwithstanding its somewhat limited precedential foundation, the logic of Buchanan Home and Tempo Music has been persuasive to some federal courts in California. Most of those decisions, in which the equitable doctrine of unclean hands was applied to bar actions for legal damages, arose in claims under federal intellectual property law or ***95** state unfair competition law.[238] In copyright cases, unclean hands has even evolved into a special defense of "copyright misuse."[239]

The Ninth Circuit Court of Appeals in Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors[240] cited Buchanan Home and Tempo Music in announcing that unclean hands may bar a legal action for copyright infringement where the copyright holder misused the copyright.[241] The District Court for the Northern District of California in Metro Publishing, Ltd. v. San Jose Mercury News, Inc.[242] followed Supermarket of Homes in finding that unclean hands barred claims for damages on trademark infringement and dilution claims.[243] The district court also noted the decisions from the Fourth Circuit in support of its judgment and quoted the following passage from Buchanan Home: "Court opinions and commentaries since the procedural merger of law and equity in 1938 have expressed the view that the clean hands doctrine embodies a general principle equally applicable to damage actions, and that rights not suited for protection in equity should not be protected at law."[244]

In addition to borrowing cases from the Fourth Circuit to apply unclean hands at law, Ninth Circuit precedent has had a spillover effect in at least one other federal circuit.[245]

4. Seventh Circuit.-The District Court for the Northern District of Illinois ***96** in Urecal Corp. v. Masters[246] followed the Ninth Circuit decision in Hall v. Wright.[247] In a diversity action involving unfair competition, the Urecal court invoked the doctrine of unclean hands to bar both legal and equitable remedies.[248] Aware of the adoption issue in damages actions, the court explained that the Federal Rules of Civil Procedure (Federal Rules) left intact a distinction between law and equity only for purposes of determining the right to trial by jury.[249]

The court's reasoning in Urecal has been approved in other cases when legal and equitable relief is joined.[250] For instance, another Illinois district court, in Energizer Holdings, Inc. v. Duracell, Inc.,[251] applied Urecal as authority to address unclean hands in a claim under the Lanham Act seeking both money damages and equitable relief.[252] Urecal's holding, however, has not been extended to cases solely seeking damages.[253]

At least one decision from the Seventh Circuit interpreting the Federal Rules appears to disagree and deems unclean hands available in actions exclusively seeking damages.[254] Soon after the merger, in fact, the court ***97** of appeals applied unclean hands to bar an action for damages under the Sherman Anti-Trust Act.[255] Citing Rule 2 of the Federal Rules, the court stated in Maltz v. Sax:[256] "As to unclean hands: The maxims of equity are available as defenses in actions at law."[257]

While the Seventh Circuit has not addressed unclean hands since Maltz, the court has indicated a willingness to continue this precedent. In Byron v. Clay,[258] for example, Judge Posner noted that while unclean hands is traditionally applicable to legal claims under the "clean up" doctrine in cases seeking both legal and equitable relief,[259] it should perhaps no longer be limited

to equitable suits in light of the merger of law and equity.[260] He reasoned that even before the merger a counterpart legal doctrine to unclean hands-in pari delicto-existed, which forbade a plaintiff to recover damages if his fault was equal to the defendant's.[261]

Judge Posner's comments in Maksym v. Loesch[262] regarding the application of the purely equitable defense of laches at law were also telling:

> Not only is there a long tradition of applying equitable defenses in cases at law-indeed, fraud itself is an equitable defense typically interposed in suits at law for breach of contract-but with the merger of law and equity there is no longer a good reason to distinguish between the legal and equitable character of defenses, save as the distinction may bear on matters unaffected by the merger, such as the right to trial by jury in cases at law, a right preserved in federal courts by the Seventh Amendment . . . .[263]

Relying on the meaning of the merger as announced in Maltz and Byron, district courts in Indiana have held all equitable defenses-including unclean hands-available at law.[264]

***98** 5. Sixth Circuit.-Consistent with the decisions from the district courts in Illinois, the District Court for the Southern District of Ohio in Big Lots Stores, Inc. v. Jaredco, Inc.[265] also indicated that unclean hands is available to bar a claim for damages in a business dispute requesting both legal and equitable relief.[266] Moreover, similar to the Northern District of Illinois in Urecal Corp. v. Masters,[267] the court relied on federal law to define unclean hands in a diversity case.[268] In contrast to Urecal, however, it did not explicitly discuss the extension of the defense to legal claims.[269]

In Big Lots Stores, a creditor sued a debt collection agency asserting state law claims for breach of confidentiality contract and conversion of customer accounts.[270] The agency claimed unclean hands barred the lawsuit on two grounds.[271] First, it contended that the creditor fraudulently attempted to induce it to begin performance of the proposed agreement for purchase of uncollected checks.[272] Second, it alleged that the creditor engaged in litigation misconduct by various activities that amounted to suborning perjury.[273] The court did not discuss the defense's application to legal claims, but instead held that there was insufficient evidence to establish the defense.[274] The court also found the perjury claims to be "tangential" to the central issue in the case regarding breach of contract.[275]

6. Fifth Circuit.-The Fifth Circuit Court of Appeals in Kuehnert v. Texstar Corp.[276] allowed unclean hands to bar a tippee from recovering losses against an insider/tipper for providing false information in federal securities litigation.[277] Unlike the Seventh Circuit opinion considering unclean hands ***99** in another federal statutory action in Maltz v. Sax,[278] the Fifth Circuit made no mention of the merger of law and equity or any potential barrier to the application of the equitable defense of unclean hands due to the law-equity distinction.[279] It focused exclusively on whether the application of unclean hands and the legal defense of in pari delicto were consonant with the policies of the federal securities statute.[280] Like Mallis v. Bankers Trust Co., the court of appeals used the legal and equitable defenses without discussion of any difference between them.[281]

Consequently, within the federal and state court systems, cases are incorporating unclean hands into the common law through a combination of utility, intuition, and oversight. As addressed below, a close examination of existing precedents also exposes the possibility for even broader application of the doctrine in the future.

III. The Future: From Pedigree to Policy

Parts I and II described the continuing conflict in the cases concerning the merger and its effect on the incorporation of unclean hands into the law. This Part moves beyond an examination of the results to explore more thoroughly the reasons behind the growing body of decisional rules incorporating unclean hands into the law and the principles upon which they stand. Understanding the premises of the precedents considering unclean hands provides inspiration for the future of the defense in damages or other legal actions. [282]

***100** Significantly, some decisions denying the defense at law have been made without the citation to any authority. [283] Certain courts citing decisional law relied on opinions that pre-dated the merger of law and equity [284] or that otherwise were not on point. [285] Moreover, many cases rejecting the defense in damages actions are distinguishable because they contain qualifying language and have been subject to alternative holdings. [286]

In particular, a review of those decisions denying the defense at law reveals some hesitancy in the holdings: words such as "generally" [287] or "usually" [288] often precede the rule of denial. For example, the Delaware Superior Court explained in USH Ventures v. Global Telesystems Group, Inc. that "[t]he defense of 'unclean hands' is generally inappropriate for legal remedies." [289] While the use of such conditional terms may express a willingness to find favor in the doctrine's application at law in the future, it also provides grounds for the court to create a policy exception like the ***101** Cummings and Maldonado courts in Michigan. [290] Specifically, the District Court for the Southern District of New York in Gala Jewelry, Inc. v. Harring [291] struck an unclean hands defense to damages claims but contemplated its application in the future: "Even if, as defendant insists, there may be exceptions to that rule where circumstances and justice require, this case presents no such exceptional circumstance." [292]

Another possible ground of distinction is hedging in the form of alternative holdings. [293] Such additional, independent reasons are frequently found in the decisions denying the defense in cases of legal relief. These reasons include the failure to satisfy the elements of unclean hands [294] and that its application would be inconsistent with the policies or equities in the case. [295] Even cases refusing the defense against legal remedies exclusively due to its equitable origin can be explained on other grounds. [296]

Furthermore, changing rationales for applying the defense to legal cases suggests the possibility of less judicial resistance to unclean hands in the future. Indeed, despite the chaotic jurisprudence, the most promising aspect of the judicial reasoning process seems to be a shift in attitude. [297] Many of the post-merger cases rejecting unclean hands did so without precedential support actually denying the defense in actions for damages. [298] The courts ***102** relied on an absence of authority applying the doctrine to legal claims and cited only equitable relief cases applying unclean hands. [299] Now, courts like First Fairfield Funding in Connecticut and Unilogic in California are making the opposite assumption. [300] Rather than requiring counsel to find cases that apply the defense at law, these courts mandate counsel to find cases rejecting it. [301] If none exist, the defense of unclean hands is available to defeat legal relief. [302]

Even courts following the law-equity distinction to dictate the denial of unclean hands in actions at law have found ways to invoke the defense by expanding the categories on both sides of the "equitable action or relief" equals "equitable defense" equation. Courts apply unclean hands (or other equity-dependent doctrines) by construing the case or claim to be equitable in nature as opposed to origin. [303] This penumbral phenomenon can be seen ***103** in opinions referencing "quasi-equitable" relief, [304] or in contradistinction, "purely" [305] or "strictly" [306] legal rights.

Whether the foregoing circumstances reflect a changing attitude or not, it is enough to observe that a handful of states across the country have begun the process of assimilation. [307] An increasing number of federal courts have also applied the defense to bar

legal claims.[308] In incorporating unclean hands into the law, courts focus their reasoning on the purpose of the merger statutes and rules.[309] They also use other authoritative sources of interpretation, such as precedent, in allowing unclean hands to be considered in legal cases.[310] For instance, courts ruling on cases of first impression often apply unclean hands at law by analogy to decisions that recognized comparable unclean conduct against equitable remedies.[311] Alternatively, cases concerning legal remedies should apply a kindred legal defense like in pari delicto,[312] or an equitable defense like estoppel may ***104** be used to justify a court's decision.[313] But the most persuasive principle seems to be policy.[314]

***105** Courts are engaging in implicit and explicit policy analysis in incorporating unclean hands into the law.[315] An indirect policy-oriented approach is evident from the fact that some courts cite decisions allowing analogous legal and fully-fused equitable defenses against legal relief, as well as cases applying unclean hands to equitable relief.[316] A decision justifying the application of unclean hands in damages actions by relying on the defense's use in equity cases levels the fictional severity or superiority between legal and equitable forms of relief.[317] These analogies also acknowledge equivalency between not only the conduct supporting these legal and equitable defenses, but also the interests and purposes they serve.[318] In particular, by matching the kinds of conduct deserving ***106** dismissal in these decisions with unclean hands, courts are making a value judgment that litigants (and courts) should be treated the same in legal and equitable actions.[319]

In addition to achieving policy objectives indirectly through the precedential form of analysis,[320] courts have also declared their policy preferences directly. In adopting unclean hands in legal cases, for example, the Superior Court of Connecticut concluded: "The integrity of the court is no less worthy of protection in action[s] at law, than in actions in equity."[321] The district court in Buchanan Home likewise invoked unclean hands against claims for legal relief because "rights not suited for protection at equity should not be protected at law."[322] In fact, it is the unity of facts and values between legal defenses and unclean hands that caused Professor Chafee's comment that the defense "ought not to be called a maxim of equity because it is by no means confined to equity."[323]

***107** The failure in many jurisdictions to consult equitable theories like unclean hands in legal cases that redress the same interests sought in suits in equity threatens to create inconsistencies across these analogous areas and endangers the overall capacity of the law to treat similarly situated parties the same.[324] The post-merger trend of adopting unclean hands into the law establishes that courts are no longer satisfied that traditional differences in form[325] support different treatment in substance.[326] What ***108** was equal in fact is becoming equal in law.[327] To be sure, courts seem less likely to ignore the inconsistent outcomes associated with the unequal treatment of unclean hands when the interests at stake are their own.[328] Thus, discrimination against unclean hands in legal cases is doubtful when the application of the defense achieves a targeted and immediate instrumental aim of court protection rather than merely furthering the overall, albeit more abstract, objectives of justice, fairness, and equality.[329] The recent decisions in Michigan, creating a policy-based exception to the conventional prohibition against unclean hands at law when litigation misconduct obstructs the judicial function, illustrate this phenomenon.[330]

***109** Perhaps courts are still drawn to equity because it seems less possible (and rewarding) to approach the world through the myth of objectivity.[331] As in art or literature, similitude is often more revealing than verisimilitude.[332] Judges turn to equity and discretionary defenses like unclean hands to draw meaning from the bombardments of experience.[333] With its malleability, ***110** ingenuity, immediacy, and complexity-the doctrine of "clean hands" provides a fresh way to make sense of the world.[334]

Be it equity or law, however, the nature of jurisprudence is that it "often accretes by fragments, taking shape mosaically-its import visible only when one stands back and sees it whole."[335] But the "stories it tells may be no more than metaphors."[336]

It is notable that decisions both for and against use of the defense at law have been made without expressly considering the meaning of the merger.[337] Other opinions are ambiguous as ***111** to whether they are making new law and extending unclean hands to legal relief or are merely a remnant of the ancient equitable clean-up doctrine.[338] Lower federal courts in diversity actions are inconsistent in choosing state or federal law for the application and/or definition of unclean hands.[339] Nor do they seem to address their source of authority to apply unclean hands in statutory versus common law causes of action.[340] Significantly, these unanswered questions as to sources of law hold importance for the constitutional doctrines of separation of powers and federalism.[341]

The fact that some courts have not directly addressed the issue of incorporation (or related issues) involving unclean hands is perhaps a consequence of the omission of equity from the standard law school curriculum.[342] As a result, "[l]awyers often advocate doctrines of law and equity without consciousness of the historic boundary between them."[343] The con- ***112** fusion surrounding some of these decisions is possibly also reflective of the lack of guidance from the courts of last resort.[344] Only recently in Michigan has a high court accepted unclean hands, albeit in a potentially narrow class of cases involving litigation misconduct.[345] The United States Supreme Court has not taken a position on unclean hands during the seventy-year period following the consolidation of procedures in the federal system.[346] With the legal status of unclean hands unsettled in most federal and state jurisdictions, it is time for more courts to begin a conversation about the merger and what it now means for the defense of unclean hands. Notably, the fusion of unclean hands into claims for legal relief will likely have implications for other equitable defenses like laches that traditionally were ***113** exclusive to equity.[347]

A century ago, Roscoe Pound feared the disappearance of equity in a merged system.[348] Since then, scholars have debated the merits of more or fewer equitable principles and procedures in our unified systems.[349] But there has been consistent recognition by the legal community that the labels "law" and "equity" should cease to determine the outcome of cases.[350] At ***114** minimum, my research on this subject aims to extend that reasoning to the equitable defense of unclean hands.[351]

Critics may complain of unclean hands on its own merits-that the defense may allow judges to go off on an uncharted course through interlocking webs of idea, circumstance, and language.[352] With any discretionary decision, there is the possibility of uncertain and inconsistent outcomes.[353] But before condemning the defense in this manner, courts should first expose unclean hands to the whole of law and not deprive litigants of its utility in an entire class of cases where they are seeking legal relief.[354] The experiential process of precedent moves legal precepts from ***115** the abstract to the particular and placed.[355] Eliminating an arbitrary and irrational legal barrier to unclean hands-a doctrine that is by turns formal and experimental, discursive and fragmentary-will allow courts to build, at the intersection of appearing law and disappearing equity, a defense that may account for and preserve the integrity of both.[356]

Conclusion

The merger of law and equity may not have remade the world of civil procedure, but it changed the terms of discourse sufficiently that ***116** expectations have been simultaneously raised and dashed.[357] Even the Herculean efforts of scholars have not been able to write the labels "law" and "equity" into non-existence.[358] And in the ensuing confusion over the status of unclean hands at law, conflicting decisions rule the day.[359]

This Article has analyzed past and present adjudications of unclean hands that may have implications for its future. The digression into court decisions is an effort to explain the doctrinal role of the defense in legal cases. Assessing these episodes of adoption additionally helps to diagnose the impasse about the meaning of the merger in state and federal civil procedure

that is at the heart of the debate over the legal incorporation of unclean hands. To be sure, the foregoing case-based analysis shows how competing concepts of "law and "equity" crash into each other, leaving behind the smoking wreckage of dogma. The continued reliance on fictions ***117** developed during a long-obsolete form of judicial organization is the very antithesis of the time-honored tradition of equity in law. [360]

Understandably, law-equity talk will be abandoned when new arguments are sufficiently established to stand on their own. [361] Yet judges must be receptive to the idea of unclean hands at law for these new notions to take root. Roscoe Pound advised that decisional rules will not change until the picture of the law also changes in the minds of judges. [362] Unfortunately, given the number of cases rejecting or accepting unclean hands at law without discussion, the depiction of unclean hands in legal cases seems to be gathering "more dust than light." [363] Surveying the legal landscape through the lens of unclean hands is meant to spotlight the debate to allow an accurate view of the defense that will (hopefully) stimulate contemplation over its social utility in the future.

Equity is hard law. [364] The surprising absence of scholarly commentary on ***118** the fusion of equitable defenses has no doubt contributed to the differing decisional law of unclean hands in cases seeking legal relief. [365] With the issue sui generis in many jurisdictions, the doctrinal analysis provided in this Article may be a reference for those courts that find themselves suspended between progress and tradition, unable to move authoritatively in either direction. [366] Of course, the hermeneutic delay of our case law system means that whether unclean hands is a dinosaur or a phoenix can only be known in the fullness of time. [367] The foregoing case-based analysis is intended to enable an informed choice through the exploration of the methodological stances of modern jurists who, like ancient chancellors, devote their energies and compassion to the search for just solutions.

Footnotes

1 Associate Professor, University of Maryland Robert H. Smith School of Business; Of Counsel, Reminger Co., L.P.A. This article was the recipient of the Outstanding Paper Award at the 2009 Annual Conference of the Pacific Southwest Academy of Legal Studies in Business. The author is grateful for the support and comments of the members and attendees of the conference. Thanks also to Abe Herzberg, Julie Manning Magid, Gideon Mark, Kevin Marshall, Don Mayer, Tom Rutledge, Paul von Nessen, and Eric Yordy for their reviews and critiques. This Article was written as part of my doctoral thesis in conjunction with fulfilling the writing requirement for a Doctor of Philosophy at Monash University. Research for the paper was supported by the 2009 Smith School Summer Research Award.

2 Zechariah Chafee, Jr., Coming into Equity with Clean Hands, 47 Mich. L. Rev. 877, 878 (1949) [hereinafter Chafee I].

3 See T. Leigh Anenson, Treating Equity Like Law: A Post-Merger Justification of Unclean Hands, 45 Am. Bus. L.J. 455, 459 (2008) ("Despite its containment mainly to actions in equity, cases considering the doctrine during the present century already tally in the thousands." (citation omitted)); see infra note 10 and accompanying text.

4 T. Leigh Anenson, The Role of Equity in Employment Noncompetition Cases, 42 Am. Bus. L.J. 1, 51-52 (2005) [hereinafter Anenson, Role of Equity] (citations omitted) (explaining that unclean hands is broader in application than the defenses of equitable estoppel and waiver); see also T. Leigh Anenson, Beyond Chafee: A Process-Based Theory of Unclean Hands, 47 Am. Bus. L.J. 509, 566-72 (2010) [hereinafter Anenson, Process-Based Theory of Unclean Hands] (comparing unclean hands to estoppel as well as to the legal doctrines of in pari delicto and fraud on the court).

5 Anenson, supra note 3, at 466 n.63 ("Unclean hands is considerably newer than most equitable doctrines."); see also Zechariah Chafee, Jr., Some Problems of Equity 2 (1950) (unclean hands "is a rather recent growth"); Id. at 5 (describing unclean hands as "a child beside some other maxims . . . mature in Shakespeare's day" (citation omitted)). Chief Baron Eyre of the English Court of Exchequer (which had equity powers) adopted the doctrine in Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184 (Ch.) 1186; 1 Cox Eq. Cas. 318, 319-20.

6 Like other equitable doctrines, dismissal for unclean hands is discretionary in nature. Anenson, supra note 3, at 461 (citation omitted); see also Robert Megarry & P.V. Baker, Snell's Principles of Equity 105-06 (27th ed. 1973); Ralph A. Newman, Equity and Law: A Comparative Study 28 (1961) ("[R]elief in the court of the Chancellor was granted according to criteria which were not confined by rules of strict logic or by analogy to prior decisions."). For the historical origin and evolution of equitable discretion generally, see T. Leigh Anenson, The Triumph of Equity: Equitable Estoppel in Modern Litigation, 27 Rev. Litig. 377, 384-87 (2008).

7 See, e.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) ("[O]ne's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim . . . ."); 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America § 399 (Spencer W. Symons ed., 5th ed. 1941) ("The dirt upon his [or her] hands must be his [or her] bad conduct in the transaction complained of.").

8 See generally Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 527-41 & nn.71-119 (citing cases articulating policies of unclean hands). The US Supreme Court in Keystone Driller Co. v. General Excavator Co., articulated unclean hands as follows:
[T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his [or her] prior conduct, then the doors of the court will be shut against him [or her] in limine; the court will refuse to interfere on his [or her] behalf, to acknowledge his [or her] right, or to award him [or her] any remedy. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933), (quoting John Norton Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America § 397 (4th ed. 1918)). In a later case, the Supreme Court explained the rationale of unclean hands: "That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.'" Id. at 814 (quoting Bein v. Heath, 47 U.S. (6 How.) 228, 247 (1848)).

9 Zechariah Chafee, Jr., a practitioner and law professor at Harvard Law School, was a noted scholar of equity jurisprudence. See Chafee I, supra note 2, at 877 n.**; see also Edgar N. Durfee, Foreword to Zechariah Chafee, Jr., Some Problems of Equity, at ix-xi (1950). The Thomas M. Cooley Lectures that he delivered at the University of Michigan Law School in 1949 and his subsequent publications in the Michigan Law Review continue to be the primary description of the American experience with the equitable defense. See, e.g., Chafee I, supra note 2; Zechariah Chafee, Jr., Coming into Equity with Clean Hands, 47 Mich. L. Rev. 1065 (1949) [hereinafter Chafee II].

10 Chafee, supra note 5, at 12; cf. Wesley Newcomb Hohfeld, The Relations Between Equity and Law, 11 Mich. L. Rev. 537, 550 (1913) (noting maxim of unclean hands to be of "slight importance" compared to other equitable doctrines (citation omitted)).

11 Chafee examined a total of eighteen different groups of cases considering unclean hands. See Chafee I, supra note 2, at 885-906 (listing eight different groups of cases); Chafee II, supra note 9, at 1065-96 (listing ten different groups of cases).

12 See generally Chafee I, supra note 2; Chafee II, supra note 9.

13 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution §2.4(2) (2d ed. 1993) ("The most orthodox view of the unclean hands doctrine makes it an equitable defense, that is, one that can be raised to defeat an equitable remedy, but not one that defeats other remedies."). The original edition by Dobbs was the first treatise on the subject of remedies. Douglas Laycock, How Remedies Became a Field: A History, 27 Rev. Litig. 161, 261 (2008). Laycock describes the treatise as "an invaluable resource that everyone in the field relies on. . . . As the treatise ages, it is not so good for finding authoritative cases any more, but its analysis is still authoritative and it continues to answer questions for novices and old hands alike." Id. at 262.

14 See discussion infra Part II.

15 See Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006) ("'The authority to dismiss a lawsuit for litigant misconduct is a creature of the "clean hands doctrine" and, despite its origins, is applicable to both equitable and legal damage claims'" (quoting Cummings v. Wayne Cnty., 533 N.W.2d 13 (1995))); see also infra notes 174-77 and accompanying text.

16 See discussion infra Part I.

17 The United States Supreme Court first recognized the doctrine of clean hands in equity in Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 158 (1795). By 1831, the Court called the defense "well settled." Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 276 (1831).

18 See discussion infra Parts I-II. Courts generally reject the defense at law on the ground that the legislature limited the consolidation to the courts and their procedures. See Anenson, supra note 3, at 462-64; see also William F. Walsh, Is Equity Decadent?, 22 Minn. L. Rev. 479, 489 (1938) ("Equitable defenses do not become legal defenses under code merger . . . ."). As such, courts read the procedural union to exclude the substantive reception of unclean hands which was used before the merger exclusively against equitable remedies. See Anenson, supra note 3, at 462-64; see also William Quinby de Funiak, Handbook of Modern Equity § 4 (2d ed. 1956) (noting unification of law and equity in the United States was a merger of procedure and not substance); Newman, supra note 6, at 51 (explaining that the fusion of law and equity under federal law was restricted to procedure with the Enabling Act providing that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant"); Id. at 50 n.1 (discussing that the New York "legislative mandate to the Commissioners was reform in procedure-not alteration of the substantive rules of equity or the common law" (citations omitted)); cf. Harold Greville Hanbury, The Field of Modern Equity, in Essays in Equity 29 (1934) (discussing the same interpretation of equitable defenses given to the English procedural form). Therefore, despite the rhetoric of completing the union of law and equity, see Charles E. Clark, The Union of Law and Equity, 25 Colum. L. Rev. 1, 10 (1925) ("The union of law and equity is justly considered to be the foundation principle of the Code reform." (citation omitted)); Roscoe Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 26 (1905) ("[A] complete absorption or blending of the two systems into one . . . is now commonly predicted by jurists."), the conventional interpretation of the procedural reforms forever banned this presumably substantive defense in legal cases. See Anenson, supra note 3, at 466. Under this view, the equitable defense of unclean hands is traditionally available against equitable (and not legal) remedies. Id. at 465-66 & nn.60-61 (citing cases).

19 In comparison to my other research, this Article does not use these cases as conceptual building blocks to derive a decision-making framework or to rethink the meaning of the merger of law and equity. See generally Anenson, supra note 3, at 455; Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 509. Instead, this article is a retrospective account of the background data upon which those theories were based.

20 See Beverley McLachlin, Foreword to Equity in Commercial Law, at vii (Simone Degeling & James Edelman eds., 2005) ("[D]espite the passage of time, the fusion of law and equity remains a live issue today, subject to debate by academics, practitioners and judges alike."); Tiong Min Yeo, Choice of Law for Equity, in Equity in Commercial Law, supra, at 147,150 ("The extent of the fusion of the substantive rules of common law and equity remains a matter of great controversy today, and different legal systems in the common law tradition have adopted different approaches to this question.").

21 McLachlin, supra note 20, at vii (using the term to refer to the discussion of the relationship of law and equity).

22 Id. at viii.

23 See Anenson, supra note 3, at 465-74 (discussing divided court positions on application of unclean hands at law); discussion infra Part III; see also id. at 480-81 (noting cases adopting unclean hands in legal actions without discussion); Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 513, 517-18 (discussing cases rejecting unclean hands based on pre-merger precedent or none at all).

24 One court's perusal of the relevant authorities and precedents found there was "scant authority on the subject." Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992) (considering the availability of unclean hands to bar a legal claim). Another court specifically complained that Chafee's analysis was not helpful and otherwise noted the "sparse product" assisting in the application of the defense. Blain v. Doctor's Co., 272 Cal. Rptr. 250, 256 (Ct. App. 1990) (dismissing a damages action for unclean hands). The court complained that Chafee's analysis "offers no detailed exposition of the case law." Id.; see also Messick v. Smith, 69 A.2d 478, 481 (Md. 1949) ("We have no occasion to pursue the details of Professor Chafee's interesting iconoclastic discussion, which is revolutionary in classification and nomenclature, not in application, of legal principles."). The Blain court was also not satisfied with Wigmore's synopsis of the defense and declared the Restatement (Second) of Torts § 889 commentary "unilluminating." Blain, 272 Cal. Rptr. at 256 ("What cases would lie in the first of Wigmore's categories is not self-explanatory."); accord Ronald J. Allen & Ross M. Rosenberg, Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes, 77 Chi.-Kent L. Rev. 683, 690-95 (2002) (noting courts' and legislatures' general disregard of theoretical scholarship as opposed to doctrinal scholarship).

25 See, e.g., Newman, supra note 6, at 255 ("The evolution of law is to a large extent the history of its absorption of equity."); Lionel Smith, Fusion and Tradition, in Equity in Commercial Law, supra note 20, at 19, 30 ("It is no doubt true that the presence of Equity

allowed the common law to under-develop its own brand of equity, and to stand on the side of certainty and predictability, knowing all the while that in many cases, relief was available elsewhere."). See generally William T. Quillen, Constitutional Equity and the Innovative Tradition, Law & Contemp. Probs., Summer 1993, at 29 (discussing Delaware's modern equity tradition).

26 Zechariah Chafee, Jr., expressed his frustration with the continued reliance on law-equity labels:
How absurd for us to go on until the year 2000 obliging judges and lawyers to climb over a barrier which was put up by historical accident in 14th century England and built higher by the eagerness of three extinct courts to keep as much business as possible in their own hands, so that these hands might be full of fees!
Zechariah Chafee, Jr., Foreword to Selected Essays on Equity, at iii, iv (Edward D. Re ed., 1955); see also Keith Mason, Fusion: Fallacy, Future or Finished?, in Equity in Commercial Law, supra note 20, at 41, 65 ("The question of exemplary damages for breach of an exclusively fiduciary duty has been addressed recently in New Zealand, Canada and Australia and has proved a catalyst for discussion about the fusion of law and equity." (citations omitted)); Douglas Laycock, The Triumph of Equity, 56 Law & Contemp. Probs., Summer 1993, at 53, 78 (describing law and equity as a ''dysfunctional proxy for a series of functional choices'‘); Doug Rendleman, The Trial Judge's Equitable Discretion Following eBay v. MercExchange, 27 Rev. Litig. 63, 97 (2007) ("It would be salutary, I submit, for the profession to discard the nonfunctional terminology of separate legal and equitable discretion."); Robert S. Stevens, A Plea for the Extension of Equitable Principles and Remedies, 41 Cornell L.Q. 351, 351 (1956) (explaining that the distinction between law and equity was not necessary or essential, but historical).

27 Fremont Homes, Inc. v. Elmer, 974 P.2d 952 (Wyo. 1999).

28 Id. at 959 (lawsuit seeking damages for breach of employment contract). The Wyoming Supreme Court also cited section 102 of C.J.S. for support. Id. This C.J.S. section misstated DiMauro v. Pavia, 492 F. Supp. 1051, 1068 (D. Conn. 1979), aff'd 614 F.2d 1286 (2d Cir. 1979). In considering the classic case of unclean hands to estop equitable relief, the DiMauro court instructed that unclean hands may be invoked "only to prevent affirmative relief." DiMauro, 492 F. Supp. at 1068. The legal encyclopedia's version inserted the word "equitable" between "affirmative" and "relief." See 30A C.J.S. Equity § 109 (2007), wherein the earlier edition's error remains uncorrected.

29 In re Estate of Barnes, 754 A.2d 284 (D.C. 2000).

30 Id. at 288 n.6. D.C. precedent on this point stems from Truitt v. Miller, 407 A.2d 1073 (D.C. 1979), which relied on Tarasi v. Pittsburgh National Bank for the proposition that unclean hands will not defeat legal relief. Truitt, 407 A.2d at 1079-80 (citing Tarasi v. Pittsburgh Nat'l Bank, 555 F.2d 1152, 1156-57, 1156 n.9 (3d Cir. 1977)); see also First Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 29 (D.D.C. 1998) (citing Johns v. Rozet, 141 F.R.D. 211, 220 (D.D.C. 1992); Truitt, 407 A.2d at 1079-80 ("[U]nder D.C. law, unclean hands acts only as a defense to equitable, and not legal, actions.").

31 Holmes v. Henderson, 549 S.E.2d 81, 81-82 (Ga. 2001) (citing Jones v. Douglas Cnty., 418 S.E.2d 19, 22-23 (Ga. 1992) (discussing the doctrine of laches)).

32 Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 184 (Iowa 1987); see also Sisson v. Janssen, 56 N.W.2d 30, 34 (Iowa 1952) ("It is of course a doctrine which may be invoked only to prevent affirmative equitable relief." (citing Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69, 70 (Iowa 1920) (ruling without citation that unclean hands does not bar defenses, only affirmative equitable relief))) (equitable relief case); cf. Davenport Osteopathic Hosp. Ass'n v. Hosp. Serv., Inc, 154 N.W.2d 153, 162 (Iowa 1967) (equitable defense of laches is not a defense to a legal action for breach of contract unless estoppel also exists).

33 Russell v. Casebolt, 384 S.W.2d 548, 553 (Mo. 1964); see also Marvin E. Neiberg Real Estate Co. v. Taylor-Morley-Simon, Inc., 867 S.W.2d 618, 626 (Mo. Ct. App. 1993) (holding that the application of unclean hands is erroneous in an action at law for damages).

34 Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 14 (Pa. 1968); see also Nedwidek v. Nedwidek, 92 A.2d 536, 537 (Pa. 1952) (discussing Pennsylvania's integration of law and equity in 1952).

35 See Bieter Co. v. Blomquist, 848 F. Supp. 1446, 1450-51 (D. Minn. 1994) (noting that "Minnesota courts have not directly addressed [the] issue" but concluding that the Minnesota Supreme Court would not recognize unclean hands in an action for damages (citing Thorem v. Thorem, 246 N.W. 674, 675 (Minn. 1933); Hagberg v. Colonial & Pac. Frigidways, Inc., 157 N.W.2d 33, 35 (Minn. 1968); LaValle v. Kulkay, 277 N.W.2d 400, 403 n.3 (Minn. 1979))); accord Foy v. Klapmeier, 992 F.2d 774, 779 (8th Cir. 1993) (reaching the same conclusion under Minnesota law).

36 Landers v. Biwer, 2006 ND 109, ¶ 9, 714 N.W.2d 476, 480 ("A litigant seeking the remedy of specific performance is held to a higher standard than one merely seeking money damages, and to receive equity he must 'do equity' and must not come into court with 'unclean hands.'" (quoting Sand v. Red River Nat'l Bank & Trust Co., 224 N.W.2d 375, 377-78 (N.D. 1974))).

37 Merchs. Indem. Corp. v. Eggleston, 179 A.2d 505, 514 (N.J. 1962) (citing federal pre-merger precedent from the United States Supreme Court); see also Sprenger v. Trout, 866 A.2d 1035, 1045 (N.J. Super. Ct. App. Div. 2005) (relying on Illinois precedent to bar unclean hands in consumer fraud action for damages due to an absence of authority in New Jersey).

38 Strickland v. Cousens Realty, Inc., 484 A.2d 1006, 1008 (Me. 1984) (banning the equitable defense of laches in legal actions under code pleading).

39 In Aetna Ins. Co. v. Robertson, 94 So. 7 (Miss. 1922), the court stated:
The rule that the enforcement of a right may be barred by laches is an application of the maxims, Vigilantibus, non dormientibus, subveniunt leges. . . . He who comes into equity must come with clean hands. . . . The defense of laches is peculiar to courts of equity and is not pleadable in actions at law.
Id. at 28 (citation omitted) (internal quotation marks omitted).

40 Laurie v. Thomas, 294 S.E.2d 78, 80-81 (W. Va. 1982).

41 The denial of laches in actions at law is the rule in many states. See, e.g., Kodiak Elec. Ass'n, Inc. v. DeLaval Turbine, Inc., 694 P.2d 150, 157 (Alaska 1984) (rejecting laches in legal action based on prevailing view and citing cases from Arkansas, California, Georgia, Minnesota, Missouri, and New Hampshire). But see Moore v. Phillips, 627 P.2d 831, 835 (Kan. Ct. App. 1981) (citing McDaniel v. Messerschmidt, 382 P.2d 304, 307 (Kan. 1963) (allowing equitable defense of laches in law actions)); Dep't of Banking and Fin. v. Wilken, 352 N.W.2d 145, 149 (Neb. 1984) (declaring laches available to defeat actions at law); Sutton v. Davis, 916 S.W.2d 937, 941 (Tenn. Ct. App. 1995) (stating that "laches may also bar purely legal claims" (citing Jansen v. Clayton, 816 S.W.2d 49 (Ten. Ct. App. 1991))).

42 See John L. Garvey, Some Aspects of the Merger of Law and Equity, 10 Cath. U. L. Rev. 59, 66 (1961); E.W. Hinton, Equitable Defenses Under Modern Codes, 18 Mich. L. Rev. 717, 719 (1920).

43 Anenson, supra note 3, at 463, 466 n.60; see also USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 20 & n.18 (Del. Super. Ct. 2000) ("It appears that in most Courts, laches cannot be asserted in an action at law.").

44 San Ann Tobacco Co., v. Hamm, 217 So. 2d 803, 810 (Ala. 1968) (quoting Harton v. Little, 65 So. 951, 953 (Ala. 1914)). The quoted language, moreover, came from another equity case that did not address the issue of the application of unclean hands in legal actions. Rather, the case concerned what conduct would constitute unclean hands. The phrase was meant to explain that the fraud or deceit that would amount to unclean hands did not need to be the same conduct as would constitute fraud or deceit under the common law. Harton, 65 So. at 952-53.

45 See Wootten v. Ivey, 877 So. 2d 585, 588 (Ala. 2003) (discussing merger of law and equity in 1973).

46 Thompson v. Coughlin, 997 P.2d 191 (Or. 2000).

47 Adams v. Manown, 615 A.2d 611, 616 (Md. 1992). Two dissenting justices would have denied the applicability of unclean hands to legal actions. Id. at 623 (Chasanow, J., concurring and dissenting) (citing pre-merger precedent from the court as well as the United States Supreme Court). Notably, Maryland did not complete the merger of law and equity procedure until 1984. See id.

48 Thompson, 997 P.2d at 196 n.9; Adams, 615 A.2d at 617.

49 See Gen. Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34, 1134 n.4 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law to find that unclean hands was unavailable as a defense to claim for tortious interference seeking damages, but was applicable to request for injunctive relief) ("Unclean hands is an equitable defense. This defense therefore is only applicable with respect to the plaintiff's claim for equitable relief . . . ."); Sprenger v. Trout, 866 A.2d 1035, 1045 (N.J. Super. Ct. App. Div. 2005) (relying on Illinois precedent to bar unclean hands in consumer fraud action for damages).

