

PEKING UNIVERSITY TRANSNATIONAL LAW REVIEW

Volume 2, Issue 1

2014

**PEKING UNIVERSITY
SCHOOL OF TRANSNATIONAL LAW**



lawreview@stl.pku.edu.cn

**PEKING UNIVERSITY
TRANSNATIONAL LAW REVIEW**

**VOLUME 2, ISSUE 1
2014**

Editorial Board

Editor-in-Chief

LI Yi

Executive Editor

LIU Shuang

Articles Editor

XU Tingting

Managing Editor

LIU Xing'er

Student Notes Editor

ZHOU Shilin

Editors

CHEN Shenglan

LING Tong

SUN Hui

XIN Junqing

ZHANG Xueying

DONG Shi

RUAN Min

WANG Lingling

ZHANG Junqi

ZHONG Xiaozhu

HAN Yanjun

SONG Yongchen

WU Guanhua

ZHANG Rou

ZHOU Qing

Faculty Advisors

Eric MAO

Christian PANGILINAN

Lori REYNOLDS

Amber RUDOLPHI

Advisory Board

Duncan ALFORD

Stephan JAGGI

Steven KARGMAN

Philip MCCONNAUGHAY

Francis SNYDER

Ray CAMPBELL

JIN Zining

Douglas LEVENE

John NIEHUSS

Stephen YANDLE

Mark FELDMAN

Sang Yop KANG

Peter MALANCZUK

Mark ROSENBAUM

Administrative Support

Nyaguthii CHEGE

Bernice INES

LIU Qing

ZHANG Chenli

DAI Zheng

LIU Jingyi

YANG Rui

ZHONG Xiaojin

GAO Xiangyu

LIU Nan

ZHANG Jing

ZHU Lin

**PEKING UNIVERSITY
TRANSNATIONAL LAW REVIEW**

**VOLUME 2, ISSUE 1
2014**

CONTENTS

A LETTER FROM THE EDITOR-IN-CHIEFI

ARTICLES

Preston M. TORBERT,

A Study of the Risks of Contract Ambiguity 1

Linda SIBERMAN & Maxi SCHERER,

Forum Shopping and Post-Award Judgments 115

Chinese Translation

论“择地行诉”与法院对仲裁裁决的裁定 157

April M. HATHCOCK,

Likely Lessons in Unlikely Places: Comparative Review of Legal Education
Policy Between the United States and East Germany 193

SPEECH SERIES

Florian GRISEL,

Precedent in Investment Arbitration: The Case of Compound Interest..... 217

STUDENT NOTES

FEI Jieqiong,

Countervailing Duties Against China—Double Counting and Beyond 228

FU Chenyuan,

China's Prospective Strategy in Employing Investor-State Dispute Resolution
Mechanism for the Best Interest of Its Outward Oil Investment..... 266

A Letter from the Editor-in-Chief

Dear Sir or Madam,

Welcome to the second volume of *Peking University Transnational Law Review* (“Law Review”). The Law Review, founded in 2011, is published in English twice a year, in spring and autumn. It is a journal focused on publishing legal scholarship and other articles on Chinese, U.S., international and transnational law, as well as articles involving comparative law issues.

The Law Review is published independently by students of Peking University School of Transnational Law (“STL”) in Shenzhen, China. STL is a unique law school that prepares students to be transnational lawyers. It provides a four-year joint-degree program, combining a Chinese law focused Juris Master, taught in Chinese, with an American law focused Juris Doctor, taught in English.

Currently, we have published three issues. These issues are accessible through our website and a number of databases such as HeinOnline, Lexis China, Chinalawinfo (the most widely used legal database in China) and Cujas library (Université Paris-1 Panthéon-Sorbonne & Université Panthéon-Assas). By our editors' great efforts, the hard copies of the issues are placed at the UNCITRAL Law Library (Vienna), Lillian Goldman Law Library of Yale Law School, WilmerHale LLP Park Lane (London), Kirkland & Ellis LLP (Shanghai), Kobre & Kim LLP (Hong Kong), K&L Gates LLP (Beijing), King & Wood Mallesons, Jun He and Fangda Partners. In the near future, the Law Review will also be available and accessible on Westlaw, LexisNexis, CNKI (the most popular academic database in China) and other databases.

The Law Review's editors are working to promote the Law Review to become a globally well-known law review and we are looking for authors with their manuscripts. The Law Review seeks to become an important tool for those who are researching and working on Chinese law, U.S. law, as well as international law, transnational law and comparative law. We are not only

focused on publishing scholar's papers, but also Book Reviews, Speech Series, Case Notes and Legal Updates. We welcome submissions from professors, practitioners, and students worldwide. We accept manuscripts year round and undergo a review process once we receive submissions.

We have no minimum or maximum requirements as to page or word numbers. We encourage footnotes rather than endnotes as well as conformity to the 19th edition of *The Bluebook: A Uniform System of Citation*.

Please submit your manuscripts in electronic form to lawreview@stl.pku.edu.cn. Please send us your inquiries to the same email address as well. We will undergo a review process once we receive submissions, maintain positive communications with authors, and provide timely feedback.

Yours Sincerely,

LI Yi (Chris)
Editor-in-Chief
Peking University Transnational Law Review

A Study of the Risks of Contract Ambiguity

Preston M. Torbert

TABLE OF CONTENTS

I. Introduction.....	4
II. The Risk of Ambiguity Itself.....	9
A. Section 1649 of the California Civil Code.....	16
B. Section 201 of the Restatement (Second) of Contracts.....	17
III. The Risk of <i>Contra Proferentem</i>	18
A. History.....	18
B. Section 1654 of the California Civil Code.....	19
C. Applying <i>Contra Proferentem</i> : A Checklist of Risk Factors.....	20
1. Introduction.....	20
(a) Contract Term Precluding the Application of <i>Contra Proferentem</i>	21
(b) Contract of Adhesion.....	24
(c) The Admission of Extrinsic Evidence.....	25
(d) The Sense of “Drafter”.....	27
(e) Reliance on Interpretation of the Ambiguous Language.....	28
(f) Reasonableness of Interpretation.....	29
(g) Negotiation of the Contract.....	30
(h) Joint Drafting.....	31
(i) Unequal Bargaining Power.....	31
(j) Sophistication of the Parties.....	32
(k) Duty to Seek Clarification.....	33
(l) Effect of Arbitration.....	34
(m) Varied Application of <i>Contra Proferentem</i> to the Contract.....	36
(n) <i>Contra Proferentem</i> as Last Resort Tie Breaker.....	37
2. Summary.....	38
IV. Review of Contract for Ambiguity.....	38
A. Introduction.....	38
B. Checklist of Contract Ambiguity Issues.....	39
1. Absence of Provision Precluding <i>Contra Proferentem</i>	39
2. Ambiguity of “Agreement” in the Title of the Contract.....	40
3. Ambiguity of “Agree” in the Text of the Contract.....	41
4. Ambiguity of <i>Ejusdem Generis</i> (the Class Presumption).....	42
5. Ambiguity of Reverse <i>Ejusdem Generis</i>	44
6. Ambiguity of <i>Noscitur A Sociis</i> (the Associated Words Presumption).....	45

7. Ambiguity of <i>Expressio Unius</i> (the Negative Implication Presumption)	46
8. Ambiguity of “Including”	47
9. Postmodification Ambiguity (the Last Antecedent Presumption).....	48
10. Ambiguity of the Proviso	49
11. Ambiguity in the Expression of Time and Numbers.....	50
12. Ambiguity of “Indemnity”	52
13. Ambiguity of “And”	54
14. Ambiguity of “Or”	55
15. The Ambiguity of “And/Or”	56
16. Ambiguity of the Modal Auxiliary Verb “Shall”	58
17. Ambiguity of the Modal Auxiliary Verb “May”	60
18. Ambiguity of the Modal Auxiliary Verb “Must”	61
19. Ambiguity of the Modal Auxiliary Verb “Will”	62
20. Ambiguity of the Auxiliary Modal Verb “Should”	63
21. Ambiguity of “Law”	65
22. Ambiguity between the Singular and the Plural.....	67
23. Ambiguity in Use of the Comma	68
24. Ambiguity of “As of”	69
25. Ambiguity of “Termination”	70
26. Ambiguity of “Execution”	71
27. Ambiguity of “Due” and “Payable”	73
28. Bijuridical Ambiguity	73
29. Miscues	75
30. Oversights	76
C. Summary	76
V. Conclusion.....	77
EXHIBIT1: LICENSE AND MANUFACTURING AGREEMENT	83
1. DEFINITION(S).....	86
2. LICENSE GRANT	91
3. ROYALTY AND PAYMENT	92
4. JOINT EXPENSES FOR MAA & REFERENCE MATERIALS	94
5. APPROVALS AND CO-OPERATION	96
6. REPRESENTATIONS, WARRANTIES AND COVENANTS	97
7. INDEMNITIES	99
8. FORECAST OF PRODUCT SUPPLY AND SALES	100
9. BRANDING	102
10. PROSECUTION AND MAINTENANCE	103
11. NEW INTELLECTUAL PROPERTY	103
12. ENFORCEMENT.....	104
13. MANUFACTURING FACILITIES	104

14. EVENT OF DEFAULT	105
15. CONFIDENTIALITY	106
16. TERM.....	107
17. TERMINATION	108
18. DISPUTE RESOLUTION.....	108
19. GOVERNING LAW	110
20. MISCELLANEOUS	110

A Study of the Risks of Contract Ambiguity

Preston M. Torbert*

“Ambiguity is the greatest cause of litigation over drafted documents”¹

I. INTRODUCTION

Ambiguity is more common, more unnoticed, and more important than we think. This article treats the risk² of ambiguity for the contract drafter. The principal goal of the contract drafter is setting forth precisely the rights and obligations that form the deal that the parties have agreed on. But a secondary and often neglected responsibility of the drafter is to avoid ambiguities in the text that can cause or promote disputes between the parties. My interest in the risk of ambiguity derives from the experience of drafting and negotiating bilingual English-Chinese contracts over several decades and in writing and teaching about the risk of ambiguity in these and other contracts.³ Of course, ambiguity is a narrow focus. Scholars

* Preston M. Torbert is Senior Counsel at Baker & McKenzie LLP’s Chicago office and a founder of the firm’s China practice. He is a Lecturer in Law at the Law School of the University of Chicago, Adjunct Faculty at the Peking University School of Transnational Law, and an Associate of the Center for East Asian Studies at the University of Chicago. He is a graduate of Princeton and Harvard Law School and received a Ph.D. in Chinese History from the University of Chicago. He has advised U.S. clients regarding trade, investment, and compliance issues in China for over 30 years. He would like to thank Lee C. Buchheit, Mitu Gulati, Wallace Baker, Arthur J. Jacobson, and Michael Greco for their comments on a draft of this article.

¹ THOMAS R. HAGGARD & GEORGE W. KUNEY, *LEGAL DRAFTING IN A NUTSHELL* 242 (3d ed. 2007).

² See PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (1996).

³ Preston M. Torbert, *Globalizing Legal Drafting: What the Chinese Can Teach Us About Ejusdem Generis and All That*, 11 *SCRIBES J. LEG. WRITING* 41 (2007); Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 *SCRIBES J. LEG. WRITING* 93 (2011–2012); Preston M. Torbert, *The Crisis Exposed by Pari Passu*, 40 *HOFSTRA L. REV.* 87 (2011); 陶博 (TAO BO), 法律英语: 中英双语法律文书制作 [LEGAL ENGLISH: THE PREPARATION OF BILINGUAL CHINESE-ENGLISH LEGAL DOCUMENTS] (2004); 陶博 (TAO BO), 法律英语: 中英双语法律文书中的句法歧义 [LEGAL ENGLISH: SYNTACTIC AMBIGUITY IN BILINGUAL CHINESE-ENGLISH LEGAL DOCUMENTS] (2008); 陶博 (TAO BO), 法律英语: 中英双语法律文书中的语义歧义 [LEGAL ENGLISH: SEMANTIC AMBIGUITY IN BILINGUAL CHINESE-ENGLISH LEGAL DOCUMENTS] (2010); 陶博 (TAO BO), 法律英语: 双语法

of incomplete contracts have emphasized gaps in contracts rather than ambiguity, but to this practitioner, the critical issue is ambiguity, not gaps.⁴ Of course, it is impossible to provide for every possible contingency in drafting a contract, but experience suggests that parties do not argue about what is not in the contract, they argue about what is in it—the ambiguities. Of course, ambiguity is but one perspective. A contract can be analyzed from many others, all valid and worthy of support. It is hoped that this article will encourage others to conduct similar analyses from these other perspectives.⁵

Three risks surround the question of ambiguity in contracts. The first is the risk of an event that the parties did not anticipate when they negotiated and signed the contract. In law practice, I was only surprised the first time when a client that had recently completed an acquisition called and said something like this: “Prior management made some mistakes. One of them was setting up a joint venture in China. We need to get out of it. I’ll send you the joint venture contract. Tell me what our options are.” When the unanticipated event brings significant economic benefit or detriment to a party, it has an incentive to review the contract, find ambiguities, and develop self-serving interpretations.

The second risk is of ambiguity itself. That risk is discussed in the contract review below. The third risk is *contra proferentem*—that the ambiguity will be construed in a manner adverse to the drafter. This risk is also discussed below. Eliminating the risk of unforeseeable events is impossible. But careful drafting can reduce the risks of both *contra proferentem* and ambiguity if we can perceive these risks. This article is a first step in that direction.

律文书的解释 [LEGAL ENGLISH: THE INTERPRETATION OF BILINGUAL LEGAL DOCUMENTS] (2013).

⁴ See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006); Ian Ayres, *Ya-huh. There Are and Should Be Penalty Default Rules*, 33 FLA. ST. U. L. REV. 589 (2006); Robert E. Scott, *Rethinking the Default Rules Project*, 6 VA. J. 84 (2003).

⁵ Examples of other perspectives are those of the comparison of the rights and obligations of the parties, contract doctrine, negotiation, and industry practice.

This article is directed primarily to students, but I hope it will also be of interest to practicing lawyers, judges, and law professors.

Its primary purpose is to help train students for the practice of law. While I believe it can benefit most law students, it is designed to serve as a template for students at the Peking University School of Transnational Law and at the University of Chicago Law School who have taken my course on ambiguity in contract drafting. The students can use this article as a template to write the 50-page thesis required for graduation at STL or to fulfill the writing requirement at Chicago. This article examines one “sanitized”⁶ contract taken from the SEC’s EDGAR database and attached as Exhibit 1; a student can choose another contract from this or another database⁷ with a different governing law and perform a similar analysis. The process of researching and writing such a thesis would hone the analytical skills that the student learned in the course and train the student to apply legal doctrine to specific contract terms. It is hoped that a student’s paper would be a writing sample that would help the student to obtain employment in a law firm or in-house legal department.

The contract examined is the License and Manufacturing Agreement between a Licensor, an American company, and a Licensee, a Hong Kong company dated June 24, 2011 and governed by California law.⁸ This contract was chosen because: it is a fairly recent and representative of a common type of contract that law school graduates will encounter in their legal careers (a technology transfer and product supply relationship between an American company and a company in China); it has a transnational element required for the student thesis at STL; and it is fairly complex, but not extremely lengthy. I did not contact the parties to the contract or their lawyers before or during the writing of this article and I have no understanding of the

⁶ Confidential pricing and some other information have been deleted from the contract as it appears in the SEC EDGAR database. In addition, as a courtesy to the parties, I have deleted specific information that would identify the parties or the individuals who signed the contract.

⁷ For example, that of the Contracting and Organizations Research Institute at the University of Missouri-Columbia, *available at* http://ronald.cori.missouri.edu/cori_search/engine_menu.php (last visited Feb. 1, 2014).

⁸ Neither of the parties to the contract nor a related company mentioned in the contract is a client of Baker & McKenzie where I serve as Senior Counsel.

relationship of the parties. Further, I have no understanding of whether future events might make the ambiguities discussed below relevant to their relationship. I hope not.

This article may also assist practicing lawyers in dealing with the risks of ambiguity by treating a typical commercial contract. Scholars and judges have discussed legal doctrine regarding ambiguity, particularly the presumption of *contra proferentem*, almost exclusively in the context of adhesion contracts,⁹ such as those for insurance. It has been said that in the United States “the bulk of contracts signed . . . are adhesion contracts.”¹⁰ The most typical contracts of adhesion are those between a company and an individual consumer or employee. The contract here is a commercial one, not a contract of adhesion. I have not done research to determine the relative size and bargaining power of the parties or to understand the details of the drafting and negotiation of the contract. My experience suggests that the Licensor is the stronger party and drafted the contract, that the contract is probably a form that the Licensor has used for other technologies and products, but it seems likely that parts of it were negotiated. Therefore, it does not seem to be a contract of adhesion. The contract, then, is not representative of the bulk of contracts, but it is very representative of the types of contracts corporate lawyers in practice deal with every day. Most corporate lawyers do not deal mainly with adhesive consumer or labor contracts; they generally draft and negotiate commercial contracts between two companies. But, if ambiguity is a key cause of disputes and litigation as suggested above, a detailed ambiguity study of a specific contract should be useful to practicing lawyers. But, to my knowledge, a detailed study of a specific contract from the perspective of ambiguity has not been done. It appears that the situation has not changed significantly¹¹ since Professor

⁹ See, e.g., David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 432 (2009); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); John T. Flynn, *The Rule Contra Proferentem in the Government Contract Interpretation Process*, 11 PUB. CONT. L.J. 379 (1979–1980).

¹⁰ ARTHUR L. CORBIN, CORBIN ON CONTRACTS, §24.27A (1999).

¹¹ Recent books on contract drafting have alleviated the “sins of omission . . . verging on the amazing and unpardonable” identified by Professor Llewellyn in 1951 (Karl Llewellyn, *Introduction*, in ROBERT N. COOK, LEGAL DRAFTING xi (1951)) but none seem to deal in detail with interpretation

Farnsworth stated in 1966, “although contract disputes often turn on the interpretation of contract language, this subject has received relatively little attention . . .”¹² This article can be seen as an attempt to fill that gap.

Further, it is hoped that judges who confront disputes in commercial contracts will also find this article useful. They may find, either *sua sponte* or at the suggestion of counsel, language-related arguments that can help them strengthen the reasoning that supports a just decision. Further, if ambiguity is a significant cause of disputes and litigation, the presumption *contra proferentem* becomes more important and deserves a reappraisal. This article suggests that this presumption could serve to improve contract drafting and reduce litigation.

Finally, this article may be seen as an attempt to begin to bridge the divide between the academy and the bar.¹³ In the academy, economic analysis of the law has become the prevailing current in contract theory over the last thirty years. The puzzle that a major branch of this current, the school of incomplete contracts, has posed is why are incomplete contracts the norm when economically complete contracts are optimal?¹⁴ Recent scholarship on the *pari passu* clause in sovereign debt instruments has posed a related question: why are these contracts so resistant to change?¹⁵ This article’s practical analysis of a specific contract is my attempt to answer the question of how contract drafting can reduce contract disputes and litigation. But, like these other inquiries, it wrestles with a single larger question: Why are contracts the way they are? Perhaps a kind reader can

and disputes. SCOTT J. BURNHAM, *DRAFTING CONTRACTS: A GUIDE TO THE PRACTICAL APPLICATION OF THE PRINCIPLES OF CONTRACT LAW* (1987); THOMAS R. HAGGARD, *LEGAL DRAFTING IN A NUTSHELL* (1996); KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (2004); TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* (2007); DAVID ZARFES & MICHAEL L. BLOOM, *CONTRACTS: A TRANSACTIONAL APPROACH* (2011); SUE PAYNE, *BASIC CONTRACT DRAFTING ASSIGNMENTS: A NARRATIVE APPROACH* (2011).

¹² E. Allan Farnsworth, *Meaning in the Law of Contracts*, 76 *YALE L.J.* 939 (1966-1967).

¹³ Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 *Scribes J. Leg. Writing* 93, 119 (2011-2012).

¹⁴ Scott, *supra* note 4, at 87.

¹⁵ MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2013); Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 *EMORY L.J.* 869 (2004).

help us blind men see the synergies among us as we grope different parts of the same elephant. And maybe bringing the specific problems of law practice to the law school will suggest paths for scholarly research that will benefit both the academy and the bar.

In short, this study of two ambiguity risks hopes to assist students and perhaps others by analyzing contract ambiguity in a specific, but representative, commercial contract.

II. THE RISK OF AMBIGUITY ITSELF

What is ambiguity? Linguists have described it as expressions “that can be interpreted in two or more different ways.”¹⁶ California courts have said that “[a]n ambiguity arises when language is reasonably susceptible of more than one application to material facts”¹⁷ and that a term is ambiguous if “it is reasonably susceptible to either of the meanings urged by the parties.”¹⁸ There are different types of ambiguity. California courts have sometimes distinguished between “patent” ambiguity that appears on the face of the contract, and “latent” ambiguity that is based on extrinsic evidence.¹⁹ Because the terms “patent” and “latent” bear strong procedural implications that may not always be appropriate,²⁰ they are not used here.

There are different forms of ambiguity, such as semantic, syntactic, and contextual.²¹ Commentators have proposed that syntactic ambiguity (ambiguity as to what modifies what) is the most common form of ambiguity in legal writing. William

¹⁶ JOHN LYONS, *SEMANTICS* II 396 (1977). For the distinction between vagueness and ambiguity, see Farnsworth, *supra* note 12, at 953. For a suggestion that the distinction is not relevant to contract interpretation, see Richard A. Posner, *Law and Economics of Contract Interpretation*, 83 *TEX. L. REV.* 1581, 1603 n.51 (2005).

¹⁷ *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (Cal. 2006).

¹⁸ *Curry v. Moody*, 40 Cal. App. 4th 1547, 1552 (1995).

¹⁹ *Solis v. Kirkwood Resort Co.*, 94 Cal. App. 4th 354, 360 (Ct. App. 2001); *Steller v. Sears, Roebuck & Co.*, 189 Cal. App. 4th 175, 183 (Ct. App. 2010).

²⁰ For example, in government contracting, the term “patent ambiguity” refers to an ambiguity that triggers a duty to inquire. *Chapman Law Firm LPA v. United States*, 103 Fed. Cl. 28, 41 (2012). For the history of the terms “latent” and “patent” ambiguity, see Farnsworth, *supra* note 12, at 960–61.

²¹ F. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* §6.1, 6.4 & 6.12 (2d ed. 1986); HAGGARD & KUNEY, *supra* note 1, at 243–92; G. C. THORNTON, *LEGISLATIVE DRAFTING* 11 (4th ed. 1996).

Cobbett, an early nineteenth century commentator, said that,” of all the faults in writing, the wrong placing of words is one of the most common, and perhaps it leads to the greatest number of misconceptions.”²² Reed Dickerson, the dean of American drafting in the twentieth century, said, “Probably the biggest source of uncertainty of meaning in legal instruments . . . is the unclear use of modifiers or reference, technically known as ‘syntactic ambiguity.’”²³ A contemporary UK specialist in statutory interpretation, Francis Bennion, has said, “The inefficient construction of the sentence is a prime cause of doubt. In particular, failure to make clear which words a modifier modifies and which it does not gives rise to ambiguous modification or syntactic ambiguity.”²⁴ The other more familiar form of ambiguity is semantic ambiguity, an uncertainty of multiple meanings of a single word. Contextual ambiguity concerns consistency of language use throughout a document. The presumption of consistency²⁵ in contract drafting assumes that words are used consistently within a contract. Violation of this rule creates a presumption that the use of different words was intended to express a different meaning. Commentators, as noted above, have emphasized syntactic ambiguity as the major problem in contract drafting, but the analysis below seems to indicate that in this case contextual ambiguity creates more risks.

Ambiguity cannot only be semantic, syntactic, or contextual, it can also be intentional or unexpected.²⁶ The discussion here does not deal with intentional ambiguity because it is a lesser problem. Because of the ambiguity between normative and empirical expectations,²⁷ the discussion here also does not use the term “expected” or “unexpected.” Further, the discussion does not use the terms “foreseeable” or “unforeseeable” because the

²² H. F. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 21 (2d ed. 1983).

²³ DICKERSON, *supra* note 21, at §6.1.

²⁴ FRANCIS ALAN ROSCOE BENNION, STATUTE LAW 170 (2d ed. 1983).

²⁵ DRIEDGER ON THE CONSTRUCTION OF STATUTES 163 (R. Sullivan ed., 3d ed. 1994); NORMAN J. SINGER & J. D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION §46.06 (7th ed. 2009).

²⁶ See Farnsworth, *supra* note 12, at 956; R. Posner, *supra* note 16, at 1583; Gregory M. Duhl, *Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies*, 71 U. PITT. L. REV. 71 (2009).

²⁷ MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 85 (2013). “The ambiguity of ‘expectations’ makes for murky and unpredictable jurisprudence.”

concept of foreseeability is not stable—we enjoy forethought and not foresight, but in retrospect everything is foreseeable. The key feature of ambiguity in contracts is that the ambiguity is not anticipated. The concern is not with the ability to predict the future as much as with the surprise of the unanticipated. Therefore, the ambiguities discussed below in the contract analysis are referred to as “unanticipated ambiguities.”²⁸

Unanticipated ambiguity is ubiquitous. As the linguist Th. R. Hoffman has said, “[i]t is astonishing how ambiguous most sentences are.”²⁹ Many expressions of language are ambiguous and in most contexts this does not cause a problem. But whatever form it takes, unanticipated ambiguity in a contract does pose a risk. The risk is of a dispute, including litigation or arbitration.³⁰ A legal education, especially the first-year Contracts course, tends to promote the belief that litigation or arbitration is caused by one party violating the contract. This may be true in some sense, but the more astute observations seem to be that of Thomas R. Haggard cited above that ambiguity is the greatest cause of litigation³¹ and the half-joking response of a senior litigation partner when I told him I was teaching a law school course on eliminating ambiguity in contract drafting: “Oh no! Don’t do that! You’ll put us all out of business!” I am not aware of any study that has documented the role of ambiguity in litigation or arbitration,³² but from experience it seems that two factors may account for the prominent, but underappreciated, role of ambiguity in litigation and arbitration.

²⁸ Of course, “anticipate” is polysemous. Here it is used in the sense of “realize beforehand” or “forestall,” and not “look forward to” or “accelerate.” I THE OXFORD ENGLISH DICTIONARY 522 (2d ed. 1991).

²⁹ THOMAS RONALD HOFFMANN, REALMS OF MEANING: AN INTRODUCTION TO SEMANTICS 254 (1993).

³⁰ Many examples of unanticipated ambiguity can be found in 陶博 (TAO BO) (2004), (2008), (2010), (2013), *supra* note 3.

³¹ The comment, “[m]any contract disputes turn on questions of interpretation” would seem to support this point. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 839 (2003).

³² One study of 500 reported cases found that in categorizing contract disputes on the basis of traditional contract doctrine, cases either arising from the ill-considered use of language or inherent in the use of language itself were the most common. Harold Sheperd, *Contracts in a Prosperity Year*, 6 STAN. L. REV. 208, 226 (1953).

First, ambiguity is very difficult to recognize. Because one characteristic of effortful mental activity is laziness,³³ we are not naturally adept at finding ambiguity in texts. As Steven Pinker has commented about reading, “many sensible ambiguities are simply never recognized.”³⁴ As Daniel Kahneman has said, when we think, the brain’s “associative system tends to settle on a coherent pattern of activation and suppresses doubt and ambiguity” and further that this system “is not prone to doubt. It suppresses ambiguity and spontaneously constructs stories that are as coherent as possible.”³⁵ Other scholars have demonstrated that in our observations we often are subject to “inattentional blindness” (failure to see things we were not expecting to see).³⁶ An unanticipated ambiguity is a good example of inattentional blindness.

Second, because ambiguity is not the focus of attention in the drafting or negotiation of a contract, it is often not noticed. Later, however, after a contract has been in effect for some time, an unanticipated event, a small Black Swan,³⁷ may occur that challenges an underlying assumption of the contract. If this change in circumstances substantially benefits one party and harms the other party, each party will search the contract language carefully to find an interpretation of the contract that is favorable to it under the changed circumstances. Generally, the

³³ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 31 (2011).

³⁴ STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* 211 (1995).

³⁵ KAHNEMAN, *supra* note 33, at 88, 114.

³⁶ CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* 6–7 (2010). Reading on computer screens can exacerbate the problem if the reading consists of “skimming” rather than “reading deeply.”; NICHOLAS G. CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* 138 (2010). For the propensity towards errors, see JOSEPH T. HALLINAN, *WHY WE MAKE MISTAKES: HOW WE LOOK WITHOUT SEEING, FORGET THINGS IN SECONDS, AND ARE ALL PRETTY SURE WE ARE WAY ABOVE AVERAGE* (2009); MICHAEL KAPLAN & ELLEN KAPLAN, *BOZO SAPIENS: WHY TO ERR IS HUMAN* (2009). Unanticipated ambiguities do not generally qualify as “mistakes” under contract law. RESTATEMENT (SECOND) OF CONTRACTS §151 (1981) defines a “mistake” as “a belief that is not accord with the facts,” not as an improvident act. Further, the erroneous belief must relate to the facts as they exist at the time of the making of the contract, not later.

³⁷ Nassim Nicholas Taleb has said of events such as strikes, electricity shortages, accidents, bad weather, etc. that “[t]hese small Black Swans that threaten to hamper our projects do not seem to be taken into account.” NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* 157 (2010).

party benefited will adopt a new, self-serving interpretation of the language, while the harmed party will insist on what it believes was the original understanding. In many cases, the original understanding was never fully expressed and the words that the harmed party insists express it are ambiguous.³⁸ And each party will have a good recollection of the gist of the contract negotiations, but not for the details, will fill in the gaps in its memory with sincere, but created self-serving facts, and honestly believe its created memory.³⁹

Three examples illustrate the important, but underappreciated, role of unanticipated ambiguity in contract interpretation. The first is a good example of the clear presentation of an unanticipated ambiguity that was acknowledged as such. The second and third show that unanticipated ambiguity has often not been characterized as ambiguity and therefore has been underappreciated.

The first example concerns a partnership dissolution agreement between a law firm and a partner described in *Dunne & Gaston v. Keltner*.⁴⁰ When the parties drafted the agreement they included a provision concerning a pending case that the withdrawing partner was handling and provided that he would receive 1/6 of the legal fees that would be eventually “recovered,” that is, paid. At the time the agreement was negotiated, neither party considered that the firm might refer the case to another law firm for settlement. In fact, the case was referred to another law firm that settled the case for 60% of the fees recovered. The word “recovered” in the dissolution agreement then became ambiguous. Did the 1/6 mean 1/6 of 100%, i.e., the entirety of all legal fees or only 1/6 of 40%, i.e., the fees received by the law firm that was party to the agreement after deducting the 60% share to the other firm? Since no evidence was introduced to show the parties’ intentions at the time of entering into the agreement, the court focused on the common connotation of “recovered” among attorneys. This common connotation was the entirety of fees

³⁸ This phenomenon of finding new meanings in an effective contract raises interesting questions of the intention of the parties and of good faith and fair dealing as set forth in the Restatement (Second) of Contracts (1981) and the California Civil Code.

³⁹ LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* 62 (2012).

⁴⁰ *Dune & Gaston v. Keltner*, 50 Cal.App.3d 560, 561(1975).

recovered. The court applied the whole statute presumption to decide in favor of the withdrawing partner.⁴¹

The second example concerns the *pari passu*, equal rank, provision in sovereign debt instruments. Lee Buchheit, Jeremiah S. Pam, Mitu Gulati, and Robert E. Scott have described the expression “*pari passu*” as “opaque,”⁴² “vague,”⁴³ “oracular,”⁴⁴ and “unconfiding.”⁴⁵ It has been said that the expression “is a chameleon, able to take on whatever meaning is advanced by the prevailing party in litigation.”⁴⁶ Although the word “ambiguous” has not been used, the *pari passu* problem can be characterized as one of unanticipated ambiguity. This provision has been a standard provision in sovereign debt instruments to indicate that the debt ranked in equal step with other creditors who form a queue during liquidation. It was thought to have little significance except, since the 1970s, in countries that permitted existing creditors to be subordinated, without their consent, to future lenders. In 2000, however, a Belgian court interpreted it to mean that one debtor who refused to enter into a restructuring agreement for sovereign bonds could obtain an injunction barring the payments to the other holders of the restructured debt because payments to them did not include proportional payments to the holdout debtor. This was the first interpretation of *pari passu* that was unanticipated. More recently, in 2012, the U.S. Second Circuit Court of Appeals’ decision in *NML v. Republic of Argentina* has adopted a similar interpretation, holding that the sovereign’s covenant to maintain the equal ranking of the defaulted bonds was an adequate basis for the District Court to grant an injunction ordering the sovereign to pay the defaulted bonds “ratably” if it wished to pay certain new bonds issued as part of the sovereign’s debt restructuring.⁴⁷ The ambiguity problem with *pari passu* was due to a future event, but it was not an extraneous event; it was simply the adoption of a creative,

⁴¹ *Id.* at 563–66.

⁴² GULATI & SCOTT, *supra* note 15, at 74.

⁴³ *Id.* at 178.

⁴⁴ Buchheit & Pam, *supra* note 15, at 871.

⁴⁵ *Id.* at 918.

⁴⁶ GULATI & SCOTT, *supra* note 15, at 178.

⁴⁷ Lee C. Buchheit, *What to Do about Pari Passu*, draft of unpublished manuscript dated Aug. 12, 2013, provided by the author; *NML Capital Ltd. v. Republic of Argentina*, 699 F. 3d 246 (2d Cir. 2012); *NML Capital Ltd. v. Republic of Argentina*, 727 F. 3d 230 (2d Cir. 2013).

unanticipated, and self-serving interpretation of an ambiguous phrase by one party.

The third example, concerning the insurance coverage for the twin World Trade Towers in New York, is a more common, but less clear, instance of unanticipated ambiguity. In this, as in many cases, for tactical or other reasons, the issue was not perceived as one of unanticipated ambiguity. The property manager of the twin Towers, the Silverstein companies, had demanded and agreed to a “single-occurrence” insurance policy to cover the twin Towers prior to September 11, 2011. They demanded “single-occurrence” policies because they anticipated that any claims would in total be less than the coverage amount and therefore multiple events could be covered as one event and they would pay only one deductible.⁴⁸ The specific language was: “‘Occurrence’ shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes.” After September 11, however, it was clear that the damages far exceeded the coverage amount, so the Silverstein companies suddenly rejected the interpretation of the policy as “single-occurrence” and claimed that it should be interpreted as a “multiple occurrence” policy.⁴⁹ The “single-occurrence” interpretation in this and the other policies would result in insurance proceeds of \$3.6 billion for the Silverstein companies, the “multiple-occurrence” interpretation, \$7.2 billion.⁵⁰ This change of heart was characterized by an insurance executive as a “self-motivated hoax.”⁵¹ The judge disposed of the issue by determining that the ambiguity in the language was a question of fact for the jury and the jury did not accept the Silverstein companies’ interpretation. From the court’s decision it is not clear whether the Silverstein parties ever mentioned the word “ambiguity.” But the interpretation by the Silverstein companies necessarily implied that ambiguity in the policy language allowed them to interpret it differently after the attack.

⁴⁸ SR Int’l Bus. Ins. Co. v. World Trade Ctr. Properties LLC, 2003 U.S. Dist. LEXIS 1103, at *14 (S.D.N.Y. 2003).

⁴⁹ SR Int’l Bus. Ins. Co. v. World Trade Ctr. Properties LLC, 222 F. Supp. 2d 385, 388–89 (S.D.N.Y. 2002).

⁵⁰ David Wessel, *Who Will Provide Terrorism Insurance?*, THE WALL ST. J. (Oct. 11, 2001) at A1.

⁵¹ Charles V. Bagli, *In Dispute on Trade Center’s Insurance, Billions at Stake*, N.Y. TIMES (Feb. 9, 2004), at A24.

The failure to recognize unanticipated ambiguity may explain in part why contract doctrine on ambiguity does not seem to directly address the issue. But another reason is probably because contract doctrine focuses on the intentions of the parties at the time they enter into the contract and when the ambiguity is not perceived by the parties at that time, inquiring into intentions is not informative. Consider the most relevant provisions of the California Civil Code, Section 1649, and the Restatement (Second) of Contracts, Section 201.⁵²

A. Section 1649 of the California Civil Code

Section 1649 of the California Civil Code states that “[I]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. [emphasis added]”⁵³ This rule would appear to make the subjective belief of the promisor the focus of inquiry. But proving subjective belief is difficult. Thus, California courts have chosen a way to interpret Section 1649 that makes it much easier to fulfill its requirements, but protect the promisee at the same time: in California, the subjective intent of the promisor does not control the interpretation. A California Court of Appeal has stated that, “[Section 1649] is . . . designed to override the promisor’s subjective intent whenever necessary to protect the promisee’s objectively reasonable expectations.”⁵⁴ This and other decisions seem to have imported the concept of “objectively reasonable expectations” developed from insurance contracts.⁵⁵ In *Wolf v. Superior Court*, the Court ruled that the promisor’s subjective understanding of the term “gross receipts” was not determinative because extrinsic evidence of industry custom and usage which reflected the promisee’s “objectively reasonable expectations” showed that the term had more than one meaning. Other cases seem to support the idea that the promisee’s understanding can

⁵² CAL. CIV. CODE §1649 (2013); RESTATEMENT (SECOND) OF CONTRACTS §206 (1981).

⁵³ CAL. CIV. CODE, §1649 (2013).

⁵⁴ *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1357 n.18 (Ct. App. 2004).

⁵⁵ *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal 4th 645, 667 (Cal. 1995); *Helfand v. National Union Fire Ins. Co.*, 10 Cal. App. 4th 869, 880 (Ct. App. 1992).

either be an understanding that it would be reasonable for the promisee to have or be subjectively true.⁵⁶

Section 1649 describes the beliefs and understandings—the intentions—of the parties at the time of entering into the contract, not during performance of the contract. It thus does not address the problem of unanticipated ambiguity that arises during performance when circumstances change. However, when an ambiguity arises due to an unforeseen event, the use of the “objectively reasonable expectations” of the promisee may help to discourage both the promisor and the promisee from constructing a self-serving rationalization after the fact.

B. Section 201 of the Restatement (Second) of Contracts

Section 201 of the Restatement first sets out the general rule that where the parties have attached the same meaning to a promise, it is interpreted in accordance with that meaning and neither party is bound by the interpretation that the other party gives to ambiguous language even if this results in a failure of mutual assent. Then, in the following section, it addresses the question of ambiguity—which meaning prevails when the parties have attached different meanings to a promise. It states that:

(2) where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party. [emphasis added]⁵⁷

This provision, like Section 1649 of the California Civil Code, addresses the question of ambiguity and looks to the

⁵⁶ *Med. Operations Mgmt, Inc. v. Nat'l Health Lab., Inc.*, 176 Ca. App. 3d 886 (Ct. App. 1986); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254 (1992).

⁵⁷ RESTATEMENT (SECOND) OF CONTRACTS §201 (1981).

knowledge of, or reason to know, the intentions of both parties, but, like Section 1649, it only concerns the intentions of the parties at the time of entering into the contract. Like Section 1649, it does not address the problem of unanticipated ambiguity that arises during performance when circumstances change.

III. THE RISK OF CONTRA PROFERENTEM

A. History

California has codified the common law rule of *contra proferentem* in Section 1654 of the California Civil Code. The concept that ambiguities in contract language should be interpreted against the drafter originated in Roman law, but the term “*contra proferentem*” is an invention of the glossators of the Middle Ages. Roman law did not use this general term; it had more specific expressions (such as, *contra stipulatorem* (“against the stipulator”)) that Roman jurists used to interpret ambiguous terms to the disadvantage of the party that had introduced them into the transaction.⁵⁸ For example, doubt as to whether a condition had been satisfied in a sales transaction was held against the seller.⁵⁹ The rule was a subsidiary rule of interpretation and only used as a last resort,⁶⁰ but it was based on a concern to protect the weaker party to a contract. The Roman and later medieval rule of *contra proferentem*, then, was developed to deal with commercial contracts that in essence were similar to those signed today between corporations and dealt with by most corporate lawyers—not mass consumer contracts of adhesion. Since the 15th century, English common law has applied this presumption to commercial contracts where an imbalance of power allowed one party to determine the terms of the contract. But in addition to the imbalance of power justification, Roger Bacon suggested that a primary reason for the presumption was that “it is a schoolmaster of wisdom and

⁵⁸ REINHARD ZIMMERMAN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 634 (1990); PÉTER CSERNE, *POLICY CONSIDERATIONS IN CONTRACT INTERPRETATION: THE CONTRA PROFERENTEM RULE FROM A COMPARATIVE LAW AND ECONOMICS PERSPECTIVE* 8 n.39, available at http://works.bepress.com/peter_cserne/28 (last visited Feb. 1, 2014). Cserne’s work is the best historical and comparative description of *contra proferentem*.

⁵⁹ ZIMMERMAN, *supra* note 58, at 736.

⁶⁰ *Id.* at 640.

diligence in making men watchful in their own business.”⁶¹ The presumption has also been included in the principles of European contract law and Unidroit.⁶² Over the centuries *contra proferentem* has been applied to commercial contracts although the policy reasons for employing it in the interpretation of ambiguity in these contracts have changed somewhat.

However, with industrialization, the rise of the insurance industry, and the invention of “contracts of adhesion” in the twentieth century,⁶³ the presumption became closely associated with “take-it-or-leave-it” contracts between a corporation and an individual.⁶⁴ California law on this presumption derives from its Civil Code.

B. Section 1654 of the California Civil Code

Section 1654, which codifies the common law presumption of *contra proferentem*,⁶⁵ states:

“In case of uncertainty not removed by the preceding rules [of interpretation], the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. [emphasis added]”⁶⁶

This Section does not refer to “ambiguity;” instead it employs the term “uncertainty,” but the California Supreme Court, in discussing Section 1654, has used the term “ambiguity” to describe the term “uncertainty.”⁶⁷ The language of this Section

⁶¹ FRANCIS BACON, THE WORKS OF FRANCIS BACON III 225 (1852).

⁶² Article 5:107: *Linguistic Discrepancies*, in THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II 298 (Ole Lando & Hugh Beale eds., 2000); THE UNIDROIT PRINCIPLES IN PRACTICE 242 (Michael Joachim Bonell ed. 2006).

⁶³ Horton, *supra* note 9, at 444.

⁶⁴ As a result, California courts sometimes have taken the position that the presumption only applies if the contract possesses one or more of the characteristics of a contract of adhesion. *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 441 (1984) (where contract was not one of adhesion, *contra proferentem* was not applied); *Mitchell v. Exhibition Foods*, 184 Cal. App. 3d 1033, 1042 (Ct. App. 1986) (refusal to apply *contra proferentem* because the contract was the product of joint drafting).

⁶⁵ It appears from the case reports that California judges often rely on precedents and the general sense of the common law presumptions, such as *contra proferentem*, rather than the specific wording of the code section.

⁶⁶ RESTATEMENT (SECOND) OF CONTRACTS §206 (1981).

⁶⁷ *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990). The application of *contra proferentem* generally requires ambiguity, but that is not

does not mention an imbalance of power. It seems to emphasize fault and imply that the party responsible for the problem should bear the adverse consequences of it. This seems similar to, but stronger than, the rationale behind the Roman practice and Section 206 of the Restatement (Second) of Contracts⁶⁸ that the drafter is more likely to provide more carefully for the protection of its own interests than those of the other party and is more likely than the other party to have reason to know of ambiguities. But in the Code, the reference to “cause” seems to imply a desire to incentivize the drafter to reduce the risk of ambiguity by improving contract drafting.

In this Code Section, the reference to the “preceding rules” is to the other presumptions of contract interpretation and indicates that *contra proferentem*, as it was under Roman law, is a last resort—it applies when the other presumptions have not resolved the ambiguity.

*C. Applying Contra Proferentem: A Checklist of Risk Factors*⁶⁹

1. Introduction

A review of relevant California case law involving *contra proferentem* shows that many factors affect the risk that the presumption may apply. The risk factors are set forth below in the form of an initial checklist of questions that may be useful for practitioners.⁷⁰ This checklist covers only California; changes would need to be made for other states.

always the case. The question of whether it can apply when there is no ambiguity is rarely raised. However, the decision by the United States Supreme Court in *United States v. Seckinger*, 397 U.S. 203 seems to leave open that possibility.

⁶⁸ Section 206 states: “In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” The United States Supreme Court has cited this section of the Restatement in ruling that a securities firm “drafted an ambiguous document, and they cannot now claim the benefit of the doubt.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

⁶⁹ This checklist is a first step towards a systematic analysis of *contra proferentem* suggested in Torbert (2011), *supra* note 3, at 91.

⁷⁰ The usefulness of checklists has been noted by ATUL GAWANDE, *THE CHECKLIST MANIFESTO* (2010). The checklist here can assist drafters and negotiators of contracts to assess the risks presented by the text of a specific contract. It would appear that knowledge of these factors and how they together

The list of factors below requires one caveat. As noted above, the contract analyzed here is a business-to-business, that is, “commercial” contract typical of those handled by many practicing lawyers. It is not a contract of adhesion.⁷¹ Therefore, in the discussion below I have tried to construct from the case law and scholarly commentary a California *contra proferentem* doctrine for commercial contracts that excludes, to the extent possible, adhesion contract precedents, especially insurance contract precedents. It seems proper, and likely, that a judge or arbitrator examining the ambiguity of language in a commercial contract would look for precedents concerning commercial contracts rather than adhesion contracts.

(a) Contract Term Precluding the Application of *Contra Proferentem*

In a contract governed by California law, can a drafter preclude the application of *contra proferentem* by including a clause to that effect?

Yes, subject to possible concerns of public policy and unconscionability. Contract law in the United States generally allows the parties substantial freedom of contract, subject to certain exceptions such as public policy and unconscionability. In theory, it should be possible for the drafting party to include a clause in the contract that precludes the application of *contra proferentem*. In fact, a number of commentators on contract drafting have suggested that the drafting party include such a provision in contracts.⁷² In my experience such a clause is rare, but it seems to be common in some contracts.⁷³

Two provisions of California’s Civil Code are potentially applicable to such a clause. The first, Section 1667, concerns public policy. It states that a contract is not lawful if it is “[c]ontrary to the policy of express law, though not expressly

constitute the risk of the application of *contra proferentem* would be helpful in evaluating the economic value of the contract and in negotiation.

⁷¹ The term “commercial contract” is used below to describe a contract between two companies that would not be characterized by a court in the jurisdiction of the governing law as a contract of adhesion.

⁷² HAGGARD & KUNEY, *supra* note 1, at 117; C. MARVIN GARFINKEL, REAL WORLD DOCUMENT DRAFTING: A DISPUTE-AVOIDANCE APPROACH 87 (2008).

⁷³ Duhl, *supra* note 26, at 112; R. Posner, *supra* note 16, at 1600, n.48.

prohibited.” It seems unlikely, however, that a clause precluding *contra proferentem* would qualify as contrary to the policy of express law.

The second provision, which concerns unconscionability, is California Civil Code Section 1670.5. It was copied from the Uniform Commercial Code and states that:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.⁷⁴

A search of California cases has not revealed any cases in which a California court opined on whether a clause precluding *contra proferentem* would be unconscionable or not. But Section 206 of the Restatement notes that at times it is difficult to distinguish between the application of *contra proferentem* and a denial of effect to an unconscionable contract clause.⁷⁵ Thus, it is arguable that a contract provision eliminating a presumption that has been used to deny effect to unconscionable clauses could be found to be unconscionable.

California Court decisions have indicated that the concept of unconscionability has both a procedural and substantive element. The procedural element focuses on oppression or surprise. “Oppression” arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. “Surprise” involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. Substantive unconscionability consists of an allocation of risk or cost which is overly harsh or one-sided and is not justified by the circumstances in which the contract was made. Presumably both procedural and substantive unconscionability must be present

⁷⁴ CAL. CIVIL CODE, §1670.5.

⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS §206 (1981).

before a contract will be held unenforceable.⁷⁶ It seems that there would be a greater probability of a contract of adhesion, as opposed to a commercial contract, being found unenforceable.

It seems unlikely that most commercial contracts between companies would meet these criteria, except perhaps insurance contracts, for which the application of *contra proferentem* against the insurer is a matter of course.⁷⁷ In one Delaware case, the Superior Court noted the presence of a clause excluding *contra proferentem* in a settlement agreement and refused to accept an insurance company's argument that, because it was in an unequal bargaining position in negotiating the agreement, *contra proferentem* should be applied to its benefit.⁷⁸ This decision seems to indicate that a clause precluding the application of *contra proferentem* may not be considered unconscionable. Therefore, if the contract discussed below were to include a clause precluding *contra proferentem*, it seems unlikely that the clause would be found unconscionable and unenforceable under California law.

This fact, however, does not guarantee that a clause precluding *contra proferentem* in a commercial contract would still effectively preclude the presumption. If the provision precluding *contra proferentem* justified the preclusion by stating that both parties had participated in the drafting and the court allowed the admission of extrinsic evidence⁷⁹ showing that only one party had drafted the contract, the application of *contra proferentem* to the preclusion clause itself could result in the application of the presumption to the contract as a whole.

Deciding whether to include a clause precluding *contra proferentem*, then, will depend on the drafter's balancing the benefits of a carefully drafted clause with the costs of negotiating it.

⁷⁶ *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284 (Ct. App. 1993). See also *Vance v. Villa Park Mobilehome Estates* 36 Cal. App. 4th 698 (Ct. App. 1995); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395 (Ct. App. 1995); *Flores v. Transamerica Homefirst Inc.*, 93 Cal. App. 4th 846 (Ct. App. 2001).

⁷⁷ This probably explains why insurance contracts generally do not seem to contain such a clause.

⁷⁸ *I. U. North America, Inc. v. A.I.U. Ins. Co.*, 896 A. 2d 880 (Del. Super. 2006).

⁷⁹ The admission of extrinsic evidence under California law is discussed *infra* p. 22.

(b) Contract of Adhesion

If the contract is not an “adhesion contract,” can *contra proferentem* still apply?

Yes. The seminal California case on adhesion contracts, *Steven v. Fidelity & Casualty Co.*, concerned an insurance contract that was issued from a vending machine. The Court described the contract as a “contract of adhesion” and applied the presumption of *contra proferentem*. It characterized an adhesion contract as one that met some of the following criteria: “a standardized contract prepared entirely by one party” that exhibited a “disparity in bargaining power” between the parties and that had to be accepted or rejected on a “take it or leave it basis” without opportunity for bargaining.⁸⁰ The application of *contra proferentem* to contracts possessing all or some of these characteristics would not be—and has not been—unusual.⁸¹ In fact, the U.S. Supreme Court’s decision in *C & L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe*⁸² could be interpreted to require an adhesion contract before *contra proferentem* applies. In explaining why the presumption did not apply in that case, the Court said that the contract was not ambiguous and that the Tribe did not find itself holding “the short end of an adhesion contract stick [emphasis added].” However, it is also true under California law that a contract does not have to be one of adhesion for the presumption to apply. In *Cathay Bank v. Lee*, the court found that the guaranty contract at issue was not a contract of adhesion, but still applied the presumption.⁸³

Considering the nature of contracts of adhesion there is good reason to apply the presumption of *contra proferentem* to them, but considering that the presumption has existed for about two thousand years before the invention of “contracts of adhesion,” there is clearly no reason to limit its application to these contracts, particularly where the ambiguity was unanticipated.

⁸⁰ *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 882 (Cal. 1962).

⁸¹ See *Tahoe Nat’l Bank v. Phillips*, 4 Cal. 3d 11 (1971) discussed *infra* p. 28.

⁸² *C & L Enters., Inc. v. Indian Tribe*, 532 U.S. 411, 423 (2001).

⁸³ *Cathay Bank v. Lee*, 14 Cal. App. 4th 1533, 1541 (Ct. App. 1993) where the court stated “It is true that guaranty contracts are not contracts of adhesion But that cannot reverse the usual rule that ambiguities are construed against the drafter.”

(c) The Admission of Extrinsic Evidence

Do California case law and California's Code of Civil Procedure allow the admission of extrinsic evidence only to clarify contract language that is ambiguous on its face?

Generally not, but the case law is inconsistent. Until 1968, California followed the traditional "plain meaning rule" for determining ambiguity. This rule required a judge to find that contract terms were ambiguous on their face before extrinsic evidence could be admitted to explain them. Under this rule, an ambiguity on the face of an adhesion contract was fatal for the drafter because the application of *contra proferentem* resulted in a decision against the drafter without consideration of extrinsic evidence.⁸⁴ In this situation, *contra proferentem* was generally the first, last, and only resort for dealing with ambiguity. Chief Justice Traynor's decision in *Pacific Gas & Electric Co. v. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33 (1968) abolished the "plain meaning rule" in California and substituted another test for the admissibility of extrinsic evidence: that the offered evidence was relevant to prove a meaning to which the language of the contract is "reasonably susceptible."⁸⁵ The effect of this decision was that ambiguities could not only exist in the language on the face of the contract, but could also be found in the seemingly plain language of the contract through the aid of extrinsic evidence. It seems likely that, as a result, recognized ambiguities have increased. Previously, ambiguities in the language on the face of the contract had been resolved by *contra proferentem*; those found through interpreting the language with the aid of extrinsic evidence could be resolved by other canons of interpretation or, as a last resort, by *contra proferentem*.

Justice Traynor's decision was not unanimous. Justice Mosk issued a thoughtful dissent in *Pacific Gas* and in another case the same year, *Delta Dynamics, Inc. v. Arioto*.⁸⁶ And *Pacific Gas* was followed three years later by another Supreme Court decision, *Tahoe National Bank v. Phillips*,⁸⁷ in which Justice Tobriner created a significant exception to Chief Justice

⁸⁴ Horton, *supra* note 9, at 448.

⁸⁵ *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, 69 Cal. 2d 33, 37 (1968).

⁸⁶ *Delta Dynamics, Inc. v. Edwin Arioto*, 69 Cal. 2d 525 (1968).

⁸⁷ *Tahoe Nat'l Bank v. Phillips*, 4 Cal. 3d 11 (1971).

Traynor's rule of allowing the admission of extrinsic evidence to clarify ambiguity. He said that in determining whether an adhesion contract is "reasonably susceptible" to the interpretation suggested by the extrinsic evidence, one factor for consideration is whether that interpretation would do violence to the "fundamental considerations of policy" that underlay *contra proferentem*.⁸⁸ In effect, the import of the decision is that equitable considerations inherent in *contra proferentem* can prevail over the rule announced in *Pacific Gas*, particularly for an adhesion contract.

Since 1971 California courts have failed to establish consistent rules on the admissibility of extrinsic evidence.⁸⁹ The decisions of trial and appellate courts often differ.⁹⁰ Appellate, but not trial, courts interpreting contracts have often followed *Pacific Gas*, but in *Nedlloyd Lines B. V. v. Superior Court*, the Supreme Court ruled that the plain meaning of contract language can bar extrinsic evidence.⁹¹ The combined effect of the case law seems to be that California law will often prevent the application of *contra proferentem*, but not if either of the following conditions exists: (1) extrinsic evidence is absent; or (2) the extrinsic evidence does not resolve the ambiguity.

To implement the *Pacific Gas* decision, Article 1856 of the California Civil Code was amended in 1978. It allows the parties to provide extrinsic evidence to "interpret the terms of the agreement . . ."⁹² Thus, the interpretation of ambiguity in a contract consists of two steps. In the first step, the court provisionally receives (without actually admitting) all credible

⁸⁸ *Id.* at 20.

⁸⁹ Eric A. Posner has suggested that no jurisdiction has a bright-line absolutely allowing or preventing extrinsic oral evidence because all sorts of subsidiary doctrines provide exceptions to any general rule established by the courts. Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533, 553 (1998). Others have noted that "[i]ndeed, the continuing vitality of the traditional parol evidence and plain-meaning rules cannot be underestimated." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 307 (1985).

⁹⁰ Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of A Pyrrhic Victory*, 25 SW. U. L. Rev. 1, 4 (1995-1996).

⁹¹ *Nedlloyd Lines B. V. v. Superior Court*, 834 P. 2d 1148, 1155 (Cal. 1992).

⁹² CAL. CIV. CODE, §1856.

evidence to determine whether the language is reasonably susceptible to the interpretation urged by a party. If it is, then, in the second step, the court proceeds to interpret the ambiguity. In this second step, *contra proferentem* may be applied to resolve the ambiguity.⁹³ Limiting the application of *contra proferentem* to the second step, together with the decision in *Pacific Gas*, seems to have diminished the frequency of resort to *contra proferentem* in California in the first step, but probably not in the second. Overall, considering both steps, resort to *contra proferentem* may actually be more frequent after *Pacific Gas*.

(d) The Sense of “Drafter”

What is the sense of the word “drafter”⁹⁴ in the presumption *contra proferentem*?

The sense depends on the context. The word is ambiguous in at least two ways and existing law does not seem to provide clear guidance.

First, the translation of the Latin term “*contra proferentem*” as “against the drafter” is not strictly correct. The term really means “against the [party] proffering” or “against the [party] making” the ambiguous language.⁹⁵ This raises the question of whether the presumption should be applied when the party proffering the document uses a form that has been prepared by others. In such case, the party will often use the form, altering it slightly by filling in the blanks and by making a few adjustments, but then “proffer” it to the other party. For most purposes, the party preparing the document is not the “drafter” but only the “profferor.” Should *contra proferentem* be applied to the disadvantage of this party? Further, in some cases, the form contract offered by the “profferor” will be one prepared by an industry group, as in the construction industry.⁹⁶ Should the party

⁹³ *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1351 (Ct. App. 2004).

⁹⁴ CAL. CIV. CODE §1654, of course, does not mention the “drafter” but only the “party that caused the ambiguity to exist.” California courts, however, generally used the term “drafter” in discussing the application of *contra proferentem*.

⁹⁵ See the definition of *profero* in CHARLTON T. LEWIS, A LATIN DICTIONARY 1457 (1993).

⁹⁶ A. M. Netto, Alice Christudason & Gabriel Kor, *The Contra Proferentem Rule and Standard Forms of Construction Contracts*, 19 INT’L CONSTR. L. REV. 387, 388–89 (Jan.–Oct., 2002). The role of the Insurance Service Office in the

using such a form be considered the drafter? Should it depend on whether the form was prepared without input from outside parties with different interests? If the form represents the efforts of a group representing both parties, such as employers and contractors, then should the presumption not apply, even though the party that prepares the contract is the “profferor”? California law has not addressed these questions.

Second, as noted above, most contracts are prepared by one party that is generally referred to as the “drafter.” But in negotiations, the other party often may make changes that will be incorporated into the final document. Should the other non-drafting party then be referred to as the “drafter” of these provisions and be subject to the application of *contra proferentem*? There would appear to be two plausible answers. One is that, if in fact the new provisions have been discussed and negotiated, they should be seen as a type of joint drafting that can prevent the application of the presumption.⁹⁷ The other is that the party adding the provisions caused any ambiguity in those provisions and therefore should suffer the application of *contra proferentem*. Perhaps further research can provide some guidance on this and the questions raised above.

For present purposes, it seems that the contract discussed below is probably not an industry form, but was prepared by the American party Licensor from its precedents. In reviewing the document without the benefit of extrinsic evidence, it seems safe to presume that the Licensor is probably the “drafter,” or at least the “profferor,” of every word in the contract subject to rebuttal that specific words were added by the Licensee.

(e) Reliance on Interpretation of the Ambiguous Language

Under California law, must the party asserting *contra proferentem* have relied on its interpretation of the ambiguous language at the time of entering into the contract?

No. But in contracts with the U.S. government, the application of the presumption of *contra proferentem* often depends on whether the non-governmental party has relied, at the

insurance industry is well known. See <http://www.iso.com> (last visited Feb.1, 2014).

⁹⁷ See the discussion *infra* p. 27.

time of entering into the contract, on its interpretation of the ambiguous language in order to sign the contract. Absent such reliance, courts often refuse to apply the presumption.⁹⁸ A U.S. District Court for the Northern District of California, however, has ruled that this requirement does not exist under California law. It limited the application of this rule to contracts to which the United States was a party and found that this rule was not applicable to a contract to which the United States was not a party.⁹⁹ Therefore, a non-drafting party wishing to assert the presumption of *contra proferentem* under California law should not have to prove that it relied at the time of entering into the contract on its interpretation of the ambiguous language.

(f) Reasonableness of Interpretation

Must each interpretation of the ambiguous language be “reasonable” in order for ambiguity to exist?

Yes. The Restatement requires that the interpretation by the non-drafting party must be reasonable before ambiguity can exist. In discussing *contra proferentem*, it refers to “choosing among the reasonable meanings of a promise or agreement or a term thereof [emphasis added].” The California Civil Code does not include this requirement, but case law has prescribed it. As noted above, *Thomas Drayage* and *Tahoe National Bank* both refer to language that is “reasonably susceptible” to the interpretation by the party proposing the application of *contra proferentem*. Other cases have confirmed the requirement of “reasonableness”¹⁰⁰ but have also suggested that the standard is whether an interpretation is “semantically reasonable”¹⁰¹ or “semantically permissible.”¹⁰² Therefore, under California law, a party’s interpretation must be one to which the language of the contract is “reasonably susceptible,” “semantically reasonable,” or “semantically permissible” before *contra proferentem* can be applied.

⁹⁸ See, e.g., *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327 (1999).

⁹⁹ *World S & L Ass’n v. Fed. Home Loan Bank of San Francisco*, 2002 U.S. Dist. LEXIS 15875 citing *Patterson v. Hughes Aircraft Co.*, 11 F. 3d 948 (9th Cir. 1993).

¹⁰⁰ *Curry v. Moody*, 409 Cal. App. 4th 1547 (Ct. App. 1995).

¹⁰¹ *California Nat. Bank v. Woodbridge Plaza LLC*, 78 Cal. Rptr. 3d 561 (Ct. App. 2008).

¹⁰² *Schaffter v. Creative Capital Leasing Group, LLC*, 83 Cal. Rptr. 3d 19 (Ct. App. 2008).

(g) Negotiation of the Contract

Does *contra proferentem* apply to a contract that has been negotiated?

Other things being equal, not if the contract has been “actively negotiated.” In 1962, a California court ruled that where the terms of a contract are “arrived at by negotiations between two parties,” the contract will not be construed against the drafter.¹⁰³ Later, U.S. Federal courts in California applying California law have set forth a standard of “active negotiations” that limits the application of the presumption. In *Miller v. United States*, a bankruptcy court said that California cases do recognize that where contract terms are “actively negotiated,” “neither party should be considered the drafter.”¹⁰⁴ Subsequent cases have applied this standard. The United States District Court for the Southern District of California in *Herring v. Teradyne, Inc.* found that “no meaningful discussions” meant that the contract was not “actively negotiated.”¹⁰⁵ In *Healy v. MCI WorldCom Network Serv.*, the U.S. Federal Court for the Eastern District of California decided that “negotiations on the periphery” did not meet the test of being “actively negotiated.”¹⁰⁶ This standard of “actively negotiated” does not explain how “active” the negotiations have to be or whether they have to address the issue involved in the ambiguity.

These cases demonstrate the difficulties in interpreting the term “actively negotiated.” Does “negotiate” mean not only discussion of the issues, but a resulting substantive change in the text of the contract? Or can it refer to a form contract with blanks for the price and a couple of other items where the only item negotiated was the price? The term “negotiate” therefore is ambiguous by itself and does not provide much guidance. Further, the combination “actively negotiate” does not provide any information on the whether the parties enjoy equal bargaining

¹⁰³ *Indenco, Inc. v. Evans*, 201 Cal. App. 2d 369, 375 (Ct. App. 1962).

¹⁰⁴ *Miller v. United States*, 253 B.R. 455, 459 (Bankr. N. D. Cal. 2000). The court cited as support *Dunne & Gaston v. Keltner*, 50 Cal. App. 3d 560 (Ct. App. 1975), but that decision does not say anything about who the drafter of the document was in that case, so it seems to be weak support.

¹⁰⁵ *Herring v. Teradyne, Inc.* 256 F. Supp. 2d 1118, 1126 (S. D. Cal. 2002).

¹⁰⁶ *Healy v. MCI WorldCom Network Serv.*, 2006 U.S. Dist. LEXIS 446, 18–19 (E. D. Cal. 2006).

power, or whether the parties are equally sophisticated, but it probably implies that both parties had input into the drafting of the contract as discussed below.

(h) Joint Drafting

Does *contra proferentem* apply if the contract was jointly drafted by the parties?

It depends. The question of negotiation of the contract is closely related to that of joint drafting. Generally, as noted above, one party will prepare the initial draft of a contract, but unless the contract is an adhesion contract, the parties will negotiate the initial draft of a commercial contract and change parts of it. The case law calls this “joint drafting” and it would seem generally to be the result of “active negotiations.” In a 1984 case, the California Supreme Court ruled that an insurance contract that was negotiated between an insurance carrier and the California Hospital Association, which enjoyed substantial bargaining power, was the product of “joint drafting” and refused to apply *contra proferentem*.¹⁰⁷ In another case two years later, *Mitchell v. Exhibition Foods*, a trial court determined that the right-of-first-refusal provision was the product of a “joint drafting” and therefore refused to apply *contra proferentem*.¹⁰⁸ In *Herring v. Teradyne*, the only changes made during the negotiations to the first sentence of the section of the agreement that was the subject of the ambiguity analysis involved certain “carve out” subsections that were not relevant to the ambiguity question.¹⁰⁹ Therefore, the court decided that *contra proferentem* could be applied.

These cases leave open the questions of how much change in the contract constitutes “joint drafting,” but together with the cases concerning active negotiations, they suggest that the changes will probably result from the negotiations and may prevent the application of *contra proferentem* if they relate to the specific ambiguity issue.

(i) Unequal Bargaining Power

¹⁰⁷ *Garcia v. Truck Insurance Exchange*, 36 Cal. 3d 426, 441 (1984).

¹⁰⁸ *Mitchell v. Exhibition Foods*, 184 Cal. App. 3d 1033, 1042 (1986).

¹⁰⁹ *Herring v. Teradyne, Inc.*, 256 F. Supp. 2d 1118, 1134 (S. D. Cal. 2002).

Is unequal bargaining power a precondition for the application of the presumption?

Other things being equal, it seems to be. This is because unequal bargaining power is the primary policy issue that *contra proferentem* addresses. California courts have looked to the bargaining power of both parties to a contract in deciding whether *contra proferentem* should be applied. In *Neal v. State Farm Ins. Cos.* the court applied *contra proferentem* to a contract of adhesion that was drafted and imposed by “the party of superior bargaining strength.”¹¹⁰ In *Tahoe*, mentioned above, the California Supreme Court identified the bank as occupying “the superior bargaining position” and therefore applied *contra proferentem* against a standardized contract.¹¹¹ In *Mitchell v. Exhibition Foods*, one of the reasons the court refused to apply *contra proferentem* was because the parties stood on “an equal footing.”¹¹² But, as noted above, the presumption can be applied even if the contract between the parties is not a contract of adhesion.¹¹³

(j) Sophistication of the Parties

Is a lack of sophistication in the non-drafter a precondition for the application of *contra proferentem*?

It depends. The sophistication of the non-drafter is a factor that California courts have cited in deciding whether to apply the presumption. For example, in a 1976 case of alleged ambiguity in a real estate loan agreement, the court found that the non-drafting parties were “sophisticated borrowers in the field of real estate development” and refused to apply the presumption.¹¹⁴ In a 1995 case, the court refused to apply the presumption because *contra proferentem* was inapplicable where “sophisticated parties” negotiated and jointly drafted the language in question.¹¹⁵ The California Supreme Court in a 1990 decision acknowledged that where an insurance policyholder does not suffer from lack of

¹¹⁰ *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690 (Ct. App. 1961).

¹¹¹ *Tahoe Nat'l Bank v. Phillips*, 480 P. 2d 320 (1971).

¹¹² *Mitchell v. Exhibition Foods*, 184 Cal. App. 3d 1033 (Ct. App. 1986).

¹¹³ *Cathay Bank v. Lee*, 14 Cal. App. 4th 1533 (Ct. App. 1993).

¹¹⁴ *Powell v. Central Cal. Fed. Sav. & Loan Assn.*, 59 Cal. App. 3d 540 (Ct. App. 1976).

¹¹⁵ *Cooper Co. v. Transcon. Ins. Co.*, 312 Cal. App. 4th 1094 (Ct. App. 1995).

sophistication or a relative lack of bargaining power and where the insurance policy is actually negotiated and jointly drafted, a court need not go so far in protecting the insured from ambiguous or highly technical drafting. However, where the drafter does not present any evidence that the provisions were actually negotiated or jointly drafted, the court saw little reason to depart from the ordinary principles of interpretation that would apply the presumption.¹¹⁶ In a 2002 case involving a loan agreement, the U.S. District Court for the Northern District of California found that even though the non-drafter was a “sophisticated borrower,” the presumption should be applied because the agreements were not subject to negotiation.¹¹⁷ It seems that California courts will not apply the presumption if the non-drafter is sophisticated, does not lack bargaining power and participated in the negotiation and drafting of the contract. It appears, however, that sophistication alone, or a lack of it, is not sufficient to preclude the presumption or to apply it.

(k) Duty to Seek Clarification

Does the non-drafter have a duty to ask for clarification of a patent ambiguity before the presumption will be applied?

In government contracting, courts have developed a doctrine that where the ambiguity is patent, the private, non-drafting party has an obligation to seek clarification of the ambiguity and, if it has not, a court will not apply *contra proferentem* against the government as the drafter.¹¹⁸ State courts, including those in California, however, do not seem to have adopted this doctrine, but it is possible that they may in the future. Two commentators have proposed that Tennessee do so.¹¹⁹ Clearly, the adoption of such a rule would reduce the frequency of application of *contra proferentem* and could prevent its application in a specific instance.

¹¹⁶ *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990).

¹¹⁷ *World S&L Ass'n v. Fed. Home Loan Bank of San Francisco*, 2002 U. S. Dist. LEXIS 15875.

¹¹⁸ Flynn, *supra* note 9, at 379; Steven W. Feldman & James A. DeLanis, *Resolving Contractual Ambiguity in Tennessee: A Systematic Approach*, 68 TENN. L. REV. 73 (Fall, 2000). See *Merando, Inc. v. United States*, 201 Ct. Cl. 23 (1973) and *Fort Vancouver Plywood Co. v. United States*, 860 F. 2d 409 (9th Cir. 1988).

¹¹⁹ Feldman & DeLanis, *supra* note 118, at 98–99.

(1) Effect of Arbitration

Does a provision for arbitration in the contract affect the application of the governing law to the contract and possibly the application of *contra proferentem*?

Yes. California law will certainly be applied in resolving ambiguities under this contract, but it will be applied by an arbitrator rather than a judge. The contract here provides for arbitration by a single arbitrator¹²⁰ under the Arbitration Rules of the International Chamber of Commerce (ICC) rather than resort to California courts.¹²¹ Under international arbitration practice, the arbitrator will conduct the proceedings in accordance with the choice-of-law clause, which is California law, specifically California arbitration law.¹²²

California arbitration law, contained in the Code of Civil Procedure, provides that the parties may agree on the procedure to be followed by the arbitrator in conducting the proceedings, but if they fail to do so (as they have in this case), the arbitrator may, subject to certain restrictions in the arbitration law, conduct the arbitration “in the manner [he or she] considers appropriate.”¹²³ In conducting the arbitration, the arbitrator has the power under California’s arbitration act to determine the admissibility, relevance, materiality, and weight of any evidence,¹²⁴ but the arbitrator would also consider the ICC Rules on evidence (requiring the arbitrator to study the written submissions of the parties and all documents relied upon; to hear the parties together in person; and to decide whether to hear witnesses). The Rules also require the arbitrator to take account of the provisions of the contract regarding the admissibility of evidence, but the contract in this case does not contain any provisions on this.

¹²⁰ In this case, the contract calls not for an arbitral tribunal, but for a single independent arbitrator who has significant experience in arbitrating matters related to the biopharmaceutical industry and who was either mutually agreed on by the Parties or selected by a senior executive of the ICC in Paris. *See* Clause 18.2 of the contract *infra*.

¹²¹ *See* Clause 18.2 of the contract *infra*.

¹²² “..the procedural law of the arbitration is almost always the arbitration legislation of the arbitral seat...” GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1310 (2009)

¹²³ CAL. CODE CIV. PROC., §1297.191, 192 (1988).

¹²⁴ CAL. CODE CIV. PROC., §1297.193 (1988).

The California arbitration law, the ICC Rules, and the terms of the contract here together give the arbitrator some latitude. Thus, the specific procedures on the admissibility of evidence, specifically extrinsic evidence to resolve ambiguity, will depend on the arbitrator. In most cases, international arbitral tribunals take a pragmatic approach to the admissibility of evidence and are reluctant to be limited by the technical rules of evidence, particularly those rules designed for use in jury trials.¹²⁵ If the arbitrator follows general practice, he or she will take practical steps to admit evidence in order to establish the facts without restriction by the procedural rules of California's Code of Civil Procedure.

California law will be applied, but the application of California law by an arbitrator will be different from its implementation by a judge.¹²⁶ An arbitrator is required to interpret the law in a reasonable manner, but, within the scope of reasonable interpretation, an arbitrator will often be more flexible in applying the law and soften the impact of a law that appears to work too harshly against one of the parties.¹²⁷ In some cases, the parties have the arbitrator assume the powers of an *amiable compositeur* or decide *ex aequo et bono*. If the parties do this, the arbitrator will be less bound by technical legal rules. The parties in this case, however, have not so provided in the arbitration clause.¹²⁸

In sum, it seems likely that the single arbitrator, in interpreting ambiguities, may be inclined to apply *contra proferentem*, particularly if he or she finds persuasive equitable considerations. More specifically, in the context of California law,

¹²⁵ NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 386 (2009).

¹²⁶ In jurisdictions that still follow the plain meaning rule, it is unclear whether an arbitral panel would disallow extrinsic evidence to show ambiguity if the contract language was clear on its face. But it could be impossible for the arbitration panel to follow the applicable law where that law provided for the deciding of fact issues but a jury, rather than a judge.

¹²⁷ MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 82 (2012).

¹²⁸ The ICC Rules state that if the contract contains any agreement that the arbitrator should assume the powers of an *amiable compositeur* or decide *ex aequo et bono*, the arbitrator should assume such role. The contract here contains no such agreement, so under the Rules the arbitrator should not assume such powers.

it would appear likely that the arbitrator would adopt an approach on the application of *contra proferentem* in the interpretation of ambiguities similar to that in *Tahoe*, one that emphasized equitable concerns. How likely this possibility is will depend on the experience and disposition of the single arbitrator and on other facts which he or she discovers through the proceedings.

(m) Varied Application of *Contra Proferentem* to the Contract

Does the probability of the application of *contra proferentem* vary with the particular provision of the contract?

Yes, it may where other policy considerations rebut the presumption. Ambiguity in an arbitration clause is one example. In the United States and in California, the courts have stated a preference for arbitration in resolving disputes. Therefore, when a contract clause requires the settlement of disputes by arbitration, the preference for arbitration would normally be given effect. However, the *contra proferentem* presumption may contradict this preference for arbitration. When the preference and the presumption conflict, which prevails? In California, the Supreme Court's decision in *Victoria v. Superior Court*¹²⁹ decided that *contra proferentem* applied where the contract was not adhesive (although it contained some adhesive provisions) and the parties had equal bargaining power.¹³⁰ A later decision by a Court of Appeal, however, has suggested that because *contra proferentem* is a "subordinate canon applied when other canons fail to dispel uncertainty," it should not be applied to construe ambiguity in an arbitration clause against the drafter.¹³¹ One factor that influenced the court's decision not to apply *contra proferentem* was that compulsory arbitration was not a term that inherently favored the interests of the drafter.¹³² These decisions suggest that under California law an ambiguous arbitration clause in a contract that is not an adhesion contract will be interpreted

¹²⁹ *Victoria v. Superior Court*, 40 Cal. 3d 734 (1985).

¹³⁰ The U.S. Supreme Court decision *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995) also favored *contra proferentem* over the preference for arbitration.

¹³¹ *Pacific Gas & Electric Co. v. Superior Court*, 6 Cal. App. 4th 207 (Ct. App. 1991).

¹³² *Id.* at 242.

against the drafter, but if the arbitration clause does not inherently favor the interests of the drafter, this result may be less likely.

In the contract analyzed below, there does not appear to be any significant ambiguity in the arbitration clause, so the issue is moot here.

(n) *Contra Proferentem* as Last Resort Tie Breaker

Is *contra proferentem* a last resort tie-breaker?

Yes. As noted above, it was seen as a last resort in Roman law. The Restatement (Second) of Contracts states that, “so long as other factors are not decisive, there is substantial reason for preferring the meaning of the [non-drafting] party.” And as noted above, the California Civil Code requires that “[i]n the case of uncertainty not removed by the preceding rules [of interpretation],” *contra proferentem* will apply. This rule, together with Article 1856 of the Code of Civil Procedure noted above, means that *contra proferentem* can be seen as a presumption of last resort.¹³³

California cases also refer to *contra proferentem* as a “tie-breaker.”¹³⁴ This case law assumes an interpretive process in which ambiguity is resolved first by the application of various linguistic presumptions (such as the presumption of consistent drafting and the whole statute interpretation), but if presumptions rebut each other, that is, the number of presumptions supporting the drafter’s interpretation and the number of those supporting the non-drafter’s interpretation are equal, then the language should be interpreted according to *contra proferentem*, that is, against the drafter.

California courts, when mentioning the role of *contra proferentem* as a tie-breaker, have often emphasized that the presumption is more than a tie-breaker. In the 1962 case *Steven v. Fidelity & Casualty Co.* noted above, the Supreme Court of California applied *contra proferentem* to an egregious standard form travel insurance contract, stating that *contra proferentem*

¹³³ *Carella v. eBay Inc.*, 2006 Cal. App. Unpub. LEXIS 3247 (2006); *Laub v. Dudley*, 2008 Cal. App. Unpub. LEXIS 8359 (2008).

¹³⁴ *Tahoe Nat’l Bank v. Phillips*, 480 P. 2d 320 (1971); *Powers v. Dickinson*, 54 Cal. App. 4th 1102 (Ct. App. 1997); and *Pacific Gas & Electric Co. v. Superior Court*, 15 Cal. App. 4th 576 (Ct. App. 1993).

“does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy.” Later decisions, such as *Tahoe* have echoed this sentiment, but applied it to other contracts that are less adhesive. The Restatement’s Reporters Notes say that “one may doubt that the rule [of *contra proferentem*] is ‘the last one to be resorted to, and never to be applied except when other rules of interpretation fail’¹³⁵ seems to reflect this view that the policy considerations behind the presumption allow it to be applied in certain situations to serve equity.

2. Summary

It appears that no California court has described precisely all the possible factors affecting the application of this presumption. But it is clear from the above discussion that courts have often focused on only one factor affecting the application of *contra proferentem* in analyzing whether to apply the presumption. It seems that the absence of any of the following factors can increase the likelihood that the presumption will apply: equal bargaining power, negotiations, joint drafting, or equal sophistication. A drafter will want to keep in mind all of these factors and consider which ones may deserve further thought in the context of a particular contract. The overall conclusion, however, is this: *Ceteris paribus, contra proferentem*.

IV. REVIEW OF CONTRACT FOR AMBIGUITY

A. Introduction

The contract review below is an attempt to identify those provisions that could be interpreted as ambiguous if an unanticipated event resulting in material consequences for one of the parties occurred and prompted that party to examine the contract again. The purpose of this review is not to criticize the drafter. How much time and effort the drafter was able to spend preparing the contract, what precedent the drafter used, the value of the contract, and many other factors are unknown and make it impossible to pass judgment. The primary purpose of the review is to give students a scaffolding that they can use to learn and to

¹³⁵ RESTATEMENT (SECOND) OF CONTRACTS §206 (1981).

practice a very narrow, but important, skill—examining a contract to identify potential ambiguities.

But this purpose imposes a number of limitations on the review. It was done without any knowledge of the parties or their relationship. It is narrow in that it only addresses language issues and does not cover other key aspects of the contract. Further, the review is superficial—it emphasizes those ambiguities that can be seen on the surface of the contract and does not involve a deep analysis of the structure of the document, the interaction of the various provisions, or the commercial background. Finally, the review does not propose solutions to the ambiguity issues it identifies. The reason for this limitation is because I wanted to leave this challenge for the students writing their theses.¹³⁶ Proposing solutions is a task the students should work out from the materials cited in the footnotes to this article and in class. But this task should not be unduly difficult. Identifying the ambiguities is the greater challenge.

The review also has a secondary purpose—to serve practicing lawyers as an initial checklist of issues in reviewing contracts for ambiguity. The checklist reflects my experience, case law, commentators on legal drafting, and some contributions from students.¹³⁷ It is not exhaustive and includes a few issues that do not happen to be relevant to this particular contract.

B. Checklist of Contract Ambiguity Issues

1. Absence of Provision Precluding *Contra Proferentem*

In reviewing a contract for purposes of ambiguity, we are concerned about two risks, the risk of ambiguity and the risk of *contra proferentem* applying. The review of the contract will reveal how much ambiguity there is in the document. That is, what the general risk of ambiguity is. But we will learn this only after the review is complete. We can determine the risk of *contra*

¹³⁶ Readers can see one strategy for reducing the ambiguity associated with the class presumption in Torbert (2007), *supra* note 3, at 11.

¹³⁷ The final three-hour exam for my course “Drafting Contracts: The Problem of Ambiguity” at the University of Chicago Law School, Winter Quarter, 2013, asked each student to identify and explain the ambiguities in this contract and then, assuming the student represented the drafter, decide whether to eliminate the ambiguity and, if so, how.

proferentem applying, however, before performing a full review of the contract. The above description of the risk factors under California law for the application of *contra proferentem* gives us a sense of the risk in general, but does not tell us whether the parties have intended *contra proferentem* to apply to the contract or not. But we can discover this rather simply by quickly scanning the contract to see whether it contains a provision precluding the application of *contra proferentem*. Given that clauses precluding *contra proferentem* are common in some contexts and drafters should be aware of them, the presumption of *expressio unius* (the negative implication presumption) should apply. That is, if the contract does not contain such a provision, the parties will be found to have intended for *contra proferentem* as interpreted by California courts to apply. If the contract does contain such a provision, it will be interpreted as signifying that the parties intended that *contra proferentem* would not apply to the contract. In this case, the contract contains no such provision. Therefore, the risk of the application of *contra proferentem* is greater than it might have been. The risk factors examined above give a sense of how great that risk is.

2. Ambiguity of “Agreement” in the Title of the Contract

The word “agreement” in the title exhibits semantic ambiguity. It can refer to either a document that is legally binding or to one that is not. Even though there is no formal recitation of consideration in the contract, the mutual obligations set forth in the text seem to express the intention to create a legally binding document. Of course, the title of the document is generally not considered to be decisive in determining whether the document is legally binding or not.¹³⁸ The use of “agreement,” however, has in some circumstances caused a problem. Consider *Pennzoil v. Texaco*.¹³⁹ There a jury found that a “Memorandum of Agreement”¹⁴⁰ between Pennzoil and Getty Oil shareholders for the purchase of the shares in Getty Oil was a legally enforceable

¹³⁸ KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING 1-2 (2d ed. 2008); CHARLES M. FOX, WORKING WITH CONTRACTS 161 (2008); HOWARD DAMSTADTER, HEREOF, THEREOF AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 80 (2002); CALLAGHAN’S ILLINOIS LEGAL FORMS, §1.12 (2003).

¹³⁹ *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. St. App. 1987).

¹⁴⁰ For the text of this document see JAMES SHANNON, TEXACO AND THE \$10 BILLION JURY 167-75 (1988).

contract. The court ruled that Texaco's later purchase of the Getty Oil shares tortiously interfered in the contractual relations between Pennzoil and the Getty Oil shareholders. Texaco was ordered to pay \$10.53 billion in damages to Pennzoil. It seems likely that if the document had been titled "Initial Contract" instead of "Memorandum of Agreement," Texaco would have been on notice that the document was legally binding and that making a bid for the Getty Oil shares would constitute tortious interference in contractual relations. Under such circumstances, it seems likely that it would not have made its bid for Pennzoil.¹⁴¹

In the contract here, the use of "agreement" in the title should not cause a problem.

3. Ambiguity of "Agree" in the Text of the Contract

The use of the word "agree," in addition to exhibiting semantic ambiguity, poses problems of tautology, inconsistency, and contextual ambiguity. These arise from the use of "agree" in the agreement formula. In a contract, the agreement formula serves the same purpose as the enactment clause in a statute: everything that follows is the direct object of the verb "agree" and is the text of what was agreed.¹⁴² The repetition of the enacting formula "it is hereby enacted," frequently repeated in the purview of English statutes, was abolished in England in 1850,¹⁴³ but the analogous practice seems to continue on in contract drafting. This repetition of the word "agree" in the past or present tense is tautologous. In effect, it means that the parties agree that they agree. (See for example, the use of "agree" in the agreement formula on page 1 "NOW IT IS HEREBY AGREED" and in Clauses 2.2; 2.4; 2.5, etc.¹⁴⁴) This tautologous usage is not ambiguous in itself, but in context it causes contextual ambiguity because of inconsistency. According to the presumption of

¹⁴¹ This conclusion is based on conversations with several litigators in which I posed the question of whether, *ceteris paribus*, they thought they could win a suit in which they had to persuade a jury that a document signed by two sophisticated parties and titled "Initial Contract" was not legally binding.

¹⁴² The illocutionary force of the purview of a statute (everything that follows the enacting clause) is declarative. The same is true of everything that follows the agreement formula in a contract.

¹⁴³ THORNTON, *supra* note 21, at 199; and FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION 37 (1989).

¹⁴⁴ See Clauses 3.4, 3.5, 4.1, 4.4, 4.5, 5.2, 5.3, 13.2, 13.3, 15.1, and 20.6.

consistent drafting, the interpreter of a contract assumes that the drafter is careful and uses the same words to express the same meaning and different words to express different meanings. From this perspective, it would appear that the drafter repeats “agree” in order to express something different from those clauses that do not have a repeat “agree.” The different language would seem to be an effort to emphasize the importance of that particular provision. However, that does not seem to be the case here. Why would the clause that set the amount of the royalty not contain the extra “agree” (Clause 3.1), but the clause that requires the payment into the Licensor’s bank account contain an extra “agree” (Clause 3.4)? If the extra “agree” is used out of an excess of caution for the avoidance of doubt, then that poses another consistency issue, because it is not consistent with other provisions which specifically use the phrase “for the avoidance of doubt” (Clauses 3.1, 4.4, and 17.1(iii)). Should an interpreter understand that the obligations preceded by an extra “agree” are somehow more important than other obligations? That seems improbable, but could become an issue if an arbitrator was confronted with a situation where one of the parties presented extrinsic evidence to suggest this interpretation as a way to deal with an unanticipated circumstance.

4. Ambiguity of *Ejusdem Generis* (the Class Presumption)¹⁴⁵

The class presumption assumes that in an enumeration a general word following specific words will be interpreted to include only things similar in nature to those enumerated by the preceding specific words. Semantic ambiguity arises because the application of the class presumption is not consistent, so it is not clear whether a court will give the general word a broad or a narrow sense. Although courts often apply the class presumption when the general word is preceded by “other,” that is not always the case. In the contract, there do not appear any occurrences of enumerations ending in general words that are not preceded by

¹⁴⁵ SINGER & SINGER, *supra* note 25, at §47.17; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 199–213 (2012); 陶博 (TAO BO) (2004), *supra* note 3, at 92–93; 陶博 (TAO BO) (2010), *supra* note 3, at 72–79, 109–216.

“other.” And the enumerations ending in a general word preceded by “other” are not very numerous.

Ordinarily, under the class presumption, “other” is interpreted to mean “other similar.” In the contract, however, the presumption of consistent drafting and the negative implication presumption (*expressio unius*) seem to combine to rebut this presumption and create contextual ambiguity. In Clause 1.1 “Prosecution and Maintenance,” line 7, the phrase “the defense of oppositions and other similar proceedings with respect to the particular patent or patent application . . .” appears. This usage shows that when the drafter intended for the word “other” before a general word to narrow the sense of the general word, the drafter added the word “similar.” The negative implication presumption would then have the reader presume that for all other uses of “other” in the contract the drafter intended for “other” to have a broad, not narrow, sense.

For example, in Clause 6.2, concerning representations and warranties, do the words in line 22 “any other documents” in the phrase “all representations, warranties and any other documents” refer only to documents that are in the nature of representations and warranties or to any other documents of any nature? In Clause 8.4, do the “other factors . . . excluding an event of Force Majeure” in the phrase “changes in market conditions, regulatory conditions or other factors but excluding an event of force Majeure” include any factors at all or only factors that are similar to market conditions and regulatory conditions? In Clause 20.6 concerning the relationship of the parties, do the words “or any other relationship” in the phrase “an employment, agency or any other relationship” refer only to a relationship that is of the same nature as “employment” and “agency” or to a wider range of relationships? In all these Clauses, the argument from the viewpoint of consistency and the negative implication presumption would be, *ceteris paribus*, that the sense is not narrow, but broad.

A similar analysis applies to an enumeration of verbs ending with the adverb “otherwise” before the last verb. In Clause 2.1 (b) concerning the license grant, do the words “otherwise exploit” in the phrase “practice any method, process or procedure or otherwise exploit the Licensor Technology” refer only to actions similar to the practice of a method, process or

procedure? In Clause 20.1 concerning assignment, do the words “or otherwise” in the phrase “(whether by merger, reorganization, acquisition, sale, or otherwise)” refer only to assignment by actions similar to a merger, reorganization, acquisition, or sale or to do they refer to any other possible means of assignment? In Clause 20.6 concerning the relationship of the parties, do the words “or otherwise” in the phrase “to assume, create or incur any expense, liability or obligation . . . on behalf of the other Party, or otherwise act as an agent for the other Party for any purpose . . .” refer only to acts similar to assuming, creating, or incurring any expense, liability or obligation or do they include acts that are dissimilar to those acts? Here again, the argument set forth above would lead to an interpretation that, other things being equal, the broad sense was intended. Whether this was, in fact, the intention of the drafter or of both parties is unknown. Whether extrinsic evidence might clarify the intention is also unknown. If the presumptions in favor and against such an interpretation were equal in number, the application of *contra proferentem* could result in an interpretation unfavorable to the drafter.

5. Ambiguity of Reverse *Ejusdem Generis*

The risk of semantic ambiguity can arise not only from the class presumption (*ejusdem generis*), but also from a new variant of it, the presumption called “reverse *ejusdem generis*.” The presumption is called “reverse *ejusdem generis*” because, when the presumption applies to an enumeration, it is not the preceding narrower words that restrict the sense of the broader word at the end, but the broader word at the end that restricts the senses of the preceding narrower words. The origin of this presumption lies in the interpretation of a criminal statute stating that to commit the crime a person must have occupied “a position of organizer, a supervisory position, or any other position of management.” The question posed in the first case, *U.S. v. Apodaca*,¹⁴⁶ was whether each of the positions of “organizer” and “supervisor” was a “position of management.” The court answered affirmatively.

¹⁴⁶ *United States v. Apodaca*, 843 F. 2d 421 (10th Cir. 1988).

Later cases¹⁴⁷ posed the question in the form of the phrase “bass, trout, or any other freshwater fish,” stating that the phrase did not include sea bass because the phrase “or any other freshwater fish” limits the scope to freshwater fish. This presumption is not widely recognized and therefore not widely applied, so it creates ambiguity as to the scope of the enumeration.

Reverse *ejusdem generis* does not appear applicable to the contract because the contract contains no enumerations where the last noun is preceded by “or” and modified by “any.”

6. Ambiguity of *Noscitur A Sociis* (the Associated Words Presumption)¹⁴⁸

The associated words presumption is similar to the class presumption and overlaps with it to a certain extent. Typically, it is applied when there is not an enumeration, but only a pair of nouns or of verbs and the pair is joined by the conjunction “or.” Semantic ambiguity is created by the doubt as to whether the presumption will be applied or not. For example, in Clause 6.2 (h) concerning representations and warranties do the words “other intellectual property rights” in the phrase “infringe . . . patents or other intellectual property rights” refer to all intellectual property rights that are not patent rights or only intellectual property rights that share common features with patents? In Clause 6.2(i) (i), do the words “invalidate or otherwise challenge” in the phrase “claims or litigation or investigations seeking to invalidate or otherwise challenge the Licensor Technology . . .” refer to challenges that are similar to invalidation or to any possible challenge? In Clause 18.1 regarding disputes, do the words “or other matter” in the phrase “unable to resolve any dispute or other matter arising out of or in connection with this Agreement . . .” refer only to matters that are similar to disputes or to any other matter? The analysis above of the class presumption would also apply to these Clauses.

¹⁴⁷ United States v. Delgado, 4 F. 3d 780 (9th Cir. 1991); United States v. Williams-Davis, 90 F. 3d 490 (D.C. Cir. 1996); Dong v. Smithsonian Institution, 125 F. 3d 877 (D.C. Cir. 1997).

¹⁴⁸ SINGER & SINGER, *supra* note 25, at §47.16; SULLIVAN & DRIEDGER, *supra* note 25, at 200–02; 陶博 (TAO BO) (2004), *supra* note 3, at 91–92; 陶博 (TAO BO) (2010), *supra* note 3, at 65–72.

7. Ambiguity of *Expressio Unius* (the Negative Implication Presumption)¹⁴⁹

The negative implication presumption assumes that the expression of one thing is the exclusion of another. It is often applied to lengthy enumerations with the result that it is presumed that the drafter intentionally omitted an item not included in the enumeration. The likelihood of the presumption applying varies with the length of the enumeration. Generally, an enumeration of three items, the most common number,¹⁵⁰ does not pose a problem. More lengthy enumerations can cause ambiguity.

The contract does not seem to contain many lengthy enumerations. Some of the longest appear in Clause 3.8 royalty and payment (“make, manufacture, use, commercialize, market, distribute or sell”), Clause 6.28 on representations and warranties (“research, development, manufacture, use, sale, offer for sale or importation of the Products”), 16.2 regarding post termination (“research, develop, make, have made, manufacture, use, sell, offer for sale, import and export”), and Clause 20.7 on force majeure (“earthquake, riot, civil commotion, war, terrorist acts, strike, flood, or governmental acts or restriction . . .”). The enumeration in Clause 7.1 (and 7.2) concerning indemnities can serve as an example of the possible ambiguity caused by the application of this presumption. The enumeration is “suits, investigations, claims, costs, demands, liabilities, losses, damages, and expenses, including reasonable attorneys’ fees (collectively, “Losses”).” As discussed below¹⁵¹, one issue with this enumeration is whether it is intended to cover undischarged liabilities. Most of the surrounding nouns (“costs,” “demands,” “losses,” “damages,” “expenses”) imply discharged liabilities. Only one of the words, “liabilities,” clearly implies undischarged liabilities. Might the omission of the word “debts” strengthen the implication that undischarged liabilities were not meant to be included? Might the use of the word “including” only at the end emphasize that other items not the object of this preposition were

¹⁴⁹ SULLIVAN & DRIEDGER, *supra* note 25, at 163; COURTNEY ILBERT, LEGISLATIVE METHODS AND FORMS 247 (1901); 陶博 (TAO BO) (2004), *supra* note 3, at 93–94.

¹⁵⁰ WILSON FOLLETT, MODERN AMERICAN USAGE: A GUIDE 67 (Erik Wenberg ed. 1999).

¹⁵¹ See *infra* pp. 45-47.

not intended to be included? Does the use of the term “Losses” to describe all these items support the interpretation that the enumeration is intended to include only discharged liabilities? An unanticipated event and extrinsic evidence could make these questions significant.

8. Ambiguity of “Including”¹⁵²

The word “including” is used to counter the negative implication presumption, but it is semantically ambiguous. Depending on the context, courts have found four different senses: illustrative (“B is an example of A” or “B is a kind of A”); componential (“B is a component of A”); expansive (“B is deemed to be a kind of, or part of, A”); and limiting sense (“B constitutes A”). In the contract, Clause 20.09 attempts to specify that throughout the entire document the words “include” and “including” have the expansive sense equivalent to “but not limited to” or “without limitation.” This is a seemingly efficient way to avoid ambiguity and assure that these words in the contract always have the expansive sense. However, although it eliminates some ambiguities, it creates others.

First is the presumption of consistent expression.¹⁵³ If all uses of “including” mean “including but not limited to,” then it is not necessary to use the words “but not limited to” in the text after “including.” However, Clause 1.1 in the definition of Licensor Know-How states that the proprietary information, trade secrets, documented techniques, materials and data “including but not limited to discoveries . . . test data (including pharmaceutical, toxicological, clinical and manufacturing information and test data) . . .” The inconsistent use of “including” in the Clause causes the careful reader, other things being equal, to presume that there is a good reason for it. Might the insertion of “but not limited to” be an effort by the drafter, for the avoidance of doubt, to emphasize this expansive sense in this Clause more than in other clauses?

The other issues with the wholesale application of the expansive sense of “include” concern its collocation. For example,

¹⁵² 陶博 (TAO Bo) (2010), *supra* note 3, at 114–28.

¹⁵³ SULLIVAN & DRIEDGER, *supra* note 25, at 163–68; 陶博 (TAO Bo) (2004), *supra* note 3, at 88–90.

in Clause 1.1 in the definition of “Licensor Patents” when it states that ““Licensor Patents means the patents which includes” does it mean that the definition of Licensor Patents is not limited to those described in the following subclauses (i), (ii), and (iii)? In Clause 15.1 regarding confidentiality, it is not clear what the implications of Clause 20.09’s prescriptive definition of “including” are when “including” is within the scope of negation. Clause 15.1 states that ““Confidential Information’ shall not be deemed to include information or materials . . .” It seems that the scope of the negation should be expanded here to conform with the expansive sense of “including,” but it seems questionable whether this interpretation was intended by the drafter.

9. Postmodification Ambiguity (the Last Antecedent Presumption)¹⁵⁴

A modifying word or phrase that follows what it modifies often causes syntactic ambiguity because more than one possible object of the modifying word or phrase precedes it. Although the context often disambiguates, sometimes ambiguity results. The contract employs postmodification less than many other contracts and the risk of ambiguity is reduced. In fact, the issue is more miscue (described below) than ambiguity. In almost all of the Clauses the context allows the reader to discern the scope of modification. For example, in Clause 1.1 the definition of “Affiliate” (“ . . . the stock or shares having the right to vote”) it is clear that the postmodifying phrase “having the right to vote” modifies both “shares” and “stock;” in Clause 2.1 (“Licensor hereby grants . . . a . . . license . . . , with the right to grant, sublicense, subject to the conditions described in this Agreement, under the Licensor Technology . . .”) it is clear that the phrase “under the Licensor Technology” modifies “license” and not “conditions”; and in Clause 13.4 (“The Licensee shall be responsible for the maintenance and repair of all equipment used in the manufacture of the Products in accordance with applicable laws . . .”) it is clear that the phrase “in accordance with applicable laws” modifies “maintenance and repair” and not “manufacture.”

¹⁵⁴ THORNTON, *supra* note 21, at 26–28; SCALIA & GARNER, *supra* note 145, at 144–46; 陶博 (TAO BO) (2008), *supra* note 3, at 70–130.

But in two Clauses the scope of the postmodification is not clear. In Clause 1.1 the definition of “EMA Costs” (“ . . . costs resulting in a specific fee charged and a deliverable documented output for EMA meetings, animal test, and human tests, resulting in a competent authority submission . . .”) it is not clear whether the underlined phrase modifies “costs,” “output,” or “meetings, animal test, and tests.” This ambiguity might be significant. In Clause 20.7 (“ . . . earthquake, riot, civil commotion, war, terrorist acts, strike, flood, or governmental acts or restriction, or other cause that is beyond the reasonable control of the respective Party . . .”) it is not clear whether the underlined phrase modifies only “other cause” or all the preceding nouns. Perhaps the sense of “other” is “other similar” and the similarity is that the entire group consists of acts beyond the reasonable control so whether the phrase grammatically modifies all the preceding nouns is irrelevant. This ambiguity does not seem to be significant.

10. Ambiguity of the Proviso¹⁵⁵

A proviso, a construction using the word “provided” or “provided however,” often exhibits semantic ambiguity as between four different senses.¹⁵⁶ These are the exceptional sense (often equivalent to “except that”), the limiting sense (often equivalent to “but”), the conditional sense (often equivalent to “but only if”), and the additional sense (often equivalent to “and”). It may be difficult to distinguish between these different senses.

The most common problem seems to be ambiguity between the conditional sense and the other senses. The reason is that whether a phrase is a condition or not has a greater impact on the legal effect of the provision. It appears that in the eight instances of provisos in the contract, the senses are fairly clear. Four provisos seem to be conditional (Clause 3.2: “provided that the aforesaid products [are] manufactured according to the New Patents . . .”); Clause 5.4 (b) (“ . . . provided, however, that nothing shall be deemed an agreement to transfer . . . to Licensee

¹⁵⁵ ELMER A. DRIEDGER, *THE COMPOSITION OF LEGISLATION: LEGISLATIVE FORMS AND PRECEDENTS* 93–103 (2d ed. 1976); ROBERT C. DICK, *LEGAL DRAFTING* 90 (1972); SCALIA & GARNER, *supra* note 145, at 154–55.

¹⁵⁶ BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 710 (2d ed. 1995); ADAMS, *supra* note 11, at 282–84.

ownership of any Licensor Technology”); Clause 18.2 (“provided that any written evidence originally in a language other than English shall, insofar as practicable, is [*sic*] submitted in English translation”); and Clause 20.7 (“provided that such Force Majeure event has not ended during such sixty (60) day period”). Two provisos seem to express the limiting sense (Clause 1.1 “Licensor Know-How”: “provided however, that Licensor Know-How that is the subject of the licenses . . . shall extend only to those applications of any of the foregoing items that are associated with specifically defined carbohydrate chemistry formulation” and Clause 1.1 “Licensor Patents”: “provided, however, that Licensor Patents that are the subject of the licenses and other rights granted Licensee hereunder shall extend only to those applications of any of the foregoing items that are associated with NDS or its drug candidate equivalent.”) One proviso seems to express the additional sense (Clause 15.2: “provided, however, that if a Party is required by law . . . to make any such disclosure of the other Party’s Confidential Information it will . . . give reasonable advance notice to the other Party”). And one proviso seems to express the exceptional sense (Clause 18.2: “provided that if the Parties are unable to agree on a single arbitrator . . . , the arbitrator shall be selected by the senior executive of the ICC in Paris.”).

The risk of ambiguity appears greatest in Clauses 5.4 and 18.2, which seem to express the limiting sense, but could also be interpreted as expressing the conditional sense. In Clause 5.4, for example, might the proviso indicate that the failure to deem the agreement as involving a transfer or assignment of ownership was a condition to Licensor’s providing all reasonable assistance? In Clause 18.2 might the proviso indicate that a condition for the conduct of the arbitration proceedings in English was that English translations be provided? In either case, the conditional sense does not seem to collocate perfectly with the preceding phrase, but an unanticipated event and extrinsic evidence might make such an interpretation acceptable.

11. Ambiguity in the Expression of Time and Numbers

The expression of time and numbers in contracts often creates the risk of ambiguity. The two principal problems are

semantic ambiguity as to what period the time-related words express and the scope of time-related prepositions.

Clause 20.09 of the contract provides some clarification as to two time-related words, “day” and “year.” It says that these words both refer to a calendar year unless otherwise specified. This short statement, however, raises two questions. First, the word “month” is not mentioned in this Clause but appears twenty one times in the contract. Because “month” is not referred to in Clause 20.09, the negative implication presumption would lead us to think that the word “month” is not used in the calendar sense, but probably in the sense of 30 continuous days. The reference in Clause 17.1(a) to “twelve (12) months prior written notice” rather than one year’s prior written notice seems to reinforce this presumption. Therefore, in the absence of countervailing contextual or extrinsic evidence, the twelve months prior written notice, then, should be 360 days prior written notice, not 365 days prior written notice. Further, the other provisions calling for time periods measured in “months” would be calculated in multiples of 30 days rather than according to the calendar. In Clause 8.5, the “three (3) months” would be 90 days; in Clause 18.2 the “six (6) months” would be 180 days.

The use of the calendar year leads to ambiguity. It is not clear how to calculate the 1.5 years referred to in Clause 4.7. Does it mean 182 or 183 days in any year or 183 days only if the calculation includes February in a leap year?

Time-related prepositions are notorious for ambiguity.¹⁵⁷ As David Mellinkoff wrote, “The riddle of the preposition of time is this: Do I lead you just up to the point, into it, or past it?”¹⁵⁸ In the contract, the preposition “prior to,” which appears fifteen times, poses no problem. The date referred to is not included in the calculation. The question in the contract is whether the five prepositions “upon,” “of,” “from,” “following,” and “after” all express the sense that the number of days or months begins on the date of reference or the day after. Clearly, in the case of “after” the calculation begins on the day after the day referred to.¹⁵⁹ Thus,

¹⁵⁷ For example, even the phrase “prior to December 31” was considered ambiguous by Justice Stevens in *United States v. Locke*, 471 U.S. 84, 118 (1985).

¹⁵⁸ DAVID MELLINKOFF, *LEGAL WRITING: SENSE & NONSENSE* 41 (1982).

¹⁵⁹ Note, however, the different interpretations of the phrase “from and after” by the Eighth Circuit (including the date) *Board of Comm’rs of Kearney*

the calculation of the time periods in Clauses 3.9, 3.4(i)(iii), 4.6, 4.8, 4.9, 4.10, 16.1, 17.1 (b), and 18.1 is clear: the starting date referred to is not included in the calculation. The other words are ambiguous as to the intention. The presumption of consistent expression would lead us to think that these words should be interpreted as having different meanings. The context, however, seems to provide some hint that they are intended to be synonyms. For example, Clause 3.3 states that the Licensee shall pay the royalty Payment “within 30 days upon the expiry of a quarter in a year,” and then includes a detailed breakout of the payment stating that the first payment will be “on or before” April 30. Clearly, the word “upon” is used in the sense of “after” and does not include the date referred to. The context does not provide much assistance as to the other words, but it seems more natural that they would be interpreted to be synonyms with “after.” Thus, the calculation of the time periods in the Clauses employing “of” (12.1, 18.2, 20.5), those employing “from” (2.2, 3.3, 8.4, 17.1 (b), and 18.1) and that employing “following” (18.2) in the absence of other contrary extrinsic or contextual evidence, should be interpreted as not including the date referred to.

12. Ambiguity of “Indemnity”¹⁶⁰

The word “indemnity” and its verb form “indemnify” are semantically ambiguous as to whether they mean to compensate for a past loss or for a future loss, that is, for a loss or a liability. Generally, the term “hold harmless” is used to refer to compensating for liability, but there is no noun form for “hold harmless,” so “indemnity” is used as a superordinate to cover compensation for both loss and for liability. This is why the title of Clause 7 is “Indemnification” and the titles to Clauses 7.1 and 7.2 are “Indemnities” and do not use the expression “Hold Harmless.” However, “indemnify” and “hold harmless” are also interpreted as synonyms.¹⁶¹ Thus, “indemnity” or “indemnify”

County v. Vandriss, 115 F. 866, 871 (8th Cir. 1902) and the Seventh Circuit (excluding the date) Zimmerman v. United States, 277 F. 965, 965 (7th Cir. 1921).

¹⁶⁰ DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 286 (1992); 陶博 (TAO BO) (2010), *supra* note 3, at 297–319.

¹⁶¹ GARNER, *supra* note 156, at 436. Garner seems to rely on Brentnal v. Holmes, 1 Root (Conn.) 291, 1 Am. Dec. 44 (1791). But other cases over the last two hundred years show that when one looks at not just the verb, but both the

without an object does not clarify whether the obligation is to compensate for just loss or also for liability. The difference can be significant as when an indemnitee with both past losses and unpaid liabilities goes bankrupt.¹⁶² Does the indemnitor have the obligation to compensate only the past losses or also the unpaid liabilities? Often, the indemnity clause is arguably ambiguous.

In the contract, the indemnity provisions in Clause 7.1 and 7.2 provide that, “Licensee [or Licensor] shall . . . indemnify, hold harmless and defend Licensor . . . from and against any and all suits, investigations, claims, costs, demands, liabilities, losses, damages, and expenses, including reasonable attorneys’ fees (collectively, “Losses”).” This sentence contains both the verbs “indemnify” and “hold harmless” and the words “losses” and “liabilities” so at first glance one assumes that compensation for both losses and liabilities is intended. However, the placement of the verbs together at the beginning and the objects together following the verbs confuses the relationship between the verbs and the nouns and makes unlikely the application of the presumption “rendering each to each.”¹⁶³ Is “liabilities” the object of “indemnify”? Since the term “liabilities” can refer to both discharged and undischarged liabilities, does making it an object of “indemnify” imply that the compensation here is only for losses? If the term “hold harmless” is synonymous with “indemnify,” then is the sense of “hold harmless” here compensate for loss rather than liability? In the list of verb objects would the associated words presumption apply so that the words “suits,” “investigations,” “claims,” “demands,” and “liabilities” would be interpreted as applying to discharged liabilities because that is what the other words “costs,” “losses,” “damages,” and “expenses” refer to? Finally, if the clause is intended to cover undischarged liabilities, why is the list of verb objects defined as “Losses,” which only refers to discharged liabilities? This line of interpretation, although implausible in the abstract, could become attractive in the case of an unanticipated event with significant financial consequences.

verb and its object, the meaning as to compensation of loss or liability becomes clear. See cases cited in 陶博 (TAO BO) (2010), *supra* note 3, at 303–05.

¹⁶² *Cunningham v. Nashville*, 476 S.W. 2d 641 (Tenn. 1972).

¹⁶³ Reed Dickerson gave the classic example of this presumption: “Men and women may become members of fraternities and sororities.” REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233 (1975).

13. Ambiguity of “And”¹⁶⁴

The conjunction “and” exhibits semantic ambiguity. It has three senses that often occur in contracts. The classic example of these senses is the phrase “charitable and educational institutions.” The several sense of “and” is “institutions that are either charitable or educational,” the joint sense is “institutions that are both charitable and educational,” and the combined joint and several sense is “institutions that are charitable, educational, or both.”¹⁶⁵ In most cases, the context clarifies which sense is intended or the ambiguity does not pose a problem (often between the several sense and the combined joint and several sense). This is generally true of the contract.

“And” is often used in the several sense, but the context in some Clauses makes clear that the sense is joint. Examples are in Clause 3.1 concerning the royalty payment, in the phrase “excluding those manufactured and supplied to Licensor;” in Clause 17.1 concerning termination (“ . . . fails to pay . . . and the payment is not settled);” and in Clause 20.5 concerning modification (“reduced to writing and signed”). The one situation in which the context could suggest either a several or joint sense is Clause 2.3 where the intent of the clause is to restrict sale and distribution of the products. In this Clause might the “and” in the phrase “Products for human and veterinary use” be used in the joint sense? After the verb “restrict” wouldn’t it be more natural to write “Products for either human or veterinary use”? Would the negative implication presumption (*expressio unius*) suggest that the intent here was joint conjunction? Further, the use of the phrase “human or veterinary use” in Clause 1.1 “Additional Territory Licensed Products” would seem to suggest that the use of “and” in Clause 2.3 was intended to express something different than disjunction. In the future if an unanticipated event caused Licensor to wish to restrict the sale and distribution of the products, it could argue that any such products would have to be

¹⁶⁴ DICKERSON, *supra* note 21, at 104–14; 陶博 (TAO BO) (2004), *supra* note 3, at 258–80.

¹⁶⁵ DICKERSON, *supra* note 21, at 110. Dickerson uses the term “several” to refer to the situation where “and” is used in the sense of “A and B, severally or jointly,” but I have not followed that use. Instead, I use “several” for “A and B, severally but not jointly” and “joint and several combined sense” for “A and B, jointly or severally.”

for both human and veterinary uses. But the presumption of *contra proferentem*, if applied, would suggest an interpretation unfavorable to Licensor as the drafter.

In two Clauses the use of “and” exhibits semantic ambiguity. In Clause 5.4(a), line 20, concerning assistance by either party, the context does not make it clear whether the “and” in the phrase “if it involves new technology and requires travel to other country” is joint or several. In Clause 6.2(b) concerning the representation and warranty of non-infringement by “any . . . employee or consultant of Licensor or consultant of Licensor and its Affiliates” it is not clear whether the sense is several, joint, or combined joint and several.

14. Ambiguity of “Or”¹⁶⁶

In contracts, the coordinating conjunction “or” exhibits semantic ambiguity as to exclusivity or inclusivity. That is, does “or” express “A or B, but not both” or “A or B, or both”? Clause 20.09 of the contract attempts to clarify the use of “or” in the document. It states that “the word ‘or’ shall be construed as the inclusive meaning identified with the phrase ‘and/or.’” Because the phrase “and/or” has been subject to criticism,¹⁶⁷ it is unusual that Clause 20.09 uses it to stipulate the sense of “or.” The reference to “inclusive meaning,” however, seems to clarify the intention—that in all instances in which the word “or” is used in the contract, it will be interpreted to be used in the inclusive sense, that is, “A or B, or both.” Such a rule attempts to achieve clarity and simplicity, but it runs the risk of being inappropriate in some provisions. That seems to be the case in the contract.

The word “or” is used extensively throughout the document and in almost all cases it seems proper to interpret it as having the inclusive sense. However, there are two provisions in which the context suggests that the sense is exclusive, not inclusive. Clause 13.2 concerning the Licensee’s right to manufacture the Products for third parties states, “This right must be exercised within five (5) years or it becomes non-exclusive [*sic*, “exclusive”?] as to the manufacture.” This sentence seems to be attempting to express the thought that if the exclusive right is not exercised within five

¹⁶⁶ *Id.* at 104–14; 陶博 (TAO BO) (2004), *supra* note 3, at 258–80.

¹⁶⁷ See the discussion *infra* pp. 49–50.

years, the right becomes non-exclusive as to manufacture. However, if “or” has the inclusive sense as prescribed by Clause 20.09, then it would seem that the meaning of the sentence is that even if the right is exercised within five years it becomes non-exclusive after five years. This interpretation could be prejudicial to the Licensee. If *contra proferentem* were applied to this interpretation, however, this interpretation might fail because Licensor appears to be the drafter.

The other instance in which the context argues against an inclusive interpretation of “or” is Clause 17.1(a). This Clause states, “This Agreement can be terminated by a Party (“Non-Defaulting Party”) if and only if: (a) the other Party (“Defaulting Party”) fails and/or refuses to pay to the Non-Defaulting Party pursuant to this Agreement and the payment is not settled after serving a twelve (12) months prior written notice to the Defaulting Party; or (b) . . .” This provision seems to contemplate that either one of two actions, either (a) or (b), can lead to termination and both actions are not required. However, if only one of the actions was performed and “or” was interpreted in the inclusive sense, then the Non-Defaulting could deny that termination was possible and argue that both conditions were required for termination. This is a potential ambiguity that does not seem to favor either party because it is impossible to predict which of the parties might wish to make such an argument in the future.

In addition to these potential ambiguities, Clause 20.09 also causes problems of inconsistency with the ten occurrences of the combination “and/or” as discussed below.

15. The Ambiguity of “And/Or”¹⁶⁸

The expression “and/or” has often been criticized for semantic ambiguity,¹⁶⁹ but apparently no empirical study has been done of its use. Almost all legal commentators condemn the

¹⁶⁸ DICKERSON, *supra* note 21, at 104; 陶博 (TAO BO) (2004), *supra* note 3, at 280–88.

¹⁶⁹ DRIEDGER, *supra* note 155, at 130; MELLINKOFF, *supra* note 158, at 56; LOUIS PHILIPPE PIGEON, DRAFTING AND INTERPRETING LEGISLATION 43–44 (1988); EDMUND LEOLIN PIESSE & J. K. AITKEN, THE ELEMENTS OF DRAFTING 90–91 (J. K. Aitken ed., 9th ed. 1995); SINGER & SINGER, *supra* note 25, at §21.14; HAGGARD & KUNNEY, *supra* note 1, at 253–256; GARNER, *supra* note 156, at 56.

expression for its “ambiguity” but do not explain how it is ambiguous. It seems that it expresses inclusive disjunction,¹⁷⁰ that is, the same meaning as the inclusive sense of “or” (“A or B, or both”).

In the contract, as we saw above, the word “or” is defined as having the same meaning as “and/or.” But in the contract both “or” and “and/or” are used. “Or” is used very frequently, but “and/or” only ten times. This use of synonyms is a violation of the rule of consistent use of words in contract drafting and is potentially confusing. It raises the issue of whether “and/or” is used infrequently to capture some nuance that “or” itself does not express. This seems unlikely. For example, it is difficult to understand how the conditions of termination would be different if Clause 17.1(a) line 3, instead of providing that a condition of termination was “the other Party . . . fails and/or refuses to pay” was changed to “the other Party . . . fails or refuses to pay.” In either case, termination would be allowed if a party either failed or refused to pay or both failed and refused to pay.

“And/or” is only one example of ambiguity associated with the slash. In fixed expressions where two nouns or verbs are joined by the slash, the question is not only whether the slash plays the role of “and” or of “or” with their various senses, but also whether the expression has created a new term that refers to something that is somehow a combination of the two words.¹⁷¹

The slash is a good example of a trifle that can cause significant damage. The misreading of a slash in the expression “Prices Ex Plant: No Packing/Protection/Transport Included” cost one of my clients hundreds of thousands of dollars. In the contract, however, the slash does not pose significant risks of semantic ambiguity. It appears not only in the expression “and/or,” but several other times. For example, in Clause 14.1 (a) line 3 the Licensee is permitted to continue to use the Licensor Know-How for “any Products which the Licensee obtains/procures or intends to obtain MAA for . . .” It is not clear why the slash was used here rather than simply using the conjunction “or.” Might it be used to create a new word that combines the characteristics of the two nouns but is somewhat

¹⁷⁰ BOWERS, *supra* note 143, at 323–24.

¹⁷¹ FOLLETT, *supra* note 150, at 279; PAUL W. LOVINGER, *THE PENGUIN DICTIONARY OF AMERICAN ENGLISH USAGE AND STYLE* 347–48 (2000).

different? It is not clear whether that is the intention here. In other Clauses, the slash seems to have the sense of either exclusive disjunction (Clause 20.1 stating that no assignment or transfer is valid “until the assignee/transferee agrees . . .”) or several conjunctions (Clause 26.5, “Entire Agreement/Modification”). The use of the slash instead of a conjunction would appear to be another violation of the rule of consistent drafting that again poses the question of the intention of the parties and the possibility of extrinsic evidence to explain it.

16. Ambiguity of the Modal Auxiliary Verb “Shall”¹⁷²

In English, the modal auxiliary verbs “shall” and “may,” which are commonly used in contracts, exhibit semantic ambiguity. “Shall” can express futurity, obligation, or rhetorical emphasis. The most common problem seems to be the use of “shall” to express obligation, which Frederick Bowers has called “a spurious expression parasitic on the biblical rhetoric of command,”¹⁷³ (such as, “Thou shalt not . . .”) and “a kind of totem, to conjure up some flavour of the law.”¹⁷⁴ In contracts, this creates ambiguity between the senses of obligation and of rhetoric. For example, in the contract, “shall” is clearly used in the obligational sense in Clauses 3.1 and 3.4 regarding the Licensee’s duty to make payments, but in other sections its use is not obligational. It does not seem to make sense to make an obligation doubly obligatory as in “shall be required” in Clauses 11.2 and “shall be responsible” in Clause 13.4. And surely, it is not an obligation for the Licensee to “be entitled” to do something as in Clauses 3.8 and 5.1, nor to “have the right” in Clauses 12.1, 14.1 and 20.7, nor to “retain the right” in Clause 8.1 or to “be permitted” under Clause 8.2. It seems reasonable for the parties to impose obligations on each other by the terms of the contract, but does the contract language also impose obligations on third parties, such as the arbitrator in Clause 18.2 who “shall select” an independent technical expert? Where the sense of “shall” does not seem to be obligational, it might be seen as

¹⁷² RANDOLPH QUIRK, SIDNEY GREENBAUM, GEOFFREY LEECH & JAN SVARTVIK, *A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE* 221 (1985); 陶博 (TAO Bo) (2004), *supra* note 3, at 110–27.

¹⁷³ BOWERS, *supra* note 143, at 223.

¹⁷⁴ *Id.* at 80.

expressing futurity. In Clause 16.1, the phrase “the term shall commence” seems to be talking about the future, not imposing an obligation on the parties.

In sum, it appears that “shall” is used in a strict obligational sense only rarely in the contract and mostly it is simply being used for rhetorical purposes—to lend some of the authority of the biblical rhetoric of command to the document. But this use of “shall” for rhetorical effect violates the presumption of consistent expression and creates ambiguity. Does making an obligation doubly obligatory mean that that obligation is more important than other obligations? Does the use of “shall” for rhetorical purposes weaken the obligational sense of its legal force? Does the ambiguity between the rhetorical and future senses mean that the rhetorical effect is weakened because the sense can also be interpreted as referring to the future? These questions tell us that ambiguity among the obligational, future and rhetorical senses of “shall” poses risks.

There is, however, another risk of ambiguity with “shall” that is often overlooked. This ambiguity is whether “shall” is expressing an obligation or a condition.¹⁷⁵ When “shall” expresses a condition for obtaining a benefit, the failure to fulfill the condition leads only to the failure to obtain the benefit. When “shall” expresses an obligation, the failure to perform the obligation leads to a violation of the contract and poses the risk of a suit for damages. In the contract, one Clause appears to exhibit this type of ambiguity. Clause 1.1 defines Licensor Know-how, but ends the definition with a clause stating “provided that . . . Licensor Know-how . . . shall extend only to those applications . . . associated with specifically defined carbohydrate chemistry formulation.” Is the sense of “shall” here one of obligation combined with a condition, so that the Licensor Know-How must extend only to these applications associated with carbohydrate chemistry formulations to be included in Licensor Know-How? If some know-how does not extend only to those applications, would it be considered not to be Licensor Know-How and not subject to the contract? Only the contracting parties know whether this ambiguity does, in these circumstances, pose a

¹⁷⁵ See ADAMS, *supra* note 11, at 70. For a discussion of this distinction, see BURNHAM, *supra* note 11, at §11.2-11.6.

problem. But this is a risk in contract drafting that drafters can learn to avoid.