50 Compare Mallis v. Bankers Trust Co., 615 F.2d 68, 75 (2d Cir. 1980) (applying New York law to conclude that unclean hands was available to bar legal relief), and Smith v. Long, 723 N.Y.S.2d 584, 586-87 (App. Div. 2001), with Morrisania II Assocs. v. Harvey,

527 N.Y.S.2d 954, 961 (Civ. Ct. 1988) (unclean hands inapplicable to legal claims) (citing Hasbro Bradley, Inc. v. Coopers & Lybrand, 515 N.Y.S.2d 461, 463 (App. Div. 1987)).

51 Compare Kirkland v. Mannis, 639 P.2d 671, 672 (Or. Ct. App. 1982) (rejecting application of unclean hands to legal action), with Beldt v. Leise, 60 P.3d 1119, 1121 (Or. Ct. App. 2003) (unclean hands unavailable in actions at law), Thompson v. Coughlin, 927 P.2d 146, 149 (Or. Ct. App. 1996), rev'd on other grounds, 997 P.2d 191, 196 n.9 (Or. 2000), and Gratreak v. N. Pac. Lumber Co., 609 P.2d 375, 377-78 (Or. Ct. App. 1980). See also McKinley v. Weidner, 698 P.2d 983, 985-86 (Or. Ct. App. 1985) (acknowledging inconsistent decisions from the same court).

52 See McMahan v. Greenwood, 108 S.W.3d 467, 494 (Tex. App. 2003); Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 165-66 (Tex. App. 1991) (citing Ligon v. E.F. Hutton & Co., 428 S.W.2d 434, 437 (Tex. Civ. App. 1968); Furr v. Hall, 553 S.W.2d 666, 672-73 (Tex. Civ. App. 1977)). Texas appellate courts have created an exception allowing unclean hands in law actions to the extent it works an estoppel. See, e.g., Steubner Realty 19, Ltd., 817 S.W.3d at 165. These courts also acknowledge a separate defense at law of "unclean acts" that involve a knowing and willful violation of state criminal law. See Shirvanian v. Defrates, No. 14-02-00447-CV, 2004 Tex. App. LEXIS 182, at *41-44 (Tex. App. Jan. 8, 2004) (citing Ward v. Emmett, 37 S.W.3d 500, 503 (Tex. App. 2001)), withdrawn and substituted on other grounds by, 161 S.W.3d 102 (Tex. App. 2004).

53 See Chow v. Aegis Mortg. Corp., 286 F. Supp. 2d 956, 964 (N.D. Ill. 2003) ("Under Illinois law, unclean hands is an equitable remedy not applicable to claims for monetary relief." (citing RIV VIL, Inc. v. Tucker, 979 F. Supp. 645, 659 (N.D. Ill. 1997))); Zahl v. Krupa, 850 N.E.2d 304, 309-10 (Ill. App. Ct. 2006); cf. Villiger v. City of Henry, 362 N.E.2d 120, 121 (Ill. App. Ct. 1977) (equitable defense of laches applies to both law and equity). Federal district courts in Illinois have allowed unclean hands in actions at law pursuant to federal law when legal and equitable claims are joined. See Urecal Corp. v. Masters, 413 F. Supp. 873, 876 (N.D. Ill. 1976) (diversity); Energizer Holdings, Inc. v. Duracell, Inc., No. 01 C 9720, 2002 WL 1067688, at *3 (N.D. Ill. May 28, 2002) (Lanham Act).

54 See, e.g., Conklin v. Conklin, No. 14-77-7, 1978 Ohio App. LEXIS 9357, at *24 (Ohio Ct. App. Feb. 9, 1978) (rejecting unclean hands in an action at law because it is "a strictly equitable doctrine"); O'Brien v. Ohio State Univ., 139 Ohio Misc. 2d 36, 2006-Ohio-4346, 859 N.E.2d 607, at ¶ 57 n.3 (unclean hands doctrine does not defeat legal claim for damages); see also May v. May, 63 Ohio Misc. 2d 207, 209 (Ct. Com. Pl. 1993) (discussing Ohio history leading up the 1853 Code of Civil Procedure merging law and equity but noting that substantive distinctions still survive); cf. Smith v. Smith, 156 N.E.2d 113, 119-20 (Ohio 1959) (equitable defense of laches does not apply to bar legal claim under merged procedures).

55 See Tripati v. State, 16 P.3d 783, 786 (Ariz. Ct. App. 2000); Ayer v. Gen. Dynamics Corp., 625 P.2d 913, 915 (Ariz. Ct. App. 1980).

56 See Wilson v. Prentiss, 140 P.3d 288, 293 (Colo. App. 2006) ("The doctrine of unclean hands enables a defendant to raise an equitable defense to defeat equitable remedies, but not remedies at law.").

57 Howe v. Fiduciary Trust Co., No. 97-2206, 2001 Mass. Super. LEXIS 135, at *30-31 (Super. Ct. Apr. 19, 2001).

58 Lopez v. Autoserve, L.L.C., No. 05 C 3554, 2005 WL 3116053, at *1 (N.D. Ill. Nov. 17, 2005) (applying Illinois and federal law of unclean hands) (striking affirmative defense of unclean hands to bar violations of state and federal statutory employment law because the complaint sought only legal damages); see also Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 716 n.28 (D.N.J. 1994) (equating an employer's use of after-acquired evidence of an employee's misconduct under federal discrimination laws with the defense of unclean hands that the court presumed was restricted to equitable remedies) (internal citations omitted). Another district court within the same circuit as Lopez accepted the defense. See Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc., No. 1:04-CV-0562-JDT-WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (citing Federal Rules of Civil Procedure 2 & 8), order amended, No. 1:04-cv-00562-JDT-WTL, 2006 WL 3305122 (S.D. Ind. Aug 16, 2006); Columbus Reg'l Hosp. v. Patriot Med. Techs. Inc., No. IP 01-1404-C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004) (citing Federal Rules 2 & 8) (denying summary judgment on affirmative defense of unclean hands as a matter of federal law in a diversity case). The Seventh Circuit Court of Appeals held unclean hands available in a legal action. Maltz v. Sax, 134 F.2d 2, 7 (7th Cir. 1943) (applying unclean hands to bar an action for damages under the Sherman Anti-Trust Act).

59 Tarasi v. Pittsburgh Nat'l Bank, 555 F.2d 1152, 1156 n.9 (3d Cir. 1977).

60 Zechariah Chafee logically concluded: "[T]he factors which divide judicial action from moral judgments seem to me the same whether the particular suit resembles what used to go on in chancery or what used to go on in the courts of common law." Chafee, supra note

5, at 102; see also Edward Yorio, A Defense of Equitable Defenses, 51 Ohio St. L.J. 1201, 1205-26 (1990) (summarizing criticisms of treating legal and equitable defenses differently).

61 "Equity jurisdiction" does not generally refer to power over the subject matter, persons, or property, but refers rather to equity jurisprudence. E.g., De Funiak, supra note 18, at 37-39 (discussing differing definitions of "equity jurisdiction" as either a court having no power to act or a court having power to act but that it should not act); Henry H. Ingersoll, Confusion of Law and Equity, 21 Yale L.J. 58, 60-61 (1911) (explaining that jurisdiction of any case in equity does not depend upon an absence of a remedy at law). Such jurisprudence is conditioned on an equitable remedy.

62 See discussion infra Part II.A.1-7. Federal courts sitting in diversity jurisdiction are divided on whether to use state or federal law to apply and/or define unclean hands in cases seeking legal relief. Some federal courts with diversity jurisdiction applied a federal law of unclean hands. See Columbus Reg'l Hosp. v. Patriot Med. Techs. Inc., No. IP 01-1404-C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004); Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644, 652-53 (S.D. Ohio 2002); Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105-07 (D. Md. 1989); Urecal Corp. v. Masters, 413 F. Supp. 873, 874-76 (N.D. Ill. 1976); Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242, 244-45 (D.S.C. 1981). Other federal courts with diversity jurisdiction applied a state law of unclean hands. See Chow v. Aegis Mortg. Corp., 286 F. Supp. 2d 956, 964 (N.D. Ill. 2003) (applying Illinois law of unclean hands); Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 952 (S.D. Cal. 1996) (applying California law of unclean hands in diversity case); Bieter Co. v. Blomquist, 848 F. Supp. 1446, 1450-51 (D. Minn. 1994) (considering whether unclean hands is a valid defense to state law damage claims under Minnesota law); Gen. Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34, 1134 n.4 (D.N.J. 1990) (applying Florida, Connecticut and Massachusetts law of unclean hands). Because many courts have not acknowledged the source of law issue for unclean hands, it is often difficult to discern. In this section on state court adoption, I have included only federal courts that have clearly used a state law of unclean hands.

63 See discussion infra Part II.A.1-7. While Kansas has no cases addressing the availability of unclean hands in actions at law, a court of appeals relied on the doctrine as a ground to apply the after-acquired evidence defense to bar damages in a contract claim for wrongful discharge. Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 921 P.2d 224, 230 (Kan. Ct. App. 1996), as modified by Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 933 P.2d 743, 744 (Kan. 1997) (affirming adoption of after-acquired evidence doctrine without discussion of unclean hands); see also Moore v. Phillips, 627 P.2d 831, 835 (Kan. Ct. App. 1981) (citing McDaniel v. Messerschmidt, 382 P.2d 304 (Kan. 1963) (allowing equitable defense of laches in law actions)).

64 See Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006); see also discussion infra Part II.A.5.

65 Maldonado, 719 N.W.2d at 818.

66 See Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, Local 1304, 39 Cal. Rptr. 64, 96-97 (Dist. Ct. App. 1964).

67 See infra Part II.A.2-7 (discussing incorporation of unclean hands into the law in states other than California).

68 See, e.g., Bio-Psychiatric-Toxicology Lab., Inc. v. Radcliff & West, 62 Cal. Rptr. 2d 853, 861 (Ct. App. 1997) ("In modern times the doctrine has been held applicable to suits for legal as well as equitable relief." (citing Fibreboard, 39 Cal. Rptr. at 96-97)); Vacco Indus., Inc. v. Van Den Berg, 6 Cal. Rptr. 2d 602, 612 (Ct. App. 1992) ("This is a principle which has application in a legal action as well as one in equity . . . ." (citation omitted)); see also Al-Ibrahim v. Edde, 897 F. Supp. 620, 626 (D.D.C. 1995) (applying California and Nevada law).

69 Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 340 (Ct. App. 1995) ("In California, the doctrine of unclean hands may apply to legal as well as equitable claims and to both tort and contract remedies." (internal citation omitted)).

70 See Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 745-47 (Ct. App. 1992) (conversion); Pond v. Ins. Co. of N. Am., 198 Cal. Rptr. 517, 521-23 (Ct. App. 1984) (malicious prosecution); Blain v. Doctor's Co., 272 Cal. Rptr. 250, 256-58 (Ct. App. 1990) (legal malpractice); Burton v. Sosinsky, 250 Cal. Rptr. 33, 41 (Ct. App. 1988) ("California has taken the position that this defense is available in a legal action." (citation omitted)); see also id. ("Although no case directly on point has been located, we see no reason why a successful defense of unclean hands should not bar the foreclosure of the mechanics' lien.").

71 Compare Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 952 (S.D. Cal. 1996) (applying California law) (declaring the defense available to bar legal conversion claims in reliance on Unilogic, 12 Cal. Rptr. 2d, at 745-748), with Alan Klarik Enters., Inc. v. Viva Optique, Inc., No. B179607, 2006 WL 2423552, at *5 (Cal. Ct. App. Aug. 23, 2006) ("[U]nclean hands applies not only to actions

seeking equitable relief, but applies as well today as a defense to legal actions."), Travel Am., Inc. v. Camp Coast To Coast, Inc., Nos. G028513, G028738, 2003 WL 558563, at *4 (Cal. Ct. App. Feb. 27, 2003) (unclean hands operates as a bar to the entire lawsuit asserting legal and equitable claims), and Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999) ("The defense is available in legal as well as equitable actions." (citations omitted)).

72 Fibreboard, 39 Cal. Rptr. 64.

73 Id. at 96. The court cited two prior California appellate court cases. Id. at 96-97. A.I. Gage Plumbing Supply Co. v. Local 300 of the International Hod Carriers, 20 Cal. Rptr. 860, 865-66 (Dist. Ct. App. 1962) indicated that unclean hands was available to deny the right to seek damages, but did not find that the conduct constituted unclean hands and did not disclose whether any contention was made before the reviewing court that the defense was inapplicable. Morrison v. Willhoit, 145 P.2d 707, 710 (Cal. Dist. Ct. App. 1944) dealt generally with the use of equitable principles in a legal demand and did not address the issue of unclean hands.

74 Fibreboard, 39 Cal. Rptr. at 97.

75 Id. (citing Carpentier v. City of Oakland, 30 Cal. 439, 442 (1866) (fraud) and Terry Trading Corp. v. Barsky, 292 P. 474, 478 (Cal. 1930) (accounting)).

76 Terry Trading Corp., 292 P. at 478; see also Carpentier, 30 Cal., at 442 ("Under our system of practice a defendant is allowed to set up as many defenses as he may have, regardless of the question as to whether they are of a legal or equitable nature, because the distinction which exists under the common law system between actions at law and suits in equity and the forms thereof have been abolished."). A later case from the Supreme Court of California considering the right to trial by jury found that "cases legal and equitable have not been consolidated . . . [and] the distinction between law and equity is as naked and broad as ever." Philpott v. Superior Court, 36 P.2d 635, 636-37 (Cal. 1934); see also Cnty. of L.A. v. City of Alhambra, 612 P.2d 24, 31 (Cal. 1980) (finding laches only available in equity).

77 Fibreboard, 39 Cal. Rptr. at 98 (affirming denial and amendment to the answer pleading unclean hands because it found no connection between the plaintiff's claim in tort and the defendant's alleged breach of contract and fraudulent misrepresentation). "It would amount to a straining of the doctrine to hold that defendants could escape liability for tort because Fibreboard breached its contract or because it was guilty of fraudulent misrepresentations." Id. at 97.

78 Goldstein v. Lees, 120 Cal. Rptr. 253 (Ct. App. 1975).

79 Id. at 255.

80 Id. at 255 n.2 (relying on unclean hands as alternative holding).

81 Pond v. Ins. Co. of N. Am., 198 Cal. Rptr. 517 (Ct. App. 1984).

82 Id. at 522-23.

83 Id. at 521-23. The procedural history of the case is as follows: insurer defended insured in wrongful death action under reservation of rights. Id. at 519. Insured filed declaratory judgment action against insurer. Id. Insurer filed cross-complaint against the agent who issued the policy alleging his actions weakened its position and caused it to settle the original personal injury lawsuit. Id.

84 Id. at 519-20, 521-23. The court explained:
The coverage issue in the defense of the wrongful death case was whether the lower pilot minimums were the ones agreed upon, an issue left ambiguous by Pond's conduct. It was upon this basis that the first suit was settled and INA's detriment incurred, largely as a result of Pond's nondisclosures and misrepresentations.
Id. at 522.

85 Id. at 522-23 (characterizing the agent's conduct in bringing the malicious prosecution action as "classic 'chutzpah"' and affirming the dismissal for unclean hands (citation omitted)). The court of appeals alternatively held that summary judgment was appropriate because the insurer relied on the good faith advice of counsel negating the element of an absence of probable cause. Id. at 520-21.

86 Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741 (Ct. App. 1992).

87 Id. at 745.

88 Id. at 742-43.

89 Id. at 743-44.

90 Id.

91 Id. at 745.

92 Id. at 745 (quoting Goldstein v. Lees, 120 Cal. Rptr. 253, 255 n.2 (Ct. App. 1975)) (citing Pond v. Ins. Co. of N. Am., 198 Cal. Rptr. 517, 522 (Ct. App. 1984)). Unilogic also reviewed the recognition of the defense in Blain v. Doctor's Co., 272 Cal. Rptr. 250 (Ct. App. 1990), discussed infra notes 93-100 and accompanying text, to bar a legal malpractice action. Unilogic, 12 Cal. Rptr. 2d at 744.

93 Unilogic, 12 Cal. Rptr. 2d at 745. Citing both Fibreboard and Unilogic, the district court in Gen-Probe, Inc. v. Amoco Corp., applied California law and declared the defense available to bar legal claims in general, and conversion claims in particular. Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 952 (S.D. Cal. 1996) (finding no connection between the conduct constituting unclean hands and the lawsuit). In Gen-Probe, two cases were pending before the court involving a business dispute over the ownership of a patent. Id. at 951. Gen-Probe was seeking to expedite and consolidate discovery with the related case set for trial where it was the defendant in order to better prepare its unclean hands defense. Id. at 951-952. The basis of its defense was the party opponent's filing of the related lawsuit with competitor funding. Id. at 951. While the court questioned whether the filing of a lawsuit could ever constitute unclean hands in the same case, it ultimately rejected the use of unclean hands because it found the funding issue unrelated to the specific issues in the complaint. Id. at 952.

94 Blain v. Doctor's Co., 272 Cal. Rptr. 250 (Ct. App. 1990).

95 Id. at 258-259 (affirming dismissal on the basis that unclean hands precluded physician's damages for emotional distress and loss of ability to practice medicine).

96 Id. at 252.

97 Id. at 254-55; see also London v. Marco, 229 P.2d 401, 402 (Cal. Dist. Ct. App. 1951) (injunction) (misleading statements made to the court constitutes unclean hands); Lazaro v. Lazaro (In re Marriage of Lazaro), No. A107473, 2005 WL 1332102, at *3 (Cal. Ct. App. June 6, 2005) (finding that presenting false testimony in a court proceeding in equity goes to the core of the unclean hands doctrine). California courts have used the paradigm provided in Blain to resolve subsequent cases involving unclean hands. See Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999) ("Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries." (citing Blain, 272 Cal. Rptr. at 256.)).

98 Blain, 272 Cal. Rptr. at 256 (quoting Chafee II, supra note 9, at 1091-92).

99 Id. at 256-257 (citing Kirkland v. Mannis, 639 P.2d 671, 673 (Or. Ct. App. 1982); Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 458 A.2d 545, 551-52 (Pa. Super. Ct. 1983)). The Blain court found the cases persuasive, but differentiated them on the basis that recovery may have softened the effect of the penal sanction. Id. at 258.

100 Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 458 A.2d 545 (Pa. Super. Ct. 1983).

101 Id. at 551-552 (sustaining demurrers to the bulk of compensatory and punitive damages claims for malpractice and emotional distress); see also id. at 552-55 (denying the defense and allowing the action to proceed with respect to the claim for attorney fees on policy grounds). The Pennsylvania Superior Court justified its application of in pari delicto:

> Were we to aid appellants-confessed perjurers-in their attempt to recover compensatory and punitive damages in excess of $250,000, we should indeed "suffer the law to be prostituted." For we should reward appellants, with a great deal of money, for their criminal conduct; we should soften the blow of the fines and sentences imposed upon them; and we should encourage others to believe that if they committed crimes on their lawyers' advice, and were caught, they too might sue their lawyers and be similarly rewarded.

Id. at 551-52 (alteration in original) (citation omitted).

102 Kirkland v. Mannis, 639 P.2d 671 (Or. Ct. App. 1982). As discussed infra notes 105-11 and accompanying text, the same court later acknowledged that it had erroneously relied solely on equity cases in applying unclean hands to a legal action. McKinley v. Weidner, 698 P.2d 983, 985 (Or. Ct. App. 1985).

103 Kirkland, 639 P.2d at 671-73. In Kirkland, a prisoner claimed malpractice against his former criminal defense attorney because the attorney allegedly manufactured a story for his defense which formed the basis of his testimony. Id. at 671-72. Based on his acknowledged perjury, the court of appeals affirmed the trial court's dismissal on the basis of unclean hands. Id. at 673.

104 Beldt v. Leise, 60 P.3d 1119, 1121 (Or. Ct. App. 2003) (unclean hands unavailable in actions at law); Thompson v. Coughlin, 927 P.2d 146, 148-49 (Or. Ct. App. 1996), rev'd on other grounds, 997 P.2d 191, 196 n.9 (Or. 2000); Gratreak v. N. Pac. Lumber Co., 609 P.2d 375, 378 (Or. Ct. App. 1980). Laches has also been denied in legal actions by the Supreme Court of Oregon. Corvallis Sand & Gravel Co. v. State Land Bd., 439 P.2d 575, 578 (Or. 1968) (en banc) (declaring its decision as the "prevailing rule" and citing cases from New Jersey, Rhode Island, Arkansas, and Michigan). See generally Roger G. Rose, Note & Comment, Equitable Defenses to Actions at Law, 34 Or. L. Rev. 55 (1954) (reviewing conflicting authority under Oregon law regarding the application of unclean hands to legal actions).

105 McKinley, 698 P.2d at 985.

106 Gratreak, 609 P.2d at 378.

107 Id. at 378 n.7; see also Or. Rev. Stat. § 11.020 (2009), repealed 1979. In Gratreak, a party brought suit against his former employer claiming damages for tortious interference with his employment contract with a new employer. Gratreak, 609 P.2d at 376. The employer defended the case on the grounds that its conduct was justified under a valid restrictive covenant, id. at 376, and presumably sought a declaratory judgment to that effect. See id. at 376-77. The employee responded to the employer's request to declare the restrictive covenant valid by seeking to foreclose the defense on grounds of unclean hands. Id. at 377; cf. T. Leigh Anenson, Litigation Between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution, 10 Stan. J.L. Bus. & Fin. 1, 4-8 (2005) (discussing UZ Eng'red Prods. Co. v. Midwest Motor Supply Co., 770 N.E.2d 1068 (Ohio Ct. App. 2001), appeal not allowed, 766 N.E.2d 1002 (Ohio 2002) (precluding challenge to validity of a non-compete agreement based on the defense of estoppel under a similar procedural posture)).

108 Gratreak, 609 P.2d at 378; accord Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 184 (Iowa 1987) (denying unclean hands at law despite the anomalous result that the same conduct may be a legal defense by another name) (citation omitted). While a statutory provision allowed equitable defenses to be pled to legal actions, the Gratreak court held that unclean hands was a "doctrine" and not a "defense" under the statute. Gratreak, 609 P.2d at 378; see also Or. Rev. Stat. §16.460(2) (2009), repealed 1979. The dissent disagreed. It found textual support in the merger statute that permitted the pleading of any "equitable matter," of which unclean hands would be included. Gratreak, 609 P.2d at 379 (Thornton, J., dissenting). The dissent also noted the inconsistency of the majority's holding. Id. In N. Pac. Lumber Co. v. Oliver, 596 P.2d 931, 944 (Or. 1979), the Supreme Court of Oregon barred enforcement of the same non-compete agreement with the same employer on the basis of unclean hands under its equitable jurisdiction. See also Anenson, supra note 3, at 492-503 (criticizing the irrational reliance on fictional differences in legal and equitable remedies in the use of unclean hands and noting its absurd results in these analogous Oregon cases).

109 McKinley, 698 P.2d at 985; see also Or. R. Civ. P. 2: "There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute, or by the Constitution of this state."

110 McKinley, 698 P.2d at 985.

111 Id. at 985-86.

112 Thompson v. Coughlin, 997 P.2d 191, 196 n.9 (Or. 2000).

113 Adams v. Manown, 615 A.2d 611, 617 (Md. 1992).

114 Manown v. Adams, 598 A.2d 821 (Md. Ct. Spec. App. 1991), rev'd on other grounds, 615 A.2d 611, 612 (Md. 1992).

115 Id. at 825-27.

116 Id. at 823.

117 Id. One of the alleged loans included down payment on a house that Adams also did not claim any interest in his bankruptcy schedule. Id.

118 Id. at 825.

119 Id. at 824.

120 Id. at 825. While the appellate court accepted the trial court's ruling that unclean hands was applicable in the case, it ultimately reversed because it found the trial court erred in giving the issue of unclean hands to the jury. Id. at 826; cf. Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 746-47 (Ct. App. 1992) (trial court did not err in having jury consider unclean hands defense when legal claim and equitable defense involved interrelated facts).

121 Manown, 598 A.2d at 824-25.

122 Id. at 827. The court described court protection as "the idea being that judicial integrity is endangered when judicial powers are interposed to aid persons whose very presence before a court is the result of some fraud or inequity." Id. at 824 (citing Niner v. Hanson, 142 A.2d 798, 803 (Md. 1958)); see also WinMark Ltd. P'ship v. Miles & Stockbridge, 693 A.2d 824, 830 (Md. 1997) ("The clean hands doctrine is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the courts from having to endorse or reward inequitable conduct." (quoting Adams v. Manown, 615 A.2d 611, 616 (Md. 1992) (internal quotation marks omitted))). The appellate court also determined that deterring fraud is best accomplished by leaving the parties without remedy against each other. Manown, 598 A.2d at 825 ("The suppression of such illegal and fraudulent transactions is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventative check, than by enforcing them at the instance of one of the parties to the fraud." (quoting Roman v. Mali, 42 Md. 513, 533-34 (1875) (alteration in original)); Bland v. Larsen, 627 A.2d 79, 85 (Md. Ct. Spec. App. 1993) (quoting Manown, 598 A.2d at 821).

123 Manown, 598 A.2d at 825 (citing Messick v. Smith, 69 A.2d 478 (Md. 1949); Shirks Motor Express Corp. v. Forster Transfer & Rigging Co., 133 A.2d 59 (Md. 1957)).

124 Manown, 598 A.2d at 826 n.6. But see Adams, 615 A.2d at 623 (Chasanow, J., concurring and dissenting) (finding the similarities between the defenses not sufficient to invoke unclean hands); accord Truitt v. Miller, 407 A.2d 1073, 1079-80 (D.C. 1979) (denying clean hands defense in action at law despite noting its similarity to in pari delicto); Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 184 (Iowa 1987) (citation omitted).

125 Manown, 598 A.2d at 825-26 (citing Md. R. Civ. P. 2-301). Relying in part on concerns over a jury trial, another Maryland appellate court had a contrary interpretation of the procedural unification and found that laches may not be raised as a defense to a legal claim. Smith v. Gehring, 496 A.2d 317, 322-23 (Md. Ct. Spec. App. 1985) (distinguishing between equitable affirmative relief and purely equitable defenses and holding that the procedural rules merging law and equity "do not extend to the elimination of distinctions between what defenses may be available to a legal claim as opposed to an equitable claim").

126 Like New York, Maryland's court of last resort is called the "Court of Appeals."

127 Adams, 615 A.2d at 617-18; accord Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 14 (Pa. 1968) (refusing to apply unclean hands in part because it would penalize innocent creditors in bankruptcy). The Court of Appeals of Maryland, in Winmark Ltd. Partnership & Miles v. Stockbridge, characterized the dilemma it had faced in Adams:
Indeed, there, liability of the defendant in the civil action to the discharged bankrupt had been determined by judgment. To the extent that the judgment was collectible, extinguishing it by applying the clean hands doctrine would have resulted in a windfall to the judgment debtor and would have deprived the bankrupt's creditors of an asset from which they should have benefited. WinMark, 693 A.2d at 830. The court could have found unclean hands applied at law but found the perjury unrelated to the claim or not supported by policy reasons.
Id. at 831.

128 Adams, 615 A.2d at 621 (Chasanow, J., concurring and dissenting).

129 Id. at 623.

130 Id.

131 Mallis v. Bankers Trust Co., 615 F.2d 68, 75 (2d Cir. 1980); see Smith v. Long, 723 N.Y.S.2d 584, 586-87 (App. Div. 2001).

132 Smith, 723 N.Y.S.2d at 587.

133 Id. at 587.

134 Id. The plaintiffs sought specific performance and damages, which raised the question of whether the court considered its power to invoke unclean hands a matter of resolving the requested legal relief under the equitable clean-up doctrine. Id. See generally A. Leo Levin, Equitable Clean-Up and the Jury: A Suggested Orientation, 100 U. Pa. L. Rev. 320 (1951); John E. Sanchez, Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine in the Guise of Inseparability and Other Analytical Problems, 38 DePaul L. Rev. 627 (1989). See also Anenson, supra note 6, at 416-17 (discussing the practice of equity courts "cleaning up" any remaining legal issues is a remnant of the split system which enabled chancellors to provide complete relief and avoid a multiplicity of actions). Other cases that appear to allow unclean hands at law concerned both legal and equitable relief. See Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002); Urecal Corp. v. Masters, 413 F. Supp. 873, 876 (N.D. Ill. 1976).

135 Smith, 723 N.Y.S.2d at 586. The plaintiffs had also previously had problems with SBA loans. Id.

136 Id.

137 Id. (The appellate court held there was an issue of fact whether one of the plaintiffs executed the agreement to perpetrate a fraud on the SBA).

138 Id. ("The unclean hands doctrine rests on the premise that one cannot prevail in an action to enforce an agreement where the basis of the action is immoral and one to which equity will not lend its aid.") (internal citations omitted).

139 See Craig v. Bank of N.Y., 169 F. Supp. 2d 202, 210 (S.D.N.Y. 2001) (holding unclean hands bars breach of fiduciary duty and breach of contract claims under New York law); Bistricer v. Bistricer, 659 F. Supp. 215, 217 (E.D.N.Y. 1987) (indicating that unclean hands is available in legal action alleging breach of contract and fraud and noting that "[b]oth parties have treated the defense as applying to the claims under New York law"); see also Welch v. DiBlasi, 737 N.Y.S.2d 716, 717 (App. Div. 2001) (finding insufficient evidence of unclean hands without discussing its applicability due to the nature of the requested relief).

140 As discussed supra note 62, federal courts sitting in diversity jurisdiction are in conflict concerning whether unclean hands is a matter of state or federal law.

141 See Mallis v. Bankers Trust Co., 615 F.2d 68, 75-76 (2d Cir. 1980).

142 Mallis, 615 F.2d 68.

143 Id. at 71.

144 Id. at 75. The defendant claimed that the plaintiff's agreement to advance funds for the purchase of securities violated the state statute prohibiting usury. Id. The defendant additionally asserted that the plaintiff falsely characterized the purpose of the loan in violation of federal law. Id.

145 Id. at 75-76.

146 Id. The court ultimately found insufficient evidence of the defense and reversed the trial court because the plaintiffs' alleged unclean conduct had no connection to the subject matter of the litigation, did not cause injury, and was not equal in guilt to the defendant. Id. at 75.

147 See Furman v. Furman, 34 N.Y.S.2d 699, 704 (Spec. Term 1941) (deciding res judicata bars subsequent legal action based upon adjudication of unclean hands in prior equity suit because unclean hands has element of equal guilt and corresponds to in pari delicto defense at law), aff'd, 30 N.Y.S.2d 516 (App. Div. 1941), aff'd, 40 N.E.2d 643 (N.Y. 1942). For cases differentiating unclean hands and in pari delicto, see infra note 312.

148 Mallis, 615 F.2d at 75.

149 See, e.g., Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566, 607 (2d Cir. 2005) (applying New York law) ("Unclean hands is an equitable defense to equitable claims. Because [defendant-counter claimant] seeks damages in an action at law, Aetna cannot avail itself of unclean hands as a defense." (internal citations omitted)); W. Alton Jones Found. v. Chevron U.S.A. Inc. (In re Gulf

Oil/Cities Serv. Tender Offer Litig.), 725 F. Supp. 712, 742 (S.D.N.Y. 1989) (applying New York law); Manshion Joho Ctr. Co. v. Manshion Joho Ctr., Inc., 806 N.Y.S.2d 480, 482 (App. Div. 2005) ("The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages." (citing Hasbro Bradley, Inc. v. Coopers & Lybrand, 515 N.Y.S.2d 461, 463 (App. Div. 1987))); Pecorella v. Greater Buffalo Press, Inc., 486 N.Y.S.2d 562, 563 (App. Div. 1985); Morrisania II Assocs. v. Harvey, 527 N.Y.S.2d 954, 961 (Civ. Ct. 1988).

150 See discussion supra Part II.A.2.

151 Even after the Field Code's abolishment of the distinction between actions at law and suits in equity, which precipitated the merger in other states and eventually the federal system, the courts of New York "returned to enforcing a distinction between law and equity in the pleadings." Ellen E. Sward, A History of the Civil Trial in the United States, 51 U. Kan. L. Rev. 347, 385 (2003). For discussion of the Field Code's abolishment of the distinction between actions at law and suits in equity, see Stephen N. Subrin, David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision, 6 Law & Hist. Rev. 311, 328-38 (1988).

152 See, e.g., Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006).

153 Id.

154 Blain v. Doctor's Co., 272 Cal. Rptr. 250, 251 (Ct. App. 1990).

155 Smith v. Long, 723 N.Y.S.2d 584, 586-87 (App. Div. 2001).

156 See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 542-57 (proposing four-phase procedural analysis for the legal incorporation of unclean hands by examining cases predicating the defense on 1) "misconduct in the present litigation that potentially interferes with the process," id. at 543; 2) "misconduct outside the present litigation that potentially interferes with the process," id. at 546; 3) "misconduct in prior litigation with no potential to interfere with the process," id. at 548; and, finally, 4) "nonlitigation misconduct with no potential to interfere with the process," id. at 553).

157 See, e.g., Maldonado, 719 N.W.2d at 818; Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995).

158 Cummings, 533 N.W.2d 13.

159 Id. at 13-15.

160 Id. at 14.

161 Id. (reviewing trial court dismissal under an abuse of discretion standard); see also id. (noting the civil rules permitting the court to dismiss an action for lack of progress and for discovery abuses).

162 Id. (citing Clarke v. Brunswick Corp., 211 N.W.2d 101, 102-03 (Mich. Ct. App. 1973) (denying both estoppel and unclean hands); cf. Grigg v. Robinson Furniture Co., 260 N.W.2d 898, 903 (Mich. Ct. App. 1977) ("At least since 1963, equitable and legal claims may be joined in a common complaint and equitable defenses can defeat legal claims.") (discussing the application of a different equitable defense).

163 Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242 (D.S.C. 1981). Buchanan Home applied unclean hands as a matter of federal law and is discussed infra Part II.B.2.

164 Cummings, 533 N.W.2d at 14.

165 Id. (citing Buchanan Home, 544 F. Supp. at 244).

166 Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), overruled on other grounds by Standard Oil Co. v. United States, 429 U.S. 17, 18 (1976).

167 Id. at 245 (explaining the facts before noting that the fraud "demands the exercise of the historic power of equity to set aside fraudulently begotten judgments").

168 Cummings, 533 N.W.2d at 14 (quoting Hazel-Atlas Glass, 322 U.S. at 246). For a discussion of the Hazel-Atlas Glass decision, see Eugene R. Anderson & Nadia V. Holober, Preventing Inconsistencies in Litigation wi th a Spotlight on Insurance Coverage Litigation:

The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions, 4 Conn. Ins. L.J. 589, 703-05 (1998).

169 See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 570 n.266 (noting that the Hazel-Atlas Glass decision is the seminal case for the doctrine of "fraud on the court"). Ironically, because the circumstances suggested that Hazel-Atlas Glass Co. knew about the fraud and benefited from it, the three dissenting Justices raised the issue of unclean hands and preferred to have the district court resolve the dispute. Hazel-Atlas Glass Co, 322 U.S. at 260-61, 270 (Roberts, J., dissenting); see also id. at 271 (Chief Justice Stone concurring with the dissent's conclusion).

170 Hazel-Atlas Glass, 322 U.S. at 245 (emphasizing that the fraud concerned more than the litigants). Hartford-Empire had manufactured evidence to obtain approval of a patent and prove its subsequent infringement. Id. at 240-41.

171 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945).

172 Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (citing Precision Instrument Mfg., 324 U.S. at 814-15). The unclean hands case of Precision Instrument Mfg. relied on the fraud on the court case of Hazel-Atlas Glass. The Court in Precision Instrument Mfg. concluded that the application of unclean hands was justified because "[o]nly in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.'" Id. at 818 (quoting Hazel-Atlas Glass, 322 U.S. at 246). The appellate court in Cummings also relied on the Supreme Court's decision in Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980), which recognized the inherent power of courts to sanction litigation misconduct. Cummings, 533 N.W.2d at 14.

173 See Bygrave v. Van Reken, No. 218048, 2001 WL 672375, at *2 (Mich. Ct. App. May 4, 2001) (extending Cummings to include monetary sanctions, not just dismissal); Beagle v. Gen. Motors Corp., No. 245519, 2004 WL 2480484, at *1 (Mich. Ct. App. Nov. 4, 2004) (same); Prince v. MacDonald, 602 N.W.2d 834, 836 (Mich. Ct. App. 1999) (extending the Cummings line of precedent without mentioning "unclean hands" for filing bad faith bankruptcy petition to delay proceedings).

174 Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006); see also id. at 816 n.15. Contra Russell v. Casebolt, 348 S.W.2d 548, 553 (Mo. 1964) (refusing to recognize unclean hands in a damages action and reversing trial court dismissal based on perjury).

175 Maldonado, 719 N.W.2d at 826. The plaintiff and her counsel had repeatedly publicized evidence ruled inadmissible at trial. Id. at 811-16. The decision in Maldonado was 4-3. The three dissenting judges found the dismissal of the case violated the plaintiff's right to free speech. Id. at 826-37 (Cavanagh, J., dissenting) (Weaver and Kelly, JJ., concurring in dissent). One of the judges in a separate dissent also found there was no legal foundation for the dismissal. Id. at 837 (Weaver, J., dissenting).

176 Id. at 818 (citations and quotation marks omitted).

177 Id. at 818-19; id. at 810. Consistent with Maldonado, courts around the country have remedied various kinds of litigation misconduct regardless of the relief requested under the doctrine of "fraud on the court." See Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1074 n.1 (2d Cir. 1972); Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384, 389-90 (E.D. Cal. 1992); see also Lazaro v. Lazaro (In re Marriage of Lazaro), No. A107473, 2005 WL 1332102, at *3 (Cal. Ct. App. June 6, 2005) (indicating fraud on the court is unclean hands (citing Katz v. Karlsson, 191 P.2d 541, 544-45 (Cal. Ct. App. 1948) (fraud on the court))). Use of this doctrine obviates the need to address the effect of the consolidation of law and equity procedures on the defense of unclean hands.