17. Ambiguity of the Modal Auxiliary Verb “May”

Like “shall,” the modal auxiliary verb “may” also exhibits semantic ambiguity. It can express permission, authority, possibility, or even—in statutes—obligation. In the contract, the word “may” appears twenty five times, most often in the sense of permission or authorization, but sometimes in the sense of possibility. For example, clear uses of the sense of permission or authorization are in Clauses 2.4(b) (“ . . . Licensee may request [***] in Product . . .”); Clause 9.1 (“ . . . Licensee may use its own brand name . . .”), Clause 13.2 (“ . . . the manufacturing facilities may be used to manufacture products other than the Products . . .”), and Clause 20.2 (“either Party may assign this Agreement . . .”). In one provision, “may” is used with negation to express the withdrawal of permission or authorization (Clause 20.3, “Neither party may waive or release . . .”).¹⁷⁶ Clear uses of the sense of possibility are Clause 1.1 (“ . . . patent applications that may hereafter be filed . . .”) and (“ . . . patents which may be granted . . .”), and Clause 20.6 (“Except as may be specifically provided herein . . .”). And in one sentence both senses occur (Clause 12.1, “ . . . Licensee may take such action . . . as the Licensee may request . . .”). In one Clause, the ambiguity between these senses seems not to pose any risk (“This Agreement may be executed in two or more counterparts . . .”).

But in other cases, the ambiguity does pose a risk. Consider the provisions regarding adding Products to the list of those to be manufactured and to the adjustment of prices. In Clause 1.1, the definition of “Products” mentions Additional Territory Licensed Product(s) “ . . . as the same may be added to this Agreement . . . details of which are set out in Exhibit 7.” Is the “may” here used in the sense of possibility or authorization? If in the sense of authorization, does it authorize the addition of further products to the list in Exhibit 7 without a writing signed by the Parties as

¹⁷⁶ This raises the question of whether the expressions “Neither party may...” and “neither party shall have any right, power or authority...” (see *infra* Clause 20.6) mean the same or different things.

required by Clause 20.5?¹⁷⁷ In Clause 3.6 (d) regarding audit, does the phrase “adjustments that may impact royalties payable to Licensor” imply that the Licensee has permission to make adjustments based on records of sub-licensees? In Clause 6.2(a), which concerns the Licensor Technology, does the phrase “a list of which is set out in Exhibit 6, but which may change from time to time as new patents and know-how are obtained” authorize Licensor to change the list without the writing signed by the Parties as required by Clause 20.5? In Clause 8.7 regarding purchase orders does the last sentence “Pricing of sales may be adjusted due to raw material increases supplied by Licensor” authorize Licensor to lower the prices because volume purchases of raw materials reduce the production cost or authorize the Licensee to raise prices because raw material prices increase or does it merely point to the possibility of such adjustment?¹⁷⁸ The ambiguity in the senses of “may” creates a risk of different self-interested interpretations of these provisions.

18. Ambiguity of the Modal Auxiliary Verb “Must”

In contract drafting, semantic ambiguity in the verb “must” arises from confusion of conditions (imposed by “must”) with obligations (imposed by “shall”). If the verb “shall” is used to impose obligations on legal or human persons, then the verb “must” should be reserved for objective conditions that must be met before some benefit or detriment results. In many contracts, this distinction is not observed and results in ambiguity. The contract here clearly distinguishes between an obligation imposed on a party and a condition that needs to be met to qualify for certain treatment. There should be no ambiguity problems in the use of “must.”

For example, Clause 2.5 requires that for any change in price, both Parties “must sign a written agreement for such change.” This provision does not impose an obligation on the parties to sign a written agreement; it merely means that no

¹⁷⁷ Clause 20.5 also raises separate questions regarding changes to the Agreement. Does this section cover all changes, so that in effect no changes may be made after 60 days after the Effective Date? Or is it that a writing signed by both parties will be required only for changes made within 60 days after the Effective Date of the Agreement?

¹⁷⁸ It appears from *infra* Clause 2.5 that such an adjustment would have to be agreed upon in writing by both parties.

change in price will be effective unless it is reflected in a writing signed by the parties. Also, in Clause 3.1 the phrase “. . . Territory Licensed Products must be manufactured based on the existing Licensor Patents” means that a product not based on the existing Licensor Patents does not qualify as a Territory Licensed Product. Clause 4.7 has a requirement that the Reference Materials that a requesting party wishes to obtain “must be” Reference Materials which obtain marketing authorization approval not more than 1.5 years before such request. Here again “must” refers to a requirement that must be met to fulfill a condition. In Clause 13.2, the provision that a right “must be” exercised within five (5) years or it becomes non-exclusive as to the manufacture prescribes the fulfillment of a certain condition and the consequences of its non-fulfillment.

19. Ambiguity of the Modal Auxiliary Verb “Will”

The modal auxiliary verb “will” is generally considered to exhibit semantic ambiguity as to the senses of prediction and volition.¹⁷⁹ However, in a contract it can be ambiguous between the senses of prediction¹⁸⁰ and obligation.

In the contract, “will” clearly has a predictive sense in some Clauses. For example, in the representations and warranties in Clause 6.2 (d) (“Licensor has not granted and will not . . . grant any right to any Third Party . . . and will not enter any agreement . . .”); Clause 6.2 (h) (“ . . . Licensee’s practice, use and exploitation of the Licensor Technology will not infringe . . .”); Clause 11.1 (“The Licensee will own all new intellectual property related to the Products . . .”), and Clause 20.2 (“ . . . address . . . as such Party will have last given . . .”). But the use of “will” in other provisions raises the risk of ambiguity because it is inconsistent with the above uses of “will” in the sense of prediction and the use of “shall” to indicate obligation. If “will” is used to express prediction, as noted in the above sections, and the verb “shall” is used to express obligation,

¹⁷⁹ QUIRK, *supra* note 172, at 228–29.

¹⁸⁰ In statutory drafting it is assumed that because a statute is “constantly speaking” the future tense is inappropriate. This same concern does not appear in contracts. See BOWERS, *supra* note 143, at 241–43; DRIEDGER, *supra* note 155, at 335.

then what does the use of “will” in the other sections of the contract express?

From the context it seems that this use may express obligation. See, for example, Clause 3.6(d) (“Licensee will assemble relevant records . . .”); Clause 5.4(a) (“Each Party will use its best reasonable efforts to provide assistance . . .”); Clause 5.4 (c) (“ . . . the filing will be made . . .”); Clause 9.1 (“Each Party will be responsible for filing . . .”); Clause 11.1 (“ . . . the Licensee will grant a royalty-free exclusive license . . . to Licensor . . .”); Clause 13.2 (“Such manufacturing facility will be in compliance with internationally accepted standards . . .”); Clause 15.2 (b) (“ . . . if a Party is required by law . . . to make any disclosure . . . it will . . . give reasonable advance notice . . . and will use its reasonable efforts to secure confidential treatment . . .”); Clause 18.1 (“ . . . a memorandum will be prepared . . .”); Clause 18.2 (“Attorney’s fees will be paid to prevailing party.”); and Clause 20.7 (“The Party affected by such Force Majeure event will provide . . . full particulars . . . and will use diligent efforts to overcome the difficulties . . .”). But if these provisions impose an obligation, then why wasn’t the verb “shall” used as it is in so many other provisions? This violation of the rule of consistency supports a presumption that the meaning of “will” is different from that of “shall” and that it expresses merely prediction, not obligation. Taken to the extreme, this distinction would imply that the failure of a party to perform an obligation expressed by “shall” constitutes a violation of the contract allowing termination or damages, but the failure of a party to perform an act expressed by “will” is merely a failure of prediction and does not constitute a violation of the contract. Further, if the Licensee is the party to perform the act, the presumption of *contra proferentem* could be applied to the prejudice of Licensor as the drafter. Of course, such a possibility seems remote, but the risk could be eliminated by careful drafting.

20. Ambiguity of the Auxiliary Modal Verb “Should”

The risk of semantic ambiguity in the modal verb “should” is similar to that in “will.” The modal auxiliary verb “should” is generally used in formal language in the United States to indicate

obligation or hypothetical meaning.¹⁸¹ Like “must,” the verb “should” generally implies the speaker’s authority, but unlike “must,” “should” does not express the writer’s confidence that the act will be carried out and has the sense that the proposition within its scope is desirable. The hypothetical meaning often occurs in a sentence with the word “if.”

In the contract the word “should” appears eight times, sometimes in the sense of obligation, sometimes with the hypothetical meaning. The sense of obligation occurs in Clause 4.1 (“A Party has absolute discretion to choose whether to reference such MAA and which part of a MAA should it references [*sic*] to.”); Clause 4.5 (“ . . . the costs to be shared by both Parties . . . should be the costs arising from or in connection with that particular D & I”); Clause 13.3 (“both parties agree . . . They should agree on the price of the Products . . .”); and Clause 17.1 (b) (“ . . . the written notice issued by Licensor should enclose the aforesaid evidence . . .”). The sense of hypothetical meaning occurs in Clause 2.5 (“Should there be any proposed change in prices . . .”); Clause 14.2 (“ . . . using a brand name other than Licensor should Licensor so request . . .”); Clause 18.1 (“If the Parties should resolve such dispute or claim . . .”); and Clause 20.4 (“If any provision hereof should be held invalid . . .”). In these Clauses, “should” seems to be used in the two different senses. But the reader of the above passages would not be confused as to the sense because the context clarifies which sense is intended.

The semantic ambiguity of “should,” like that of “will,” is also contextual; it arises from the violation of the rule of consistent drafting. If the verb “shall” is used to impose binding obligations under the contract that carry the force of law, then the use of another verb such as “should” to impose an obligation raises the presumption that the obligation expressed by “should” is different from that expressed by “shall.” It seems likely that most readers of English would assume that “should” expresses a weaker sense of obligation than “shall.” The inference is that therefore the obligations imposed by “should” have lesser force than those expressed by “shall.” Whether and how extrinsic

¹⁸¹ QUIRK, *supra* note 172, at 227, 234–35.

evidence might present an arbitrator the chance to give effect to this distinction is unclear.

21. Ambiguity of “Law”¹⁸²

Broadly speaking, the word “law” in most contracts, as in this one, exhibits semantic ambiguity between two senses. One is the general “mass-noun” sense referring to the whole legal system and all three branches of government at three levels, the national, state, and local. The other is the “count-noun” sense referring to a specific statute and only the legislative branch of government. In contract provisions concerning compliance or authorization, the distinction between these two senses can be significant.¹⁸³ Does the provision require compliance with the rules issued by all three branches of government at all levels or only with those issued by the legislative branch in the form of a statute? Is the authorization based on support in any of the three branches of government or only in a specific statute passed by the legislative branch? Because of the ambiguity of “law” the answer is often not clear.

This ambiguity is exacerbated by several factors. These are whether “law” is used with the definite or indefinite article, whether its use is in the singular or the plural, and whether it is the object of a preposition. As to the use of an article, when “law” is used as a singular noun with the indefinite article “a,” it has the count-noun sense. This is true regardless of whether it is otherwise premodified or postmodified, or is the object of a preposition. When “law” is used in the singular with the definite article “the,” is not otherwise premodified, and the preceding text does not refer to a specific statute, it will generally have the mass-noun sense.¹⁸⁴ But if a specific statute is referred to in the preceding text, then it generally has the count-noun sense.¹⁸⁵ Further, the intensifiers “all” and “any” can be used with either a count noun or a mass noun, so they do not help disambiguate.

¹⁸² 陶博 (TAO BO) (2010), *supra* note 3, at 217–245.

¹⁸³ Generally, in provisions regarding authorization a higher level of authority is desired, but in those regarding compliance a lower, broader level of authority is desired.

¹⁸⁴ For example, “The life of the law has not been logic: it has been experience.” FRED R. SHAPIRO, *THE OXFORD DICTIONARY AMERICAN LEGAL QUOTATIONS*, 242 (1993).

¹⁸⁵ For example, “the Chinese contract law.”

Thus, the use of an article, particularly the indefinite article, helps to disambiguate “law” in the singular when it is not the object of a preposition. But there is no plural form of the indefinite article. This poses the question of disambiguating the plural. A partial answer is that the mass-noun sense, referring only to a mass, logically should not have a plural. Therefore, it would seem that the plural “laws” should always have the count-noun sense and should always refer only to statutes.¹⁸⁶ However, case law from *Yick Wo v. Hopkins*,¹⁸⁷ and continuing through *Erie Railroad Co. v. Tompkins*,¹⁸⁸ have interpreted the plural “laws” in some instances to have a meaning very close to that of the mass-noun sense.

The frequent use of “law” as the object of a preposition further complicates the picture. In expressing compliance or authorization, “law” is often the object of a preposition, such as “in accordance with” or “by.” Due to an historical quirk, in English usage the article is often omitted after a preposition. Therefore, the “law” in the phrase “by law” is ambiguous as to the mass-noun sense or the count-noun sense.

The ambiguities caused by this combination of factors appear clearly in the contract. The word “law” in the singular or plural appears fourteen times.¹⁸⁹ Of these 14 occur as the object of a preposition, 7 relating to compliance, 3 to authorization, and one is unclear. Of the 14 instances, 6 have no article or intensifier, 4 have the article “the,” 3 have the intensifier “any,” and one has the intensifier “all.” Eight of the instances use the plural “laws,” while six use the singular. Eleven instances concern the use of “law” as the object of a preposition, three do not.

¹⁸⁶ For an early example, see *Swift v. Tyson*, 41 U.S. 1, 18; 10 L. Ed. 865 (1842). As Justice Story said, “In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.”

¹⁸⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); OXFORD ENGLISH DICTIONARY, *supra* note 28, at 712; *Ralston v. Dep't. of Licenses*, 374 P. 2d 571, 575 (Wash. 1962).

¹⁸⁸ *Erie R.R. Co. v. Tompkins*, 304 U. S. 64, 91 (1938). Justice Reed said, “To decide the case now before us and to ‘disapprove’ the doctrine of *Swift v. Tyson* requires only that we say that the words ‘the laws’ include in their meaning the decisions of the local tribunals.”

¹⁸⁹ See *infra* pp. 74, lines 4 and 8; Clauses 1.1, 6.1, 13.4, 5.2, 19, 19.1, 20.8, and 20.09.

Ambiguity arises as the result of the use of the plural “laws.” In the first sentence of the contract, does the mention of the incorporation of the parties “under the laws” of a particular jurisdiction refer to authority or compliance? If it refers to compliance, does it refer only to compliance with statutes or does it also include compliance with administrative regulations and judicial orders and decisions? Similar questions are posed in Clause 6.1 by the phrase “organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation;” in Clause 13.4 concerning the obligation of maintenance and repair of the equipment “in accordance with applicable laws” and in Clause 20.8 as to the obligation to “comply with all laws.”¹⁹⁰

Ambiguity also arises in the use of the singular. Does the reference to “material applicable law” in Clause 6.1.3 refer to a statute passed by the legislative branch or to any binding document issued by any branch of government at any level?

Finally, it is not clear whether the count-noun sense of “law” includes regulations or not. It would seem reasonable to assume that regulations issued pursuant to a specific statute should be covered, but the reference to “law, rule or regulation” in Clause 20.09 could allow the application of the rule of consistent drafting and the negative implication presumption (*expressio unius*) to make the assumption that the count-noun sense of “law” must express something different than “law, rule, or regulation” and therefore does not include regulations.

22. Ambiguity between the Singular and the Plural¹⁹¹

A common semantic ambiguity is whether the singular includes the plural and the plural the singular. Where the contract has a provision stating that the singular includes the plural and *vice versa*, unexpected interpretations can occur. In a long-term-care insurance policy that has such a provision and states that the

¹⁹⁰ Another complication appears in *infra* Clause 19.1 in which the word “laws” is capitalized. It is unclear whether this is an effort to emphasize that only things called “Laws,” that is, statutes, are referred to or not. The term “laws” is not defined in the definition section Clause 1.1, so the initial capitalization does not indicate that it is a defined term.

¹⁹¹ DICKERSON, *supra* note 21, at 124; DONALD HIRSCH, DRAFTING FEDERAL LAW 43–44 (2d ed. 1989); LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER’S DESK REFERENCE 230 (1992); ROBERT J. MARTINEAU, DRAFTING LEGISLATION IN PLAIN ENGLISH 67 (1991).

insurance company cannot cancel the policy “unless you do not make the required premium payments on a timely basis,” will the plural be interpreted to include the singular so the company can cancel after the failure to make timely payment only once?

More generally problems occur, as here, due to the lack of consistent usage. It appears that in Clause 1.1, the definition section, the drafter has chosen to use the convention of appending “(s)” to singular words to indicate that they can also express the plural. See “Definition(s),” “Additional . . . Product(s),” etc.¹⁹² But the use of the “s” in parentheses is unnecessary and repetitive of Clause 20.9 (viii) which provides that “words using the singular or plural number also include the plural or singular number, respectively.” It could be argued that the inconsistent use of the “s” in parentheses creates a presumption that certain nouns only have the plural sense and the plural in such cases does not include the singular. The possible consequences of such an interpretation are difficult to predict.

23. Ambiguity in Use of the Comma¹⁹³

A comma can be critical. Roger Casement was said to have been “hanged by the comma” in the Treason Statute of 1351.¹⁹⁴ In contracts, the comma, especially the serial comma, can eliminate syntactic ambiguity, but inattention to the serial comma can cause ambiguity, especially post-modification ambiguity.¹⁹⁵ For example, the sentence “Tenant shall not allow to remain on the premises overnight any persons not related by blood or marriage, minor children or pets weighing more than 25 pounds,” is ambiguous as to whether the postmodifier “weighing more than

¹⁹² “Business Day(s),” “Products(s),” “Reference Material(s),” and “Territory Licensed Product(s).” But even within this Clause there are plural nouns with no parentheses, such as “BTI Patents,” and “EMA Costs.”

¹⁹³ THE CHICAGO MANUAL OF STYLE, §5.57 (14th ed. 1993); SINGER & SINGER, *supra* note 25, at §21.15; RICHARD C. WYDICH, PLAIN ENGLISH FOR LAWYERS 84 (3rd ed. 1994).

¹⁹⁴ DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 167–70 (1963).

¹⁹⁵ For an example of premodification ambiguity caused by the absence of the serial comma, see HAGGARD & KUNEY, *supra* note 1, at 290. See also *Anderson v. State Farm*, 270 Cal. App. 2d 346 (Ct. App. 1969); *McCormack Trucking Co. v. United States*, 298 F. Supp. 39 (N.J. 1969). For the effect of the serial comma in limiting the scope of postmodification see *Ludwig v. State of Texas*, 931 S. W. 2d 239 (Tex. Crim. App. 1996); and *Elliot Coal Min. Co. v. Dir., Office of Workers’ Comp. Programs*, 17 F. 3d 616 (3rd. Cir 1994).

25 pounds modifies not only “pets” but also “children.” A serial comma after “children” would restrict the scope of the postmodification to the last antecedent “pets” and make clear that it did not modify “children.” The contract here, however, does not seem to contain any example of ambiguous postmodification that could be clarified by a serial comma.

Two examples of postmodification after a series show that the absence of a serial comma allows the inference that the postmodification applies to all the preceding conjoins. In Clause 2.4(i) in the phrase “. . . the results, documents and other information related to the chemical trials . . .,” it seems clear that the drafter intended the underlined postmodifying phrase to modify “results” and “documents.” In Clause 6.1, in the phrase “. . . duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation . . .,” it seems clear that the drafter also intended the underlined postmodifying phrase to modify all of “organized,” “validly existing” and “in good standing.”

24. Ambiguity of “As of”¹⁹⁶

The expression “as of” is used to assign an event to one time and the recognition of it to another,¹⁹⁷ that is, to express the meaning of the phrase “as if it were.”¹⁹⁸ This American jargon for expressing a date has become so popular that many people, including the drafter of the contract, seem to think it is the only way to express a date.¹⁹⁹ In Clause 6.1 concerning representations and warranties and Clause 6.2 concerning representations and warranties, the use of “as of” seems to express simply the same concept as “on” a specific date. There seems to be no need to use “as of” instead of “on.”²⁰⁰

¹⁹⁶ 陶博 (TAO BO) (2004), *supra* note 3, at 178–80.

¹⁹⁷ FOLLETT, *supra* note 150, at 41–42.

¹⁹⁸ Horwitz v. New York Life Ins. Co., 80 F. 2d 295, 299 (9th Cir. 1935).

¹⁹⁹ FOLLETT, *supra* note 150, at 41–42; MERRIAM-WEBSTER'S DICTIONARY OF ENGLISH USAGE 132 (Merriam-Webster, Inc., 1974).

²⁰⁰ In fact, the drafter in §16.1 did use the phrase “on the Effective Date” supporting a presumption that the drafter intended a distinction between “as of” and “on” the Effective Date.

But in legal documents, “as of” can be used to disclose the fact that a document has been backdated.²⁰¹ In this contract, the usage is semantically ambiguous because it is not clear whether the document has been backdated. In determining whether a contract has been backdated, it is necessary to know two facts: when the contract was signed and when it became effective. If the two are the same, there is no backdating issue. If they are not and the effective date is prior to the signing date, then the expression “as of” to modify the effective date discloses the backdating. In this case, however, the contract does not make clear what the signing date is. The first line of the Agreement tells us the effective date (“as of June 24, 2011”), but the description of the execution of the document in Clause 20.10 tells us merely that it was executed “as of the Effective Date.” Thus, both the effective date and the execution date of the contract are expressed as “as of” June 24, 2011. Therefore, it is not clear whether the document was backdated or not. If it was backdated and the failure to disclose this fact would compromise the rights of a third party or violate a law, then it would pose a problem.

25. Ambiguity of “Termination”

Contracts sometimes confuse the related concepts of “termination” and “expiration,” apparently because “termination” exhibits semantic ambiguity as to whether the ending of the legal effect of the contract is due to the action of a party or occurs automatically by operation of the set duration of the contract. For example, an agreement may contain provisions that allow either party to “terminate” the agreement upon advance notice, that the agreement will “expire” at the end of the term if not renewed, but that prohibitions on the use of one party’s proprietary information continue after the “termination” [but not the “expiration”?] of the agreement.

The contract does not appear to exhibit substantial ambiguities of this nature, the term “termination” being used only for the active ending of the contract, and “expiration” only for the automatic ending of the contract. However, the reference to “termination” in provision in Clause 14.1.2 may include the sense

²⁰¹ Jeffrey L. Kwall & Stuart Duhl, *Backdating*, 63 *BUS. LAW.* 1153, 1177–78 (Aug. 2008). In this contract, it is also used simply in the sense of “as if it were” in Clauses 10, 6.1, and 6.2.

of automatic ending. That Clause states that the Licensee has the right to continue the use of the Licensor Intellectual Property for the research and the manufacturing of “[a]ny other new products until termination date.” It seems unreasonable to assume that the Licensee will have the right to use Licensor Intellectual Property in perpetuity, so the reference to “termination” probably does not exclude, but includes, expiration. That is, the Licensee has the right to use the Licensor Intellectual Property until the earlier of either termination or the expiration of the last patent.

There is also a postmodification issue in Clause 14.1.2. The preceding subclause 14.1.1 does not have any termination or expiration provision. It seems that perhaps the postmodifying phrase “until termination date” in Clause 14.1.2 may be intended to modify Clause 14.1.1 as well, but the division of the two subclauses into two separate paragraphs prevents the scope of this postmodifying clause from including the preceding subclause. Is the Licensee’s right to continue to use the Licensor Intellectual Property to research and manufacture the products for which the Licensee obtains or intends to obtain MAA perpetual? From the language this would seem to be so.

26. Ambiguity of “Execution”²⁰²

The word “execution” presents the risk of semantic ambiguity because it can have three different meanings when used in contracts. First, it can refer to the completion of all acts necessary to render an instrument complete with nothing remaining to be done to make it legally effective. Second, in common usage it also is used as a synonym for “sign.” Third, it can have the sense of “perform” or “carry out” a contract or, especially, a will. This third sense is the one that civil law lawyers often assume that “execute” has in a contract written in English.

In the contract, it seems “execution” is used mainly in the second and third senses. Clause 6.1.2 concerning representations and warranties refers to authorization “to execute and deliver this Agreement” and Clause 6.1.3 states that the “execution, delivery

²⁰² OXFORD DICTIONARY, *supra* note 28, at 521–2; BLACK’S LAW DICTIONARY 467 (7th ed. Bryan A. Garner ed. 2000); FREDERICK STROUD & JOHN S. JAMES, STROUD’S JUDICIAL DICTIONARY OF WORDS AND PHRASES 905 (5th ed. 1986).

and performance of this Agreement”²⁰³ does not conflict with any agreement or violate any law. Clause 20.10 states that the Agreement “may be executed in two or more counterparts” and the signature block records the fact that the parties have “executed” the Agreement “as of the Effective Date.” Taken together, the use of “execute” in these Clauses could be interpreted to be that of “sign,” because completion of all acts to bring the document into legal effect would not make sense in Clauses 6.1.2 and 6.1.3. However, as to the amendment of the contract, Clause 20.5 provides that a change to the contract is binding “if and only if reduced to writing and signed” by the representatives of the Parties. This would seem to indicate that “signing” is the act that makes the change legally binding. The senses of “execute” and “sign” are further confused by Clause 18.1 regarding dispute resolution, which refers to a memorandum by the Chief Executive Officers being “signed” by the parties. The presumption of consistency and the negative implication presumption would lead us to assume, *ceteris paribus*, that “sign” and “execute” have different meanings, “sign” meaning simply to write one’s name and “execute” meaning to bring into legal effect. If the memorandum described in Clause 18.1 is not intended to have legally binding effect, then the use of “sign” does not pose any problem with that Clause, but it and the use of “sign” in Clause 20.5 leave some doubt about whether the sense of “execute” in the other Clauses has the sense of “sign” or the sense of “bring into legal effect.”

“Execute” in the third sense appears in the context of implementation of the contract. Clause 12.1 concerning enforcement refers to the discovery of “an executed or potential patent infringement” and Clause 14.1 concerning events of default refers to the fact that “no execution to cure [a gross default] has been taken.” These instances do not seem to pose a significant risk of ambiguity.

²⁰³ It is not clear why one clause refers to “execute” and “deliver” while the other refers to “execution,” “delivery” and “performance.” The negative implication presumption would seem to raise the question of whether the parties are authorized only to execute and deliver the Agreement, but not to perform it. Further, the use of “deliver” seems tautologous or a mere courtesy if “execute” means to bring into legal effect.

27. Ambiguity of “Due” and “Payable”²⁰⁴

The adjectives “due” and “payable” exhibit semantic ambiguity as to matured or unmatured debt. Generally, when “due” is used together with an expression indicating a specific time, it expresses the sense of matured debt. Otherwise, it is ambiguous. “Payable” can also express matured or unmatured debt as well as possibility of payment.

The contract uses both “due” and “payable.” It appears that “due” is used in the sense of matured debt. For example, Clause 3.8 regarding Licensee’s right to make deductions from the Royalty, states that the Licensee may “deduct from the Royalty payment due to Licensor” royalty payments made to a third party. Clause 3.9 regarding the calculation of the Royalty states that the Licensee is to “provide a calculation of the Royalty Payment amount due . . . within ninety (90) days.” The payment due and the amount due seem to refer to amounts that should be paid immediately. The use of “payable” is more ambiguous. Clause 3.6(d) obligates Licensee to assemble records for determining the aggregate price of Products sold “that may impact royalties payable to Licensor.” Clause 4.6 regarding reimbursement states that “[w]here reimbursement and repayment is payable pursuant to Clause 4.4 . . .” In both these Clauses “payable” could refer to amounts that should be paid immediately or later. It is not clear whether the drafter was trying to distinguish between “due,” using it only to express matured debt, and “payable,” using it only to express unmatured debt. While the use of these two adjectives leaves open a risk of ambiguity, it seems unlikely to result in any negative consequences.

28. Bijuridical Ambiguity²⁰⁵

“Bijuridical” is a term used in Canada to refer to federal legislation that applies to the two legal systems that exist in Canada, the common law and the civil law. The term “bijuridical ambiguity” can be used to refer to a semantic ambiguity that

²⁰⁴ GARNER, *supra* note 156, at 298–99; 陶博 (TAO BO) (2010), *supra* note 3, at 320–26.

²⁰⁵ DRIEDGER, *supra* note 155, at 235–43; MICHEL BASTARACHE, NAIOMI METALLIC, REGAN MORRIS, & CHRISTOPHER ESSERT, *THE LAW OF BILINGUAL INTERPRETATION* 114–35 (2008); 陶博 (TAO BO) (2013), *supra* note 3.

occurs in the use of a legal term from one legal system in the context of another legal system. Examples are the concepts “notarize,” “power of attorney,” and “bankruptcy” in English which differ between the common law and civil law. As one would expect, bijuridical ambiguity occurs in international contracts. The contract is often written in one language and has a governing law provision that applies the law of a jurisdiction that uses that language. When one of the parties is based in another jurisdiction that uses another language, the question arises of how the terminology of the language of the governing law jurisdiction applies in the other jurisdiction. Often, this discrepancy in the terminology and the two legal systems results in ambiguity.

A representation and warranty of “good standing” is an example of semantic and possibly bijuridical ambiguity. In the contract Clause 6.1 concerning representations and warranties by each party, the Licensee represents and warrants that it is “in good standing” under the laws of the jurisdiction of its incorporation (the Hong Kong Special Administrative Region). The term “standing” is ambiguous. Black’s Law Dictionary²⁰⁶ defines “standing” as “One’s place in the community in the estimation of others; his relative position in social, commercial, or moral relations; his repute, grade, or rank . . .” For corporations, however, the meaning is more specialized. In the United States, it refers to a Certificate of Good Standing issued by the Secretary of State of a company’s state of incorporation certifying the corporation has complied with all the provisions of the business corporation act relating to the filing of annual reports and payment of franchise taxes. Some states, such as New Hampshire, the state of incorporation of Licensor, while using similar language, do not use the words “good standing.”²⁰⁷ In any case, however, these certificates do not certify the corporation’s standing in the community or financial resources, merely the fact that the corporation has been established, has not been dissolved, and has filed any required annual reports and paid any required annual fees. In Hong Kong, which is a common law jurisdiction using the English language, the Registrar of Companies issues a

²⁰⁶ BLACK’S LAW DICTIONARY 1405 (6th ed. 1990).

²⁰⁷ For samples of certificates of incorporation, see the Certificate of Existence Good Standing/Status Samples on the Indiana Secretary of State’s website, available at [http://www.in.gov/sos/business/files/COEsamples2011_\(2\).pdf](http://www.in.gov/sos/business/files/COEsamples2011_(2).pdf) (last visited Feb. 1, 2014).

Certificate of Continuing Existence which is similar in nature to a certificate of good standing. Therefore, the use of the term “good standing” would be understood to mean that Licensee could obtain a certificate of continuing existence to evidence its “good standing” under Hong Kong law. If Licensee had been established in mainland China, however, there would be a bijuridical issue because the Chinese authorities do not issue certificates of good standing regularly during the year, but documents evidencing yearly compliance with required annual inspections.²⁰⁸

29. Miscues²⁰⁹

A miscue is a temporary, often syntactic, ambiguity, a temporary misreading of a document. Fowler called it “false scent” after the practice in a fox hunt when the dogs go off in one direction only to find that they have made a mistake, retreat and then pick up the scent again.²¹⁰ But for non-native speakers of English a miscue is often a permanent ambiguity.

The contract contains a number of examples of miscues. In Clause 1.1 the definition of “Licensor Technology” is “Licensor Patents and Licensor Know-How relating to NDS or its drug candidate equivalent only.” It appears at first reading that the word “only” modifies only “drug candidate equivalent” but in fact it modifies both “NDS” and “drug candidate equivalent.” A similar issue occurs in the definitions of EMA Costs and FDA Costs. Clause 3.1 setting forth the obligation to pay royalties, states that the royalty is based on “the sales and distribution of the Territory Licensed Products (excluding those manufactured and supplied to Licensor) . . .” Because the verb “manufactured” does not collocate with the preposition “to,” the reader’s first impression is that the products manufactured are not necessarily supplied to Licensor, that is, that the “and” is several, not joint. A moment’s reflection, however, informs the reader that the sense is joint, that is, that the products excepted are those that are both

²⁰⁸ 企业年度检验办法 (2006 年修改) [Enterprise Annual Inspection Regulations (2006 revised)] (promulgated by the General Administration for Industry and Commerce, Feb. 24, 2006, effective Mar. 1, 2006), CLI.4.75065 CHINALAWINFO.

²⁰⁹ GARNER, *supra* note 156, at 564.

²¹⁰ H. W. FOWLER & F. G. FOWLER, *THE KING’S ENGLISH* 356 (3d ed. 1931).

manufactured for Licensor and provided to Licensor. In Clause 13.4 which states that the Licensee is responsible “for the maintenance and repair of all equipment used in the manufacture of the products in accordance with applicable laws . . . ,” the reader at first assumes that the postmodifier “in accordance with applicable laws” modifies “manufacture,” but then realizes that it modifies “maintenance and repair.”

30. Oversights

Oversights in contracts are mostly typographical, not common, and not consequential. This is true for the contract for the most part. For example, the phrase “damage receivables” for “damaged receivables” in Clause 12.2 is probably just a miscue. The words “Paid-Up, Non-Exclusive License on Expiration” at the end of Clause 16.1(ii) are confusing until one realizes that they are the title of the following Clause 6.2. The misnumbering of subclauses in Clause 3 does not cause problems because there are no cross references to these subclauses elsewhere in the document. In Clause 4.6 concerning the payment of joint expenses, the verb “pay” or “transfer” is missing in the sentence “Where reimbursement and repayment is payable pursuant to Clause 4.4, the Party owing such reimbursement or repayment shall via telegraphic transfer to the account details set forth in Exhibit 4”

C. Summary

The vast majority of the ambiguities noted in the contract are semantic. Often this is combined with contextual ambiguity caused by inconsistent drafting. It is difficult to say which form of ambiguity or which combination is most dangerous, but the combination of semantic and contextual ambiguity is a good candidate because the ambiguity often only emerges from a reading of the whole contract. The ambiguity issues are similar to those in other commercial contracts of this type, but the modal verbs seem to be more prominent here. In other commercial contracts, ambiguities relating to the application of the class presumption, the last antecedent presumption, and the calculation of time periods seem to occur more often. Our ignorance about the commercial background, the relationship between the parties, and the impossibility of knowing in advance what unanticipated

event might occur and what extrinsic evidence would be available make it impossible to judge which ambiguities are most important. (For example, if this contract were a “relational contract”²¹¹ evidencing solidarity and reciprocity through a stable, long-term relationship between the parties, these issues could be irrelevant.) Still, the following ambiguities would seem to be potentially significant: those regarding the definition of Licensor Patents, Licensor Know-How, and Licensor Technology; those concerning changes in the Products and audit; those concerning the Licensee’s right to manufacture Products for third parties, the scope of Products sold by Licensee in the Additional Territory, and the condition to Licensor’s providing assistance; those concerning indemnity and termination; those concerning EMA costs and the pricing of sales; those concerning the imposition of obligations; and those concerning the calculation of time periods.

V. CONCLUSION

The primary purpose of this article is to help train students for the practice of law by helping them, through the analysis of one commercial contract, to identify the risks associated with ambiguity in contracts and to reduce those risks. This exercise can in this way assist them in improving their contract drafting. But it will also teach them to see things in a contract which others cannot and that ability will allow them to distinguish themselves from others in drafting, negotiating, implementing, and litigating contracts.

A secondary purpose has been to propose a working hypothesis that the most important problem for commercial contracts is disputes; that ambiguity is a major, if not the major, cause of commercial contract disputes; and that reducing ambiguity in contracts can benefit both parties to the contract and the legal system as a whole. More specifically, it suggests that the contract drafter faces three risks associated with contract disputes: that of an unanticipated event, that of ambiguity in the contract, and that of the application of *contra proferentem*. It suggests specific measures for identifying and eliminating ambiguity in commercial contracts in order to reduce these risks.

²¹¹ IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 298–310 (David Campbell ed. 2001).

This working hypothesis is not without fault. Common sense tells us that it is not just ambiguity that causes disputes. The ultimate cause of disputes is probably the divergent interests of the parties. But the written document that largely expresses the parties' intent is the medium in which the struggle of these divergent interests plays out. If we want to understand why and how disputes and contracts interact, it seems practical to focus intensely on this medium and on its specific wording. After all, humans communicate through language, not pheromones.²¹² This working hypothesis, with its heightened focus on the language, is only a preliminary tool, but it seems to this practitioner that it offers us a useful approach that, with others, can bring us closer to the question of why contract disputes occur.

This working hypothesis poses some other challenges and questions.

For drafters, the first of the three risks, that of an unanticipated event, is something they will find difficult to quantify. Although sophisticated probability methods to assess risks have developed in the natural sciences, it seems that their application to the real world of human conduct is still premature.²¹³ But even in an imperfect world where drafters suffer from heuristic biases and bounded rationality, they may be able to make sufficing decisions on the risks of at least the known unknowns, if not the unknown unknowns.²¹⁴ Even if a risk cannot be completely eliminated, chance still favors the prepared.²¹⁵

Drafters can estimate the second risk by studying the application of *contra proferentem* under the governing law of the contract, preparing a checklist of factors like that above, and then they can consider this risk in drafting and negotiating the contract.

²¹² See 陶博 (TAO BO) (2011–2012), *supra* note 3, at 93–94.

²¹³ NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN THE MARKETS AND IN LIFE* 188 (Texere, 2001); MICHAEL KAPLAN & ELLEN KAPLAN, *CHANCES ARE...: ADVENTURES IN PROBABILITY* 223–27 (Viking, 2006).

²¹⁴ For the terms “known unknowns” and “unknown unknowns”, see remarks by Secretary of Defense Donald H. Rumsfeld, News Transcript, Feb. 12, 2002. “...there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know . . .” *available at* <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636> (last visited February 1, 2014).

²¹⁵ TALEB, *supra* note 37, at 208.

Drafters can reduce the third risk by taking care in drafting to identify ambiguities and to eliminate them to the extent practicable. They can use the above checklist of ambiguity issues and revise it to suit the particular contract. The draft contract could then be reviewed and changed after a careful weighing of the different factors and making the appropriate tradeoffs. Reducing two of these three risks should reduce the likelihood of a dispute or litigation.

Practitioners, including some drafters, may question the costs to the individual party of improving drafting, saying that perfect foresight is infinitely costly and providing for every possible contingency in a contract is prohibitive.²¹⁶ They may say that it is useless to expend greater resources on careful contract drafting. As the analysis above suggests, to reduce disputes it is more important to reduce the ambiguity of the provisions in the contract, than speculate about including additional provisions the contract does not contain. And the costs of improving contract drafting by reducing ambiguity as suggested above should not be unreasonably high. They could be negligible, especially if a drafter uses the checklists set forth above and has summer associates, contract lawyers, or junior associates perform the task. Aside from the drafter's review time,²¹⁷ the costs can even be almost free if the drafter is willing to have a student perform the task as part of the thesis requirement described above. For standard form contracts used in many deals, the costs per contract could be quite low. Of course, ultimately we need a study of the costs and benefits of improving contract drafting,²¹⁸ but for now we can work with the assumption that the benefits of reducing ambiguity will outweigh the costs for the individual party and for the legal system. And even if the checklists and the analysis suggested above do not result in changes to the contract itself, the party preparing them will have made a more informed decision on whether to amend the contract.

Other practitioners may find that trying to reduce the risk of ambiguity through the analysis and checklists above is an

²¹⁶ R. Posner, *supra* note 16, at 1582, 1602.

²¹⁷ Admittedly, this time would be more than the famous three and a half minutes described in GULATI AND SCOTT, *supra* note 15.

²¹⁸ But the difficulty of empirical investigation of contractual behavior has been noted. E. Posner, *supra* note 31, at 863.

exercise in obsessive pickiness. After all, a dispute may never arise from any of the issues noted above and the importance of the ambiguities depends on the nature of unanticipated events and future extrinsic evidence. And the study of *pari passu* suggests that the institutional structure of the modern large law firm discourages innovation in contract design²¹⁹ and that the bar has perhaps fallen victim to its myths and the herd, not worrying too much about ambiguity because the returns to the firm in terms of volume transactions outweigh the present value of the risk of ambiguity.²²⁰ And the response to the suggestions in this article may be simply “Oh, we couldn’t do that—it’s never been done before!” But experience suggests to this practitioner that in many cases an individual drafter may have a personal incentive in guarding against ambiguity. Consider the following two questions: Other things being equal, how many lawyers would like to negotiate in front of their colleagues or client a contract they drafted for which the opposing party, in addition to its normal preparation, had done an analysis of the kind described above?²²¹ And how many lawyers would like to be the one lawyer at the negotiations who had done such analysis? Enough said.

Efforts by the drafters themselves to reduce ambiguity, however, will not be sufficient. The analysis of California case law above suggests that changes in the attitude of both practitioners and judges towards *contra proferentem* are needed.²²² I believe the presumption of *contra proferentem* deserves more serious consideration for two policy reasons.²²³ The first is personal responsibility. As a drafter and teacher of contract drafting, I believe that the most effective way to improve contract drafting is to make the drafter responsible. When drafters are confronted with the moral hazard of careless drafting, they

²¹⁹ GULATI & SCOTT, *supra* note 15, at 163.

²²⁰ *Id.* at 6.

²²¹ Pride of authorship may be hard to find in these situations. More likely are comments like “Well, it’s the firm’s standard form, not mine,” or “We inherited this form from the former GC.” See the comment in GULATI & SCOTT, *supra* note 15, at 83: “Oh, I guess we weren’t in charge of the documents: underwriter’s counsel were.”

²²² Goetz and Scott’s statement that “[t]he risk that a court will apply *contra proferentem* arguably chills the development of innovative contractual language...” seems to this transactional lawyer speculative and unfounded. See Goetz & Scott, *supra* note 89, at 261, 302–03. Perhaps a litigator could assist.

²²³ For some other considerations, see CSERNE, *supra* note 58, at 11–12.

will exercise more care in preparing documents.²²⁴ Second, *contra proferentem* promotes fairness and justice. The drafter has an inherent advantage over the non-drafter. The drafter knows the contract better and has written it to benefit the drafter's client.

These policy considerations pose questions for judges. Can disputes be more accurately characterized as problems of ambiguity and dealt with more effectively that way? Can the disadvantages of being the drafter of a commercial contract really be overcome simply by arguing that both parties are sophisticated, that the contract was negotiated, that the contract was "jointly" drafted when the ambiguous provision was not, or that the term "drafter" includes the non-drafter as well? Is it reasonable to make the application of the presumption depend on whether the contract was one of adhesion or whether the parties had unequal bargaining power? Shouldn't *contra proferentem* be treated like other presumptions, such as that of negative implication, without judicial interpretations that limit its application? After all, isn't the presumption a last resort as is and isn't it true that the interpretation suggested by *contra proferentem* must be reasonable so the risk of judicial abuse is small and less than allowing judges to determine the parties' "objectively reasonable expectations"? Do the "fundamental considerations of policy" underlying *contra proferentem* mentioned by Justice Tobriner suggest that clauses precluding the application of *contra proferentem* should be unenforceable as against public policy?²²⁵ In sum, it seems to this practitioner that acquiring a deeper understanding of this presumption and giving it thoughtful, broad, and consistent application would increase certainty, improve contract drafting, and help reduce the risk of ambiguity and litigation.

This working hypothesis seems to pose questions for scholars and a challenge for existing contract doctrine. Corbin's view, the prevailing one in contract doctrine, sees the written document not as the contract, but only strongly persuasive evidence of it and views the parties' intentions as more important

²²⁴ As discussed *supra*, the specific language of California Civil Code §1654 emphasizes the drafter causing the ambiguity.

²²⁵ Such a rule makes sense when one considers the presumption's close connection with unconscionability. See RESTATEMENT (SECOND) OF CONTRACTS §201, com.. "sometimes the result [of the application of *contra proferentem*] is hard to distinguish from a denial of effect to an unconscionable clause."

than certainty.²²⁶ But this focus on the parties' intentions, as noted above in the discussion of section 1649 of the California Civil Code and section 201 of the Restatement, is only on the parties' intentions at the time of signing the contract. But an unanticipated event is by definition something that the parties did not have any intentions about at the time they signed the contract. Doesn't this fact suggest that the conclusion that intentions trump certainty be reexamined? But if ambiguity is ubiquitous and unanticipated events unavoidable, how much certainty can we ever attain? It is unclear to this practitioner how theory might address these questions. But it seems clear that theory needs to start the inquiry from practice—the fact that an unanticipated event is by definition something that the parties did not have any intentions about at the time they signed the contract. And it would be advisable to combine theory and practice in a virtuous cycle. As Chairman Mao put it in the Little Red Book, "Understanding starts with practice, after experiencing practice we gain an understanding of theory, and then we need to return back again to practice."²²⁷ Or, in the words of Nassim Nicholas Taleb, we should go from problems to books, from books to problems, and finally from problems back to books again.²²⁸

Finally, I would like to address one future event that is not unanticipated—my students' discovery somewhere of a contract that I had drafted some years ago. My plea to them—with apologies to the drafter of the contract that follows—is the same one that a senior partner made to me when I was a young associate many years ago—"Now, don't be too tough on my standard form."!

²²⁶ CORBIN, *supra* note 10, at §25.4. Eric A. Posner has made a similar point. "Corbin's mistake is that, in assuming that the purpose of contract law is to enforce the intentions of the parties, he overlooks the fact that the parties, in addition to their ordinary contractual intentions, have intentions about how courts should evaluate their contracts in case of dispute." E. Posner, *supra* note 89, at 570.

²²⁷ 毛泽东语录 [The Sayings of Chairman Mao] 180 (1969). English translation is mine.

²²⁸ Taleb, *supra* note 37, at 290. One might infer from Gulati and Scott another virtuous cycle: "from transactional lawyer to litigator, from litigator to transactional lawyer, from transactional lawyer to litigator." GULATI & SCOTT, *supra* note 15, at 164.

Exhibit 1

Certain portions of this exhibit, as indicated by [***], have been omitted, pursuant to a request for confidential treatment under Rule 24b-2 of the Securities Exchange Act of 1934. The omitted materials have been separately filed with the Securities and Exchange Commission.

EXHIBIT1: LICENSE AND MANUFACTURING AGREEMENT²²⁹

BETWEEN

ABC, INC.

AND

XYZ COMPANY LIMITED

1. DEFINITION(S).....	86
2. LICENSE GRANT.....	91
3. ROYALTY AND PAYMENT.....	92
4. JOINT EXPENSES FOR MAA & REFERENCE MATERIALS.....	94
5. APPROVALS AND CO-OPERATION.....	96
6. REPRESENTATIONS, WARRANTIES AND COVENANTS.....	97
7. INDEMNITIES.....	99
8. FORECAST OF PRODUCT SUPPLY AND SALES.....	100
9. BRANDING.....	102
10. PROSECUTION AND MAINTENANCE.....	103
11. NEW INTELLECTUAL PROPERTY.....	103
12. ENFORCEMENT.....	104
13. MANUFACTURING FACILITIES.....	104
14. EVENT OF DEFAULT.....	105
15. CONFIDENTIALITY.....	106
16. TERM.....	107
17. TERMINATION.....	108
18. DISPUTE RESOLUTION.....	108
19. GOVERNING LAW.....	110

²²⁹ The names of the parties have been changed and certain other information deleted. All emphasis has been added.

20. MISCELLANEOUS 110

LICENSE AND MANUFACTURING AGREEMENT

This LICENSE AND MANUFACTURING AGREEMENT (this “Agreement”) is effective as of June 24, 2011 (the “Effective Date”) by and between:–

ABC Inc. a company incorporated under the laws of Delaware, USA having a principal place of business at [deleted] St. Manchester, NH 03101, United States of America (“Licensor”); and

XYZ COMPANY LIMITED, a company incorporated under the laws of the Hong Kong Special Administrative Region of the People’s Republic of China at Tai Po, New Territories (“the LICENSEE”),

(Licensor and the Licensee are each referred to herein by name or, individually, as a “Party” or, collectively, as the “Parties”.)

WHEREAS:

Licensor is a biopharmaceutical company having certain proprietary rights, technologies and data related to dietary supplements and potential drug agents developed from complex carbohydrate chemistry.

The Licensee is a Hong Kong Asia-based pharmaceutical company with a vertically integrated platform engaged in development, manufacturing, design, marketing, sales, logistics and distribution of pharmaceutical and other health care products.

By an option agreement dated July 7, 2010 (“Option Agreement”) as set out in Exhibit 1, DEF Company Ltd. (the “Optionee”) was granted an option by Licensor (the “Option”) to enter into a license and manufacturing agreement according to the terms stipulated in the Option Agreement. Optionee has designated the Licensee as its nominee to enter into this Agreement.

Licensor and the Licensee wish to further develop, manufacture and commercialize the Products (defined hereinafter). Accordingly, Licensor desires to grant to the Licensee, and the Licensee desires to obtain from Licensor, certain rights, licenses and sub-license rights pertaining to the

Territory (defined hereinafter) and the possible first right of offer, all subject to the terms and conditions set forth here-in-below.

Subject to the terms and conditions set forth below, Licensor desires to manufacture and sell the Products (defined hereinafter) to the Licensee, and the Licensee agrees to have the Licensee engage in the following:

market and sell such Products (defined hereinafter) in the Territory; and

manufacture, market and sell such Products upon the setting up of the Licensee's manufacturing facilities.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITION(S)

In this Agreement including the Recitals, except where the context otherwise requires, the words and expressions specified below shall have the meanings attributed to them below:—

“Additional Territory” means all countries and territories in the world except the Territory and the USA;

“Additional Territory Licensed Product(s)” means any product for human or veterinary use, the research, development, manufacture, use, sale, offer for sale, import or export (collectively, “Exploitation”) of which, is based upon or incorporates Licensor Technology or, but for the license granted in this Agreement, the Exploitation or which would infringe any Licensor Patents in any country in the Additional Territory;

“Affiliate” means with respect to either Party, any person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with such Party, for so long as such control exists.

For purposes of this Section only, “control” means

direct or indirect ownership of fifty percent (50%) or more (or, if less than fifty percent (50%), the maximum ownership interest

permitted by applicable law) of the stock or shares having the right to vote for the election of directors of such corporate entity, or

the possession, directly or indirectly, of the power to direct, or cause the direction of, the management or policies of such entity, whether through the ownership of voting securities, by contract or otherwise;

“LICENSOR Know-How”

Any proprietary information, trade secrets, documented techniques, materials and data owned or controlled by Licensor during the Term or which are acquired by or developed for Licensor by a Third Party during the Term, including but not limited to discoveries, formulae, materials, reagents, proprietary methods, processes, test data (including pharmacological, toxicological, clinical and manufacturing information and test data), and analytic and quality control data, which is necessary or useful to research, develop, make, have made, use, sell, offer for sale, import or export the Products, provided however, that Licensor Know-How that is the subject of the licenses and other rights granted to Licensee hereunder shall extend only to those applications of any of the foregoing items that are associated with specifically defined carbohydrate chemistry formulation; Licensor Know-How does not include Licensor Patent Rights.;

“LICENSOR Patents”

means the patents which includes:

All patents and patent applications of any kind anywhere in the world as more particularly listed in the Exhibit 6 owned or controlled by Licensor during the Term or which are acquired by or developed for Licensor by a Third Party during the Term (together with all divisions, continuations, patents of addition, substitutions, registrations, re-issues, re-

examinations or extensions of the foregoing) and which are necessary or useful to research, develop, make, have made, use, sell, offer for sale, import or export the Products, provided, however, that Licensor Patents that are the subject of the licenses and other rights granted Licensee hereunder shall extend only to those applications of any of the foregoing items that are associated with NDS or its drug candidate equivalent;

All patent applications that may hereafter be filed by or on behalf of Licensor which either are based on or claim priority from any of the foregoing patents and applications; and

All patents which may be granted pursuant to any of the foregoing patent applications;

- “LICENSOR Technology” means Licensor Patents and Licensor Know-How relating to NDS or its drug candidate equivalent only;
- “Business Day(s)” means a day (other than a Saturday or a Sunday) on which licensed banks are generally open for business in Hong Kong;
- “Effective Date” means the date of this Agreement as set forth above;
- “EMA” means the European Medicines Authority;
- “EMA Costs” means external contracted costs resulting in a specific fee charged and a deliverable documented output for EMA meetings, animal tests, and human tests, resulting in a competent authority submission only;
- “FDA” means the United States Food and Drug Administration, or any successor agency thereto;
- “FDA Costs” means external contracted costs resulting in a specific fee charged and a deliverable documented output for FDA meetings, animal tests, and human tests, resulting in a competent

- Regulatory Authority submission only;
- “Force Majeure” means the force majeure as referred to and defined in Clause 20.7 of this Agreement;
- “Hong Kong” means the Hong Kong Special Administrative Region of the People’s Republic of China;
- “MAA” means the Marketing Authorization Approval of a new drug application for permission to initiate marketing, sale, testing and food supplement registration), licenses, registrations or authorizations necessary for the marketing and sale of such Product, filed with:
the FDA in accordance to the FDA Code of Federal Regulation Title 21 Part 314 Section 50 et. Seq (21 C.F.R. 314.50 et. Seq);
the EMA; or
any other Competent Regulatory Authority.
- “Product(s)” means initially Territory Licensed Product(s) and from time to time, as the same may be added to this Agreement, Additional Territory Licensed Product(s), details of which are set out in Exhibit 7;
- “Prosecution and Maintenance” means with respect to a patent or patent application, the preparing, filing, prosecuting and maintenance of such patent or application, as well as re-examinations, reissues, requests for patent term extensions and related matters with respect to such patent or application, together with the conduct of interferences, the defense of oppositions and other similar proceedings with respect to the particular patent or patent application; and ‘Prosecute and Maintain’ shall have the correlative meaning;
- “Qualified Person” means a person qualified and accepted by competent authority to batch release and to assure quality and acceptance by a competent authority;
- “Reference” means the official materials submitted to the

Material(s)”	regulatory authority in support of the regulatory label and approval of Products;
“Regulatory Authority”	means federal, national, multinational, state, provincial or local regulatory agency, department, bureau or other governmental entity with authority over the discovery, advancement, manufacture, commercialization or other use or exploitation (including the granting of MAA) of the Products in any jurisdiction, including the FDA, the European Medicines Agency (EMA), the State Food and Drug Administration (SFDA) in the People’s Republic of China and the Ministry of Health Labor and Welfare (MHLW) in Japan;
“NDS”	means the trademark, namely “NDS”, registered in (*) and owned by (*) and such trademark is adopted in the manufacture, sale, marketing, promotion, distribution and advertising of the Products, details of which are set out in Exhibit 2
“Term”	means the term as defined and set out in Clause 16 of this Agreement;
“Territory”	means the following territories:- People’s Republic of China; Hong Kong Special Administrative Region; and Macau Special Administrative Region;
“Territory Licensed Product(s)”	means any product, the research, development, manufacture, use, sale, offer for sale, import or export (collectively, “Exploitation”)of which is based upon or incorporates Licensor Technology or, but for the license granted in the Agreement, would infringe any Licensor Patents in any country in the Territory;
“Third Party”	means any person or entity other than Licensor, the Licensee or their respective Affiliates;
“USA”	means the United States of America; and

“US Dollars” means United States dollars, the lawful and the sign currency of the United States of America.

“US\$”

2. LICENSE GRANT

Licensor hereby grants to the Licensee a sole and exclusive license to use the Licensor Technology in The Territory, with the right to grant, sublicenses, subject to the conditions described in this Agreement, under the Licensor Technology, to enable the Licensee to:

(a) bottle, label, use, commercialize, market, distribute, sell, have sold, offer for sale and import and export; and

(b) research, develop, make, have made, manufacture

(c) the Products in the Territory, practice any method, process or procedure or otherwise exploit the Licensor Technology, and to have any of the foregoing performed on its behalf by a Third Party, subject to Clauses 2.2 and 2.3 hereinbelow.

Both Parties agree that

(i) Clause 2.1(a) shall be active and in force from the Effective Date; and

(ii) Clause 2.1(b) shall be contingent upon establishment of oversight quality control batch release and quality assurance requirements set forth by Licensor and agreed upon by both Parties.

Insofar as the license granted in Clause 2.1 is concerned, sale and distribution in the Additional Territory shall be restricted to Products for human and veterinary use.

The Licensee and Licensor have agreed that Licensor shall both (a) initiate a clinical trial at a cost not to exceed [***] (such amount, up to [***], “the “Clinical Study Fund”), and (b) as Licensor’s investment in the promotion of a market for Licensor’s products, provide Product to Licensee having an aggregate value (at the pricing described in Exhibit 3) equal to the amount of the Clinical Study Fund as further described below. Specifically, Licensee and Licensor have agreed that:

(i) the results, documents and other information related to the clinical trials of the Products conducted under the auspices of and financed by the Clinical Study Fund can be used by either Party; and

(ii) upon the Licensee's request, Licensor shall supply and deliver to Licensee, Products having an aggregate value equal to the amount actually set aside in the Clinical Study Fund and committed to clinical trials as described in clause 2.4(i) at the time of the request for Product, at the agreed prices set out in Exhibit 3 to this Agreement. In other words, if [***] has been committed and paid into the Clinical Study Fund for clinical trials then Licensee may request [***] in Product at the agreed price. The Licensee is not required to pay for the aforesaid amount of Products, except by means described herein.

Both Parties agree and acknowledge that the prices set out in Exhibit 3 (List of Prices) have been agreed upon as the final prices of the Products. Should there be any proposed change in prices, both Parties must sign a written agreement for such change.

3. ROYALTY AND PAYMENT

Subject to Clause 3.2, the Licensee shall pay to Licensor a royalty of US Dollars [***] of revenue on a quarterly basis, based on the sales and distribution of the Territory Licensed Products (excluding those manufactured and supplied to Licensor) in the Territory as invoiced to the Licensee for the duration of the Term, in accordance to Clause 3 below ("Royalty Payment"). For the avoidance of doubt, the aforesaid Territory Licensed Products must be manufactured based on the existing Licensor Patents.

In the event that the Licensee invents, develops, obtains and registers new patents ("New Patents") based on the Licensor Patents in the name of Licensor, the Licensee shall pay to Licensor a royalty of US Dollars [***] of revenue on a quarterly basis based on the sales and distributions of the aforesaid products in the Territory as invoiced to the Licensee for the duration of the Term provided that the aforesaid products manufactured according to the New Patents, not the existing Licensor Patents.

The Licensee shall pay the Royalty Payment of a year to Licensor within 30 days upon the expiry of a quarter in a year. In other words, the Licensee shall pay the Royalty Payment to Licensor in the following manner:

(i) on or before the 30th day of April for the first quarter (i.e. from January to March in a year);

(ii) on or before the 30th day of July for the second quarter (i.e. from April to June in a year);

(iii) on or before the 30th day of October for the third quarter (i.e. from July to September in a year); and

(iv) on or before the 30th day of January for the fourth quarter (i.e. from October to December in a year).

Both Parties agree that the Royalty Payment shall be paid to Licensor's bank account as set out in Exhibit 4.

Both Parties agree that, to determine the sales and distribution of the Products, any Product shall be regarded as distributed or sold by the Licensee or its sub-licensee after one hundred and twenty (120) days of receipt of invoice by the Licensee or its sub-licensee, or if not invoiced, when shipped or delivered by the Licensee or its sub-licensee.

The Licensee and its sub-licensees shall keep complete and accurate accounts of all Products distributed and sold and shall permit Licensor at Licensor's own expense [if audit discloses underpayment of royalty, then Licensee pays for audit] and through an independent certified accountant of international standing to be agreed by both Parties, to audit such accounts in accordance to the following:

(i) at least sixty (60) days' prior written notice prior to the audit;

(ii) no more than once each calendar year solely for the purpose of determining the accuracy of the Royalty Report (defined hereinafter) and Royalty Payment; and

(iii) the obligation of the Licensee and its sub-licensees concerning audit of their accounts shall be terminated three (3) years after the date of issue of an audit report.

(iv) Licensee will assemble relevant records, including those of sub-licensees as a mechanism for determining aggregate

price of Products sold and adjustments that may impact royalties payable to Licensor.

Royalty Payment shall be net of any deductions or withholdings which are required to be deducted under any relevant legislation in any country.

If the Licensee or its sub-licensee is obliged to pay royalties to an independent Third Party for the right to make, manufacture, use, commercialize, market, distribute or sell the Products, the Licensee shall be entitled to deduct from the Royalty Payment due to Licensor the said royalty payment actually made to such Third Party.