178 First Fairfield Funding, L.L.C. v. Goldman, No. CV020465799S, 2003 WL 22708882, at *1-2 (Conn. Super. Ct. Nov. 3, 2003); Robarge v. Patriot Gen. Ins. Co., No. CV-91-0393211S, 1991 Conn. Super. LEXIS 2793, at *3 (Conn. Super. Ct. Dec. 4, 1991); Jesperson v. Ponichtera, No. CV88 0096615 S, 1990 WL 283884, at *1-2, (Conn. Super. Ct. Jul. 16, 1990); accord Liberty Bank v. Holloway, No. CV92-0703852 S, 1993 WL 408314, at *1 (Conn. Super. Ct. Sept. 28, 1993) (citing Jesperson) (laches).

179 See Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, Local 1304, 39 Cal. Rptr. 64, 97 (Dist. Ct. App. 1964); see supra note 75.

180 First Fairfield Funding, 2003 WL 22708882, at *1 (quoting Kerin v. Udolf, 334 A.2d 434, 437 (Conn. 1973)) (granting equitable relief to the defendant who claimed to have deposited the money in the mail in suit for default on a note); Robarge, 1991 Conn. Super. LEXIS, at *3; see also Hubley Mfg. & Supply Co. v. Ives, 70 A. 615, 616 (Conn. 1908) (arguing that the "fundamental purpose" of the Practice Act of 1879 was so that "legal and equitable rights of the parties may be enforced and protected in one action"); cf. Thompson v. Orcutt, 777 A.2d 670, 676, 681 (Conn. 2001) (reversing appellate court finding that unclean hands was inapplicable

on an action to foreclose a mortgage which the court noted was an "equitable proceeding"); Samasko v. Davis, 64 A.2d 682, 685 (Conn. 1949) ("Where a plaintiff's [equitable] claim 'grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have."' (quoting Gest v. Gest, 167 A. 909, 912 (Conn. 1933))).
Jesperson was a shareholder derivative action alleging wrongful conversion and breach of fiduciary duty by an officer and director who asserted the defense of unclean hands of the shareholders by participating in and benefitting from any wrongdoing. Jesperson, 1990 WL 283884, at *1. The Jesperson court cited Grigg v. Robinson Furniture Co., 260 N.W.2d 898, 903 (Mich. Ct. App. 1977) ("equitable defenses can defeat legal claims"), as persuasive authority for the proposition that equitable defenses may defeat legal claims. Jesperson, 1990 WL 283884, at *1. Grigg, like Kerin, did not involve the defense of unclean hands. Grigg, 260 N.W.2d at 903. Two federal district court cases from Connecticut cited by the Jesperson court neither discussed the adoption question nor found that the proof offered sustained the defense. See Matthies v. Seymour Mfg. Co., 23 F.R.D. 64, 93-96 (D. Conn. 1958) (applying Connecticut law), rev'd on other grounds, Matthies v. Seymour Mfg. Co., 270 F.2d 365, 375 (2d Cir. 1959); Burndy Corp. v. Teledyne Indus., Inc., 584 F. Supp. 656, 663 (D. Conn. 1984).

181 See, e.g., Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 744-45 (Ct. App. 1992); see also supra notes 86-93 and accompanying text.

182 First Fairfield Funding, 2003 WL 22708882.

183 See id. at *1.

184 Id. (citations omitted) (third-party defendant alleging unclean hands on the part of the plaintiff in connection with the plaintiff's initial acquisition of a contract).

185 Id. at *2.

186 See id.

187 Bartlett v. Dunne, No. C.A. 89-3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989).

188 See, e.g., Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (citing Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242, 244-45 (D.S.C. 1981).

189 Buchanan Home, 544 F. Supp. at 244-45.

190 Bartlett, 1989 WL 1110258, at *3.

191 Id. at *1-3.

192 Id. at *3; accord Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105-07 (D. Md. 1989) (pretrial perjury subject to unclean hands). For a discussion of Smith, see infra notes 234-37 and accompanying text.

193 Bartlett, 1989 WL 1110258, at *2.

194 Id. at *3 (discussing alternative sanction of contempt).

195 Supra note 62 (discussing federal courts with diversity jurisdiction using a federal law of unclean hands without the benefit of an Erie analysis). Some courts are not clear upon which law (federal or state) they rely on to apply and/or define unclean hands. For instance, a New York district court sitting in diversity in Gala Jewelry, Inc. v. Harring appears to follow federal law. It declared that "the law of this circuit restricts the 'unclean hands' doctrine to suits in equity, thereby categorically defeating defendant's attempted defense in this suit at law." Gala Jewelry, Inc. v. Harring, No. 05 Civ. 7713(GEL), 2006 WL 3734202, at *2 n.3 (S.D.N.Y. Dec. 18, 2006) (citing Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566 (2d Cir. 2005)). However, the Aetna decision actually applied New York law to determine the applicability of unclean hands to actions at law. See Aetna Cas. & Sur. Co., 404 F.3d at 607.The court also cited a federal decision from the U.S. Supreme Court. Id. (citing Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245-46 (1933)).

196 See Mallis v. Bankers Trust Co., 615 F.2d 68, 75 (2d Cir. 1980) (applying New York law) (holding the defense inapplicable because plaintiffs' supposed misconduct was not sufficiently connected with the subject of litigation); Blain v. Doctor's Co., 272 Cal. Rptr. 250, 255 (Ct. App. 1990); Kirkland v. Mannis, 639 P.2d 671, 671-73 (Or. Ct. App. 1982).

197 See, e.g., Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002).

198 Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679 (S.D. Fla. 2006).

199 Id. at 694.

200 Id. at 691.

201 Id. at 692.

202 Id. at 694.

203 Sikes v. Teleline, Inc., 281 F.3d 1350, 1366 n.41 (11th Cir. 2002).

204 Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1148 (2006).

205 Boca Raton Cmty. Hosp., 238 F.R.D. at 693 (internal citations omitted).

206 Id. (quoting Sikes, 281 F.3d at 1366 n.41).

207 Id. (citing Official Comm. of Unsecured Creditors, 437 F.3d. at 1155-56); see also Mallis v. Bankers Trust Co., 615 F.2d 68, 75-76 (2d Cir. 1980) (finding unclean hands to bar legal relief for state law claims and considering in pari delicto to bar the same conduct under the federal securities law claim); Manown v. Adams, 598 A.2d 821, 825-26 (Md. Ct. Spec. App. 1991), rev'd on other grounds, 615 A.2d 611, 612 (Md. 1992) (relying on in pari delicto to justify the application of unclean hands); Smith v. Long, 723 N.Y.S.2d 584, 586-87 (App. Div. 2001) (using in pari delicto interchangeably with unclean hands without discussion of any difference between them).

208 Boca Raton Cmty. Hosp., 238 F.R.D. at 693 (alteration in original); see also Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992); First Fairfield Funding, L.L.C. v. Goldman, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003).

209 Boca Raton Cmty. Hosp., 238 F.R.D at 694.

210 Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242 (D.S.C. 1981). Cases citing Buchanan Home include Cummings v. Wayne County, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) and Bartlett v. Dunne, No. C.A. 89-3051, 1989 WL 1110258, at *3 (R.I. Super. Ct. Nov. 10, 1989).

211 Buchanan Home, 544 F. Supp. at 245. The Buchanan Home opinion was authored by Judge Robert F. Chapman, who is now a Circuit Judge on the Fourth Circuit Court of Appeals. Despite diversity jurisdiction, the district court cited several federal decisions for the proposition that unclean hands applies to bar legal relief. See id. at 245-47. Thus, while it did not address the choice of law issue, the district court viewed the question of application as a matter of federal procedural law under the Erie Doctrine.
The Fourth Circuit Court of Appeals relied on Maryland law to define unclean hands in a diversity action between business partners. See Lyon v. Campbell, No. 99-2455, 2000 WL 991650, at *3 (4th Cir. July 19, 2000) (per curiam) (reversing trial court's application of unclean hands for failing to disclose a conflict of interest in the potential sale as not sufficiently related to the breach of fiduciary duty claim to warrant application of the doctrine (citing Bland v. Larsen, 627 A.2d 79, 85 (Md. Ct. Spec. App. 1993); Manown v. Adams, 598 A.2d 821 (Md. Ct. Spec. App. 1991), rev'd on other grounds, 615 A.2d 611, 612 (Md. 1992))) (first appeal); Lyon v. Campbell, 33 Fed. App'x 659, 665 (4th Cir. 2002) (affirming trial court decision to impose equitable relief of constructive trust and to deny unclean hands based on false trial testimony because it was collateral to the main issues in the case) (second appeal) (applying Maryland law).

212 Buchanan Home, 544 F. Supp. at 246.

213 Id. at 243.

214 Id.

215 Id. at 244.

216 Id.

217 Id. at 246.

218 Id. at 247.

219 Id. (quoting Mas v. Coca-Cola Co., 163 F.2d 505, 511 (4th Cir. 1947)).

220 Mas, 163 F.2d 505.

221 Buchanan Home, 544 F. Supp. at 244-45 (citing Mas, 163 F.2d at 507-08). The plaintiff in Mas "used forged documents and perjured testimony in his attempts to establish priority of invention in the Patent Office." Mas, 163 F.2d at 507; see also Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa. 1968) (citing Mas for the proposition that manufacturing evidence in the existing case constitutes unclean hands).

222 Mas, 163 F.2d at 511; see also Mas v. Coca-Cola Co., 198 F.2d 380, 381 (4th Cir. 1952) ("One who has had the door of a court of equity closed in his face because of his fraud may not have relief by the simple device of beginning again and labeling his suit an action at law for damages.") (upholding dismissal of patent action at law for damages, following dismissal of equitable suit on the ground of unclean hands involving same patent).

223 Buchanan Home, 544 F. Supp. at 245.

224 Id.

225 Id. (citing Union Pac. R.R. Co. v. Chi. & N.W. Ry. Co., 226 F. Supp. 400 (N.D. Ill. 1964); Tempo Music, Inc. v. Myers, 407 F.2d 503 (4th Cir. 1969)).

226 Union Pac. R.R. Co., 226 F. Supp. 400.

227 Id. at 410. (citing Chafee, supra note 5, at 94).

228 See id. (citing A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 312 U.S. 38, 43 (1941)).

229 Tempo Music, 407 F.2d at 507-08.

230 Buchanan Home, 544 F. Supp. at 245.

231 Tempo Music, 407 F.2d at 508 n.8 (noting that the infringer requested a list of copyrighted songs from owner that the owner neglected to supply).

232 Buchanan Home, 544 F. Supp. at 245 (Tempo Music "justified application of the clean hands principle to the damages portion of the suit by stating that principles of equitable estoppel would apply to deny the plaintiff its right to plead and prove the copyright infringement."); accord Metro Publ'g., Ltd. v. San Jose Mercury News, Inc., 861 F. Supp. 870, 880 (N.D. Cal. 1994) (citing both Buchanan Home and Tempo Music as authority to apply clean hands to damages claims).

233 See Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105-07 (D. Md. 1989); see also Stratton v. Sacks, 99 B.R. 686, 694 (D. Md. 1989) ("Although the clean hands doctrine is an equitable principle, it has been applied by a district court in this Circuit to defeat an action at law." (citations omitted)); McGovern v. Deutsche Post Global Mail, Ltd., No. Civ. JFM-04-0060, 2004 WL 1764088, at *10 n.6 (D. Md. Aug. 4, 2004) (noting in dicta that "[t]he clean hands doctrine originated in the courts of equity but now extends to actions at law" (citation omitted)).

234 Smith, 124 F.R.D. 103 (dismissing damages claim related to lost income).

235 Id. at 105-07.

236 Id. at 107.

237 The court explained:
It can hardly be disputed that Mr. Garner's hands are unclean with respect to a matter at issue in this litigation. Mr. Garner has filed suit, seeking damages resulting from the crash of his plane. As part of those damages, he seeks compensation for the income he lost while recuperating from his injuries. His tax returns are critical to allowing the defendants to assess accurately their potential liability

for these damages. By providing the defendants with tax documents that were admittedly false, and by lying in his deposition and answers to interrogatories, Mr. Garner has abused the discovery system and has deprived the defendants of essential information. Id. (citing Buchanan Home, 544 F. Supp. at 246). The court summarized Buchanan Home writing, "Plaintiff's fraud in submitting falsified adjustment forms to defendant hopelessly obscure[d] any possibility of accurately resolving validity of plaintiff's claim." Id. (internal quotation marks omitted). The court further explained that "the fact that the fraud and perjury are discovered before trial does not vitiate the taint upon the litigation process as a whole." Id.

238 See, e.g., McCormick v. Cohn, No. CV 90-0323 H, 1992 WL 687291, at *3 (S.D. Cal. July 31, 1992) (action for damages due to copyright infringement, trademark infringement, and unfair competition barred by unclean hands).

239 See Magnuson v. Video Yesteryear, No. C-92-4049 DLJ, 1994 WL 508826, at *5 (N.D. Cal. September 9, 1994) ("[Unclean hands] operates to deprive a copyright owner from asserting infringement and asking for damages when the infringement occurred by the claimant's dereliction of duty." (citing Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986))), aff'd in part, rev'd in part on other grounds, 85 F.3d 1424 (9th Cir. 1996); Sega Enters. Ltd. v. Accolade, Inc., 785 F. Supp. 1392, 1399 (N.D. Cal. 1992) ("The defense of copyright misuse is a form of unclean hands."), aff'd in part, rev'd in part on other grounds, 977 F.2d 1510 (9th Cir. 1992).

240 Supermarket of Homes, 786 F.2d 1400.

241 Id. at 1408 (citing Tempo Music, Inc. v. Myers, 407 F.2d 503, 507 (4th Cir. 1969); Buchanan Home, 544 F. Supp. at 245). The court did not apply the defense because it found the facts did not constitute unclean hands. Id. at 1408-09.

242 Metro Publ'g., Ltd. v. San Jose Mercury News, Inc., 861 F. Supp. 870 (N.D. Cal. 1994).

243 Id. at 880 (citing Supermarket of Homes, 786 F.2d at 1408).

244 Id. (quoting Buchanan Home, 544 F. Supp. at 245 (citation omitted)); see also id. (citing Tempo Music, 407 F.2d at 507 & n.8 (4th Cir.1969) (barring legal recovery due to unclean hands "where alleged infringer sought copyright holder's assistance to avoid infringing copyright" and holder failed to assist)).

245 See Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 792 & n.80 (5th Cir. 1999) (explaining that the "[copyright misuse doctrine] has its historical roots in the unclean hands defense") (citing Qad, Inc. v. ALN Assocs., Inc., 974 F.2d 834, 836 (7th Cir. 1992); Supermarket of Homes, 786 F.2d at 1408).

246 Urecal Corp. v. Masters, 413 F. Supp. 873 (N.D. Ill. 1976).

247 Id. at 876. The district court reasoned: "In an unfair competition action like the case at bar, where equitable and legal claims are joined, the doctrine of 'clean hands,' if indicated by the facts, should preclude recovery on both claims." Id. (citing Hall v. Wright, 240 F.2d 787 (9th Cir. 1957) (affirming application of unclean hands)).

248 See id. at 874-76; see also id. at 876 (alternatively holding there was insufficient proof of damages). Despite the state law claims, the court applied unclean hands as a matter of federal law. See id; cf. Am. Nat'l Bank & Trust Co. of Chi. v. Levy, 404 N.E.2d 946, 948-49 (Ill. App. Ct. 1980) (citing pre-merger precedent of the US Supreme Court to deny the defense in actions at law).

249 Urecal, 413 F. Supp. at 876 (citing Rogers v. Loether, 467 F.2d 1110, 1119 (7th Cir. 1972)).

250 Parkman & Weston Assocs., Ltd. v. Ebenezer African Methodist Episcopal Church, No. 01 C 9839, 2003 WL 22287358, at *6 (N.D. Ill. Sept. 30, 2003) ("[I]n certain situations the clean hands doctrine may bar 'a claim at law for damages.' For example, 'where equitable and legal claims are joined, the doctrine of "clean hands," if indicated by the facts, should preclude recovery on both claims."' (quoting Urecal, 413 F. Supp. at 876)); Rauland Borg Corp. v. TCS Mgmt. Grp., Inc., No. 93 C 6096, 1995 WL 242292, at *12-14 (N.D. Ill. Apr. 24, 1995) (denying summary judgment on unclean hands asserted to bar right to injunctive relief or damages).

251 Energizer Holdings, Inc. v. Duracell, Inc., No. 01 C 9720, 2002 WL 1067688 (N.D. Ill. May 28, 2002).

252 See id. at *3. Other cases are in accord for Lanham Act claims, although they denied the defense for reasons other than its application at law. See also Alpo Petfoods, Inc. v. Ralston Purina Co., 720 F. Supp. 194, 214 (D.D.C. 1989) ("The defense of unclean hands

is available in an action brought under the Lanham Act seeking equitable and monetary relief." (citing Am. Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568, 590 (S.D.N.Y. 1987))).

253 See Lopez v. Autoserve, L.L.C., No. 05 C 3554, 2005 WL 3116053, at *1 (N.D. Ill. Nov. 17, 2005) (applying Illinois and federal law of unclean hands) (striking affirmative defense of unclean hands to bar violations of state and federal statutory employment law because the complaint sought only legal damages).

254 Maltz v. Sax, 134 F.2d 2 (7th Cir. 1943).

255 Id. at 5.

256 Id.

257 Id. at 5 (citing federal statutory law and the Federal Rules).

258 Byron v. Clay, 867 F.2d 1049 (7th Cir.1989).

259 Id. at 1052 (citing Medtronic, Inc. v. Intermedics, Inc., 725 F.2d 440, 442-43 (7th Cir. 1984)).

260 Id.

261 Id. (citing Holman v. Johnson, (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341 (Mansfield, C.J.)).

262 Maksym v. Loesch, 937 F.2d 1237 (7th Cir. 1991).

263 Id. at 1248 (citation omitted) (ultimately determining that laches would not apply to legal relief under Illinois law).

264 See Columbus Reg'l Hosp. v. Patriot Med. Techs. Inc., No. IP 01-1404-C K/H, 2004 WL 392938, at *7 (S.D. Ind. Feb 11, 2004) (citing Fed. R. Civ. P. 2; Fed. R. Civ. P. 8) (denying summary judgment on affirmative defense of unclean hands as a matter of federal law in a diversity case); see also Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc., No. 1:04-CV-0562-JDT-WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (citing Fed. R. Civ. P. 2; Fed. R. Civ. P. 8), order amended, No. 1:04-cv-00562-JDT-WTL, 2006 WL 3305122 (S.D. Ind. Aug 16, 2006).

265 Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644 (S.D. Ohio 2002).

266 See id. at 653.

267 Urecal Corp. v. Masters, 413 F. Supp. 873, 876 (N.D. Ill. 1976).

268 Big Lots Stores, 182 F. Supp. 2d at 652-53. The court relied on precedent from the US Supreme Court, see Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 814 (1945), to define unclean hands and cited case law from the Sixth Circuit, see Kearney & Trecker Corp. v. Cincinnati Milacron Inc., 562 F.2d 365, 371 (6th Cir. 1977), to establish the appropriate burden of proof. Big Lots Stores, 182 F. Supp. at 652. But see id. at 644 (West Headnotes stating that unclean hands was decided as a matter of Ohio law).

269 Big Lots Stores, 182 F. Supp. 2d at 652.

270 See id. at 648-51.

271 Id. at 652-53.

272 Id. at 653.

273 See id. (alleging activities such as obtaining a temporary restraining order under wrongful or deceitful circumstances, preparing false affidavits, and exchanging debt forgiveness for friendly affidavits).

274 Id. at 652.

275 Id. at 653 n.2 (noting that the litigation misconduct claims, at most, go to damages).

276 Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969).

277 Id. at 704.

278 Maltz v. Sax, 134 F.2d 2, 5 (7th Cir. 1943) (citing federal statutory law and the Federal Rules)).

279 Kuehnert, 412 F.2d at 703-05.

280 See id. The majority explained: "The question must be one of policy: which decision will have the better consequences in promoting the objective of the securities laws by increasing the protection to be afforded the investing public." Id. at 704; see also id. at 703 (citing cases establishing the availability of unclean hands in SEC proxy requirements); 703 n.6 (citing cases establishing the availability of unclean hands in labor disputes). The dissent disagreed with the application of unclean hands on policy grounds. See id. at 705 (Godbold, J., dissenting); accord Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 53 (S.D.N.Y. 1971); E.F. Hutton & Co. v. Berns, 682 F.2d 173, 176 n.6 (8th Cir. 1982) (citing securities law violation cases which either allow or deny the in pari delicto defense). Thus, the court divided solely on whether barring the lawsuit pursuant to unclean hands would promote the purposes of the federal securities statute. See generally Zygmunt J.B. Plater, Statutory Violations and Equitable Discretion, 70 Calif. L. Rev. 524 (1982) (suggesting courts have less remedial discretion in statutory versus common law or constitutional causes of action).

281 Kuehnert, 412 F.2d at 704-05. But see Nathanson, 325 F. Supp. at 52 (referencing the issue in Kuehnert as the application of in pari delicto). In Mallis v. Bankers Trust Co., 615 F.2d 68, 75-76 (2d Cir. 1980), however, the Second Circuit Court of Appeals considered unclean hands only against the pendant state claims.

282 See Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 889-90 (2006) (discussing how the reasons for rules announced in decisions may have normative weight and constrain future decisions); see also Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. Cal. L. Rev. 755, 784 (2003) (noting changing nature of judicial decisions from common law to statutory substitutes); Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1187-88 (2007) (describing the textualization of the common law and the greater interpretative constraints on those who apply it). In analyzing the issue of fusion of legal and equitable doctrines, Justice Keith Mason, of the New South Wales Court of Appeals of Australia, related his view that "the accumulated judicial wisdom of the ages remains a starting (and usually finishing) point for decision-making, even at the appellate level." Mason, supra note 26, at 72.

283 See Gen. Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law); Spitler v. Perry Town Lot & Improvement Co., 179 N.W. 69, 70 (Iowa 1920) (ruling without citation that unclean hands does not bar defenses, only affirmative equitable relief); Wilson v. Prentiss, 140 P.3d 288, 292-93 (Colo. App. 2006); Hasbro Bradley, Inc. v. Coopers & Lybrand, 515 N.Y.S.2d 461, 463 (App. Div. 1987); cf. Rodriguez v. Dicoa Corp., 318 So. 2d 442, 446 (Fla. Dist. Ct. App. 1975) ("No authority is required" in reversing equitable attachment in legal action).

284 See, e.g., Merchs. Indem. Corp. v. Eggleston, 179 A.2d 505, 514 (N.J. 1962) (citing federal pre-merger precedent from the United States Supreme Court).

285 See discussion of cases cited supra notes 27-30 and accompanying text (denying unclean hands from precedent considering the defense to ban equitable relief); see also supra note 45 (discussing Alabama case relying on purported decisional law to deny unclean hands in a damages action based on precedent that did not address the issue).

286 See infra notes 287-96 and accompanying text.

287 Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 14 (Pa. 1968) ("[I]t generally has been held that the doctrine operates only to deny equitable, and not legal, remedies.") (citations omitted) (emphasis added); Russell v. Casebolt, 384 S.W.2d 548, 553 (Mo. 1964) (discussing the "inapplicability of the doctrine generally in cases at law" (citation omitted) (emphasis added)); see also Sandobal v. Armour & Co., 429 F.2d 249, 257 (8th Cir. 1970) (laches "is rarely, if ever, invoked" in an action at law).

288 Clark v. Amoco Prod. Co., 794 F.2d 967, 971 (5th Cir. 1986) ("Laches is usually available only in suits . . . in equity . . . .") (citations omitted) (emphasis added); DiMauro v. Pavia, 492 F. Supp. 1051, 1068 (D. Conn. 1979) ("The principle of unclean hands is usually applied only to prevent affirmative relief . . . .") (citations omitted) (emphasis added).

289 USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 20 n.16 (Del. Super. Ct. 2000) (citations omitted) (emphasis added).

290 See Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006) (creating exception to general rule against unclean hands in cases seeking legal relief on grounds of court protection); Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995) (same); see also discussion supra notes 152-77 and accompanying text.

291 Gala Jewelry, Inc. v. Harring, No. 05 Civ. 7713(GEL), 2006 WL 3734202, at *2-3 (S.D.N.Y. Dec. 18, 2006) (granting motion to strike unclean hands defense to damages claims for breach of contract, negligence, and conversion).

292 Id. at *2 n.3 (citing Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245-46 (1933)).

293 See Ellwood v. Mid States Commodities, Inc., 404 N.W.2d 174, 184 (Iowa 1987) (alternative holding). The courts applying the doctrine of unclean hands to bar legal relief have also found other grounds to support their decision. See Urecal Corp. v. Masters, 413 F. Supp. 873, 876 (N.D. Ill. 1976) (alternatively holding there was insufficient proof of damages even if unclean hands did not apply to bar legal relief).

294 Courts typically find there is no connection between the case and the unclean conduct. See Karpierz v. Easley, 68 S.W.3d 565, 572 (Mo. Ct. App. 2002); Hasbro Bradley, Inc. v. Coopers & Lybrand, 515 N.Y.S.2d 461, 463 (App. Div. 1987); Birk v. Jackson, 75 S.W.2d 918, 920 (Tex. Civ. App. 1934). Courts may also find that the conduct does not rise to the level of unclean hands. See Beldt v. Leise, 60 P.3d 1119, 1122 (Or. Ct. App. 2003).

295 See, e.g., Billes v. Bailey, 555 A.2d 460, 462-63 (D.C. 1989); Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10, 15 (Pa. 1968) (finding unclean hands inapplicable to legal claims as one of three alternative holdings).

296 See, e.g., Swisher v. Swisher, 124 S.W.3d 477, 483-84 (Mo. Ct. App. 2003).

297 See USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 19 (Del. Super. Ct. 2000) ("Courts of law have become increasingly flexible and have abandoned the worship of formalism and technicality that spawned the development of the split system of law and equity in England.").

298 See, e.g., Tarasi v. Pittsburgh Nat'l Bank, 555 F.2d 1152, 1156 n.9 (3d Cir. 1977) (stating rule without authority); discussion supra Part I.

299 See In re Estate of Barnes, 754 A.2d 284, 288 n.6 (D.C. 2000) (denying unclean hands because "we know of no authority for applying this 'maxim of equity' to a legal claim for money." (citations omitted)); Freemont Homes, Inc. v. Elmer, 974 P.2d 952, 959 (Wyo. 1999) (supporting denial of the defense solely from precedent considering unclean hands to ban equitable relief); discussion supra Part I; cf. Mason, supra note 26, at 68 ("Chancery's unwillingness to award damages during the early nineteenth century was seen by some writers at the time to have been jurisdictional, in the sense of establishing an absence of power." (citing PM McDermott, Equitable Damages (1994)).

300 See First Fairfield Funding, L.L.C. v. Goldman, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003); Unilogic, Inc. v. Burroughs Corp., 12 Cal. Rptr. 2d 741, 745 (Ct. App. 1992); Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp., 238 F.R.D. 679, 693-94 (S.D. Fla. 2006); Burton v. Sosinsky, 250 Cal. Rptr. 33, 41 (Ct. App. 1988) ("Although no case directly on point has been located, we see no reason why a successful defense of unclean hands should not bar the foreclosure of the mechanics' lien.").

301 Boca Raton Cmty. Hosp., 238 F.R.D. at 693; Unilogic, 12 Cal. Rptr. 2d at 745; First Fairfield Funding, 2003 WL 22708882, at *1.

302 See Boca Raton Cmty. Hosp., 238 F.R.D. at 693; Unilogic, 12 Cal. Rptr. 2d at 745; First Fairfield Funding, 2003 WL 22708882, at *1.

303 See Sender v. Mann, 423 F. Supp. 2d 1155, 1167-68 (D. Colo. 2006) (applying Colorado law) (finding bankruptcy trustee's fraudulent conveyance claims were equitable in nature and subject to unclean hands even though trustee only sought money damages); see also C&K Eng'g Contractors v. Amber Steel Co., 587 P.2d 1136, 1138-41 (Cal. 1978) (evaluating promissory estoppel for purposes of determining the right to trial by jury); Philpott v. Superior Court, 36 P.2d 635, 640-41 (Cal. 1934) (en banc) (discussing confusion with quasi-contract that originated in law but that is equitable in nature); Corvallis Sand & Gravel Co. v. State Land Bd., 439 P.2d 575, 578 (Or. 1968) (en banc) (reviewing case determining that quo warranto was equitable in nature despite being denominated as an action at law under the statute for the purpose of applying laches); Megarry & Baker, supra note 6, at 6 (discussing dual meaning of "equity"). In many cases, it is difficult to discern the origin of the equitable claim or relief due to its mixed heritage. See Anenson, supra note 3, at 497 ("[R]emedies have become so intertwined in this post-merger world that it is difficult to discern what is or

was equity versus law. The advent of statutory causes of action compounds the problem.") (citations omitted) (providing examples); Mason, supra note 26, at 46 ("Very few causes of action or remedies will be exclusively equitable in historical derivation and even these are now statutory in most cases."); see also Yeo, supra note 20, at 168 (arguing that the mixed and uncertain heritage of equitable doctrines will unduly complicate choice of law analysis for equity).

304 Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 169 (8th Cir. 1995) (quoting Maksym v. Loesch, 937 F.2d 1237, 1248 (7th Cir. 1991) (laches)), abrogated on other grounds, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); see also Russell v. Casebolt, 384 S.W.2d 548, 553 (Mo. 1964) ("wholly or partially in equity").

305 Ashley, 66 F.3d at 169; Maksym, 937 F.2d at 1248; Corvallis Sand, 439 P.2d at 578 (quo warranto).

306 Am. Nat'l Bank & Trust Co. of Chi. v. Levy, 404 N.E.2d 946, 948 (Ill. App. Ct. 1980) (unclean hands); see also Clark v. Amoco Prod. Co., 794 F.2d 967, 971 (5th Cir. 1986) (laches).

307 See discussion supra Part II; cf. Stefanie A. Lindquist & Frank B. Cross, Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent, 80 N.Y.U. L. Rev. 1156, 1173-77 (2005) (finding that judges are more ideological and prone to decide based on policy preferences in cases without doctrinal direction than in those governed by precedent).

308 See discussion supra Part II.

309 See Anenson, supra note 3, at 474-76; discussion supra Part II. None of the opinions incorporating unclean hands into the law appeared to acknowledge the historical distinction between the different kinds of equitable defenses based on their pre-merger pleading practices. See, e.g., Jesperson v. Ponichtera, 2 Conn. L. Rptr. 105, 105 (Super. Ct. 1990) ("Another recognized principle is that equitable defenses may be interposed against actions at law." (citation omitted)).

310 See discussion supra Part II; cf. Frederick Schauer, Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy, 3 Persp. on Psychol. Sci. 454, 457-58 (2008) (distinguishing principle of precedent from reasoning by analogy).

311 See, e.g., Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242, 247 (D.S.C. 1981) (citing Mas v. Coca-Cola Co., 163 F.2d 505 (4th Cir. 1947)); see also Stratton v. Sacks, 99 B.R. 686, 694 (D. Md. 1989) ("Although the clean hands doctrine is an equitable principle, it has been applied by a district court in this Circuit to defeat an action at law." (citations omitted)). A number of courts have been persuaded to extend unclean hands to legal remedies by reference to the United States Supreme Court equity decision in Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945). See, e.g., Kendall-Jackson Winery, Ltd. v. Superior Court, 90 Cal. Rptr. 2d 743, 749 (Ct. App. 1999); Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995).

312 See discussion supra Part II. Courts have also used the terms in pari delicto and unclean hands interchangeably or have relied on the similarity between unclean hands and this kindred legal defense in justifying the availability of unclean hands in legal cases. See, e.g., Blain v. Doctor's Co., 272 Cal. Rptr. 250, 258 (Ct. App. 1990) (recognizing unclean hands at law by accepting guidance from the Pennsylvania case of Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 458 A.2d 545, 551-52 (Pa. Super. Ct. 1983) in which the general legal principle of in pari delicto was applied); Manown v. Adams, 598 A.2d 821, 825 n.6 (Md. Ct. Spec. App. 1991) (equating unclean hands and in pari delicto defenses), rev'd on other grounds, 615 A.2d 611, 612 (Md. 1992); Smith v. Long, 723 N.Y.S.2d 584, 586-87 (App. Div. 2001) (holding unclean hands applicable to legal relief by reference to the defense of in pari delicto and declaring unclean hands available in "law or equity"). But see Truitt v. Miller, 407 A.2d 1073, 1079-80 (D.C. 1979) (citation omitted) (denying unclean hands defense in action at law despite noting its similarity to in pari delicto); Ellwood v. Mid States Commodities, Inc. 404 N.W.2d 174, 184 (Iowa 1987) (willing to apply illegality or against public policy but not unclean hands); Russell v. Casebolt, 384 S.W.2d 548, 553 (Mo. 1964) (same). Judge Posner's dictum in Byron v. Clay also compared unclean hands and in pari delicto in concluding that unclean hands should no longer be limited to equitable actions. Byron v. Clay, 867 F.2d 1049, 1052 (7th Cir. 1989) (citing Holman v. Johnson, (1775) 98 Eng. Rep. 1120 (K.B.); 1 Cowp. 341 (Lord Mansfield C.J.)). Similar to unclean hands, the doctrine of in pari delicto preserves the dignity of the courts and deters illegal behavior. See Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985) ("[C]ourts should not lend their good offices to mediating disputes among wrongdoers; . . . denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." (citations omitted)). But the defenses are not an exact match. See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 566-69. In pari delicto requires a common scheme and imposes a guilt differential between the parties (i.e. that the claimant's guilt be less than the respondent). Bateman Eichler, 472 U.S. at 307, 310-11 (confining the application of in pari delicto under federal anti-trust laws and federal securities laws to the doctrine's traditional limitations, which require that the plaintiff bear "at least substantially equal

responsibility for the violations he seeks to redress"); id. at 306 ("In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one." (quoting Black's Law Dictionary 711 (5th ed. 1979) (alteration in original) (internal quotation marks omitted)); Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50, 53 n.11 (S.D.N.Y. 1971) (explaining under the securities laws that in pari delicto is narrower than unclean hands as it contemplates "equal and simultaneous participation by the parties in the same illegal activity").

313 See, e.g., Tempo Music, Inc. v. Myers, 407 F.2d 503, 507-08 (4th Cir. 1969); Buchanan Home, 544 F. Supp. at 245; see also discussion supra notes 231-32 and accompanying text. Some courts have converted laches into an estoppel in order to apply the defense at law. See, e.g., Maksym v. Loesch, 937 F.2d 1237, 1248 (7th Cir. 1991) ("It is really a doctrine of estoppel rather than a substitute for a statute of limitations." (citation omitted)); Davenport Osteopathic Hosp. Ass'n v. Hosp. Serv., Inc., 154 N.W.2d 153, 162 (Iowa 1967); Moore v. Phillips, 627 P.2d 831, 835 (Kan. Ct. App. 1981). In other countries that share our common law heritage, there has been considerable debate concerning the fusion of legal and equitable principles and doctrines by analogy. Anthony Mason, Fusion, in Equity in Commercial Law, supra note 20, at 11, 12; see also Smith, supra note 25, at 22 n.15 (defining a "fusion fallacy" as "a belief in substantive fusion" (citation omitted)); James Edelman, A "Fusion Fallacy" Fallacy, 119 Law Q. Rev. 375, 379-80 (2003) (discussing the possible grounds for supporting fusion by analogy and the academic justifications for such an approach).

314 See Anenson, supra note 3, at 476-508 (analyzing policies in favor of considering unclean hands in legal cases and the cases supporting them); T. Leigh Anenson, From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law, 11 Lewis & Clark L. Rev. 633, 660 (2007) (suggesting that policy analysis be the preferred method of interpretation in equitable estoppel cases); see also id. at 659 (noting that equity has come to be regarded as public policy and that both equity and public policy promote the same purpose of change based on modern morality); Robert S. Stevens, A Brief on Behalf of a Course in Equity, 8 J. Legal Educ. 422, 424-25 (1956) (noting one of the factors to influence a decision in equity was that special consideration was given to the public interest).

Analyzing the fusion of legal and equitable doctrines in Australia, Justice Mason explained: "Investigation of pedigree is being eclipsed by the greater need to have regard to the function served by a particular right or remedy and to the overlap of the parallel or discordant strands suggested by historical enquiries about 'legal' and 'equitable' rules." Mason, supra note 26, at 42; see also id. at 71.

315 Given the indeterminacy associated with the range of choice, including the selection of policy goals and the process of balancing the competing policies, policy analysis has been described as the most subjective type of legal argument. See Wilson Huhn, The Five Types of Legal Argument 68 (2002); see also id. at 54 (tracing policy analysis to the "'ends-means"' philosophy of teleology (citation omitted)).

316 Huhn, supra note 315, at 120 (explaining that deeming another decision a "precedent" based on a similarity in values is a form of policy analysis); see discussion supra notes 311-314 and accompanying text.

317 See William J. Lawrence, III, Note, The Application of the Clean Hands Doctrine in Damage Actions, 57 Notre Dame Law. 673, 681 (1982) (calling for recognition of unclean hands in cases seeking legal relief because damages are often as severe as equitable remedies); Anenson, supra note 3, at 490-96 (listing lack of differential in relief as one reason to recognize unclean hands at law); see also id. at 490 ("Even if damages are less harmful in a particular case, such severity does not derive from any purported difference between law and equity." (citation omitted)); cf. Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 687, 701 (1990) (concluding that a remedial hierarchy of legal and equitable relief no longer exists with respect to the irreparable injury rule requiring "no adequate remedy at law" before equitable relief); Douglas Laycock, The Death of the Irreparable Injury Rule 265-76 (1991) (same); see also USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 15 (Del. Super. Ct. 2000) (concluding that "we need to desert the whole idea of hierarchy between law and equity"); Chafee, supra note 5, at 29; Garvey, supra note 42, at 67-68. Professor Newman concluded long ago that the assumption that the enforcement of equitable rights is not a matter of right, but rather a privilege, "has long since become obsolete." Newman, supra note 6, at 38. But see Dobbs, supra note 13, §2.4(2), at 69 (endorsing rights versus privilege dichotomy in denying unclean hands at law).

318 Huhn, supra note 315, at 120 (explaining that judicial opinions become precedents by a matching of facts and/or values). Justice Cardozo found the practice of drawing analogies to the facts of the case without also considering the values involved incomplete: "Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule." Benjamin N. Cardozo, The Nature of the Judicial Process 20 (1921); see also Cass R. Sunstein, Commentary, On Analogical Reasoning, 106 Harv. L. Rev. 741, 756-57 (1993).

319 Mason, supra note 313, at 15 ("There is no place for inconsistent treatment of like cases."); Smith, supra note 20, at 23 ("This goal [of treating like cases alike] is part of the rule of law, but only, I think, because it is rational to treat like cases alike, and if the law is not rational it loses its normative force."). Case analysis depends on what points of similarity and dissimilarity are deemed important. Huhn, supra note 315, at 120; Anenson, supra note 314, at 641 ("[T]he technique of developing grounds of decision based on reported judicial experience is an art." (citation omitted)). How the judge answers the question of importance determines whether the prior decisional rule will be distinguished or applied. See Steven J. Burton, An Introduction to Law and Legal Reasoning 83 (1985); see also Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923, 1016 (1996) (explaining grounds to apply cases by analogy and to distinguish them); John Dickinson, The Law Behind Law: II, 29 Colum. L. Rev. 285, 290 (1929) (discussing the value judgments made by judges when choosing one analogy over another).

320 Wilson Huhn describes the types of legal argument under his proposed pluralistic model of law as a system of legal reasoning techniques because they are interrelated. Huhn, supra note 315, at 81-82. In a single argument, one may utilize multiple arguments at the same time and in such a way that they may be distinguishable from each other. Id.

321 First Fairfield Funding, L.L.C. v. Goldman, No. CV020465799S, 2003 WL 22708882, at *1 (Conn. Super. Ct. Nov. 3, 2003).

322 Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., 544 F. Supp. 242, 245 (D.S.C. 1981); accord Metro Publ'g, Ltd. v. San Jose Mercury News, Inc., 861 F. Supp. 870, 880 (N.D. Cal. 1994) (quoting Buchanan Home).

323 Chafee I, supra note 2, at 878 (quoted in Messick v. Smith, 69 A.2d 478, 481 (Md. 1949)). Justice Brandeis had a similar motivation in expressing his opinion of the universal nature of unclean hands: "The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law." Olmstead v. United States, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting) (citations omitted). Brandeis' dissents in Olmstead and other cases were later adopted by the majority of the Supreme Court under the so-called supervisory power doctrine. See Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1443 (1984) (citing, e.g., McNabb v. United States, 318 U.S. 332 (1943)). Under this doctrine, the Court accepted Brandeis's view that litigation misconduct principally harms the court and not the litigant. Id. at 1452.

324 See Anenson, supra note 3, at 477 (criticizing the continued discrimination against unclean hands on the basis of an alleged historical impediment given the similarities of the defense to legal and other fully incorporated equitable defenses); accord James Edelman & Simone Degeling, Introduction to Equity in Commercial Law, supra note 20, at 1,1 (advocating structural approach to the fusion of legal and equitable principles and doctrines in other common law countries); see also Mark P. Gergen, Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response, 38 Ariz. L. Rev. 1175, 1220-23 (1996) (noting the importance of identifying and reconciling the justifications underlying other ancillary bodies of law). Failing to account for similar policies and purposes in deciding cases is especially pernicious given that the historical differences in form have been eradicated with the merger of law and equity in most jurisdictions. Anenson, supra note 3, at 478 ("[T]he absurdity of courts climbing over a barrier built by historical accident is amplified now that that barrier no longer exists."); accord Mason, supra note 313, at 14 ("The unsatisfactory and confused state into which the law in this area has fallen is little short of a disgrace." (citation omitted)); see also Anenson, supra note 3, at 492 (illustrating past and present cases reaching opposite outcomes) (comparing Carmen v. Fox Film Corp., 269 F. 928 (2d Cir. 1920), reversing, 258 F. 703 (S.D.N.Y. 1919) (equity) with Carmen v. Fox Film Corp., 198 N.Y.S. 766 (N.Y. App. Div. 1923) (law) and N. Pac. Lumber Co. v. Oliver, 596 P.2d 931 (Or. 1979) (equity) with Gratreak v. N. Pac. Lumber Co., 609 P.2d 375 (Or. Ct. App. 1980) (law)). Indeed, the doctrine of stare decisis embodies the ideal that like cases be treated alike. Huhn, supra note 315, at 16; id. at 41-43 (precedent supports the stability and predictability of law as a guide to future action); see also Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 815, 827-29 (2008) (placing precedent within federal procedural common law).

325 For a discussion of how the different remedies were a conflict in substantive rights and duties of citizens, but not a conflict in the form of the rules themselves, see generally William Searle Holdsworth, The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor, 26 Yale L.J. 1 (1916); 1 Austin Wakeman Scott, The Law of Trusts § 1 (2d ed. 1956) ("There is no conflict in form . . . there is only a conflict in substance.").

326 See Megarry & Baker, supra note 6, at 7 ("There is much truth in the view that equity is a historical accident.") (quoting the Honorable Robert Megarry of the Chancery Division of the High Court of England); Stevens, supra note 26, at 351 (explaining that the distinction between law and equity was not necessary or essential-but historical); see also Philpott v. Superior Court, 36 P.2d 635, 637 (Cal. 1934) (discussing the "parity of law and reason which governs both species of courts" (quoting II Cooley's Blackstone § 436, at 1181-82

(4th ed.))); Edelman & Degeling, supra note 324, at 2 (explaining that Justice Keith Mason denies any particular characteristic of equitable doctrine apart from historical development); cf. id.(noting that Sir Anthony Mason and Professor Lionel Smith accept there are unique characteristics of equity that may limit analogies to the common law in certain cases).

327 The "structural" approach to legal analysis that involves inferring rules from the relationship among ancillary doctrines was popularized by Philip Bobbitt, a constitutional scholar, as one of six heuristic devices ("modalities") of interpreting the Constitution. Philip Bobbitt, Constitutional Interpretation 12-13 (1991). Others have adapted Bobbitt's structural argument outside the constitutional law discussion. See T. Leigh Anenson, Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship, 43 Am. Bus. L.J. 173, 203-05 (2006) (using the structural argument in borrowing from groundless litigation theories in litigious interference cases redressing a separation of client and counsel); Gergen, supra note 324, at 1178 & n.16 (interference tort); Dennis Patterson, The Pseudo-Debate over Default Rules in Contract Law, 3 S. Cal. Interdisc. L.J. 235, 240-242, 242 n.16 (1993) (contract); see also William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 322 (1990) (outlining an analogous model of statutory interpretation). In particular, Wilson Huhn articulated a pluralist model of analysis that may be applied to all areas of the law and described Bobbit's structural, ethical, and prudential methods of legal reasoning as "policy" arguments consisting of a predictive portion and a value judgment. See Wilson R. Huhn, Teaching Legal Analysis Using a Pluralistic Model of Law, 36 Gonz. L. Rev. 433, 456 (2000-01).

328 See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 511, 518-20, 526, 530-32 (explaining that the courts consider the court protection policy paramount in applying unclean hands at law); see also Yeo, supra note 20, at 157 ("Unconscientiousness in the exercise of legal rights provides the reason for the intervention [of equity]."); cf. Chafee I, supra note 2, at 895 (discussing the overall policy behind unclean hands is that "a court of justice should be very reluctant to do injustice"). Cases emphasize unclean hands as a protector of the process. See, e.g., Manown v. Adams, 598 A.2d 821, 826 (Md. Ct. Spec. App. 1991), rev'd on other grounds, 615 A.2d 611, 620 (Md. 1992) ([T]he policy underlying the clean hands doctrine is institutional. The objective is to prevent the court from assisting in fraud or other inequitable conduct."); Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006) ("The 'clean hands doctrine' applies not only for the protection of the parties but also for the protection of the court." (citation omitted)); see also discussion supra Part II.

329 See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 542-43 (proposing process-based theory of unclean hands where application at law is based on sliding scale between court and party protection); see also Anenson, supra note 314, at 662-63 (listing similar policies for courts to create exceptions to the elements of equitable estoppel); cf. Huhn, supra note 315, at 135 (describing the range of policies as "abstract values . . . instrumental concerns . . . or targeted societal goals").

330 For conduct considered unclean hands that interferes with the judicial mission by tainting the jury pool, see Maldonado v. Ford Motor Co., 719 N.W.2d 809, 815-18 (Mich. 2006) or obstructing witness testimony, see Cummings v. Wayne Cnty., 533 N.W.2d 13, 14 (Mich. Ct. App. 1995). See also Smith v. Cessna Aircraft Co., 124 F.R.D. 103, 105-07 (D. Md. 1989) (perjury); Bartlett v. Dunne, No. C.A. 89-3051, 1989 WL 1110258, at *2-3 (R.I. Super. Ct. Nov. 10, 1989) (perjury). Ancient equity courts exercised their power to remedy abuses of the common law process. See Hohfeld, supra note 10, at 556, 560-61 (citing examples); Mason, supra note 26, at 52-53, 75 (noting the judicial power in equity to prevent abuse of the common law process); cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 339 (1999) (Ginsburg, J., concurring in part and dissenting in part) (justifying the jurisdictional basis of the modern English practice of Mareva injunctions on "equity's traditional power to remedy the 'abuse' of legal process" (citation omitted)).

331 See Morton J. Horwitz, The Changing Common Law, 9 Dalhousie L.J. 55, 62-63 (1984) (discussing the realist attack on the intellectual foundations of conceptualism and formalism); Nim Razook, Obeying Common Law, 46 Am. Bus. L.J. 55, 69-73 (2009) (discussing how realist scholars like Frank, Llewellyn, and Holmes saw their role as one of refuting legal determinism); see also Huhn, supra note 315, at 10-11 ("Rules of law do not describe objective truth, they reflect subjective intentions."); see id. at 57 n.149 (explaining that H.L.A. Hart's criticism of legal formalism was not due to "its reliance upon logic, but its failure to acknowledge the . . . ambiguity of legal rules" (internal parenthetical omitted) (citing Douglas Lind, Logic, Intuition, and the Positivist Legacy of H.L.A. Hart, 52 SMU L. Rev. 135, 152-57 (1999))); Richard A. Posner, Overcoming Law 405 (1995); accord Durfee, supra note 9, at x (commenting that Chafee, a practitioner, professor, and scholar of equity jurisprudence, looked at law as a "kit of tools" to repair, sharpen, or redesign). Justice Cardozo described the diverse and opposing values served by law in attempting to do justice:

> The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. . . . We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding . . . .

Benjamin N. Cardozo, The Paradoxes Of Legal Science 4 (3d prtg. 2006); see also Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 61 (1897), reprinted in 110 Harv. L. Rev. 991, 1000 (1997) (urging educators to train lawyers to consider the "social advantage" of the rule and to educate them to see that "they were taking sides upon debatable and often burning questions").

332 In literary terms, a version of verisimilitude is where the reader is willing to suspend disbelief. See Robert P. Ashley, What Makes a Good Novel?, 60 Eng. J. 596, 596-97 (1971) (discussing Samuel Coleridge's version of verisimilitude); cf. Truthlikeness, Stanford Encyclopedia of Philosophy (Spring 2007), http://plato.stanford.edu/archives/spr2007/entries/truthlikeness/ (noting that the literary idea of verisimilitude has been applied in the philosophical context). In legal parlance, verisimilitude could be equated to legal fictions like the labels "law" and "equity." Cf. Frederic M. Bloom, Jurisdiction's Noble Lie, 61 Stan. L. Rev. 971, 1018 (2009) (characterizing the fixed and unyielding nature of jurisdiction as a "noble lie" in that it does not actually deceive); L.L. Fuller, Legal Fictions (pt. 1), 25 Ill. L. Rev. 363, 367 (1930) ("For a fiction is distinguished from a lie by the fact that it is not intended to deceive.").

333 Cf. Newman, supra note 6, at 13 ("Twenty-three centuries ago Aristotle said that equity is that idea of justice which contravenes the written law." (citation omitted)); Anton-Hermann Chroust, Aristotle's Conception of "Equity" (Epieikeia), 18 Notre Dame Law. 119, 125-26 (1942) (explaining the meaning of equity as a component of justice); Darien Shanske, Note, Four Theses: Preliminary to an Appeal to Equity, 57 Stan. L. Rev. 2053, 2054 (2005) ("Aristotle's account of equity has been received into the legal tradition many times and this reception is ongoing today."). See generally Anenson, supra note 3.

334 The equitable defense of unclean hands has been most recently suggested as a supplement to the regulatory regime in the current financial crisis in an effort to reduce or eliminate excessive executive compensation. See generally T. Leigh Anenson & Donald O. Mayer, ''Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation, 12 U. Pa. J. Bus. L. 947 (2010) (explaining unclean hands as a defense to contract law and outlining its use in the executive pay context). Equity has been used to understand administrative law, Charles E. Clark, The Handmaid of Justice, 23 Wash. U. L.Q. 297, 303 (1938), alternative dispute resolution, Jacqueline M. Nolan-Haley, The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound, 6 Cardozo J. Conflict Resol. 57, 57-60 (2004), and, most recently, presidential powers, Eric A. White, Note, Examining Presidential Power Through the Rubric of Equity, 108 Mich. L. Rev. 113 (2009). Cf. Anenson, supra note 314, at 669 (concluding that the invocation of equitable estoppel "enables juridical actors to (create magic-what Pound called 'juristic chemistry'"-in resolving cases (quoting Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 643 (1923))).

335 Deborah Tall & John D'Agata, The Lyric Essay, Hobart and William Smith Colleges, (2010), http:// www.hws.edu/academics/senecareview/lyricessay.aspx (describing the lyric essay as a unique style of literature published in the Seneca Review). What Helen Vendler says of the lyric poem is true of jurisprudence: "It depends on gaps. . . . It is suggestive rather than exhaustive." Id. (internal quotation marks omitted). Another literary reference squares with the idea of common law-making: "It might move by association, leaping from one path of thought to another by way of imagery or connotation, advancing by juxtaposition or sidewinding poetic logic." Id. (describing the lyric essay as a genre of literature). As Holmes put it, through jurisprudence we might hope to "connect . . . with the universe and catch an echo of the infinite." Holmes, supra note 331, at 1009; see also Karl N. Llewellyn, The Case Law System in America, 88 Colum. L. Rev. 989, 991 (1988).

336 Tall & D'Agata, supra note 335.

337 For courts applying unclean hands without discussion of its application to legal relief, see Mallis v. Bankers Trust Co., 615 F.2d 68, 74-76 (2d Cir. 1980); Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969); Blain v. Doctor's Co., 272 Cal. Rptr. 250, 258-59 (Ct. App. 1990); Kirkland v. Mannis, 639 P.2d 671, 673 (Or. Ct. App. 1982); see also A.I. Gage Plumbing Supply Co. v. Local 300 of the Int'l. Hod Carriers, 20 Cal. Rptr. 860, 865-66 (Dist. Ct. App. 1962) (considering unclean hands in damages action without discussing the merger of law and equity). Correspondingly, courts precluding unclean hands in actions at law tend to rely on pre-merger precedent or none at all. See, e.g., Gen. Dev. Corp. v. Binstein, 743 F. Supp. 1115, 1133-34 (D.N.J. 1990) (applying Florida, Connecticut, and Massachusetts law); Hasbro Bradley, Inc. v. Coopers & Lybrand, 515 N.Y.S.2d 461, 463 (App. Div. 1987).

338 See Big Lots Stores, Inc. v. Jaredco, Inc., 182 F. Supp. 2d 644, 652 (S.D. Ohio 2002); Urecal Corp. v. Masters, 413 F. Supp. 873, 876 (N.D. Ill. 1976); discussion supra note 134; see also Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 Ind. L.J. 223, 253-54 (2003) (discussing the ambiguity left by the decision of Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), regarding the availability of equitable relief when both legal and equitable remedies are pled and whether the issue should be determined by discerning if equity "predominates" or alternatively, if it is "ancillary" or "incidental" to the legal relief claimed).

339 See discussion supra note 62.

340 See Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969) (finding the application of unclean hands furthers the purposes of the statute); Bieter Co. v. Blomquist, 848 F. Supp. 1446, 1449 (D. Minn. 1994) (deciding the applicability of unclean hands in statutory cause of action per the policies of the statute).

341 See Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 532-35 (analyzing how the source of authority to invoke unclean hands has implications for the horizontal and vertical structures of our government (citing Barrett, supra note 324; Beale, supra note 323)); see also id. (discussing potential differences in implied power between the state and federal benches).

342 See Jerome Frank, Civil Law Influences on the Common Law-Some Reflections on "Comparative" and "Contrastive" Law, 104 U. Pa. L. Rev. 887, 895 n.43 (1956) ("In several of our leading law schools, there is now no course on 'equity.'"); Douglas Laycock, Remedies: Justice and the Bottom Line, 27 Rev. Litig. 1, 7 (2007) ("The short explanation is that courses in damages, equity, and restitution were combined into a single course in remedies.") (citing Douglas Laycock, How Remedies Became a Field: A History, 27 Rev. Litig. 161 (2008)); Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. Ill. L. Rev. 269, 272 ("[E]quity was taught as a separate course until the 1950s."); see also Edward D. Re, Introduction to Selected Essays on Equity, supra note 26, at xiv ("[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses."); Stevens, supra note 314, at 422 (criticizing trend of law schools that do not offer a separate course in equity). But see Hohfeld, supra note 10, at 537-38 (agreeing with Maitland's view to eliminate a separate course in equity so as not to preserve the distinctiveness of equity).

343 Anenson, supra note 3, at 480 (citation omitted); see also id. ("It may also explain why courts have applied unclean hands to actions at law without discussion." (citation omitted)). Erosion of the law-equity distinction has been so complete in certain cases that courts and commentators mistake their origins. See Decatur Ventures, L.L.C. v. Stapleton Ventures, Inc., No. 1:04-CV-0562-JDT-WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006) (plaintiff's mistaken belief that in pari delicto defense was equitable), order amended, 2006 WL 3305122, at *1-3, *13 (S.D. Ind. Aug 16, 2006). Professor Laycock cited two cases to make the point that "judges and lawyers no longer understand what such references mean." Laycock, supra note 26, at 70, 81 (citing In re De Laurentiis Entm't Grp. Inc., 963 F.2d 1269, 1272 (9th Cir. 1992) (mis-describing quasi-contract as an equitable remedy); Mertens v. Hewitt Assocs., 500 U.S. 248 (1993) (construing 29 U.S.C. § 1132(a)(3) (1988))). In applying precedent that bans pure discretionary equitable defenses like unclean hands or laches, courts have erroneously banned fully incorporated equitable defenses like estoppel. See Howe v. Fiduciary Trust Co., No. 97-2206, 2001 Mass. Super. LEXIS 135, at *30-31 (Super. Ct. Apr. 19, 2001); Clarke v. Brunswick Corp., 211 N.W.2d 101, 102-03 (Mich. Ct. App. 1973); Russell v. Casebolt, 384 S.W.2d 548, 553 (Mo. 1964). While this oversight may initially appear to contribute to the fusion of law and equity, see Mason, supra note 26, at 62, it actually adds to the lack of coherence and consistency in the law and undermines its development.

344 The lack of guidance from state supreme courts could be both a cause of the confusion in the lower courts and a consequence of the lack of education and training on equitable principles and doctrines. Notably, the US Supreme Court has made errors in its decisions regarding what theories are historically equitable. See John H. Langbein, What ERISA Means By "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317 (2003). In an effort to provide new direction in patent law, the Federal Circuit Court of Appeals has decided to rehear en banc the issue of inequitable conduct and review its link to equity and unclean hands. Therasense, Inc. v. Becton, Dickinson & Co., 374 F. App'x 35 (Fed. Cir. 2010). See Randall R. Rader, Always at the Margin: Inequitable Conduct in Flux, 69 Am. U. L. Rev. 777,784 (2010) (discussing the Federal Circuit's failure to restrain the doctrine). See also Robert J. Goldman, Evolution of the Inequitable Conduct Defense in Patent Litigation, 7 Harv. J.L. & Tech. 37, 67 (1993) ("Over a period of 37 years, various circuits experimented with three different standards of materiality and two different standards of intent.") (discussing the inequitable conduct defense derived from unclean hands before the creation of the Federal Circuit Court of Appeals).

345 See Maldonado v. Ford Motor Co., 719 N.W.2d 809, 818 (Mich. 2006); see also discussion supra notes 174-77 and accompanying text. For a discussion of the state supreme courts that have rejected the defense at law, see supra Part I.

346 The Supreme Court has not considered the issue of unclean hands despite expressly incorporating other equitable defenses like estoppel into legal actions even prior to the federal merger of law and equity in the 1938 Federal Rules of Civil Procedure. See Kirk v. Hamilton, 102 U.S. 68, 78 (1880) (declaring that "there would seem no reason why its application should be restricted in courts of law"); see also discussion supra note 17 and accompanying text.

347 See discussion supra notes 38-43 and accompanying text. The Supreme Court had the opportunity to resolve the fusion debate in the context of the equitable defense of laches, but avoided it and ruled on other grounds. See Cnty. of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 244-45 (1985) (discussing but not deciding whether equitable defense of laches applies to bar legal relief); cf. City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 217, 221 (2005) (invoking laches to bar equitable relief). The Second Circuit later adopted laches at law. See Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266, 273-74, 276 (2d Cir. 2005). The legal adoption of laches in the area of Indian land claims has been the focus of scholarly attention. See, e.g., Matthew L.M. Fletcher, The Supreme Court's Indian Problem, 59 Hastings L.J. 579 (2008); Kathryn E. Fort, The New Laches: Creating Title Where None Existed, 16 Geo. Mason L. Rev. 357 (2009).

348 Pound, supra note 18, at 35; supra note 25 and accompanying text; cf. Sidney Post Simpson, Fifty Years of American Equity, 50 Harv. L. Rev. 171, 179-81 (1936) (predicting the future of equity is good and certain because it is a flexible tradition for allowing growth in the law).

349 See Thomas O. Main, Traditional Equity and Contemporary Procedure, 78 Wash. L. Rev. 429, 495-507, 514 (2003) (calling for more equity-like civil procedures); Mason, supra note 26, at 75 ("Debate about the fusion of law and Equity goes back for centuries."); Nolan-Haley, supra note 334, at 59 n.15 (calling for a return to the values of equity in mediation) (citing Martha C. Nussbaum, Equity and Mercy, 22 Phil. & Pub. Aff. 83 (1993)); id. at 67-70 (same); Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 975-1002 (1987) (arguing for less equity-like civil processes); see also Garrard Glenn & Kenneth Redden, Equity: A Visit to the Founding Fathers, 31 Va. L. Rev. 753 (1945) (reviewing history of equity to demonstrate that the traditional theory of the equitable process can help solve modern problems).

350 See, e.g., Chafee, supra note 26, at iii-iv; Laycock, supra note 317, at 693 (noting that law-equity jurisdictional "rules . . . have become obstacles to decision instead of guides"); Laycock, supra note 26, at 78; Pound, supra note 18, at 35; see also Chafee, supra note 5, at 303 ("One of the chief troubles with the frequent preoccupation of judges with questions of power is that it makes them slide over much more important questions of wisdom and fairness which ought to receive careful attention."); Newman, supra note 6, at 29-30; Garvey, supra note 42, at 67. Certain judges are in accord with legal scholars on this point. See, e.g., Maksym v. Loesch, 937 F.2d 1237, 1248 (7th Cir. 1991) (Posner, J.) ("[W]ith the merger of law and equity there is no longer a good reason to distinguish between the legal and equitable character of defenses, save as the distinction may bear on matters unaffected by the merger, such as the right to trial by jury in cases at law, a right preserved in federal courts by the Seventh Amendment." (citation omitted)); USH Ventures v. Global Telesystems Grp., Inc., 796 A.2d 7, 15-16 (Del. Super. Ct. 2000); Mason, supra note 26, at 70 ("Labels can operate as signposts, but they can also be misleading either because they may conflate separate concepts or (when different labels are seized upon as automatic indicators of distinctive legal concepts) because they may impede parallels or analogies being drawn (that is, principled fusion)."). Outside the United States, there have been strong opponents of fusion. See Edelman & Degeling, supra note 324, at 1; see also Mason, supra note 26, at 45 (commenting that academic cultures have also done their part to preserve them in Australia).

351 See generally Anenson, supra note 3; Anenson, Process-Based Theory of Unclean Hands, supra note 4.

352 See, e.g., Chafee I, supra note 2, at 878 (calling unclean hands a mischievous doctrine capable of causing harm); see also Henry L. McClintock, Handbook of Equity 29 (1936) (noting that the "brevity and generality" of the maxims of equity "prevent them from having much utility" in predicting court action in a certain situation); cf. Cardozo, supra note 318, at 23 ("The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined." (quoting Munroe Smith, Jurisprudence 21 (1908))). See also Anenson, supra note 3, at 507 ("[W]hile discretionary doctrines such as unclean hands may be criticized by lawyers as lacking legal certainty and predictability, they paradoxically provide legal certainty for laypersons and foster legitimacy in our courts."); accord Llewellyn, supra note 335, at 991 (explaining that Llewellyn justified the case law system in America by explaining how judicial decisions provide congruence between legal rules and "'real-life norms"' which fosters legitimacy in our courts).

353 See, e.g., Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 758 (1982); Steve Hedley, Rival Taxonomies Within Obligations: Is There a Problem?, in Equity in Commercial Law, supra note 20, at 77, 87 (advocating the continued use of equity but noting that there will be legitimate concerns over the degree of flexibility that should be allowed) (citing articles on debate over "discretionary remedialism" (citation omitted)); Rendleman, supra note 26, at 64 (citing articles devoted to discretion in substance,

procedure, and jurisprudence); see also Newman, supra note 6, at 15-16 (citing "equality" as one of the necessary virtues of justice (quoting Frederick Pollock, Jurisprudence 37 (5th ed. 1923))); Robert G. Bone, Who Decides?: A Critical Look at Procedural Discretion, 28 Cardozo L. Rev. 1961, 1975-2002 (2007) (questioning trial judge discretion to properly administer procedure); Main, supra note 349, at 444 ("[T]here is no more fundamental social interest than that law should be uniform and impartial." (citation omitted)). Notably, the lack of reconciliation between relevant legal and equitable bodies of law is also detrimental to the certainty and predictability of law. See Anenson, supra note 327, at 205; Gergen, supra note 324, at 1221-22.

354 See Anenson, supra note 3, at 508 (commenting that the defense has "served as a significant safety valve in equity cases for more than two hundred years" and arguing that the rule of relatedness provides a reasonable prescription for the application of the defense (citation omitted)); accord Smith, supra note 20, at 38 (discussing the relationship between equity and law and noting that discretion is not necessarily an injustice); see also Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 562 (noting that attempting to eradicate unclean hands from our case law is not within the realm of reality as lawyers are asserting it and some courts are listening). In addition to litigant protection, the defense of unclean hands also serves the interests of the court in providing a fair and impartial administration of justice. Id. at 522-41 (discussing primary purpose of unclean hands is court protection and proposing a process-based theory of application).

355 Wilson Huhn's insight was that standards evolve into rules through the use of formalistic analogies that identify the factual similarities in the cases that apply the standard. See Wilson Huhn, The Stages Of Legal Reasoning: Formalism, Analogy, and Realism, 48 Vill. L. Rev. 305, 378-79 (2003). Rules evolve into standards through the use of realistic analogies that identify the interests justifying exceptions to the rule. Id. at 307 (proposing that precedent bridges the transition between formalism and realism and vice versa); see also Anenson, supra note 314, at 643-51 (illustrating the phenomena in cases considering the equitable defense of estoppel); cf. Amy Coney Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1072 (2003) ("Allowing an issue to be hashed out multiple times compensates for the imperfections-the very humanness-in the process of decisionmaking. It allows the courts to see a more complete picture before rushing to judgment.").

356 See Smith, supra note 20, at 27 (calling for a balanced approach to the fusion of law and equity). Stephen Burbank explained:

> We have been fortunate that our system has included, most of the time and in most American jurisdictions, both law and equity, each of which requires the other and both of which, in combination, have helped us over more than two hundred years to make social and economic progress. That progress has often not come easily, and there is much of it still to be made.

Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power-A Case Study, 75 Notre Dame L. Rev. 1291, 1346 (2000); see also Hedley, supra note 353, at 87 ("A certain amount of theoretical incoherence is a necessary price for allowing both common law and equity to develop; allowing both to develop is necessary if they are not to become irrelevant to the needs of today." (citation omitted)). Emily Sherwin reminds us that there is restraint in the common law construction process. Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179, 1186-97 (1999) (explaining the benefits of judge-made law as providing numerous data for decision-making, representing the collaborative efforts of judges over time, correcting the biases that might lead judges to discount the force of precedent, and exerting a conservative force in the law to change at a gradual pace); see also Anenson, supra note 314, at 659-60 (discussing how equitable defenses are "built brick by brick on the backs of numerous judges bound by past precedents in saying what the law is-one case at a time" (citation omitted)).

357 See Burbank, supra note 356, at 1292 ("It did not take long after Professor Chayes celebrated the triumph of equity in public law litigation to recognize that the announcement was premature-part prophecy, partly unfulfilled-at least if equity meant what he thought or hoped it meant." (citations omitted) (internal quotation marks omitted)); accord Edelman, supra note 313, at 380 ("'[T]he dream has been a long time coming.' It seems, in Australia at least, that the dream still has some time to come." (quoting Justice Mason of the New South Wales Court of Appeals in reference to Maitland's prophesy)); see also Mason, supra note 313, at 17 (listing examples of judges who "fashioned new principles applicable at common law or equity by drawing upon the companion body of law"); Smith, supra note 25, at 26 (citing Mansfield and Blackstone as passionate advocates of substantive fusion). Compare Clark, supra note 18, at 2 ("The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law . . . ." (quoting Frederic William Maitland, Equity 20 (1910))), and Sward, supra note 151, at 385 (discussing how the original drafters of the Field Code intended to abolish "'not only the forms but the "inherent" distinctions' between law and equity" (citation omitted)), with T.A. Green, A General Treatise on Pleading and Practice in Civil Proceedings at Law and in Equity under the Code System 51-52 (1879) (advising that the "substance of [common law and equitable actions] remains unchanged and wholly unchangeable, and cannot be united, fused or commingled into one by any human legislation"); see also Newman, supra note 6, at 53 ("'reform . . . came too soon"' for the newer equitable doctrines (quoting Roscoe Pound (citation omitted), Address before the Nebraska State Bar Association (Nov. 24, 1908))); Anenson, Process-Based Theory of Unclean Hands, supra note 4, at 517-18

("Despite the rhetoric of completing the union of law and equity, procedural reform was initially interpreted by most courts to forever bar this presumably substantive defense in legal cases." (citations omitted)); Pound, supra note 18, at 26.

358 As discussed supra note 26 and accompanying text, Zechariah Chafee, and more recently, Douglas Laycock, have advocated the removal of the labels "law" and "equity" since unification. See supra note 350 (referencing Judge Posner of the US Court of Appeals for the Seventh Circuit, and Justice Mason of the Court of Appeals of New South Wales, Australia); accord Andrew Burrows, Fusing Common Law and Equity: Remedies, Restitution and Reform 44 (2002) (Hochelaga Lectures 2001) (asserting "to see the two strands of authority, at law and in equity, moulded into a coherent whole" (citation omitted)); Andrew Burrows, We Do This at Common Law but That in Equity, 22 Oxford J. Legal Stud. 1, 4 (2002); see also Smith, supra note 25, at 22-23 (noting that "terminological fusion, non-substantive in itself, is liable to lead to substantive fusion").

359 See discussion supra Parts I-II; cf. Mason, supra note 313, at 14 (noting confused state of equity in Australia due to lack of principled fusion).

360 See, e.g., Hohfeld, supra note 10, at 567 n.23 (explaining that equity resulted in "a liberalizing and modernizing of the law" (citation omitted)); Laycock, supra note 26, at 67-68 (explaining that common law without equity would have been a functioning system, but in many applications it would have been "'barbarous, unjust, absurd"' (quoting 1 Frederick William Maitland, Equity 19 (2d ed. 1936))); Mason, supra note 26, at 74 (commenting that "the Court of Chancery flowered 'to soften and mollify the Extremity of the Law"' (citation omitted)); Roscoe Pound, Do We Need a Philosophy of Law?, 5 Colum. L. Rev. 339, 350 (1905) (concluding that "the rise of the court of chancery preserved [our legal system] from medieval dry rot"); see also Oliver Wendell Holmes, Early English Equity, 1 Law.Q. Rev. 162, 162-63 (1885) (discussing substantive doctrines developed in chancery); cf. Laycock, supra note 26, at 67 (calling equity without common law "'a castle in the air"' given that the imposition of equitable duties presupposed legal rights (quoting Maitland, supra)).

361 Laycock, supra note 317, at 693; see also Cardozo, supra note 318, at 35 (stating that the justification of judicial decisions ultimately depends on the judgment of lawyers).

362 See Pound, supra note 334, at 660; accord Hohfeld, supra note 10, at 557 (noting how modes of thought and language may perpetrate the old dual system long after the merger of law and equity).

363 Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) (Judge Friendly writing for the majority) (discussing the irreparable injury rule of remedies). It would be better that courts address the matter of unclean hands at law directly and correctly. See generally Anenson, supra note 3, at 508-09 (calling for such explicit recognition of unclean hands in legal cases); see also Huhn, supra note 315, at 63 ("The disclosure of the true reasons for a decision performs a valuable function: the stated premises of the law will over time be empirically tested . . . ." (citation omitted)); Karl Llewellyn, Book Reviews, 52 Harv. L. Rev. 700, 703 (1939) (reviewing O. Prausnitz, The Standardization of Commercial Contracts in English and Continental Law (1937)) (emphasizing that "[c]overt tools are never reliable tools"); Newman, supra note 6, at 261 (noting that the indirect method of adoption is a form of common law resistance to the expansion of equity that retards wider acceptance of the doctrine).

364 The difficulty of equity is recognized even in those countries that continue a strong equity tradition. Justice Gummow of the High Court of Australia explained that "[e]quity is hard law, even to those who have spent much of their professional lives wrestling with it." William Gummow, Conclusion, in Equity in Commercial Law, supra note 20, at 515, 518. Disputes raising equitable theories tend to be legally and factually complex. See generally Doug Rendleman, Complex Litigation: Injunctions, Structural Remedies, and Contempt (2010). The complicated nature of cases raising equitable issues is due in part to the historical content of the rules themselves as well as their foundation in philosophy. See, e.g., Re, supra note 342, at iv, xii (commenting that no other subject "offers as rich an opportunity to delve into problems of jurisprudence and the philosophy of law as does equity"). US Supreme Court jurisprudence on equitable issues has been far from clear or accurate. See, e.g., Langbein, supra note 344, at 1338-66 (criticizing historical errors of the US Supreme Court concerning what theories arose in equity in ERISA litigation); Laycock, supra note 13, at 168 (citing the Supreme Court's confusion over the tests for permanent and preliminary injunctions in eBay Inc. v. MereExchange, L.L.C., 547 U.S. 388 (2006), as "a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist"). See also supra note 24.

365 Twenty-five years before my research regarding the fusion of unclean hands at law, see Anenson, supra note 3; Anenson, Process-Based Theory of Unclean Hands, supra note 4, there was a student note addressing the topic. See Lawrence, supra note 317; see also Rose, supra note 104 (note discussing fusion of unclean hands in Oregon).

366 See Llewellyn, supra note 335, at 991 (discussing Llewellyn's confidence that legal scholarship can contribute to the improvement of doctrine); Mason, supra note 26, at 61 (commenting on the influence of judges and academics on the issue of fusion and the progress of the law); see also Emerson H. Tiller & Frank B. Cross, Essay, What is Legal Doctrine?, 100 Nw. U. L. Rev. 517, 532-33 (2006) ("Do legal scholars play a role in limiting the use of certain legal doctrines or, perhaps, introducing or endorsing legal doctrines that courts will use?"). Even in those jurisdictions that have a single precedent rejecting unclean hands in cases seeking legal relief, courts should reconsider its application at law. See Barrett, supra note 355, at 1072-74 (proposing that the precedential value of "thin" versus "thick" precedent is different in that "'[i]t is the existence of the line of cases, not any one case, that gives a proposition its force").

367 Patterson, supra note 327, at 272 ("Lawyers have always recognized the effects of 'hermeneutic delay'-that is, the meaning of today's precedent can only be known in the fullness of time." (citation omitted)). Of course, there is the remote possibility of legislative correction explicating that unclean hands is available against causes of action seeking legal relief.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Veeam Software Corporation v. Monckton, S.D.Ohio, July 1, 2016

147 Ohio App.3d 382
Court of Appeals of Ohio,
Tenth District, Franklin County.

UZ ENGINEERED PRODUCTS COMPANY,
Plaintiff–Appellee and Cross–Appellant,
v.
MIDWEST MOTOR SUPPLY CO., INC.,
Defendant–Appellant and Cross–Appellee. *

No. 01AP–551.
|
Decided Dec. 20, 2001.