The Licensee shall provide Licensor with a royalty report stating the gross sales of the Territory Licensed Products and provide a calculation of the Royalty Payment amount due (“Royalty Report”) within ninety (90) days after the 31st day of March, the 30th day of June and 30th day of September in each year during the Term .

4. JOINT EXPENSES FOR MAA & REFERENCE MATERIALS

Pre-MAA

The Parties acknowledge and agree that where a Party incurs expenses arising from MAA filing for the Products), the other Party referencing such MAA shall contribute the MAA filing costs (“Joint Expenses”). A Party has absolute discretion to choose whether to reference such MAA and which part of a MAA should it references to. In other words, a Party is entitled to reference part of the documents and/or information in a MMA process at its sole discretion.

The portion of Joint Expenses to be contributed by each Party shall be agreed upon in writing prior to incurring the Joint Expenses on a fair, reasonable and arm’s length basis. If no such written agreement is entered into between the Parties, the Party incurring the cost for the MAA shall be solely liable for it.

Post-MAA

Both Parties agree that Licensor shall be solely responsible for all MAA costs outside the Territory and the Licensee shall be

solely responsible for all MAA costs incurred in the Territory unless otherwise agreed by both Parties.

Notwithstanding the basic payment obligations in Clause 4.3, both Parties agree that reimbursement of the costs incurred by a Party in filing and obtaining a MAA shall be in accordance to Exhibit 5 and Clause 4.5 below. For the avoidance of doubt, if a Party just references part of the documents and/or information (“D&I”) in a MAA, the costs to be shared by both Parties according to Exhibit 5 should be the costs arising from or in connection with that particular D&I.

Where reimbursement and repayment is payable pursuant to Clause 4.4, the Party owing such reimbursement or repayment shall via telegraphic transfer to the account details set forth in Exhibit 4 within one hundred and twenty (120) days after the use of and/or reference to a MAA or part of a MAA.

Reference Materials

In the event that a Party requests (“the Requesting Party”) Reference Materials created by the other Party (“the Providing Party”) whether for a MAA or not, the Requesting Party shall pay the Providing Party up to 50% of the actual costs of the Providing Party in accordance with its record for establishing such Reference Materials, subject to the condition that Reference Materials which a Requesting Party wishes to obtain must be Reference Materials which obtained MAA not more than 1.5 years before such request.

Where reimbursement and repayment is payable pursuant to Clause 4.6, the Party owing such reimbursement or repayment shall via telegraphic transfer to the account details set forth in Exhibit 4 within one hundred and twenty (120) days after the use of Reference Materials.

For all other costs and expenses in relation to matters not referred to in Clause 4, the Parties shall negotiate in good faith and at arms’ length the payment arrangement for costs incurred in the 2 years prior to MAA.

The paying party shall forthwith notify the receiving party of the payment and upon successful transfer of the payable amount, the receiving party shall issue an acknowledgement of receipt to the paying party within 14 Business Days thereafter.

5. APPROVALS AND CO-OPERATION

In furtherance of the Agreement, the Licensee shall have the right to obtain, or procure the obtaining of all MAA. Licensor shall provide all reasonable assistance and disclosure of MAA and/or Reference Materials as necessary or as requested by the Licensee (or its sub-licensee) to aid their manufacturing of the Products and their efforts to obtain MAA, and charge only a minimum expense for administrative purposes.

Subject to Clause 4 above and other payments as herein provided, each Party agrees to use commercially reasonable efforts to make its personnel reasonably available, upon reasonable written request by the other Party in relation to license rights, at their respective places of employment to consult with the other Party on matters and issues related to MAA obtained during the Term.

Each Party (the “Enabling Party”) agrees to cooperate with the other (the “Filing Party”), at its written request, to comply with specific requests of any applicable Regulatory Authority (such as requests to inspect clinical trial sites), with respect to data supplied or to be supplied by the Enabling Party to the Filing Party for filing with such Regulatory Authority. In this regard, the Enabling Party agrees to provide reference rights to the Filing Party, or to provide to applicable Regulatory Authorities copies of relevant manufacturing data specifically requested by the Filing Party, which is reasonably necessary for the Filing Party to obtain, proceed towards and/or maintain regulatory approval for the Products in accordance with this Agreement

Assistance beyond initial transfer of Licensor Technology

In connection with the performance of this Agreement, each Party will use its best reasonable efforts to provide assistance to the other Party as such other Party may reasonably request if it involves new technology and requires travel to other country or territory. The requesting Party shall reimburse the reasonable costs and expenses incurred by the assisting Party in providing such assistance.

The Licensee shall at its discretion register this Agreement with all relevant patent offices or governmental authorities and Licensor shall provide all reasonable assistance as may be

requested by the Licensee; provided, however, that nothing herein shall be deemed an agreement to transfer or assign ownership to Licensee of any Licensor Technology

If Licensee files for patent protection of any Licensor claims, the filing will be made in the name and on behalf of Licensor, who shall be identified as the owner of the technology subject to such filing.

6. REPRESENTATIONS, WARRANTIES AND COVENANTS

General Representations and Warranties

Each Party represents and warrants to the other that, as of the Effective Date:

it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, and it has full corporate power and authority to enter into this Agreement and to carry out the provisions hereof;

it is duly authorized to execute and deliver this Agreement and to perform its obligations hereunder, and the authorized representative executing this Agreement on its behalf has been duly authorized to do so by all requisite corporate action; and

this Agreement is legally binding upon it and enforceable in accordance with its terms, and the execution, delivery and performance of this Agreement does not conflict with any agreement, instrument or understanding, oral or written, to which it is a party or by which it may be bound, nor violate any material applicable law.

Licensor's Representations and Warranties

Licensor represents and warrants to the Licensee that as of the Effective Date:

Licensor owns and/or has an absolute and unfettered right to all Licensor Technology which include patents and know-how that are developed or acquired by or for Licensor during the Term as well as what Licensor owns or controls as of the Effective Date, a list of which is set out in Exhibit 6, but which may change from time to time as new patents and know-how are obtained;

Licensor Technology is solely and beneficially owned by Licensor, and Licensor has not placed, or suffered to be placed, any liens, charges or encumbrances on or against the patents or patent applications on the Licensor Patents or the Licensor Know-how, and that Licensor has full right and authority to grant to the Licensee the licenses granted herein with respect to such patents, patent applications and know-how in the Territory.

the Licensor Patents are valid and existing, and no issued or granted patents within the Licensor Patents are invalid or unenforceable to the best of their knowledge;

Licensor has not granted, and will not during the Term grant any right to any Third Party which would conflict with the rights granted to the Licensee hereunder, nor has entered and will not enter any agreement with or assignment to any Third Party nor permit any encumbrance which would be inconsistent or otherwise conflict with the terms of this Agreement;

Licensor has no knowledge that any Third Party has any right, title or interest in or to any of the Licensor Technology;

the Licensor Technology to the best of its knowledge is not subject to any litigation, judgments or settlements against or owed by Licensor;

the Licensor Technology is not subject to any funding agreement with any government or government agency;

Licensor has disclosed to the Licensee all material information of which Licensor is aware as to whether the research, development, manufacture, use, sale, offer for sale or importation of the Products infringes or would infringe issued or granted patents or other intellectual property rights owned by a Third Party, and that the Licensee's practice, use and exploitation of the Licensor Technology in accordance with this Agreement will not infringe or misappropriate any patent rights or other intellectual property rights of any Third Party;

Licensor has not received any notice of:-

any threatened claims or litigation or investigations seeking to invalidate or otherwise challenge the Licensor Technology or Licensor's rights therein; or

alleged infringement of any Third Party patent rights or intellectual property rights in connection with the use and exploitation of the Products;

none of the Licensor Patents are subject to any pending re-examination, opposition, interference or litigation proceedings. Licensor shall provide to the Licensee regular updates of all Licensor Patents pertaining to any stage being reached in any of the foregoing events; and for all pending patents granted for Licensor technology;

To the best of Licensor's knowledge, there is no unauthorized use, infringement or misappropriation of any of the Licensor Technology by any Third Party in the Territory, including by any current or former employee or consultant of Licensor and its Affiliates. Licensor shall promptly inform the Licensee of any misappropriation or infringement of the Licensor Technology of which Licensor becomes aware; and

Licensor is not aware of any action, suit or inquiry or investigation instituted by any Third Party which questions or threatens the validity of this Agreement.

Licensor declares that all representations, warranties and any other documents (including the Certificated of analysis of NDS chewable tablet (Exhibit 8) and the Declarations of Good Manufacturing Practice (Exhibit 9)) are true and accurate.

7. INDEMNITIES

INDEMNIFICATION BY LICENSEE. Licensee shall, up to the maximum amount of its product liability insurance, indemnify, hold harmless and defend Licensor, its Affiliates and their respective directors, officers, employees and agents ("Licensor Indemnitees") from and against any and all suits, investigations, claims, costs, demands, liabilities, losses, damages, and expenses, including reasonable attorneys' fees (collectively, "Losses") arising from or occurring as a result of a third party's claim, action, suit, judgment or settlement against a Licensor Indemnitee that is due to or based upon: (a) any breach of any representation or warranty of Licensee hereunder; (b) the failure of Licensee to perform any of its duties or obligations set forth in this Agreement; (c) Licensee's misuse or adulteration of Product, or combination of Product with other products without Licensor's

express acknowledgement and approval, or sale and disposition of Product for applications or uses other than those for which the Product is intended, and (d) any act of gross negligence or intentional misconduct by Licensee or any of its sublicensees in connection with any action or transaction under this Agreement, including the further processing, formulation, storage, labeling, promotion, use or sale of Product while in the possession or control of Licensee or its sublicensees.

INDEMNIFICATION BY Licensor. Licensor shall, up to the maximum amount of its product liability insurance, indemnify, hold harmless and defend Licensee, its Affiliates and their respective directors, officers, employees and agents (“Advance Indemnitees”) from and against any and all Losses arising from or occurring as a result of a third party’s claim, action, suit, judgment or settlement against an Advance Indemnitee that is due to or based upon: (a) any breach of any representation or warranty of Licensor hereunder; (b) the failure of Licensor to perform any of its duties or obligations set forth in this Agreement; (c) any act of gross negligence or intentional misconduct by Licensor in connection with any action or transaction under this Agreement, including manufacture, testing, handling, packaging, labeling, storage or supply of Product while it is in the possession or control of Licensor or its Affiliates. Licensor shall have no liability under this Section 7.2 for any infringement based on the use of any Product if the Product is used in a manner or for a purpose for which it was not reasonably intended. Licensor’s obligations under this Section 6.2 shall survive termination or expiration of this Agreement.

8. FORECAST OF PRODUCT SUPPLY AND SALES

Supply

The Licensee shall have a first priority offer to supply Licensor’s requirements for the Products for commercial use in the Additional Territory. Licensor shall, however, retain the right to manufacture or otherwise obtain the Products, in the Additional Territory.

Subject to Clause 8.1, in the event that the Licensee (once manufacturing has commenced) fails to accept any order of Licensor for sale of the Products in the Additional Territory or

accepts but fails to fulfill such an order, in each case due to an event of Force Majeure that lasts for a continuous period of one hundred and twenty (120) days, Licensor shall be permitted to arrange with other manufacturers or suppliers for the fulfillment of such orders (to the extent of any shortfall from the supply of the Products by the Licensee) on any terms that are reasonable.

Within a reasonable time after Licensee resumes full supply of the Products after an event of Force Majeure Licensor shall cease sourcing of Products from manufacturers or suppliers other than Licensee, and shall resume its relationship with Licensee on terms consistent with the terms that preceded the event of Force Majeure

Right of First Refusal

Subject to Clause 8.1, in the event that the Licensee is unable to manufacture sufficient Products to meet the orders placed by Licensor or its Affiliates (the “Licensor Group”) for sale and distribution in the Additional Territory, whether such inability is due to changes in market conditions, regulatory conditions or other factors but excluding an event of Force Majeure, Licensor may set up manufacturing facilities in the Additional Territory subject to the Licensee having the right of first refusal to invest in any such manufacturing facilities, either on its own, or together with Licensor and other Third Party in such proportion as the Licensee may deem appropriate. Licensor shall determine the terms and conditions, and provide written explanation of the details of such investment and the economic and political reasons justifying the explanation to the Licensee. The Licensee shall have thirty (30) Business Days from the date of receipt of the written explanation to evaluate the investment and exercise its right of first refusal.

Forecasts

Subject to Clause 8.1, no later than three (3) months prior to its second year of commercial sale of the Products, Licensor shall provide the Licensee with a twelve-month (12-month) rolling forecast of Licensor’s or its designee’s commercial requirements of the Products in the Additional Territory, broken down by month and updated monthly on a rolling twelve-month (12-month) basis, with an allowed monthly variation of twenty percent (20%).

Subject to Section 8.1 and before the Licensee can manufacture the Product on its own, no later than three (3) months prior to its second year of commercial sale of the Products, the Licensee shall provide Licensor with a twelve-month (12-month) forecast of the Licensee's purchase order forecast of the Products in the Territory, broken down by month and updated monthly on a rolling twelve-month (12-month) basis, with an allowed monthly variation of twenty percent (20%) until the Licensee manufactures the Product.

Purchase Orders

Subject to Clause 8.1, Licensor shall submit purchase orders for the Products that are consistent with quantities forecast in the first three (3) months of each rolling forecast. All purchase orders submitted shall be agreed upon between Licensor and the Licensee and constitute firm orders binding on the Parties. Payment terms of each Product shall be determined and revised by the Licensee from time to time by mutual agreement. Pricing of sales may be adjusted due to raw material increases supplied by Licensor.

Subject to Section 8.1, the Licensee shall submit purchase orders for the Products that are consistent with quantities forecast in the first three (3) months of each rolling forecast until the Licensee can manufacture the Product on its own.

9. BRANDING

Each Party will be responsible for filing, registering and maintaining its own worldwide brand names and trademarks for the Products, at its own expense. All Products provided by the Licensee to Licensor hereunder shall display the name of the Licensee as manufacturer of such Products. Each of Licensor and the Licensee may use its own brand name, or that of the other Party, to identify the Products.

If one Party uses the brand name or trademark of the other Party in connection with the Products, the manner of use of the other Party's brand name and/or trademark (as the case may be) shall first be submitted to the other Party for approval of design, color, and other details, and shall in any event comply with the other Party's usage and quality control and quality assurance guidelines as reasonably established from time to time and as

registered with the competent authority. All approvals required under this section shall not be unreasonably withheld or delayed.

10. PROSECUTION AND MAINTENANCE

Licensor shall be responsible for the Prosecution and Maintenance, and all costs and expenses associated therewith, of the Licensor Technology worldwide, unless otherwise stated in a mutual agreement in writing. However, in the Territory, the Licensee shall be responsible for all costs.

Licensor shall consult in good faith with the Licensee regarding matters stated in Clause 10.1, including the withdrawal, abandonment or cessation of Prosecution and Maintenance of any Licensor Technology covering the Products. If Licensor determines to withdraw, abandon or otherwise cease to Prosecute or Maintain any of the Licensor Technology covering the Products, then Licensor shall provide the Licensee with one hundred and twenty (120) days' written notice prior to the date on which such withdrawal, abandonment or cessation of Prosecution and Maintenance would become effective. In such event, the Licensee shall have the first right, but not the obligation, to take over at the Licensee's expense the Prosecution and Maintenance of such Licensor Technology, and in such event, such Licensor Technology shall be assigned to the Licensee at the nominal price of USD1.00 (and such Licensor Technology shall thereafter be expressly excluded from the Licensor Technology stipulated herein).

Licensor shall provide the Licensee with regular updates and records of all matters stated in Clauses 10.1 and 10.2.

The Licensee shall have the right to be granted with a license by Licensor in relation to any continuation, divisional, re-issues of any of the Licensor Patents.

11. NEW INTELLECTUAL PROPERTY

The Licensee will own all new intellectual property related to the Products that is conceived or reduced to practice by the Licensee during the Term. New IP that is related to improvements modifications, enhancements, etc. to the Licensor patents (for example the New Patents as referred in Clause 3.2),

upon Licensor's request, the Licensee will grant a royalty-free exclusive license of such new intellectual property to Licensor on terms to be agreed between the Parties similar to the terms and conditions in this Agreement

The Licensee shall be required to disclose where improvements to the intellectual property are developed by the Licensee.

If the new developments are not under or within the Licensor claims, the Licensee shall be required to offer the license to the same to Licensor on reasonable commercial terms.

12. ENFORCEMENT

The Licensee shall have the right to determine the appropriate course of action to enforce any patent rights relating to the Licensor Technology in the Territory, or otherwise to abate the infringement thereof. The Licensee, upon discovery of an executed or potential patent infringement, shall notify Licensor within fourteen (14) days of discovery. In the event Licensor does not take such action as determined by the Licensee in respect of any infringement of the Licensor Technology within thirty (30) days of request by the Licensee to do so, the Licensee may take such action in its own name or in the name of Licensor and Licensor shall provide all assistance and information as the Licensee may request to enable the Licensee to take appropriate action in respect of any infringement of the Licensor Technology. Licensor and the Licensee shall each bear one-half (1/2) of the cost and expense of any such action.

All damage receivables as a result of such actions shall be utilized first to reimburse each Party for the cost and expense of any such action and shall thereafter be equitably allocated between Licensor and the Licensee based on the Parties' relative damages attributable to the underlying claim.

13. MANUFACTURING FACILITIES

The Licensee shall purchase or establish and maintain one or more manufacturing facilities for the manufacture of the Products at its own expense.

Both Parties agree and acknowledge that the manufacturing facilities may be used to manufacture products other than the Products and to manufacture the Products for Third Parties. This right must be exercised within five (5) years or it becomes non-exclusive as to the manufacture. Such manufacturing facility will be in compliance with internationally accepted standards for GMP, FDA, quality control and quality assurance.

With regard to a decision on making the investment to establish and maintain one or more manufacturing facilities for the manufacture of the Products, both Parties agree that, prior to the Licensee deciding to proceed with the establishment of the manufacturing facilities,

(i) Licensor has to provide the Licensee a forecast of its purchase orders of the Products; and

(ii) They should agree on the price of the Products manufactured and supplied by the Licensee to Licensor.

The Licensee shall be responsible for the maintenance and repair of all equipment used in the manufacture of the Products in accordance with applicable laws and consistent with good industry practice.

14. EVENT OF DEFAULT

Even if gross default of performance by the Licensee occurs and no execution to cure has been taken in sales or in manufacturing after the receipt of notification of default by Licensor, the Licensee shall have the absolute and unfettered right to retain and to continue the use of the Licensor Know-How, the Licensor Patents, the Licensor Technology (collectively “Intellectual Property”) for the research and the manufacturing in the territory of:

any Products which the Licensee obtains/ procures or intends to obtain MAA for (in accordance to Clause 11); and

Any other new products until termination date.

Further to Clause 14.1 above, the Licensee shall have the right to manufacture only if curable defaults have been cured, to sell and to distribute these new drugs within the Territory, using a brand name other than Licensor should Licensor so request, and/or at the discretion of the Licensee.

Subject to Clause 11, Licensor shall have the right to continue to use the intellectual property which the Licensee has contributed to the development of and shall have the right to continue to manufacture, distribute and sell the Products which use the intellectual property in any jurisdiction except in the Territory.

15. CONFIDENTIALITY

Except to the extent expressly authorized by this Agreement or otherwise agreed by the Parties in writing, the Parties agree that the receiving Party shall keep confidential and shall not publish or otherwise disclose or use for any purpose other than as provided for in this Agreement any confidential or proprietary information or materials furnished to it by the other Party pursuant to this Agreement (collectively, “Confidential Information”) or the terms and conditions of this Agreement. Notwithstanding the foregoing, Confidential Information shall not be deemed to include information or materials to the extent that it can be established by written documentation by the receiving Party that such information or material:

(i) was already known to or possessed by the receiving Party, other than under an obligation of confidentiality (except to the extent such obligation has expired or an exception is applicable under the relevant agreement pursuant to which such obligation established), at the time of disclosure;

(ii) was generally available to the public or otherwise part of the public domain at the time of its disclosure to the receiving Party;

(iii) became generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the receiving Party in breach of this Agreement;

(iv) was independently developed by the receiving Party as demonstrated by documented evidence prepared contemporaneously with such independent development; or

(v) was disclosed to the receiving Party, other than under an obligation of confidentiality, by a Third Party who had no

obligation to the disclosing Party not to disclose such information to others.

Each Party may use and disclose Confidential Information of the other Party or the terms and conditions of this Agreement as follows:

(i) under appropriate confidentiality provisions substantially equivalent to those in this Agreement, in connection with the performance of its obligations or exercise of rights granted to such Party in this Agreement;

(ii) to the extent such disclosure is reasonably necessary in filing for, prosecuting or maintenance of patents, copyrights and trademarks (including applications therefore) in accordance with this Agreement, complying with the terms of agreements with Third Parties, prosecuting or defending litigation, complying with applicable governmental regulations, filing for, conducting preclinical or clinical trials, obtaining and maintaining regulatory approvals (including MAA), or otherwise required by applicable law or the rules of a recognized stock exchange, provided, however, that if a Party is required by law or stock exchange to make any such disclosure of the other Party's Confidential Information it will, except where impracticable for necessary disclosures (for example, in the event of medical emergency), give reasonable advance notice to the other Party of such disclosure requirement and, except to the extent inappropriate in the case of patent applications, will use its reasonable efforts to secure confidential treatment of such Confidential Information required to be disclosed with key financial terms blanked;

(iii) in communication with existing investors, contracted consultants, advisors (including financial advisors, lawyers and accountants) and others on a need-to-know basis, in each case under appropriate confidentiality provisions substantially equivalent to those of this Agreement; or

(iv) to the extent mutually agreed to by the Parties.

16. TERM

The term of this Agreement (the "Term") shall commence on the Effective Date and continue in force on a product-by-

product basis with respect to each country anywhere in the world until the later of:-

(i) the last of the applicable Licensor Patents with valid claims to expire covering a Product in such country expires; or

(ii) seven (7) years after the first material commercial sale of a Product in a particular country, whichever Term is greater Paid-Up, Non-Exclusive License on Expiration

Upon the expiration of this Agreement on a Product-by-Product and a country-by-country basis, the Licensee shall have a non-exclusive, fully paid-up, royalty-free license in such country to research, develop, make, have made, manufacture, use, sell, offer for sale, import and export that particular Product (and to have any of the foregoing activities regarding such Product performed by any Third Party on behalf of the Licensee).

17. TERMINATION

This Agreement can be terminated by a Party (“Non-Defaulting Party”) if and only if: -

(i) the other Party (“Defaulting Party”) fails and/or refuses to pay to the Non-Defaulting Party pursuant to this Agreement and the payment is not settled after serving a twelve (12) months prior written notice to the Defaulting Party; or

(ii) after the manufacturing facilities are established by the Licensee and the Licensee begins to manufacture the Products, the Licensee fails to use its best endeavours to maintain the quality of the Products which is evidenced by a scientific report issued by an international reputable scientific laboratory or university and the Licensee does not cure this and continues to fail in this aspect one hundred and twenty (120) days after receipt of written notice by Licensor of such failure. For the avoidance of doubt, the written notice issued by Licensor should enclose the aforesaid evidence and set out the curing measures to be complied with by the Licensee in details; or

(iii) a winding up order is granted by a Court against the Defaulting Party.

18. DISPUTE RESOLUTION

Disputes

If the Parties are unable to resolve any dispute or other matter arising out of or in connection with this Agreement, either Party may, by written notice to the other Party, have such dispute referred to the Chief Executive Officers of Parties for attempted resolution by good faith negotiations within sixty (60) Business Days after such notice is received. In such event, each Party shall cause its Chief Executive Officers to meet (face-to-face or by teleconference) and be available to attempt to resolve such issue. If the Parties should resolve such dispute or claim, a memorandum setting forth their agreement will be prepared and signed by both Parties if requested by either Party. The Parties shall cooperate in an effort to limit the issues for consideration in such manner as narrowly as reasonably practicable in order to resolve the dispute.

Arbitration

In the event that the Parties are unable to resolve any such matter pursuant to Clause 17.1 and 17.2, then either Party may initiate arbitration pursuant to this Clause 18.2. Any arbitration under this Clause 18.2 shall be conducted by and in accordance with the applicable rules of the International Chamber of Commerce (“ICC”) by a single independent arbitrator with significant experience in arbitrating matters related to biopharmaceutical industry and mutually agreed by the Parties; provided that if the Parties are unable to agree on a single arbitrator within thirty (30) days of notice of the dispute, the arbitrator shall be selected by the senior executive of the ICC in Paris. In such arbitration, the arbitrator shall select an independent technical expert with significant experience relating to the subject matter of such dispute to advise the arbitrator with respect to the subject matter of the dispute. The place of arbitration shall be in (i) the State of California, USA, if initiated by the Licensee or (ii) Hong Kong, if initiated by Licensor. The costs of such arbitration shall be shared equally by the Parties, and each Party shall bear its own expenses in connection with the arbitration. The Parties shall use good faith efforts to complete arbitration under this Clause 18.2 within six (6) months following the initiation of such arbitration. The arbitrator shall establish reasonable additional procedures to facilitate and complete such arbitration within such six (6) month period. All arbitration

proceedings shall be conducted and all evidence and communications shall be in English, provided that any written evidence originally in a language other than English shall, insofar as practicable, is submitted in English translation accompanied by the original or true copy thereof. Attorney's fees will be paid to prevailing party.

Equitable Relief

Nothing in this Agreement shall limit the right of either Party to seek to obtain in any court of competent jurisdiction any equitable or interim relief or provisional remedy, including injunctive relief.

19. GOVERNING LAW

This Agreement and any dispute arising from the performance or breach hereof (including arbitration proceedings under Clause 18.2) shall be governed by and construed and enforced in accordance with the Laws of the State of California in the U.S., without reference to conflicts of laws principles.

20. MISCELLANEOUS

Assignment

This Agreement shall not be assignable by either Party to any Third Party without the prior written consent of the other Party. Notwithstanding the foregoing, either Party may assign this Agreement, without the written consent of the other Party, (i) to an Affiliate, or (ii) to an entity that acquires all or substantially all of the business or assets of such Party to which this Agreement pertains (whether by merger, reorganization, acquisition, sale or otherwise), and agrees in writing to be bound by the terms and conditions of this Agreement. No assignment or transfer of this Agreement shall be valid and effective unless and until the assignee/transferee agrees in writing to be bound by the provisions of this Agreement. The terms and conditions of this Agreement shall be binding on and inure to the benefit of the permitted successors and assigns of the Parties.

Except as expressly provided in this, any attempted assignment or transfer of this Agreement shall be null and void.

Notices

Any notice, request, delivery, approval or consent required or permitted to be given under this Agreement shall be in writing in the English language and shall be deemed to have been sufficiently given if delivered in person, transmitted by facsimile (receipt verified) or by reputable international-express courier service (signature required) to the Party to which it is directed at its address or facsimile number shown below or such other address or facsimile number as such Party will have last given by written notice to the other Party.

If to Licensor, addressed to:

ABC Inc.

[deleted] St.

Manchester, NH 03101

Attention: [deleted]

Telephone: [deleted]

Facsimile: [deleted]

If to the Licensee, addressed to:

XYZ Co.,

Ltd [deleted]

Tai Po Industrial Est.

Tai Po, New Territories, Hong Kong

Attention: [deleted]

Telephone: [deleted]

Facsimile: [deleted]

Waiver

Neither Party may waive or release any of its rights or interests in this Agreement except in writing. The failure of either Party to assert a right hereunder or to insist upon compliance with any term or condition of this Agreement shall not constitute a waiver of that right or excuse a similar subsequent failure to perform any such term or condition. No waiver by either Party of any condition or term in any one or more instances shall be construed as a continuing waiver of such condition or term or of another condition or term.

Severability

If any provision hereof should be held invalid, illegal or unenforceable in any jurisdiction, the Parties shall negotiate in good faith a valid, legal and enforceable substitute provision that

most nearly reflects the original intent of the Parties and all other provisions hereof shall remain in full force and effect in such jurisdiction and shall be liberally construed in order to carry out the intentions of the Parties as nearly as may be possible. Such invalidity, illegality or unenforceability shall not affect the validity, legality or enforceability of such provision in any other jurisdiction.

Entire Agreement/Modification

This Agreement, including its Exhibits, sets forth all of the covenants, promises, agreements, warranties, representations, conditions and understanding between the Parties and supersedes and terminates all prior agreements and understanding between the Parties. Subsequent alteration, amendment, change or addition to this Agreement which is agreed upon between the Parties within 60 days of the Effective Date shall be binding upon the Parties if and only if reduced to writing and signed by the respective duly authorized representatives of the Parties.

Relationship of the Parties

The Parties agree that the relationship of Licensor and the Licensee established by this Agreement is that of independent contractors. Furthermore, the Parties agree that this Agreement does not, is not intended to, and shall not be construed to, establish an employment, agency or any other relationship. Except as may be specifically provided herein, neither Party shall have any right, power or authority, nor shall they represent themselves as having any authority to assume, create or incur any expense, liability or obligation, express or implied, on behalf of the other Party, or otherwise act as an agent for the other Party for any purpose.

Force Majeure

Except with respect to payment of money, neither Party shall be liable to the other for failure or delay in the performance of any of its obligations under this Agreement for the time and to the extent such failure or delay is caused by earthquake, riot, civil commotion, war, terrorist acts, strike, flood, or governmental acts or restriction, or other cause that is beyond the reasonable control of the respective Party (a “Force Majeure” event). The Party affected by such Force Majeure event will provide the other Party with full particulars thereof as soon as it becomes aware of the

same (including its best estimate of the likely extent and duration of the interference with its activities), and will use diligent efforts to overcome the difficulties created thereby and to resume performance of its obligations as soon as practicable. If the performance by the affected Party of any obligation under this Agreement is delayed owing to such a Force Majeure event for any continuous period of more than one hundred twenty (120) days, the other, unaffected Party shall have the right to terminate this Agreement upon sixty (60) days' prior written notice; provided that such Force Majeure event has not ended during such sixty (60) day period.

Compliance with laws/other

Notwithstanding anything to the contrary contained herein, all rights and obligations of Licensor and the Licensee are subject to prior compliance with, and each Party shall comply with, all laws, including obtaining all necessary approvals required by the applicable agencies of the governments of the United States, the Territory and foreign jurisdictions. In addition, each Party shall conduct its activities under this Agreement in accordance with good scientific and business practices.

Interpretation

The captions and headings used in this Agreement are for convenience only, and are to be of no force or effect in construing or interpreting any of the provisions of this Agreement. Unless otherwise specified to the contrary, references to Clauses or Exhibits mean the particular Clauses or Exhibits of this Agreement, and references to this Agreement include all Exhibits hereto.

Unless the context otherwise clearly requires, whenever used in this Agreement: (i) the words "include" or "including" shall be construed as incorporating, also, "but not limited to" or "without limitation;" (ii) the word "day" or "year" means a calendar day or year unless otherwise specified; (iii) the word "notice" means notice in writing (whether or not specifically stated) and shall include notices, consents, approvals and other written communications contemplated under this Agreement; (iv) the words "hereof," "herein," "hereby," "hereunder" and derivative or similar words refer to this Agreement (including any Exhibits) as a whole, and not to any particular provision of this

Agreement; (v) the word “or” shall be construed as the inclusive meaning identified with the phrase “and/or”; (vi) provisions that require that a Party or the Parties “agree,” “consent” or “approve” or the like shall require that such agreement, consent or approval be specific and in writing, whether by written agreement, letter or otherwise; (vii) words of any gender include all genders; (viii) words using the singular or plural number also include the plural or singular number, respectively; and (ix) references to any specific law, rule or regulation, or article, section or other division thereof, shall be deemed to include the then-current amendments thereto or any replacement law, rule or regulation thereof. Neither Party shall be deemed to be acting “by or under authority” of the other Party for purposes of this Agreement.

Counterparts

This Agreement may be executed in two or more counterparts by original or facsimile signature, each of which shall be deemed an original, and all of which together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Agreement in duplicate originals by their duly authorized

ABC, INC.,

XYZ COMPANY LIMITED,

By:

By:

[deleted]

[deleted]

Director, President

Director

representatives as of the Effective Date.

Forum Shopping and Post-Award Judgments

Linda Silberman & Maxi Scherer*

I. INTRODUCTION

The forum shopping theme comes into play in multiple ways in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside,¹ confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-award judgment. This paper examines how courts respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.

* Linda J. Silberman is a Martin Lipton Professor of Law, New York University, and Co-Director of the Center on Transnational Litigation and Commercial Law. She is a leading figure in private international law and transnational litigation, covering both commercial and family law areas.

Maxi Scherer is a Senior Lecturer in International Arbitration at Queen Mary, University of London and Global Professor at New York University School of Law, Paris. She is also Special Counsel at Wilmer Cutler Pickering Hale and Dorr LLP.

¹ As a matter of terminology, we use the term to “set aside” or to “annul” an award when referring to proceedings nullifying an award before the national courts of the seat of the arbitration. The term “set aside” is found in Article V(1)(e) of the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 33 U.S.T.S. 4739 [hereinafter New York Convention]; in some jurisdictions, such as the United States, the terminology may be to “vacate” an award. *See* Federal Arbitration Act, 9 U.S.C. § 10 (2002). Note that Article V(1)(e) refers both to the country “in which” or “under the law of which” the award was made, in identifying the place for set-aside that will justify non-recognition of an award. References in the paper to annulment at the “seat” or “place of arbitration” should be understood to include the rare situation where a different *lex arbitri* is chosen by the parties.

Part II of the paper considers the most straightforward issue of all: what is the role of a court requested to recognize and enforce an award that has been set aside at the seat of arbitration? Should it enforce the award and ignore the judgment of the foreign court? Or should it respect the decision of the foreign court and refuse to enforce the award? Additionally, what criteria should be used by a court in making its decision? The paper offers a tentative hypothesis that a “judgment route”—that is, the use of foreign judgment principles—should be invoked by a national court to assess whether or not to give effect to a foreign set-aside.

In Part III of the paper, this paper goes on to consider whether such judgment principles have application to other post-award judgments, such as judgments confirming (or refusing to set aside) an award and judgments recognizing and enforcing a foreign award. The paper concludes and explains that the judgment recognition framework does not have application outside the “set-aside” context. Unlike a judgment setting aside an award, which is expressly included as an exception to recognition and enforcement in Article V(1)(e) of the New York Convention, other post-award judgments are not referred to in the Convention as possible exceptions to recognition and enforcement.

II. FORUM SHOPPING AND THE APPROACH TO SET-ASIDES

Although the Convention provides grounds for exceptions to recognition and enforcement of an arbitral award,² it says nothing about the grounds for review or set-aside at the place of arbitration. Thus, each country establishes its own regime for reviewing and/or annulling awards rendered in that country. It is therefore not surprising to learn that informed parties and their counsels are likely to take into account the legal regime with respect to set aside when they select the *situs* for the arbitration. A 2006 study offered some evidence that the legal regime (including the extent to which awards are challenged at the seat) was the single most important criterion for a corporation in selecting the *situs* for arbitration.³ A later 2010 study also found that the

² New York Convention, *supra* note 1.

³ See PRICEWATERHOUSECOOPERS & QUEEN MARY UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 13–14 (2006),

formal legal infrastructure, including the approach to annulment, was the most influential factor in the choice of a seat.⁴

Of course, a robust set-aside regime might be of greatest concern if other New York Convention States were required to refuse recognition or enforcement of an award that had been set aside at the *situs*. But that is not the case. The Convention compels recognition and enforcement of arbitral awards, but provides for certain exceptions; and Article V(1)(e) is one of the grounds on which recognition and enforcement “may be refused” at the request of the party against whom it is invoked.⁵ Its parameters are that “the award has not yet become binding on the parties, or has been set aside, suspended by a competent authority of the country in which, or under the law of which, that award was made.”⁶ However, as underscored by the permissive language, there is no obligation to refuse recognition or enforcement, and a country is nonetheless free to enforce an award that is set aside in the country where the award is rendered.

Leaving aside for the moment that the “permissive language” extends to all of the Article V grounds, at least as understood in the English version of the Convention,⁷ there is a good reason for permitting a recognizing court to evaluate the annulment. Set-aside itself permits a check on the arbitral process in the place of arbitration. In addition, although a number of countries prefer the approach of the Model Law to harmonize the grounds for set-aside and recognition, several others have different views as to how interventionist courts should be in supervis-

available at http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

⁴ See WHITE & CASE & QUEEN MARY UNIVERSITY OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 18 (2010), available at http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

⁵ New York Convention, *supra* note 1, art. V(1)(e).

⁶ *Id.*

⁷ See, e.g., Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907, 909 n.2 (D.D.C. 1996); cf. Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 32–33 (1999).

ing arbitration in their jurisdiction,⁸ and the Convention does not limit that autonomy.

The question is then raised as to how countries that are party to the New York Convention should respond to a set-aside at the seat of arbitration. On one view, an award that is set aside is not an award at all and thus there is no award to recognize or enforce (“*Ex nihilo nil fit*”).⁹ Arbitration is perceived as an extension of the legal regime of the country in which the arbitration takes place, and therefore the courts’ oversight of the arbitration should be conclusive. Moreover, proponents of this view consider that parties have consciously chosen to arbitrate at a particular place and should therefore understand possible exposure to a set-aside. Accordingly, in countries following such a view, courts generally refuse to recognize or enforce an award set aside at the seat of the arbitration.

A series of recent decisions in Russia, represented by the case *Ciments Français v. Sibirskiy Cement*, deal with these issues.¹⁰ An award made in Turkey in favor of *Ciments Français* was set aside by the Turkish court on grounds that the arbitrators had failed to address certain arguments, and that the award violated the Turkish *ordre public*.¹¹ Notwithstanding the set-aside, on application of *Ciments Français*, the Arbitrazh Court of Kemerovo Region recognized the award.¹² A year later, the Supreme

⁸ See, e.g., English Arbitration Act, 1996, c.23, § 103 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/part/III/crossheading/recognition-and-enforcement-of-new-york-convention-awards>.

⁹ See generally Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J. INT’L ARB 179 (2010); see also Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB 47 (2010).

¹⁰ *Ciments Français v. Sibirskiy Cement*, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation], Aug. 27, 2012, VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA RF [VESTN. VAS] 2012, No. 17458/11 (Russ.). See also Elvira R. Gadelshina, *Ciments Français: Russian Putabali No More*, KLUWER ARB. BLOG (Mar. 22, 2012), available at <http://kluwerarbitrationblog.com/blog/2012/03/22/ciments-francais-russian-putrabali-no-more/>.

¹¹ *Ciments Français*, VESTN. VAS 2012, NO. 17458/11, p. 11 (Russ.).

¹² *Ciments Français v. Sibirskiy Cement*, Arbitrazh Court of Kemerovo [Arbitration Court of Kemerovo], July 20, 2011 (Russ.), XXXVI Y.B. COM. ARB. 325,

Arbitrazh Court reversed and denied recognition to the award, holding that recognition of a foreign arbitral award at odds with a national court decision is contrary to domestic public order.¹³

In Germany, courts view the award as inextricably linked to the judicial regime of the seat of the arbitration.¹⁴ In determining whether to enforce an award, German courts look to the award's status in the country where it was made, without engaging in scrutiny of the annulment decision itself.¹⁵ German law even goes so far as to provide that a court may reverse its earlier decision to enforce an award if it is subsequently set aside at its *situs*.¹⁶ A 1999 German case is illustrative. A German Higher Regional Court refused to enforce an award set aside in Russia;¹⁷ however,

325 (2011). The decision to enforce was based partially on Article IX(2) of the European Convention on International Commercial Arbitration of 1961, Apr. 21, 1961, 484 U.N.T.S. 364, No. 7041 (1963–1964) [hereinafter *European Convention*]. Article IX(2) provides that an award set aside will only be relevant if the reason for set-aside is one in the list of reasons set forth in Article IX(1) of said Convention. See Mike McClure, *An Unlikely Mix—the Russian Courts, a French Cement Company, and the 1961 European Convention on International Commercial Arbitration*, KLUWER ARB. BLOG (Sept. 28, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/09/28/genevaconventio/>.

¹³ *Ciments Français*, VESTN. VAS 2012, No. 17458/11 (Russ.). However, the Russian national court decision on which the Supreme Arbitrazh Court based its reasoning has subsequently been reversed and the effects of this reversal on the non-recognition of the Turkish award remain to be assessed.

¹⁴ See Erica Smith, *Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin*, 20 B.U. INT'L L.J. 355, 363–64 (2002); see also DANA FREYER, *The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS—THE NEW YORK CONVENTION IN PRACTICE 757, 785 (E. Gaillard/D. Di Pietro eds., 2008).

¹⁵ FREYER, *supra* note 14, at 784–85; Günther J. Horvath, *What Weight should be Given to the Annulment of an Award under the Lex Arbitri? The Austrian and German Perspectives*, 27 J. INT'L ARB. 249, 259–66 (2009).

¹⁶ Horvath, *supra* note 15, at 259–66; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, § 1061(3) (Ger.). An English translation of the law was done by Samson-Übersetzungen GmbH, Dr. Carmen von Schoning (2012), available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_ch_zpo.html.

¹⁷ Oberlandesgericht [OLG] [Higher Regional Court] Oct. 28, 1999 (Ger.),

when the highest Russian court subsequently overturned the annulment decision and confirmed the award, the German Federal Supreme Court followed suit and reversed its decision, deeming the award enforceable.¹⁸

A recent decision of the Supreme Court of Chile offers an even more extreme view. In *EDF Internacional S. A. v. Endesa Internacional S. A. and YPF S. A.*, the Court held that it would not recognize or enforce an award annulled in Argentina.¹⁹ The Court relied upon Article 246 of the Chilean Code of Civil Procedure, which provides that the authenticity and effectiveness of an award “shall be proven by its approval by a superior court of the seat of arbitration.”²⁰ The language suggests that the Court is adopting a double exequatur requirement that was expressly rejected in the New York Convention,²¹ and that the Chilean courts will only enforce an award that has been confirmed at the seat. At minimum, however, it indicates that annulments at the place of arbitration will be respected in Chile.

Should this approach become the dominant view in recognition and enforcement practice, forum shopping for selection of the arbitral seat would become absolutely critical since a decision to set-aside there would have a broad extraterritorial effect. In selecting the arbitral seat, the parties would be aware that any set aside judgment at the *situs* would result in the award not being recognized or enforced in most jurisdictions. But such complete deference to the set-aside at the place of arbitration undermines one of the goals of international arbitration—to offer neutral

XXV Y.B. COM. ARB. 717, 719 (2000); see Freyer, *supra* note 14, at 785.

¹⁸ Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 22, 2001 (Ger.), XXIX Y.B. COM. ARB. 724 (2004).

¹⁹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], 8 septiembre 2011, “EDF Internacional S.A. c. Endesa Internacional S.A. and YPF S.A.,” Rol de la causa: 4390–2010, arbitraje, 5(3) ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES p. 915 (Chile).

²⁰ CODIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV] [Civil Procedure Code], art. 246 (Chile).

²¹ See Albert. Jan. van den Berg, *The New York Convention of 1958: An Overview*, THE INT’L COUNS. FOR COM. ARB. 17 (2008), available at http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

transnational dispute adjudication in contrast to a national court. To the extent that local favoritism or bias produces idiosyncratic and/or parochial set-asides, it is sensible to permit a country asked to recognize or enforce awards some discretion as to how to treat the set-aside. The difficulty is that, in addition to the lack of uniformity among countries as to the approach to take to set-aside judgments, no guidelines exist to determine when an award that has been set aside should be enforced. Furthermore, to return to the forum shopping theme, an enforcing court's attitude toward set-asides will certainly lead to forum shopping at the enforcement stage.

Other practical factors are, of course, at play when considering where to seek recognition or enforcement of an award. The choice of forum for recognition/enforcement will most often be dictated by where the defendant's assets are located,²² although in some cases one may look to recognition in a jurisdiction without assets in the hope of achieving a decision with either influential or precedential effect.²³ And in many cases, the award debtor will

²² In the United States, courts have been unanimous in holding that an independent basis of adjudicatory jurisdiction—either personal jurisdiction over the award debtor or quasi-in rem jurisdiction over his property—is necessary in order to enforce an arbitral award. *See, e.g.*, *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 2012 U.S. App. LEXIS 26207 (5th Cir. Dec. 21, 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Glencore Grain Rotterdam B. V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002). In other countries, however, the consent to arbitrate in a New York Convention country is construed as concomitant consent to enforce that award in other Convention countries without the need for any other connection to the defendant or his property. *See* Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407 (2004); *see generally* Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439 (2012). *See also* MAXI. SCHERER, *THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A COMMENTARY*, art. III, paras. 17, 22 (R. Wolff ed., 2012).

²³ In the absence of assets, an award creditor might be hoping to use the judgment as precedent in a jurisdiction where the award defendant does have assets, or even to independently enforce that judgment against the debtor's

have assets in numerous jurisdictions, leading to multiple enforcement actions with potentially different results—a situation certainly contemplated by the New York Convention.

The completely opposite approach—that is, to treat a set-aside at the place of arbitration as irrelevant—has its own unattractive features. Such a view is illustrated in France, which takes a strong pro-arbitration position and negative attitude toward set-asides.²⁴ French arbitration law, both the prior and present versions, eliminate the Convention's Article V(1)(e) as a basis for non-recognition/enforcement.²⁵ The two leading decisions from the French Cour de Cassation, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*²⁶ and *PT Putrabali Adyamulia v. Rena Holding, Ltd.*,²⁷ enforced awards that had been set aside at the place of arbitration. In *Putrabali*, the Court explained that “an international arbitral award is not anchored in any national legal order [and thus] is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.”²⁸ The French view is thus that international arbitration is part of a transnational legal order and is not attached to the national legal regime at the seat.²⁹

assets elsewhere. For a more extensive discussion of this issue, see *infra* at III. B.

²⁴ For a rather comprehensive treatment of the history of this approach in France, see C. Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience*, 26 J. INT'L ARB 267 (2009).

²⁵ CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] arts. 1520, 1525 (Fr.). An English translation of the law was done by E. Gaillard/N. Leleu-Knobil/D. Pellarini, INT'L ARB. INST. (2011) available at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf.

²⁶ *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration] 327 (1994).

²⁷ *PT Putrabali Adyamulia v. Rena Holding, Ltd.*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration], 507 (2007), XXXII Y.B. COM. ARB. 299 (2007).

²⁸ *PT Putrabali Adyamulia*, XXXII Y.B. COM. ARB. 299, 302 (2007).

²⁹ See, e.g., P. Fouchard, *La portee internationale de l'annulation de la sen-*

The most recent decision in France, albeit of a lower court, follows this approach of treating an award annulled at the seat of arbitration as fully enforceable in France, barring any other Convention ground justifying non-enforcement.³⁰ In *Maximov v. Novolipetsky Steel Mill*, the Tribunal de Grande Instance de Paris enforced an award rendered in Russia and set aside by the Russian courts.³¹ The underlying dispute concerned an agreement for the purchase and sale of shares between Mr. Maximov and Novolipetsky Steel Mill (“NLMK”). The seat of the ICAC tribunal (International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation) was Russia,

tence arbitrale dans son pays d'origine [The international scope of the annulment of the award in his home country], REVUE DE L'ARBITRAGE 329 (1997) (Fr.); E. Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 505, 505 (A. J. van den Berg ed., 1999); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).

³⁰ Under French Civil Procedure Law, revised in 2011, recognition and enforcement is automatically ordered so long as the award has been shown to exist and enforcement would not be manifestly contrary to public policy. CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] art. 1514 (Fr.). An English translation of the law was done by E. Gaillard/N. LeleuKnobil/D. Pellarini, INT'L ARB. INST. (2011) available at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf. However, parties resisting enforcement may appeal the decision on grounds mirroring those in the New York Convention art. V, namely that the tribunal lacked jurisdiction, was improperly constituted, exceeded its jurisdiction, there was a violation of due process, or recognition/enforcement of the award would violate public policy. *Id.* arts. 1520, 1525. Notably absent from this list is that the award has been set aside in the place it was made. Therefore, under French law, the fact that an award has been set aside by the competent court is accorded no weight. This omission is presumably justified on the basis of the “more favorable right” provision of Art. VII of the Convention, which allows a party seeking enforcement to rely on a domestic law instead of the Convention if that domestic law is more favorable to enforcement. See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, 85 (1981); see also Freyer, *supra* note 14, at 761–62.

³¹ *Maximov v. Novolipetsky Steel Mill*, Tribunal de Grande Instance de Paris [TGI] [Court of First Instance of Paris], May 16, 2012 (Fr.).

and the tribunal rendered a U.S. \$300 million award in favor of Maximov. The Moscow Arbitrazh Court annulled the award on the ground that under Russian law corporate disputes are not arbitrable. The decision was affirmed by the Federal Arbitrazh Court of the Moscow District, and subsequently by the Supreme Arbitrazh Court. Notwithstanding the set-aside in Russia, Maximov sought to enforce the award in the Tribunal de Grande Instance de Paris. On May 16, 2012, the court enforced the award, holding that the annulment of the award at its seat was an insufficient basis for refusal to enforce the award and that a valid arbitration award procured in accordance with the parties' agreed contractual method should be recognized and enforced.

The French view has often been criticized. Not only does it completely disregard the decision of a court at the place of arbitration, but the French approach also creates particular complications in cases where a second award is made after the annulment of the first, and the outcome of such second award differs from that of the first. If the French courts have enforced the first award, they will refuse to enforce the second one on *res judicata* grounds. But nothing prevents the award creditor of the second award from seeking recognition of that award in some other place. This situation arose in *Hilmarton*, where an annulled Swiss award was enforced in France.³² A subsequent second Swiss award was denied enforcement in France on *res judicata* grounds,³³ but was enforced in England.³⁴

Putrabali is an even more unfortunate example of the forum shopping opportunities presented by the French approach.³⁵

³² *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in *REVUE DE L'ARBITRAGE* [Review of Arbitration] 327 (1994).

³³ *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 10, 1997, reprinted in *REVUE DE L'ARBITRAGE* 376 (1997).

³⁴ *Omnium de Traitement et de Valorisation S. A. v. Hilmarton Ltd.*, [1999] Q. B. 222.

³⁵ For a more comprehensive discussion of *Putrabali*, see Richard W. Hulbert, *When the Theory Doesn't Fit the Facts—A Further Comment on Putrabali*, 25 *ARB. INT'L* (2009); see also Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24(2) *ARB. INT'L* 277

An award rendered in an English arbitration between a French buyer and an Indonesian seller resulted in an award in favor of the French party. The award was annulled in part by an English court on the basis of an error of law (review of such questions not having been excluded under the English Arbitration Act). As a result, a second award was then rendered, this time in favor of the Indonesian party. The French party sought enforcement of the *initial* award in its favor in France, and the Indonesian party sought enforcement of the later award in its favor in France. The view of the French courts, including the Cour de Cassation, was that only the first award could be enforced and that the second award was precluded by the first.³⁶ The forum shopping tactic here is apparent, where the first award resulted in dismissal of the claimant's case. Exequatur was sought primarily to prevent subsequent enforcement in France of the later award. And, under the strict French approach of giving no weight to annulments, the claimant's forum shopping strategy was successful.

As we see, neither the “enforce-all” or “enforce-nothing” approach is desirable. But an intermediate approach of leaving the issue to the “discretion” of the recognizing court has the disadvantage of lacking any guidance or uniformity. How does the court decide whether or not a particular award that is set aside should be enforced?

One view, endorsed by various arbitration experts, is that awards that are set aside will be enforced only if the ground for annulment exceeded the grounds for non-recognition under the Convention; otherwise, the set-aside judgment should be respected. This approach appears to be similar to the emerging practice in Canada.³⁷ Jan Paulsson also takes that position. He argues that

(2008).

³⁶ PT Putrabali Adyamulia v. Rena Holding, Ltd., Cour de Casation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, *reprinted in* REVUE DE L'ARBITRAGE [Review of Arbitration] 507 (2007).

³⁷ It appears that no Canadian court has been squarely faced with enforcing an annulled award, but several have decided enforcement actions with set-aside actions pending at the *situs*. The courts have expressed that they must recognize an award unless one of the grounds of refusal in Article 36 of the UNCITRAL Model Law is present, and within that they have discretion to enforce the award. In deciding whether to grant a stay of proceedings pending the outcome courts

a local annulment ought not to prevent international recognition or enforcement of a New York Convention award unless the grounds for the annulment were those identified by the Convention itself.³⁸ This approach is similar to that in Article IX(1) of the European Convention, which provides that a set-aside will not be recognized unless it was based on one of the specific grounds specified in Article IX(1)(a) to (d) of that Convention.³⁹ But the New York Convention is not so limited and failed to adopt that solution. In particular, under the New York Convention, where the parties have agreed to arbitration in a place where substantive legal review is part of the arbitral regime, annulment on that basis would appear to be appropriate.

The late Hans Smit offered the suggestion that all annulments should presumptively be disregarded in cases where the setting aside has taken place in the “home court” of one of the

have indicated that there must be a “serious issue to be tried” (from the point of view of the Canadian court) in the foreign set-aside action. If not, a stay will not be provided and the award will be enforced. *Europcar Italia S. p. A. v. Alba Tours Int’l Inc.*, 23 O. T. C. 376, [1997] O. J. No. 133, para. 22 (Can. Ont. Ct. J.); *Powerex Corp. v. Alcan Inc.*, 2004 B. C. S. C. 876, [2004] B. C. J. No. 1349 (Can.). Except for a small subset of cases falling within the Federal ambit, enforcement of awards is to be determined by provincial law; however, Article 34 of the Model Law has been implemented throughout the provinces and territories in Canada (except arguably Quebec). Henri. C. Alvarez, *The Implementation of the New York Convention in Canada*, 25(6) J. INT’L ARB. 669, 670 (2008).

³⁸ See Jan. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT’L CT. OF ARB. BULL. 14 (1998).

³⁹ European Convention, *supra* note 12. For an application of Article IX(1) of the European Convention by the Austrian Supreme Court, see *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Oberster Gerichtshof [OGH] [Supreme Court], Oct. 20, 1993 and Feb. 23, 1998 (Austria), XXIV Y.B. COM. ARB. 919 (1999). The Austrian Supreme Court enforced an award that had been annulled by the Supreme Court of Slovenia because it violated Slovenian public policy, due to certain aspects of the contract that gave the claimant a monopoly power. Austria is a party to both the New York Convention and European Convention, but the court looked to the European Convention as the one having the most favorable approach to arbitration. For a more comprehensive discussion of this case and the reasoning behind it, see Horvath, *supra* note 15, at 256–59; see also Freyer, *supra* note 14, at 764.

parties, and at the party's request.⁴⁰ As noted by others,⁴¹ that proposal is strikingly over inclusive even though it identifies the kinds of concerns one has about local bias and parochialism at the *situs*, particularly where a state-owned entity is involved and that state was the only realistic place of arbitration.

Gary Born offers several criteria for denying effect to an annulment decision in the arbitral seat: annulments that (1) are based on local public policies or non-arbitrability rules in the annulment forum, (2) are based on judicial review of the merits of the arbitrators' substantive decisions or on other grounds not included in Articles (V)(1)(a) to (d) of the Convention, or (3) fail to satisfy generally applicable standards for recognition of foreign judgments.⁴² However, it is not clear why non-arbitrability rules of the seat, particularly if that is the applicable law or has a close connection to the parties, should be excluded altogether. Also, parties who choose a seat could expect the legal regime at the seat to control, and if judicial review is part of that regime, there seems few reason for objection. Nevertheless, Gary Born's focus on judgment recognition is particularly appropriate, and Linda Silberman, in a prior article, proposed precisely that solution to deal with the problem of annulled awards.⁴³ Similarly, William Park in several articles has argued for treating annulment decisions "like other foreign money judgments, according them deference unless procedurally unfair or contrary to fundamental notions of justice."⁴⁴

⁴⁰ See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 304 (2007).

⁴¹ See Rau, *supra* note 9, at 109.

⁴² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2691 (2009).

⁴³ Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 32–36 (2009).

⁴⁴ WILLIAM W. PARK, *Duty and Discretion in International Arbitration*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 353, 363 (2nd ed., 2012); see also William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999). Professor Park refers to a comity approach to foreign judgments, whereas Professor Silberman refers to national law on judgment recognition and enforcement. The basic concept is the same: that recognition of annulment decisions should depend on whether

According to Linda Silberman, there are good reasons to look to the law on recognition and enforcement of foreign judgments for guidance in determining whether a set-aside judgment should be respected: When a court at the arbitral seat sets aside an arbitral award, a second court asked to recognize and enforce the award has no obligation under the Convention to do so. However, if the award is annulled, there is now a judgment from a national court, and a court that enforces an arbitral award set aside by that national court has accordingly refused to recognize the foreign judgment. Under this view, national laws on recognition and enforcement of foreign judgments can offer guidance as to when refusal of recognition of such a judgment is appropriate. If the judgment is one that would be entitled to recognition, the set-aside should be respected and the award should not be enforced. However, if the judgment is one that does not meet the criteria for recognition and enforcement under national law, such as fairness of process or international public policy (which would incorporate international standards for respecting arbitral awards), the set-aside judgment should not be respected and the award should be enforced.

The most recent draft of the American Law Institute's Restatement of the Law Third on International Commercial Arbitration⁴⁵ has adopted such a regime for purposes of U.S. law. Section 4-16 (b) of the Draft Restatement provides:

“Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recog-

the set-aside judgment is consistent with fundamental notions of justice and international public policy that is part of judgment-recognition law in most jurisdictions. Professor Silberman also argues that in the U. S. the recognition and enforcement of a foreign judgment annulling a Convention award would fit the type of case where a federal standard of recognition/enforcement would be in play. *See* Silberman, *supra* note 43, at 33 n.36; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 481 cmb. a (1987) (stating that recognition and enforcement of foreign judgments is typically a matter of state law unless there is a basis for federal jurisdiction such as a treaty or federal statute). Here the New York Convention and Chapter 2 of the Federal Arbitration Act call for a federal standard.

⁴⁵ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-16 (Tentative Draft No. 2, 2012).

nize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances.”⁴⁶

One can even find the outlines of a “judgments route” in existing U.S. case law.⁴⁷ In the most notable case in which a U.S. court enforced an award annulled at the seat, *Chromalloy Aeroservices v. Arab Republic of Egypt*,⁴⁸ the district court enforced an Egyptian arbitral award even though the award had been set aside by the Egyptian courts. The district court viewed Article V as providing a permissive standard, under which the court could exercise its discretion about whether or not to enforce an award that had been set aside. Ultimately, the court rested its decision on Article VII of the Convention, holding that Sections 9 and 10 of the Federal Arbitration Act would require enforcement of the award if the Egyptian award were a U.S. award. That rationale is misconceived, however, since Sections 9 and 10 apply only to domestic U.S. awards and the court’s attempt to equate an Egyptian and a U.S. award in that way misconstrues Article VII.⁴⁹ However, in its opinion, the court also posed the question of whether the Egyptian set-aside judgment could itself be recognized and granted *res judicata* effect. The district court answered its own question, finding that recognition of the annulment decision would violate U.S. public policy in favor of “final and binding arbitration of commercial disputes”⁵⁰ and rejecting any concerns of comity in these circumstances.⁵¹

Taken to the extreme, a “judgments framework” that viewed finality in arbitration as a public policy justification to

⁴⁶ *Id.* § 4–16(b).

⁴⁷ Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the Judgment Route the Wrong Road?*, 4 J. INT’L DISP. SETTLEMENT 587 (2013).

⁴⁸ In the Matter of the Arbitration Between Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907 (D. D. C. 1996).

⁴⁹ For a further critique of the reasoning in *Chromalloy*, see Rau, *supra* note 9, at 102–11.

⁵⁰ *Chromalloy*, 939 F. Supp., at 913.

⁵¹ *Id.* at 913–14.

refuse to enforce any set-aside would look very much like the French approach of giving no weight to set-aside judgments. The inadequacies of that approach,⁵² would apply equally here, and thus a more nuanced analysis of the public policy exception to recognition of judgments is called for.

Another U.S. case that lends support to a recognition of judgments approach is a case—like most of the U.S. cases in which the issue has arisen—that respected the set-aside and *refused* to enforce the award. In *Spier v. Calzaturificio Tecnica, S. p. A.*,⁵³ an Italian court set aside an Italian arbitral award on the ground that the arbitrators exceeded their powers, a decision which was upheld by the Court of Cassation. The federal court in New York respected the set-aside judgment and refused to enforce the award. Although not specifically referencing the law of judgments, the court does appear to have given some attention to that point:

“[The applicant’s] reference to the permissive “may” in Article V(1) of the Convention does not assist him since, as in *Baker Marine*, [the applicant] has shown no adequate reason for refusing to recognize the judgments of the Italian courts.”⁵⁴

Several other U.S. decisions, although not explicitly adopting a judgments approach, may be read as consistent with such an approach. For instance, in *Baker Marine* the Second Circuit found that the petitioner “has shown no adequate reasons for refusing to recognize the [set-aside] judgments of the Nigerian court.”⁵⁵ Absent reasons for declining to recognize the annulment judgments, the Court refused to enforce the arbitration award.⁵⁶

However, for a judgments framework to offer an effective solution to the problem of annulled awards, a court must be able to point to criteria for assessing the judgment. The need for impartial tribunals, fairness of proceedings, and specific public policy relating to arbitration would appear to be relevant factors

⁵² Discussed *supra* pp. 121–26.