Synopsis

Former employer brought action against former employees' new employer, alleging that new employer tortiously interfered with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products, and new employer counterclaimed for declaratory judgment. The Court of Common Pleas, Franklin County, entered judgment on jury's verdict awarding former employer $69,837 in compensatory damages and $30,000 in punitive damages. Cross-appeals were taken. The Court of Appeals, Peggy L. Bryant, P.J., held that: (1) evidence regarding new employer's noncompetition agreements and new employer's previous litigation regarding noncompetition agreements was relevant; (2) former employer's noncompetition and nonsolicitation agreements, containing two-year territorial restrictions, were enforceable; (3) itemization of consequential damages was not required; (4) evidence supported the determination of past and future lost profits; and (5) award of punitive damages was warranted.

Affirmed.

West Headnotes (32)

[1] **Labor and Employment** Evidence

Evidence regarding noncompetition agreements signed by employees, after they left their former employer and joined new employer, was relevant, in former employer's action against new employer for tortiously interfering with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products; nature and extent of restrictive covenants used by companies in MRO industry, and determination whether such covenants were "reasonable," were at issue, as was new employer's credibility in asserting that former employer's territorial and two-year time restrictions were overly broad, unreasonable, and unenforceable when, as matter of practice, new employer included the very same territorial and time restrictions in its own employment agreements.

[2] **Contracts** Restraint of Trade or Competition in Trade

Noncompetition agreements in employment contracts are enforceable only to the extent they: (1) are necessary to protect the employer's legitimate interests; (2) do not impose undue hardship on the employee; and (3) are not adverse to the public interest.

2 Cases that cite this headnote

[3] **Contracts** Restraint of Trade or Competition in Trade

Various factors are considered in determining whether an employee's noncompete agreement is reasonable, including the agreement's geographic and time limitations.

1 Cases that cite this headnote

[4] **Trial** Discretion of court

The trial court's denial of a motion for mistrial is a matter committed to the sound discretion of the trial court.

[5] **Appeal and Error** Admission or exclusion of evidence in general

The trial court's decision whether to admit evidence is a discretionary decision that the appellate court may reverse only upon a showing of an abuse of that discretion.

[6] **Labor and Employment** Evidence

Evidence of new employer's previous litigation concerning other companies' noncompete covenants was relevant, in former employer's action against new employer for tortiously interfering with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products; new employer's president testified that he was unaware of any other company in the industry that enforced territorial limitations in its restrictive covenants, but on cross-examination he acknowledged that in previous suit against new employer, new employer had agreed in a settlement that two-year territorial restriction was reasonable, and the evidence was also relevant to whether new employer knew that territorial limitations were valid and enforceable and whether new employer knew that it was interfering with valid contract provision and acted with conscious disregard of former employer's contractual rights, providing basis for award of punitive damages.

[7] **Damages** Loss of Earnings, Services, or Consortium

Evidence of former employer's lost business income, relating to all six of the sales representatives hired by new employer, was relevant to determining former employer's consequential damages, in former employer's action against new employer for tortiously interfering with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products, though former employer narrowed its claim at trial to tortious interference with employment agreements of only three employees, where one of those three employees induced the other three employees to leave their employment with former employer.

[8] **Damages** Loss of Profits

Consequential damages in an action for tortious interference with contract include all damages proximately caused by the defendant's misconduct, including lost profits.

2 Cases that cite this headnote

[9] **Appeal and Error** Submission of issues or questions to jury

New employer invited any error regarding, and therefore waived appellate review of, the trial court rather than the jury deciding whether former employer's noncompetition agreements were reasonable and enforceable, in former employer's action alleging that new employer tortiously interfered with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products; new employer brought counterclaim for declaratory judgment that the noncompetition agreements were unreasonable and unenforceable, new employer's pretrial motion to bifurcate trial asked trial court rather than jury to decide the reasonableness and enforceability issues, and new employer did not object when trial court advised counsel that it would be instructing jury that former employer's noncompetition agreements were enforceable as matter of law.

[10] **Appeal and Error** Invited, induced, or encouraged error

The invited-error doctrine prohibits a party from taking advantage of an error which he himself invited or induced.

1 Cases that cite this headnote

[11] **Contracts** Questions for jury

Whether a restrictive covenant in a contract, including an employee's covenant not to compete, is valid and enforceable is an issue for the court to decide.

1 Cases that cite this headnote

[12] **Contracts** Restriction necessary for protection

Covenants not to compete will be enforced only to the extent that the restrictions imposed on an employee are reasonably necessary to protect the employer's legitimate business interests.

3 Cases that cite this headnote

[13] **Estoppel** Claim inconsistent with previous claim or position in general

Trial court could have found that new employer was estopped from asserting that the two-year territorial noncompetition period was unreasonable, in former employer's action alleging that new employer tortiously interfered with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products, where new employer's president testified that new employer, for over 15 years, used an employment contract for its employees incorporating two-year territorial restrictions virtually identical to the territorial and time restrictions former employer imposed, and president acknowledged that in other litigation, new employer had agreed in a settlement order that two-year restriction on territory was reasonable.

[14] **Contracts** Restraint of Trade or Competition in Trade

In determining the validity of an employee's covenant not to compete, each case must be decided on its own facts.

[15] **Contracts** Restraint of Trade or Competition in Trade

The list of factors a court may consider when determining the validity of an employee's covenant not to compete is not limited.

1 Cases that cite this headnote

[16] **Contracts** Restriction necessary for protection

Former employer had legitimate business interest in imposing time and territorial restrictions to limit its former employees' ability to solicit customers for competitor, as element for determining the enforceability of covenant not to compete, in former employer's action alleging that new employer tortiously interfered with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products; the three sales representatives hired by new employer had extensive information regarding former employer's products and sales practices, including pricing, that would be advantageous to a competitor in soliciting customers, regardless whether the customers had been former or existing customers of former employer or its former employees.

5 Cases that cite this headnote

[17] **Contracts** Restriction necessary for protection

Contracts Preventing disclosure of trade secrets

An employer has a legitimate interest in limiting not only a former employee's ability to take advantage of personal relationships the employee has developed while representing the employer to the employer's established client, but also in preventing a former employee from using his former employer's customer lists or contacts to solicit new customers.

7 Cases that cite this headnote

[18] **Contracts** Restriction necessary for protection

An employer has a legitimate interest in preventing a former employee from using the skill, experience, training, and confidential information the former employee has acquired during the employee's tenure with his employer in a manner advantageous to a competitor in attracting business, regardless of whether it was an already established customer of the former employer.

8 Cases that cite this headnote

[19] **Contracts** Limitations as to time and place in general

Enforcement of former employer's two-year territorial restriction would not be injurious to the public, as element for determining the enforceability of former employees' noncompetition agreements, in former employer's action alleging that new employer tortiously interfered with employment agreements for sales representatives for maintenance, repair, and operations (MRO) products; MRO industry was highly competitive, with at least ten national companies in addition to various local and chain competitors.

[20] **Contracts** Restraint of Trade or Competition in Trade

Whether an employee's noncompetition agreement is injurious to the public, as element for determining the enforceability of such an agreement, is primarily concerned with the public's interest in promoting fair business competition.

4 Cases that cite this headnote

[21] **Damages** Questions to Be Submitted

New employer was not entitled to interrogatories asking jury to itemize, with respect to each of three employees, the former employer's consequential damages from new employer's tortious interference with employment agreements; the total amount of damages, rather than itemized damages, was the ultimate or determinative issue, and the individual employees were not defendants, meaning that new employer was solely liable for the damages. Rules Civ.Proc., Rule 49(B).

[22] **Trial** Power and Duty of Court to Require Special Findings

Trial Sufficiency of requests in general

A trial court does not have a mandatory duty to submit written interrogatories to the jury that a party has requested; rather, a trial court retains discretion to reject proposed interrogatories that are ambiguous, redundant, or legally objectionable. Rules Civ.Proc., Rule 49(B).

3 Cases that cite this headnote

[23] **Trial** Power of Jury to Find Specially

The essential purpose to be served by jury interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial, which are ultimate issues that when decided will settle the controversy between the parties. Rules Civ.Proc., Rule 49(B).

2 Cases that cite this headnote

[24] **Torts** Contracts

The elements of the tort of intentional interference with contract are: (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) lack of justification; and (5) resulting damages. Restatement (Second) of Torts § 766.

2 Cases that cite this headnote

[25] **Damages** Injuries affecting limited or special rights or interests

Damages Extent of damage in general

A plaintiff may recover all damages proximately caused by an actor's misconduct, in an action for tortious interference with contract; such damages include lost profits reduced by the expenditures saved by not having to produce that profit, if both the existence of the loss and the dollar amount of the loss are proven to a reasonable certainty.

4 Cases that cite this headnote

[26] **Damages** Injuries affecting limited or special rights or interests

Lost profit damages, in an action for tortious interference with contract, are measured by the

loss, including lost profits the plaintiff business sustained as a result of the tortious interference, not by its effect upon the defendant's business.

7 Cases that cite this headnote

[27] **Damages** Loss of profits

A plaintiff seeking damages for lost profits may not merely assert that it would have made a particular amount of profits, but must prove lost profits with calculations based on facts.

11 Cases that cite this headnote

[28] **Labor and Employment** Damages

Evidence established that former employer's past and future lost profits were $69,837, in action against new employer for tortious interference with employment agreements; independent economist, calculated past lost profits by looking at value of sales by the five sales representatives while they were employed with former employer, compared those values with sales values for each territory after sales representatives joined new employer, and deducted variable costs, and calculated future lost profits by performing regression analysis on former employer's financial statements.

2 Cases that cite this headnote

[29] **Damages** Loss of Profits

Loss of future profits may be recovered as part of a claim of compensatory damages in an action for tortious interference with contract.

1 Cases that cite this headnote

[30] **Appeal and Error** Competent or credible evidence in general

Appeal and Error Against Weight of Evidence

An appellate court will not reverse a judgment as against the weight of the evidence if competent, credible evidence supports the judgment.

[31] **Damages** Punitive damages

Evidence established new employer's actual malice, so that award of punitive damages was warranted, in former employer's action for tortious interference with employment agreements; new employer's president acknowledged that an employee who goes to work for direct competitor within two years can cause harm to the former employer by soliciting former or new customers and acknowledged that new employer had sought to enforce its own two-year territorial restrictions on competition and solicitation, president admitted that new employer consciously ignored territorial restrictions and assigned the new employees to work in their old territories and to call on new customers within their respective territory, and new employer was aware that new employees solicited some of their former customers.

[32] **Damages** Grounds for Exemplary Damages

A trial court may instruct on punitive damages only if plaintiff proves "actual malice," defined as either: (1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

1 Cases that cite this headnote

Attorneys and Law Firms

****1073** ***388** Reminger & Reminger and Nicholas D. Satullo; William A. Barnett and Jennifer H. Gorman, Cleveland, for appellee.

Ferron & Associates, John W. Ferron, Sloan T. Spaulding and Dawn M. Dunker, Columbus, for appellant.

Opinion

PEGGY L. BRYANT, Presiding Judge.

{¶ 1} Defendant-appellant, Midwest Motor Supply Co., Inc., d.b.a. Kimball–Midwest, appeals from a judgment of the Franklin County Court of Common Pleas awarding plaintiff-appellee, UZ Engineered Products Company, $69,837 in compensatory damages and $30,000 in punitive damages on plaintiff's claim that defendant tortiously interfered with the employment agreements of plaintiff's former employees.

{¶ 2} Plaintiff and defendant are both companies in the maintenance, repair, and operations ("MRO") industry who sell products, composed mostly of small parts, throughout the United States to businesses, institutions, and agencies that perform maintenance for buildings, machinery, equipment, and vehicles. Highly competitive and generating over $160 billion in annual sales, the MRO industry comprises at least ten companies, including plaintiff and defendant, who distribute products on a national basis. It also includes mail order suppliers and other local and national businesses with whom the national companies compete. MRO companies generally sell their products through sales representatives, who make personal calls on active and potential customers and sell the products on a straight commission basis. Plaintiff employs approximately one hundred thirty-five sales representatives, and defendant employs approximately three hundred thirty sales representatives.

{¶ 3} Because the MRO business is competitive and compensation is based solely on commission, the attrition rate of sales employees in the MRO industry is high, with fifty to eighty percent of new hires leaving within the first year of employment. Employees of one MRO company often leave to work for another MRO company. As a result, companies within ****1074** the MRO industry commonly require their employees to sign employment agreements containing restrictive covenants to protect the company's customer and employee bases. Typical restrictive covenants, at issue here, contain noncompete and nonsolicitation clauses in which an employee agrees that for a specified period of time after the ***389** employee leaves the company, he or she will not solicit business for a competitor or solicit the company's employees to work for a competitor.

{¶ 4} In 1998 and 1999, defendant hired six of plaintiff's employees, including (1) Jeffrey Moore, who worked for plaintiff for eighteen years as a sales manager and was responsible for recruiting, hiring, and training sales representatives, (2) James Grady, who worked for plaintiff for twelve years and was one of plaintiff's top sales representatives when defendant hired him, and (3) Michael McLane, who worked for plaintiff for approximately ten years as a sales representative and area sales manager, during which time he reported to Moore as his supervisor. The three remaining employees defendant hired were Katherine Weber, Michael Greig, and Stanley Boyd, all of whom were sales representatives when they worked for plaintiff.

{¶ 5} Before defendant hired the employees, defendant's management knew that the employees had signed written employment agreements with plaintiff that contained noncompete and nonsolicitation restrictive covenants. Although the precise wording in the employees' agreements differed, each of the noncompete and nonsolicitation clauses was similar in material respects. Specifically, in the noncompete clauses, each employee agreed that for a period of two years following termination of the employee's employment with plaintiff, the employee would refrain from working for a direct or indirect competitor in the same geographic territory in which the employee had worked for plaintiff. In the non-solicitation clauses, the employee agreed that for the same two-year period after the employee left plaintiff's employment, he or she would not solicit plaintiff's other employees to leave their employment with plaintiff.

{¶ 6} Moore was the first of plaintiff's former employees defendant hired. After he began work with defendant, he acknowledged engaging in conversations that he referred to as "recruiting" with some of plaintiff's existing employees, including some of the other individuals defendant subsequently hired from plaintiff. The geographic territories defendant assigned to each of plaintiff's former employees were identical to or substantially overlapped the territories the employees were responsible for while in plaintiff's employment. Moreover, after some of plaintiff's former employees began working for defendant, they solicited some of the same customers they had solicited while employed with plaintiff, despite knowing that they had noncompete agreements with plaintiff. The contacts and solicitations were documented on various reports submitted to defendant.

{¶ 7} Plaintiff sued defendant and its six former employees defendant hired (the "individual defendants"), seeking injunctive relief and compensatory and punitive damages for tortious interference with and violation of the noncompete and nonsolicitation clauses in plaintiff's

employment agreements with its former ***390** employees. Plaintiff alleged the violations resulted in loss of customers and employees, loss of business income, and damage to its business reputation and goodwill. Defendant filed a counterclaim seeking a declaratory judgment that plaintiff's employment agreements were overly broad, unreasonable and unenforceable with regard to the ****1075** geographic and two-year time restrictions, and defendants sought reformation and modification of plaintiff's employment agreements accordingly.

{¶ 8} Before and during trial, plaintiff dismissed its claims against the individual defendants, withdrew its claims for injunctive relief, and withdrew all claims against defendant except a claim for tortious interference with the contracts of Moore, Grady, and McLane, for which plaintiff sought compensatory and punitive damages at trial. At the conclusion of trial, the trial court determined as a matter of law that the restrictive covenants in plaintiff's employment agreements were reasonable and enforceable as written. In its verdict, the jury found that defendant had tortiously interfered with plaintiff's employment agreements and awarded plaintiff $69,837 in compensatory damages and $30,000 in punitive damages.

{¶ 9} Defendant appeals, assigning the following errors:

{¶ 10} "I. The trial court erred to appellants' prejudice by allowing appellee to comment upon before the jury, and introduce into evidence, irrelevant and improper exhibits and testimony including evidence of Kimball–Midwest's own employment agreements and other litigation and settlements, and the court erred in overruling appellants' motion for a mistrial.

{¶ 11} "II. The trial court erred in denying the appellants' motion for directed verdict where appellee failed to establish that its non-compete agreement was reasonable and enforceable.

{¶ 12} "III. The trial court erred in denying appellants' right to a jury trial by declaring that UZ's non–compete agreements with Moore, McLane and Grady were reasonable and enforceable 'as a matter of law.'

{¶ 13} "IV. The trial court erred in refusing to submit to the jury certain of the appellants' proposed interrogatories.

{¶ 14} "V. The jury's damage award against appellant Kimball–Midwest was against the manifest weight of the evidence adduced at trial, and the trial court erred in instructing the jury on the availability of punitive damages.

{¶ 15} "VI. The trial court erred in adopting appellee's proposed findings of fact and conclusions of law and appellee's proposed judgment entry; moreover, the trial court's limited findings and conclusions simply do not support the trial court's judgment as a matter of law."

***391** {¶ 16} Plaintiff presents a single cross-assignment of error:

{¶ 17} "The trial court could have properly determined that the restrictive covenants in appellee's employment contracts were enforceable pursuant to the doctrine of estoppel."

[1] {¶ 18} In its first assignment of error, defendant asserts that the trial court erred in allowing plaintiff's counsel to comment in opening statement regarding the restrictive covenants contained in defendant's own employment agreements with the individual defendants. Defendant argues that it was unfairly prejudiced by those comments that defendant maintains warranted a mistrial, and by the admission of testimonial and documentary evidence regarding defendant's noncompete and nonsolicitation agreements. Defendant notes that the issue at trial was whether defendant had tortiously interfered with *plaintiff's* employment contracts with Moore, McLane, and Grady, and that defendant's own contracts with those individuals were not in issue and were therefore irrelevant. Defendant contends that it was further prejudiced by irrelevant evidence concerning defendant's previous litigation ****1076** and settlements with other companies concerning noncompete agreements.

[2] **[3]** {¶ 19} The parties agree that noncompetition agreements in employment contracts are enforceable only to the extent they (1) are necessary to protect the employer's legitimate interests, (2) do not impose undue hardship on the employee, and (3) are not adverse to the public interest. *Rogers v. Runfola & Assoc., Inc.* (1991), 57 Ohio St.3d 5, 565 N.E.2d 540; *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 71 O.O.2d 12, 325 N.E.2d 544, paragraph two of the syllabus. See, also, *Brentlinger Enterprises v. Curran* (2001), 141 Ohio App.3d 640, 645–646, 752 N.E.2d 994. Various factors are considered in whether a noncompete agreement is reasonable, including the agreement's geographic and time

limitations. *Raimonde,* supra, at 25, 71 O.O.2d 12, 325 N.E.2d 544.

{¶ 20} While defendant acknowledged at trial that noncompete and nonsolicitation clauses were frequently used by companies in the MRO industry, defendant maintained that the territorial restrictions contained in plaintiff's employment agreements were unnecessary and therefore invalid, and the two-year restrictive period was unnecessarily long and therefore unenforceable. Defendant argued that the only necessary and reasonable restriction was a customer-oriented restriction prohibiting former employees from soliciting their former customers for a period of time less than two years.

{¶ 21} To rebut defendant's contention that plaintiff's territorial and time restrictions were unreasonable and unenforceable, plaintiff presented evidence of defendant's own employment agreements with its employees as "best evidence" of the type of noncompete and nonsolicitation covenants used, and thus accepted as ***392** reasonable, by the MRO industry generally and defendant specifically. The restrictive covenants in defendant's employment contracts, like those in plaintiff's employment contracts, provided that for a period of two years after an employee of defendant left the company, the employee (1) would not work for a direct or indirect competitor within any geographical area in which the employee had responsibility while employed with defendant, and (2) would not solicit defendant's employees to leave their employment with defendant.

[4] **[5]** {¶ 22} The trial court's denial of defendant's motion for mistrial was a matter committed to the sound discretion of the trial court. *State v. Garner* (1995), 74 Ohio St.3d 49, 59, 656 N.E.2d 623. Similarly, the trial court's decision whether to admit evidence was a discretionary decision that this court may reverse only upon a showing of an abuse of that discretion. *Robinson–Lloyds, Ltd. v. Ohio Dept. of Liquor Control* (1952), 91 Ohio App. 521, 49 O.O. 111, 108 N.E.2d 748.

{¶ 23} The trial court did not abuse its discretion in denying defendant's motion for mistrial and admitting evidence of the restrictive covenants contained in defendant's own employment agreements. The evidence was relevant to a determination of the nature and extent of restrictive covenants used by companies in the MRO industry and to a determination of whether such covenants were customarily used and enforced by companies in the industry as "reasonable." See, generally, *Raimonde,* supra. Specifically, regarding defendant, the evidence was relevant to the credibility of defendant's position at trial that plaintiff's territorial and two-year time restrictions were overly broad, unreasonable, and unenforceable when, as a matter of practice, defendants included the very same territorial and time restrictions in its own employment agreements. Evidence of defendant's own territorial restrictions in its employment agreements, apparently utilized ****1077** by defendant for approximately fifteen years, was further admissible in light of a statement made by defendant's counsel in opening argument that a "normal agreement" does not contain a territorial restriction.

[6] {¶ 24} Regarding the admission of evidence of defendant's previous litigation concerning other companies' noncompete covenants, the court was within its discretion to admit the evidence. Defendant's president, Patrick McCurdy, repeatedly testified to his belief that territorial restrictions were unenforceable, despite the fact that defendant had such restrictions in its own employment contracts. McCurdy initially testified that he was unaware of any other company in the industry that enforced territorial ***393** limitations in its restrictive covenants. On cross-examination, however, McCurdy acknowledged that in a previous suit against defendant, defendant had agreed in a settlement that a two-year territorial restriction was reasonable. Such evidence was relevant and admissible to a determination of (1) whether defendant knew that territorial limitations in restrictive covenants in employment contracts were valid and enforceable, and (2) whether defendant knew that it was interfering with a valid contract provision and acted with a conscious disregard of plaintiff's contractual rights, providing a basis for an award of punitive damages. See *Digital & Analog Design Corp. v. N. Supply Co.* (1989), 44 Ohio St.3d 36, 43–44, 540 N.E.2d 1358.

[7] {¶ 25} In its first assignment of error, defendant also asserts that the trial court erred to defendant's prejudice in refusing to redact from seven of plaintiff's exhibits the alleged damages for lost business income plaintiff incurred in the territories of former employees Katherine Weber, Michael Greig, and Stanley Boyd. Defendant contends that because plaintiff narrowed its claim at trial to tortious interference with the contracts of Jeffrey Moore, James Grady, and Michael McLane, plaintiff could not pursue damages related to Weber, Greig, and Boyd. Defendant argues that the lost business income figures pertaining to Weber, Greig, and Boyd were irrelevant and should have been stricken from consideration of the jury in its damages award.

[8] {¶ 26} In *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418–419, 650 N.E.2d 863, the Ohio Supreme Court adopted 4 Restatement of the Law 2d, Torts (1979), Section 766, regarding intentional interference with a contract. Section 766 states that "[t]he cause of action is for pecuniary loss resulting from the interference. Recovery may be had also for consequential harms for which the interference was a legal cause." Id. at Comment t. Consequential damages in a tortious interference action include all damages proximately caused by the defendant's misconduct, including lost profits. *Gray–Jones v. Jones* (2000), 137 Ohio App.3d 93, 102, 738 N.E.2d 64.

{¶ 27} Here, plaintiff presented evidence that after Jeffrey Moore began working for defendant, where he was responsible for employee recruitment and training, he may have induced Weber, Greig, and Boyd to leave plaintiff's employment, in violation of Moore's nonsolicitation agreement with plaintiff. If the jury believed that Moore, with the knowledge or approval of defendant, improperly solicited those employees to work for defendant in violation of his nonsolicitation agreement with plaintiff, and plaintiff also proved that the employees' departure caused plaintiff to suffer a loss of business income, plaintiff could recover the resulting loss of business income as part of the consequential damages flowing from ****1078** Moore's violation of his agreement not to solicit plaintiff's employees.

{¶ 28} The admission of exhibits into evidence was within the discretion of the trial court. *Siders v. Reynoldsburg School Dist.* (1994), 99 Ohio App.3d 173, 189, 650 N.E.2d 150. The trial court did not abuse its discretion in refusing to exclude ***394** or redact from the "loss of business income" exhibits the figures for Weber, Greig, and Boyd, where the purported amounts were components of plaintiff's claim for consequential damages.

{¶ 29} Having determined the trial court did not abuse its discretion in the admission of evidence concerning defendant's restrictive covenants and plaintiff's loss of business income, we overrule defendant's first assignment of error.

[9] {¶ 30} Defendant's third assignment of error contends that the trial court erred in deciding as a matter of law whether plaintiff's noncompete agreements with Moore, McLane and Grady were reasonable and enforceable; defendant asserts that the issue should have been submitted to the jury.

{¶ 31} Defendant, however, has waived the argument for appellate purposes. Initially, in its counterclaim, defendant specifically requested that the trial court issue a declaratory judgment finding plaintiff's noncompete agreements to be unreasonable and unenforceable, and asked the court as a matter in equity to modify or reform the territorial and time restrictions in the agreements, all arguably consistent with defendant's request for declaratory relief. However, in its pretrial motion to bifurcate the trial, defendant specifically requested that the trial court, not the jury, determine whether plaintiff's noncompete agreements are valid and enforceable and, if so, the extent to which they are reasonably enforceable. In that same motion, defendant asserted that once the court determined the enforceability issue, the jury was to determine whether the individual defendants breached their noncompete agreements with plaintiff, whether defendant tortiously interfered with such agreements, and the damages, if any, to be awarded to plaintiff. (Defendant's motion to bifurcate.) Moreover, defendant did not object when the trial court advised counsel that it would be instructing the jury that plaintiff's employment agreements were enforceable as a matter of law, and defendant did not object to that instruction when it was given to the jury.

[10] {¶ 32} The invited-error doctrine prohibits a party from taking "advantage of an error which he himself invited or induced." *Hal Artz Lincoln–Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 28 OBR 83, 502 N.E.2d 590, paragraph one of the syllabus. Because defendant not only failed to object to the action of the trial court now asserted to be error, but also requested it, defendant has waived our consideration of the claimed error.

[11] {¶ 33} Even if defendant's assignment of error is considered, it is without merit. Whether a restrictive covenant in a contract, including a covenant not to compete, is valid and enforceable is an issue for the court to decide. See *Raimonde,* supra; *Runfola,* supra; *Briggs v. Butler* (1942), 140 Ohio St. 499, 45 N.E.2d 757. See, also, ***395** *Stark Cty. Milk Producers' Assn. v. Tabeling* (1934), 129 Ohio St. 159, 1 O.O. 472, 194 N.E. 16, paragraph three of syllabus ("Ordinarily the question whether a covenant in a contract in restraint of trade is reasonable under the circumstances and as to subject-matter to which it relates, is one of law for the court"). Defendant's third assignment of error is overruled.

****1079** {¶ 34} Defendant's second assignment of error and plaintiff's cross-assignment of error will be discussed

together. In its second assignment of error, defendant asserts that the trial court erred in determining that plaintiff's employment contracts were valid and enforceable. Defendant contends that the restriction plaintiff imposed on its former employees against competing in their former sales territories for a period of two years is an unreasonable restraint of trade because the restriction is (1) not necessary to protect plaintiff's legitimate interests, (2) unduly harsh to the employees, and (3) adverse to the public interest. *Runfola,* supra, at 8, 565 N.E.2d 540; *Raimonde,* supra, paragraphs one and two of the syllabus. In its cross-assignment of error, plaintiff contends that because defendant undisputedly requires its employees to execute noncompete agreements that are virtually identical to plaintiff's noncompete agreements, defendant was estopped from claiming that plaintiff's territorial noncompete provisions should be stricken.

[12] {¶ 35} Covenants not to compete will be enforced only to the extent that the restrictions imposed on an employee are reasonably necessary to protect the employer's legitimate business interests. *Raimonde,* supra, paragraph one of the syllabus; *Brentlinger,* supra, at 645, 752 N.E.2d 994. In concluding that plaintiff's employment agreements are enforceable, the trial court determined the time and geographical restrictions in the agreements to be reasonable and appropriate for the type of industry involved. According to the trial court, "[u]nder no circumstances is this agreement unreasonable." The court noted for the record that "it's very difficult for this court to believe that plaintiffs [sic, defendant] should be able to sit here with their own agreements and argue that other people's agreements are invalid and they continue to use their own. But I don't think that's a factor that's supposed to be taken into consideration by me in making that determination."

[13] **[14]** **[15]** {¶ 36} Under the somewhat unusual circumstances of this case, the trial court properly could have considered the effect of estoppel in evaluating the reasonableness or enforceability of the noncompete agreements. "In determining the validity of a covenant or agreement in restraint of trade, each case must be decided on its own facts * * *." *Raimonde,* supra, at 25, 71 O.O.2d 12, 325 N.E.2d 544, citing *Extine v. Williamson Midwest* (1964), 176 Ohio St. 403, 27 O.O.2d 375, 200 N.E.2d 297, overruled in part on other grounds in *Raimonde,* supra, paragraph one of the syllabus. The list of factors a court may consider is not limited. See *Raimonde,* supra, quoting ***396** *Extine,* supra, at 406, 27 O.O.2d 375, 200 N.E.2d 297 ("*Among the factors* properly to be considered are: '[t]he absence or presence of limitations as to time and space' "). (Emphasis added.)

{¶ 37} Here, although defendant argued at trial that its own two-year territorial restrictions were overly broad and unenforceable, defendant's president acknowledged that defendant, for over fifteen years, used an employment contract for its employees incorporating two-year territorial restrictions virtually identical to the territorial and time restrictions plaintiff imposed. When asked to explain why defendant had not changed its contracts to eliminate the purportedly overbroad provisions, defendant's president stated, "I feel better that we have it in there." Indeed, defendant's president admitted that when defendant enforces its own contracts, it seeks to enforce the two-year restrictions. He further acknowledged that in a lawsuit with another company in the MRO industry, defendant had agreed ****1080** in the settlement order that a two-year restriction on territory was reasonable. On these facts, the trial court properly could have found defendant estopped from claiming that the two-year territorial restrictions in plaintiff's noncompetition agreements were unreasonable or unenforceable. Nevertheless, we also examine the enforceability of plaintiff's noncompete provision under the test enunciated in *Raimonde.*

[16] {¶ 38} The test articulated in *Raimonde* first requires that the restriction be necessary to protect plaintiff's legitimate business interests. Under more usual circumstances, plaintiff's agreement would appear to be overly broad in precluding plaintiff's former employees from soliciting not only customers they called on while in plaintiff's employment but also all potential customers in the geographic area they worked for plaintiff. Plaintiff, however, demonstrated that it had legitimate business interests sufficient to justify enforcement of its noncompete clauses that prohibited former employees from doing business with, or attempting to do business with, plaintiff's customer base, including all potential customers in a designated geographic area that the former employees had worked while in plaintiff's employment. Defendant presented no evidence to the contrary that suggested prohibiting solicitation of former customers, but allowing competition in the former employee's geographic territory, would adequately protect plaintiff's legitimate business interests.

[17] **[18]** {¶ 39} An employer has a legitimate interest in limiting not only a former employee's ability to take advantage of personal relationships the employee has

developed while representing the employer to the employer's established client, but also in preventing a former employee from using his former employer's customer lists or contacts to solicit new customers. *Runfola,* supra, at 8–9, 565 N.E.2d 540; *Brentlinger,* supra, at 651, 752 N.E.2d 994; *Ruhl v. J.E. Hanger Co., Inc.* (Sept. 8, 1992), Franklin App. No. 92AP–280, 1992 WL 223738. In addition, an employer has a legitimate interest in preventing a former employee ***397** from using the skill, experience, training, and confidential information the former employee has acquired during the employee's tenure with his employer in a manner advantageous to a competitor in attracting business, regardless of whether it was an already established customer of the former employer. *Runfola,* supra; *Ruhl,* supra.

{¶ 40} Here, Moore, Grady, and McLane each had worked for plaintiff for at least ten years and had acquired extensive information regarding plaintiff's products and sales practices, including pricing, that would be advantageous to a competitor in soliciting customers, regardless whether the customers had been former or existing customers of plaintiff or its former employees. Accordingly, plaintiff presented a legitimate interest in imposing time and territorial restrictions to limit its former employees' ability to solicit customers for a competitor. The first element of *Raimonde* weighs in favor of the enforcement of plaintiff's restrictive covenants.

{¶ 41} Under the second *Raimonde* element, the noncompete clause must not impose undue hardship on the employee. Although defendant argued in the trial court that the territorial restrictions were unreasonable and unenforceable, little, if any, evidence was presented that enforcement of the two-year territorial restriction would cause plaintiff's former employees to suffer undue hardship. Neither Moore, Grady, nor McLane testified that his employment options would be severely limited if the restriction were enforced. Cf. ****1081** *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 747 N.E.2d 268 (finding a three-year noncompete agreement with a worldwide restriction to be valid and enforceable). Because of the lack of evidence in this case on this element, we cannot conclude that enforcement of the noncompete clause necessarily would cause undue hardship to plaintiff's former employees.

[19] **[20]** {¶ 42} The third element in *Raimonde* provides that a covenant restraining an employee from competing with his former employer upon termination of employment is reasonable and enforceable if it is not injurious to the public. The third element is primarily concerned with the public's interest in promoting fair business competition. *Brentlinger,* supra, at 653, 752 N.E.2d 994. Because the MRO industry is highly competitive, with at least ten national companies in addition to various local and chain competitors, enforcement of plaintiff's noncompete clauses likely would not adversely affect business competition in the MRO industry or harm the public. See *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (1997), 124 Ohio App.3d 308, 319–320, 706 N.E.2d 336 (finding enforcement of a noncompete clause which required a hospital to close its sleep disorder center for a two-year period was not harmful to the public where there were twelve other sleep disorder centers in the same metropolitan area); *Brentlinger,* supra, at 653, 752 N.E.2d 994 (finding enforcement of noncompete clause ***398** of one automobile dealer would not significantly affect the advantage to the public or competition among dealers where six other automobile dealers were in operation). Thus, the third element weighs in favor of enforcement of plaintiff's noncompete clauses.

{¶ 43} Accordingly, the evidence in the record does not demonstrate that plaintiff's former employees will suffer undue hardship or that unfair competition between businesses in the MRO industry will result, if plaintiff's two-year territorial noncompete covenants in its employment contracts are enforced. The trial court did not err in concluding that the noncompete covenants are reasonable and enforceable as written, given the circumstances of this case. Plaintiff's cross-assignment of error is sustained, and defendant's second assignment of error is overruled.

{¶ 44} Because defendant's first three assignments of error are without merit, defendant's sixth assignment of error is similarly overruled, where defendant relies solely on its first three assignments of error to advance its assertion that inadequate factual and legal support existed for the trial court's determination that plaintiff's employment contracts were reasonable and enforceable.

{¶ 45} In its fourth assignment of error, defendant asserts that the trial court erred in refusing to submit to the jury nine of defendant's twelve proposed special jury interrogatories concerning the issue of compensatory damages.

[21] {¶ 46} At trial, the court submitted interrogatories to the jury directing the jury to determine separately for Moore, McLane, and Grady whether defendant tortiously interfered with their employment contracts with plaintiff, and the court directed the jury to determine as a collective matter whether

plaintiff was entitled to punitive damages. In addition, the court submitted four interrogatories to the jury concerning compensatory damages: (1) whether plaintiff proved it had incurred compensatory damages as a proximate cause of defendant's tortious interference with plaintiff's employment contract with Moore, McLane and/or Grady, (2) what amount, if any, of compensatory damages plaintiff proved was proximately caused by defendant's tortious interference ****1082** with the contracts, (3) whether defendant proved that plaintiff failed to mitigate its damages, and (4) if so, what amount of damages plaintiff failed to mitigate should be deducted from its compensatory damages. The trial court refused to submit to the jury defendant's proposed, more detailed interrogatories that would have directed the jury to separately determine the damages for each of the three employment contracts with which plaintiff contended defendant had tortiously interfered.

{¶ 47} On appeal, defendant asserts that the trial court had a mandatory duty, on defendant's timely request, to submit the interrogatories to the jury ***399** where the interrogatories were allegedly clear, concerned determinative issues, and were consistent with the trial court's instructions.

{¶ 48} Civ.R. 49(B) provides:

{¶ 49} "The court shall submit written interrogatories to the jury * * * upon request of any party prior to the commencement of argument. * * * The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law."

[22] **[23]** {¶ 50} A trial court does not have a mandatory duty to submit written interrogatories to the jury that a party has requested. *Ziegler v. Wendel Poultry Serv., Inc.* (1993), 67 Ohio St.3d 10, 14–15, 615 N.E.2d 1022. Rather, a trial court retains discretion to reject proposed interrogatories that are ambiguous, redundant, or legally objectionable. Id. at 15, 615 N.E.2d 1022. "The essential purpose to be served by interrogatories is to test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 336–337, 28 OBR 400, 504 N.E.2d 415. See, also, *Ziegler,* supra; *Joseph v. Ohio Power Co.* (1988), 46 Ohio App.3d 170, 173, 546 N.E.2d 970 (concluding that only interrogatories dispositive of determinative or ultimate issues must be submitted by the trial court). Determinative issues are "ultimate issues" that when decided will settle the controversy between the parties. *Ziegler,* supra, at 15, 615 N.E.2d 1022; *Miller v. McAllister* (1959), 169 Ohio St. 487, 494, 8 O.O.2d 485, 160 N.E.2d 231.

{¶ 51} Defendant's proposed interrogatories did not address ultimate or determinative issues. The relevant ultimate or determinative issue was the "amount," if any, of consequential damages plaintiff suffered due to tortious interference with its employment contracts. See *Ziegler,* supra, at 15, 615 N.E.2d 1022 (concluding that the determinative issue is "the amount of damages"). Defendant, in effect, sought to have the jury "itemize" the damages for each employment contract with which defendant tortiously interfered. Such itemizations are not determinative, id., and would not test the ultimate verdict in this case regarding the appropriateness of an award of consequential damages.

{¶ 52} Further, defendant's corporation was the only remaining defendant when the case went to the jury for deliberations, the individual defendants having been dismissed from the case. Thus, with regard to liability, the amount of damages plaintiff suffered on any individual employment contract was irrelevant because defendant was solely liable for all of the damages the jury awarded; ***400** apportionment or an itemization of the ****1083** damages was unnecessary. Accordingly, the trial court did not abuse its discretion in refusing to submit the proposed interrogatories to the jury, and defendant's fourth assignment of error is overruled.

{¶ 53} In its fifth assignment of error, defendant asserts that the jury's award of compensatory damages in the amount of $69,837 and its award of punitive damages in the amount of $30,000 were against the manifest weight of the evidence. Specifically, defendant contends that plaintiff did not prove that it incurred lost sales of $69,837 due to its sales representatives leaving plaintiff's employment to work for defendant, as opposed to some other reason. Defendant further contends that plaintiff's evidence of malice was insufficient to support either an instruction on punitive damages or an award of punitive damages.

[24] {¶ 54} Pursuant to 4 Restatement of the Law 2d, Torts (1979), Section 766, adopted in *Kenty,* supra, at 419, 650 N.E.2d 863, the elements of the tort of intentional interference with contract are "(1) the existence of a contract, (2) the

wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." Ohio law recognizes that a plaintiff may recover all damages proximately caused by an actor's misconduct in a tortious interference action. *Gray–Jones,* supra, at 102, 738 N.E.2d 64; *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.* (1996), 112 Ohio App.3d 150, 157–158, 678 N.E.2d 248.

[25] **[26]** **[27]** {¶ 55} Such damages include lost profits, reduced by the expenditures saved by not having to produce that profit, if both the existence of the loss and the dollar amount of the loss are proven to a reasonable certainty. *Digital & Analog Design,* supra, at 40, 540 N.E.2d 1358. Lost profit damages are measured by the loss, including lost profits the plaintiff business sustained as a result of the tortious interference, not by its effect upon the defendant's business. *Developers Three v. Nationwide Ins. Co.* (1990), 64 Ohio App.3d 794, 803, 582 N.E.2d 1130. A plaintiff may not merely assert that it would have made a particular amount of profits, but must prove lost profits with calculations based on facts. *Gahanna v. Eastgate Properties* (1988), 36 Ohio St.3d 65, 68, 521 N.E.2d 814; *Brookeside,* supra, at 158, 678 N.E.2d 248. An expert may rely upon facts derived from the facts in evidence or from his own investigation. Evid.R. 703; *Brookeside,* supra.

[28] {¶ 56} At trial, plaintiff called John Burke, an independent economist, to testify regarding damages plaintiff incurred due to defendant's allegedly tortious conduct. Using plaintiff's financial statements, Burke calculated the past and future business losses attributable to each of the employees who left ***401** plaintiff's employment to work for defendant, and he then totaled the figures to determine the total loss of business income.

{¶ 57} With regard to the loss of past business income, Burke testified that he looked at the value of the sales by plaintiff's five sales representatives, excluding Moore, made to customers in their respective sales territories while the sales representatives were employed with plaintiff, and then compared those values with the sales values for each territory after the sales representatives left plaintiff's employment to work for defendant. The resulting figure was determined to be the gross loss amount. From the gross loss amount, Burke deducted the variable costs associated with producing the sales, including wages, taxes and costs of goods sold. The final figure was the purported net loss to plaintiff. Burke testified to a reasonable ****1084** degree of financial certainty plaintiff incurred a total of $171,116 in past business losses through the year 2000.

[29] {¶ 58} As to future business losses, Burke testified that he performed a regression analysis on plaintiff's financial statements and calculated to a reasonable degree of financial certainty that plaintiff would incur $671,863 in damages beginning in 2001 and continuing over a five-year period. Loss of future profits may be recovered as part of a claim of compensatory damages in an action for tortious interference with contract. See, e.g., *Premix, Inc. v. Zappitelli* (N.D.Ohio, 1983), 561 F.Supp. 269, 278 (award of two years' future lost profits upheld). Burke determined plaintiff's total business losses to be approximately $843,000, which did not include any value for loss of customer goodwill.

{¶ 59} Robert Rainey, director of plaintiff's operations and a certified public accountant, also analyzed plaintiff's financial records and calculated the loss of sales to plaintiff attributable to defendant's tortious conduct. The analytical method Rainey used was similar to that Burke used. Rainey opined that Burke's assessment of damages was certain but was low because Burke did not include approximately $46,000 in customer goodwill which Rainey calculated plaintiff had lost. According to Rainey, plaintiff's business losses to a reasonable degree of financial certainty were at least $889,000. He testified that the cause of plaintiff's sales decline was defendant's conduct of encouraging plaintiff's ex-employees to breach their contract with plaintiff (1) by soliciting plaintiff's other employees to terminate their employment with plaintiff (breach of nonsolicitation clauses), and (2) by selling for defendant in their old territories (breach of noncompete clauses). Rainey stated that the sales drop-off was dramatic in the territories of the employees who went to work for defendant but, in comparison, sales in territories for employees who left without violating the covenants in their contracts stayed active with little loss of sales.

***402** **[30]** {¶ 60} An appellate court will not reverse a judgment as against the weight of the evidence if competent, credible evidence supports the judgment. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. Burke's and Rainey's methods and opinions constituted competent, credible evidence of the amount of compensatory damages plaintiff suffered due to defendant's tortious conduct, and the evidence amply supported the jury's award of compensatory damages of $69,837.

[31] **[32]** {¶ 61} Moreover, plaintiff presented sufficient evidence to support an instruction on and an award of punitive damages. A trial court may instruct on punitive damages only if plaintiff proves "actual malice," defined as either "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis sic.) *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus; see, also, *Digital & Analog Design,* supra, at 43–44, 540 N.E.2d 1358; *Developers Three,* supra, at 805, 582 N.E.2d 1130.

{¶ 62} Plaintiff presented evidence to establish that defendant knew of and consciously disregarded plaintiff's rights under plaintiff's employment contracts, and defendant knew its interference with plaintiff's contractual rights would cause substantial harm to plaintiff. Specifically, Patrick McCurdy, defendant's president, acknowledged that an employee who goes to work for a direct competitor within two ****1085** years can cause harm to the former employer. Acknowledging the importance of business agreements, he testified that when defendant enforces its own contracts, it seeks to enforce its two-year restrictions. Indeed, McCurdy acknowledged that defendant had previously agreed in a settlement order that a two-year restriction on territory is reasonable. Moreover, McCurdy admitted that, despite knowing that plaintiff's employment contracts restricted its employees for a period of two years after termination from calling on *any* companies within their sales territory, defendant consciously ignored the territorial restrictions and allowed, and in fact assigned, plaintiff's former employees to work in their old territories and to call on any company within their respective territory, as long as it was not a former customer. Other evidence showed that plaintiff's former employees, hired by defendant, solicited some of their former customers as well as other companies within their old sales territories, and defendant had knowledge of the solicitations.

{¶ 63} Defendant's knowledge, coupled with its actions in connection with plaintiff's former employees, demonstrates a conscious disregard for plaintiff's rights. Moreover, given defendant's own experience with its identical noncompetition and nonsolicitation agreements, defendant knew of the probability of causing plaintiff substantial harm. Because sufficient evidence was presented of ***403** defendant's malice, the trial court did not err in instructing the jury on punitive damages, nor did the jury incorrectly assess punitive damages against defendant. Defendant's fifth assignment of error is overruled.

{¶ 64} Having overruled defendant's six assignments of error, and having sustained plaintiff's cross-assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

McCORMAC and LAZARUS, JJ., concur.

JOHN W. McCORMAC, J., retired, of the Tenth Appellate District, was assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

All Citations

147 Ohio App.3d 382, 770 N.E.2d 1068, 2001 -Ohio- 8779

Footnotes

* Reporter's Note: An appeal to the Supreme Court of Ohio was not allowed in 95 OhiSt.3d 1437, 2002-Ohio-2084, 766 N.E.2d 1002.

AA-61

40 Cal.3d 870, 710 P.2d 309, 221 Cal.Rptr. 509

BRIAN WHITE et al., Plaintiffs and Respondents,
v.
WESTERN TITLE INSURANCE COMPANY, Defendant and Appellant

S.F. No. 24813.
Supreme Court of California
Dec 31, 1985.

SUMMARY

The purchasers of two parcels of property filed suit against a title insurance company for breach of contract, negligence, and breach of implied covenants of good faith and fair dealing and were awarded damages of $8,400 for breach of contract and negligence, and an additional $20,000 for breach of the covenants of good faith and fair dealing. The preliminary title insurance reports issued by defendant did not mention recorded water easements on the property. The insurance policies purported to insure a "fee" interest, free from any defect in title or any lien or encumbrance on title, subject to certain specific exceptions including unrecorded easements, and water rights, claims, or title to water. After plaintiffs learned of the existence of the easements, their appraiser estimated the loss in value of their lots resulting from the potential loss of ground water at $62,947. Plaintiffs made a demand on defendant for that sum. Defendant declined to pay their claim. Plaintiffs filed suit alleging causes of action for breach of the insurance contract and negligence in the preparation of the preliminary title reports. Defendant moved for summary judgment; after briefing and argument the motion was denied. Defendant then retained an appraiser, who estimated plaintiffs' loss at $2,000. Assertedly based on this estimate, defendant in May 1980 offered to settle the case for $3,000. Plaintiffs rejected the offer. In June defendant served a written offer to compromise for $5,000 pursuant to Code Civ. Proc., § 998. Plaintiffs, having already incurred litigation expenses exceeding this figure, rejected the offer. Plaintiffs then obtained leave of court to amend their complaint to state a cause of action for breach of the covenant of good faith and fair dealing. The issues of liability and damages were tried separately. After the trial court rendered an interlocutory judgment finding defendant liable for breach of contract and negligence, defendant filed a new offer to compromise for $15,000. Plaintiffs rejected the offer, and the remaining issues were tried to a jury in February 1982. The jury returned a special verdict fixing the loss at $100 per acre, or a total of $8,400. With respect to the cause of action for breach of the covenant of good faith and fair dealing, plaintiffs sought to introduce evidence ***871** of defendant's conduct, including settlement offers, during the whole course of the litigation. In response to defendant's objection, the court ruled such evidence would be admissible only as to events occurring before the interlocutory judgment finding defendant liable for breach of contract and negligence. (Superior Court of Mendocino County, No. 42119, Timothy W. O'Brien, Judge.)

The Supreme Court affirmed. The court held that the title insurance policies in question, construed to carry out their purpose of protecting against an undisclosed recorded interest, provided coverage for water rights which appeared of record within the scope of an ordinary title search. It also held the title insurer liable for its negligent failure to list recorded encumbrances in the preliminary title report. With respect to liability for breach of the covenant of good faith and fair dealing, the court held that the trial court did not err in admitting, as evidence of breach, the settlement offers and other matters occurring after commencement of litigation. The duty of good faith and fair dealing continued after plaintiffs filed their lawsuit, that the admission of the first two settlement offers did not violate either Evid. Code, § 1152, Civ. Code, § 47, subd. 2, or Code Civ. Proc., § 998. Finally, the court held that there was substantial evidence to support the verdict finding a breach of the covenant of good faith and fair dealing. (Opinion by Broussard, J., with Bird, C. J., Mosk and Reynoso, JJ., concurring. Separate concurring opinion by Grodin, J. Separate concurring and dissenting opinions by Lucas, J., and by Kaus, J. [*])

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d)
Abstracters and Title Insurers § 7--Title Insurers--Contract and Policy--Coverage--Exclusions--Recorded Water Easements.
Under well-established rules for the construction of insurance contracts, title insurance policies which purported to insure a "fee" interest, free from any "defect in or lien or encumbrance

on ... title," subject to certain specific exclusions, including unrecorded easements and "water rights, claims or title to water," provided coverage for a recorded water easement. The structure of the policy itself created the impression that coverage was provided for claims of record, but excluded for unrecorded claims, which impression was reinforced by the specific language of the policy. Coverage of claims of record also ***872** accorded with the purpose of the title policies and the reasonable expectations of the insured.

(2)
Real Property § 2--Definitions and Distinctions--Fee Interest.
A fee interest in real property includes appurtenant water rights.

(3)
Insurance Contracts and Coverage § 15--Rules in Aid of Interpretation of Contracts--Interpretation Against Insurer.
Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer, and, if semantically possible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates. The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy.

(4)
Insurance Contracts and Coverage § 16--Rules in Aid of Interpretation of Contracts--Interpretation Against Insurer--Exclusions and Exemptions.
Whereas coverage clauses in insurance policies are interpreted broadly so as to afford the greatest possible protection to the insured, exclusionary clauses are interpreted narrowly against the insurer.

(5)
Abstracters and Title Insurers § 7--Title Insurers--Contract and Policy--Interpretation.
In determining what benefits or duties an insurer owes his insured pursuant to a contract of title insurance, the court may not look to the words of the policy alone, but must also consider the reasonable expectations of the public and the insured as to the type of service which the insurance entity holds itself out as ready to offer. In other words, the provisions of the policy must be construed so as to give the insured the protection which he reasonably had a right to expect.

(6)
Contracts § 23--Construction and Interpretation--Expressio Unius Est Exclusio Alterius.
Under the familiar maxim of *expressio unius est exclusio alterius,* when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded. This canon, based on common patterns of usage and drafting, is equally applicable to the construction of contracts.

(7a, 7b)
Abstracters and Title Insurers § 8--Title Insurers--Liability of Insurer.
When a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, two distinct responsibilities are assumed. In rendering the first service, the insurer serves ***873** as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report. Accordingly, a title insurer is liable for its negligent failure to list recorded encumbrances in preliminary title reports.

(8)
Abstracters and Title Insurers § 3--Abstracter--Rights, Duties, and Liabilities.
The duty imposed upon an abstractor of title is a rigorous one: an abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that professional skill. The abstractor must report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made.

(9)
Abstracters and Title Insurers § 11--Title Insurers--Actions--Pleading and Proof--Prima Facie Negligence.
The failure of a title company to note an encumbrance of record, a recorded water easement, in the preliminary title report was prima facie negligent.

(10)
Abstracters and Title Insurers § 8--Title Insurers--Liability of Insurer--Exculpatory Language in Title Report.
A title insurance company was not relieved of its liability in negligence for the failure of its preliminary title reports to list a recorded water easement, notwithstanding each report stated that it was "issued solely for the purpose of facilitating

the issuance of a policy of title insurance and no liability is assumed thereby." This statement appeared in the report itself, not in the contract under which the title insurance company agreed to prepare the report, and, moreover, even if the title report was a contract, the quoted provision would be ineffective to relieve the title company of liability for negligence, since a title company is engaged in a business affected with the public interest, and cannot, by an adhesory contract, exculpate itself from liability for negligence.

(11a, 11b)
Abstracters and Title Insurers § 8--Title Insurers--Liability of Insurer--Liability Based on Preliminary Title Report.
Ins. Code, § 12340.11, which provides that preliminary title reports are offers to issue a title policy subject to the stated exceptions set forth therein, that the reports are not abstracts of title and none of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title is applicable to the issuance of any such report, and that any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted, and which ***874** became effective January 1, 1982, is not applicable to preliminary title reports procured prior to that date.

(12)
Statutes § 5--Operation and Effect--Retroactivity.
Generally, unless the intention to make a statute retrospective clearly appears from the act itself, it will not be construed to have that effect. This is particularly true with respect to a statute which diminishes or extinguishes an existing cause of action.

(13)
Abstracters and Title Insurers § 8--Title Insurers--Liability of Insurer--Contributory Negligence.
In an action by the purchasers of title insurance against the title insurance company alleging that defendant was negligent in failing to note a recorded water easement, the trial court did not err in refusing to permit defendant to introduce evidence of plaintiffs' contributory negligence. Defendant offered only to prove that plaintiffs by diligent investigation could have discovered the water easement. Since plaintiffs had no duty to investigate, but were entitled to rely on the preliminary title report, such evidence was insufficient to show contributory negligence, and defendant did not offer to prove that plaintiffs had actual knowledge of the easement.

(14)
Abstracters and Title Insurers § 7--Title Insurers--Contract and Policy--Covenant of Good Faith and Fair Dealing.
A covenant of good faith and fair dealing is implied in every insurance contract, including title insurance contracts.

(15)
Abstracters and Title Insurers § 11--Title Insurers--Actions--Pleading and Proof--Evidence--Breach of Covenant of Good Faith and Fair Dealing--Offers of Compromise.
In an action by the purchasers of two title insurance policies against the insurer for breach of implied covenants of good faith and fair dealing, based on the insurer's failure to settle a claim, requiring plaintiffs to file suit against the insurer for breach of contract and negligence, evidence relating to events after plaintiffs filed their suit, including evidence of two settlement offers made by the insurer, was not required to be excluded on the ground that, once suit was filed, the insurer stood in an adversary position to the insured and no longer owed a duty of good faith and fair dealing.

(16a, 16b)
Abstracters and Title Insurers § 11--Title Insurers-- Actions--Pleading and Proof--Evidence--Admissibility--Settlement Offers.
In an action by the purchasers of two title insurance policies against the title insurer for breach of implied covenants of good faith and fair dealing, based on the insurer's failure to settle a claim requiring ***875** plaintiffs to file suit against the insurer for breach of contract and negligence, the admission of two settlement offers made by the insurer after plaintiffs' lawsuit had been filed did not violate Evid. Code, § 1152, which states that "[e]vidence that a person has, in compromise or from humanitarian motives, furnished, offered or promised to furnish money ... to another who has sustained ... loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it." The language of this section does not preclude the introduction of settlement negotiations if offered not to prove liability for the original loss but to prove failure to process a claim fairly and in good faith. Similarly, evidence relating to the second settlement offer, which was filed as an offer to compromise, under Code Civ. Proc., § 998, was not rendered inadmissible by § 998,

subd. (b), which provides that, if the offer is not accepted, it cannot be given in evidence at trial.

(17)
Abstracters and Title Insurers § 11--Title Insurers--Actions--Pleading and Proof--Evidence--Settlement Offers.
In an action by the purchasers of two title insurance policies against the title insurer for breach of implied covenants of good faith and fair dealing, based on the insurer's failure to settle a claim, requiring plaintiffs to file suit against the insurer for breach of contract and negligence, evidence of two settlement offers made by the insurer after plaintiffs filed their lawsuit was not barred by Civ. Code, § 47, subd. 2, which provides that a communication made in a judicial proceeding is a privileged publication. Even if liability cannot be founded on a judicial communication, it can be proved by such a communication. There is a distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based on an underlying course of conduct evidenced by the communication. Plaintiffs did not assert that defendant's communications were defamatory, or done with the intent of causing emotional distress, but instead that they showed that defendant was not evaluating and seeking to resolve their claim fairly and in good faith.

(18)
Abstracters and Title Insurers § 11--Title Insurers--Actions--Pleading and Proof--Evidence--Sufficiency--Breach of Covenant of Good Faith and Fair Dealing.
In an action by the purchasers of two title insurance policies against the title insurer, the evidence was sufficient to support a verdict finding a breach of the covenant of good faith and fair dealing. The record revealed that, although defendant failed to disclose an easement of record on its preliminary title reports and its title insurance policies, it denied any liability for loss of value in water rights attributable to the easement. When plaintiffs filed suit, ***876** defendant responded with a motion for summary judgment. After denial of that motion, defendant was faced with both a ruling of the trial court rejecting its narrow reading of the policy and a unanimous body of case law establishing liability for negligence. Defendant nevertheless offered only nuisance-value settlements, and made no attempt to appraise plaintiffs' loss until the issue of liability had been tried and decided in plaintiffs' favor. The entire pattern of conduct showed a clear attempt by defendant to avoid responsibility for its obvious failure to discover and report the recorded easement.

[See **Cal.Jur.3d,** Abstracters and Title Insurers, § 23; **Am.Jur.2d,** Insurance, § 1566.]

(19)
Abstracters and Title Insurers § 12--Title Insurers--Actions--Damages--Breach of Covenant of Good Faith and Fair Dealing--Emotional Distress.
On appeal from a judgment in favor of an insured against a title insurer, awarding damages for breach of a title insurance policy and breach of the policy's covenant of good faith and fair dealing, there was no merit in the insurer's argument that damages for emotional distress were not permitted because that issue was unraised by the pleadings. Such an issue is reasonably, perhaps necessarily, raised by the pleaded issue of an insurer's bad faith in rejecting settlement of a meritorious claim. Furthermore, the issue of damages for emotional distress was fully and fairly tried and presented for adjudication in the trial court.

(20)
Abstracters and Title Insurers § 12--Title Insurers--Actions--Damages--Attorney Fees and Other Litigation Expense.
In an action by the purchasers of two title insurance policies against the insurer, the trial court properly awarded attorney fees and other litigation expenses as an element of the damages for breach of the covenant of good faith and fair dealing. When an insurer's conduct is unreasonable, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which detriment includes attorney fees, witness fees and other litigation expenses that are incurred to obtain the policy benefits and that would not have been incurred but for the insurer's tortious conduct.

COUNSEL
Garrison, Townsend & Orser, James L. Stoelker, D. D. Hughmanick, Daniel McLoughlin and Richard D. Carrington for Defendant and Appellant. ***877**
Stanford H. Atwood, Jr., Robert Knox, Kevin L. Anderson and Atwood, Hurst & Knox as Amici Curiae on behalf of Defendant and Appellant.
Richard J. Henderson for Plaintiffs and Respondents.

BROUSSARD, J.

Plaintiffs Brian and Helen White filed suit against defendant Western Title Insurance Company for breach of contract, negligence, and breach of implied covenants of good faith and fair dealing. A jury found for plaintiffs, awarding damages

of $8,400 for breach of contract and negligence, and an additional $20,000 for breach of the covenants of good faith and fair dealing. We affirm the judgment.

In 1975, William and Virginia Longhurst owned 84 acres of land on the Russian River in Mendocino County. The land was divided into two lots, one unimproved, the other improved with a ranchhouse, a barn and adjacent buildings. It contained substantial subsurface water.

On December 29, 1975, the Longhursts executed and delivered an "Easement Deed for Waterline and Well Sites," conveying to River Estates Mutual Water Corporation an "easement for a right-of-way for the construction and maintenance of a water pipeline and for the drilling of a well or wells within a defined area and an easement to take water, up to 150 [gallons per minute], from any wells within said defined area." The deed was recorded the following day.

In 1978 plaintiffs agreed to purchase the property from the Longhursts. Plaintiffs, who were unaware of the water easement, requested preliminary title reports from defendant. Each report purported to list all easements, liens and encumbrances of record, but neither mentioned the recorded water easement.

Plaintiffs and the Longhursts opened two escrows, one for each lot. Upon close of escrow defendant issued to plaintiffs two standard CLTA title insurance policies, for which plaintiffs paid $1,467.55. Neither policy mentioned the water easement.

The title insurance policies provided: "Subject to Schedule B and the Conditions and Stipulations Hereof, Western Title Insurance Company ... insures the insured ... against loss or damage, ... and costs, attorneys' fees and expenses ... incurred by said insured by reason of: ***878**

"1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

"2. Any defect in or lien or encumbrance on such title; ..."

"Schedule B" provided in part that "[t]his policy does not insure against loss or damage ... which arise[s] by reason of the following: ...

"3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records. ...

"5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) *water rights, claims or title to water*." (Italics added.)

About six months after the close of escrow, River Estates Mutual Water Corporation notified plaintiffs of its intention to enter their property to implement the easement. Plaintiffs protested, and River Estates filed an action to quiet title to the easement. Plaintiffs notified defendant, who agreed to defend the proceeding. Plaintiffs, however, declined defendant's offer, preferring representation by an attorney who was then representing them in an unrelated action. River Estates eventually decided not to enforce its easement and dismissed the suit.

Plaintiffs' appraiser estimated the loss in value of their lots resulting from the potential loss of groundwater at $62,947. Plaintiffs then made a demand on defendant for that sum. Defendant acknowledged its responsibility for loss of value due to the easement (the loss attributable to the occupation of plaintiffs' land by wells and pipes, and to the water company's right to enter the property for construction and maintenance). It maintained, however, that any loss in value attributable to loss of groundwater was excluded by the policy, and since plaintiffs' claim of loss was based entirely on diminution of groundwater, declined to pay their claim. [1]

Plaintiffs filed suit in October of 1979, alleging causes of action for breach of the insurance contract and negligence in the preparation of the preliminary ***879** title reports. Defendant moved for summary judgment; after briefing and argument the motion was denied. Defendant then retained an appraiser, who estimated plaintiffs' loss at $2,000. Assertedly based on this estimate, defendant in May of 1980 offered to settle the case for $3,000. Defendant did not furnish plaintiffs with a copy of the appraisal, and plaintiffs rejected the offer. In June defendant served a written offer to compromise for $5,000 pursuant to Code of Civil Procedure section 998. [2] Plaintiffs, having already incurred litigation expenses exceeding this figure, rejected the offer. Plaintiffs then obtained leave of court to amend their complaint to state a cause of action for breach of the covenant of good faith and fair dealing.

The trial court separated the issues of liability and damages. The issue of liability under the original complaint was presented to the court without a jury in January of 1981;

in August of that year the court rendered an interlocutory judgment finding defendant liable for breach of contract and negligence. Defendant then furnished plaintiffs with a copy of their appraisal, and filed a new offer to compromise for $15,000. Plaintiffs rejected the offer, and the remaining issues were tried to a jury in February of 1982.

The parties first presented evidence of the loss in value to plaintiffs' property; the jury returned a special verdict fixing the loss at $100 per acre, or a total of $8,400. The court then turned to the cause of action for breach of the covenant of good faith and fair dealing. Plaintiffs indicated their intention to present evidence of defendant's conduct, including settlement offers, during the whole course of the litigation. In response to defendant's objection, the court ruled that such evidence would be admissible only as to events occurring before the interlocutory judgment of August 1981. Plaintiffs' former attorney then testified to defendant's settlement offers of $3,000 and $5,000, its failure to provide plaintiffs with a written appraisal to support those offers, and the attorney's fees paid and incurred in prosecuting the suit. The jury returned a special verdict finding defendant in breach of the covenant, awarding compensatory damages of $20,000, and denying punitive damages. Defendant appeals from the judgment.

1. Liability Under the Terms of the Insurance Contracts. (1a) The insurance policies purport to insure a "fee" interest, free from any defect in title or any lien or encumbrance on title, subject to the exceptions listed in schedule B of the policies. (2) A fee interest includes appurtenant water rights. (See ***880** *City of San Diego* v. *Sloane* (1969) 272 Cal.App.2d 663 [77 Cal.Rptr. 620].) (1b) Thus the only question is whether coverage under the present case is excluded by schedule B.

Schedule B contains two parts. Part two lists specific exceptions, generally encumbrances of record discovered by the title company and therefore excluded from coverage under the policy. The easement of River Estates Mutual Water Corporation was not listed in part two. Part one describes nine kinds of title defects [3] excluded generally from coverage. The first four paragraphs describe interests which should have been, but were not, recorded; item 3, for example, excludes coverage of "[e]asements, liens, or encumbrances ... which are not shown by the public records. ..." The remaining five paragraphs exclude interests of a type which are ordinarily ***881** not recorded, including, in paragraph 5, "(a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water." Defendant relies on this last exclusion to avoid coverage in the present case.

Construction of the policy, however, is controlled by the well-established rules on interpretation of insurance agreements. (3) As described most recently in *Reserve Insurance Co.* v. *Pisciotta* (1982) 30 Cal.3d 800, 807-808 [180 Cal.Rptr. 628, 640 P.2d 764]: "'[A]ny ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates.' The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy. Its effect differs, depending on whether the language to be construed is found in a clause providing coverage or in one limiting coverage. (4) 'Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured ... exclusionary clauses are interpreted narrowly against the insurer.'" (Citations omitted.)

(5) The Court of Appeal in *Jarchow v. Transamerica Title Ins. Co*. (1975) 48 Cal.App.3d 917, 941 [122 Cal.Rptr. 470], reiterated these rules in the title insurance context: "In determining what benefits or duties an insurer owes his insured pursuant to a contract of title insurance, the court may not look to the words of the policy alone, but must also consider the reasonable expectations of the public and the insured as to the type of service which the insurance entity holds itself out as ready to offer. (*Barrera v. State Farm Mut. Automobile Ins. Co*., 71 Cal.2d 659, 669 [79 Cal.Rptr. 106, 456 P.2d 764].) Stated in another fashion, the provisions of the policy, '" *must be construed so as to give the insured the protection which he reasonably had a right to expect*, ..." (Original italics.) (*Gray v. Zurich Insurance Co*., 65 Cal.2d 263, 270, fn. 7 [54 Cal.Rptr. 104, 419 P.2d 168].)"

(1c) In the present context, these rules require coverage of water rights shown in public records within the scope of an ordinary title search. The structure of the policy itself creates the impression that coverage is provided for claims of record, while excluded for unrecorded claims. This impression is reinforced by the specific language of the policy. (6)**(See fn. 4.)** , (1d) Paragraph 3, by excluding easements, liens, and encumbrances "not shown by public records," implies inclusion of such interests when recorded. [4] ***882** Paragraph

5, the exclusion of water rights on which defendant relies, joins that exclusion with exclusion of unpatented mining claims and exceptions in patents or authorizing legislation - interests which would not appear in the records ordinarily searched by a title company. [5]

Coverage of claims of record also accords with the purpose of the title policies and the reasonable expectations of the insured. This standard CLTA policy is a policy based upon an inspection of records and, unlike more expensive policies, does not involve inspection of the property. The purchaser of such a policy could not reasonably expect coverage against unrecorded claims, but he could reasonably expect that the title company had competently searched the records, disclosed all interests of record it discovered and agreed to protect him against any undisclosed interests. [6] Nothing in the policy makes it clear that there may be interests of record undisclosed by the policy yet excluded from coverage. [7]

We conclude that the title insurance policies here in question, construed to carry out their purpose of protecting against undisclosed recorded interests, provide coverage for water rights which appear of record within the scope of the ordinary title search. The trial court reached the same conclusion, but by a different route. It reasoned that the water rights here at issue are inseparable from the recorded easement permitting River Estates Mutual ***883** Water Corporation to construct and maintain wells and pipelines. No provision of the policies excluded such easement, and defendant from the beginning has acknowledged liability for any loss in value attributable to the easement. The loss of water rights, the trial court concluded, is a loss attributable to the easement. We raise no objection to this line of reasoning, but prefer to rest our holding upon the broader ground that a purchaser of a title policy could reasonably expect protection against recorded water rights even if they were not connected to an easement for wells or pipes. [8]

2. Liability for Negligence.

Plaintiffs' cause of action for negligence rests on long-established principles concerning the duties of a title insurer. (7a) As explained in *Jarchow v. Transamerica Title Ins. Co., supra*, 48 Cal.App.3d 917, 938-939: "When a title insurer presents a buyer with both a preliminary title report and a policy of title insurance, two distinct responsibilities are assumed. In rendering the first service, the insurer serves as an abstractor of title - and must list *all* matters of public record regarding the subject property in its preliminary report. [Citations.] (8) The duty imposed upon an abstractor of title is a rigorous one: 'An abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that professional skill. ... [T]he abstractor must report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made.' [Citations.] (7b) Similarly, a title insurer is liable for his negligent failure to list recorded encumbrances in preliminary title reports. [Citations.]" These principles find support in the numerous cases cited in *Jarchow*, and also in the more recent decision of *Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 650 [172 Cal.Rptr. 254], where the court said that "[w]hen a title insurer furnishes a preliminary title report to a prospective buyer, the insurer serves as an abstractor of title and has a duty to list all matters of public record regarding the subject property in its preliminary report."

(9) It is undisputed that the preliminary title report failed to list the recorded easement of River Estates Mutual Water Corporation. The failure ***884** of a title company to note an encumbrance of record is prima facie negligent. Defendant has made no attempt to rebut this inference of negligence.

(10) Defendant relies instead on the language of the preliminary title reports and on the enactment of Insurance Code section 12340.11. Each report states that it "is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed thereby." This statement, however, appears in the report itself, not in a contract under which defendant agreed to prepare that report. Moreover, even if we viewed the title report as a contract, the quoted provision would be ineffective to relieve defendant of liability for negligence. A title company is engaged in a business affected with the public interest and cannot, by an adhesory contract, exculpate itself from liability for negligence. (*Akin v. Business Title Corp.* (1968) 264 Cal.App.2d 153 [70 Cal.Rptr. 287].)

(11a) Insurance Code section 12340.11, effective January 1, 1982, provides: "'Preliminary report', 'commitment', or 'binder' are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance

of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted."

Whatever the effect of this statute upon preliminary title reports prepared after January 1, 1982, it has no effect upon the present case. (12) "'It is a general rule of construction ... that, unless the intention to make it retrospective clearly appears from the act itself, a statute will not be construed to have that effect.'" (*Western Pioneer Ins. Co. v. Estate of Taira* (1982) 136 Cal.App.3d 174, 180-181 [185 Cal.Rptr. 887]; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 830 [114 Cal.Rptr. 589, 523 P.2d 629]; *Battle v. Kessler* (1983) 149 Cal.App.3d 853, 858 [197 Cal.Rptr. 170]; *Carr v. State of California* (1976) 58 Cal.App.3d 139, 147 [129 Cal.Rptr. 730].) This rule is particularly applicable to a statute which diminishes or extinguishes an existing cause of action. (Cf. *Robinson v. Pediatrics Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907 [159 Cal.Rptr. 791].) (11b) Nothing in the language or legislative history of section 12340.11 suggests an intention to apply that statute to a preliminary title report procured prior to its effective date.

(13) Defendant finally argues that the trial court refused to permit it to introduce evidence of plaintiffs' contributory negligence. Defendant offered ***885** only to prove that plaintiffs by diligent investigation could have discovered the water easement. Since plaintiffs had no duty to investigate, but were entitled to rely on the preliminary title report, such evidence is insufficient to show contributory negligence. (See *J. H. Trisdale Inc. v. Shasta etc. Title Co.* (1956) 146 Cal.App.2d 831, 839 [304 P.2d 832].) Defendant did not offer to prove that plaintiffs had actual knowledge of the easement.

3. Liability for Breach of the Covenant of Good Faith and Fair Dealing.

(14) A covenant of good faith and fair dealing is implied in every insurance contract (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575 [108 Cal.Rptr. 480, 510 P.2d 1032]), including title insurance contracts (*Jarchow* v. *Transamerica Title Ins. Co., supra*, 48 Cal.App.3d 917, 940; see *Kapelus* v. *United Title Guaranty Co.* (1971) 15 Cal.App.3d 648, 653 [93 Cal.Rptr. 278]). The jury found defendant breached the covenant, and awarded compensatory damages of $20,000. Defendant argues on appeal that the court erred in admitting, as evidence of breach, settlement offers and other matters occurring after commencement of litigation. It also asserts that no substantial evidence supports the jury's verdict.

(15) Defendant first contends that all evidence relating to events after plaintiffs filed suit should have been excluded on the ground that, once suit has been filed, the insurer stands in an adversary position to the insured and no longer owes a duty of good faith and fair dealing. The issue is one of first impression. The parties review the numerous cases which discuss first-party good faith litigation: plaintiffs point out that none of the cases suggest that the insurer's duty of good faith terminates when suit is filed; defendant points out that all involve acts which in fact occurred before litigation commenced. But neither can point to any case which has considered the issue raised here, and we have discovered none.

We believe, however, that the issue can be resolved as a matter of principle. It is clear that the contractual relationship between insurer and the insured does not terminate with commencement of litigation. In an automobile liability policy, for example, even if the insurer and insured were engaged in litigation concerning coverage of one accident, if the insured were involved in another accident within the policy terms and coverage he would certainly be protected. In the present setting, if some third party today were to assert title to plaintiff's land - or if River Estates Mutual Water Corporation were to reassert its right to a pipeline easement - there is no doubt that defendant would be obliged to provide a defense and possible indemnity. And it is not unusual for an insurance company to provide policy benefits, such as the defense of litigation, while itself instituting suit ***886** to determine whether and to what extent it must provide those benefits. It could not reasonably be argued under such circumstances either that the insurer no longer owes any contractual duties to the insured, or that it need not perform those duties fairly and in good faith.

Defendant's argument is less unreasonable in a case in which the insured filed suit (obviously the insurer could not be permitted to terminate its own obligations by initiating litigation), and the issue is limited to the insurer's duty of good faith and fair dealing in regard to the specific subject matter of the suit. But even here a sharp distinction between conduct before and after suit was filed would be undesirable. Defendant's proposed rule would encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal

fairly and in good faith. Defendant responds that such delay would itself be a breach of the implied covenant, but the incentive would remain, especially since the insured would find it difficult to prove the prelitigation conduct unreasonable if it could not present evidence of the postlitigation conduct by way of contrast. The policy of encouraging prompt investigation and payment of insurance claims would be undermined by defendant's proposed rule.

Defendant argues that imposing a duty of good faith after litigation has begun will make it difficult for the insurer to defend the suit. It claims that investigation of the factual circumstances would be hampered by an obligation to reveal to the insured any material facts it discovers favorable to his claim, and that the attorney who prepares the case for trial could not conduct the trial because he would be a critical witness to the insurer's good faith during the pretrial period. Neither of these concerns, however, justify a distinction between the period before suit is filed and the period after it is filed. Certainly the insurer should have investigated the factual basis of the claim before suit is filed, and may well have utilized counsel to evaluate that claim. The issue of contractual liability can be tried separately, and prior to the trial on the good faith claim, as was done in the present case. In any event, what constitutes good faith and fair dealing depends on the circumstances of each case, including the stage of the proceedings and the posture of the parties. We trust that the jurors will be aware that parties to a lawsuit are adversaries, and will evaluate the insurer's conduct in relation to that setting. [9] ***887**

(16a) Defendant next contends that the admission of the two settlement offers violated Evidence Code section 1152. That section states that "[e]vidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money ... to another who has sustained ... loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it." The Law Revision Commission comment to this section states that "[t]he rule excluding offers is based on the public policy in favor of the settlement of disputes without litigation."