⁵³ *Spier v. Calzaturificio Tecnica, S.p. A.*, 71 F.Supp.2d 279 (S. D. N. Y. 1999).

⁵⁴ *Id.* at 288.

⁵⁵ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999).

⁵⁶ *Id.* at 198.

both in the United States and elsewhere.⁵⁷ Applied properly, such criteria should have led the D. C. Circuit Court of Appeals in *TermoRio S. A. E. S. P. v. Electranta S. P.*⁵⁸ to enforce a Colombian arbitral award, notwithstanding its annulment by the Colombian court. In *TermoRio*, the Colombian court set aside the arbitral award on the ground that selection of the ICC Rules in the arbitration agreement was invalid under Colombian law. The D. C. Court of Appeals might be said to have looked to the law of judgments in that it considered whether the Colombian judgment violated any “basic notions of justice” that would justify non-recognition of the Colombian judgment.⁵⁹ The court viewed the public policy exception to judgments as a narrow one,⁶⁰ found no violation of public policy, and therefore respected the set-aside. However, the court erred in failing to invoke the public policy exception to take account of how accepted international arbitration practice was frustrated by the Colombian set-aside. In fact, the Colombian judgment, annulling an arbitration award on the parochial ground that the use of ICC rules was invalid under Colombian law, is inconsistent with international arbitration principles; accordingly, such a judgment should have been seen as repugnant to the public policy of the United States.

The decision of the Amsterdam Court of Appeal in *Yukos Capital SARL v. OAO Rosneft*,⁶¹ reflects how a “recognition of foreign judgments” framework operates to permit enforcement of an award that has been set aside. The Dutch court granted leave to enforce in the Netherlands four arbitral awards issued by the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation in arbitral proceedings brought by Yukos Capital against Yuganskneftegaz to recover on four loan agreements. The award in favor of

⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 44, § 482.

⁵⁸ *TermoRio S. A. E. S. P. v. Electranta S. P.*, 487 F.3d 928 (D. C. Cir. 2007).

⁵⁹ *Id.* at 938–39.

⁶⁰ *Id.* at 939 (“Accepting that there is a narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States, appellants’ claims still fail.”).

⁶¹ *Yukos Capital SARL v. OAO Rosneft*, Hof’s-Amsterdam [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

Yukos was set aside by the commercial court in Russia, and that decision was upheld by two Russian appeals courts. Among the grounds relied upon for setting aside the award was a failure to disclose that the managing partner of the law firm representing Yukos had organized conferences in which the arbitrators had participated. Although the district court in the Netherlands refused to enforce the award based on the Russian set-aside judgment, the Amsterdam Court of Appeal reversed. The Court of Appeal looked to rules of private international law to determine whether the Russian court judgments should be recognized. It concluded that a foreign judgment rendered by a judicial body that is not impartial and independent should not be recognized.

Another recent Dutch decision considered similar issues. In *Maximov v. NLMK*, an award, annulled in Russia, but enforced in France, was also presented to the Dutch courts for enforcement. The first instance court confirmed the “judgments” approach, granted the annulment judgment and refused enforcement of the award.⁶² The Amsterdam Court of Appeal did not reverse, but did not explicitly invoke the judgments-framework rationale it adopted in *Yukos*.⁶³ Indeed, the Court of Appeal referred to aspects of its judgment in *Yukos* as presenting a “troublesome picture”.⁶⁴ Nevertheless, the Court of Appeal concluded that the presumption of recognition given to a judgment is trumped only if the party resisting recognition of the foreign annulment provides sufficiently specific evidence of partiality and dependence.⁶⁵ The parties were instructed to elaborate on a number of specific questions of Russian law relating to annulment of arbitral awards and asked to comment more specifically on the proceedings in the Russian court.⁶⁶ Whether this case indeed marks a change in the *Yukos* judgments approach is unclear but perhaps the subsequent decision will prove to be enlightening.

In some countries, one potential complicating issue in a

⁶² *Maximov v. NLMK*, Amsterdam District Court, Nov. 17, 2011 (Neth.), XXXVII Y.B. COM. ARB. 274 (2012).

⁶³ Hof's-Amsterdam 8 September 2012, No. 200.100.508/1, (*Maximov/NLMK*) (Neth.).

⁶⁴ *Id.* para. 2.11

⁶⁵ *Id.*

⁶⁶ *Id.* paras. 2.13–15.

judgments approach to recognition and enforcement might be the reciprocity requirement, when it is part of national judgments law. Reciprocity was an issue for a Ukrainian court that was asked to recognize English arbitral awards made in favor of a Russian company (as assignor of a Cypriot company) against a Malaysian company (Pacific).⁶⁷ The court in the U.K. set aside the awards,⁶⁸ but the Ukrainian court chose to enforce the awards. The Ukrainian court held that the lack of reciprocity between Ukraine and the U.K. with respect to the recognition and enforcement of judgments meant that the English court set-aside judgment was not entitled to effect. One may be somewhat skeptical of the court's determination that there was in fact a lack of reciprocity between the U.K. and Ukraine in light of a different Ukrainian court's conclusion that there was reciprocity with respect to recognition and enforcement of judgments.⁶⁹ Just as there is a danger of parochial set-asides, there is a danger of "parochial" refusals to respect a set-aside where, as here, it is the local party who asks for recognition of the award and wants the set-aside ignored.

The judgments framework described above should be limited to the treatment of set-asides at the place of arbitration (or under the law of arbitration) as expressly provided for in the New York Convention. As shown by Maxi Scherer elsewhere,⁷⁰ and as explained more fully in Part III of the paper, the use of a "judgments route" raises some important practical and theoretical issues and thus should not extend to judgments confirming, rec-

⁶⁷ *Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd.*, Court of Appeal of the Odessa Region, July 16, 2012, No. 1511/2458/2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/25273828>.

⁶⁸ *Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd.*, [2011] EWHC (Comm) 923. The English court set aside the awards on the ground that no valid arbitration agreement existed, and therefore, the tribunal had lacked jurisdiction. This had been a primary issue in the arbitration itself, and largely came down to whether the terms of the contract had been adequately agreed to over the course of a particular telephone conversation. Evidently, the English court thought not, basing its reasoning on the conclusions in the earlier case of *Grace Shipping v. Sharp & Co.*, [1987] 1 Lloyd's Rep. 207.

⁶⁹ *BTA Bank v. Ablyazov and others*, District Court of Kyiv, June 1, 2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/24526659>.

⁷⁰ Scherer, *supra* note 47.

ognizing, or enforcing arbitral awards.⁷¹ The distinction between a judgment that sets aside an award and other post-award judgments is justified by the Convention itself. The Convention provides in Article V(1)(e) for an exception to recognition and enforcement when an award is set aside, but is silent as to the effects of other post-award judgments.⁷²

However, even the attempt of using judgments principles to evaluate a set-aside has been met with a number of criticisms.⁷³ Among the specific objections are that a judgments approach to set-aside is superfluous in some cases (*e.g.* when it is not a primary jurisdiction that renders the set-aside), vague in others, fails to provide international harmony, is at odds with the text of the Convention and creates the effect of blacklisting certain legal systems.

Indeed, a judgments approach is unnecessary where the set-aside occurs at a place other than the primary jurisdiction because the Convention itself does not authorize an exception to recognition and enforcement in such a case. However, as for objections

⁷¹ See *infra* p. 330.

⁷² Under existing law, the distinction between set-aside and confirmation judgments may encounter difficulty. The Uniform Foreign Country Money Judgments Recognition Act, excludes foreign arbitral awards and agreements to arbitrate from coverage of the Act, leaving that to federal law, but then states that “[a] judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.” THE UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT, § 2 cmt. 3 (2005). *Cf.* AM. L. INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006), that also brings judgments of foreign courts confirming or setting aside awards within its scope, but does so only for the purpose of ensuring that federal and not state law governs the question. See § 1(a)(iii). The ALI proposal makes clear that the Act itself does not resolve the question of when a judgment setting aside or confirming a foreign arbitral award should be recognized, but only that *if the judgment is to be recognized* it meet the criteria set out in the proposed Act. Accordingly, there is room to rely on the Convention to draw the distinction between judgments of set-aside and judgments confirming an award.

⁷³ See Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, Apr. 28, 2009, 27 J. INT’L ARB. 179, 190–93 (2010); Scherer, *supra* note 47.

to using a judgments framework to assess judgments of set-aside at the seat, there are several responses. Unless there is a Protocol to deal with the problem of annulled awards, there will never be any harmonization or consistency in the approach to awards that have been set aside. It is true that the judgments solution is based on the national judgments law in each Contracting State and therefore lacks uniformity. However, in looking at recognition and enforcement practices comparatively, one finds a basic similarity and generally agreed-to criteria.⁷⁴ Moreover, a “judgments” solution is less vague than the mere “discretion” that appears to be the only viable alternative and a “judgments framework” offers certain identifiable principles—and a set of legal rules to apply—to determine when a set-aside should be respected and when it should not.

Furthermore, the arguments that a judgments framework is at odds with the text of the Convention are not convincing.⁷⁵ Professor Albert Jan van den Berg argues that the judgments approach creates “‘a mirror recognition in the reverse’: a foreign arbitral award can be recognized if a foreign court judgment is not recognized . . . [which] turn[s] the New York Convention upside down.”⁷⁶ The fact that the judgments approach is not explicitly provided for in the Convention is of little significance. Indeed, if there were such a requirement, no method for determining when an annulled award should be enforced is viable because the Convention is silent on that point.⁷⁷ In fact, a discretionary standard arguably does the least violence to the Convention’s inclusion of the word *may* (which various standards discussed above appear to transform into a *must* or *must not*), and of the discretionary standards, arguably the judgments approach is the most principled.

Similarly, a judgments approach does not lead to the black-listing of various legal systems more than any discretionary standard.⁷⁸ To be sure, the danger of ruling on countries’ legal

⁷⁴ See generally Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 79 KING’S L.J. 235, 237–38 (2008).

⁷⁵ Van den Berg, *supra* note 73, at 190–93.

⁷⁶ *Id.* at 190 (internal quotation marks omitted).

⁷⁷ Discussed *supra* pp. 116–18.

⁷⁸ Van den Berg, *supra* note 73, at 192.

systems is avoidable when either an “always enforce annulled awards” or “never enforce annulled awards” standard is adopted, but these approaches are problematic for other reasons.⁷⁹ Moreover, the danger of courts sitting in judgment of other countries’ judiciaries appears overstated. Courts have long employed the judgment recognition framework to non-arbitration related judgments, and no discernible blacklist of legal systems has resulted. Indeed, the class of cases where a party attempts to enforce a set-aside award is relatively small and therefore unlikely to culminate in the wholesale blacklisting of legal systems.

In sum, private international law rules on recognition and enforcement of judgments offer identifiable principles to assess whether or not a set-aside of an arbitral award in the courts of the seat should be respected.

III. FORUM SHOPPING AND OTHER POST-AWARD JUDGMENTS

The previous part of this paper has dealt with the issue of forum shopping in relation to set-aside judgments. This part addresses the same issue in relation to other post-award judgments, *i.e.* judgments confirming, recognizing or enforcing arbitral awards. Like set-aside judgments, those other post-award judgments can lead to situations of forum shopping. For instance, one of the parties may obtain a confirmation judgment in one country, typically at the seat of the arbitration,⁸⁰ and then subsequently rely on the preclusive effect of that confirmation judgment in subsequent recognition and enforcement proceedings relating to the same award in another country.

The “judgment route” first proposed by Linda Silberman and adopted in Part II of this paper consists of applying foreign judgment principles when assessing whether or not to give effect to a foreign set-aside. It leaves open the question whether, and if so how, foreign judgment principles should be applied to other

⁷⁹ *Supra* pp. 314–21.

⁸⁰ Except in the unusual case in which the parties have chosen to submit the arbitration to a law other than the law of the seat. In this situation, the award might also be presented for set-aside proceedings in the country of the law chosen by the parties. See New York Convention art. V(1)(e) referring to the “authority of the country in which, *or under the law of which*, that award was made” as the competent authority for set-aside proceedings (emphasis added).

post-award judgments. We will now address this question, first regarding confirmation judgments, and second regarding recognition and enforcement judgments.

A. Foreign Confirmation Judgments

For foreign confirmation judgments,⁸¹ the use of foreign judgments principles has long been accepted under the heading of the so-called parallel entitlement approach. This doctrine allows the award creditor, having obtained a foreign confirmation judgment, to seek recognition and enforcement of that judgment, in lieu and in place of the award. In other words, the enforcing court grants effect to the foreign confirmation judgment, applying the forum's foreign judgment principles.

The parallel entitlement approach is followed in the U.S. according to well-established case law⁸² and endorsed by the draft U.S. Restatement on International Commercial Arbitration.⁸³ According to the Restatement, “[o]nce an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both.”⁸⁴ Similar options can be found in

⁸¹ The term “confirmation judgment” will be used in this section as encompassing judgments refusing to set aside an award, unless mentioned otherwise.

⁸² *Ocean Warehousing BV v. Baron Metals and Alloys Inc.*, 157 F.Supp.2d 245 (S. D. N. Y. 2001); *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Oriental Commercial & Shipping Co. v. Rosseel NV*, 769 F. Supp. 514 (S. D. N. Y. 1991); *Victrix SS Co. v. Salen Dry Cargo AB*, 825 F.2d 709 (2d Cir. 1987); *accord* *In re Waterside Ocean Navigation Co., Inc.*, 737 F.2d 150 (2d Cir. 1984); *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975). *Cf.* *Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973).

⁸³ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–3(d) (Tentative Draft No. 2, 2012).

⁸⁴ *Id.* § 4–3 cmts, at 72, lines 10–12. The exact scope of the parallel entitlement approach, however, is often not clearly identified. Although it is clear that the parallel entitlement approach allows parties an option (*i.e.*, to seek enforcement of the award or the foreign confirmation judgment), the precise terms of such option are less clear. Does the parallel entitlement approach provide mutually exclusive alternatives (*i.e.*, the parties must choose to enforce *either* the award *or* the confirmation judgment) or does it provide non-

other common law countries, including Australia,⁸⁵ India,⁸⁶ and Israel.⁸⁷ In the U.K., courts have sometimes granted award creditors the option to enforce a foreign confirmation judgment instead of the award;⁸⁸ however, it is unclear whether this rule applies to awards falling under the New York Convention.⁸⁹ Variants of the parallel entitlement approach also exist—or existed—to some

exclusive paths to enforcement (*i.e.*, the parties may choose to seek enforcement of *both* the award *and* the confirmation judgment)? If it is the latter, then may the parties pursue both options in parallel (*i.e.*, seek enforcement of the award and the confirmation judgment *at the same time*) or only as subsequent actions (*i.e.*, seek enforcement of the confirmation judgment only *after* an enforcement action regarding the arbitral award was unsuccessful, and vice versa)? From a U.S. perspective at least, it seems that the parallel entitlement approach allows the broadest possible option. U.S. courts have taken no issue with the fact that the party sought enforcement of the award and the confirmation judgment at the same time (*Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973)) or in subsequent actions (*Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994), allowing an action to enforce a foreign validating judgment even though the same court had found in a previous action that the enforcement of the award itself was time-barred). *But see* *Commission Import Export S.S. v. The Republic of the Congo*, Civ. No. 12-743, 2013 WL 76270 (D. D. C., Jan. 8, 2013), discussed *infra* p. 140.

⁸⁵ *Biakh v. Hyundai Corp.*, Supreme Court of New South Wales, Oct. 17, 1988 (Australia), XV Y.B. COM. ARB 360 (1990).

⁸⁶ *Harendra H. Metha v. Mukesh H. Metha*, Supreme Court, May 13, 1999 (India), XXV Y.B. COM. ARB 721 (2000).

⁸⁷ CA 10854/07 *Pickholz v. Sohachesky*, Mar. 17, 2010 (Isr.) (cited by Talia Einhorn, *The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards*, 12 Y.B. PRIVATE INT'L L. 3 (2010)).

⁸⁸ *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, [1952] 1 ALL E.R. 1053, [1952] Q.B. 439; *International Alltex Corp. v. Lawler Creations Ltd.*, [1965] IR 264 (High Ct., Kenny, J.); Jonathan Hill, *The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England*, 8 J. PRIVATE INT'L L. 159, 177 (2012).

⁸⁹ DICEY, MORRIS AND COLLINS: *THE CONFLICTS OF LAWS*, 902 paras. 16–165 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012) (stating that for awards falling within the scope of the New York Convention, “[i]n almost all cases, the proper course will be direct enforcement of the New York Convention award itself.”).

extent in some civil law jurisdictions. For instance, the parallel entitlement approach was applied in Germany until a recent Supreme Court decision, as discussed below.⁹⁰ Switzerland still applies the parallel entitlement approach in most circumstances.⁹¹

One might argue that the parallel entitlement approach does not involve any forum shopping strictly speaking. Indeed, just like a set-aside, the confirmation of an award can (generally) only be sought at the seat of the arbitration. The award creditor thus has no choice and cannot “shop around” to obtain a favorable confirmation judgment.

Nevertheless, the parallel entitlement approach results in situations that are equivalent to forum shopping. Under the parallel entitlement approach, the award creditor may *indirectly* obtain enforcement of the award *qua* the foreign confirmation judgment, although the *direct* route of enforcing the award itself is barred in the forum. For instance, in *Seetransport v. Navimpex*, a U.S. court refused enforcement of a foreign award (with seat in France) on the basis that it was time-barred. The same court granted enforcement of a French judgment having confirmed the award since the statute of limitations for enforcing the French judgment

⁹⁰ Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.), discussed *infra* p. 144. For previous case law, Swiss and German buyer v. German seller, Bundesgerichtshof [BGH] [Federal Supreme Court], May 10, 1984 (Ger.), X Y.B. COM. ARB. 427, 428–29 (1985); U.S. exporter X v. German (F.R.) importer Y, Bundesgerichtshof [BGH] [Federal Supreme Court], Mar. 27, 1984 (Ger.), X Y.B. COM. ARB. 426 (1985); Frankfurt am Main Court of Appeal, July 13, 2005, NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006); Hamburg Court of Appeal, Nov. 5, 1991, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [New Legal Weekly Judicial Report] 658.

⁹¹ Tribunal Federale (TF) (Federal Supreme Court) July 28, 2010 (Switz), 30 ASA BULL. 97 (2012); Swiss Federal Tribunal, 4A.137/2007, July 20, 2007, 25 ASA BULL. 798, 803 (2007). COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 812 (Jean-François Poudret & Sébastien Besson 2nd ed. 2007). *Contra* M. Patocchi & C. Jermini, Art. 194 para 11, *in* INTERNATIONALES PRIVATRECHT (Heinrich Honsell et al. eds., 2nd ed. 2007). For France, see Dominique Hascher, *Recognition and Enforcement of Arbitration Awards and the Brussels Convention*, 12 ARB. INT'L. 233, 254 (1996).

had not expired yet.⁹²

A recent 2013 U.S. decision sheds some doubts as to whether this option remains.⁹³ In this case, the award creditor had obtained a judgment from the London High Court recognizing a foreign award in the U.K., and sought enforcement of this English judgment in the U.S. at a moment in time when an action to enforce the award was already time-barred.⁹⁴ The District Court of the District of Columbia dismissed the action, taking issue with the award creditor's "maneuver" trying to profit from the longer limitations period applying to foreign judgment enforcement actions, instead of the shorter limitations period applying to foreign awards.⁹⁵

One can imagine other situations in which the award creditor obtains indirectly the enforcement of the foreign confirmation

⁹² See *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

⁹³ *Commission Import Export S. S. v. The Republic of the Congo*, 916 F.Supp.2d 48 (D.D.C. Jan. 8, 2013). The decision rejected on preemption grounds an attempt to rely upon the Uniform Foreign-Country Money Judgments Recognition Act to obtain recognition of an earlier English judgment recognizing an award that itself would have been barred by the three year statute of limitations provided for in § 207 of the Federal Arbitration Act. The case should have been much easier than the court made it because the English judgment—one of recognition outside of the arbitral seat—should not have been considered a judgment entitled to recognition. See *infra* at III.B. The preemption point has more relevance where courts have adopted the parallel entitlement approach so that a party that has obtained a confirming judgment in a court at the *situs* of the arbitration has both an award and a judgment that can be enforced.

⁹⁴ In the U.S., proceedings to seek recognition or enforcement of a New York Convention award must be filed within 3 years. See Federal Arbitration Act, 9 U.S.C. § 207 (2006). The limitations period for actions to recognize or enforce foreign judgments is a matter of state law.

⁹⁵ The court held that such "maneuver" was preempted since it would create an obstacle to the accomplishment of the purposes of the statute of limitations contained in the Federal Arbitration Act (Federal Arbitration Act, 9 U.S.C. § 207 (2006)), which aims at creating a uniform limitations period and protecting the award debtor's interest in finality. *Commission Import Export S. S.*, 916 F.Supp.2d, at 54.

judgment although the direct enforcement of the award would not have been possible in the forum. This is particularly the case if the foreign court used a more lenient standard than the one that the enforcing court would have itself applied to the control of the award. This may lead to situations in which the foreign award judgment is enforced, although the award itself would not have been permitted enforcement.⁹⁶

Such a dichotomy (refusal to enforce award but enforcement of the foreign confirmation judgment relating to the same award) is due to the fact that the parallel entitlement approach leads to the application of different control standards.⁹⁷ The enforcement of foreign awards is governed in most cases by the New York Convention, and the control focuses on the arbitral tribunal (*e.g.*, its composition and jurisdiction based on a valid arbitration agreement), the conduct of the proceedings before it (*e.g.*, a fair arbitral process), and the resulting award (*e.g.*, no violation of public policy).⁹⁸ To the contrary, the enforcement of foreign judgments is generally governed by the *lex fori*'s principles (or any regional harmonizing instrument) and the control focuses on the jurisdiction of the foreign court, the proceedings

⁹⁶ The following hypothetical case may illustrate this point: assume an award was rendered in country A and the arbitral tribunal found it had jurisdiction vis-à-vis a party that has never signed nor intended to be bound by the arbitration agreement. Assume country A has a very liberal regime concerning the confirmation of awards rendered in that country, only permitting refusal of confirmation of the award on grounds of due process and public policy, thus leaving the control of the validity existence and scope of the arbitration agreement entirely to the arbitral tribunal. The award creditor obtains confirmation of the award in country A applying its liberal regime. The award creditor then obtains enforcement of the confirmation judgment in country B since the validating judgment complies with country B's judgment standard, *i. e.* the validating judgment was rendered by a competent court in fair proceedings and was not obtained by fraud. As a consequence, the confirmation judgment is enforced in country B, although had the award creditor applied for the enforcement of the award in country B directly, country B would have applied the New York Convention standard under which the courts of country B would have controlled the existence of a valid arbitration agreement and would have refused the enforcement of the award.

⁹⁷ For more detail, see Scherer, *supra* note 47.

⁹⁸ New York Convention, *supra* note 1, art. V.

conducted before it, and the judgment it rendered.⁹⁹ Importantly, most developed jurisdictions generally prohibit review of the findings of the foreign court. As a consequence, a court cannot refuse enforcement of a foreign judgment on the basis that it would have reached a different result, save where the decision of the foreign court is so shocking that it amounts to a violation of the forum's public policy.

Accordingly, if the award creditor chooses enforcement of the foreign confirmation judgment (in lieu of enforcement of the award itself), the control by the enforcing court is limited to the jurisdiction of the foreign court (not the arbitral tribunal), the proceedings in the foreign country (not the arbitration proceedings) and any possible violation of public policy by the judgment (not by the award).¹⁰⁰ In particular, the enforcing court cannot review the findings of the foreign court regarding the validity of the award, including, for instance, whether there was a valid arbitration agreement, an independent and impartial arbitral tribunal and a fair arbitral process. These issues are left to the exclusive control of the foreign court.

As such, the results of the parallel entitlement approach are equivalent to forum shopping: it permits the award creditor to change the applicable control standard by using a foreign confirmation judgment, and to eventually obtain indirect enforcement of the award (*qua* the foreign confirmation judgment) where the direct route of enforcing the award in the forum would have been barred.

The logical follow-up question is whether such results are problematic and should be prevented. One might argue that the indirect enforcement of the award *qua* the foreign award judgment under the parallel entitlement approach should always be allowed because it favors the enforcement of awards.¹⁰¹ As such, it is in line with the pro-arbitration and pro-enforcement bias under the New York Convention and in many arbitration-friendly

⁹⁹ Silberman, *supra* note 74, at 237–38.

¹⁰⁰ Einhorn, *supra* note 87, at 60.

¹⁰¹ George A. Bermann, “Domesticating” the New York Convention: the Impact of the Federal Arbitration Act, 2(2) J. INT’L DISP. SETTLEMENT 317, 322 (2011).

jurisdictions.¹⁰²

However, it does not seem sensible to allow the enforcement of foreign awards—directly or indirectly—if the courts at the place of enforcement have no control over the most basic requirements concerning the award’s validity. As detailed above, as a result of the change in the relevant control standard under the parallel entitlement approach, the enforcing court is not in a position to review the findings of the foreign court as to the most fundamental requirements of international arbitration, including (i) the existence of a valid arbitration agreement, (ii) an independent and impartial arbitral tribunal, or (iii) a fair arbitral process. Leaving these issues to the exclusive control of the foreign court seems highly problematic.

In addition, there are a number of other possible criticisms to be made against the parallel entitlement approach.¹⁰³ First, the parallel entitlement approach is problematic because it leads to a duplication of the cause of action.¹⁰⁴ As explained above, the parallel entitlement approach allows the award creditor to seek enforcement of *both* the award and the foreign award judgment in parallel or subsequent actions.¹⁰⁵ This duplication of the cause of

¹⁰² See, e. g., *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“section 2 [FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements”); *IPCO (Nigeria) Ltd. v. Nigerian Nat’l Petroleum Corp.*, [2005] EWHC 726 (“[there is] a predisposition to favor enforcement of New York Convention Awards . . . even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award.”); *Hainan Mach. Imp. & Exp. Corp. v. Donald & McArthur Pte Ltd.*, High Court (Sing.), XXII Y.B. COM ARB. 771, 778 (1997) (“the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist”).

¹⁰³ Martin L. Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Award as Judgment under the Parallel Entitlement Approach*, CORNELL L. REV. 573, 588–89 (2007).

¹⁰⁴ For more details, see Scherer, *supra* note 47.

¹⁰⁵ This potential was realized, for instance, in the U.S. case *Seetransport v. Navimpex* where a party first unsuccessfully sought enforcement of an arbitral award and then sought enforcement of a French judgment relating to the same award. *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v.*

action may be seen as a judicial harassment of the award debtor. After having successfully fought the action seeking to enforce the award, the award debtor also must defend against the subsequent action seeking to enforce the foreign award judgment. This risk of judicial harassment was identified by the German Supreme Court as one of the main reasons why, in 2009, it departed from its previous line of case law that had allowed a parallel entitlement approach. Supported by the large majority of commentators,¹⁰⁶ the *Bundesgerichtshof* explained that a parallel entitlement approach was not compatible with the legitimate interests of the award debtor, noting that “[t]he protection of the debtor commands that he/she is not confronted with more than one enforcement proceeding in one and the same forum.”¹⁰⁷ Indeed, whereas the multiplication of post-award proceedings concerning the same award in *different* countries may seem a natural consequence of the multitude of separate legal orders existing in the world, the multiplication of proceedings concerning the same award in the *same* country should be avoided. There is no reason why the award creditor should be allowed to get “two bites at the apple” in the same forum.

Second, the parallel entitlement approach ignores the fact that confirmation judgments may have no enforceable subject matter. Enforcement requires that the judgment contains an order that can be executed, if necessary by use of the forum’s public force. This requirement is not met, in particular, for declaratory

Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994).

¹⁰⁶ See e. g., H. Plafmeier, *Ende des “Doppelexequatur” bei ausländischen Schiedssprüchen* [End of the “Doppelexequatur” in foreign arbitral awards], ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 82 (2010) (Ger.); R. Schutze, *Der Abschied vom Doppelexequatur ausländischer Schiedssprüche* [Farewell to Doppelexequatur of Foreign Arbitral Awards], RECHT DER INTERNATIONALEN WIRTSCHAFT [RDIW] [Law of the International Economy] 817 (2009); cf. more critical, G. Borges, *BGH: Doppelexequatur von Schiedssprüchen unzulässig* [Doppelexequatur of arbitral awards inadmissible], KOMMENTIERTE BGH-RECHTSPRECHUNG LINDENMAIER-MÖHRING [LMK] [Annotated BGH Jurisdiction Lindenmaier-Moehring] 30812 (2010).

¹⁰⁷ Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009 (Ger.), ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (286), 2009.

judgments or judgments simply dismissing a claim.¹⁰⁸ In most civil law jurisdictions, confirmation judgments (or judgments refusing to set aside the award) merely contain a non-enforceable declaration as to the validity of the award and/or a dismissal of the underlying claim to set aside the award. As such they are not capable of enforcement. For instance, in *Seetransport v. Navimpex*, the U.S. court enforced a French judgment in which the Paris Court of Appeal found that the award was valid and refused to set it aside.¹⁰⁹ Such a judgment has no enforceable subject matter and should thus not be open for enforcement in the U.S. or elsewhere.

To the contrary, in most common law jurisdictions, the foreign court enters a judgment on the terms of the award, rather than just declaring the award confirmed or not set aside.¹¹⁰ Arguably, if the court orders the award debtor to perform the award, *e.g.* to pay the damages awarded therein, the judgment contains an enforceable content. Accordingly, some authors make a distinction between simple declarations as to the enforceability of the award and judgments entering the terms of the award, with only the latter to be open for enforcement in a third country.¹¹¹

However, it would be unsatisfactory if the options of the award creditor under the parallel entitlement approach depended on such a formalistic difference, *i.e.*, whether or not the foreign court entered a judgment in the terms of the award or issued a declarative order. Also, there might be instances where the difference between the two categories (declarative order and judgment upon award) is not easy to establish.¹¹² In any event, irrespective of the formalistic differences, in both cases, the ultimate goal is the same, *i.e.* to grant effect to the award's findings. In the words

¹⁰⁸ See LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14-003, at 64.

¹⁰⁹ *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

¹¹⁰ For instance, under English law, the court may issue an enforcement order or enter judgment in the terms of the award. See Arbitration Act, 1996, 15 Eliz. 2, c. 23, §§ 66(1)-66(2), 101(3) (Eng.) (for New York Convention awards).

¹¹¹ Hascher, *supra* note 91, at 245-46; LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 16-163, at 902.

¹¹² Hascher, *supra* note 91, at 247 (referring to "labelling problems").

of the Spanish Supreme Court, in both cases, “the claim’s real aim [i]s to enforce the arbitral award.”¹¹³ Accordingly, it is therefore only consistent to limit the award creditor’s options to do exactly that, *i.e.* to seek enforcement of the initial award, and not of the subsequent confirmation award judgment.

B. Foreign Recognition or Enforcement Judgments

This section deals with cases in which the award creditor has obtained a foreign recognition or enforcement judgment and seeks to rely on that foreign judgment in subsequent proceedings concerning the same award in the forum, using relevant doctrines of *res judicata* or claim/issue estoppel. Contrary to the situation of confirmation judgments described in the previous section, this situation is a clear-cut case of forum shopping. With very few limitations,¹¹⁴ the award creditor may “shop around,” go to an arbitration-friendly jurisdiction, obtain a positive recognition and enforcement judgment, and seek to rely on the judgment’s preclusive effects in the forum.

In a series of recent cases, courts in the U.K. have applied relevant English foreign judgment principles (including principles of issue estoppel) to grant effect to foreign recognition or enforcement judgments.¹¹⁵ In 2011, in *Chantiers de l’Atlantique SA v. Gaztransport & Technigaz SAS*,¹¹⁶ the High Court dealt with an award in which the arbitral tribunal (with seat in London) had dismissed all claims. The successful respondent in the arbitration

¹¹³ *Union Naval de Levante SA v. Bisba Comercial Inc.*, S.T.S. [highest court of ordinary jurisdiction], Oct. 9, 2003 (Spain), XXX Y.B. COM. ARB. 623, 624 (2005).

¹¹⁴ *See supra* note 22.

¹¹⁵ The relevant principles of issue estoppel under English law are as follows: (1) the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; (2) the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and (3) the issues raised must be identical. *See Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (no 2)*, [1967] 1 A.C. 853 (H.L.); *The Sennar (no 2)*, [1985] 1 W.L.R. 490, 494 (H.L.); LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14–030 ff, at 679.

¹¹⁶ *Chantiers de l’Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3883 (Eng.).

sought recognition and enforcement of the award in France and the other party resisted arguing that the award had been obtained by fraud. The French courts dismissed this latter argument and declared the award enforceable. The other party also applied for the award to be set aside in the U.K. on the basis that it was obtained by fraud. Flaux J—after having found that the award had not been obtained by fraud—held *obiter* that the same party had already raised these matters in resisting recognition and enforcement before the French courts and lost, and thus was barred under the relevant English law principles of issue estoppel from raising those matters again before the English court.¹¹⁷

A similar analysis can be found in the U.K. decision relating to the *Yukos* dispute discussed earlier.¹¹⁸ As mentioned above, an arbitral tribunal with seat in Russia had rendered four awards in favor of the claimant and those awards were subsequently set aside by the Russian courts. The claimant was nevertheless successful in enforcing the awards in the Netherlands, since the Dutch courts found that the Russian set-aside judgments were the result of partial judicial proceedings.¹¹⁹ Although having obtained payment of the award, the claimant then sought recognition and enforcement of the award in England and in the U.S. in order to collect post-award interest (close to U.S. \$160 million). In the English proceedings, the preliminary question arose as to whether the respondent could re-litigate the (im)partial nature of the judicial proceedings that led to the Russian set-aside judgments, or whether it was barred from doing so due to the earlier findings on this issue by the Dutch courts.

The High Court, *as per* Hamblen J, found that this was a case of issue estoppel and that the respondent was barred from reopening the issue of the (im)partial nature of the Russian proceedings which had been decided by the Dutch courts in a final and binding judgment.¹²⁰ On appeal, the Court of Appeal agreed

¹¹⁷ *Id.* [313]–[318].

¹¹⁸ *See supra* p. 326.

¹¹⁹ *Yukos Capital SARL v. OAO Rosneft, Hof's-Amsterdam* [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

¹²⁰ *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2011] EWHC (Comm) 1461, [107] (Eng.). On the background of the dispute, *see* J. van de Velden, *The*

that the relevant question was whether the Dutch judgment met the English requirements for issue estoppel. However, contrary to the first instance judge, the Court of Appeal found that those requirements were not met since the issues at stake were not the same. The Court of Appeal held that the question of whether the Russian courts should be regarded as partial and dependent was not the same issue in the Dutch and in the English context:

“The standards by which any particular country resolves the question whether courts of another country are ‘partial and dependent’ may vary considerably [. . .]. It is our own [English] public order which defines the framework for any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court . . . ”¹²¹

In other words, because the legal standard for public policy is a different one in each country, the issues at stake were not the same and the Court of Appeal did not grant estoppel effect to the findings in the Dutch judgment. It is nevertheless clear that the Court of Appeal would have no objections in principle to applying relevant principles of issue estoppel and granting preclusive effect to the foreign recognition and enforcement judgment if the

“*Caution lex fori*” approach to Foreign Judgments and Preclusion, 61 INT’L & COMP. L.Q. 519, 521 ff. (2012).

¹²¹ *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2012] EWCA (Civ) 855, [151] (Eng.). Cf. the points made by Linda Silberman in an earlier article in connection with Yukos’ attempt to enforce both the arbitral award (and/or the Dutch judgment) in New York. For several reasons, the Dutch judgment, even as the judgment later in time, should not be the focus for the New York court. Rather, the court in New York should apply its judgment-recognition principles to the Russian judgment setting aside the arbitral award. First, the Dutch judgment is analogous to an exequatur on a judgment; it has only territorial reach and thus need not be “recognized.” Second, even applying principles of U.S. judgments—recognition law, a foreign judgment—here the Dutch judgment—need not be recognized if it conflicts with another final and conclusive judgment. Thus, it is for the New York court to form an independent conclusion about whether to respect the Russian set-aside based on principles of U.S. judgment recognition. See Silberman, *supra* note 43, at 36.

test for issue estoppel was met.

Finally, the same rationale can also be found in a short *obiter* remark in the U.K. Supreme Court's decision in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.¹²² In this case, recognition and enforcement had been denied by the lower courts in the U.K. and the case was before the U.K. Supreme Court when set-aside proceedings concerning the same award were brought in France. Lord Mance noted that "an English judgment [in the recognition and enforcement proceedings] holding that the award is not valid could prove significant in relation to [the French] proceedings if French courts recogni[z]e any principle similar to the English principle of issue estoppel."¹²³

In sum, there can be no doubt that English courts grant preclusive effect to foreign recognition or enforcement judgments if the relevant test for issue estoppel is met (and they expect courts in other countries to do the same).¹²⁴ Accordingly, an award

¹²² *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.).

¹²³ *Id.* [29]. Lord Collins took a more nuanced approach, saying that determinations made by the court at the seat in an annulment action may result in preclusive effect over subsequent enforcement actions, but did not suggest that preclusion runs the other way. Ultimately, of course, the French court in upholding the award gave no effect to the English judgment, including any preclusive effect to the determinations of the English court. *Gouvernement de Pakistan, Ministère des Affaires Religieuses v. Société Dallah Real Estate and Tourismes Holding Co.*, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011 (Fr.), XXXVI Y.B. COM. ARB. 590 (2011). *Dallah* applied for enforcement of the award in France and the Government subsequently sought to set the award aside there. In upholding the award, the French court did not grant preclusive effect to the English decision. For a discussion on this point, see G. A. Bermann, *The U.K. Supreme Court Speaks to International Arbitration: Learning from the Dallah Case*, 22 AM. REV. INT'L ARB. 1, 8–9, (2011).

¹²⁴ *Cf.* not related to judgments recognizing or enforcing foreign awards but judgments recognizing or enforcing foreign judgments (so-called "judgments on judgments"): *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443 (H.L.) (indicating, *obiter*, that an Italian judgment enforcing a foreign judgment from St. Vincent might have issue estoppel effect in England in proceedings relating to the same St Vincent judgment); *House of Spring Gardens Ltd. v. Waite*, [1985] F.S.R. 173

creditor may obtain recognition or enforcement of an award outside the U.K. and subsequently rely on the preclusive effect of the foreign judgment in subsequent recognition and enforcement proceedings concerning the same award in the U.K.

In the U.S., there seems to be little case law on this issue. In *Belmont Partners LLC v. Mina Mar Group Inc.*, one party sought confirmation in the U.S. of an award rendered in the U.S. whereas the other party cross-motivated to vacate the award.¹²⁵ In enforcement proceedings concerning the same award in Canada, the Superior Court of Justice in Ontario had recognized the award and ordered its enforcement. The U.S. court found that the Canadian judgment merited comity and its findings constituted *res judicata* for the U.S. court.¹²⁶

The draft Restatement on International Commercial Arbitration adopts this approach. According to the Restatement, a U.S. court “[i]n deciding whether to grant post-award relief, [and whether to] re-examine a matter decided at an earlier stage of the proceedings [. . .] by a foreign court,” should apply the forum’s relevant principles, including “claim and issue preclusion, and recognition of foreign judgments.”¹²⁷ Accordingly, if the forum’s relevant standards on claim or issue preclusion are met, a U.S. court should give preclusive effect to a foreign judgment that considered the same claim/issue in a previous recognition or

(C.A.) (granting estoppel effect to a Irish judgment refusing to set aside a prior Irish judgment and thus barring the defendant from re-litigating the same issues in a subsequent enforcement action in the U.K.).

¹²⁵ *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W. D. Va. 2010).

¹²⁶ The three prong test of *res judicata* applied by the district court was that the foreign judgment (i) constituted a final judgment on the merits, (ii) between the same parties, and (iii) concerning the same cause of action. Regarding the requirement of identity of cause of action, the U.S. court noted that “although no motion to vacate was brought in the prior proceedings [in Canada], the plaintiff need not proceed on the same legal theory as in the first suit.” *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743, 752 (W. D. Va. 2010). It added that pleading before the U.S. court contained “substantially the same factual allegations as were reviewed by the Ontario Superior Court.” *Id.*

¹²⁷ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 (Tentative Draft No. 2, 2012).

enforcement action.¹²⁸

Since foreign judgment principles, including principles of claim and issue preclusion, are governed in the U.S. by state law and thus may vary depending on the state in which the post-award proceedings are brought, the Restatement does not contain any precise directions.¹²⁹ Nevertheless, the comments to the relevant section in the U.S. Restatement contain a further important explanation: “[w]hether a prior judicial determination is given preclusive effect in a post-award action may depend on, among other things, the law that governed that determination in the prior action.”¹³⁰ If that law is different, no preclusive effect should be given. As an example, the Restatement commentator lists issues of public policy and concludes that “[i]n such instances, it may be inappropriate for a [U.S.] court to treat the prior judicial determination as binding [. . .].”¹³¹

The above described solution adopted in the U.K. and the U.S. clearly allows the award creditor to forum shop to obtain a favorable recognition or enforcement judgment in a foreign country and rely on the preclusive effects of that foreign judgment in subsequent proceedings concerning the same award in the forum. A good example of such forum shopping can be found in *Chantiers de l'Atlantique*, discussed earlier.¹³² In this case, the respondent in the arbitration (having successfully defended against all claims) went to the French courts to have the award recognized and then relied on the preclusive effect of the French judg-

¹²⁸ Bermann, *supra* note 101, at 324.

¹²⁹ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 reporter’s notes b(ii) (Tentative Draft No. 2, 2012) (“The Restatement thus takes the position that these judgment recognition question are no different in nature from those presented in other situations involving successive court rulings. Rather than propound wholly new rules for the arbitration context, the Restatement embraces the forum’s existing rules on claim and issue preclusion, “law of the case,” and recognition of foreign country judgments, as the case may be.”). *Cf.* also Linda Silberman’s view, *supra* note 44, that in the arbitration context, the standard should be federal.

¹³⁰ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 cmt. c (Tentative Draft No. 2, 2012).

¹³¹ *Id.*

¹³² *See supra* p. 338.

ment in subsequent set-aside proceedings in the U.K. The aim of the proceedings in France was obviously not to enforce the award (which having dismissed all claims, left nothing to enforce) but possibly to simply create an estoppel effect in subsequent proceedings in the U.K.¹³³

This solution to give effect to foreign recognition and enforcement judgments and allow forum shopping is problematic for a number of reasons.¹³⁴ One important criticism relates to the fact that neither the English nor the U.S. cases take into account the location of the seat of the arbitration. In particular, courts in these countries grant preclusive effect to foreign recognition and enforcement judgments in subsequent proceedings concerning the same award even when brought in the forum that was the seat of the arbitration. For instance, in *Chantiers de l'Atlantique*, the English judge (albeit in *obiter*) held that a party was estopped from re-litigating in England, the seat of the arbitration, an issue that had been decided in a foreign (French) recognition and en-

¹³³ *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.).

¹³⁴ Sometimes the view has been expressed that recognition or enforcement judgments have necessarily or *per se* only a territorial scope and are thus incapable of producing extra-territorial effects, *i.e.* effects outside the country in which they were rendered. *See e.g.*, Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.) (holding that “a foreign enforcement judgment [. . .], like any enforcement judgment, merely aims at having a territorially limited effect, *i. e.*, for the territory of the state in which it is rendered” and adding that therefore it is “as per its subject-matter incapable of been enforced elsewhere.”); Frankfurt am Main Court of Appeal, July 13, 2005 (Ger.), NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006) (holding that a Romanian judgment refusing to enforce an arbitral award was incapable of being recognized in Germany since it only determined that the award had effect in that forum, *i. e.*, in Romania). *See also* J.-F. Poudret & S. Besson, *supra* note 91, at 812; G. Kegel, *Exequatur sur exequatur ne vaut in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS [Festschrift for Wolfram Mueller-Freienfels] 377, 378 (Dieckmann et al. eds. 1986). *Cf.* Silberman, *supra* note 43, at 36 note 48 (suggesting that a judgment relating to recognition or enforcement of an award “may have only territorial scope,” but leaving the question open). Maxi Scherer does not agree with this analysis. For a detailed analysis, *see* Scherer, *supra* note 47.

forcement judgment.¹³⁵ Similarly, in *Belmont Partners*, the U.S. court granted preclusive effects to a Canadian recognition and enforcement judgment, although the seat of the arbitration was in the U.S.¹³⁶

The question of whether and to what extent the seat of arbitration plays a role in international arbitration remains one of the most complex and debated questions in the field and is not the topic of this paper.¹³⁷ The fact is, however, that the U.K. and the

¹³⁵ *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.); *Good Challenger Navegante SA v Metalexportimport SA*, [2003] EWCA (Civ) 1668 (Eng.). Cf. *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.) (holding, also *obiter*, that the English refusal to recognize the award could produce preclusive effects in France, seat of the arbitration).

¹³⁶ *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W. D. Va. 2010).

¹³⁷ On the one hand, according to the traditional judicial or territorial view, an award's legal force stems from the law of the seat and the courts in that country have a supervisory function over the arbitration proceedings as well as primary jurisdiction when it comes to the assessment of the validity of the award. See, e. g., F. Mann, *The UNCITRAL Model Law—Lex Facit Arbitrum*, LIBER AMICORUM FOR MARTIN DOMKE 157 (1967), reprinted in 2(3) ARB. INT'L 241(1986); Sir R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19 (2001); B. Leurent, *Reflections on the International Effectiveness of Arbitration Awards*, 12 ARB. INT'L 269 (1996); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113–20 (1992). On the other hand, according to a delocalized or contractual view, arbitration is based on party autonomy and detached from the laws of the seat and the supervising control of the courts in that country. See, e. g., P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL [International Commercial Arbitration] 401 ff. (1965); P. Fouchard, *L'Autonomie de l'arbitrage commercial international [Autonomy of International Commercial Arbitration]*, REVUE DE L'ARBITRAGE [Review of Arbitration] 99 (1965); B. Goldman, *Les conflits de lois dans l'arbitrage international de droit prive [Conflicts of Laws in International Arbitration in Private International Law]*, VOL II RECUEIL DES COURS DE DROIT INTERNATIONAL [Report of Courses on International Law] 351 (1963); B. Goldman, *Arbitrage international et droit commun des nations [International arbitration and common law of nations]*, REVUE DE L'ARBITRAGE [Review of Arbitration] 115 (1965); A. VON MEHREN, LIMITATIONS ON PARTY

U.S. follow a rather territorial view and accept, among other things, that the courts at the seat of the arbitration exercise a certain supervisory function in controlling the validity of the award. Under this view, it seems counterintuitive, if not illogical, to grant preclusive effect in post-award proceedings at the seat to issues previously decided in a recognition or enforcement judgment by a non-seat court. Doing so gives priority to the findings of non-seat courts over the findings of the courts at the seat which are supposed to exercise a supervisory function. Put differently, the supervisory function of the courts at the seat becomes an empty shell if those courts are to give preclusive effect to a determination regarding validity of the award (*e.g.*, establishing the existence of a valid arbitration agreement) given by any court around the world asked to recognize and enforce the same award.

One might argue that one needs to balance the need to maintain the supervisory function of the courts at the seat (under a territorial view), with the need to grant comity to foreign judgments under the forum's foreign judgment principles. This balancing exercise, however, is missing in the case law described above. Courts in the U.K. and in the U.S. grant preclusive effect to foreign recognition or enforcement judgments emanating from a non-seat country, without making any distinction as to whether this will affect the supervisory function of the courts at the seat, and without even discussing this point. The U.S. Restatement does not contain any discussion or distinction in this respect either.¹³⁸ These views are difficult to reconcile with the territorially influenced view which the courts in the U.S. and the U.K. generally take in international arbitration.

A second criticism of the above detailed solution adopted in the U.K. and U.S. relates to the application of the New York Convention. Assume the seat of the arbitration is in country C1. Assume the award creditor unsuccessfully tried to seek recognition or enforcement of the award in country C2 (a New York Convention country). Referring to Article V(1)(a) of the New

CHOICE OF THE GOVERNING LAW: DO THEY EXIST FOR INTERNATIONAL COMMERCIAL ARBITRATION 19 (1986); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 35 (2010).

¹³⁸ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 (Tentative Draft No. 2, 2012).

York Convention, the court in C2 held that the award was based on an invalid arbitration agreement. The award creditor subsequently starts the recognition and enforcement proceedings in the forum (country C3, also a New York Convention country). In those proceedings, the award debtor argues that the foreign judgment from C2, and in particular its finding that there was no valid arbitration agreement, should be granted preclusive effect and that the award thus should be refused recognition and enforcement.

In such a situation, granting preclusive effect to the foreign court's determination of the invalidity of the arbitration agreement (provided that the foreign judgment meets the forum's relevant requirements for judgment recognition and *res judicata* or claim/issue estoppel) means that the forum's court is not allowed to review that determination. Accordingly, even if the forum's court were to come to a different conclusion (*i.e.*, the arbitration agreement is valid under Article V(1)(a)), the preclusive effect would prevent the forum from recognizing or enforcing the award. This is true, even where the foreign court's finding is obviously erroneous under the New York Convention.

This outcome is certainly far from satisfactory. In this situation, one could even argue that granting preclusive effect to the foreign court's determination of the invalidity of the arbitration agreement would violate the forum's obligations under the New York Convention to recognize and give effect to valid arbitration agreements.¹³⁹ Indeed, one could further argue that the question of a valid arbitration agreement is so central to the respect which New York Convention countries owe to foreign awards that accepting preclusive effect of a determination by a foreign court on this issue may be seen to constitute an abdication of the forum court's obligations under the Convention.

On that basis, it has been suggested that foreign recognition or enforcement judgments should only be given preclusive effect if they granted (as opposed to refused) such effect.¹⁴⁰ However, it

¹³⁹ New York Convention, *supra* note 1, art. II.

¹⁴⁰ Hill, *supra* note 88, at 188. *Cf.* Hamburg Court of Appeal, Jan. 24, 2003, XXX Y.B. COM. ARB. 509 (2005) (holding that a Polish judgment denying enforcement cannot be recognized in Germany because it is a decision on procedural, rather than substantial matters).

seems unsatisfactory that the effect of a judgment depends on its outcome (*i.e.* whether granting or refusing the action). Therefore, it seems preferable that foreign recognition and enforcement judgments should not be granted preclusive effect at all.¹⁴¹ In any event, the general and unlimited application of principles of issue/claim estoppel (as practiced in the U.S. and U.K.) might, in certain circumstances, lead to situations undermining the purposes and objectives of the New York Convention and the signatories countries' obligations thereunder.

IV. CONCLUSION

After an award has been rendered, parties may forum shop in order to obtain a post-award judgment (setting aside, confirming, recognizing or enforcing the award) and rely on the effects of that judgment in subsequent proceedings relating to the same award. This paper examines the effects of such forum shopping attempts and concludes that a distinction needs to be drawn between set asides and other post-award judgments. On one hand, Article V(1)(e) of the New York Convention permits national courts to grant effect to foreign set-asides, but fails to provide criteria as to when they should do so. As explained in Part II of this paper, the general framework for foreign judgments can provide guidance and help national courts in assessing whether or not to grant effects to foreign set-asides. On the other hand, for other post-award judgments, the New York Convention is silent as to their effects. As shown in Part III of this paper, there are good reasons not to extend the "judgment route" rationale to those other post-award judgments and not to grant them effects in subsequent proceedings concerning the same award.

¹⁴¹ For more details, see Scherer, *supra* note 47.

论“择地行诉”与法院对仲裁裁决的裁定

琳达·希尔伯曼 & 马克斯·谢雷尔*

I. 总述

在仲裁裁决的裁定语境下的择地行诉正以不同形式为人们所利用。依据这个裁决是被撤销¹、确认、承认还是执行对仲裁裁决的裁定分为不同形式。聪明的当事人可以通过择地行诉来获得一个仲裁裁决撤销、确认、承认或者执行的裁定，并且在另一个国家的后续诉讼过程中得以实现。该国的法院将评估这项外国裁定的作用。本文研究法院对择地行诉的态度，并评估撤销、确认、承认或执行一个仲裁裁决的决定是否会影

* Linda J. Silberman is a Martin Lipton Professor of Law, New York University, and Co-Director of the Center on Transnational Litigation and Commercial Law. She is a leading figure in private international law and transnational litigation, covering both commercial and family law areas.

Maxi Scherer is a Senior Lecturer in International Arbitration at Queen Mary, University of London and Global Professor at New York University School of Law, Paris. She is also Special Counsel at Wilmer Cutler Pickering Hale and Dorr LLP.

The Chinese text of this article is translated by Peking University Transnational Law Review's editors, Dong Shi, Zhang Xueying, Zhong Xiaozhu and reviewed by Liu Xing'er and Li Yi.

¹ As a matter of terminology, we use the term to “set aside” or to “annul” an award when referring to proceedings nullifying an award before the national courts of the seat of the arbitration. The term “set aside” is found in Article V(1)(e) of the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 33 U.S.T.S. 4739 [hereinafter New York Convention]; in some jurisdictions, such as the United States, the terminology may be to “vacate” an award. See Federal Arbitration Act, 9 U.S.C. § 10 (2002). Note that Article V(1)(e) refers both to the country “in which” or “under the law of which” the award was made, in identifying the place for set-aside that will justify non-recognition of an award. References in the paper to annulment at the “seat” or “place of arbitration” should be understood to include the rare situation where a different *lex arbitri* is chosen by the parties.

响在其他地方对该裁决后续的承认和执行。

本文第 II 部分研究一个极为简单的问题：一个法院在被请求承认和执行一个在仲裁地被撤销的裁决时发挥着何种作用？它应该执行还是忽略该裁决呢？或者它应该尊重外国法院的决定拒绝执行裁决吗？此外，法院有何种具体决定标准呢？这篇文章提供了一个试探性的假设，在评估是否支持外国法院的撤销决定时，法院应采用运用外国裁定原则——即“裁定理论”（“judgment route”）。

本文第 III 部分分析这项裁定原则是否可以运用于对仲裁裁决其他类型的裁定，比如确认裁决（或拒绝撤销），承认执行裁决。作为结论，本文认为这种裁定承认模式不能运用于除“撤销”以外的其他裁决形式，并对此予以解释说明。撤销裁决是承认和执行裁决的一个例外，对此《承认及执行外国仲裁裁决公约》（以下称《纽约公约》）的第五条第一项（戊）款已做出明确规定。而其他类型的裁定则没有被《纽约公约》列为可以接受的例外。

II. 择地行诉以及申请撤销的方法

尽管《纽约公约》规定了承认和执行仲裁裁决的例外²，但对在仲裁地审查和申请撤销的根据却只字未提。因此，每个国家都建立了自己的一套审查及撤销裁决的体系。所以消息灵通的当事人和他们的律师在选择仲裁地时会考虑该地与申请撤销相关的法律制度。一项 2006 年的调查证明，法律制度（包括仲裁裁决在仲裁地被挑战的程度）是一个公司在选择仲裁地时最为看重的唯一标准³。后来一项 2010 年的研究调查也发现，正式的法律基础制度（包括撤销裁决的方法）是选择仲裁地时最具影响力的因素。⁴

当然，如果其他的《纽约公约》成员国被要求拒绝承认或执行

² New York Convention, *supra* note 1.

³ See PRICEWATERHOUSECOOPERS & QUEEN MARY UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 13-14 (2006), available at http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

⁴ See WHITE & CASE & QUEEN MARY UNIVERSITY OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 18 (2010), available at http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

一个已在其仲裁地被撤销的裁决，那么一个稳健的撤销制度可能是最重要的因素。然而事实并非如此，《纽约公约》要求承认和执行仲裁裁决的同时也允许一定的例外。第五条第一项（戊）款⁵是反对方可以用来请求拒绝承认和执行裁决的理由之一。它的要素是“该裁决还未对当事人形成约束力或者该裁决已被做出这项裁决的国家主管机关依据本国法律予以撤销和暂停执行”⁶。然而，正如这种软性语言所强调的，一国没有义务去拒绝承认或执行，其仍然可以执行一个被仲裁地所在国撤销的裁决。

且不论这种“软性语言”是否适用于第五条的所有款项，至少《纽约公约》的英文版⁷允许法院在承认裁决的决定过程中评估先前的撤销裁定。申请撤销本身允许在仲裁地进行仲裁审查。另外，尽管一些国家倾向于通过参考示范法来整合撤销和承认的理由，但是另外一些国家，针对干涉主义法庭在各自的管辖区内应当如何监督一项仲裁⁸，有不同的观点。对这种自治权，《纽约公约》并未加以限制。

这样就产生了一个问题，公约国应该如何应对一项在仲裁地提出的撤销申请。一种观点认为，一项被撤销的裁决不再是一个裁决，因此不存在承认或执行的问题（“*Ex nihilo nil fit*”）⁹。仲裁被视为仲裁地法律制度的延伸，因此法院的监督应该是决定性的。支持这种观点的人认为当事人有意识地选择在特定的地方仲裁，因此应该了解可能的出现的撤销。所以，遵循这种做法的国家的法院通常会拒绝承认或执行一个被仲裁地撤销的裁决。

⁵ New York Convention, *supra* note 1, art. V(1)(e).

⁶ *Id.*

⁷ *See, e.g.*, Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907, 909 n.2 (D.D.C. 1996); *cf.* Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 32–33 (1999).

⁸ *See, e.g.*, English Arbitration Act, 1996, c.23, § 103 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/part/III/crossheading/recognition-and-enforcement-of-new-york-convention-awards>.

⁹ *See generally* Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J. INT'L ARB 179 (2010); *see also* Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT'L ARB 47 (2010).

俄罗斯最近的一系列裁定处理了这些问题，其中以 *Ciments Français* 诉 *Sibirskiy Cement* 案¹⁰最为典型。一个在土耳其做出的裁决支持了 *Ciments Français* 公司，但是土耳其法庭撤销了该裁定，因为仲裁员未能提供足够理由，而且该裁决违反了土耳其的公共秩序 (“*ordre public*”) ¹¹。克麦罗沃地区仲裁法院不管裁决已撤销而承认了该裁决¹²。一年以后，最高仲裁院以承认一个与国内法院不相符的外国仲裁裁决违反公共秩序为由推翻并否认了该认可。¹³

在德国¹⁴，法院认为裁决不可避免地与其仲裁地的司法体系紧密相关。在决定是否执行一个裁决时，德国的法院通常会看一个裁决

¹⁰ *Ciments Français v. Sibirskiy Cement*, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation], Aug. 27, 2012, VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA RF [VESTN. VAS] 2012, No. 17458/11 (Russ.). See also Elvira R. Gadelshina, *Ciments Français: Russian Putabali No More*, KLUWER ARB. BLOG (Mar. 22, 2012), available at <http://kluwerarbitrationblog.com/blog/2012/03/22/ciments-francais-russian-putabali-no-more/>.

¹¹ *Ciments Français*, VESTN. VAS 2012, No. 17458/11, p. 11 (Russ.).

¹² *Ciments Français v. Sibirskiy Cement*, Arbitrazh Court of Kemerovo [Arbitration Court of Kemerovo], July 20, 2011 (Russ.), XXXVI Y.B. COM. ARB. 325, 325 (2011). The decision to enforce was based partially on Article IX(2) of the European Convention on International Commercial Arbitration of 1961, Apr. 21, 1961, 484 U.N.T.S. 364, No. 7041 (1963–1964) [hereinafter *European Convention*]. Article IX(2) provides that an award set aside will only be relevant if the reason for set-aside is one in the list of reasons set forth in Article IX(1) of said Convention. See Mike McClure, *An Unlikely Mix—the Russian Courts, a French Cement Company, and the 1961 European Convention on International Commercial Arbitration*, KLUWER ARB. BLOG (Sept. 28, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/09/28/genevaconventio/>.

¹³ *Ciments Français*, VESTN. VAS 2012, No. 17458/11 (Russ.). However, the Russian national court decision on which the Supreme Arbitrazh Court based its reasoning has subsequently been reversed and the effects of this reversal on the non-recognition of the Turkish award remain to be assessed.

¹⁴ See Erica Smith, *Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin*, 20 B.U. INT'L L.J. 355, 363–64 (2002); see also DANA FREYER, *The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS—THE NEW YORK CONVENTION IN PRACTICE 757, 785 (E. Gaillard/D. Di Pietro eds., 2008).

在其做出地的状态，而不会严格审查这个撤销裁定本身¹⁵。德国法律甚至规定如果某仲裁裁决最终被撤销，法院仍可以推翻其之前执行该裁决的裁定。¹⁶ 1999 年的一个德国案例可以说明这种情况。某德国高级地区法院拒绝执行一个在俄罗斯被撤销的裁决¹⁷，但是当俄罗斯最高法院后来推翻这个撤销裁定并确认该裁决后，德国联邦最高法院也依此推翻了之前的决定，裁定这个裁决是可以执行的。¹⁸

一个近期智利最高法院做出的裁定提供了一个更加极端的做法。在 *EDF Internacional S. A. 诉 Endesa Internacional S. A. and YPF S. A.* 一案¹⁹中，法院裁定不承认或执行一个在阿根廷宣告无效的仲裁裁决。该法院基于智利民事诉讼法第 246 条做出决定，该条规定一个仲裁裁决的真实性和有效性应该由仲裁地高级法院加以证明。²⁰ 由该法条语言可看出，法院采纳了《纽约公约》明确否定的双重许可要求²¹，同时智利法院只执行已在仲裁地获得确认的裁决。但是，至少该法条说明一个在仲裁地被宣告无效的裁决在智利会得到尊

¹⁵ FREYER, *supra* note 14, at 784–85; Günther J. Horvath, *What Weight should be Given to the Annulment of an Award under the Lex Arbitri? The Austrian and German Perspectives*, 27 J. INT'L ARB. 249, 259–66 (2009).

¹⁶ Horvath, *supra* note 15, at 259–66; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, § 1061(3) (Ger.). An English translation of the law was done by Samson-Übersetzungen GmbH, Dr. Carmen von Schoning (2012), available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

¹⁷ Oberlandesgericht [OLG] [Higher Regional Court] Oct. 28, 1999 (Ger.), XXV Y.B. COM. ARB. 717, 719 (2000); see Freyer, *supra* note 14, at 785.

¹⁸ Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 22, 2001 (Ger.), XXIX Y.B. COM. ARB. 724 (2004).

¹⁹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], 8 septiembre 2011, “EDF Internacional S.A. c. Endesa Internacional S.A. and YPF S.A.,” Rol de la causa: 4390–2010, arbitraje, 5(3) ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES p. 915 (Chile).

²⁰ CODIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV] [Civil Procedure Code], art. 246 (Chile).

²¹ See Albert. Jan. van den Berg, *The New York Convention of 1958: An Overview*, THE INT'L COUNS. FOR COM. ARB. 17 (2008), available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

重。

如果这种方式成为承认和执行实践中的主流的观点，通过择地行诉来选择仲裁地也将必然会自决定撤销时成为关键并发挥广泛的治外法权作用。在选择仲裁地时，当事人会意识到任何申请撤销的裁定都会导致该裁决在多数管辖区不被认可或执行。但是这种对仲裁地做出的撤销的全盘接受损害了国际仲裁的目标之一——提供一个中立的跨国争端解决程序而非一个国内的法庭。本地偏袒主义或偏见很大程度上会催生独特的和（或）观念狭隘的撤销，允许国家有一定裁量权是合理的，这些收到申请的国家可以决定如何对待撤销。但难点在于，对于撤销裁定的处理方法不同国家有不同的做法，而且在决定何时认可一个已经被撤销的裁决时也缺乏指导方针。回归到本文择地行诉的主题，执行法院对于撤销的态度会导致执行阶段的择地行诉。

当然，也有一些其他的实际因素影响在何地认可或执行裁决。尽管有时人们会在某个没有财产的管辖区寻求裁决的承认以达到影响力或先例作用²²，但是通过选择法院来寻求认可或执行通常由被告的财产所在地起主导作用²³。大多数时候，裁决的败方通常

²² In the absence of assets, an award creditor might be hoping to use the judgment as precedent in a jurisdiction where the award defendant does have assets, or even to independently enforce that judgment against the debtor's assets elsewhere. For a more extensive discussion of this issue, see *infra* at III. B.

²³ In the United States, courts have been unanimous in holding that an independent basis of adjudicatory jurisdiction—either personal jurisdiction over the award debtor or quasi-in rem jurisdiction over his property—is necessary in order to enforce an arbitral award. See, e.g., *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 2012 U.S. App. LEXIS 26207 (5th Cir. Dec. 21, 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Glencore Grain Rotterdam B. V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002). In other countries, however, the consent to arbitrate in a New York Convention country is construed as concomitant consent to enforce that award in other Convention countries without the need for any other connection to the defendant or his property. See Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407 (2004); see generally Linda J. Silberman, *Civil Procedure*

在几个管辖区内都有财产，这会导致多个执行同时很可能产生很多结果，这种情形《纽约公约》已经考虑到了。

另一个完全相反的理论则略显乏味，这种理论认为在仲裁地的撤销是不相关。法国很推崇这种支持仲裁反对撤销的态度²⁴。无论是以往的还是现行的法国仲裁法均排除《纽约公约》第五条第一项（戊）款作为不承认或执行的根据²⁵。法国关于撤销法院在执行在仲裁地被撤销的裁决，有两个著名的案例，*Hilmarton Ltd. 诉 Omnium de Traitement et de Valorisation* 案²⁶，和 *PT Putrabali Adyamulia 诉 Rena Holding, Ltd.* 案²⁷。*Putrabali* 一案中，法院认为“国际仲裁裁决并不依附于任何国内的法律体系，因此它是一个国际司法体系下的决定，它的有效性必须由寻求认可和执行的所在国的法规来决定”²⁸。因此，法国认为国际仲裁是跨国法律秩序的一部分，并不附着于该仲裁地的国内法律制度²⁹。

Meets International Arbitration: A Tribute to Hans Smit, 23 AM. REV. INT'L ARB. 439 (2012). See also MAXI. SCHERER, THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A COMMENTARY, art. III, paras. 17, 22 (R. Wolff ed., 2012).

²⁴ For a rather comprehensive treatment of the history of this approach in France, see C. Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience*, 26 J. INT'L ARB 267 (2009).

²⁵ CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] arts. 1520, 1525 (Fr.). An English translation of the law was done by E. Gaillard/N. Leleu-Knobil/D. Pellarini, INT'L ARB. INST. (2011) available at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf.

²⁶ *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration] 327 (1994).

²⁷ *PT Putrabali Adyamulia v. Rena Holding, Ltd.*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration], 507 (2007), XXXII Y.B. COM. ARB. 299 (2007).

²⁸ *PT Putrabali Adyamulia*, XXXII Y.B. COM. ARB. 299, 302 (2007).

²⁹ See, e.g., P. Fouchard, *La portee internationale de l'annulation de la sentence arbitrale dans son pays d'origine* [The international scope of the annulment of the award in his home country], REVUE DE L'ARBITRAGE 329 (1997) (Fr.); E. Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in IMPROVING THE EFFICIENCY OF ARBITRATION

法国最近一个案例即采纳了此种方式，尽管某裁定由下级法院做出，但是却认为在仲裁地被撤销的裁决得到了完全执行，该方式不予考虑《纽约公约》中其他支持不执行的条款。³⁰ 在 *Maximov* 诉 *Novolipetsky Steel Mill* 一案中，巴黎初审法院执行一个在俄罗斯做出并撤销的裁决³¹。该案的争议焦点为马克西莫夫（Maximov）先生和 *Novolipetsky Steel Mill*（“NLMK”）公司之间的股权买卖合同。ICAC（国际商事仲裁法庭俄罗斯商业和产业委员会）法庭所在地是俄罗斯，该法庭判处 NLMK 支付 3 亿美元给马克西莫夫（Maximov）先生。莫斯科仲裁法庭基于在俄罗斯法律下公司争端不可仲裁而撤销了该仲裁裁决。莫斯科联邦仲裁法庭以及最高仲裁法庭均维持原判。马克西莫夫（Maximov）先生不管该撤销，转而向巴黎初级法庭提出执行该裁决。2012 年 5 月 16 日，该法庭裁定执行该裁决，并指出在原仲裁地的撤销裁定不足以支持该法庭拒绝

AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 505, 505 (A. J. van den Berg ed., 1999); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).

³⁰ Under French Civil Procedure Law, revised in 2011, recognition and enforcement is automatically ordered so long as the award has been shown to exist and enforcement would not be manifestly contrary to public policy. CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] art. 1514 (Fr.). An English translation of the law was done by E. Gaillard/N. LeleuKnobil/D. Pellarini, INT'L ARB. INST. (2011) available at http://www.iaiparis.com/pdf/FR_ENCH_LAW_ON_ARBITRATION.pdf. However, parties resisting enforcement may appeal the decision on grounds mirroring those in the New York Convention art. V, namely that the tribunal lacked jurisdiction, was improperly constituted, exceeded its jurisdiction, there was a violation of due process, or recognition/enforcement of the award would violate public policy. *Id.* arts. 1520, 1525. Notably absent from this list is that the award has been set aside in the place it was made. Therefore, under French law, the fact that an award has been set aside by the competent court is accorded no weight. This omission is presumably justified on the basis of the “more favorable right” provision of Art. VII of the Convention, which allows a party seeking enforcement to rely on a domestic law instead of the Convention if that domestic law is more favorable to enforcement. See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, 85 (1981); see also Freyer, *supra* note 14, at 761–62.

³¹ *Maximov v. Novolipetsky Steel Mill*, Tribunal de Grande Instance de Paris [TGI] [Court of First Instance of Paris], May 16, 2012 (Fr.).

执行裁决，同时一个有效的并符合双方约定方式的仲裁裁决应该得以承认和执行。

法国的这种实践时时招致批评。不仅因为法国完全无视仲裁地法院的裁定，也因为这种实践产生了十分复杂的情况。如第二个裁决是在第一个被宣告无效后做出的，而且第二个裁决的结果与第一个不同。如果法国法院执行了第一个裁决，那么他们将根据既判力（“*res judicata*”）拒绝执行第二个。但是第二个裁决的胜方仍然会在其他地方寻求裁决的认可。这种情况出现在 *Hilmarton* 一案³²中，在该案中一个已经被撤销的瑞士裁决在法国得到执行。接下来的第二个瑞士裁决因既判力（“*res judicata*”）而在法国遭到拒绝执行³³，但却在英国得到执行。³⁴

Putrabali 一案³⁵是一个运用法国方式寻求择地行诉的不幸案例。英国仲裁庭做出有利于法国买方而不利于印度尼西亚卖方的裁决。该裁决做出后在英国法院以法律适用错误为由（英国并未将审查这类问题排除在仲裁法案之外）而被部分撤销。结果，第二个裁决做出有利于印尼一方的决定。法国一方想要在法国寻求执行第一个裁决，而印尼一方在法国寻求执行第二个裁决。包括做出撤销裁定的法院在内的法国法院都认为只能执行第一个裁决，第二个因被第一个排除而无法执行。³⁶ 择地行诉的策略在这里很明显，第一个裁决导致原告案件被驳回。而得到对裁定书的认可主要是为了阻止

³² *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in *REVUE DE L'ARBITRAGE* [Review of Arbitration] 327 (1994).

³³ *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 10, 1997, reprinted in *REVUE DE L'ARBITRAGE* 376 (1997).

³⁴ *Omnium de Traitement et de Valorisation S. A. v. Hilmarton Ltd.*, [1999] Q. B. 222.

³⁵ For a more comprehensive discussion of *Putrabali*, see Richard W. Hulbert, *When the Theory Doesn't Fit the Facts—A Further Comment on Putrabali*, 25 *ARB. INT'L* (2009); see also Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24(2) *ARB. INT'L* 277 (2008).

³⁶ *PT Putrabali Adyamulia v. Rena Holding, Ltd.*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, reprinted in *REVUE DE L'ARBITRAGE* [Review of Arbitration] 507 (2007).

后一个裁决在法国的执行。同时，在严格的法国方式下，法院不认可无效裁定，那么原告的择地行诉策略是成功的。

正如所见，“全部执行”和“全不执行”都是不可取的。而一个中间方式则会留给执行法院很大的自由裁量权，从而产生缺乏一致性或纲领性的缺点。那么法院到底应如何决定是否执行一个被撤销的裁决呢？

许多仲裁专家认为只有在《纽约公约》中规定的撤销理由多于不承认的理由时，裁决才可得以撤销，否则须尊重撤销裁定。这种方式似乎与加拿大目前的实践很相似。³⁷ 让·保尔松（Jan Paulsson）也持这种立场。他认为除非撤销的理由被《纽约公约》本身所认可³⁸，否则当地的撤销裁定不应该阻碍《纽约公约》裁决的国际认可或执行。这种方式与《国际商事仲裁欧洲公约》的第九条第一项类似，该条款规定，除非一个撤销申请是明确基于该公约第九条第一项（甲）款至（丁）款³⁹之外，其他撤销申请是无法得到认可的。

³⁷ It appears that no Canadian court has been squarely faced with enforcing an annulled award, but several have decided enforcement actions with set-aside actions pending at the *situs*. The courts have expressed that they must recognize an award unless one of the grounds of refusal in Article 36 of the UNCITRAL Model Law is present, and within that they have discretion to enforce the award. In deciding whether to grant a stay of proceedings pending the outcome courts have indicated that there must be a “serious issue to be tried” (from the point of view of the Canadian court) in the foreign set-aside action. If not, a stay will not be provided and the award will be enforced. *Europcar Italia S. p. A. v. Alba Tours Int’l Inc.*, 23 O. T. C. 376, [1997] O. J. No. 133, para. 22 (Can. Ont. Ct. J.); *Powerex Corp. v. Alcan Inc.*, 2004 B. C. S. C. 876, [2004] B. C. J. No. 1349 (Can.). Except for a small subset of cases falling within the Federal ambit, enforcement of awards is to be determined by provincial law; however, Article 34 of the Model Law has been implemented throughout the provinces and territories in Canada (except arguably Quebec). Henri. C. Alvarez, *The Implementation of the New York Convention in Canada*, 25(6) J. INT’L ARB. 669, 670 (2008).

³⁸ See Jan. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT’L CT. OF ARB. BULL. 14 (1998).

³⁹ European Convention, *supra* note 12. For an application of Article IX(1) of the European Convention by the Austrian Supreme Court, see *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Oberster Gerichtshof [OGH] [Supreme Court], Oct. 20, 1993 and Feb. 23, 1998 (Austria),

但是《纽约公约》并无这样的限制，也并不采取这种方式。尤其当双方当事人同意在某地仲裁，而该地的实体法律审查是仲裁体系的一部分时，基于这种理由下的撤销看起来则是合适的。

此后汉斯·斯米特（Hans Smit）建议当撤销裁定由在当事人所在国之一做出或是应当事人要求做出时，所有撤销裁定都应推定不予考虑⁴⁰。但也有人⁴¹认为虽然这种建议可以解决本地偏袒和本位主义，但是这明显太过宽泛，特别是考虑到一个国家国有实体的介入而这个国家又是唯一可能的仲裁地的情况。

加里·博恩（Gary Born）提出了几个标准用以削弱一个在仲裁地做出的撤销裁定的效力：撤销那些（1）是基于当地公共秩序或非仲裁法规做出的，（2）是基于司法审查仲裁员的实体意见做出或者基于未被包括在《纽约公约》第五条第一项（甲）款至（丁）款中的理由做出的，或者（3）未能满足一般运用于外国认可裁决的标准⁴²的裁定。然而，为何仲裁地的非仲裁法规应该被排除在外，尤其是当它是所适用的法律或者与当事人有紧密联系时，这个问题还不甚明了。选择仲裁地的当事人可以期待对这个地方的法律制度有所掌控，尤其是如果司法审查也是这个制度一部分的话，更没有理由去反对了。不过，加里·博恩关注裁定的承认是十分合适的，而且琳达·希尔伯曼（Linda Silberman）在其之前的一篇文章里也明确提出了专门解决裁决撤销的方案⁴³。同样地，威廉·帕克（William Park）在几篇文章中均提出“在对待一个无效裁定时要像

XXIV Y.B. COM. ARB. 919 (1999). The Austrian Supreme Court enforced an award that had been annulled by the Supreme Court of Slovenia because it violated Slovenian public policy, due to certain aspects of the contract that gave the claimant a monopoly power. Austria is a party to both the New York Convention and European Convention, but the court looked to the European Convention as the one having the most favorable approach to arbitration. For a more comprehensive discussion of this case and the reasoning behind it, see Horvath, *supra* note 15, at 256–59; see also Freyer, *supra* note 14, at 764.

⁴⁰ See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 304 (2007).

⁴¹ See Rau, *supra* note 9, at 109.

⁴² GARY. B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2691 (2009).

⁴³ Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 32–36 (2009).

其他外国的金钱给付裁定一样给予其尊重，除非这个决定程序上不公正或者与基本的公平正义相悖。”⁴⁴

根据琳达·希尔伯曼的观点，在决定是否尊重一个撤销裁定时，很有必要借助认可和执行外国裁定的相关法律作为指导：当仲裁地的法院撤销了一项仲裁裁决，被要求认可和执行的第二个法院在《纽约公约》下没有义务这样做。但是，如果这个裁决被撤销，那么现在就有了一个国内法院的裁定，这样想要执行这个裁定的法院就可以因此拒绝承认这项外国裁定。在这种观点下，国内关于承认和执行外国裁定的法律可以为何时可以拒绝执行裁定提供指导。如果得出的裁定应当得到承认，那么撤销裁定应该被尊重，而裁决不应该被执行。但是，如果得出的裁定不符合国内法律下承认和执行的标准，比如程序公平或者国际公共秩序（包括尊重仲裁裁决的国际标准），那么此时撤销裁定不应得到尊重，而应当执行原裁决。

美国法学会《关于国际商事仲裁的第三次法律重述》⁴⁵最近的草案采用了这种制度。《重述（草案）》第四至十六条（乙）款规定：

“即使一项基于《纽约公约》的仲裁裁决被主管机关撤销，如

⁴⁴ WILLIAM W. PARK, *Duty and Discretion in International Arbitration*, in *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 353, 363 (2nd ed., 2012); see also William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999). Professor Park refers to a comity approach to foreign judgments, whereas Professor Silberman refers to national law on judgment recognition and enforcement. The basic concept is the same: that recognition of annulment decisions should depend on whether the set-aside judgment is consistent with fundamental notions of justice and international public policy that is part of judgment-recognition law in most jurisdictions. Professor Silberman also argues that in the U. S. the recognition and enforcement of a foreign judgment annulling a Convention award would fit the type of case where a federal standard of recognition/enforcement would be in play. See Silberman, *supra* note 43, at 33 n.36; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 481 cmb. a (1987) (stating that recognition and enforcement of foreign judgments is typically a matter of state law unless there is a basis for federal jurisdiction such as a treaty or federal statute). Here the New York Convention and Chapter 2 of the Federal Arbitration Act call for a federal standard.

⁴⁵ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-16 (Tentative Draft No. 2, 2012).

果撤销该项仲裁裁决的裁定违反了仲裁裁决执行地关于承认法院裁定的指导原则,或者存在其他特殊情况,那么美国法院仍然可以确认、承认、或者执行该仲裁裁决。”⁴⁶

在美国判例法中,甚至可以找到“裁定理论”(“judgments route”)的脉络⁴⁷。在著名的判例 *Chromalloy Aeroservices* 诉 *Arab Republic of Egypt*⁴⁸一案中,美国联邦地方法院执行了一项被埃及法院撤销的埃及仲裁裁决。该地方法院认为《纽约公约》第五条规定的是软性的标准。在该标准下,法院对于是否执行一项被撤销的仲裁裁决可以行使自由裁量权。最后,该法院基于《纽约公约》第七条,判定如果此项埃及仲裁裁决是美国仲裁裁决,那么《联邦仲裁法案》第九款和第十款将要求法院执行该裁决。但由于《联邦仲裁法案》第九款和第十款只适用于美国仲裁裁决,该法院这种将埃及仲裁裁决和美国仲裁裁决视为等同的做法是对《纽约公约》第七条的错误解读。⁴⁹ 不过,该法院在裁定书中还提出了埃及法院撤销仲裁裁决的裁定本身是否应该被承认并认定具有既判力(“*res judicata*”)的问题。该地区法院认为承认被撤销的仲裁裁决会违反美国认可“商事仲裁终局且有效”⁵⁰的公共秩序,因此在这种情况下对任何礼让问题均不予考虑。⁵¹

这种将仲裁的终局性视为公共秩序,从而拒绝执行任何撤销裁定的“裁定理论”(“judgments framework”),如果发展到极端,就与根本不考虑撤销裁定的法国模式非常相似。这种模式的不足⁵²存在相同点,因此公共秩序作为承认裁决的一个例外,需要更加细致的分析。

⁴⁶ *Id.* § 4-16(b).

⁴⁷ Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the Judgment Route the Wrong Road?*, 4 J. INT'L DISP. SETTLEMENT 587 (2013).

⁴⁸ In the Matter of the Arbitration Between Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907 (D. D. C. 1996).

⁴⁹ For a further critique of the reasoning in *Chromalloy*, see Rau, *supra* note 9, at 102-11.

⁵⁰ *Chromalloy*, 939 F. Supp. at 913.

⁵¹ *Id.* at 913-14.

⁵² Discussed *supra* pp. 163-66.

另一个支持裁定理论的美国判例，如同大多数涉及此类问题的美国判例一样，承认了撤销仲裁裁决的裁定并且拒绝执行仲裁裁决。在 *Spier* 诉 *Calzaturificio Tecnica, S. p. A.* 一案⁵³中，意大利法院认定仲裁员越权，并据此撤销了一项意大利仲裁裁决。这项裁定得到了最高司法法院的认可。美国纽约联邦法院认可了撤销裁定并且拒绝执行该仲裁裁决。尽管该法院没有特别指出所依据的法律，但针对这一问题不无重视：

“（申请人）虽然提及了《纽约公约》第五条第一项中的软性用语‘可以’，但对其帮助不大。正如 *Baker Marine* 一案中，申请人没有提出充足的理由来（说服法院）拒绝承认意大利法院的裁定。”⁵⁴

其他一些美国判例，虽然没有明确采纳裁定理论，但是仍然可以解读为是与该路线相一致的。例如，在 *Baker Marine* 一案中，第二上诉巡回法院判定申请人“没有提出充足的理由足以（使法院）拒绝承认尼日利亚法院撤销仲裁裁决的裁定。”⁵⁵ 由于缺少拒绝承认该撤销裁定的理由，该法院拒绝执行仲裁裁决。⁵⁶

然而，要想使裁定理论能够在处理被撤销的仲裁裁决时，提供有效的解决办法，法院必须能够提出相应标准来评估该项撤销裁定的裁定。在美国和一些其他地方，中立的法庭、公正的程序和与仲裁有关的特定的公共秩序都是相关考虑因素。⁵⁷ 如果对这些因素加以恰当利用，那么华盛顿特区上诉巡回法院在 *TermoRio S. A. E. S. P.* 诉 *Electranta S. P.*⁵⁸ 一案中便应该执行一份哥伦比亚的仲裁裁决，而不去考虑该裁决已被哥伦比亚法院撤销这一事实。在 *TermoRio* 一案中，哥伦比亚法院以仲裁协议中选择适用国际商会（ICC）规则违反哥伦比亚法律而无效为由，撤销了该仲裁裁决。华盛顿特区上诉巡回法院考察了裁定依据的法律并考量了哥伦比亚的裁定是否

⁵³ *Spier v. Calzaturificio Tecnica, S.p. A.*, 71 F.Supp.2d 279 (S. D. N. Y. 1999).

⁵⁴ *Id.* at 288.

⁵⁵ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999).

⁵⁶ *Id.* at 198.

⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 44, § 482.

⁵⁸ *TermoRio S. A. E. S. P. v. Electranta S. P.*, 487 F.3d 928 (D. C. Cir. 2007).

违反了任何“基本的正义理念”，从而无需承认哥伦比亚的裁定。⁵⁹然而该法院采取了狭义的角度来看待裁定中作为例外的公共秩序保留，⁶⁰并且认为哥伦比亚的裁定没有违反公共秩序，进而承认该项撤销裁定。但是，该法院错在没有提出公共秩序保留来考虑哥伦比亚的撤销裁定对国际仲裁实务产生的严重阻碍。实际上，哥伦比亚以仲裁选择适用国际商会（ICC）规则不符合哥伦比亚法律为由撤销仲裁裁决的裁定违反了国际仲裁原则；根据该原则，这样一种裁定应当被视为违反了美国公共秩序。

阿姆斯特丹上诉巡回法院在 *Yukos Capital SARL 诉 OAO Rosneft*⁶¹中的裁定反映了“承认外国裁定”路线是如何适用从而允许执行一项被撤销的仲裁裁决的。荷兰法院裁定在荷兰执行四项由国际商事仲裁法庭（ICAC）俄罗斯联邦工商部委员会做出的裁决。Yukos 获胜的裁决结果被俄罗斯商事法院撤销，该撤销裁决被两个俄罗斯上诉法院认可。撤销该仲裁裁决的理由之一是 Yukos 一方没有披露代表 Yukos 的律师事务所中的管理合伙人曾组织本案仲裁员共同参与会议。尽管荷兰地区法院根据俄罗斯的撤销裁定拒绝执行仲裁裁决，但是阿姆斯特丹上诉法院推翻了荷兰地方法院的裁定。上诉法院通过国际私法对是否承认俄罗斯法院的裁定进行判断，认为不公正、不独立的外国司法机关所做出的裁定不应得到认可。

另外一个近期的荷兰判例遇到了类似的问题。在 *Maximov 诉 NLMK* 一案⁶²中，荷兰法院面临一项仲裁裁决的执行申请，而该裁决被俄罗斯法院宣布无效但却在法国被执行。荷兰初审法院确认了“裁定理论”，承认了撤销裁决的裁定并且拒绝执行该裁决。阿姆斯特丹上诉法院没有驳回该裁定，但是也没有明确地提出其在

⁵⁹ *Id.* at 938–39.

⁶⁰ *Id.* at 939 (“Accepting that there is a narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States, appellants’ claims still fail.”).

⁶¹ *Yukos Capital SARL v. OAO Rosneft, Hof’s-Amsterdam* [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

⁶² *Maximov v. NLMK*, Amsterdam District Court, Nov. 17, 2011 (Neth.), XXXVII Y.B. COM. ARB. 274 (2012).

Yukos 中采纳裁定理论理由。⁶³ 事实上, 上诉法院认为其做出的 Yukos 裁定是一幅“棘手的图景”。⁶⁴ 尽管如此, 上诉法院得出结论, 只有当申请拒绝承认外国撤销裁定的一方拿出充分详细的证据来证明存在不公正不独立时, 承认裁决的推定才能被推翻。⁶⁵ 本案中诉讼双方被要求详细说明一系列俄罗斯法律中关于撤销仲裁裁决的问题, 并被要求对俄罗斯法院的诉讼程序进行更为具体的评论。⁶⁶ 这个案件是否改变了 Yukos 的裁定模式还不甚明了, 但是后续的裁定可能会提供一些启示。

在有些国家, 采用裁定理论来承认和执行外国裁决可能面临一个潜在的复杂问题就是国内法对互惠条件的要求。乌克兰法院就存在该问题, 该法院承认了一项俄罗斯公司(作为塞浦路斯公司让与人)和马来西亚公司(Pacific)之间的英国仲裁裁定, 该裁定支持俄罗斯公司胜诉。⁶⁷ 英国法院撤销了该裁决,⁶⁸ 但是乌克兰法院选择执行该裁决。乌克兰法院判定, 对于承认和执行裁定, 乌克兰和英国之间缺乏互惠条件, 因此英国法院的撤销裁定无效。有人可能会对法院的决定感到怀疑, 因为另一个乌克兰法院认为在承认和执行裁定方面, 乌克兰和英国之间存在互惠条件。⁶⁹ 正如存在一种“基于狭隘观念”而撤销仲裁裁决的危险, 同时也存在基于狭隘观念而拒绝承认撤销裁定的危险。在后一种情况是由本地当事人向当

⁶³ Hof's-Amsterdam 8 September 2012, No. 200.100.508/1, (Maximov/NLMK) (Neth.).

⁶⁴ *Id.* para. 2.11.

⁶⁵ *Id.*

⁶⁶ *Id.* paras. 2.13-15.

⁶⁷ Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd., Court of Appeal of the Odessa Region, July 16, 2012, No. 1511/2458/2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/25273828>.

⁶⁸ Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd., [2011] EWHC (Comm) 923. The English court set aside the awards on the ground that no valid arbitration agreement existed, and therefore, the tribunal had lacked jurisdiction. This had been a primary issue in the arbitration itself, and largely came down to whether the terms of the contract had been adequately agreed to over the course of a particular telephone conversation. Evidently, the English court thought not, basing its reasoning on the conclusions in the earlier case of Grace Shipping v. Sharp & Co., [1987] 1 Lloyd's Rep. 207.

⁶⁹ BTA Bank v. Ablyazov and others, District Court of Kyiv, June 1, 2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/24526659>.

地法院请求承认仲裁裁决并且希望法院忽视撤销裁定的。

正如《纽约公约》中明确规定的，上文描述的裁定理论应当被限制在对待仲裁地（或仲裁所适用的法律）的撤销。正如马克斯·谢雷尔（Maxi Scherer）另文提出，⁷⁰并在本文第 III 部分详细解释的，适用“裁定理论”会带来很多实务和理论问题，因此不应该将其扩展到确认、承认、或者执行仲裁裁决的裁定中去。⁷¹撤销仲裁裁决的裁定和其他裁决后的裁定之间的区别是由《纽约公约》本身决定的。

《纽约公约》第五条第一项（戊）款中规定当仲裁裁决被撤销时，可以不承认和执行该裁决，但是它并没有说明其他裁决后裁定的效果。⁷²

然而，仅仅是企图适用裁定理论来评估一项撤销都会招致很多批评⁷³。其中一些具体的批评有：针对撤销裁决的裁定理论在很多案件中是多余的（例如，当做出撤销裁定的法院没有主要管辖权时），在一些案件中是模糊不清的，无法提供国际上的一致性，与《纽约公约》的内容相冲突，以及会致使一些司法系统被列入黑名

⁷⁰ Scherer, *supra* note 47.

⁷¹ See *infra* p. 330.

⁷² Under existing law, the distinction between set-aside and confirmation judgments may encounter difficulty. The Uniform Foreign Country Money Judgments Recognition Act, excludes foreign arbitral awards and agreements to arbitrate from coverage of the Act, leaving that to federal law, but then states that “[a] judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.” THE UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT, § 2 cmt. 3 (2005). Cf. AM. L. INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006), that also brings judgments of foreign courts confirming or setting aside awards within its scope, but does so only for the purpose of ensuring that federal and not state law governs the question. See § 1(a)(iii). The ALI proposal makes clear that the Act itself does not resolve the question of when a judgment setting aside or confirming a foreign arbitral award should be recognized, but only that *if the judgment is to be recognized* it meet the criteria set out in the proposed Act. Accordingly, there is room to rely on the Convention to draw the distinction between judgments of set-aside and judgments confirming an award.

⁷³ See Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, Apr. 28, 2009, 27 J. INT’L ARB. 179, 190–93 (2010); Scherer, *supra* note 47.

单。

事实上,当做出撤销裁定的法院没有主要管辖权的时候,《纽约公约》本身并没有提供承认和执行仲裁裁决的例外,因此在这种情况下,裁定理论是没有必要的。然而,对于那些反对使用裁定理论来评价仲裁地法院做出的撤销裁定的意见,人们给出了一些回应。除非存在一个解决被撤销裁决问题的协议,否则在处理被撤销的裁决中永远无法达到一致和统一。确实,裁定方案由于是基于每个成员国的国内法,因此缺少一致性。然而,在比较地看待实务中的承认和执行时,我们可以发现一个基本的相似点和得到普遍认可的标准。⁷⁴另外,相较之似乎是唯一选择的自由裁量权,此种“裁定理论”方式要更清晰具体,而且“裁定理论”给出了一系列法律原则来决定何时应当承认撤销裁定,何时不应该承认。

此外,认为裁定理论与《纽约公约》内容相冲突的观点并不足以为信。⁷⁵阿尔贝·让·范德恩·贝格(Albert Jan van den Berg)教授认为裁定理论创造了“反向镜面承认”:如果一个外国法院的裁定不被承认,那么一个外国仲裁裁决就能够被承认,这完全与《纽约公约》相悖⁷⁶。《纽约公约》中没有明确规定裁定理论的事实并不重要。因为《纽约公约》在这点上的规定是空白的,所以即使存在这样的要求,也没有可行的方法来决定何时应该执行一项被撤销的仲裁裁决⁷⁷。事实上,可以说自由裁量标准已尽可能控制了《纽约公约》采用“可以”这样的用词所带来的害处(上文中讨论的很多标准把“可以”转变成了“必须”或者“禁止”),而且在自由裁量的标准中,裁定理论可以说是原则性最强的。

类似的,相比其他自由裁量的标准,裁定理论裁定不易导致很多司法系统被列入黑名单。⁷⁸确切而言,无论采用“所有被撤销的裁决都执行”或者“所有被撤销的裁决都不执行”哪个标准,对国家司法系统进行裁判的危险都是可以避免的,但是这两种方式基于

⁷⁴ See generally Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 79 KING'S L.J. 235, 237-38 (2008).

⁷⁵ Van den Berg, *supra* note 73, at 190-93.

⁷⁶ *Id.* at 190 (internal quotation marks omitted).

⁷⁷ Discussed *supra* pp. 158-59.

⁷⁸ Van den Berg, *supra* note 73, at 192.

其他原因都有各自的问题。⁷⁹而且,一国法院对其他国家司法系统进行评判的危险被夸大了。法院长期以来一直使用裁定承认模式来处理非仲裁相关的裁定,而且并没有导致明显的司法系统黑名单。实际上,一方当事人企图执行一项被撤销的仲裁裁决的案件相对来说很少,因此并不太可能造成大规模的司法系统黑名单。

总之,国际私法在承认和执行裁定方面的规则提供了可以识别的原则,运用这些原则可以评估一项被仲裁地法院撤销的仲裁裁决是否可以得到尊重。

III. 择地行诉和其他对仲裁裁决的裁定

本文之前的篇幅讨论了与撤销裁定有关的择地行诉问题。这一部分将继续在其他种类的对仲裁裁决的裁定中讨论这一问题,例如,确认、承认和执行仲裁裁决的裁定。正如撤销裁定一样,这些对仲裁裁决的裁定也会导致择地行诉的出现。比如说,一方当事人在一个国家取得确认仲裁裁决的裁定后,通常是在仲裁地法院⁸⁰,这样他便可依赖该确认裁定的终局性效力,在另一国家的法院进行该裁决的后续承认和执行程序。

“裁定理论”,即适用外国裁定的原则是由琳达·希尔伯曼首先提出的,并在本文第 II 部分给予讨论。该原则在评估是否对外国撤销裁定给予考虑时执行外国裁定。但是该“裁定理论”并未明确说明是否可适用以及如何适用于其他种类的对仲裁裁决的裁定。我们现在就将对这一问题进行分析,首先分析确认裁定,之后分析承认和执行裁定。

A. 外国确认裁定

对于外国确认裁定⁸¹,适用外国裁定原则很早便得到了认可,

⁷⁹ *Supra* pp. 314–21.

⁸⁰ Except in the unusual case in which the parties have chosen to submit the arbitration to a law other than the law of the seat. In this situation, the award might also be presented for set-aside proceedings in the country of the law chosen by the parties. See New York Convention art. V(1)(e) referring to the “authority of the country in which, or under the law of which, that award was made” as the competent authority for set-aside proceedings (emphasis added).

⁸¹ The term “confirmation judgment” will be used in this section as

该原则称为双重授权理论。这一学说允许仲裁胜方在得到外国确认裁定后，寻求承认和执行这一外国裁定来代替仲裁裁决。换言之，执行法院适用外国裁定原则给予外国确认裁定相应的效力。

双重授权理论被美国判例法所广泛采用⁸²，同时也被《美国国际商事仲裁重述》采纳。⁸³ 根据《重述》，“一旦一项仲裁裁决被仲裁地的法院确认，那么胜方则可以通过裁决方式或外国裁定方式或两种方式，来寻求承认或者执行该裁决裁定。”⁸⁴ 类似的选择也存

encompassing judgments refusing to set aside an award, unless mentioned otherwise.

⁸² *Ocean Warehousing BV v. Baron Metals and Alloys Inc.*, 157 F.Supp.2d 245 (S. D. N. Y. 2001); *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Oriental Commercial & Shipping Co. v. Rosseel NV*, 769 F. Supp. 514 (S. D. N. Y. 1991); *Victrix SS Co. v. Salen Dry Cargo AB*, 825 F.2d 709 (2d Cir. 1987); accord *In re Waterside Ocean Navigation Co., Inc.*, 737 F.2d 150 (2d Cir. 1984); *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975). Cf. *Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973).

⁸³ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-3(d) (Tentative Draft No. 2, 2012).

⁸⁴ *Id.* § 4-3 cmts, at 72, lines 10-12. The exact scope of the parallel entitlement approach, however, is often not clearly identified. Although it is clear that the parallel entitlement approach allows parties an option (*i.e.*, to seek enforcement of the award or the foreign confirmation judgment), the precise terms of such option are less clear. Does the parallel entitlement approach provide mutually exclusive alternatives (*i.e.*, the parties must choose to enforce *either* the award *or* the confirmation judgment) or does it provide non-exclusive paths to enforcement (*i.e.*, the parties may choose to seek enforcement of *both* the award *and* the confirmation judgment)? If it is the latter, then may the parties pursue both options in parallel (*i.e.*, seek enforcement of the award and the confirmation judgment *at the same time*) or only as subsequent actions (*i.e.*, seek enforcement of the confirmation judgment only *after* an enforcement action regarding the arbitral award was unsuccessful, and vice versa)? From a U.S. perspective at least, it seems that the parallel entitlement approach allows the broadest possible option. U.S. courts have taken no issue with the fact that the party sought enforcement of the award and the confirmation judgment at the same time (*Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973)) or in subsequent actions (*Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex*

在于其他普通法系国家，例如澳大利亚⁸⁵、印度⁸⁶和以色列⁸⁷。在英国，法院有时给予仲裁胜方选择的权利，他们可以选择执行外国确认裁定，而非仲裁裁决；⁸⁸但是这一原则是否适用于《纽约公约》下的仲裁裁决却并不清晰。⁸⁹双重授权理论的变体在某种程度上同样存在或者存在过于一些大陆法系的国家。例如，双重授权理论曾经被德国适用，直到下文将讨论的德国最高法院近期的一项裁定时，德国才终止了该原则的适用。⁹⁰而瑞士在绝大多数情况下仍然

Centrala Navala, 29 F.3d 79 (2d Cir. 1994), allowing an action to enforce a foreign validating judgment even though the same court had found in a previous action that the enforcement of the award itself was time-barred). *But see* Commission Import Export S.S. v. The Republic of the Congo, Civ. No. 12-743, 2013 WL 76270 (D. D. C., Jan. 8, 2013), discussed *infra* p. 178.

⁸⁵ Biakh v. Hyundai Corp., Supreme Court of New South Wales, Oct. 17, 1988 (Australia), XV Y.B. COM. ARB 360 (1990).

⁸⁶ Harendra H. Metha v. Mukesh H. Metha, Supreme Court, May 13, 1999 (India), XXV Y.B. COM. ARB 721 (2000).

⁸⁷ CA 10854/07 Pickholz v. Sohachesky, Mar. 17, 2010 (Isr.) (cited by Talia Einhorn, *The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards*, 12 Y.B. PRIVATE INT'L L. 3 (2010).

⁸⁸ East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd., [1952] 1 ALL E.R. 1053, [1952] Q.B. 439; International Alltex Corp. v. Lawler Creations Ltd., [1965] IR 264 (High Ct., Kenny, J.); Jonathan Hill, *The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England*, 8 J. PRIVATE INT'L L. 159, 177 (2012).

⁸⁹ DICEY, MORRIS AND COLLINS: THE CONFLICTS OF LAWS, 902 paras. 16–165 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012) (stating that for awards falling within the scope of the New York Convention, “[i]n almost all cases, the proper course will be direct enforcement of the New York Convention award itself.”).

⁹⁰ Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.), discussed *infra* p. 181. For previous case law, Swiss and German buyer v. German seller, Bundesgerichtshof [BGH] [Federal Supreme Court], May 10, 1984 (Ger.), X Y.B. COM. ARB. 427, 428–29 (1985); U.S. exporter X v. German (F.R.) importer Y, Bundesgerichtshof [BGH] [Federal Supreme Court], Mar. 27, 1984 (Ger.), X Y.B. COM. ARB. 426 (1985); Frankfurt am Main Court of Appeal, July 13, 2005, NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006); Hamburg Court of Appeal, Nov. 5, 1991, NEUE

适用这一双重授权理论。⁹¹

有人可能认为双重授权理论严格来讲并不涉及择地行诉。确实,就像撤销裁定一样,确认裁定一般只能在仲裁地申请。因此,仲裁胜方其实并无选择,无法通过挑选法院而获得对其更为有利的确认裁定。

但是,双重授权理论导致的结果却和择地行诉一样。在双重授权理论下,尽管无法直接取得仲裁裁决的执行,仲裁胜方仍然可以以执行外国确认裁定从而间接取得仲裁裁决的执行。例如,在 *Seetransport* 诉 *Navimpex* 一案中,某美国法院基于超出时效原因拒绝执行一项外国仲裁裁决(仲裁地在法国)。同样是这个法院,因为法国裁定并未超出时效,而批准执行了一项法国确认仲裁裁决的裁定⁹²。

美国 2013 年的一份法院裁定⁹³为美国是否仍然存在这样的选

JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [New Legal Weekly Judicial Report] 658.

⁹¹ Tribunal Federale (TF) (Federal Supreme Court) July 28, 2010 (Switz), 30 ASA BULL. 97 (2012); Swiss Federal Tribunal, 4A.137/2007, July 20, 2007, 25 ASA BULL. 798, 803 (2007). COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 812 (Jean-François Poudret & Sébastien Besson 2nd ed. 2007). *Contra* M. Patocchi & C. Jermini, Art. 194 para 11, in INTERNATIONALES PRIVATRECHT (Heinrich Honsell et al. eds., 2nd ed. 2007). For France, see Dominique Hascher, *Recognition and Enforcement of Arbitration Awards and the Brussels Convention*, 12 ARB. INT'L. 233, 254 (1996).

⁹² See *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

⁹³ *Commission Import Export S. S. v. The Republic of the Congo*, 916 F.Supp.2d 48 (D.D.C. Jan. 8, 2013). The decision rejected on preemption grounds an attempt to rely upon the Uniform Foreign-Country Money Judgments Recognition Act to obtain recognition of an earlier English judgment recognizing an award that itself would have been barred by the three year statute of limitations provided for in § 207 of the Federal Arbitration Act. The case should have been much easier than the court made it because the English judgment—one of recognition outside of the arbitral seat—should not have been considered a judgment entitled to recognition. See *infra* at III.B. The preemption point has more relevance where courts have adopted the parallel entitlement approach so that a party that has obtained a confirming judgment in a court at the *situs* of the arbitration has both an award and a judgment that

择增添了疑问。在该案中，仲裁胜方在英国取得了伦敦高级法院对一项外国仲裁裁决的承认，并在向美国申请执行仲裁裁决已超过诉讼时效的情况下，寻求对这一英国裁定的执行。⁹⁴ 哥伦比亚地方法院驳回了这一诉讼请求，认为仲裁胜方“狡猾地企图”通过适用于外国裁定较长的诉讼时效，从而避免适用本国较短的诉讼时效的不利后果。⁹⁵

可以想象，在其他的情况下，尽管仲裁胜方无法直接寻求执行仲裁裁决，也仍然可以间接地寻求执行外国的确认裁定，尤其是当外国法院适用一种比执行法院更为宽泛的标准时。这就可能导致仲裁裁决本身不被允许执行，但外国裁定的裁决却得以执行的情况。

⁹⁶

can be enforced.

⁹⁴ In the U.S., proceedings to seek recognition or enforcement of a New York Convention award must be filed within 3 years. See Federal Arbitration Act, 9 U.S.C. § 207 (2006). The limitations period for actions to recognize or enforce foreign judgments is a matter of state law.

⁹⁵ The court held that such “maneuver” was preempted since it would create an obstacle to the accomplishment of the purposes of the statute of limitations contained in the Federal Arbitration Act (Federal Arbitration Act, 9 U.S.C. § 207 (2006)), which aims at creating a uniform limitations period and protecting the award debtor’s interest in finality. *Commission Import Export S. S.*, 916 F.Supp.2d at 54.

⁹⁶ The following hypothetical case may illustrate this point: assume an award was rendered in country A and the arbitral tribunal found it had jurisdiction vis-à-vis a party that has never signed nor intended to be bound by the arbitration agreement. Assume country A has a very liberal regime concerning the confirmation of awards rendered in that country, only permitting refusal of confirmation of the award on grounds of due process and public policy, thus leaving the control of the validity existence and scope of the arbitration agreement entirely to the arbitral tribunal. The award creditor obtains confirmation of the award in country A applying its liberal regime. The award creditor then obtains enforcement of the confirmation judgment in country B since the validating judgment complies with country B’s judgment standard, *i. e.* the validating judgment was rendered by a competent court in fair proceedings and was not obtained by fraud. As a consequence, the confirmation judgment is enforced in country B, although had the award creditor applied for the enforcement of the award in country B directly, country

这种二分法（拒绝执行仲裁裁决，但是批准执行外国对这一仲裁裁决的确认裁定）是由于双重授权理论导致的不同标准的适用。⁹⁷在绝大多数情况下，执行外国仲裁裁决是由《纽约公约》规定的，控制的焦点在于仲裁庭（如仲裁庭的组成和基于有效的仲裁协议的裁量）、仲裁程序（如程序的公正）和仲裁的结果（如没有违反公共秩序）。⁹⁸相反，执行外国裁定一般是由法院地法（“*lex fori*”）决定的（或者任何区域一致性文件），其控制的焦点在于外国法院的管辖权、诉讼程序和裁定结果。⁹⁹重要的是，大多数发达国家一般都禁止审查外国法院的裁定。所以，法院不能基于若该案件由它审理，它会给出不同的裁定为由，而拒绝执行外国法院的裁定，除非外国法院的裁定太让人震惊以至于违反了该法院所在地的公共秩序。

因此，如果仲裁胜方选择执行外国确认裁定（代替执行仲裁裁决本身），执行法院所能控制的则局限在外国法院的管辖权（而非仲裁庭的管辖权）、外国法院的诉讼程序（而非仲裁程序）和任何违反公共秩序的裁定（而非违反公共秩序的仲裁裁决）。¹⁰⁰特别是，执行法院不能审查外国法院对仲裁裁决有效性的裁定，包括仲裁协议是否有效、仲裁庭是否独立无偏见、仲裁程序是否公正。这些问题都由外国法院排他性管辖。

因此，这种双重授权理论的结果与择地行诉无异：它允许仲裁胜方通过使用外国确认裁定来改变适用的标准，从而当直接执行仲裁裁决无法实现时，间接取得对该仲裁裁决的执行（执行的是外国确认裁定）。

接下来的问题就是这种结果是否有问题，是否应当被禁止。有人可能会说双重授权理论下通过执行外国裁定来间接执行仲裁裁决应该始终被允许，因为这对执行仲裁裁决有利¹⁰¹。因此，它与支

B would have applied the New York Convention standard under which the courts of country B would have controlled the existence of a valid arbitration agreement and would have refused the enforcement of the award.

⁹⁷ For more detail, see Scherer, *supra* note 47.

⁹⁸ New York Convention, *supra* note 1, art. V.

⁹⁹ Silberman, *supra* note 74, at 237–38.

¹⁰⁰ Einhorn, *supra* note 87, at 60.

¹⁰¹ George A. Bermann, “Domesticating” the New York Convention: the Impact of the Federal Arbitration Act, 2(2) J. INT’L DISP. SETTLEMENT 317, 322

持仲裁和支持执行仲裁裁决的《纽约公约》，以及很多支持仲裁的国家的立场相一致。¹⁰²

然而，如果执行地法院对仲裁裁决的有效性没有最基本的控制，那么无论直接或者间接允许执行外国仲裁裁决都是不合理的。正如上文详细描述，双重授权理论下相关控制标准的变化导致执行法院无法审查外国法院对国际仲裁最基本要求的要求，这些要求包括（1）存在有效的仲裁协议，（2）仲裁庭独立无偏见，（3）仲裁程序公正。将这些要求的审查完全置于外国法院的排他性控制下会产生很多问题。

此外，对于双重授权理论还有很多其他可能的批评¹⁰³。首先，双重授权理论会导致诉讼理由重复¹⁰⁴。正如上文所解释的，双重授权理论允许仲裁胜方在平行的诉讼或者后续的诉讼中寻求执行仲裁裁决和外国法院对仲裁裁决的裁定¹⁰⁵。这种诉讼理由的重复可以说是对仲裁败方的司法骚扰。仲裁败方在寻求执行仲裁裁决的诉讼中胜诉后，仍需要在后续寻求执行外国裁定的诉讼中进行辩护。德国最高法院确认了该司法骚扰风险的存在，并因此在其 2009 年做

(2011).

¹⁰² See, e. g., *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“section 2 [FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements”); *IPCO (Nigeria) Ltd. v. Nigerian Nat’l Petroleum Corp.*, [2005] EWHC 726 (“[there is] a pre-disposition to favor enforcement of New York Convention Awards . . . even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award.”); *Hainan Mach. Imp. & Exp. Corp. v. Donald & McArthur Pte Ltd.*, High Court (Sing.), XXII Y.B. COM ARB. 771, 778 (1997) (“the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist”).

¹⁰³ Martin L. Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Award as Judgment under the Parallel Entitlement Approach*, CORNELL L. REV. 573, 588–89 (2007).

¹⁰⁴ For more details, see Scherer, *supra* note 47.

¹⁰⁵ This potential was realized, for instance, in the U.S. case *Seetransport v. Navimpex* where a party first unsuccessfully sought enforcement of an arbitral award and then sought enforcement of a French judgment relating to the same award. *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

出背离之前允许双重授权理论的裁定。被大多数学者所支持的 *Bundesgerichtshof* 一案¹⁰⁶解释到,“对仲裁败方的保护要求他或她无需面对同一法院超过一次的执行程序”,因此双重授权理论与仲裁败方的合法利益是不一致的¹⁰⁷。的确,不同国家不同的法律秩序会造成多个针对同一仲裁裁决的后仲裁程序,但是同一国家中针对同一仲裁裁决的多个后仲裁程序是应该避免的。仲裁胜方没有理由可以获得在同一法院两次进行诉讼的权利。

其次,双重授权理论忽视了这样一个事实,即确认裁定可能没有可执行的主体。执行要求一个裁定中存在一项可以被执行的命令,执行该命令可能会动用法院的公权利。这一要求在这里并未得以满足,尤其是对于宣告性的裁定或者仅仅驳回诉讼的裁定。¹⁰⁸ 在大多数大陆法系国家,确认裁定(或者拒绝撤销仲裁裁决的裁定)仅仅包含一项针对仲裁有效性做出的不具有执行力的声明或者对申请撤销仲裁裁决的驳回。因此它们无法得以执行。例如在 *Seetransport* 诉 *Navimpex* 一案中,美国法院执行了一项法国裁定,这项法国巴黎上诉法院做出的裁定判定仲裁有效并且决绝撤销该仲裁裁决。¹⁰⁹ 这样的一项裁定并不具有可被执行的主体,因此不应该在美国或者其他地方得以执行。

与此相反,大多数普通法国家的法院不仅仅是宣布确认或撤销

¹⁰⁶ See e. g., H. Plafmeier, *Ende des “Doppelexequatur” bei ausländischen Schiedssprüchen* [End of the “Doppelexequatur” in foreign arbitral awards], ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 82 (2010) (Ger.); R. Schutze, *Der Abschied vom Doppelexequatur ausländischer Schiedssprüche* [Farewell to Doppelexequatur of Foreign Arbitral Awards], RECHT DER INTERNATIONALEN WIRTSCHAFT [RDIW] [Law of the International Economy] 817 (2009); cf. more critical, G. Borges, *BGH: Doppelexequatur von Schiedssprüchen unzulässig* [Doppelexequatur of arbitral awards inadmissible], KOMMENTIERTE BGH-RECHTSPRECHUNG LINDENMAIER-MÖHRING [LMK] [Annotated BGH Jurisdiction Lindenmaier-Moehring] 30812 (2010).

¹⁰⁷ Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009 (Ger.), ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (286), 2009.

¹⁰⁸ See LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14-003, at 64.

¹⁰⁹ *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

裁决，还会讨论仲裁裁决的具体内容。¹¹⁰可以说，如果法院责令仲裁裁决债务人履行裁决，如，支付裁决中的损害赔偿，该裁定则包含执行内容。因此，一些学者区别了对仲裁裁决的简单执行声明和对仲裁裁决内容的具体裁定，而只有后者可以在第三国得以执行。¹¹¹

然而，如果仲裁裁决债权人在双重授权理论下仍需依赖一个形式上的差异，即外国法院是裁定了仲裁裁决的具体内容还是仅给出了声明式的裁定，那么这一原则仍是不够令人满意的。此外，可能会存在这种情况，即这两种类型（裁定声明和对裁决的裁定）的差异不易分辨。¹¹²暂且不论形式上的差异，这两种情况的最终目标总归是一致的，如实现仲裁裁决的效力。用西班牙最高法院的话来说，在这两种情况下“诉讼的真正目的在于执行仲裁裁决”¹¹³。因此，唯一一致的做法是限制仲裁裁决胜方的选择权，即寻求执行裁决本身的权利而非执行后续确认裁定的权利。

B. 国外承认与执行裁定

本节将讨论一些具体案例，这些案例中的仲裁裁决均已获得外国承认或执行裁定，裁决胜方在法院随后涉及同一裁决的诉讼中，通过既判力或禁止反言原则对该外国的承认或执行裁定加以利用。与上一节中所描述的确认裁决的情况不同，这是明显的择地行诉。除了较少的限制¹¹⁴，仲裁裁决胜方可以通过多地比较，选择一个相对仲裁友好的管辖地，从而取得有利的承认和有利的执行裁定，并对该裁决的终局效力加以利用。

英国法院在最近的一系列案件中适用了相关的英国关于外国

¹¹⁰ For instance, under English law, the court may issue an enforcement order or enter judgment in the terms of the award. See Arbitration Act, 1996, 15 Eliz. 2, c. 23, §§ 66(1)-66(2), 101(3) (Eng.) (for New York Convention awards).

¹¹¹ Hascher, *supra* note 91, at 245-46; LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 16-163, at 902.

¹¹² Hascher, *supra* note 91, at 247 (referring to “labelling problems”).

¹¹³ Union Naval de Levante SA v. Bisba Comercial Inc., S.T.S. [highest court of ordinary jurisdiction], Oct. 9, 2003 (Spain), XXX Y.B. COM. ARB. 623, 624 (2005).

¹¹⁴ See *supra* note 22.

裁定的原则¹¹⁵（包括禁止反言原则）来认可外国承认或执行裁定的效力。在 2011 年 *Chantiers de l'Atlantique SA* 诉 *Gaztransport & Technigaz SAS* 案¹¹⁶中，高等法院处理了仲裁庭（仲裁地为伦敦）驳回所有索偿的裁决。应诉方成功地取得了法国对仲裁的承认和执行裁定，而申诉方则坚称该裁决属欺诈取得。法国法院驳回了后一种说法，并责令执行该裁决。同时，申诉方以该裁决属欺诈取得为由，在英国申请撤销该裁决。弗洛（Flaux）法官在发现该裁决并未欺诈取得后，出具附带意见（“*obiter*”）认为，申诉方为阻止法国法院的承认和执行，已在法国法院针对欺诈问题提出异议但未获认可，因此根据英国法律中相关的禁止反言原则，申诉方不可在英国法院再次针对这一问题提起起诉。¹¹⁷

在前述关于 Yukos 争议的英国裁定中可以看到类似的分析¹¹⁸。正如上面提到的，俄罗斯仲裁庭的四个有利于申诉人的仲裁裁决均被俄罗斯法院撤销。尽管如此，由于荷兰法院认定俄罗斯的撤销裁定属于不公正司法程序的结果，申诉人仍然在荷兰得以成功执行该仲裁裁决。¹¹⁹ 虽然已取得仲裁裁决判给的款额，申诉人又到英国和美国申请承认和执行该裁决，以期获得仲裁裁决之后的款额利息（近 1.6 亿美元）。英国诉讼中出现了两个司法程序问题，一是申诉人是否可以再次以俄罗斯撤销裁决的不公正为由提起诉讼，二是这一诉讼请求是否应该因为荷兰法院的既有裁决而被禁止。

¹¹⁵ The relevant principles of issue estoppel under English law are as follows: (1) the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; (2) the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and (3) the issues raised must be identical. *See Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (no 2)*, [1967] 1 A.C. 853 (H.L.); *The Sennar (no 2)*, [1985] 1 W.L.R. 490, 494 (H.L.); LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14–030 ff, at 679.

¹¹⁶ *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3883 (Eng.).

¹¹⁷ *Id.* [313]–[318].

¹¹⁸ *See supra* p.326.

¹¹⁹ *Yukos Capital SARL v. OAO Rosneft, Hof's-Amsterdam* [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

英国高等法院的汉布伦（Hamblen）法官认定¹²⁰这是一个禁止反言的问题，荷兰法院对俄罗斯裁决的公正性的既有裁定具有终局性和约束力，因此应驳回应诉人重新提起的诉讼。在上诉中，上诉法院一致认为，案件的争议点在于荷兰裁决是否符合英国法律关于禁止反言的要件。然而，与一审法官不同，上诉法庭认为，因为争议点不同，荷兰裁决不符合英国法律关于禁止反言的要件。上诉法院认为，对俄罗斯法院的裁决不公正性的认定，在荷兰和英国语境下并非同一问题：

“对于他国法院是否不公正，任何一个特定国家都可能标准迥异……这应由我们自己（英国）的公共秩序来定义这一棘手问题的评判框架；一个裁定在英国法律下公正与否与一个裁定在其他国家法律下公正与否并非同一问题……”¹²¹

换句话说，因为公共秩序问题的法律标准在每个不同国家都有所不同，争议点也因国而异。上诉法院没有支持荷兰法院裁定具有禁止反言的既判力。但有一点很明确，即只要符合禁止反言的要件，上诉法院在原则上并不反对通过适用禁止反言等相关原则支持外国的承认和执行裁定。

最后，在英国最高法院对 *Dallah Real Estate and Tourism*

¹²⁰ Yukos Capital SARL v. OJSC Rosneft Oil Company [2011] EWHC (Comm) 1461, [107] (Eng.). On the background of the dispute, see J. van de Velden, *The “Caution lex fori” approach to Foreign Judgments and Preclusion*, 61 INT’L & COMP. L.Q. 519, 521 ff. (2012).

¹²¹ Yukos Capital SARL v. OJSC Rosneft Oil Company [2012] EWCA (Civ) 855, [151] (Eng.). Cf. the points made by Linda Silberman in an earlier article in connection with Yukos’ attempt to enforce both the arbitral award (and/or the Dutch judgment) in New York. For several reasons, the Dutch judgment, even as the judgment later in time, should not be the focus for the New York court. Rather, the court in New York should apply its judgment-recognition principles to the Russian judgment setting aside the arbitral award. First, the Dutch judgment is analogous to an exequatur on a judgment; it has only territorial reach and thus need not be “recognized.” Second, even applying principles of U.S. judgments—recognition law, a foreign judgment—here the Dutch judgment—need not be recognized if it conflicts with another final and conclusive judgment. Thus, it is for the New York court to form an independent conclusion about whether to respect the Russian set-aside based on principles of U.S. judgment recognition. See Silberman, *supra* note 43, at 36.

Holding Company 诉 *The Ministry of Religious Affairs, Government of Pakistan* 一案的裁定中的简短附带意见也可以看到同样的法律分析¹²²。英国下级法院拒绝承认和执行该案裁决。后该案诉至英国最高法院，同时对该案裁决的撤销程序也被诉至法国。曼斯（Mance）大法官指出，“如果法国法院承认任何与英国相似的禁止反言原则，那么一个（承认和执行程序中）认定仲裁裁决无效的英国裁定必然与法国诉讼程序有着不容忽视的联系。”¹²³

总之，只要符合禁止反言的相关要件，英国法院无疑将支持外国承认或执行裁定的终局性（并期待他国法院也会同样行事）。¹²⁴因此，裁决胜方可能通过获得外国承认或执行裁定，而后在英国的承认和执行程序中利用该外国裁定的终局性。

¹²² *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.).

¹²³ *Id.* [29]. Lord Collins took a more nuanced approach, saying that determinations made by the court at the seat in an annulment action may result in preclusive effect over subsequent enforcement actions, but did not suggest that preclusion runs the other way. Ultimately, of course, the French court in upholding the award gave no effect to the English judgment, including any preclusive effect to the determinations of the English court. *Gouvernement de Pakistan, Ministère des Affaires Religieuses v. Societe Dallah Real Estate and Tourismes Holding Co.*, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011 (Fr.), XXXVI Y.B. COM. ARB. 590 (2011). Dallah applied for enforcement of the award in France and the Government subsequently sought to set the award aside there. In upholding the award, the French court did not grant preclusive effect to the English decision. For a discussion on this point, see G. A. Bermann, *The U.K. Supreme Court Speaks to International Arbitration: Learning from the Dallah Case*, 22 AM. REV. INT'L ARB. 1, 8–9, (2011).