The language of this section does not preclude the introduction of settlement negotiations if offered not to prove liability for the original loss but to prove failure to process the claim fairly and in good faith. This distinction is the basis of the Court of Appeal decision in *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 [89 Cal.Rptr. 78, 47 A.L.R.3d 286]. In that case, the insurer sent two letters to its insured falsely accusing him of concealing a congenital back defect: the second letter also offered to compromise his claim under a disability policy by permitting him to retain the payments already received. Plaintiff refused the offer, and at trial introduced both letters into evidence. The Court of Appeal commented: "[Defendants' suggestion] that their letters were improperly admitted into evidence is not meritorious. ... [T]he applicable code provision (Evid. Code, § 1152) prohibits the introduction into evidence of an offer to compromise a claim *for the purpose of proving liability for that claim*. If the letter of October 4, 1966, were considered an offer to compromise, it would be an offer to compromise the claim of liability under the policy. Plaintiff, however, did not offer the letter to prove liability under the policy but, rather, as a part of his proof of the instrumentality of the tort. Section 1152, therefore, did not preclude its admission." (10 Cal.App.3d at p. 396.) Defendant argues that both letters at issue in *Fletcher* were sent before suit was filed, but under our conclusion that the duty of good faith and fair dealing does not disappear with the filing of suit, that distinction is immaterial.

Fletcher also rejected the argument that the insurer's privilege to assert its legal interests would protect communications and settlement offers which were not in good faith. (17) Defendant revives this argument with a twist; it argues that its offers, because made after commencement of litigation, are absolutely privileged under Civil Code section 47, subdivision 2. [10] No cases apply that privilege in the present context, but defendant relies generally on ***888** decisions which have extended the absolute privilege beyond defamation to bar actions for intentional infliction of emotional distress or intentional interference with economic advantage (see *Herzog* v. *"A" Company, Inc.* (1982) 138 Cal.App.3d 656, 660 [188 Cal.Rptr. 155] and cases there cited), and argues that liability cannot be based upon a communication in a judicial proceeding.

It is obvious, however, that even if liability cannot be founded upon a judicial communication, it can be proved by such a communication - otherwise Evidence Code section 1152 would be unnecessary, and much of modern discovery valueless. Defendant's argument, consequently, forces us to draw a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication. In the present case plaintiffs do not assert that defendant's communications were defamatory, or done with the intent of causing emotional

distress, but instead that they show that defendant was not evaluating and seeking to resolve their claim fairly and in good faith. In our opinion, section 47, subdivision 2, does not bar admission of the offers for that purpose.

(16b) Finally, defendant points out that its second offer - the offer of June 1980, to settle the claim for $5,000 - was filed as an offer to compromise under Code of Civil Procedure section 998. Section 998, subdivision (b) states that if such an offer "is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial." Defendant argues that the reasoning of *Fletcher v. Western National Life Ins. Co., supra*, 10 Cal.App.3d 376 - that Evidence Code section 1152 does not bar introduction of a settlement offer as an instrumentality of the tort - is inapplicable to section 998. [11]

We believe, however, that despite their difference in wording sections 1152 and 998 should receive a parallel construction. Section 1152 states that offers are inadmissible to prove "liability for the loss or damage," which we have construed to refer to liability for that loss or damage to be compromised by the offer. Section 998, subdivision (b), states that an offer cannot be "given in evidence upon the trial." We think that language refers ***889** to the trial upon the liability which the offer proposed to compromise. Thus both sections would serve the same purpose; to bar the introduction into evidence of an offer to compromise a claim for the purpose of proving liability for that claim, but to permit its introduction to prove some other matter at issue.

Both defendants' offers of compromise were submitted before plaintiffs had filed a claim for damages for breach of the covenant of good faith and fair dealing. Both sought only to compromise plaintiffs' original contractual and negligence claims. Under our construction of the statutes, those offers were inadmissible to prove liability on plaintiffs' original causes of action, but were admissible to prove liability for breach of the covenant. That is exactly how matters proceeded: the trial court bifurcated the trial, and admitted the offers into evidence only on the issue of liability for breach of the covenant. [12]

(18) Finally, defendant contends that no substantial evidence supports the verdict finding a breach of the covenant of good faith and fair dealing. However, reading the record most favorably to the judgment below, it reveals that although defendant failed to disclose an easement of record on its preliminary title reports and its title insurance policies, it denied any liability for loss of value in water rights attributable to the easement. When plaintiffs filed suit, defendant responded with a motion for summary judgment. After losing that motion, defendant was faced with both a ruling of the trial court rejecting its narrow reading of the policy and a unanimous body of case law establishing liability for negligence. Defendant nevertheless offered only nuisance-value settlements, and made no attempt to appraise plaintiffs' loss until the issue of liability had been tried and decided in plaintiffs' favor.

The entire pattern of conduct shows a clear attempt by defendant to avoid responsibility for its obvious failure to discover and report the recorded easement of River Estates Mutual Water Corporation. We conclude that the evidence is sufficient to permit the jury to find a breach of the covenant of good faith and fair dealing.

4. Damages for Breach of the Covenant of Good Faith and Fair Dealing.

(19) We agree with the Court of Appeal that there is no "merit in the ... argument that damages for emotional distress were not permitted because ***890** that issue was unraised by the pleadings. Such an issue is reasonably, perhaps necessarily, raised by the pleaded issue of an insurer's bad faith in rejecting settlement of a meritorious claim. And here we observe that the issue of damages for emotional distress was fully and fairly tried and presented for adjudication, in the superior court."

(20) The remaining question concerns recovery of attorney fees and other litigation expense as an element of damage. The Court of Appeal held that attorney fees were recoverable under the terms of the title insurance policies, which insure against "costs, attorney's fees and expenses sustained or incurred by said insured by reason of ... any lien or encumbrance on ... title." Defendant contends that this provision covers only actions against third parties in defense of title, and does not apply to suits against the title insurer itself. (See *Jesko* v. *American-First Title and Trust Co*. (10th Cir. 1979) 603 F.2d 815, 819.)

The trial court, however, did not award attorney fees as a separate item of damage under the quoted policy provision, but as an element of the damages for breach of the covenant of good faith and fair dealing. A subsequent decision by this court, *Brandt v. Superior Court* (1985) 37 Cal.3d 813 [210 Cal.Rptr. 211, 693 P.2d 796], supports the trial court's position. We there stated that "'when the insurer's conduct is

unreasonable, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which detriment ... includes those attorney's fees that were incurred to obtain the policy benefits and that would not have been incurred but for the insurer's tortious conduct.'" (37 Cal.3d 813, 819.) The same reasoning supports inclusion of witness fees and other litigation expenses as an element of damage.

The judgment is affirmed.

Bird, C. J., Mosk, J., and Reynoso, J., concurred.

GRODIN, J.

I agree with the majority that an insurer's duty to deal with its insured fairly, and not to withhold payment of claims unreasonably and in bad faith, does not evaporate with the onset of litigation. While breach of the duty gives rise to an action in tort against the insurer, the duty itself is rooted in the covenant of good faith and fair dealing, which is implied in all contracts, and which imposes upon each contracting party to refrain from doing anything which will injure the right of the other to receive the benefits of the agreement. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818 [169 Cal.Rptr. 691, 620 P.2d 141]; *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 940 [132 Cal.Rptr. 424, 553 P.2d 584]; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573-574 [***891** 108 Cal.Rptr. 480, 510 P.2d 1032].) There is no reason why this implied covenant should cease to be operative simply because litigation has begun. This is not to say - and I do not understand the majority to be saying - that all of an insurer's litigation tactics will be subject to scrutiny by a jury on the basis of a bad faith claim. An insurer must have the right to defend itself in court against claims it believes to be without merit, and the normal rules of litigation should be adequate to protect against abuse. But where an insurer has unreasonably and in bad faith withheld payment of benefits due under a policy prior to litigation, and then continues this bad faith conduct after a complaint is filed, there seems to be no compelling reason why the right to recover for that continuing wrong should terminate either because the insurer decides to file a preemptive action for declaratory relief or because the insured, under the compulsion of the insurer's recalcitrance, decides to file suit himself. [1] Once it is accepted that the insured's covenant of good faith and fair dealing does not perish with the onset of litigation, I see no reason - nor do I find any reason suggested in either of the dissenting opinions - why evidence of settlement offers should not be admissible, as relevant, in the same manner as they are admissible *prior* to litigation, apparently with legislative approval [2] to prove the elements of the tort. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 [89 Cal.Rptr. 78, 47 A.L.R.3d 286].)

What bothers me in this case - and, I take it, our dissenting colleagues as well - is that the two settlement offers which *were* admitted in evidence support plaintiff's theory of bad faith only weakly, and a third settlement offer, which might have been helpful to the jury's evaluation despite its somewhat disparate context, was excluded. Once the trial court decided to admit the first two offers, I believe (unlike the majority) that it should have allowed the defendant to complete the picture. However, in light of the relatively modest verdict I do not believe there has been such a miscarriage of justice as to require reversal and a new trial.

Subject to these reservations, I concur.

LUCAS, J.,

Concurring and Dissenting.

I respectfully dissent from the affirmance of the judgment as to plaintiff insured's good faith cause of action. ***892** Scylla and Charybdis had nothing on my colleagues for making life difficult - if not impossible. An insurer who refuses to pay its insured on a disputed claim is now not only at risk that its refusal will subject it to damages for breach of the covenant of good faith and fair dealing, but must also be conscious that any aspect of its conduct during litigation of the original claim of coverage may be used as significant evidence in an ensuing breach of good faith action. An insurer's unsuccessful attempts to settle during the course of the initial litigation may now be presented to a second jury, along with all other aspects of its defense. Confronted with such evidence and unfamiliar with the vagaries of litigation the jury will, I submit, in all likelihood regard any settlement attempts as prejudgment admissions of liability, and standard defense tactics as indications of a lack of good faith. [1]

The majority resolves the issue of the admissibility of the settlement information as a "matter of principle" by in part placing "trust" in the perspicacity of jurors who "will be aware that parties to a lawsuit are adversaries, and will evaluate the insurer's conduct in relation to that

setting." (*Ante*, p. 887.) No guidelines are enunciated for the jury to follow in performing this balancing act. No recognition is given to the fact that "good faith" may significantly differ before and after the filing of a complaint. Moreover, when one considers that in this context "[t]he terms 'good faith' and 'bad faith' ... are not meant to connote the absence or presence of positive misconduct of a malicious or immoral nature ..." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 921, fn. 5 [148 Cal.Rptr. 389, 582 P.2d 980]), the probability that jurors will place heavy reliance on settlement offers as evidence that the insurer did not have the requisite "good faith" in this context is particularly problematic and prejudicial.

When an insurer refuses to settle after a claim has been filed, an insured may seek relief by filing an action alleging a breach of contract or negligence, as was done here. As the majority asserts, the insurer and insured continue to have a contractual relationship despite the filing of such action as long as the period of coverage lasts. My colleagues' reliance here on this "continuing" duty to act in good faith as to any future aspects of the contractual relationship, is, however, misplaced. The better analysis is one which focuses on the nature of the relationship between the parties *as to the particular claim at issue*. One who it is asserted has negligently injured another continues thereafter to have a duty to refrain from inflicting new ***893** harm upon the victim. Nonetheless, he is still subject to suit *and* entitled to defend himself on the issue of whether the completed transaction involved negligence on his part.

The effect of a filing of an action for professional malpractice also sheds light on this question. An attorney owes a fiduciary duty to his clients. If a client sues for malpractice, the attorney is not required to handle his defense of the action as though the attorney-client relationship still existed. He is not burdened with a "continuing duty of good faith" which cramps the exercise of his defense to the malpractice claim. Nor does the filing of a suit for malpractice necessarily abrogate any duties the attorney may have regarding his handling of any other matter for the client. That there is a fundamental shift in the nature of the attorney-client relationship when a malpractice suit is filed is further demonstrated by the nullification of the attorney-client privilege which is deemed not to exist "as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." (Evid. Code, § 958; compare, § 954 [explaining how the privilege normally applies].)

While the general good faith obligation may remain intact for the term of the insurance contract, of necessity the parties' duties and relationship alter when a given claim is made by the insured, disputed by the insurer, and suit thereon is commenced. I wonder whether the majority, to be consistent, now intends to impose on others in special relationships, such as attorneys or trustees, the same duty during litigation regarding the performance of their services.

The majority contends that a distinction drawn between pre- and postinitiation of litigation[2] settlement offers "would encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith." (*Ante*, p. 886.) I strongly question whether any insurer not acting in good faith will ever be interested in encouraging early action by plaintiffs.[3] Actions asserting a breach of the duty of good faith are generally based on a claim that the insurer has wrongfully delayed or denied payment. Anything that encourages early suits and early resolution of the question of coverage would, I contend, have a *beneficial* effect on the very policies that the majority purports to promote. Moreover, if it were indeed the intent of insurers "to delay serious investigation until after suit was filed," then it seems to me that promotion of early filing of ***894** suits is definitely to be preferred. Earlier filing will force earlier serious investigation and may therefore lead to earlier payment of benefits to the insured. Of course, any failure reasonably to investigate or attempt to settle *before* suit is filed will still subject the insurer to potential liability for breach of the covenant of good faith.

The majority also, while finding Evidence Code section 1152 does not apply to bar introduction of evidence of settlement offers made in the course of the first action, gives no real consideration to the policies underlying that section. The motivation behind the prohibition is encouragement of settlement. The Law Revision Commission comment to the enactment of section 1152 expressly states "[t]he rule excluding offers is based upon the public policy in favor of settlement of disputes without litigation. The same public policy requires that admissions made during settlement negotiations also be excluded." The language of the section is sweeping as well: "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof,

is inadmissible to prove his liability for the loss or damage or any part of it."

In *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 [89 Cal.Rptr. 78, 47 A.L.R.3d 286], upon which the majority relies, the offers of settlement which the court found admissible were made *prior* to the filing of an action against the insurer and were found relevant as part of the plaintiff's "proof of the instrumentality of the tort" alleged, namely intentional infliction of emotional distress. The *Fletcher* court had no occasion to consider whether the making of settlement offers or other conduct following commencement of trial should be admitted despite section 1152's bar.

My colleagues' wholesale acceptance, adoption and extension of the *Fletcher* approach is undertaken with only an empty nod at the policy behind section 1152. If offers of settlement, even offers made pursuant to Code of Civil Procedure section 998, are admissible in later actions, settlement negotiations will become dangerous engagements. An unaccepted offer of settlement is likely to serve as powerful evidence for plaintiffs to argue that the insurer knew its liability but failed to act accordingly. Free-wheeling settlement negotiations and exploratory offers will, I suspect, become things of the past as insurers balance present and future liabilities and interests. The effect may well redound to the disadvantage of plaintiffs who will find it harder to negotiate with constrained insurers. ***895**

Another more fundamental problem with the majority's approach is its complete failure meaningfully to consider or accord any weight to the right of a defendant to defend itself. Nothing in the majority opinion limits introduction of evidence regarding tactics during the earlier trial to attempts to settle. *Any* aspect of the defendant's "conduct" during the first trial will now be fair game. A plaintiff may argue that an answer filed by a defendant, or a defendant's motion for extension of time, or request for interrogatories, or any other action taken by a defendant in the course of defending the original litigation involving coverage is relevant to the issue of the defendant's good faith. [4] Thus anything the insurer does to defend in a coverage action in which it is ultimately unsuccessful, no matter how pro forma a part of the litigation process, may arguably under this approach be considered conduct in violation of the insurer's duty "to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. ..." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818 [169 Cal.Rptr. 691, 620 P.2d 141].)

These litigation strategies and tactics will be offered up to juries who, with the benefit of hindsight, and without the benefit of extensive exposure to litigation practices and techniques, will second guess the defendant's rationales for taking a particular course. Moreover, they may be introduced without a showing of bad intent or malice on the insurer's part or of unusual tactics or delay. In so permitting wholesale introduction of such evidence, the majority reaches a result not only inconsistent with the right to defend, but also arguably unnecessary because the trial court itself will be able during the initial action to assure that defendants do not act improperly. [5] ***896**

Recently, in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 [183 Cal.Rptr. 508, 646 P.2d 179], we had occasion to consider guidelines for determining whether an appeal is frivolous and warrants imposition of sanctions. We observed that a balance must be struck between avoiding improper conduct and assuring that attorneys are free actively to assert their clients' interests. To this end we reiterated the principle that "'Free access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties.' (*Young v. Redman* (1976) 55 Cal.App.3d 827, 838 [128 Cal.Rptr. 86].)" (31 Cal.3d at p. 648.) The majority's holding in this case imposes just such a restraint upon an insurer's right to present a defense.

Similarly, in *Bertero v. National General Corp.* (1974) 13 Cal.3d 43 [118 Cal.Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878], we stressed the importance of the right to assert a defense. We held in *Bertero* that a claim asserted in a cross-pleading could give rise to an action for malicious prosecution and rejected the argument that the cross-pleading had been only defensive. In so concluding, however, we observed that courts in a line of cases starting with *Eastin v. Bank of Stockton* (1884) 66 Cal. 123 [4 P. 1106], had "refused to recognize a tort of malicious defense" and announced that "[w]e do not propose to establish such a tort by our holding here." (13 Cal.3d at p. 52.) *Eastin* and its progeny serve to "protect the right of a defendant, involuntarily haled into court, to conduct a vigorous defense." (*Ibid.*)

The majority here does not give any reasoned consideration to this fundamental and recognized right to defend. Nonetheless, its opinion effectively establishes potential tort liability based on a failure to "defend in good faith." Such liability extends far beyond that which could be based on even the thus far disallowed tort of "malicious defense." [6] As we have often ***897** reiterated, a breach of the covenant of good faith and fair dealing requires no showing of malice or immoral intent on the part of the insurer. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at pp. 921-933, fn. 5.) The prospect of defendants automatically being sued for malicious defense or subject to an easy standard for determining if an appeal is frivolous has previously raised substantial concerns about the potential chilling effect on the right of a defendant to present its case. As a result, courts have exercised extreme caution in these areas. (Cf. *In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650 ["Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal [or at trial]. An appeal [or defense] that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals"].) Unfortunately, the majority ignores this traditional approach without a second glance.

The initiation of litigation places the parties in an entirely new arena. Whereas before filing of a suit, an insurer may feel freer to act with impunity in improperly pressuring insureds or delaying proceedings, once an action is brought in court, the plaintiff may appeal to the trial judge for relief from improper conduct on the defendant's part. If the insurer's defense is totally meritless, a motion for summary judgment can speed things along. If the insurer improperly drags its feet in preparing for trial, the trial judge has a range of options extending from imposition of monetary sanctions to striking the answer and entering judgment for the plaintiff. On the one side is the importance of affording defendants an opportunity to defend (especially where there is not even a preliminary showing of any malicious intent on the defendant's part) and the potential for prejudice to them if their trial "conduct" may be second-guessed in a subsequent action. On the other is the necessity to admit the information here at issue into evidence. I conclude that without more showing the former interests must prevail. [7] ***898**

The tunnel vision exhibited by the majority here is further emphasized by its differing treatment of the various settlement offers which were in fact made during this litigation. To review briefly, the complaint filed in October 1979 alleged a breach of the insurance contract and negligence in the preparation of the preliminary title reports. In May 1980, seven months later, the insurer offered to settle for $3,000 based on an appraisal it had ordered. That offer was rejected. The next month, the insurer served a written offer to compromise in the sum of $5,000 pursuant to the terms of Code of Civil Procedure section 998. This offer was also rejected by the insured who then successfully amended the complaint to include a cause of action for breach of the covenant of good faith and fair dealing.

The parties stipulated to bifurcating the action in order to avoid increased litigation costs should the court find no liability under the original causes of action. In August 1981, the court rendered an interlocutory judgment following a nonjury trial which had been held in January of the same year. It found that the insurer was liable for breach of contract and negligence. The insurer then filed a new Code of Civil Procedure section 998 offer to compromise for $15,000. Following rejection of this offer, the parties went to trial before a jury in February 1982.

This proceeding was also divided. In the first portion, the jury was asked to determine what damages to the value of their property the insured had suffered by virtue of the insurer's negligence and breach of the insurance contract. The jury awarded *$8,400*. That sum was (1) approximately $54,000 *less* than the insureds had been demanding, and (2) only $3,400 *more* than the June 1980 offer to compromise.

After the jury had awarded those damages, it was asked to decide whether the insurer had violated its duty of good faith and fair dealing. The court allowed the insured to offer evidence of the settlement offers and surrounding negotiations for the first two offers made in 1980 but refused to allow introduction of the offer to compromise for $15,000 made after liability had been determined. Thus, as far as the jury knew in February 1982, the insurer had last offered to settle 20 months before and had made no further offers even after liability had been determined.

The $15,000 payment was intended to settle claims arising out of both the initial breach of contract cause of action as well as the claim relating to ***899** the insurer's asserted breach of the duty of good faith and fair dealing. At the time it was made, damages had not been fixed on the former claim and the latter claim was certainly a debatable one. Moreover, the $15,000 offer was made before plaintiff incurred additional attorney fees and other costs of litigation for prosecution of

the damages claim on the first cause of action as well as in pursuit of the entire claim regarding good faith. The eventual total damages award was $28,400. Since, as I will argue, the jurors might well have considered the apparent failure of the insurer to make additional settlement offers a material factor once they had learned of the earlier lower offers, it is difficult to assess how the settlement offer truly related to the damages awarded. Nonetheless, even taking into account the fact that the partial information presented to the jury might well have inflated the damages awarded for breach of good faith, the offer was well within the realm of reasonable, good faith offers when measured against the final total award and in the context of the time at which it was made.

The majority disposes of the insurer's claim of error on this point by announcing that "Once the court had determined liability, defendant's willingness to make a reasonable settlement offer has little tendency to prove that defendant has been acting fairly and in good faith toward its insured." (*Ante*, p. 889, fn. 12.) The opposite is true: The apparent continued unwillingness to make a reasonable settlement offer during this period may well have influenced the jury in its determination that the insurer was not acting in good faith. The jury found only unreasonableness, and not malice or bad intent, as indicated by its refusal to award punitive damages. If such evidence is generally to be admitted, I would argue that the exclusion of this information regarding settlement negotiations in the six months between the determination of liability and the award of damages was at least as relevant as the settlement offers which the majority allows.

I have grave doubts overall whether a sufficient showing was made of a breach of the covenant of the duty of good faith and fair dealing. I have no doubts, however, that prejudicial and improper information was offered and argued to the jury in the form of evidence relating to matters occurring during the original litigation in this action. When insurance companies abuse the rights of their insured and breach their contracts and obligations thereunder, they should be subject to the full scope of appropriate punishments under law. In the rush to punish, however, the majority has lost sight of fundamental principles of due process and fairness. The right to defend is basic to our system. Without any real showing of a need to do so, my colleagues have cavalierly hobbled that right for a class of defendants. I cannot join them in this unwarranted and unfair exercise. ***900**

I would reverse the good faith judgment and remand for further proceedings in which evidence of the insurer's conduct during litigation could not be introduced.

KAUS, J., *

Concurring and Dissenting.

I concur generally in Justice Lucas' concurring and dissenting opinion. In most cases, once the insured has started to litigate, the evidence of bad faith which a stingy offer may permit is submerged by the strategic and tactical maneuvers - the gamesmanship - generated by the suit. This seems particularly true in this case, where the inference would be weak even if no action had been started: the company had a plausible policy defense to an aspect of the claim with respect to which the insured's estimate of the damage was outrageously high. Even if liability on the policy had been conceded, the offers were within hailing distance of the damages which, at the time of the evidentiary ruling, the jury had already fixed at $8,400. [1] Finally I can see no rational basis for excluding the insurer's final offer of $15,000. Surely the inference as to the insurer's intent which emanates from a reasonable offer is not nullified by the fact that liability has been adjudged. Under plaintiffs' ground rules, whether the $15,000 offer was reasonable, although the consideration included dismissal of the bad faith claim, was a question of fact for the jury.

The only reason why I cannot get very excited about the result of this litigation, is that this particular jury showed unusual restraint for a type of case in which multi-million dollar awards for punitive damages appear to be almost routine. It is perhaps fortunate that so far most of the defendants in these bad faith cases have been insurance companies which can spread the cost of their mishandling of claims with relative ease. We know, however, that there is tremendous pressure on the courts, particularly this court, to extend bad faith liability to other contractual relationships. (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 767-770 [206 Cal.Rptr. 354, 686 P.2d 1158].) So far we have not succumbed, although a satisfactory rationale for continued resistance is hard to come by. We have learned how to spell "banana" but not how to stop. Nevertheless, in my view it would be disastrous if every contract were to be subjected to the same set of rules which we have applied in the context of the insurer-insured relationship. [2] Without wishing to strike a blow for bad ***901** faith or unfair dealing,

I just cannot see every person who wilfully breaks a contract subjected to almost unlimited liability for punitive damages.

At the same time it must be recognized that in many cases confining a successful plaintiff in a contract case to traditional damages, which do not even include attorneys' fees, is to guarantee that he will not be made whole. This seems unconscionable where the defaulting defendant has acted in bad faith. Unfortunately our desire to prevent this kind of injustice has caused us to go overboard in the other direction and paint ourselves into a corner from which we can only escape by taking back much of what we have said in the insurance cases or applying the rule of those cases to all other contracts.

While I believe that in the long run the courts can develop an equitable solution, the issue appears to be one of some urgency and no quick answers should be expected from the judiciary. On the one hand too much established law - some of it statutory - would have to be overturned or "reinterpreted" if we were to refashion contract remedies so that contract claimants against insurance companies are made truly "whole." On the other, our experience in *Seaman's* surely tells us that there are real problems in applying the substitute remedy of a tort recovery - with or without punitive damages - outside the insurance area. In other words, I believe that under all the circumstances, the problem is one for the Legislature - a suggestion which should not come as too much of a shock to devotees of separation of powers. [3]

If any legislator should feel moved to draft a bill, he could do worse than to study an excellent article by Michael Traynor which, written in the wake of *Seaman's*, reviews the need for more liberal compensatory damage awards in contract, explains why the bad faith/punitive damage solution is unsatisfactory and suggests specific remedies. (Traynor, *Bad Faith Breach of a Commercial Contract: A Comment on the Seaman's Case* (Cal. State Bar, Fall 1984) 8 Bus. L. News 1.) I copy some of the latter below. [4] To ***902** quote Mr. Traynor, the solution for the victims of breaches of contract should not be "a hit or miss game of punitive damages." (*Id*., at p. 12.) "If," however, "judges, legislators and lawyers focus on the adequacy of compensation for breach of contract, they will be focusing on the central problem." (*Ibid*.)

Appellant's petition for a rehearing was denied February 14, 1986. Lucas, J., and Panelli, J., were of the opinion that the petition should be granted. ***903**

Footnotes

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

1 The parties dispute whether the letter from defendant to plaintiffs on September 13, 1981, constituted a rejection of their claim. The letter states specifically that "the availability of water on the White property is not a valid consideration in the assessment of a claim under the policies of title insurance." Then, after criticizing the appraisal for not considering other possible items of loss, it concludes, stating: "This letter should not be interpreted as a rejection of your client's claim. However, the documentation provided is not sufficient for Western to properly evaluate the claim. Western will look forward to hearing from you further in this regard." Plaintiffs understood this letter to reject any claim for loss based upon the taking of groundwater, which seems a reasonable interpretation of the letter.

2 Under section 998, if a plaintiff rejects a defendant's offer and fails to obtain a more favorable judgment, he cannot recover costs, is liable for defendant's costs from the time of the offer, and in the discretion of the court liable for defendant's prior costs.

3 Schedule B, part one, reads in full as follows:
"This policy does not insure against loss or damage, nor against costs, attorneys' fees or expenses, any or all of which arise by reason of the following: "Part One:
"1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
"Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
"2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.
"3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.
"4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

"5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water.

"6. Any right, title, interest, estate or easement in land beyond the lines of the area specifically described or referred to in Schedule C, or in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing in this paragraph shall modify or limit the extent to which the ordinary right of an abutting owner for access to a physically open street or highway is insured by this policy.

"7. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.

"8. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records.

"9. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not shown by the public records and not otherwise excluded from coverage but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had been a purchaser or encumbrancer for value without knowledge."

4 "'Under the familiar maxim of *expressio unius est exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded.'" (*Kiely Corp. v. Gibson* (1964) 231 Cal.App.2d 39, 46 [41 Cal.Rptr. 559]; *Collins v. City & Co. of San Francisco* (1952) 112 Cal.App.2d 719, 731 [247 P.2d 362].) This canon, based on common patterns of usage and drafting, is equally applicable to the construction of contracts.

5 Water rights may arise by appropriation, prescription, or by virtue of ownership of riparian land. Often such rights do not appear of record, or if recorded do not clearly refer to the property whose title is under investigation, or appear in the recorded chain of title to that property. The same is true of unpatented mining claims and other interests mentioned in paragraph 5. (See 2 Miller & Starr, Current Law of Cal. Real Estate (1977 ed.) § 12.31.)

6 Defendant argues that plaintiffs did not rely on the title policies, since they were issued only when the sale was consummated. Plaintiffs did rely on the preliminary title report. If, as defendant contends (see part 2 of this opinion) that report is an offer to insure upon the terms stated, plaintiffs' reliance on that report is equivalent to reliance upon the policies issued in conformity with the report.

7 Defendant quotes Miller and Starr, who after noting that some water rights are duly recorded in the chain of title, state that "the exclusion in the standard coverage policy is not limited merely to *unrecorded* rights. The policy apparently also intends to exclude liability arising out of recorded water interests. Therefore, a subsequent purchaser or encumbrancer is not protected by his title policy against prior interests in water on the property, whether recorded or unrecorded." (2 Miller & Starr, Current Law of Cal. Real Estate, *supra*, § 12.31.)

It may well be that the policy was intended to exclude recorded water rights, even those in the chain of title which would be discovered during the ordinary search incident to preparation of a standard title policy. Construction of the policy, however, depends not on the intent of the drafter but on the reasonable expectations of the insured. (See *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 270-271 [54 Cal.Rptr. 104, 419 P.2d 168]; *Otter v. General Ins. Co.* (1973) 34 Cal.App.3d 940, 950-951 [109 Cal.Rptr. 831].)

8 We distinguish the case of *Coleman v. Security Title Ins. Co.* (1963) 218 Cal.App.2d 444 [32 Cal.Rptr. 575]. In that case the title insurance policy recited that the property was in the "Beaumont Irrigation District, City of Beaumont"; in fact it was in neither the district nor the city. The court held coverage was barred by the policy's exclusion of "water rights." But as appears from the opinion, it was unnecessary to reach the question of policy exclusions. The policy protected only against defects in title, and the erroneous recital in no way impaired plaintiffs' title.

9 Defendant fears that juries will misunderstand the function of various litigation tactics, and in particular that they might mistakenly view a settlement offer as an admission of liability. The trial court, however, would retain the authority to exclude evidence of settlement offers or other conduct of the insurer if it concluded that in the case before it the prejudicial effect of such evidence would outweigh its probative value. (Evid. Code, § 352.)

10 Civil Code section 47 provides in relevant part: "A privileged publication or broadcast is one made -

"

. . . . .

"2. In any (1) legislative or (2) judicial proceeding. ..." There is a specific exemption for allegations concerning third parties in a divorce proceeding.

11 If the May offer to settle for $3,000 were admissible, the admission into evidence of the June 1980 offer could not be reversible error. If plaintiffs had not been able to present evidence of any of the postlitigation negotiations, including the May 1980 offer, their proof of defendant's breach might have been hampered. But the fact that defendants in June of 1980 made a second offer, $2,000 higher than the first offer, did not add substantially to the case. We believe it unlikely that the exclusion of that second offer would have led to a result more favorable to defendant. (See Cal. Const., art. VI, § 13.)

12 We find no error in the trial court's exclusion of a $15,000 settlement offer made after the interlocutory judgment of liability in August of 1981. Once the court had determined liability, defendant's willingness to make a reasonable settlement offer has little tendency to prove that defendant has been acting fairly and in good faith toward its insured.

1 There is no reason here to address, and I reserve judgment on, the situation where an insurer acts in good faith prior to litigation but engages in bad faith conduct following the onset of litigation.

2 Insurance Code section 790.03, subdivision (h)(5) establishes as an unfair act an insurer's knowledge of "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." The statute apparently contemplates that evidence of settlement offers will come in as part of the means of proving a violation of the statutory duty imposed. Although the Legislature has not explicitly addressed the common law tort of breach of the implied duty of good faith and fair dealing, from a policy standpoint there appears to be no difference between the common law duty and the statutory duty imposed by Insurance Code section 790.03, subdivision (h) as regards admissibility of settlement offers.

1 This possibility is exacerbated by the majority's holding that only the settlements offered here before liability was determined could be introduced. As I will discuss, the illogic of the majority's approach is well demonstrated by its refusal to find as error the exclusion of defendant's $15,000 offer made in the six months between interlocutory judgment of liability and the jury's award of only $8,400 in damages.

2 I speak here of actions initiated by the insured. Declaratory relief actions brought by the insurer may give rise to different considerations.

3 Of course, "inducing" litigation, early or late, is not a problem where the insurer has already paid up without dispute.

4 The jury in the good faith portion of the action here heard evidence regarding not only the settlement offers per se, but also regarding the negotiations and conduct of the parties' attorneys in regard to the offers. In closing argument, the insured's counsel told the jury "The other aspect of this case is that you have a situation where they have delayed the case, you've seen the files that we've been dragging around .... [O]nce a suit is filed then every movement from one side produces an equal and opposite movement in the other direction, and you end up with these numerous briefs. Briefs on that, briefs on this, research depositions, there were eight or nine depositions taken in this case. Most of which were unnecessary but once somebody takes some information you've got to do the same thing to prepare for trial." There was no argument that the particular tactics used were in and of themselves improper; rather the implicit claim was that the normal delays of litigation themselves amounted to evidence of a lack of good faith.

5 Justice Grodin's concurrence further illustrates the difficulty of extending the duty of good faith following commencement of litigation. He speaks of finding no basis for concluding evidence of settlement offers should not be admitted as relevant evidence regarding the insurer's asserted bad faith following the commencement of litigation. He then observes that the evidence regarding the defendant's settlement offers here were only "weakly" supportive of plaintiff's good faith claim. Nowhere does he explain how the offers made here and the other actions relied on by plaintiff's counsel (see, *ante*, fn. 4) were anything other than part and parcel of the insurer's "right to defend itself in court against claims it believe[d] to be without merit" (*ante*, p. 891), nor how or by whom a distinction is to be drawn between normal litigation tactics and actual conduct involving "bad faith." While utilizing the point that litigation is commenced as the cutoff may not be an ideal rule and may in a few instances result in wrongful conduct by the insurer which will not be reachable and curable by the court before which the litigation is proceeding, I nonetheless believe that such a rule is necessary in order not to chill the insurer's fundamental right to defend itself.

6 Even those who argue that a tort of "malicious defense" should be allowed do not go so far as the majority here in loosely permitting liability to be premised on the mere defense of an action filed against one. (See Van Patten & Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation* (1984) 35 Hastings L.J. 891.) They at least require an adapted version of the requirements for asserting "malicious prosecution," including "Assertion of a defense, which the defendant knows or should know is without credible basis, for the purpose of delay ..." (*id*. at p. 936) and the fundamental requirement of malice (*id*. at p. 931). Since the elements of a cause of action for a breach of the duty of good faith and fair dealing do *not* echo those required by an action alleging malicious prosecution (or defense), it

is clear that the majority has taken a giant leap forward beyond that contemplated even by those advocating recognition of a general new tort based on improper defensive conduct.

7 Without explanation, the majority vaguely suggests that the trial court's authority to exclude evidence as more prejudicial than probative pursuant to Evidence Code section 352 will prevent juries from "misunderstand[ing] the function of various litigation tactics." (*Ante*, p. 886, fn. 9.) My colleagues offer no guidelines for that determination. Moreover, in view of their approval of the trial court's exclusion of the $15,000 settlement offer (see *ante*, p. 889, fn. 12 and *post* at p. 898), it appears that this approach may in fact work to the further detriment of insurers.

In any event, the majority fails to explain how permitting a trial court to exercise discretion cures the fundamental problems. Insurers are still left uncertain as to whether any action they take with regard to litigation on an underlying breach of contract claim may be used against them. There is no lessening of the basic constraints on a defendant's right to defend by virtue of a rule which says the trial court has discretion to decide what may be introduced. Moreover, in this case no flagrant misconduct was alleged and plaintiff's argument regarding defendant's litigation conduct can be characterized as asserting only that litigation generally caused delay. The majority nevertheless approves the trial court's admission of the $3,000 and $5,000 offers without even an attempt to apply section 352. As a result, it is difficult to see when a trial court will ever exclude such evidence following this decision.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

1 On the majority's reasoning, defendant would have been better off if it had made no offer at all. Discouraging "ballpark" offers by permitting them to be used as evidence of bad faith seems very poor policy.

2 The problem is not so much the theory of the bad faith cases, as its application. It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith.

3 I emphasize that I am merely thinking about policy, not constitutionality. Certain constitutional aspects of bad faith claims against insurers are now pending in the United States Supreme Court in *Aetna Life Ins. Co. v. Lavoie* (Ala. 1984) 470 So.2d 1060, consideration of jurisdiction postponed to hearing on merits (1985) U.S. [86 L.Ed.2d 691, 105 S.Ct. 2672].