¹²⁴ *Cf.* not related to judgments recognizing or enforcing foreign awards but judgments recognizing or enforcing foreign judgments (so-called “judgments on judgments”): *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443 (H.L.) (indicating, *obiter*, that an Italian judgment enforcing a foreign judgment from St. Vincent might have issue estoppel effect in England in proceedings relating to the same St Vincent judgment); *House of Spring Gardens Ltd. v. Waite*, [1985] F.S.R. 173 (C.A.) (granting estoppel effect to a Irish judgment refusing to set aside a prior Irish judgment and thus barring the defendant from re-litigating the same issues in a subsequent enforcement action in the U.K.).

美国在这一问题上判例似乎较少。在 *Belmont Partners LLC v. Mina Mar Group Inc.* 一案¹²⁵中，一方在美国诉请确认一个美国的仲裁裁决，而另一方则反诉撤销此裁决。在加拿大针对同一仲裁裁决的执行程序中，安大略省高级法院确认并责令执行该裁决。后美国法院认定加拿大裁决对美国法院具有既判力，须礼让加拿大裁决。¹²⁶

《国际商事仲裁重述（草案）》采纳了这一解决方案。该《重述（草案）》认为，美国法院“在进行后仲裁裁定以及对早前阶段涉及过的法律问题进行再次评估时”，应当适用本院包括“诉讼请求、诉讼争议终局性以及承认外国裁决”的相关原则¹²⁷。因此，如果既判力或间接禁止反言的标准得以满足，则美国法院应给予在之前承认或执行程序中同样案件或焦点以终局性效力。¹²⁸

在美国，由于包括诉讼请求、诉讼争议终局性原则在内的外国裁定原则由美国各州法律主导，这些原则可能会因后仲裁裁定行诉地的不同而有所变化，因此《重述（草案）》对此并未给出任何确切的指导。¹²⁹ 尽管如此，《重述（草案）》相关章节的评论则给出

¹²⁵ *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W. D. Va. 2010).

¹²⁶ The three prong test of *res judicata* applied by the district court was that the foreign judgment (i) constituted a final judgment on the merits, (ii) between the same parties, and (iii) concerning the same cause of action. Regarding the requirement of identity of cause of action, the U.S. court noted that, “although no motion to vacate was brought in the prior proceedings [in Canada], the plaintiff need not proceed on the same legal theory as in the first suit.” *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743, 752 (W. D. Va. 2010). It added that pleading before the U.S. court contained “substantially the same factual allegations as were reviewed by the Ontario Superior Court.” *Id.*

¹²⁷ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-8 (Tentative Draft No. 2, 2012).

¹²⁸ Bermann, *supra* note 101, at 324.

¹²⁹ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-8 reporter’s notes b(ii) (Tentative Draft No. 2, 2012) (“The Restatement thus takes the position that these judgment recognition question are no different in nature from those presented in other situations involving successive court rulings. Rather than propound wholly new rules for the arbitration context, the Restatement embraces the forum’s existing rules on claim and issue preclusion, “law of the case,” and recognition of foreign

来一个更为重要的解释：“相比其他，早前的裁定是否能在后仲裁诉讼中取得裁定终局性更可能取决于早前裁定的法院地法”¹³⁰。如果法律不同，则不应认定其具有终局性。例如，《重述（草案）》的评论者提出了公共秩序问题并得出结论，“在这类情况下，美国法院如果认定早前裁定具有法律约束力可能是不恰当的……”。¹³¹

在上文描述的被英国和美国采纳的方案中明确地允许胜方通过择地行诉在外国取得有利的承认或执行裁定，然后在法院针对同一仲裁裁决的司法程序中利用该外国裁定的终局性效力。择地行诉的典型案件可以参考前面讨论的 *Chantiers de l'Atlantique* 一案¹³²。该案中，已经成功辩驳了所有诉讼请求的应诉人起诉至法国法院请求确认裁定，而后在英国的撤销程序中利用了该法国裁定的终局性效力。在法国进行诉讼的目的显然不是强制执行仲裁裁决（该裁决已驳回所有诉讼请求，因此本无裁决可执行），而是意在创造法国裁定在英国的司法程序中的终局性效力。¹³³

基于如下原因，这种认可外国承认和执行裁定效力并允许择地行诉的解决方案存在一定缺陷¹³⁴。一个重要的批评就是英美案例均

country judgments, as the case may be.”). Cf. also Linda Silberman’s view, *supra* note 44, that in the arbitration context, the standard should be federal.

¹³⁰ RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 cmt. c (Tentative Draft No. 2, 2012).

¹³¹ *Id.*

¹³² See *supra* p. 338.

¹³³ *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.).

¹³⁴ Sometimes the view has been expressed that recognition or enforcement judgments have necessarily or *per se* only a territorial scope and are thus incapable of producing extra-territorial effects, *i.e.* effects outside the country in which they were rendered. See *e.g.*, Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.) (holding that “a foreign enforcement judgment [. . .], like any enforcement judgment, merely aims at having a territorially limited effect, *i. e.*, for the territory of the state in which it is rendered” and adding that therefore it is “as per its subject-matter incapable of been enforced elsewhere.”); Frankfurt am Main Court of Appeal, July 13, 2005 (Ger.), NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006) (holding that a Romanian judgment refusing to enforce an arbitral award was incapable of being recognized in Germany since it only determined

未将仲裁地纳入考虑范畴。特别是即使在仲裁地法院提起后仲裁裁定申请，英美法院也会支持外国承认或执行裁定的终局性。例如，在 *Chantiers de l'Atlantique* 一案中，英国法官（在附带意见中）认为，一方当事人不可在英国（原仲裁地）针对外国（法国）承认和执行裁定中处理过的争议重新提起诉讼。¹³⁵ 同样，在 *Belmont Partners* 案中，作为仲裁地法院，美国法院认可了加拿大承认和执行裁定的终局性。¹³⁶

仲裁地是否以及在多大程度上发挥其在国际仲裁中的作用仍然是这一领域中最复杂最具争议性的问题之一，但这并非本文讨论的主题。¹³⁷ 但是事实上，英美两国遵循着地域性视角，允许仲裁

that the award had effect in that forum, *i. e.*, in Romania). *See also* J.-F. Poudret & S. Besson, *supra* note 91, at 812; G. Kegel, *Exequatur sur exequatur ne vaut in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS [Festschrift for Wolfram Mueller-Freienfels] 377, 378 (Dieckmann et al. eds. 1986). *Cf.* Silberman, *supra* note 43, at 36 note 48 (suggesting that a judgment relating to recognition or enforcement of an award “may have only territorial scope,” but leaving the question open). Maxi Scherer does not agree with this analysis. For a detailed analysis, *see* Scherer, *supra* note 47.

¹³⁵ *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.); *Good Challenger Navegante SA v Metalexportimport SA*, [2003] EWCA (Civ) 1668 (Eng.). *Cf.* *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.) (holding, also obiter, that the English refusal to recognize the award could produce preclusive effects in France, seat of the arbitration).

¹³⁶ *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W.D. Va. 2010).

¹³⁷ On the one hand, according to the traditional judicial or territorial view, an award's legal force stems from the law of the seat and the courts in that country have a supervisory function over the arbitration proceedings as well as primary jurisdiction when it comes to the assessment of the validity of the award. *See, e. g.*, F. Mann, *The UNCITRAL Model Law—Lex Facit Arbitrum*, LIBER AMICORUM FOR MARTIN DOMKE 157 (1967), reprinted in 2(3) ARB. INT'L 241(1986); Sir R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19 (2001); B. Leurent, *Reflections on the International Effectiveness of Arbitration Awards*, 12 ARB. INT'L 269 (1996); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113–20 (1992). On the other hand, according to a delocalized or

地法院发挥其对仲裁裁决效力的监督职能。这一视角下，仲裁地法院在后裁决程序中支持非仲裁地法院的承认或执行裁定的终局性的做法，不合逻辑，也似乎有悖常理。这样做就使得非仲裁地法院的裁定获得了相对于本应发挥监督职能的仲裁地法院裁定的优先效力。换言之，针对仲裁裁决效力的后仲裁裁定（如，认定仲裁协议有效）如果被世界上的任一法院给予以终局性，那么仲裁地法院的监督职能将成为空谈。

有人辩称，须平衡仲裁地法院（在地域性视角下）发挥其监督职能的需要和在外国裁定原则下，礼让外国裁定的需要。然后判例法尚未出现对这种平衡的实践。针对由非仲裁地法院做出的承认或执行裁定的终局性，英美两国法院并未关注仲裁地法院的监督职能是否会受到影响，甚至完全没有讨论这一问题。对此，美国的《重述（草案）》同样没有关注或讨论¹³⁸。这些观点都难以与英美两国法院在国际仲裁中普遍采取的地域性视角相调和。

针对上述英美采用的解决方案的第二个批评主要涉及《纽约公约》的适用问题。假定仲裁地所在国为 C1，仲裁裁决胜方向《纽约公约》成员国 C2 申请执行仲裁裁决。C2 国的法院根据《纽约公约》第五条第一项（甲）款，认定该仲裁裁决基于无效的仲裁协议，从而不予承认或执行。随后该仲裁裁决胜方在国家 C3（同样是《纽

contractual view, arbitration is based on party autonomy and detached from the laws of the seat and the supervising control of the courts in that country. See, e. g., P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* [International Commercial Arbitration] 401 ff. (1965); P. Fouchard, *L'Autonomie de l'arbitrage commercial international* [Autonomy of International Commercial Arbitration], *REVUE DE L'ARBITRAGE* [Review of Arbitration] 99 (1965); B. Goldman, *Les conflits de lois dans l'arbitrage international de droit prive* [Conflicts of Laws in International Arbitration in Private International Law], *VOL II RECUEIL DES COURS DE DROIT INTERNATIONAL* [Report of Courses on International Law] 351 (1963); B. Goldman, *Arbitrage international et droit commun des nations* [International arbitration and common law of nations], *REVUE DE L'ARBITRAGE* [Review of Arbitration] 115 (1965); A. VON MEHREN, *LIMITATIONS ON PARTY CHOICE OF THE GOVERNING LAW: DO THEY EXIST FOR INTERNATIONAL COMMERCIAL ARBITRATION* 19 (1986); EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 35 (2010).

¹³⁸ RESTATEMENT OF THE LAW (THIRD), *THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION* § 4-8 (Tentative Draft No. 2, 2012).

约公约》成员国)启动承认和执行程序。在 C3 国的诉讼程序中, 裁决败方辩称 C2 国的裁定, 特别是对仲裁协议无效的认定, 具有终局性, 故应不予承认和执行该仲裁裁决。

在这种情况下, (当外国裁定符合承认裁定以及既判力或禁止反言的相关要件时) 给予外国法院对仲裁协议效力的认定以终局性, 意味着法院无法审查该裁定。这样一来, 即使法院得出了不同的结论 (即根据《纽约公约》第五条第一项 (甲) 款, 仲裁协议有效), 裁定的终局性也会阻止法院承认或执行该仲裁裁决。即使根据《纽约公约》外国法院的裁定确有错误, 法院也无能为力。

这样的结果显然不尽如人意。在这种情况下, 甚至可以说法院给予认定仲裁协议无效的外国法院裁定以终局性的行为, 违背了《纽约公约》成员国承认有效仲裁协议并使之生效的义务。¹³⁹ 事实上还可以说, 仲裁协议效力认定问题是《纽约公约》的核心问题, 《纽约公约》成员国给予外国法院针对这一问题的裁定以终局性可能构成对《纽约公约》义务的重大违背。

在此基础上, 有人提出, 只有外国的承认或执行裁定对裁决予以承认或执行 (而不是不予承认或执行) 时, 才能认定其终局性¹⁴⁰。然而, 终局性的认定需要依赖裁定本身的结果 (即是否承认或执行) 似乎不尽人意。因此, 对外国承认和执行裁定的终局性直接不予支持可能更好。¹⁴¹ 不论如何, (正如英美两国实践) 对诉讼争议与诉讼请求的禁止反言原则的普遍且缺乏限制的适用, 在某些情况下导致了《纽约公约》的宗旨和目标以及签署国之义务的违背。

IV. 结论

仲裁当事人在取得仲裁裁决后可能通过择地行诉获得裁决后裁定 (撤销, 确认, 承认或执行裁决的裁定), 并在针对同一仲裁裁决的后续诉讼中利用该裁定的终局性。本文探讨了这类择地行诉的影响, 并指出有必要将撤销裁定与其他后仲裁裁定加以区分的结

¹³⁹ New York Convention, *supra* note 1, art. II.

¹⁴⁰ Hill, *supra* note 88, at 188. Cf. Hamburg Court of Appeal, Jan. 24, 2003, XXX Y.B. COM. ARB. 509 (2005) (holding that a Polish judgment denying enforcement cannot be recognized in Germany because it is a decision on procedural, rather than substantial matters).

¹⁴¹ For more details, see Scherer, *supra* note 47.

论。一方面,《纽约公约》第五条第一项(甲)款允许一国法院准予外国撤销裁定生效,但却未能提供相应标准来规定何时方可准予其生效。正如在本文第 II 部分所解释的,对外国裁定设置的一般路线可以为各国法院在评判是否对外国撤销裁定准予生效时提供指导和帮助。另一方面,《纽约公约》也未对其他后仲裁裁定的效力问题给予规定。正如本文的第 III 部分所述,不应把“裁定理论”理念扩展到其他后仲裁裁定,同时也不应在后续诉讼程序中给予这些裁定以终局性效力。

**Likely Lessons in Unlikely Places:
Comparative Review of Legal Education Policy
Between the United States and East Germany**

April M. Hathcock

TABLE OF CONTENTS

ABSTRACT.....	193
I. Introduction.....	194
II. Study Plan and Policy Statement.....	195
A. Study Plan	195
B. The Policy Statement.....	197
III. Brief History of East Germany.....	197
IV. What Can We Learn from a Defunct Nation?.....	200
A. Post-curricular Focus.....	201
1. Clarity	201
2. Consistency	204
B. Balance Between Theory and Practice	209
1. Inclusion of <i>Practica</i> in the Required Curriculum	209
2. Faculty as Practitioners.....	212
V. A Shift in Perspective.....	214

Likely Lessons in Unlikely Places: Comparative Review of Legal Education Policy Between the United States and East Germany

*April M. Hathcock**

ABSTRACT

Legal education in the United States is in a period of crisis. Everyone involved, from legal educators to law students to current practitioners, has engaged in intense discussion about the various forms this reform could take, but little has been actually implemented. There has, however, been a general leaning toward creating a legal education policy that possesses a more comprehensive and balanced practical focus. In this vein, legal education policy makers have been looking to other countries and even other disciplines for ideas on how to build a better legal education system in the U.S. With this in mind, being open to finding lessons in the unlikeliest of places, this article looks to the legal education policy in East Germany and the lessons that today's American legal education policymakers can learn from it with a particular emphasis on post-curricular focus and the balance between theory and practice.

* April M. Hathcock is a Reference Librarian and Legal Research Instructor at the University of South Carolina School of Law. She received her B.A. from Agnes Scott College in 2004, J.D. and LL.M. in International and Comparative Law from Duke University School of Law in 2007, and M.L.I.S. from the University of South Florida in 2013. She owes heartfelt thanks to Karen Walker, M.L.S., of St. Petersburg College and Ryan Torrie of Carleton College for their research and editing assistance with this article.

I. INTRODUCTION

Legal education in the United States is in a period of crisis. For the longest time, more and more graduates have been leaving American law schools in pursuit of fewer and fewer jobs.¹ In recent years, law schools have seen a drastic reduction in the number of law school applicants, as potential students and employers look to law schools to reform in keeping with the rough economic times.² Everyone involved, from legal educators to law students to current practitioners, has engaged in intense discussion about the various forms this reform could take, but little has been actually implemented. There has, however, been a general leaning toward creating a legal education policy that possesses a more comprehensive and balanced practical focus.³ In this vein, legal education policy makers have been looking to other countries and even other disciplines for ideas on how to build a better legal education system in the U.S.⁴

This being the case, it is sometimes surprising where the most effective lessons for reform can be found. Most people, when they think of the former nation-state commonly known as East Germany—if they think of East Germany—think of a decrepit communist territory that was doomed to pass away into the historical ether from the very start. Whatever lessons we could learn from the German Democratic Republic are cautionary tales the ephemeral nature of political structures built on faulty ideals. Yet, what many do not realize is that not all of East Germany's policymaking attempts were inherently faulty. Particularly, in the area of legal education, East German leaders produced a written

¹ Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (Jun. 25, 2012, 10:18 AM), <http://online.wsj.com/news/articles/SB10001424052702304458604577486623469958142>.

² Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs and Jobs Are Cut*, N.Y. TIMES (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html>.

³ See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS (2007) (recommending a more profession-focused approach to legal education).

⁴ See, e.g., Jennifer S. Bard, "Practicing Medicine and Studying Law": How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them, 10 SEATTLE J. SOC. JUST. 135 (2011); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 424–29 (2007) (discussing innovations in legal education in Canada and the United Kingdom).

standard that combined a comprehensive and balanced post-curricular and practical focus. They essentially succeeded, in writing at least,⁵ to create the kind of legal education policy that we have been struggling for in the U.S. for the last decade or so.

With this in mind, being open to finding lessons in the unlikelyst of places, this article looks to the legal education policy in East Germany and the lessons that today's American legal education policymakers can learn from it. The article begins with a brief description of the two major documents that represented East German legal education policy, followed by a summary of the political history of the area. The article then proceeds through an analysis of the lessons that can be learned from the East German legal education policy, with particular emphasis on the clarity and consistency of its post-curricular focus and the balance between theory and practice created by the use of required *practica* and faculty practitioners. The article ends with a discussion of the fundamental changes in framework that need to occur in order for American legal education reform to truly take place.

II. STUDY PLAN AND POLICY STATEMENT

The two main documents representing East German legal education policy that serve as the focus for this article are the *Study Plan for the Primary Directions in Educations for Law*⁶ ("Study Plan") and the *Conception for the Structure of Training and Further Education of Jurists in the German Democratic Republic*⁷ ("Policy Statement"). Both documents detail the pedagogical and theoretical framework for legal education in East Germany as determined by its leaders during the 1980s. While the main focus of the two documents is the same, there are some differences that make an examination of both documents necessary.⁸ They are essentially best viewed in tandem.

A. Study Plan

⁵ This article does not attempt to examine the implementation of this policy, in part because it did not exist long enough to be fully implemented, in part because the lessons to be learned from this policy lie primarily in the written ideals.

⁶ DANIEL JOHN MEADOR, IMPRESSIONS OF LAW IN EAST GERMANY 213–37 (1986).

⁷ Daniel John Meador, *Legal Education in East Germany: The 1988 Policy Statement*, 16 REV. SOCIALIST L. 81 (1990).

⁸ *Id.* at 81–82.

The Study Plan was issued in 1982 by the Council of Ministers in the Ministry of Higher Education.⁹ In particular, it was “authorized as an obligatory study plan for instruction at GDR Universities” and meant to create a strictly uniform system of learning and instruction in the field of law.¹⁰ The Study Plan was primarily developed at one of four of East Germany’s universities,¹¹ but the Council received input from faculty members at all the academic institutions, as well as from current legal practitioners.¹² In the end, the document represented a wholesale collaborative effort between all members of the legal education community, from professors to practitioners, from university administrators to government leaders.

On the whole, the Study Plan describes in minute detail the course of study for an East German student of law. It begins with a description of the “Aim of Instruction and Education” and continues with a subject-by-subject detailing of coursework and instruction for a number of areas of law, including labor, constitutional, and copyright law.¹³ The Study Plan then provides further curricular description for the two distinct specializations available in legal education in East Germany: Justice and Economics.¹⁴ Finally, it ends with an overview of the “Development and Utilization of Studies” with a plan for “Continuing Education” that involves both law students and current legal practitioners.¹⁵

Of course, the primary focus throughout the Study Plan is to equip new lawyers to pursue and uphold the ideals of the Communist Party; this focus shines through right from the beginning.¹⁶

⁹ MEADOR, *supra* note 6, at 213.

¹⁰ *Id.* at 214.

¹¹ The four universities offering legal studies in East Germany were at Berlin, Jena, Leipzig, and Halle. Meador, *supra* note 7, at 81.

¹² MEADOR, *supra* note 6, at 214.

¹³ *Id.* at 214–27.

¹⁴ *Id.* at 214. The Justice track was available at the universities in Berlin and Jena. The Economics tract was offered at Leipzig and Halle. Meador, *supra* note 7, at 81.

¹⁵ MEADOR, *supra* note 6, at 214.

¹⁶ The Study Plan opens with the following:

In realization of the historical mission of the proletariat, the legal leading roll [sic] of the working class and its Marxist-Leninist party grows through ongoing construction of the already developed socialist society and the establishment of basic prerequisites for the gradual transition to Communism . . .

Nevertheless, as has been stated before, there are aspects of this Study Plan and the accompanying Policy Statement that are well worth examining in light of modern American capitalist legal education.

B. The Policy Statement

The Policy Statement for legal education in East Germany was released in 1988 as the brainchild of the East German Communist Party and the Council of Ministers.¹⁷ The main focus of the Policy Statement is similar to that of the Study Plan but with an increased focus on the social and political changes that necessitate a renewed focus on standardizing legal education.¹⁸ It begins with a section detailing the “Societal Demands on the Development and Tasks of Law” and continues with policies that focus primarily on improved training for new lawyers.¹⁹ Together with the Study Plan, the Policy Statement provides a detailed schema for the theoretical and practical formulation of legal education in East Germany.

III. BRIEF HISTORY OF EAST GERMANY

To fully understand the philosophy behind the legal education policy of East Germany, it is essential to understand its history. The German Democratic Republic (“GDR”), popularly known as “East Germany,” arose in the aftermath of World War II.²⁰ Immediately following the defeat of the Nazi forces in early 1945, the Allied forces met during the famed Yalta and Potsdam Conferences to determine how the territory of the Third Reich should be divided.²¹ The western portion of the country fell under

Inseparably bound up with the universal strengthening of the socialist state are the systematic improvement of the socialist judicial system and guarantee of socialist legality

Accordingly, high and constantly improving standards have to be set for the political and ideological education and for the theoretical and practical training of the students who enroll in the GDR university courses of political science and law.

Id. at 214–15.

¹⁷ Meador, *supra* note 7.

¹⁸ *See id.* at 81–83.

¹⁹ *Id.* at 83–96.

²⁰ PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 11 (1997).

²¹ *Id.* at 10.

the control of the Western world, to be divided equally between the United States and Great Britain, and later France.²² The eastern portion of the country fell under the purview of the then-Soviet Union.²³ In addition to the overarching geo-political division of the German territory, the capital city of Berlin was also divided into four sectors, belonging to the four respective Allied nations.²⁴ Nonetheless, at the time, all of the Allied nations held a unified goal to see the German territory reunified and fully reconstructed in the near future.²⁵

Unfortunately, the rise of the Cold War put a considerable damper on these plans. Hostilities between the West and the Soviet Union, particularly between the United States and the Soviet Union, created an ever-deepening rift between the eastern and western German territories.²⁶ By 1949, the two sectors had completely split to become two entirely independent nation-states.²⁷ The three sectors falling under British, French, and American control combined to create the Federal Republic of Germany, commonly known as “West Germany,” a constitutional republic existing under a Basic Law.²⁸ The Federal Republic underwent a widespread currency reform and swiftly began rebuilding, with the help of its Allied sponsors, from the devastations of WWII.²⁹ The Soviet sector developed into the GDR, a separate constitutional republic, otherwise known as East Germany.³⁰

While East Germany was officially created and nationalized in 1949, it did not fully gain its own independence of personality until well into the late 1960s.³¹ In the midst of the Cold War, hostilities between East and West Germany escalated tremendously.³² The two nations, once was one country, refused to acknowledge the diplomatic and sovereign existence of the oth-

²² *Id.*

²³ *Id.*

²⁴ *See id.* at 15.

²⁵ *Id.* at 10.

²⁶ *Id.* at 10–11.

²⁷ *Id.* at 11.

²⁸ *Id.*

²⁹ *See id.* at 11–12.

³⁰ *Id.* at 11.

³¹ *Id.* at 13.

³² *Id.*

er.³³ Indeed, as law professor Peter Quint notes, the two countries “possessed no formal diplomatic relations and their informal relations were characterized by sharp public attacks and a certain amount of necessary quiet cooperation.”³⁴

In light of the rising hostilities, East Germany erected the Berlin Wall in 1961 and effectively ended the movement of people and goods between the two nations-states.³⁵ Berlin, while physically situated in East Germany, became a two-nation city.³⁶ To further cement the division between east and west, the GDR rewrote its constitution to reflect its independence from the Federal Republic and to emphasize its close relationship to the Soviet Union.³⁷

As East Germany grew into its independent personality as a nation-state, a corresponding gloss of independence took hold in its system and philosophy of legal education. During the 1970s, socio-political leaders moved forward with what was essentially a complete overhaul of the legal education system.³⁸ In the years leading up to the seemingly irrevocable split that occurred in the late 1960s, much of the East and West German systems of legal education remained similar.³⁹ However, during the 1970s, East German officials completely transformed the policy and practices behind legal education in the GDR to reflect better the communist agenda.⁴⁰ These changes were a natural outcropping of the concomitant changes that were taking place in the legal and political world.⁴¹ “During that unusually active decade in the legal sphere, most of the substantive and procedural law administered through the state court system was rewritten in a way that divested it of remaining traces of the ‘bourgeois system’ and infused it with the principles of Marxism-Leninism.”⁴² It was against this background of social and political upheaval that the Ministry for Higher Education issued its *Study Plan for the Primary Direc-*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ *Id.* at 13.

³⁸ MEADOR, *supra* note 6, at 178.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

*tions in Educations for Law*⁴³ and the East German Communist Party and GDR Council of Ministers issued their subsequent *Conception for the Structure of Training and Further Education of Jurists in the German Democratic Republic*⁴⁴.

It is important to note that these policies, however lofty in goal, were not long-lived. Political opposition against the Communist Party of the GDR, always present to a certain degree, rose to new heights during the latter half of the 1980s.⁴⁵ West Germany watched with interest as the people of the GDR fought for better economic stability and possible reunification of the two nation-states.⁴⁶ In late 1989, after the election of a new prime minister in East Germany, one more favorably disposed toward cooperation between the two territories, the chancellor of West Germany proposed a ten-point plan for diplomatic collaboration between East and West Germany that would eventually lead to reunification of the nation as a whole.⁴⁷ By the following summer of 1990, reunification went from being a goal to a reality with the signing of the Unification Treaty on August 31.⁴⁸ The treaty called for the revocation of the East German constitution and the modification of the Federal Republic's Basic Law constitution to account for the addition of the GDR.⁴⁹ With that, East Germany, and its separate policies and philosophies, including that for legal education, ceased to exist.

IV. WHAT CAN WE LEARN FROM A DEFUNCT NATION?

Despite the short lifespan of East Germany's policy for legal education, and of East Germany itself, there is much that we can glean from their policies regarding legal education as we set out to rework and redevelop our own. Though our current economic woes are minor compared to the political and economic upheaval that characterized much of the life of the GDR, we, like

⁴³ *Id.* at 213–37.

⁴⁴ Meador, *supra* note 7, at 83.

⁴⁵ QUINT, *supra* note 20, at 16. It was perhaps in response to this threatened political upheaval that the Communist Party and the Council of Ministers felt the need to adopt a new policy statement on legal education, emphasizing Marxist-Leninist ideology. See Meador, *supra* note 7.

⁴⁶ QUINT, *supra* note 20, at 18–20.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 103.

⁴⁹ *Id.* at 104.

East Germany, find ourselves in the midst of unprecedented financial trouble that is vastly affecting the legal market and, subsequently, legal education. Reform is essential and inevitable. The ABA is doing what it can to keep abreast of the times,⁵⁰ but the profession continues to fall woefully behind in adjusting to the demands of a declining legal market.

With the need for legal education reform so high, it is worth looking to whatever sources possible to find and retool solutions to our own unique challenges. With this in mind, there are a number of characteristics of the East German policy for legal education that are worth considering as we move forward into a new era of American legal education. In particular, we should take a long look at the post-curricular focus, efforts on behalf of student buy-in, balance of theory and practice, and interdisciplinary nature of the policy as we seek to redevelop our own.

A. Post-curricular Focus

One of the most notable lessons present in the East German policy for legal education lies in its devoted post-curricular focus. This focus can best be viewed in terms of two “C”s: clarity and consistency.

1. Clarity

One of the hallmarks of the post-curricular focus of East German legal education was the clarity of that focus. There was no mistaking the intent of policymakers in setting up the system for legal education in the country. Political and educational leaders of the GDR were determined that law students would learn more than just the theoretical basics of the law. Students were meant to become fully engaged in the process of incorporating the law into the social and political life of their country, and this goal was articulated in distinct and explicit terms:

The student is to develop into a socialist lawyer working within the socialist apparatus of state and econo-

⁵⁰ See RANDALL T. SHEPARD, AMERICAN BAR ASS’N, THE ABA SOLICITS VIEWS ON LEGAL EDUCATION (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/december_2012_council_meeting/2012_task_force_future_legal_education.authcheckdam.pdf.

my. He must become a political functionary and public leader who is able and determined to protect the socialist order of state and society, to apply socialist law in the service of social progress, and to preserve the rights and interests of the people.⁵¹

The GDR recognized that its law students would play a crucial role in the development of the political, social, diplomatic, and economic landscape of the nation and planned the training of its law students accordingly.⁵² Legal education was not meant to exist for its own sake. It was not meant to be little more than an academic exercise. Legal professionals served very clear roles in shaping society, and law students were to be trained to take on those specific roles.

Certainly, the socialist nature of East German politics played a major part in the development of such a concentrated post-curricular focus for legal education; but that does not change the fact that American lawyers play very similar key roles in the development of politics, economics, and society, and American law students could vastly benefit from a clear policy of legal education that is explicitly committed to preparing them for those roles. There has been some movement to provide clearer missions for the goal of legal education in America, but that movement has been vague and disjointed, at best. For instance, the ABA, whose Section of Legal Education and Admissions to the Bar is charged with developing and enforcing legal education policy in the U.S.,⁵³ says relatively little regarding the purpose of law school

⁵¹ MEADOR, *supra* note 6, at 215.

⁵² *Id.*; Meador, *supra* note 7, at 83–86.

⁵³ A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education.html (last visited May 31, 2013); Bard, *supra* note 4, at 145–46. The ABA Section of Legal Education and Admissions to the Bar (“Section of Legal Education”) is responsible for the accreditation of law schools in the country. In fact, the Section of Legal Education was the first section created within the ABA, less than 20 years after the national organization’s inception. Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1101 (1997). While accreditation of a law school is not required for it to function, the accreditation system does bear heavily on a law graduate’s chances for future employment and certification. Bard, *supra* note 4, at 166–67. Many state bars and legal employers require graduation from an ABA-accredited law school in order to be eligible for practice. *Id.*

education in relation to American society as a whole.⁵⁴ The first stated objective of legal education according to the ABA is simply to “prepare . . . students for admission to the bar; and effective and responsible participation in the legal profession.”⁵⁵ In the interpretations accompanying the objectives, the ABA goes on to require a law school to “maintain an educational program that prepares its students to address current and anticipated legal problems.”⁵⁶ However, the organization makes no effort to explain what constitutes the “legal problems” that law students may be asked to face. Unlike the East German policy, there is no mention of the integral role lawyers play in American politics, society, and the economy. Instead, the ABA allows that an institution of legal education “*may* offer an educational program designed to emphasize certain aspects of the law or the legal profession”⁵⁷ without ever delineating what those “aspects” could or should be. Essentially, American law schools *could* emphasize certain aspects of the profession for which it is preparing its students, but this is by no means required.

Another source of ambiguity in the focus of American legal education is the popular maxim that law schools are meant to teach students how to “think like a lawyer.”⁵⁸ Law schools have been working to teach law students what it means to “think like a lawyer” without ever fully defining what that process entails. Any attempts to capture empirically the meaning of the phrase are met with a slew of differing opinions that run the gamut of potential meanings.⁵⁹ What is more, these vast differences in definition

⁵⁴ See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR [hereinafter A.B.A. SEC. OF LEGAL EDUC.]; 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 301 (dealing with the objectives of legal education).

⁵⁵ *Id.* § 301(a).

⁵⁶ *Id.* § 301-1.

⁵⁷ *Id.* § 301-2 (emphasis added).

⁵⁸ SULLIVAN ET AL., *supra* note 3, at 47; Judith Welch Wegner, *Symposium 2009: A Legal Education Prospectus: Law Schools & Emerging Frontiers: Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 891 (2009).

⁵⁹ SULLIVAN, *supra* note 3. See generally Wegner, *supra* note 58, at 893–923 (reviewing the responses of American and Canadian faculty and students at sixteen different law schools to the question of what it means to “think like a lawyer”).

transcend the boundary between law professor and law student.⁶⁰ There appears to be a consensus in legal education that the purpose of law school is to teach students to “think like lawyers,” but no effort has been made to create a consistent explanation for that purpose. As Judith Welch Wegner, co-author of the 2007 Carnegie Report on legal education, notes, “Law schools have historically been weak in articulating their institutional goals”⁶¹ She goes on to challenge the universal acceptance of “thinking like a lawyer” as an adequately clear goal for legal education: “[L]egal educators who . . . claim[] that teaching students to ‘think like lawyers’ sufficiently ‘names’ the obligations of legal education are mistaken.”⁶²

It is time for American legal education policy to develop beyond vague notions of preparing students to confront undefined “legal problems” or guiding students into the amorphous terrain of “thinking like a lawyer.” Legal education in America, as it was in the GDR, should be based on a clear and concise focus that takes into account the realities of the lawyer’s role in society. Wegner poses the key question in these terms: “Might students learn to ‘think like lawyers’ more readily if they received clearer guidance about the relation between law study and the intellectual and social context in which lawyers operate . . . ?”⁶³ The answer must be a resounding “Yes.” As Wegner goes on to note, “Schools with *clear* and well-remembered missions tied to preparing students for practice . . . have a better chance than others in retaining their focus.”⁶⁴ It is time for the American legal education system to develop a clear mission and realign its focus with the realities of the legal field.

2. Consistency

The second hallmark of East Germany’s post-curricular focus was its consistency. Students attending any of the GDR’s law

⁶⁰ See Wegner, *supra* note 58 (variety of responses seen in both faculty and student definitions of what it means to “think like a lawyer”).

⁶¹ *Id.* at 941.

⁶² *Id.* at 923.

⁶³ *Id.* at 939.

⁶⁴ *Id.* at 957 (emphasis added).

schools would receive the same basic legal education.⁶⁵ Students on the Justice track at the university in Berlin received the same education as students graduating from the same program in Jena.⁶⁶ Coursework for each semester of the legal education program was carefully prescribed and applicable to all students pursuing the study of law.⁶⁷

One apparent downside to this system of course standardization would be a failure to allow for individual student academic interests, but even that is provided for in the East German policy on legal education: “In the final phase of law studies, elective subjects are offered as incentives to individual development and to the particular needs of a student’s special field of future activity.”⁶⁸ Students were permitted, even encouraged to take elective courses, all with a view to the post-curricular focus of preparing students for their work beyond law school.

Not only was the curriculum consistent among schools, the actual course content was standardized across institutions and even among faculty members within a single institution.⁶⁹ The Study Plan lists thirty different subject areas in which students were to attain a certain level of mastery upon graduation, and for each, there is a brief description of the educational and practical goals for instruction in that area.⁷⁰ For example, students were required to take “History of State and Law” in which they learned about “the development of state and legal systems” with a particular focus on the rise and functioning of the GDR.⁷¹ In “Land Law,” students studied government regulations relating to “land protection, land ownership, and real estate transaction.”⁷² There was even a course in intellectual property, in which students studied issues relating to domestic and international copyright.⁷³

⁶⁵ See MEADOR, *supra* note 6, at 213 (identifying the Study Plan as “obligatory” for all GDR universities).

⁶⁶ Meador, *supra* 7, at 81.

⁶⁷ *Id.* See also MEADOR, *supra* note 6, at 217–37 (outlining the course of study for all resident and nonresident students).

⁶⁸ *Id.* at 218.

⁶⁹ MEADOR, *supra* note 6, at 217–27.

⁷⁰ *Id.*

⁷¹ *Id.* at 220.

⁷² *Id.* at 223–24.

⁷³ *Id.* at 225.

In the United States, this type of standardization in legal education curricula is far from a reality. U.S. law schools have not even fixed upon a single focus for legal education in the country. Each institution has adopted its own mission for the education of future lawyers and has developed its curriculum in light of that unique mission.⁷⁴ A student from one law school will receive a vastly different education than a student at another, and these differences extend far beyond the expected vagaries of individual ability.

For one thing, differing missions lead to differing core curricula. Even within the realm of first-year curricula, an area that enjoys a relatively higher instance of coherence across institutions,⁷⁵ there is variation between law schools as to the coursework that should be required. In a 2006 survey of the required 1L courses for sixty law schools, researchers found that only one subject—contracts—that was required in all sixty schools.⁷⁶ From the very beginning of their law school careers, students are receiving core instruction that lacks consistency across schools. Moreover, this discrepancy often extends beyond curriculum lists to the very substance of instruction within a particular subject area. All sixty of the schools studied in 2006 offered a contracts course, but it is doubtful that every one of those law schools covered the same basics within those contracts courses. Unlike the law schools in East Germany, there is no agreement in the U.S. regarding the make-up of core curricula, much less the content of individual subject areas.

In addition to affecting the curricula of law schools, differences in educational mission also affect the sense of academic and professional well-being of future lawyers being trained in law schools.⁷⁷ In a 2007 study, Kennon Sheldon, a psychology pro-

⁷⁴ See Sonsteng et al., *supra* note 4, at 310–14 n.3 (quoting the unique mission statements of sixty different law schools).

⁷⁵ For the most part, law schools continue to adhere to the first-year program prescribed by Christopher Columbus Langdell, an 1850 graduate from Harvard: contracts, torts, civil procedure, criminal law, and property. *Id.* at 400–02.

⁷⁶ *Id.* at 401 n.517.

⁷⁷ See generally Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, in 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007) (reporting on study of professional well-being of law students at two law schools

fessor,⁷⁸ and Lawrence Krieger, a law professor,⁷⁹ investigated the sense of professional well-being and academic engagement of law students at two law schools.⁸⁰ Law School 1 (LS1) “emphasize[d] previous and potential scholarly production, a fact attested to by substantially higher national rankings for reputation and scholarly production,” while Law School 2 (LS2) “place[d] relatively greater emphasis on law practice and public service experience.”⁸¹ After comparing grades and reported “career motivation” and “need satisfaction” of students from both schools, Sheldon and Krieger found that the students from LS2 demonstrated “greater need satisfaction . . . higher subjective well-being . . . , better graded performance . . . , and more self-determined motivation to pursue the upcoming legal career.”⁸² On the other hand, students from LS1 demonstrated “reduced well-being, poorer-than-expected grade performance, and less self-determined motivation to pursue the legal career.”⁸³ The differing missions of the two schools greatly affected the mindset with which students entered the legal field, essentially creating vastly different groups of new lawyers with varying acquired skill-sets and psychological approaches to the profession. Yet, these different groups of young lawyers would inevitably be competing for the same legal jobs upon graduation. They would be required to complete the same tasks, do the same work, but would have to approach the profession with differing levels of preparation, completely unrelated to their individual abilities.

Sadly, the ABA has remained silent on the issue of consistency in the mission of legal education. Aside from admonishing accredited institutions to “maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession,”⁸⁴ the ABA supplies no specific unifying mission for institutions that provide legal education in the United States. Schools are free to develop their own missions and implement those missions in their own

with differing underlying missions); Sonsteng et al., *supra* note 4, at 387 (summarizing the results of the Sheldon and Krieger study).

⁷⁸ Sonsteng et al., *supra* note 4, at 387 n.421.

⁷⁹ *Id.* at 387 n.422.

⁸⁰ Sheldon & Krieger, *supra* note 77, at 887–88.

⁸¹ *Id.* at 886.

⁸² *Id.* at 888, 893.

⁸³ *Id.* at 893.

⁸⁴ A.B.A. SEC. OF LEGAL EDUC., *supra* note 54, § 301(a).

way, provided the schools meet the minimum requirements set out by the ABA—and that only if the school wishes to be accredited.⁸⁵ In addition, the ABA provides very little instruction regarding curricular requirements across law schools. Standard 302, which deals with curriculum for law school accreditation, simply demands that a law school provide “substantial instruction” in substantive law, legal reasoning, research, and analysis, legal writing, “other professional skills,” and the history and responsibilities of the legal profession.⁸⁶ Aside from the details on research, writing, and analysis, the ABA provides no guidance on what specifically should comprise an effective law school curriculum. There is no definition of “substantive law” or “other professional skills” other than a vague reference to what is “generally regarded as necessary to effective and responsible participation in the legal profession.”⁸⁷ Law schools are left to define these terms, and their curricula, as best they can in light of their unique missions.

Promoting consistency in the focus of legal education in America will not be without its challenges. Officials in East Germany had only four institutions to consider,⁸⁸ and there are more than 200 ABA-accredited law schools spread across 49 separate states in the U.S.⁸⁹ Nevertheless, studies have demonstrated the need for more consistency in American legal education. Recommendations from the 2007 Carnegie Report included a call

⁸⁵ See A.B.A. SEC. OF LEGAL EDUC. and MacCrate, *supra* note 53.

⁸⁶ A.B.A. SEC. OF LEGAL EDUC., *supra* note 54, § 302(a). The standard reads: A law school shall require that each student receive substantial instruction in:

- (1). the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- (2). legal analysis and reasoning, legal research, problem solving, and oral communication;
- (3). writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
- (4). other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- (5). the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

⁸⁷ *Id.*

⁸⁸ MEADOR, *supra* note 11.

⁸⁹ A.B.A.-Approved law Schools, A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Aug. 9, 2013).

for law schools to “[r]ecognize a common purpose” and “[w]ork together within and across institutions.”⁹⁰ Before that, in his 1979 study for the ABA, Roger Cramton advised, “Law schools should seek to achieve greater coherence in their curriculum, even if it results in the loss of some teacher autonomy.”⁹¹ Researchers recognize the need for consistency in the mission and curricula of American law schools; it is now a matter of making concerted efforts to address this need.

B. Balance Between Theory and Practice

The other major lesson to be learned from the legal education in the GDR lies in its pedagogical balance between theory and practice. As one American professor noted at the time, “GDR education in general stresses the blending of the practical and the theoretical at every stage.”⁹² This balance grew directly from the post-curricular focus of East German legal education and served as a means of implementing the demands of that focus. The theory-practice balance evident in the policy took shape through the emphasis on including *practica* as part of the required curriculum and combining the roles of faculty and practitioners.

1. Inclusion of *Practica* in the Required Curriculum

One of the ways in which the East German legal education policy highlighted the balance between theory and practice was through the inclusion of *practica* as part of the required curriculum. As the Study Plan made clear:

Another important aspect of the education is practical training. It coordinates the student’s education and training at the university with practical socialist aspects, and it unites theory and practice. The students get a chance to use in actual practice their theoretical knowledge, to learn advanced practical methods, and to be active as propagators of socialist law even during their time of study.⁹³

⁹⁰ Sonsteng et al., *supra* note 4, at 333.

⁹¹ *Id.* at 332, 366 n.360.

⁹² MEADOR, *supra* note 6, at 187.

⁹³ *Id.* at 231–32.

Law students in the GDR were meant to graduate from law school with a clear understanding of how the theory of the classroom and the realities of day-to-day practice intersect. To that end, all law students, on both the Justice and Economics tracks, were required to complete a four-week externship in a government agency during their second year of law school and another twelve-week externship in a different setting during their third year of law school.⁹⁴ These externships were meant to be completed in addition to the one-year assistantship that every new legal practitioner had to complete following their last year of law school.⁹⁵ Students had the option of working in all manner of government offices, including in the court system, alongside prosecutors, with state notaries, or in local government organizations.⁹⁶ “This [required practical experience] has, as its goal, the intensification of the student’s practical training in state and administrative law, of work in government organization [sic], and learning from the experience accumulated in local organs of government.”⁹⁷ These widespread opportunities to interact with the legal system allowed students to gain real-world glimpses of their future careers.

Legal education in the U.S. does not require the same amount of practical experience for its students. In fact, there are no general externship or clerkship requirements for students of American law schools. In Standard 302(b)(1), the ABA Section for Legal Education and Admission to the Bar simply states:

A law school shall offer *substantial opportunities* for . . . live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence . . .⁹⁸

Practical experience is encouraged but in no way required, and the ABA provides no guidance as to what constitutes “substantial opportunities.” Instead, in two separate interpretations to

⁹⁴ *Id.* at 232; MEADOR, *supra* note 7, at 91, 93.

⁹⁵ MEADOR, *supra* note 7, at 91, 93.

⁹⁶ MEADOR, *supra* note 6, at 232.

⁹⁷ *Id.*

⁹⁸ A.B.A. SEC. OF LEGAL EDUC., *supra* note 54, § 302(b) (emphasis added).

this standard, the ABA emphasizes that practice experience is not required for law student education and that law schools are therefore not required to provide that experience for all students: “A law school need not accommodate every student requesting enrollment in a particular professional skills course . . . A law school need not offer [live-client or real-life] experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life experience.”⁹⁹

Despite the ABA’s reluctance to make real-life experience a required part of the legal education curriculum, law schools have been working to provide more practical experience for their students. Clinical education opportunities have developed exponentially since their inception in the 1970s, allowing American law students to gain real-life practice experience as early as their first year of law school.¹⁰⁰ Many law schools have expanded on the concept of clinical education to develop comprehensive *practica* that focus on particular areas of the law.¹⁰¹ One school describes the basis of its program as such: “The basic premise of the Law School’s program is that theory cannot be separated from practice, abstract knowledge of doctrine from practical skill, and understanding the professional role from professional experience.”¹⁰²

This increase in opportunities for practical legal experience during law school has been welcomed by future lawyers and their future employers alike. Law students, when asked to recount their most “memorable educational experiences,” overwhelmingly turn to “their actual experiences with lawyers and the law through practice-oriented courses, clinical experiences, summer jobs, or volunteer contributions.”¹⁰³ In particular, students point to the opportunities for personal interaction with clients and commitment to public service as hallmarks of gaining practice experience

⁹⁹ *Id.*, §§ 302–4, 302–5.

¹⁰⁰ See generally MacCrate, *supra* note 53.

¹⁰¹ See Sonsteng et al., *supra* note 4, at 417–24 (outlining the *practica* in law management, family law, public interest, law, and property developed at schools like Syracuse University College of Law, William Mitchell College of Law, and City University of New York (CUNY)).

¹⁰² *Id.* at 422 (quoting the mission of CUNY Law School).

¹⁰³ Wegner, *supra* note 58, at 906 (recounting student responses gathered during the course of the Carnegie Report).

while in law school.¹⁰⁴ In terms of legal employers, they welcome opportunities for future employees to gain practical experience in school as potential cost-saving measures, of particular importance given the current state of the economy.¹⁰⁵ More and more law firms are facing clients who are unwilling or unable to cover the training costs for new associates;¹⁰⁶ this being the case, firms have been looking and will continue to look to law schools to provide potential employees who have already gained some practical experience.¹⁰⁷ As one commentator has noted, “Law schools that continue to focus on training students in legal analysis and skills work will be in demand, because the schools will be performing a role that employers will likely find useful in the future.”¹⁰⁸ With both the students and future employers on board, American law schools would do well to make practical training a fully integrated part of the legal curriculum, as was done in East Germany.

2. Faculty as Practitioners

Another way in which East German legal education achieved such a clear balance between theory and practice was through an emphasis on combining the roles of faculty and practitioners. This emphasis worked in two ways: One, faculty were encouraged to continue working as legal practitioners in their respective fields; and two, legal practitioners were encouraged to be involved in teaching and interacting with law students.¹⁰⁹ The Policy Statement clearly laid out this method for achieving theory-practice balance:

The principle of the unity of theory and practice should be put into effect throughout the course of study. In order to do this, forms of cooperation between academia and practice . . . should be cultivated. The teaching faculty should be included in law-

¹⁰⁴ SULLIVAN ET AL., *supra* note 3, at 159.

¹⁰⁵ Bard, *supra* note 4, at 183; Richard W. Bourne, *Changes in Legal Education and Legal Ethics: Article: The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 698–96 (2012).

¹⁰⁶ Bard, *supra* note 4.

¹⁰⁷ *Id.*; Bourne, *supra* note 105.

¹⁰⁸ Bourne, *supra* note 105, at 696.

¹⁰⁹ Meador, *supra* note 7, at 87.

making and in bringing the law into effect, while practitioners should be included in academic life and teaching. On the basis of firm arrangements between universities and organs of practice, the faculty should be enabled to work uninterrupted periods of time in practice.¹¹⁰

Thus, East German law students were able to benefit from the practical expertise teachers who were themselves enmeshed in current legal practices and developments.

This focus on faculty as practitioners is largely lacking in American legal education. For one, American law schools focus their hiring primarily on individuals with research experience and great publication potential.¹¹¹ The primary hiring criteria include such items as “superior academic grades from top rank law schools, law review experience, prestigious judicial clerkships, [and] scholarly publications” with little to no attention to practice or even teaching experience.¹¹² As a result, American law faculty by and large includes individuals who have little to no experience in the actual practice of the profession for which they are instructors.¹¹³ Unlike legal educators in the GDR—or even medical educators in the U.S., who are required to continue their medical practices as they teach¹¹⁴—American law faculty “struggle to balance legal scholarship with teaching duties and are often pressured to sacrifice the needs of the students for scholarly pursuits.”¹¹⁵ Students suffer in the classroom because the curriculum often revolves around a given professor’s scholarly work, rather than what is relevant to actual practice.¹¹⁶ In fact, a common complaint of law students is that their professors “are so far removed from legal practice that their teachings are theoretical and impractical.”¹¹⁷

Another way in which American law schools fail to focus on faculty as practitioners is in the hiring and promotion of practitioners as professors in law school courses. Because of the em-

¹¹⁰ *Id.*

¹¹¹ Sonsteng et al., *supra* note 4, at 351–52.

¹¹² *Id.* at 353.

¹¹³ *Id.*; Bard, *supra* note 4, at 171.

¹¹⁴ Bard, *supra* note 4, at 184.

¹¹⁵ Sonsteng et al., *supra* note 4, at 351.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 352–53.

phasis on academia and research, law school hiring committees rarely look to practitioners for teaching positions unless they meet the publication and research requirements mentioned above.¹¹⁸ When practitioners are hired as law faculty, for example, for clinics or other skills-based courses, their positions are more often than not lower-paid and with little to no opportunities for promotion, such as tenure.¹¹⁹ The ABA encourages the involvement of practitioners in legal instruction when it comes to “the history, goals, structure, values, rules and responsibilities of the legal profession,”¹²⁰ but does not require their involvement and in no way encourages their further integration into the law school teaching environment. In some ways, the hesitation to incorporate practitioners fully into legal education stems from a fear that doing so will “de-standardize” certain aspects of law schooling.¹²¹ “Some are concerned that practitioners will teach students bad habits or the wrong way of doing things. Others write that ‘[t]he quality of adjunct faculty is often uneven . . .’”¹²² Nevertheless, some legal educators, like Wegner, recognize the importance of exposing students to “learning communities” in which they can benefit from learning from practitioners about the profession, particularly in the students’ second and third years of law school.¹²³ In this way, American law students, as was intended for the law students of East Germany, can achieve a more effective balance of theory and practice in their learning, as a direct result of better integration of faculty and practitioner roles.

V. A SHIFT IN PERSPECTIVE

As American legal educators look to ways in which to revamp U.S. legal education, it would be of huge benefit to consider policies, like that of the GDR, that combine a clear and consistent post-curricular focus with a careful balance between theory and practice. Recent policy discussions have centered on the importance of focus and practice in American legal education, but

¹¹⁸ See *supra* note 112 and accompanying text.

¹¹⁹ Bard, *supra* note 4, at 142.

¹²⁰ A.B.A. SEC. OF LEGAL EDUC., *supra* note 54, § 302(a)(5). The accompanying interpretation states: “A law school should involve members of the bench and bar in the instruction required by Standard 302(a)(5).” *Id.*, § 302-6.

¹²¹ Bard, *supra* note 4, at 204.

¹²² *Id.* (citation omitted).

¹²³ Wegner, *supra* note 58, at 956.

little has actually been done to shift those discussions into action. What is needed is a true shift in perspective regarding legal education in order to create meaningful change.

Even with the general recognition of the advantages of focused and practical legal study, the legal education system in the U.S. has been slow to move toward a more post-curricular, practice-centered focus. Unlike the system in East Germany, legal education in the United States comes from a long tradition of scholarly and academic focus. Indeed, the reluctance to incorporate focused, practice-centered study in American law curricula stems from a continual struggle between viewing law school as a trade or an academic endeavor.¹²⁴ In some ways, law schools have made varying degrees of progress in the right direction by integrating more skills- and practice-based courses into the curriculum and developing focused policy statements that point to the individual institutions commitment to preparing new lawyers for practice.¹²⁵ However, wide-scale reform of American legal education will not take place without a fundamental shift in perspective.

The legal education policy of East Germany grew out of a war-torn nation struggling to survive and it showcased a strong post-curricular focus and theory-practice balance. While the U.S. is not in such dire straits, American legal education faces a critical phase that cries for reform. Perhaps it is time to look in unlikely places to find helpful lessons that point toward true legal education reform.

¹²⁴ Bourne, *supra* note 105, at 661–62. *See also* Sullivan et al., *supra* note 3, at 93 (discussing the struggle of law schools “to escape the ‘trade school’ stigma”).

¹²⁵ Bourne, *supra* note 105, at 661–62; Wegner, *supra* note 58, at 945–46.

Precedent in Investment Arbitration: The Case of Compound Interest

*Florian Grisel**

Investment arbitration is a process through which foreign investors initiate proceedings against States in connection with governmental conducts that would have harmed their investment. Investment arbitration has grown rapidly in the past 10 to 15 years. For instance, the International Centre for Settlement of Investment Disputes, or ICSID, has seen its caseload rapidly increase during that time period: ICSID was created in 1966 but approximately 85% of its cases were registered after year 2000. ICSID is now the main recourse for foreign investors against States. In 2009, in the case of *Sadio Diallo v. DRC*, the International Court of Justice pointed out that ICSID had replaced diplomatic protection as the main legal recourse for foreign investors.¹

The recourse to investment arbitration is therefore expanding and investment tribunals adjudicate an increasing number of claims involving various kinds of investors in many geographic places all around the world. The claims that went to investment arbitration in the past include claims brought by the former shareholders of Yukos against Russia for the expropriation of their assets through taxation,² claims brought under the North

* Florian Grisel is a Research Fellow at the *Centre National de la Recherche Scientifique* (CNRS). His doctoral dissertation (University Paris 1 Panthéon-Sorbonne) was awarded the 2011 “Prix de Varenne” for the best doctoral thesis in Legal Theory and Philosophy of Law. “L’arbitrage international ou le droit contre l’ordre juridique – Application et création du droit en arbitrage international” (International Arbitration or Law versus Legal Order—Application and Creation of Law in International Arbitration) was published as a book by the “Librairie Générale de Droit et de Jurisprudence” (LGDJ) in 2011. Florian Grisel also is a graduate of Sciences Po Paris, Université Paris 1 Panthéon-Sorbonne, Columbia University (M.P.A.) and Yale Law School (LL.M.). He currently works on a book project on the judicialization of international arbitration (in collaboration with Alec Stone Sweet).

¹ Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), 2007 I.C.J. 582, ¶188 (May 24).

² Yukos Universal Ltd. (*Isle of Man v. Russ.*), PCA Case No. AA 227, Interim Award of Jurisdiction and Admissibility (Perm. Ct. Arb. 2009), available at <http://italaw.com/documents/YULvRussianFederation-InterimAward30Nov2009.pdf>.

American Free Trade Agreement against the United States in connection with environmental regulations,³ or claims brought by a class of 180,000 bondholders from Italy against Argentina in connection with Argentina's default on its sovereign bonds.⁴ As you can see, investment tribunals settle a wide variety of claims which may nonetheless raise similar legal issues because of the similarity of the legal instruments under which investment claims are brought. Because of these similarities, investment tribunals increasingly refer to the decisions of other investment tribunals in their own decisions and awards.

When a coherent line of reasoning appears on a given legal issue, the question has emerged of whether arbitrators should follow this line of reasoning, or whether they retain discretion to give a distinct legal solution to the legal issue at stake.

In this context, two main positions have emerged in the academic debate on investment arbitration: the proponents of a first position, which I call the "majority position", argue that there is no rule of precedent in investment arbitration. Arbitrators would act on an *ad hoc* basis and retain their discretion to decide cases as they see fit. Conversely, the proponents of a second position, which I call the "minority position", argue that arbitrators consistently refer to prior decisions and even feel compelled to follow these decisions when resolving a case.

The debate is omnipresent today in the world of investment arbitration. In fact, it divides investment tribunals themselves. For instance, in the decision on liability rendered on 14 December 2012 in the case of *Burlington v. Ecuador*, a dissenting arbitrator disagreed with the majority of the arbitral tribunal as to the weight to be given to prior awards of other tribunals. Let me go through the relevant extract of this decision: "[...] the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions

³ *Glamis Gold Ltd. v. United States*, Notice of Arbitration (Dec. 9, 2003), available at <http://www.state.gov/documents/organization/27320.pdf>.

⁴ *Abaclat and Others v. Arg. Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at <http://italaw.com/documents/Aba-clatDecisiononJurisdiction.pdf> (the total number of claimants exceeded 180,000 at the time of the initiation of the arbitration).

established in a series of consistent cases. [...] Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend."⁵

This extract of *Burlington v. Ecuador* illustrates the importance of the debate on the weight given to prior cases in investment arbitration. While the majority of the tribunal held that it should follow solutions established in a series of consistent cases; Arbitrator Stern dissented and held that she had a duty to decide each case on its own merits.

My lecture today will test these conflicting positions through a concrete example: that of compound interest in investment arbitration. I chose this example for two main reasons. First, the award of interest is a subject over which investment tribunals have limited options. In fact, I have identified three issues that investment tribunals may decide with respect to interest: the dates from which interest should start running, the rate of interest, and whether interest should be calculated at simple or compound rates. What is the difference between simple and compound interest? Let me give you a concrete example. Assume that you made an investment of 100 at a simple rate of 10%: your investment will bring 10 the first year, 10 the second year, and so on. In other words, the rate of return is constant with simple interest. Let's now assume that you made the same investment, but at compound rate. Your investment will bring 10 the first year. But the second year, the 10 of interest incurred during the first year will be compounded to the principal of 100, and the interest for the second year will be calculated on this basis. As a consequence, the interest for the second year will be 10% of 100 + 10, or 10% of 110, or 11. In other words, the rate of return is exponentially growing with compound interest. This method of calculation may have an enormous impact on the amount of damages granted by arbitrators: for instance, in the seminal case of *Aminoil v. Kuwait*, the arbitrators granted approximately 100 million dollars of compound interest out of a total of 180 million dollars of damages.⁶ I

⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶187 (Dec. 14, 2012), available at https://icsid.worldbank.org/ICSID/FrontSevlet?requestType=CasesRH&actionVal=showDoc&docId=DC2778_En&caseId=C300.

⁶ Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (AMINOIL), 21 INT'L LEGAL MATERIALS 976 (1982).

will concentrate on this issue of simple vs. compound interest in this lecture. Second, the issue of simple vs. compound rates is particularly relevant because the practice of investment tribunals dramatically changed in this regard around 2000. Before year 2000, investment tribunals exclusively granted simple interest, except in two cases. This was justified to the extent that international law clearly favored simple interest over compound interest. For instance, the International Law Commission pointed out in 2001 in its Draft Articles on State Responsibility that “given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation”.⁷

As a consequence of this state of international law, the two tribunals that had granted compound interest on damages before 2000 had done so on the sole basis of domestic law, not on the basis of international law. These two cases are *Atlantic Triton v. Guinea* and *SPP v. Egypt*.

In the case of *Atlantic Triton v. Guinea*, the plaintiff claimed for the repayment of a debt owed by Guinea pursuant to a management contract for the operation of fishing vessels in order to establish a fishing industry in Guinea. The arbitral tribunal upheld Atlantic Triton’s claim for payment of damages as well as interest. In particular, the arbitral tribunal applied the article of the French Civil Code (which was still in force at the time in Guinea) according to which interest can be compounded if it has been judicially claimed and is owing for at least an entire year.⁸

In the case of *Southern Pacific Properties (SPP) v. Egypt*, the claimant sought compensation for the value of its investment in a joint venture company that it had set up with the Egyptian General Organization for Tourism and Hotels for the development of tourist complexes in Egypt. The tribunal ordered Egypt to compensate SPP for the expropriation of the project, as well as compound interest on this amount of compensation. The tribunal

⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int’l L. Comm’n, in Report of the Int’l L. Comm’n, 53rd Sess., UNGAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001).