4 "There are several ways in which damages for bad faith breach of contract could be amplified to yield an adequate compensatory award without radically altering the existing framework of contract law:

"*First*, the *Hadley v. Baxendale* [(1854) 156 Eng. Rep. 145] rule that consequential damages are limited to those in contemplation of the parties when the contract was made could be relaxed in accordance with the current trend; both the applicable statutory language and existing case law support compensatory damages that go beyond that limit and that approach or are comparable to compensatory damages in tort cases.

"*Second*, contractual limitations on the amount of damages or on the availability of consequential damages could be denied enforcement or circumscribed; doing so would provide a second look, at the damages phase, at clauses whose mere existence might not cause the bargain to be unconscionable but whose enforcement in a bad faith case could produce an unconscionable result.

"*Third*, the present discretion of courts to award prejudgment interest when the amount of the liability is not certain could be exercised more broadly to ameliorate the loss of opportunity and delay that results from the breach.

"*Fourth*, by legal rule and jury instruction, trial courts and juries could be encouraged as well as guided in bad faith cases to award a higher rather than a lower compensatory award within the leeways and the range of uncertainty that presently exist in the law of contract damages; such a development would recognize what now occurs frequently, although ad hoc, in practice.

"*Fifth*, in appropriate cases, a court could consider invoking principles of restitution and unjust enrichment to take away the profits resulting from a bad faith breach and award them to the party whose expectations were destroyed.

"The foregoing suggestions are by no means exhaustive; there may be additional opportunities for rationally developing the resources of contract law to improve compensatory damages when a contract is broken in bad faith." (Fns. omitted.) (Traynor, *supra*, 8 Bus. L. News at pp. 12-13.)

AA-62

114 Cal.App.4th 1343
Court of Appeal, Second
District, Division 7, California.

Gary K. WOLF et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Walt Disney Pictures and Television, Real Party in Interest.

No. B169265.
|
Jan. 21, 2004.
|
As Modified on Denial of Rehearing Feb. 19, 2004.
|
Review Denied April 14, 2004. *

Synopsis
Background: Author sued movie and television company for royalties he alleged were due him under parties' agreement concerning characters author created in book from which company made successful movie, and company filed countersuit. The Superior Court, Los Angeles County, No. BC251199, Mary Ann Murphy, J., granted company summary adjudication as to several causes of action. Author petitioned for a writ of mandate.

Holdings: The Court of Appeal, Johnson, J., held that:

[1] term "gross receipts," in agreement was susceptible to more than one interpretation, and

[2] triable issue of fact remained precluding determination of term's meaning.

Writ granted.

West Headnotes (14)

[1] Appeal and Error De novo review

On review of an order summarily adjudicating issues, the Court of Appeal reviews the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent's case or demonstrated that under no hypothesis is there a material issue of fact which requires the process of a trial.

2 Cases that cite this headnote

[2] Evidence Latent ambiguity

Extrinsic evidence was admissible to determine whether term "gross receipts," in royalties agreement between author and movie and television company concerning characters author created in book from which company made successful movie, was limited to money received by company or also extended to other valuable consideration; term was not uniformly defined in agreement, and author's proffered expert testimony of entertainment industry custom and usage revealed the term had more than one possible meaning, thereby exposing a latent ambiguity in the contract language.

See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 696; 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, §§ 76, 77, 85; Cal. Jur. 3d, Contracts, § 197 et seq., Evidence, § 230.

22 Cases that cite this headnote

[3] Evidence Grounds for admission of extrinsic evidence

Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning.

71 Cases that cite this headnote

[4] **Appeal and Error** Parol or extrinsic evidence affecting writings

It is reversible error for a trial court to refuse to consider extrinsic evidence on the meaning of a contract term on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face.

47 Cases that cite this headnote

[5] **Evidence** Latent ambiguity

Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.

51 Cases that cite this headnote

[6] **Contracts** Existence of ambiguity

Evidence Grounds for admission of extrinsic evidence

The interpretation of a contract involves a two-step process: first the court provisionally receives all credible evidence concerning the parties' intentions to determine ambiguity, i.e., whether the language is reasonably susceptible to the interpretation urged by a party, and if in light of the extrinsic evidence the court decides the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step, i.e., interpreting the contract.

115 Cases that cite this headnote

[7] **Appeal and Error** Construction, interpretation, and application in general

Contracts Ambiguity in general

The trial court's determination of whether an ambiguity exists in the terms of a contract is a question of law, subject to independent review on appeal.

17 Cases that cite this headnote

[8] **Contracts** Ambiguity in general

Contracts Extrinsic facts

The trial court's resolution of an ambiguity in a contract is a question of law if no parol evidence is admitted or if the parol evidence is not in conflict, but where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.

35 Cases that cite this headnote

[9] **Evidence** Grounds for admission of extrinsic evidence

Judgment Contracts

When two equally plausible interpretations of the language of a contract may be made, parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.

35 Cases that cite this headnote

[10] **Copyrights and Intellectual Property** Contracts

Term “gross receipts” in entertainment royalties contract was subject to consideration in light of all the circumstances and the overall context of the contract, where term appeared several times in contract, term was defined in some sections but not others, and in some contexts term was not capitalized to suggest a special meaning.

3 Cases that cite this headnote

[11] **Contracts** Subject, object, or purpose as affecting construction

Contracts Language of contract

Contracts Preliminary negotiations and agreements

Contracts Construction by Parties

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties, which is determined by objective manifestations of the parties' intent,

including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature, and subject matter of the contract; and the subsequent conduct of the parties.

21 Cases that cite this headnote

[12] **Contracts** Intention of Parties

Rule of contractual interpretation that when a term is found to be ambiguous it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it, does not mean the promisor's subjective intent controls, but instead is designed to override the promisor's subjective intent whenever necessary to protect the promisee's objectively reasonable expectations.

5 Cases that cite this headnote

[13] **Judgment** Contract cases in general

Triable issue of fact existed as to meaning of term "gross receipts" in entertainment royalties contract between author and movie and television company, precluding summary adjudication of issue of interpretation; company's construction that royalties were triggered only when it received money, and author's construction that he was entitled to royalties when company received other types of valuable consideration, were both reasonable, thereby requiring court's testing of competing constructions.

3 Cases that cite this headnote

[14] **Appeal and Error** Construction, interpretation, and application in general

Contracts Extrinsic facts

Where no extrinsic evidence is introduced to construe a contract, or the evidence is not in conflict, an appellate court will independently construe the contract, but where a conflict in the evidence exists, it must be resolved in the trial court, as with any question of fact, before the court can declare the meaning of the contract as a matter of law.

23 Cases that cite this headnote

Attorneys and Law Firms

****651** ***1345** Rintala, Smoot, Jaenicke & Rees, J. Larson Jaenicke, Robert W. Hodges, Michael B. Garfinkel, Los Angeles, and Heather M. Noelte for Petitioners.

No appearance for Respondent.

Sheppard, Mullin, Richter & Hampton, Martin D. Katz, Lisa N. Stutz and Ann B. Clark, Los Angeles, for Real Party in Interest.

Opinion

***1346** JOHNSON, J.

An author seeks a writ of mandate to compel the trial court to vacate its order granting summary adjudication of issues in favor of an entertainment industry conglomerate ****652** on its cross-claims for a declaration it was not required to pay royalties on the value of promotional agreements with third parties for which it received no cash. At issue is whether the term "gross receipts" as used in the royalty agreement is reasonably susceptible to an interpretation urged by the author to mean other valuable in-kind consideration as well as cash. The trial court found the term "gross receipts" clearly and unambiguously meant "cash" only, and rejected expert extrinsic evidence indicating the term in the entertainment context meant money as well as the value of other consideration received. We conclude the trial court erred in concluding the term "gross receipts" was not reasonably susceptible to the interpretation urged by the author. Accordingly, we grant the petition for writ of mandate with directions for the trial court to vacate its order granting summary adjudication and remand for further proceedings.

FACTS AND PROCEEDINGS BELOW

Gary K. Wolf and his company Cry Wolf!, Inc. (Wolf), are the petitioners in this case. Petitioner, Gary K. Wolf, is the author of an original novel entitled Who Censored Roger Rabbit? In his novel Wolf created characters such as Roger

Rabbit, Jessica Rabbit, Baby Herman and Detective Eddie Valiant. Wolf's novel also created and introduced the concept of Toontown as the place where these cartoon characters lived.

Shortly after the book's release in 1981, real party in interest, Walt Disney Pictures and Television (Disney), reached an agreement with Wolf to option nearly all rights to Who Censored Roger Rabbit? Disney memorialized the terms of the parties' oral agreement in a letter dated May 1981. According to this deal memo, if Disney exercised its option, Wolf would be entitled to a 5 percent royalty on children's story books, children's story-telling records and on merchandise based on the characters he had developed in Who Censored Roger Rabbit? as well as other rights.

In 1983, Disney exercised its option to purchase the rights to Who Censored Roger Rabbit? The parties thereafter executed a "long form" purchase agreement. This 1983 agreement superceded the 1981 "deal memo" and expanded on the parties' respective rights regarding motion picture rights, television series rights, and other matters. In the 1983 agreement, Wolf also assigned to Disney the right to exploit the characters he created in his novel.

Not one of the parties who played a role in, or who helped negotiate the terms of, the 1983 agreement could recall any discussion they held at the time ***1347** regarding the meaning of the term "gross receipts" as used in paragraph 21 governing royalty rights to character merchandise.

Thereafter, Disney developed and coproduced the motion picture Who Framed Roger Rabbit? with Steven Spielberg's Amblin Entertainment. Disney released the movie in June 1988. It proved to be an extraordinarily successful feature combining cartoon and live action actors.

By 1989 a dispute arose among the parties regarding use of Wolf characters at theme parks and in movie cels, auditing rights, and other matters. The parties resolved their dispute by entering into another agreement in 1989 which clarified and/or modified certain terms of the 1983 agreement. However, Wolf's right to a 5 percent royalty on merchandise depicting his characters remained intact. Again, none of the negotiating parties to the 1989 agreement could recall any discussion regarding the meaning of Wolf's right to a royalty on "gross receipts" from character merchandise.

****653** In order to promote the theatrical and home video releases of the film (and at various times thereafter to promote and sustain the Roger Rabbit franchise), Disney entered into alliance agreements with corporate entities such as Kodak, Coca–Cola, and Burger King, licensing them to use Roger Rabbit and Disney characters in their advertising and promotions. The terms of Disney's promotional agreements with these third parties varied: sometimes Disney received money from the other company; sometimes Disney paid the other company, and in still other situations, no cash exchanged hands. An example of this latter type of agreement is a Disney/McDonald's agreement entered into in 1988 in connection with the picture's release. In this agreement Disney allowed McDonald's to use Wolf as well as Disney characters in a "tie-in" promotion between its menu items and the motion picture Who Framed Roger Rabbit? Under this agreement McDonald's agreed to: (1) conduct a promotion featuring the licensed characters on 18 million collector cups; (2) purchase $12 million worth of specified advertising themed to the motion picture; and (3) place approximately $100 worth of point-of-purchase materials at each of the McDonald's stores throughout the United States. Disney received no cash directly from McDonald's under this particular licensing agreement.

In 1991, Disney entered into another so-called alliance agreement with Eckerd/Kodak. The agreement called for Eckerd Drug Company to fund and produce television and radios ads, print ads, in-store advertisements and to undertake other promotional efforts. The agreement required Kodak to underwrite the cost of producing hundreds of thousands of Walt Disney World collector pins depicting Disney as well as Roger Rabbit characters. In exchange, Disney provided six grand prize travel packages to Walt Disney World. Disney received no cash directly from this arrangement.

***1348** On the other hand, Disney did receive cash under its 1995 licensing agreement with McDonald's to promote Disneyland's 40th anniversary. McDonald's Disneyland 40th Anniversary Happy Meal agreement was a licensing arrangement which allowed McDonald's to give away eight toy car "premiums" featuring various Disney characters, including one car which featured two of the Roger Rabbit characters. McDonald's paid Disney $400,000 under the licensing agreement for the eight cars. Because the Wolf characters represented one eighth of this amount, Disney reported $50,000 attributable to the Roger Rabbit characters and paid Wolf 5 percent of this amount, or $2,500.

Wolf claimed he was entitled to a 5 percent royalty every time Disney licensed Roger Rabbit characters for use in any merchandising venture by Disney or through its alliance agreements. He asserted he was entitled to this royalty based on the value of the licensing agreement to Disney from use of the Roger Rabbit characters, whether or not Disney chose to receive the benefit in cash. Disney countered it was not obligated to pay Wolf any royalty unless or until it received actual cash from a licensing agreement.

Unable to resolve the dispute, Wolf filed suit against Disney in May 2001. In March 2002, Disney filed a cross-complaint for declaratory relief, reformation, money had and received and unjust enrichment. In October 2002, Disney moved for summary adjudication on three of the causes of action in its cross-complaint which sought a declaration the parties' 1983 contract only obligated it to pay a 5 percent royalty on cash it received for character merchandising, and that it had no obligation to pay a royalty on any noncash consideration it ****654** received from licensing Wolf's characters for use in merchandise for promotional purposes. [1]

In its motion Disney argued it was entitled to summary adjudication of issues because the "clear and unambiguous meaning" of "gross receipts" in the contract could only mean receipt of cash money. Disney claimed the contract language was clear and unambiguous because the contract did not obligate it to account for royalties to Wolf unless and until it had *received* funds in the United States. In opposition, Wolf presented extrinsic evidence in the form of expert testimony to refute Disney's assertion. According to ***1349** Wolf's expert, the term "gross receipts" in the entertainment industry means "money or the value of other consideration received by the studio," when not otherwise defined or limited by written agreement.

The trial court heard several hours of arguments on the motion over two court days. The trial court questioned Wolf regarding his proffered extrinsic evidence that the term "gross receipts" was interpreted in the entertainment industry to mean cash or other valuable consideration. [2] The court acknowledged Wolf's expert's testimony created an ambiguity regarding the meaning of the term "gross receipts." However, the court was persuaded the contract term clearly and unambiguously meant Disney's obligation to pay Wolf royalties only arose with actual receipt of cash in connection with the merchandising of Wolf's characters. The trial court found the term "gross receipts" was not reasonably susceptible to the meaning urged by Wolf and rejected his proffered extrinsic evidence.

In its written order the trial court ruled Disney had met its burden of showing there were no triable issues of material fact and Wolf had failed to raise a triable issue of material fact. The court thus granted summary adjudication in favor of Disney on its first, fourth and seventh causes of action in its cross-complaint. The court reasoned: "Wolfe [*sic*] claims entitlement to 5% of the 'promotional value' of the two Alliance Agreements at issue, that is, monies *not actually received* by Disney. However, the plain and unambiguous language of [ ] Wolfe's [*sic*] contract provides that he is entitled to 5% of the monies *received* by Disney. The contract at issue was negotiated at arms length between the parties. The contract is clear and unambiguous and extrinsic evidence is not received to interpret the contract. The contract does not require the addition of fictional receipts, nor does it require payment to Wolfe [*sic*] of 5% of monies that were never received by Disney.

"Cross–Complainants' motion for summary adjudication of issues on the first, fourth, and seventh causes of action of Disney's cross-complaint against Wolfe [*sic*], filed on March 11, 2002, is granted. Pursuant to [ ] paragraph 21 of the 1983 ****655** agreement, with regard to the July 18, 1991 Kodak agreement and the March 21, 1995 McDonald's agreement, Disney has no obligation to pay Wolfe [*sic*] 5% of the gross receipts, until monies have been received by Disney. Although the court has read all papers filed in support of and opposition to the instant motion, extrinsic evidence is not admitted for the reasons stated. Only admissible nonextrinsic evidence has been considered in deciding this motion." [3]

***1350** Wolf filed a petition for writ of mandate to compel the trial court to vacate its order for summary adjudication. We issued an order directing the trial court to either vacate its order for summary adjudication and make a new and different order denying the motion for summary adjudication, or in the alternative, to show cause why the requested relief should not be granted. Respondent Superior Court did not respond and we now consider the petition.

DISCUSSION

I. *STANDARD OF REVIEW.*

[1] On review of an order summarily adjudicating issues, we review the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his

opponent's case or demonstrated under no hypothesis is there a material issue of fact which requires the process of a trial. [4]

II. *THE TERM "GROSS RECEIPTS" IN PARAGRAPH 21 OF THE 1983 AGREEMENT CAN BE REASONABLY INTERPRETED TO MEAN CASH AS WELL AS VALUABLE IN–KIND CONSIDERATION.*

[2] The dispute in this case is over the meaning of the term "gross receipts" for purposes of triggering Disney's obligation to pay Wolf royalties on character merchandising. Wolf contends "gross receipts" as used in the royalty agreement means "cash and other valuable consideration." Disney contends the agreement clearly and unambiguously provides its obligation to pay Wolf royalties from the exploitation of certain merchandising rights arises only upon receipt of monies. The trial court ruled the term "gross receipts" was not ambiguous—it meant only cash actually received by Disney. The court further found the term was not reasonably susceptible to the meaning Wolf urged claiming the term as used in this context included not just cash, but also other valuable consideration such as promotions undertaken by third parties employing his characters. We disagree with the trial court.

[3] **[4]** **[5]** "Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40, 69 Cal.Rptr. 561, 442 P.2d 641; *Pacific Gas & Electric* ***1351** *Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1140–1141, 234 Cal.Rptr. 630.) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals ****656** more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co., supra,* 69 Cal.2d at p. 40 & fn. 8, 69 Cal.Rptr. 561, 442 P.2d 641; *Pacific Gas & Electric Co. v. Zuckerman, supra,* 189 Cal.App.3d at pp. 1140–1141, 234 Cal.Rptr. 630.)" [5]

[6] **[7]** **[8]** **[9]** The interpretation of a contract involves "a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]' (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, 6 Cal.Rptr.2d 554.) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. (*Id.* at p. 1166, 6 Cal.Rptr.2d 554.) Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made ... parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158, 241 Cal.Rptr. 677.)" [6]

[10] The term "gross receipts" appears several times in the parties' agreement. In the exhibit attached to the contract discussing motion picture rights, the term appears in a separate section heading and is given a specific definition peculiar to motion picture revenue and exclusions. "Gross receipts" also appears as a separate section heading in the exhibit discussing television series rights. Again, the term is defined and given a peculiar meaning tied to revenue sources and exclusions uniquely relevant to production of a potential ***1352** television series. In the section of the contract discussing Wolf's royalty rights to *character merchandising* the term "gross receipts" again appears. This time, however, the term does not appear in a separate section heading, and "gross receipts" is not defined. Moreover, the term is not even capitalized to suggest it has a special or limited meaning in the merchandising context. As a result, the term "gross receipts" must be considered in light of all the circumstances and the overall context of the contract.

Paragraph 2 of the agreement describes the merchandising rights Disney purchased:

"(h) The sole and exclusive right to make, publish and vend, throughout the world, or to license others so to make, ****657** publish and vend, representations of the characters created by the Seller [Wolf] which are in the work (including said

characters from the work appearing in any such motion pictures or other adaptations), upon, in and/or in connection with articles of merchandise, or the advertising, display or exploitation of merchandise or in connection with any commercial activities." [7]

Paragraph 21 of the 1983 agreement concerns Disney's obligation to pay royalties for the merchandising of Wolf's characters. This paragraph provides:

"21. In the event that Purchaser [Disney] exercises any of the rights granted to it in and by Subparagraph 2(h), (i) and (k) hereof, Purchaser agrees to pay to Seller [Wolf] a sum equal to five percent (5%) of Purchaser's *gross receipts* derived from the exercise of such rights, which, in the event of Purchaser's licensing of any such rights to others, shall be composed of Purchaser's royalties so derived from the licensee. In the event that such licensee is a subsidiary of Purchaser, then such royalties received by Purchaser from such subsidiary shall be deemed to be not less than five percent (5%) of such subsidiary's gross receipts derived from the exercise of such rights. Purchaser's obligation to pay such sums to Seller shall not accrue unless and until monies with respect to which the same are to be paid shall have been received within the United States of America by, and placed at the unrestricted disposal of, Purchaser or Purchaser's subsidiary (or if restricted from being transmitted to the United States by applicable law or regulations ['restricted funds'] then the restricted funds shall be deemed to have been so received to the extent used by Purchaser or Purchaser's subsidiary in such territory from which such monies would have otherwise been transmitted). So long as such monies are so received, Purchaser shall render semi-annual statements to the Seller within forty-five (45) days after the end of each half ***1353** of the calendar year, showing the sums of money so received during the preceding half with respect to which the said obligation applies; and said statements shall be accompanied by payment of the amount appearing thereby to be then due from Purchaser to Seller. All such statements shall be mailed to Seller at the address specified for notices herein, unless or until Purchaser is otherwise instructed in writing. All statements and accountings furnished by Purchaser hereunder shall be conclusively deemed correct unless the same shall be objected to within ninety (90) days from Purchaser's rendition thereof...." [8]

****658** Disney emphasizes this paragraph uses the terms "monies" and "monies so received" and discusses "statements" for monies "so received." Based on this language in the paragraph on royalty rights Disney argues "gross receipts" clearly and unambiguously means only cash, and then only when actual cash is received.

In support of its argument "gross receipts" can only mean "cash received," Disney relies on the decision in *County of Sacramento v. Pacific Gas and Electric Company.* [9] There the court held the utility's gross receipts for purposes of calculating its franchise fee did not include the value of electricity consumed by the utility itself in generating electricity for sale to consumers. The decision in *County of Sacramento* is of no assistance here. In the context of franchise fees on public utilities, the definition of the term "gross receipts" was dictated by statute and prior decisions interpreting the statute at issue, which excluded the monetary value of electricity consumed internally and not sold for cash. Accordingly, the decision in *County of Sacramento* sheds no light on the issue whether the term "gross receipts" may ***1354** be subject to multiple meanings in a private contract in the entertainment industry context.

Wolf offered extrinsic evidence to show the term "gross receipts" meant not just cash receipts but also other valuable consideration received. Wolf pointed out the interpretation he urged was consistent with the legal definition of "gross receipts" as defined in Black's Law Dictionary, namely, "[t]he total amount of money or the value of other consideration received from selling property or from performing services." [10] Wolf also referred the court to an appellate decision in which the court stated the term "gross receipts" was such a familiar and commonplace term in accounting and taxation that when used in its ordinary sense it meant the "total amount of money or the value of other consideration received." [11]

Wolf argued this is the definition of "gross receipts" customarily used in the entertainment industry when the term is not otherwise limited or defined by written contract. Wolf thus urged the court to read paragraph 21 in the context of custom and practice in the entertainment industry. The extrinsic evidence Wolf offered to explain industry custom consisted of expert testimony from David Held. Mr. Held is an attorney who has worked in the motion picture industry since 1973. United Artists Corporation, Paramount Pictures Corporation and the Samuel Goldwyn Company have employed him. He initially worked as an attorney in the legal department then in such capacities as Director of Business Affairs, Vice President of Business Affairs and was ultimately promoted

****659** to the position of Executive Vice President in Charge of Business Affairs in Paramount's Motion Picture Group. Since 1988, Held has been employed as a consultant in the entertainment industry. In his 28 years of experience Held had personally negotiated, or supervised negotiations of, thousands of agreements and also reviewed thousands of proposals involving third party participation agreements, film performance reports, and the like.

Held stated, from the start of his career until the present, the term "gross receipts" in the entertainment industry "means the total amount of money or the value of other consideration received by the studio" when not otherwise specifically defined to limit the term's meaning.

***1355** In his declaration, Held explained the portion of paragraph 21 which uses the terms "monies" does not purport to define the term "gross receipts." Instead, it specifies Disney's obligation to pay royalties does not arise unless or until potential or proposed licensing of the Wolf characters became a fait accompli and the terms of such agreements carried out so as to ensure the studio did not become responsible to pay royalties on failed or aborted projects. Regarding alliance agreements in which the licensor received promotional benefits rather than cash, Held stated industry custom for purposes of paying royalties was to attribute a cash value to the benefits a studio received.

The trial court read Held's declaration and questioned Wolf about its meaning. The court noted, "So where we are here is that personally I think 'gross receipts,' as the parties wrote it in paragraph 21, means 'money.' But if I have to consider that Held declaration, you win the summary judgment. There's a disputed issue of fact. That's where we are. That's the bottom line." Ultimately, the trial court concluded it did not need to consider Wolf's extrinsic evidence, finding the term "gross receipts" unambiguously meant cash money.

We find the trial court erred in its treatment of the proffered extrinsic evidence on the issue whether the contract was ambiguous. At the very least, this conflicting evidence exposed an ambiguity in the term's meaning. If Held's definition is the industry norm, then the competing definitions were equally plausible. Disney, on the other hand, argues the parties' contract did not use the term "gross receipts" in a technical sense and for this reason the expert's declaration of industry custom and practice was inadmissible. However, we note, Disney did not—and does not attempt to—refute the expert's factual assertion through independent evidence that in the entertainment industry context "gross receipts" means not only cash, but also the value of other consideration received. Accordingly, the trial court was not justified in rejecting this extrinsic evidence on the ground it did not comport with the court's own view of the contract language as unambiguous.

This case is analogous to the situation presented in *Pacific Gas and Electric Company v. G.W. Thomas Drayage & Rigging Company.* [12] In *Thomas Drayage,* the Supreme Court considered a contract clause in which the defendant agreed to indemnify the plaintiff for injury to property arising out of or connected with the performance of the contract. The trial court agreed with the defendant the clause could be read to cover only injury to the property of third parties. The trial court ****660** nevertheless held the "plain language" of the agreement also required defendant to indemnify plaintiff for ***1356** injuries to plaintiff's property. Once the trial court concluded the contract had a plain meaning it refused to admit any extrinsic evidence contradicting its interpretation. [13] The Supreme Court observed, "[w]hen the court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the ' ... extrinsic evidence of the judge's own linguistic education and experience.' [Citation.] The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression...." [14]

The court explained the test for admitting extrinsic evidence as an aid in interpreting contract terms as follows: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." [15] [Citations.]

[11] "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." [16] "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ.Code, §§ 1635–1656; Code Civ. Proc., §§ 1859–1861, 1864; ***1357** *Hernandez v.*

Badger Construction Equipment Co. (1994) 28 Cal.App.4th 1791, 1814, 34 Cal.Rptr.2d 732; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 688–689, pp. 621–623.)" [17]

[12] Because there is no evidence in this case of objective manifestations of the parties' intent, [18] and because the term at ****661** issue is undefined in the parties' contract, the only way to construe the meaning of the term "gross receipts" is to consider the nature of the contract and the circumstances under which the parties negotiated. [19] In this case, both the nature of the contract and the circumstances involved the motion picture industry. The offered evidence of industry custom and usage revealed the term "gross receipts" had more than one possible meaning. Thus, the industry expert's statements of fact were relevant and admissible to expose the latent ambiguity in the contract language regarding the industry's customary usage of the term. Held's declaration did not violate the parol evidence rule, as Disney suggests. [20] On the contrary, the proffered evidence regarding trade usage and custom was relevant to prove an interpretation to which the agreements were reasonably susceptible in the entertainment industry context.

The Supreme Court discussed the rule regarding the admission of trade usage and custom in *Ermolieff v. R.K.O. Radio Pictures, Inc.* [21] In *Ermolieff* the parties were producers and distributors in the motion picture industry. The plaintiff had reserved distribution rights in all countries not listed in an exhibit attached to the contract. The exhibit listed the United Kingdom as an area for which plaintiff had assigned his distribution rights. A dispute arose ***1358** over the question whether Ireland, or the "Free Irish State," was included within the global term "United Kingdom." The plaintiff argued the plain language of the contract made clear Ireland was excluded because it was not a part of the United Kingdom. The studio countered including Ireland within the term "United Kingdom" was the custom and practice in the motion picture industry and such usage was part of the contract. [22] Both parties sought declaratory relief.

At the close of the plaintiff's case the trial court ruled the evidence of trade usage incompetent, struck the defendant's evidence, and entered judgment in favor of ****662** the plaintiff. [23] The Supreme Court reversed. "The correct rule with reference to the admissibility of evidence as to trade usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. [Citations.] The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation." [24]

In *Ermolieff* the trial court at least considered the proffered extrinsic evidence throughout the plaintiff's entire case-in-chief. In the present case, by contrast, the trial court rejected the evidence after reading the expert's declaration and questioning Wolf on its content. Yet, this extrinsic evidence of trade usage exposed a latent ambiguity in the contract language and presented an alternative interpretation to which the term "gross receipts" was reasonably susceptible in the circumstances. Accordingly, we conclude the trial court erred in rejecting the extrinsic evidence and in concluding the term "gross receipts" was not reasonably susceptible to the interpretation urged by Wolf that according to industry custom and usage "gross receipts" meant cash and other valuable consideration received.

***1359** III. *THE CONFLICTING INTERPRETATIONS OF THE CONTRACT TERM RAISE FACTUAL ISSUES WHICH PRECLUDE A DETERMINATION AS A MATTER OF LAW.*

[13] **[14]** Having determined the contract is reasonably susceptible to the meaning given it by Wolf, we address the second step in the analysis—the ultimate construction to be placed on the ambiguous language. As noted, where no extrinsic evidence is introduced or the evidence is not in conflict, an appellate court will independently construe the contract. [25] "Where, however, a conflict in the evidence exists, it must be resolved in the trial court, as with any question of fact, before the court can declare the meaning of the contract as a matter of law." [26]

****663** From what this court has observed earlier, it is apparent triable issues of fact remain regarding the proper meaning to be given the term "gross receipts," thus precluding our independent interpretation of the contract as a matter of law. By way of example only, Disney claims it receives nothing from the noncash alliance agreements. In the alternative, Disney argues even if it derives some intrinsic benefit from participating in joint promotions, it is not feasible for third parties to ascribe values to these promotional activities unless Disney receives cash. Disney thus claims under Wolf's interpretation it would be impossible to comply with its contract obligation to provide an accounting for fictional benefits allegedly derived from noncash alliance agreements.

Wolf, by contrast, asserts Disney and its vast enterprises receive benefits from the third party promotions in the form of good will, increased theme part attendance, increased merchandise sales, film attendance and the like, most of these benefits not reflected in increased royalty payments to Wolf. For these reasons, Wolf claims attribution of monetary values for in-kind promotional activities is a routine matter in the entertainment industry.

The reasonableness of the competing interpretations thus must be tested in light of these concerns.

Also as noted, neither side presented any direct or objective evidence regarding the negotiating parties' understanding of the term "gross receipts" ***1360** at the time the parties entered into the contract. Accordingly, Wolf's and Disney's objectively reasonable expectations regarding the scope of the term when they agreed to the contract remain additional triable issues of material fact.

DISPOSITION

Let a peremptory writ issue directing the trial court to vacate its order granting the motion for summary adjudication of the cross-complainant's first, fourth and seventh causes of action for declaratory relief and to enter a new and different order denying said motion. Petitioners are entitled to costs in this proceeding.

We concur: PERLUSS, P.J., and WOODS, J.

All Citations

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Footnotes

* George, C.J., and Brown, J., did not participate therein.

1 Specifically, the motion for summary adjudication of issues sought declarations: (1) Disney had no obligation to pay Wolf anything in connection with the 1991 Eckerd/Kodak promotional agreement because neither Disney nor its subsidiaries received cash under this particular agreement; (2) Disney had already satisfied its contractual obligation to pay Wolf what it owed in connection with the McDonald's Disneyland 40th Anniversary Happy Meal agreement; and (3) Disney had no obligation to pay Wolf anything in connection with any third party agreement if Disney or its subsidiaries received, or will receive, no cash from the third party, because the parties' 1983 agreement specifies its obligation to pay royalties does not accrue unless or until monies are received by Disney or its subsidiaries.

2 The trial court read, and thus to this extent, "considered" Wolf's proffered extrinsic evidence.

3 Italics in original.

4 See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673–674, 25 Cal.Rptr.2d 137, 863 P.2d 207.

5 *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912, 75 Cal.Rptr.2d 573.

6 *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710, 50 Cal.Rptr.2d 323; see also *Morey v. Vannucci, supra,* 64 Cal.App.4th 904, 913, 75 Cal.Rptr.2d 573 ["An appellate court is *not* bound by a trial court's construction of a contract where (a) the trial court's contractual interpretation is based solely upon the terms of the written instrument *without* the aid of extrinsic evidence; ..."].

7 Disney also purchased the right to use Wolf's characters in children's storytelling recordings, and in various types of children's books.

8 Italics added. The balance of paragraph 21 provides: "Purchaser's said obligation shall not apply to picture books or other books containing no text material (or containing text material averaging not more than two lines per page), comic strips, comic books, magazines or other similar types of publications, nor to or in connection with publication of, or sound recordings or record albums of, only music or lyrics, or both (as distinguished from children's storytelling records under

Subparagraph 2(i)), from any of the Purchaser's versions of the work. Nothing in this paragraph contained shall be construed as requiring Purchaser to manufacture, publish or sell, or to license the manufacture, publication or sale of, any items which are the subject hereof. In the case of restricted funds, at the request and expense of Seller, and subject to applicable law and banking regulations, Purchaser agrees to cause an amount equal to the sum otherwise payable to Seller hereunder with respect to such restricted funds, to be deposited in a bank account in the territory involved in Seller's name, and such deposit shall constitute payment by Purchaser to Seller hereunder. If, other factors being equal, Purchaser has a choice between an interest and noninterest bearing bank account at the same bank, the deposit will be made in the bank account which is interest bearing. Purchaser shall in no event be liable for interest on sums deposited regardless of whether such deposit is made in an interest or non-interest bearing account."

9 *County of Sacramento v. Pacific Gas & Elec. Co.* (1987) 193 Cal.App.3d 300, 238 Cal.Rptr. 305.

10 Black's Law Dictionary (6th ed.1990) page 703, 2d column.

11 See *County of Sacramento v. Pacific Gas & Elec. Co., supra,* 193 Cal.App.3d 300, 309, 238 Cal.Rptr. 305 ["the courts have always considered that gross receipts are measured by money or other consideration actually received by a party or paid for his benefit"].

12 *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641.

13 *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., supra,* 69 Cal.2d 33, 36, 69 Cal.Rptr. 561, 442 P.2d 641.

14 *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., supra,* 69 Cal.2d 33, 36–37, 69 Cal.Rptr. 561, 442 P.2d 641; see also *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 88 Cal.Rptr.2d 777 [court erroneously refused to even consider extrinsic evidence of trade usage and custom in evaluating the fair market value of pipeline easements].

15 *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., supra,* 69 Cal.2d 33, 37, 69 Cal.Rptr. 561, 442 P.2d 641. The Supreme Court provided examples of how extrinsic evidence of trade usage or custom revealed latent ambiguities in the meaning of terms otherwise unambiguous on their face. Such evidence had been admitted to show the word "ton" in a lease meant a long ton or 2,240 pounds and not the statutory ton of 2,000 pounds; the word "stubble" in a lease included not only stumps left in the ground but everything left on the ground after the harvest; the term "north" in a contract dividing mining claims indicated a boundary line running along the magnetic and not the true meridian; and a form contract for purchase and sale was actually an agency contract. (*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., supra,* 69 Cal.2d 33, 39, fn. 6, 69 Cal.Rptr. 561, 442 P.2d 641 and cases cited.)

16 *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839.

17 *Morey v. Vannucci, supra,* 64 Cal.App.4th 904, 912, 75 Cal.Rptr.2d 573.

18 This is distinct from evidence of the uncommunicated *subjective* intent of two of Disney's employees who acknowledged never discussing the term with Wolf or his representatives, but who testified they understood the term "gross receipts" to mean cash received. These employees could only assume Wolf and his representatives had the same meaning in mind. Based on these Disney employees' testimony, Disney invokes the rule that when a term is found to be ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ.Code, § 1649; *Bank of the West v. Superior Court, supra,* 2 Cal.4th 1254, 1264–1265, 10 Cal.Rptr.2d 538, 833 P.2d 545.) This rule does not, as Disney suggests, mean the promisor's subjective intent controls. The rule is instead designed to override the promisor's subjective intent whenever necessary to protect the promisee's objectively reasonable expectations. (*Bank of the West v. Superior Court, supra,* 2 Cal.4th 1254, 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545.) As we later note, Wolf's objectively reasonable expectations at the time of negotiations remains a material triable issue of fact.

19 See, e.g., *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 442, 15 Cal.Rptr.2d 622.

20 Compare *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 83 Cal.Rptr.2d 388 [integrated agreement which gave the district the right to cancel the contract on 30 days' written notice could not be contradicted by the plaintiff's proposed additional condition of cancellation only with good cause]; *General Motors Corp. v. Superior Court, supra,* 12 Cal.App.4th 435, 15 Cal.Rptr.2d 622 [current counsel who had not negotiated settlement and release agreement could not offer competent testimony regarding the contracting parties' subjective intent when executing the agreement].

21 *Ermolieff v. R.K.O. Radio Pictures, Inc.* (1942) 19 Cal.2d 543, 122 P.2d 3.

22 *Ermolieff v. R.K.O. Radio Pictures, Inc., supra,* 19 Cal.2d 543, 545–546, 122 P.2d 3.

23 *Ermolieff v. R.K.O. Radio Pictures, Inc., supra,* 19 Cal.2d 543, 546, 122 P.2d 3.

24 *Ermolieff v. R.K.O. Radio Pictures, Inc., supra,* 19 Cal.2d 543, 550, 122 P.2d 3.

25 *Parsons v. Bristol Development Co., supra,* 62 Cal.2d 861, 866, 44 Cal.Rptr. 767, 402 P.2d 839.

26 *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 852, 44 Cal.Rptr.2d 227; see also *Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158, 241 Cal.Rptr. 677 ["(w)hen two equally plausible interpretations of the language of a contract may be made ... parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory"].