⁸ *Atlantic Triton Co. v. People’s Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award, ¶4 (Apr. 21, 1986), 3 ICSID Rep. 13 (1995).

held that the loan agreement that had been concluded between SPP and the joint venture provided for compound interest, and further held that English law, which was applicable to the loan agreement, also allowed for compound interest.⁹

In these two cases, the tribunals had therefore granted compound interest on the basis of a domestic law. But the principle remained that investment tribunals could not grant compound interest on the basis of international law.

Twelve years later, in 2013, the opposite holds true: under the current practice of investment tribunals, injured parties seem entitled to compound interest under international law. This change in the general practice of investment tribunals can be traced back to 2000, after which investment tribunals started granting compound interest, as opposed to simple interest, on damages.

What happened in 2000? The tribunal in the case of *CDSE v. Costa Rica* reversed the general practice with respect to compound interest. In that case, U.S. investors claimed that the Government of Costa Rica had expropriated their property, purchased in 1970 and known as “Santa Elena”. Santa Elena was a real estate located in the northwest corner of Costa Rica and consisted in 30 kilometers of Pacific Coastlines. The expropriation decree was passed in 1978 for the purpose of preserving the populations of pumas and jaguars that were present on the property. The U.S. investors did not initiate arbitral proceedings before ICSID until 1995, and the tribunal rendered a final award in 2000. Therefore, twenty-two years had passed between the expropriation of the U.S. assets in 1978 and the condemnation of Costa Rica to pay damages in 2000.

In these circumstances, the ICSID tribunal decided that simple interest would not fully compensate the lost income that would have been generated if the foreign investors had reinvested the amounts due in 1978. Let me go through the relevant extract of the final award rendered on 17 February 2000 in *CDSE v. Costa Rica*: “[...] while simple interest tends to be awarded more frequently than compound interest, compound interest certainly is not unknown or excluded in international law. No uniform rule of

⁹ S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶1229 (May 20, 1992), 3 ICSID Rep. 189 (1995).

law has emerged from the practice in international arbitration as regards the determination of whether compound interest or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.”¹⁰

The tribunal accordingly applied compound interest on the damages granted to CDSE without relying on any domestic law. In support of its decision, the tribunal referred to two main reasons. The tribunal first pointed out that there was no uniform rule regarding the award of interest (which was not entirely true as made clear by the ILC draft articles of 2001. The tribunal also referred to general considerations of equity in order to justify the additional financial burden – in that case close to 12 million dollars – that it placed upon the State of Costa Rica. After *CDSE v. Costa Rica*, investment tribunals progressively started granting compound interest on damages. Before I further describe this new trend in investment arbitration, I would like to go back to the terms of the debate on precedent that I presented earlier.

If we follow the “majority position”, the change that occurred after 2000 should be purely circumstantial and was not based on any “jurisprudential trend”, to borrow Arbitrator Stern’s words. Conversely, if we follow the “minority position,” investment tribunals should have relied on prior awards when granting compound interest since 2000.

In order to find out which position is correct, I gathered all the publicly available awards where investment tribunals granted interest between 2000 and 2012, or a total of 50 awards. In order to identify any evolution in the practice of investment tribunals, I divided these 50 awards into two equal batches of 25 awards each. Each batch was in turn divided into two categories of awards: awards that granted simple interest, and awards that granted compound interest. Within the second category of awards granting compound interest, I made a third distinction between tribunals that relied on prior awards and tribunals that did not rely on

¹⁰ *Compañía Del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, ¶103 (Feb. 17, 2000), 5 ICSID Rep. 153 (2002).

prior awards when granting compound interest. In order to do so, I looked at the citations of prior awards in the dispositive part of each award. If the tribunal cited a prior award, I considered that it had relied, at least to a certain extent, on this prior award.

If the majority position were correct, the proportion of awards where arbitrators relied on prior decisions when granting compound interest should remain stable on average: indeed, if arbitrators did not feel bound in any way by prior awards, they would not rely on these awards, but for the sake of mere reference. The citation rate should therefore remain more or less the same across time. If the minority position were correct, on the contrary, the proportion of awards where arbitrators cite prior awards should increase: indeed, an increasing number of investment tribunals should rely on prior awards as these tribunals feel bound by an increasingly uniform practice. It is indeed reasonable to assume that tribunals increasingly refer to prior awards or decisions in a system where there are precedential mechanisms.

In reality, neither position appears to be correct: the proportion of awards where investment tribunals rely on prior decisions when granting compound interest does not remain stable or increase: in fact, this proportion has decreased between 2000 and 2012.

Between 2000 and 2012, indeed, investment tribunals granted compound interest much more often (in 39 cases) than simple interest (only in 11 cases). In addition, investment tribunals have granted compound interest more and more often since 2000: in the first batch of 25 awards, 17 tribunals granted compound interest; whereas in the second batch of 25 awards, 22 tribunals granted compound interest.

In addition, investment tribunals have relied on prior decisions when granting compound interest after 2000, but they have been doing so less and less often in the recent period. The proportion of tribunals that granted compound interest without referring to prior awards is indeed smaller in the first batch of awards than it is in the second batch. If we concentrate for instance on the last three years of the study (2010 until 2012), 8 investment tribunals granted compound interest without relying on any prior award, whereas all the investment tribunals that granted compound interest between 2001 and 2003 did refer to prior awards.

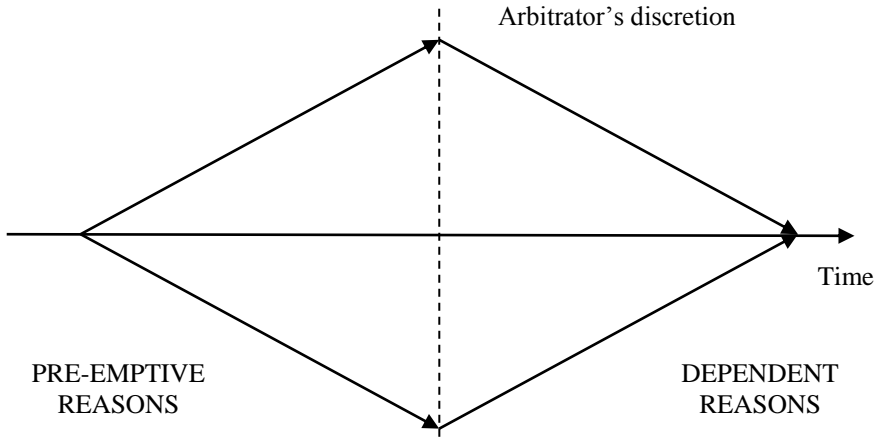
Therefore, the test does not validate either the minority or the majority position. Investment tribunals do not seem to increasingly cite prior awards, even though they adopt increasingly similar solutions over time.

In order to understand this apparent paradox, my hypothesis is that the issue of precedent should not be analyzed from the angle of the arbitrators' duty to follow or not follow precedent. In my opinion, the analysis should focus on the reasons why arbitrators choose, in their own discretion, to refer to prior decisions and may feel compelled to follow these decisions. My proposition today is to analyze this question from the angle of the arbitrators' authority, rather than the arbitrators' duty.

On this question, Joseph Raz' *Morality of Freedom* provides an interesting analysis of the arbitrators' authority. Raz argues that the authority of arbitrators is "dual" and depends on their ability to provide "reasons for action." According to Raz, arbitral awards would both contain what he calls "dependent" reasons and what he calls "pre-emptive" reasons. Arbitrators would decide cases in two different ways: they would use the arguments relied upon by the disputing parties (what Raz calls the "dependent reasons"), but they would also seek to substitute their own reasoning to the parties' arguments when necessary (what Raz calls the "pre-emptive reasons"). Allow me to go through a rather long extract of Joseph Raz' *Morality of Freedom*: "Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. [...]The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome. For ease of reference I shall call both reasons of this character and the reasons they are meant to reflect dependent reasons. [...] This leads directly to the second distinguishing feature of the example. The arbitrator's decision is also meant to replace the reasons on which it depends. In agreeing to obey his decisions they agreed to follow his judgment of the balance of

reasons rather than their own. [...] I shall call a reason which displaces others a pre-emptive reason.”¹¹

I represented Raz’ argument on the following graph:



You can see on the horizontal line the level of discretion exercised by the arbitrators. On the left side of the graph, you are in the world of preemptive reasons. On the right side of the graph, you are in the world of dependent reasons. We can trace on this graph the practice of investment tribunals regarding compound interest. In fact, this example illustrates perfectly the dual nature of arbitral authority. As a first step, arbitrators cited investment awards to give themselves discretion to award compound interest, they pushed the boundaries of their authority and their decisions were “pre-emptive” in nature. We are on the left side of the graph and are getting closer to the center. Once compound interest became generally accepted by foreign investors and States, as a second step, investment tribunals no longer needed to rely on prior awards and progressively ceased to do so. Foreign investors and States indeed cited investment awards in their briefs and these citations operated as constraints for the arbitrators. As a consequence, the arbitrators’ discretion decreased and their decisions became dependent reasons. This evolution can be seen on the right side of the graph

In this context, the citation of awards seems to be used by arbitrators for authority purposes: by relying on prior decisions, arbitrators have been able to assert their authority and introduce

¹¹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–42 (1986).

the award of compound interest. Although these awards have no binding effect, the discretion of arbitrators has progressively decreased as parties progressively started to rely on decisions granting compound interest.

As a further illustration of this dynamic, I would like to draw your attention to the award recently rendered on 5 October 2012 in the case of *Occidental v. Ecuador*. In that case, the arbitral tribunal granted the largest award in the history of investment arbitration against Ecuador, namely 1.7 billion dollars of principal and approximately 500 millions dollars of compound interest. The reasoning of the *Occidental v. Ecuador* tribunal regarding interest is worth noting: “The traditional norm is to award simple interest. However, this practice has changed and, in fact, most recent awards provide for compound interest. [...] An analysis of recent interest awards demonstrates that in 2007, all tribunals, except one, awarded compound interest. In the 2008-2009 period, six out of ten tribunals awarded compound interest. Several more recent cases have also awarded compound interest. [...] In summary, it may be seen that compound interest is the norm in recent expropriation cases under ICSID. The Tribunal sees no reason to depart from the norm and from the basis pleaded by both parties.”¹² The decision in *Occidental v. Ecuador* is a good illustration of how precedent works in investment arbitration: tribunals do not consider themselves bound by prior decisions but nonetheless rely on these decisions in order to sustain their authority when their decision would appear controversial. In this case, the arbitral tribunal accordingly granted compound interest despite the prohibition of compound interest under Ecuadorian law. As you may remember, an allowance for compound interest under the applicable domestic law was precisely the ground upon which investment tribunals occasionally granted compound interest prior to 2000. The *Occidental v. Ecuador* award confirms that the practice is now reversed: investment tribunals do not hesitate to bypass or ignore the prohibition of compound interest under an applicable domestic law and grant compound interest. Interestingly, the tribunal in *Occidental v. Ecuador* went as far as referring

¹² Occidental Petroleum Corp., Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶834-40 (Oct. 5, 2012), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2672_En&caseId=C80.

to the “norm” and the “basis pleaded by both parties” in its decision to grant compound interest: it clearly situated itself in the world of dependent reasons, where its decision was constrained and indeed summarized the reasons provided by the parties, in other words, the “norms”.

In sum, arbitrators do not seem to think of precedent in terms of duty; they use prior decisions depending on their needs, notably when they need to assert their own authority towards the parties. In the case of *Occidental v. Ecuador*, for instance, precedent was a useful tool for the arbitrators to ground their decision to grant compound interest despite the prohibition thereof under Ecuadorian law.

As a conclusion, I would like to go back to the original debate between what I called the majority position and the minority position. I tried to refute the majority position according to which there is no precedent in investment arbitration but I also suggested that the minority position may be too simplistic. Investment tribunals do act on an *ad hoc* basis and there is no rule of precedent in the traditional sense in investment arbitration. Therefore, precedent cannot be analyzed as a duty from the arbitrators’ perspective. However, the nature of the arbitrators’ authority may explain why arbitrators consistently refer to prior decisions when deciding cases and why precedent may over time operate as a constraint in their decision-making process.

Countervailing Duties Against China—Double Counting and Beyond

Fei Jieqiong

TABLE OF CONTENT

ABSTRACT.....	229
I. Introduction.....	231
II. The U.S. Anti-dumping Law and Non-market Economies.....	233
A. Background.....	233
B. Application of U.S. AD law to NMEs.....	234
III. U.S. Countervailing Duty Law and Non-market Economies	235
A. Background.....	235
B. Statutes.....	236
C. Case Law on Statutory Interpretation.....	237
1. Continental Steel Corp. Case.....	237
2. Georgetown Steel Case.....	238
3. Post Georgetown Steel Decisions.....	239
4. Application of CVD law to Imports from China	241
IV. Double Counting	242
A. Background.....	242
B. WTO Issues.....	245
1. Consistency with WTO Agreements	245
2. WTO Accession Protocol and the Working Party Report of China ..	247
3. China's WTO Challenge	249
V. Recent U.S. Judicial Decisions	254
A. GPX: CIT Decision.....	254
B. GPX: Court of Appeals for the Federal Circuit Decision.....	256
VI. Subsequent Legislative and Judicial Development.....	256
A. Amendment of CVD law and AD law	256
B. Legal Analysis of the New Amendment	258
C. Implications in Practice.....	261
VII. Conclusion	264

Countervailing Duties Against China—Double Counting and Beyond

*Fei Jieqiong**

ABSTRACT

The antidumping duties and countervailing duties are commonly utilized by states as trade remedies when there is unfair trade practice such as dumping and subsidization. In the international trade between China and the United States, the main trade remedy the U.S. had provided for its domestic industries against imports from China before 2007 is antidumping duties.

The U.S. antidumping law considers China as a non-market economy country and has a different mechanism in the determination of dumping margins for imports from China. Dumping margins are greater if calculated by the non-market economy method. The U.S. countervailing duty law had not been traditionally applied to imports from non-market economies. The rationale behind it is two-fold. First, the statutes do not authorize trade agencies to do so because subsidies are market phenomenon and can only exist in market economies. Second, even assuming subsidies exist in a non-market economy country, it is impossible for trade investigating agencies to measure due to the market distortion by the government.

In 2006, the U.S. Department of Commerce (“DOC”), however, started a countervailing investigation against imports from China. The courts later on in deciding the legitimacy of the application of the U.S. countervailing duty law, reinstated the rationale and ruled that DOC cannot impose countervailing duties on imports from non-market economies.

* Ms. Fei Jieqiong obtained her Bachelor’s Degree on management from the University of Science and Technology Beijing in 2009 and her Juris Master’s Degree from the School of Transnational Law Peking University in 2013. In addition, she holds a LLM degree from the International University College of Turin. She completed an internship with the international arbitration group at WilmerHale’s London office and currently is working at Kobre & Kim Hong Kong office. She developed her interest in the legal system of the World Trade Organization (“WTO”) and the double counting problem in particular during the study of the course “the WTO and China”.

In parallel with the U.S. cases, China challenged the imposition of countervailing duties in front of the WTO Dispute Resolution Body on double counting ground. China argued that the concurrent imposition of antidumping duties and countervailing duties on imports from China was inconsistent with WTO law because it caused double counting and compensated the same trade injuries twice. The WTO Appellate Body agreed and concluded that the method used in determining dumping margins for imports from non-market economies might also cover any subsidies on the products, hence imposing countervailing duties in addition to antidumping duties was likely to cause double counting and was inconsistent with WTO law.

The U.S. Congress responded the developments both in the U.S. courts and the WTO Appellate Body by passing a new legislation amending countervailing duty law and the corresponding part in antidumping law. The new legislation authorizes DOC to impose countervailing duties on imports from non-market economies when necessary and to make any adjustment to antidumping duties in order to avoid double counting when it is possible.

After the new legislation, the U.S. trade agencies now have the statutory authorization to apply countervailing duty law to imports from non-market economies, but the language in the new legislation and the different effective dates between the amendment of countervailing duty law and antidumping law do not address the double counting problem effectively. The Chinese exporters under countervailing investigations are facing new difficulties when they try to get remedies from the U.S. courts.

I. INTRODUCTION

The World Trade Organization (“WTO”) is an international organization which promotes worldwide free trade through identifying and eliminating trade barriers.¹ While trade duties, as a type of trade barriers, are controversial under WTO law due to their trade restrictive nature,² they are not completely forbidden. There are two main types of trade duties employed by WTO members: the antidumping duty (“AD”) and the countervailing duty (“CVD”). Member States can also take safeguard measures,³ but this paper will only focus on the two types of trade remedies.

In the WTO’s legal framework, dumping in international trade is in fact price discrimination, and it occurs when the products are sold in a foreign market at a price that is lower than the “normal value” (“NV”).⁴ In most cases, NV equals to the price charged in the home market, or in a surrogate market if the home market is not a proper venue (one typical scenario will be that the home country is not a market economy country).⁵ International dumping can be permissible under WTO law if the purpose is to get rid of surplus or unsustainable inventory, or to cure domestic recession,⁶ provided that dumping would only last for a short period of time and does not cause severe injuries to domestic industries of the importing country.⁷ Long-term dumping is suspicious under WTO law when the purpose is to obtain market share and drive producers in importing countries out of business through low price strategy.⁸ After the exporters have gained a

¹ See Meredith Schutzman, *Antidumping and the Continued Dumping and Subsidy Offset Act of 2000: A Renewed Debate*, 11 CARDOZO J.INT’L & COMP. L. 1069 (2004).

² See Claire Hervey, *The Byrd Amendment Battle: American Trade Policies at the WTO*, 27 HASTINGS INT’L & COMP. L. REV. 131, 133–34 (2003).

³ See generally JOHN HOWARD JACKSON & EDWIN A. VERMULST, *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* (Univ. of Michigan Press, 1989).

⁴ General Agreement on Tariffs and Trade art. 6, § 1, Oct. 30, 1947, 55 U.N.T.S. 194 [herein after GATT].

⁵ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art 2.2 [hereinafter WTO Anti-Dumping Agreement]. In the U.S. practice, there is another method of calculating NV: the factors of production, which will be addressed later in this paper.

⁶ See generally JACKSON & VERMULST, *supra* note 25, at 162.

⁷ See *id.*

⁸ See *id.*

large market share, they will increase the price dramatically and get compensated for the previous below-cost price. The AD is calculated based on the dumping margin, which is the difference between NV and export price (“EP”) of the goods involved.⁹ The imposition of AD forces the exporters to increase the export price and therefore eliminates the price discrimination against domestic industries.

A subsidy is an “economic benefit conferred to the producer” by the government,¹⁰ which can be used to reduce the production cost. This benefit is not earned by the producer, and it gives the producer an advantage over others who are not subsidized, hence creating potential economic distortion.¹¹ The CVD is “a duty imposed on imports to offset the advantage to foreign producers derived from a subsidy that their government offers for the production or export of the article taxed,” which is designed to remedy any trade damages caused by subsidization.¹²

ADs and CVDs are employed by the U.S. trade law under Title VII of the Tariff Act of 1930. Both remedies are available when goods are imported from countries that are free market economies (“ME”s). For goods from nonmarket economies (“NME”s), only AD law was applied before 2007. With the continued economic growth of some of these economies, such as China, pressure has increased on the U.S. government to utilize both domestic trade remedies more aggressively against imports from these countries. The huge trade surplus on China’s side has certainly increased the tension in trade between China and the U.S. For the last decade, the U.S. has found its way to apply CVDs to imports from China in the shadows of the WTO law and even its own long-standing case law.

This paper first discusses the application of AD and CVD law by the U.S. to goods imported from NME countries before China’s successful WTO challenge, including the statutes and the case law developed by the U.S. courts. Second, it reviews China’s

⁹ See Patricia H. Piskorski, *A Dangerous Discretionary “Duty”: U.S. Anti-dumping Policy Toward China*, 34 HOFSTRA L. REV. 595, 603 (2005).

¹⁰ Xuesong A. Yu, *The Byrd’s View Might not Give You a Whole Picture—the Battle in the World Trade Organization on the Continued Dumping and Subsidy Offset Act of 2000*, 17 FLA. J. INT’L L. 417, 422 (2005)

¹¹ See MITSUO MATUSHITA ET AL., *THE WORLD TRADE ORGANIZATION, LAW, PRACTICE, AND POLICY* 260–61 (OUP Oxford, 2nd ed. 2006).

¹² *Id.* at 262.

successful case in WTO challenging the application of CVDs by the U.S. to Chinese products (DS379). Next, it proceeds to examine the decision of the U.S. Court of Appeals for the Federal Circuit in *GPX Int'l Tire Corp. v. United States* in December 2011, in parallel with China's WTO challenge. Then, it analyzes the subsequently enacted statute authorizing DOC to apply CVDs to such products on March 13, 2012. Finally, it notes the problem with the new legislation through recent developments in the *GPX* case and other challenges.

II. THE U.S. ANTI-DUMPING LAW AND NON-MARKET ECONOMIES

A. Background

According to the U.S. AD law, dumping happens when the imported products are sold at a lower price in the U.S. market than in the home market, which is called "less than its fair value" (LTFV).¹³ There is a difference between the determination of ADs for imports from MEs and imports from NMEs. If the alleged dumping products are from MEs, DOC first will look at domestic price of the products if available, and use it as the NV of the products.¹⁴ When domestic price is not available because the products are only sold overseas, DOC will look at the price in countries other than the U.S. and decide the NV.¹⁵ If the products are only sold in the U.S. market, DOC will have to calculate the "constructed value" as the NV of the products.¹⁶

Based on the determination of NV, DOC can then decide whether dumping has occurred by comparing the NV to the EP. If DOC has a positive finding of dumping, it has to determine the "dumping margin" by calculating the average difference between the product's NV and the EP of the product in the U.S.¹⁷ After the establishment of dumping practice and the dumping margin, there needs to be a positive finding that the dumped imports have caused or threaten to cause material injury to a U.S. industry, or materially retard the establishment of an industry in the U.S. in

¹³ See Tariff Act of 1930, 19 U.S.C. § 1673 (2012).

¹⁴ See 19 U.S.C. § 1677b(a) (2006).

¹⁵ See 19 U.S.C. § 1677b(a)(1)(B)(ii) (2006).

¹⁶ See 19 U.S.C. § 1677b(a)(4) (2006) (defining the use of constructed value); 19 U.S.C. § 1677b(e) (2006) (providing the method of calculating a constructed value).

¹⁷ 19 U.S.C. § 1677(35) (2006).

order to impose ADs to the products.¹⁸ The last element of injury determination is made by the U.S. International Trade Commission (ITC), an independent agency. When DOC and ITC together finish the three steps, ADs can be imposed at the determined amount.

B. Application of U.S. AD law to NMEs

The mechanism is different when the imported products are from NMEs. A typical attribute of NMEs is that the cost of production is not determined by supply and demand in the market, but by other factors beyond the market. As a result, the determination of NV of products from NMEs only based on the domestic prices is not plausible. The AD law did not have specific provisions in prescribing the method of calculating NVs of imports from NMEs at the beginning, so it gave the administrative agencies great discretion on this matter.¹⁹ In the 1960s, the Treasury Department, which at the time was the agency responsible for implementing domestic trade remedy laws, developed and began using the “surrogate country” approach in applying AD law to NME countries. Under this approach, comparable prices and costs from similarly situated third countries are used by the U.S. in the determination of NV of imported goods from NMEs.²⁰ This approach was adopted and codified by Congress in the Trade Act of 1974.²¹ There is one problem with this approach in finding a surrogate country, since sometimes a surrogate country is not available.²² The Treasury Department adopted a new methodology in 1975, which is known as the “factors of production” approach. It requires that the price of each factor input be taken from a ME country which is considered to be at a comparable stage of economic development with the NME country.²³ Congress expressly adopted this approach in the Trade Agreements Act of 1979, as an alternative to be used in NME cases where

¹⁸ 19 U.S.C. § 1677(7)(A) (2006).

¹⁹ Antidumping Act of 1921, ch. 14 §205, 42 Stat. 9, 13 (1921); Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2074 (1974) [hereinafter Trade Act of 1974]

²⁰ See *Bicycles from Czechoslovakia*, 25 Fed. Reg. 6657 (July 7, 1960).

²¹ See Trade Act of 1974, *supra* note 19.

²² Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT'L L. & POLY 993, 1003 (1995).

²³ See *Electric Golf Cars from Poland*, 40 Fed. Reg. 25497 (June 11, 1975).

there was no available surrogate country.²⁴

DOC has significant administrative discretion in determining when a foreign country is a NME country. The factors DOC will take into consideration include 1) the extent to which the currency of the foreign country is convertible into the currency of other countries; 2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; 3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; 4) the extent of government ownership or control of the means of production; 5) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and 6) such other factors as the administering authority [i.e., DOC] considers appropriate.²⁵

From the discussion above, it is clear that with a specific authorization by Congress, DOC is free to apply AD law to NME countries. AD law has also promulgated methodologies on how to determine dumping margin, including “surrogate country” approach and “factors of production” approach. All of these have made AD law an effective remedy for the U.S. in dealing with unfair trade practice done by NME countries. CVD law was not in the picture when products from NMEs were involved until 2007. The recent application of CVD law to China, a NME, potentially has changed the rule of the game. It might be another venue for the U.S. industries to fight against imports from China, but it is also a step forward on the U.S. way to trade protectionism.

III. U.S. COUNTERVAILING DUTY LAW AND NON-MARKET ECONOMIES

A. Background

In general, CVD laws authorize the imposition of an additional import duty on any subsidized imports. The purpose of CVD laws is to provide relief to domestic industries that have been materially injured, or are threatened with material injury, by imported goods that have been subsidized by a foreign govern-

²⁴ Trade Agreements Act of 1979, Pub. L. No. 96-39, § 776, 93 Stat. 144, 186 (1979). [hereinafter Trade Agreements Act of 1979].

²⁵ Tariff Act of 1930, 19 U.S.C. § 1677(18)(B) (2006).

ment or other public entities. In order to eliminate the effect of any subsidies, the duty levied is to be equal to the estimated amount of the governmental or other public subsidization. In the U.S., similar to AD law, for an industry to pursue the imposition of CVDs, both the ITC and DOC have to make conclusive determinations.²⁶ DOC must find that the imported products have been subsidized, and ITC must find that the subsidized imports have caused material injury or the threat of material injury to a domestic industry, or have materially retarded the establishment of an industry in the U.S.

B. Statutes

In a determination made by DOC in 1984, it stated that there was no proper methodology to measure market distortions caused by subsidies in a NME country. As a result, CVD laws did not apply to imports from NMEs. At the time of this determination, the statute (mainly the Tariff Act of 1930) did not have a clear rule on whether it is allowed to take countervailing measures against imports from NME countries. DOC noticed that “Congress never has confronted directly the question of whether the countervailing duty law applies to NME countries.”²⁷ In particular, when faced with a dramatic increase of imports from NMEs (for example, a communist country), Congress inserted Section 406 in the Trade Act of 1974, and provided a remedy against market disruption caused by these imports, but it did not make any changes to CVD law at that point.²⁸ Later when Congress amended AD law to address unfair competition caused by imports from NMEs, it did not make corresponding changes to CVD laws either. Therefore, in light of statutory silence with respect to the application of CVDs to imports from NMEs, DOC had assumed broad discretionary authority with respect to the question of whether a countervailable subsidy could exist in a nonmarket economy country.²⁹

There have been some recent developments in the U.S. legislation on the application of CVD laws to imports from NMEs.

²⁶ 19 U.S.C. § 1671 (2006).

²⁷ Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19370, 19373 (May 7, 1984).

²⁸ *Id.*

²⁹ *Id.* at 19374.

After Canada's countervailing investigation against imports from China, several proposals are made by senators to amend CVD laws in order to provide legal basis for the application of CVD laws to imports from NMEs, the goods from China in particular. For example, there was a proposal in 2005, which was trying to put in the law that it should be allowed to impose CVDs on imports from NME countries. But Congress did not pass the proposal.³⁰ In 2012, Congress finally amended the law and authorized the application of CVD law to imports from NMEs.³¹ As discussed below, this amendment has caused controversies both in the U.S. trade practice and under WTO law.

C. Case Law on Statutory Interpretation

1. Continental Steel Corp. Case

In *Continental Steel Corp. v. United States*, the U.S. Court of International Trade (CIT) reviewed DOC's negative final finding on any subsidies in the Czechoslovakian and Polish wire rod investigations and disagreed with the agency's conclusion that subsidies cannot by definition exist within a NME country.³² The CIT in its final decision reversed and remanded the case back to DOC for further investigation.

The CIT discussed in depth on two main issues. First, the CIT disagreed with DOC's assumption that a subsidy can only exist in a ME country and cannot be found in any NME countries. The CIT said this assumption was a "fundamental error" committed by DOC.³³ Second, the CIT found that the application of this wrong assumption by DOC in the determination was "at odds with the plain meaning and purpose of the law," "contradict[ed] judicial interpretations of the law," and was "inconsistent with past administration of the law."³⁴ According to the CIT's interpretation of Section 303 of the Tariff Act of 1930, Congress "makes no distinctions based on the form of any country's economy," and "on its face shows a meticulous inclusiveness and an

³⁰ H.R. 3283, 109th Cong. (2005).

³¹ 19 U.S.C. §1671 f-1 (2012).

³² *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 557 (Ct. Int'l Trade 1985).

³³ *Id.* at 550.

³⁴ *Id.*

unwavering intention to cover all possible variations of the acts sought to be counterbalanced.”³⁵ As a result, the CIT considered DOC’s adoption of the assumption to have effectively changed CVD laws by administrative power and this practice should be condemned.³⁶

The CIT further explained that the non-application of CVD laws to imports from NME countries was not because of DOC’s assumption that subsidies do not exist in NMEs, but was due to the technical difficulties in identifying and measuring any subsidies that might exist in NMEs.³⁷ In the application of AD law to NMEs, Congress provided the “surrogate country” approach and “factors of production” approach to enable DOC to determine dumping margins, and the absence of those approaches in CVD laws should not become a legitimate reason for the non-application to NMEs.³⁸ According to the CIT, the only thing that DOC need to do is to set up a mechanism of determining the subsidies and CVDs on imports from NMEs. If the technical difficulty is solved, there are no obstacles in the language of the law.

2. Georgetown Steel Case

Subsequently, in *Georgetown Steel Corp. v. United States*, the U.S. Court of Appeals for the Federal Circuit (CAFC) reversed the CIT’s decision and affirmed DOC’s conclusions.³⁹ The court noticed that at the time of the legislation in 1897, NMEs did not exist, therefore the terms “bounty” and “grant” in Section 303 of the Tariff Act of 1930 were not intended to apply to imports from NMEs.⁴⁰ In the subsequent amendments of the statute, Congress did not address the issue on application of CVD laws to NMEs at all. The meaning of the statute stays the same as the time of its enactment, which is, according to the court, not to apply CVD laws to imports from NMEs.⁴¹

The court then discussed the two most recent amendments

³⁵ *Id.* at 551.

³⁶ *Id.* at 552.

³⁷ *Id.* at 554.

³⁸ *Id.* at 555.

³⁹ *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

⁴⁰ *Id.* at 1314.

⁴¹ *Id.*

to the CVD laws in depth and observed Congress's belief, as evidenced by both the acts themselves and their legislative histories, that "changes in the antidumping law were necessary to make that law more effective in dealing with exports from non-market economies, coupled with its silence about application of the countervailing duty law to such exports, strongly indicates that Congress did not believe that the latter law covered nonmarket economies."⁴² According to the court, AD law was intended to be the exclusive remedy for the injury caused by low-price imports from NMEs.⁴³

In conclusion, the CAFC afforded DOC substantial deference with respect to its determinations on the application of CVD laws to NMEs. The CAFC agreed with DOC that subsidies are distortions of free market economy and the concept is meaningless in NME context. In a NME country, every government action can be considered as a subsidy since the government is behind the whole economy. As a result, although the language of the statute does not exclude NME countries from the application of CVD laws, subsidies cannot be found in those NME countries and consequently, DOC's conclusion was in accordance with the law, and not an abuse of its discretion.⁴⁴

3. Post Georgetown Steel Decisions

After the CAFC's decision in *Georgetown Steel*, there were no other countervailing duty investigations on imports from NMEs until 1991, when DOC had the chance to examine a petition alleging the subsidization of ceiling and oscillating fans imported from China.⁴⁵ In the case of *Oscillating and Ceiling Fans From the People's Republic of China* (the *Lasko* decision),⁴⁶ the American company lost the anti-dumping petition because the DOC did not use the surrogate country method in calculating the dumping margin. DOC used domestic price in China to determine the NV of the imports under investigation and decided that dumping had not occurred. China was still consid-

⁴² *Id.* at 1317.

⁴³ *Id.* at 1318.

⁴⁴ *Id.*

⁴⁵ Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China, 57 Fed. Reg. 24018 (June 5, 1992).

⁴⁶ *Id.*

ered as a nonmarket economy country by the U.S., the calculation of NV was based on the rationale that the domestic price was market-oriented enough.⁴⁷

The test used by DOC to determine whether an industry is sufficiently market-oriented is essentially three-fold. First, “there must be virtually no government involvement in setting prices or amounts to be produced.”⁴⁸ Second, the industry “should be characterized by private or collective ownership. There may be state-owned enterprises in the industry, but substantial state ownership would weigh heavily against finding a market-oriented industry.”⁴⁹ Finally, “market-determined prices must be paid for all significant inputs, whether material or non-material (e.g., labor and overhead), and for an all-but-insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation.”⁵⁰

After losing the antidumping petition, the American company raised the matter of countervailing measures. Since the domestic price of the Chinese imports can be used in dumping margin determination, DOC could also reliably use the economic data provided by the industry itself to conduct the CVD investigation.⁵¹ However, DOC ultimately concluded that, while some of the inputs for the ceiling and oscillating fans were in fact obtained from market sources, there remained a significant portion of the inputs that were not. Therefore, the industry as a whole did not qualify as a market-oriented industry.⁵² As a result, in this particular case, CVDs was not imposed on products from China.

This market-oriented industry approach has received some negative comments and doubts. First, the third prong of the test is almost impossible to meet, since it requires all significant inputs to be bought at a price determinate by the market. Secondly, the language in the test is ambiguous and can create arbitrariness and uncertainty for NME producers with respect to the application of CVD laws.⁵³ In addition, it is possible for an industry to argue

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 24019.

⁵³ See JAMES K. KEARNEY & JIM WANG, THE DEPARTMENT OF COMMERCE'S MARKET-ORIENTED INDUSTRY METHODOLOGY FOR NONMARKET ECONOMIES IN

that it is sufficiently market-oriented for AD determinations, but at the same time it is not subject to any CVD investigations, like what happened in the *Lasko* case.⁵⁴

Due to the impractical nature of the MOE test, after *Lasko case*, DOC did not conduct any other CVD investigations against imports from NMEs until 2006.

4. Application of CVD law to Imports from China

The non-application policy is changed by a memorandum issued by DOC in 2007. On November 27, 2006, DOC announced that it had initiated a CVD investigation against China with respect to coated free-sheet paper.⁵⁵ The ITC made a positive preliminary finding regarding injury and then DOC made an affirmative determination that the alleged subsidization existed.⁵⁶ Along with its preliminary findings, DOC also issued a memorandum that discussed and differentiated the *Georgetown Steel* precedent.⁵⁷ The memorandum makes a distinction between China's economy in 2005, the period with which the investigation was concerned, and the so-called "soviet-style economies" discussed in *Georgetown Steel* and further provides a justification for the possible application of CVD laws to certain NMEs.⁵⁸

The memorandum and preliminary CVD determination did not change China's formal status as a NME country in the U.S. trade practice.⁵⁹ It examined the rationale behind the *Georgetown Steel* decision and concluded that the situation has changed. The memorandum looked into five major areas of the Chinese econo-

ANTIDUMPING INVESTIGATIONS: THE RESPONDING PARTY'S PERSPECTIVE, PLI CORP. LAW & PRACTICE HANDBOOK SERIES No. 789, 255, 266-67 (1992).

⁵⁴ See LAWRENCE J. BOGARD & LINDA C. MENGHETTI, THE TREATMENT OF NON-MARKET ECONOMIES UNDER U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAW: A PETITIONER'S PERSPECTIVE, PLI CORP. LAW & PRACTICE COURSE HANDBOOK, SERIES No.789, 9-11 (1992).

⁵⁵ Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea, 71 Fed. Reg. 68546 (Nov. 27, 2006).

⁵⁶ Coated Free Sheet Paper from China, Indonesia, and Korea, 71 Fed. Reg. 78464 (Dec. 29, 2006).

⁵⁷ See Memorandum from Shauna Lee-Alaia & Lawrence Norton, Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary, Import Administration (Mar. 29, 2007). [hereinafter *Georgetown Steel Memo*]

⁵⁸ See *id.*

⁵⁹ See *id.* at 2-4.

my: wages and prices, access to foreign currency, personal property rights and private entrepreneurship, foreign trading rights, and allocation of financial resources, and then concluded that, the economy in China is not in any way similar to “soviet-style economies” discussed in *Georgetown Steel*.⁶⁰ While subsidies cannot be found in former soviet countries, they can be identified in China.

In this particular case, CVD laws did not apply because the ITC made a negative final finding on injury.⁶¹ However, there are other successful petitions made by U.S. industries, which have resulted in the imposition of CVDs on imports from NMEs, including China.⁶² Twenty-four such CVD orders, covering goods from China and Vietnam, are also in place.⁶³

IV. DOUBLE COUNTING

A. Background

In the setting of the trade practice between China and the U.S., the concurrent imposition of ADs and CVDs on Chinese products is likely to create double imposition problem where the two remedies compensate the same injury in the importing countries twice. NME status matters in the calculation of NV of the imports because DOC employs a different methodology to determine dumping margin.⁶⁴ For a ME country, NV is often determined by the costs or the prices in the home market. For a NME country, however, a surrogate country will be chosen to provide data for NV determination.⁶⁵ Under the current U.S. law, a coun-

⁶⁰ See *id.*

⁶¹ Coated Free Sheet Paper from China, Indonesia, and Korea, 72 Fed. Reg. 70892 (Dec. 13, 2007).

⁶² Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Notice of Amended Final Affirmative Duty Determination and Notice of Countervailing Duty Order, 73 Fed. Reg. 42545 (July 22, 2008).

⁶³ See Antidumping and Countervailing Duty Orders in Place as of October 11, 2011, by Date of Order, USITC (Oct. 11, 2011), available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm (click on “AD/CVD Orders”); Multilayered Wood Flooring from the People’s Republic of China: Countervailing Duty Order, 76 Fed. Reg. 76693 (December 8, 2011).

⁶⁴ See Joseph A. Laroski, Jr., *NMES: A Love Story Nonmarket and Market Economy Status Under U.S. Antidumping Law*, 30 LAW & POLY INT’L BUS. 369, 375 (1999).

⁶⁵ See Tariff Act of 1930, 19 U.S.C. § 1677b(c) (2006).

try will be classified as NME status if “the administering authority determines [that the country] does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”⁶⁶ China is considered to be a NME country under this U.S. definition, and therefore the NV in ADs is constructed by data from a third country which is deemed to have ME status by U.S.

The double counting problem does not exist when ADs and CVDs are imposed to products from ME countries at the same time. The calculation of dumping margin will offset the amount of possible subsidies if it is based on ME methodology (illustrated by figure 1). However, the double imposition problem can arise from the dual imposition of ADs and CVDs to a NME country like China. Firstly, the export subsidy will affect the EP pro rata, and therefore the AD margin calculated by NV offsetting EP will catch the effect of the export subsidy.⁶⁷ Applying CVDs in addition to ADs leads to double counting. Secondly, domestic subsidies may or may not affect the EP pro rata, but under NME methodology of determining AD margin, those domestic subsidies can nevertheless be captured by ADs.⁶⁸ Under NME methodology, NV in AD margin is determined according to a surrogate country which has ME status, and thus is of unsubsidized nature.⁶⁹ The economic distortion caused by any domestic subsidies is captured by the comparison between unsubsidized NV (usually higher than if determined by home market data) and subsidized EP regardless of the price effect from these subsidies (illustrated in figure 2). If there is any price effect (most likely leads to a lower EP), the effect will cause an even greater amount of double remedy. When U.S. applies CVDs in addition to ADs against certain Chinese products, there is a high possibility of double imposition problem.

⁶⁶ 19 U.S.C. § 1677(18)(A).

⁶⁷ World Trade Organization Commentary, “the Issue of ‘Double Remedies’ in Relation to Concurrent Anti-Dumping and Countervailing Duties” (March 25, 2011).

⁶⁸ *Id.*

⁶⁹ *Id.*

FIGURE 1. CVD OFFSET STRUCTURE IN DUMPING MARGIN CALCULATION: MARKET ECONOMY⁷⁰

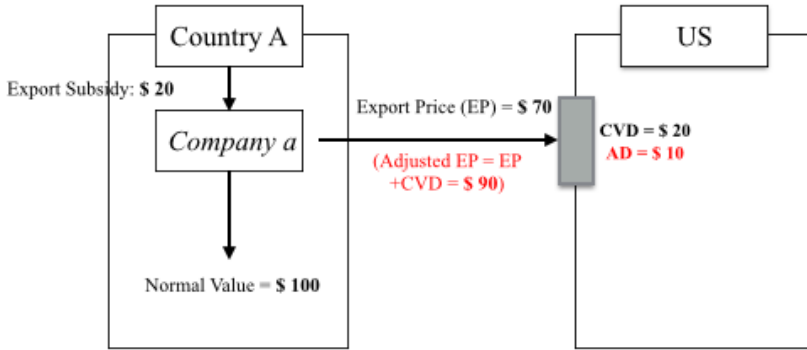
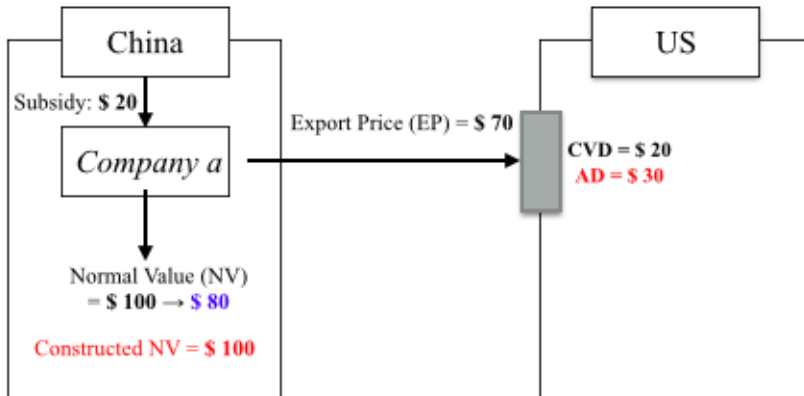


FIGURE 2. CVD OFFSET STRUCTURE IN DUMPING MARGIN CALCULATION: NON-MARKET ECONOMY⁷¹



⁷⁰ See Brian D. Kelly, *The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties*, 11(2) GLOBAL ECONOMY J. (July 2011), available at http://papers.ssrn.com/sol3/\papers.cfm?abstract_id=1653631 (last visited Feb. 14, 2014).

⁷¹ See *id.*

B. WTO Issues

1. Consistency with WTO Agreements

In WTO legal framework, Article 6(5) of GATT states about the double counting problem: “[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.”⁷² From its language, this article seems to prohibit the imposition of anti-dumping and countervailing measures at the same time. A more careful analysis, however, leads to a different conclusion. First of all, it only addresses export subsidization, not domestic subsidies. Double counting caused by ADs and export subsidies is clearly not allowed, and it is quite easy to understand due to the price effect of export subsidies as discussed above.

As for other subsidies, we can only focus on the nature of the potential damage. In Article 6, it speaks of “the same situation” caused by dumping or export subsidies, so it is the damage results that the WTO law examines.⁷³ Whether the law prohibits double counting on the same products, therefore, is not clear. When a product has been sold at a lower price in foreign markets than in domestic market, there could be different reasons for it. The lower price can be part of the dumping practice in order to open foreign markets or gain more market share. It can also be caused by domestic subsidies which bring down the cost of production and reduce the NV in antidumping duties calculation, assuming they are calculated under ME method. Under WTO law, the importing country can impose both antidumping and countervailing duties on the same product at the same time because they compensate different injuries and they are not dealing with “the same situation.”⁷⁴

To compensate trade injuries, not to over-compensate, is the ultimate goal of ADs and CVDs under WTO law. On one hand, if one of them could achieve the purpose, there is no need for the

⁷² General Agreement on Tariffs and Trade 1994, art. VI: 5 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

⁷³ See *id.* art. VI:6.

⁷⁴ See *id.*

other. On the other hand, if the damages require both measures to be imposed, they can be imposed together on the same goods. The rule is clear when the exporting countries are considered to have ME status; or the subsidies are for exports only and will affect export prices accordingly. In China-U.S. trade, the NME status of China makes double counting problem more complicated under the WTO law.

When dumping and subsidization (usually domestic subsidies) cause different damages, ADs and CVDs can be imposed to the same goods at the same time. In this situation, the other concern would be whether the subsidies are actionable under The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Part III and part IV of the SCM agreement have made the distinction between actionable and non-actionable subsidies.⁷⁵ This distinction also applies to double counting cases. The SCM Agreement, which expands considerably on obligations in GATT Articles VI and XVI, sets out obligations, rights, and remedies regarding the government subsidization of goods and the imposition of countervailing duties on subsidized imports.⁷⁶ The SCM Agreement prohibits export subsidies and subsidies that are contingent on the use of domestic cover imported products.⁷⁷ While the SCM Agreement does not prohibit domestic subsidies, for an importing WTO member to obtain any relief under WTO law, it has to show that a subsidy is specific to an industry and has caused adverse effects to its interests first.⁷⁸ These are called as “actionable” subsidies in SCM Agreement. WTO Members may respond in two ways to subsidies that are actionable: 1) a direct challenge of the subsidy in a WTO dispute settlement proceeding, and 2) the imposition of countervailing duties on subsidized goods as the result of a domestic trade remedy proceeding.⁷⁹

The SCM Agreement does not expressly address or forbid the imposition of CVDs on the goods from NME countries.⁸⁰ In

⁷⁵ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

⁷⁶ *See id.*

⁷⁷ *Id.* art. 3.1.

⁷⁸ *Id.* arts. 1.2, 2.1, 5.

⁷⁹ *Id.* art. 10, n.35.

⁸⁰ *Id.* art. 29.

the process of measuring any benefit conferred by government, the SCM Agreement provides an approach of using cross-border benchmarks.⁸¹ In measuring such a benefit, WTO Members generally refer to market-based rates and prices in the subsidizing country. When the market-based benchmark is not available in an NME country, the U.S. would use benchmarks based on rates or prices from one or more foreign market economy countries to make its benefit determinations.⁸²

2. WTO Accession Protocol and the Working Party Report of China

Other legal basis for double counting practice can be found in Protocol on the Accession of the People's Republic of China ("the Protocol") and the Report of the Working Party on the Accession of China ("the Working Party Report"). Firstly, the title of Article 15 of the protocol indicates that it covers both dumping and subsidization practice.⁸³ Section (a) sets out the conditions for using Chinese prices in antidumping measures; section (b) authorizes the importing Member to use so-called "NME methodologies" to identify and calculate Chinese subsidies. The conditions to impose such use are few.⁸⁴ The Protocol states: "in proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and condi-

⁸¹ *Id.* art. 1. The Agreement defines a subsidy as "a financial contribution by a government or any public body" within the territory of a WTO Member, or any form of income or price support, that confers a benefit. A financial contribution may take the form of (1) a direct or potential direct transfer of funds such as a loan or loan guarantee; (2) the foregoing of revenue "otherwise due"; (3) government provision of goods or services other than general infrastructure or government purchase of goods; or (4) government payments to a funding mechanism, or entrustment or direction of a private body to carry out one of the functions described above.

⁸² See Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 Fed. Reg. 17487-89 (Apr. 9, 2007).

⁸³ See Protocol on the Accession of the People's Republic of China art. 15, WT/L/432 (Nov. 23, 2001).

⁸⁴ See *id.*

tions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.”⁸⁵ Section 15(b) above, is the first and only WTO provision that explicitly authorizes the use of alternative benchmarks for a NME country. In general, Article 15 does not set ME status as a prerequisite for other countries to take countervailing measures against imports from China.

Secondly, in paragraph 150 of the Working Party Report, it reads “[s]everal members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.”⁸⁶ This statement is identical to the language used in Agreement on Implementation of Article VI of GATT 1994.⁸⁷ This means the special methodology of determining price comparability for NME countries can be applied not only to anti-dumping investigations, but also to countervailing investigations.

The Protocol and the Working Party Report are binding on China and China has to perform the obligations therein. Any WTO member can carry out a countervailing investigation on imports from China based on the SCM agreement and its domestic trade remedy laws. As for the question of applying CVDs to a NME country, there are not many legal difficulties under the WTO legal framework. In practice, the number of cases which the importing countries impose CVDs on Chinese products is increasing in the last decade.

⁸⁵ *See id.*

⁸⁶ The Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (Oct. 1, 2001).

⁸⁷ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement].

3. China's WTO Challenge

China made a successful appeal in WTO on the matter of double counting in 2011. The case *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379) originated from a complaint brought by China concerning the simultaneous imposition of countervailing and anti-dumping duties by the U.S. on four products imported from China following concurrent countervailing duty and anti-dumping investigations.⁸⁸ As discussed above, the U.S. began applying its CVD legislation to imports from China in 2007, after the DOC determined that China's economy had undergone sufficient economic reform as to enable the DOC to identify and countervail subsidies granted by the Chinese Government. In the four anti-dumping investigations at issue, the DOC still treated China as a non-market economy and determined NV using prices in a surrogate country rather than domestic prices in China.

Before the Panel, China raised multiple claims that the final DOC determinations which led to the imposition of the duties, the orders imposing the duties themselves, and certain aspects of the conduct of the underlying countervailing duty investigations were inconsistent with the U.S.' obligations under the SCM Agreement and the GATT 1994.⁸⁹ China also appealed the Panel's finding with respect to the issue of "double remedies", namely, that the U.S. was not required, when simultaneously applying anti-dumping and countervailing duties on the same products, to take account of whether the same subsidies were offset twice by virtue of the manner in which the anti-dumping duties were calculated under the DOC's NME methodology.⁹⁰

China appealed the Panel's interpretation and application of Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement, as well as of Article VI: 3 of the GATT 1994, as allowing the imposition

⁸⁸ Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (December 12, 2008).

⁸⁹ See generally Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010).

⁹⁰ See generally Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

of “double remedies”, that is the offsetting of the same subsidization twice through the concurrent imposition of anti-dumping duties based on an NME methodology and of countervailing duties.⁹¹ China argued that the Panel erred in reasoning that, because these provisions do not expressly prohibit a Member from offsetting the same domestic subsidies through the imposition of two different duties, it was the intention of the drafters to authorize such actions.⁹²

The Appellate Body (“AB”) explained that “double remedies” might arise when both countervailing duties and anti-dumping duties were imposed on the same imported products.⁹³ The term “double remedies” does not, however, refer simply to the fact that both an anti-dumping and a countervailing duty are imposed on the same product.⁹⁴ Rather, “double remedies” refers to circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice.⁹⁵ “Double remedies” are “likely” to occur in cases where an NME methodology is used to calculate the margin of dumping.⁹⁶

The AB started its analysis with Article 19.3 of the SCM Agreement, which provides that countervailing duties shall be levied in the appropriate amounts in each case. The AB observed that what was “appropriate” was to be assessed in relation to something else, and as a function of particular circumstances.⁹⁷ The AB agreed with the Panel that Article 19.4 provided context relevant to Article 19.3, but did not share the Panel’s apparent view that this provision, alone, defined what “appropriate amounts” of countervailing duties were under Article 19.3.⁹⁸ The AB also observed that several provisions in the SCM Agreement (Articles 19.1, 19.2, 19.3, and 21.1) linked the actual amounts of countervailing duties to the injury to be removed and, thus, indicated that the appropriateness of the amount of countervailing

⁹¹ *Id.* ¶ 539.

⁹² *Id.* ¶ 540.

⁹³ *Id.* ¶ 541.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* ¶¶ 552, 553.

⁹⁸ *Id.* ¶¶ 554–556.

duties was not unrelated to the injury that was being caused.⁹⁹ The AB also considered the context provided by Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994. The AB disagreed with the contextual significance attributed by the Panel to Article VI: 5 of the GATT 1994, as well as with its consideration of the significance of the object and purpose of the SCM Agreement for the interpretation of Article 19.3.¹⁰⁰

Based on its interpretation, the AB disagreed with the Panel that Articles 19.3 and 19.4 of the SCM Agreement were “oblivious to any potential concurrent imposition of anti-dumping duties”.¹⁰¹ The AB recalled its previous jurisprudence that the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously, and that Members should be mindful of their actions under one agreement when taking action under another.¹⁰² The AB considered that a proper understanding of the concept of “appropriate amounts” of countervailing duties under Article 19.3 of the SCM Agreement cannot be achieved without due regard to relevant provisions of the Anti-Dumping Agreement, and the requirement that any amounts be “appropriate” means, at a minimum, that investigating authorities might not, in fixing the appropriate amount of countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization.¹⁰³ The AB further noted that both the Anti-Dumping Agreement and the SCM Agreement contained provisions requiring that the amounts of anti-dumping and countervailing duties be “appropriate in each case”, as reflected in Articles 9.2 and 19.3 respectively, and concluded that reading the two agreements together suggested that the imposition of double remedies would circumvent the standard of appropriateness that the two agreements separately established for their respective remedies.¹⁰⁴

The AB concluded that the Panel erred in its interpretation of Article 19.3 of the SCM Agreement and failed to give meaning and effect to all the terms of that provision, because under Article 19.3 of the SCM Agreement, the appropriateness of the amount

⁹⁹ *Id.* ¶¶ 557, 558.

¹⁰⁰ *Id.* ¶¶ 566, 567.

¹⁰¹ *Id.* ¶ 570.

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 571.

¹⁰⁴ *Id.* ¶ 572.

of countervailing duties cannot be determined without having regard to anti-dumping duties imposed on the same product to offset the same subsidization.¹⁰⁵ The amount of a countervailing duty cannot be “appropriate” in situations where that duty represented the full amount of the subsidy and where anti-dumping duties, calculated at least to some extent on the basis of the same subsidization, were imposed concurrently to remove the same injury to the domestic industry.¹⁰⁶ The AB, therefore, reversed the Panel’s interpretation that Article 19.3 of the SCM Agreement did not address the issue of double remedies and found instead that the imposition of double remedies, that was, the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and of countervailing duties, was inconsistent with Article 19.3 of the SCM Agreement.¹⁰⁷

Having found that the imposition of double remedies was inconsistent with Article 19.3 of the SCM Agreement, the AB considered that it was unnecessary for the purposes of resolving this dispute to rule on the interpretation of Article 19.4 of the SCM Agreement and Article VI: 3 of the GATT 1994. The AB considered the Panel’s interpretation of these provisions to be moot and of no legal effect.¹⁰⁸

Having reversed the Panel’s interpretation of Article 19.3 of the SCM Agreement, the AB considered China’s request that it completed the legal analysis and found the DOC’s concurrent imposition of anti-dumping duties calculated on the basis of its NME methodology, and of countervailing duties on the same products in the four countervailing duty determinations at issue to be inconsistent with Article 19.3 of the SCM Agreement. The AB agreed with the Panel that double remedies were “likely” to arise from the concurrent imposition of anti-dumping duties calculated based on an NME methodology, and of countervailing duties, but observed that double remedies did not necessarily result in every instance of such concurrent application of these duties.¹⁰⁹ This depended, rather, on whether and to what extent domestic subsi-

¹⁰⁵ *Id.* ¶ 582.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 583.

¹⁰⁸ *Id.* ¶ 590.

¹⁰⁹ *Id.* ¶ 599.

dies had lowered the export price of a product, and on whether the investigating authority had taken the necessary corrective steps to adjust its methodology to take account of this factual situation.¹¹⁰

Turning to the four sets of investigations at issue, the AB stated that an investigating authority was subject to an affirmative obligation to ascertain the precise amount of the subsidy, as well as the appropriate amount of the duty.¹¹¹ The AB noted that in the four investigations at issue, the DOC had made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties.¹¹² Thus, the AB concluded that by declining to address China's claims concerning double remedies in the four countervailing duty investigations at issue, the DOC had failed to fulfill its obligation to determine the "appropriate" amount of countervailing duties within the meaning of Article 19.3 of the SCM Agreement.¹¹³ The AB, therefore, found that, in the four sets of investigations at issue, the United States imposed anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties. The AB concluded that, in doing so, the U.S. acted inconsistently with its obligations under Article 19.3 of the SCM Agreement, and, consequently, with its obligations under Articles 10 and 32.1 of the SCM Agreement.¹¹⁴

For these reasons, the AB recommended that the DSB requested the United States to bring its measures, found in the AB Report, and in the modified Panel Report, to be inconsistent with the SCM Agreement, into conformity with its obligations under that Agreement.

Under the analysis of the AB, the U.S. needs to change its current practice in applying AD law and CVD law on imports from China. Firstly, the AB makes a presumption that there was double counting problem when the U.S. applies AD law and

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶¶ 601–02.

¹¹² *Id.* ¶ 604.

¹¹³ *Id.* ¶ 605.

¹¹⁴ *Id.* ¶ 606.

CVD law to imports from China in parallel, due to the NME methodology employed in the determination of dumping margins.¹¹⁵ The investigating authority, namely, DOC in the U.S. has the burden to prove there is no double counting problem and rebut the presumption. Secondly, there are huge difficulties in identifying the exact amount of subsidies which are included in dumping margin calculation when the NME methodology is used.¹¹⁶ Even if the U.S. investigating authority could try to separate the effect of the subsidies, this practice will cause lots of redundancy and thus become inefficient in practice. At the same time, the WTO legal agreements and the AB report all indicate that the imposition of CVDs on imports from NMEs itself is not forbidden. Only when there is also the imposition of ADs, double counting problem would arise, and the imposition of CVDs becomes problematic under WTO law.

However, the AB did not recognize the economic rationale for banning simultaneous imposition of ADs and CVDs for export subsidies. In the context of domestic subsidies, the AB only concluded that double counting was “likely” to happen, but it did not spell out any specific scenarios. The AB report does put some pressure on DOC in applying CVD law to imports from China. The U.S. courts have also realized the problem. In a recent case, double counting was addressed and the court made a similar conclusion to the WTO AB report.

V. RECENT U.S. JUDICIAL DECISIONS

A. *GPX: CIT Decision*

As the WTO case was proceeding, the CIT in a ruling in *GPX Int'l Tire Corp. v. United States* involving the CVD order on off-the-road tires from China, stated that “[if] there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem

¹¹⁵ *See id.*

¹¹⁶ World Trade Organization Commentary, “the Issue of ‘Double Remedies’ in Relation to Concurrent Anti-Dumping and Countervailing Duties” (March 25, 2011).

through improved methodologies or new statutory tools.”¹¹⁷ The court instructed DOC that it had discretion in deciding not to apply CVDs to imports from NMEs according to the U.S. trade remedy laws. The ADs calculated under NME methodology is likely to capture all measurable competitive advantages. If DOC wants to impose CVDs in addition to this type of ADs, it must apply a mechanism that will effectively avoid double counting problem.

DOC considered in the remand that it had three options: 1) not to apply the CVDs; 2) to apply the market economy anti-dumping methodology to either the company involved or the PRC; or 3) to offset the CVDs against the duty deposit rate for the NMEADs. It chose the third option in the end.¹¹⁸ In its August 2010 ruling, the CIT held that the application of CVDs on these imports concurrently with ADs calculated under the NME methodology without making adjustments to avoid double counting was unreasonable and inconsistent with U.S. law.¹¹⁹ The CIT found that the offset was “unreasonable” because it would always result in the unaltered NME AD margin and thus rendered concurrent AD and CVD investigations unnecessary.¹²⁰ The court also found that this practice was inconsistent with Section 772(c)–(d) of the Tariff Act of 1930, 19 U.S.C. 1677a(c)–(d), which lists the specific offsets in dumping margin calculations that are “permissible” and held that the offset “does not comply with the statute.”¹²¹ The court further stated that DOC had limited options in this case and “it is too difficult for Commerce to determine, using improved methodologies and in the absence of new statutory tools, whether and to what degree double counting is occurring.”¹²² The court thus remanded again and ordered DOC not to apply CVD law to the goods under investigation.¹²³

¹¹⁷ *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1243 (Ct. Int’l Trade 2009) [hereinafter GPX I].

¹¹⁸ *GPX Int’l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1344 (Ct. Int’l Trade 2010) [hereinafter GPX II].

¹¹⁹ *Id.* at 1337.

¹²⁰ *Id.* at 1345–46.

¹²¹ *Id.* at 1345. (Later, the Congress changed the relevant part of AD law to allow off-settings by CVDs in AD measurement, see 19 U.S.C. §1677 f (2012)).

¹²² *Id.* at 1346.

¹²³ *Id.* at 1346–47.

B. GPX: Court of Appeals for the Federal Circuit Decision

The U.S. government and domestic industry defendants appealed the *GPX* decision to the U.S. Court of Appeals for the Federal Circuit (CAFC). On December 19, 2011, the CAFC affirmed the lower court ruling, but on a different ground that the legislation and judicial interpretations did not provide DOC with the authority to apply CVD law to imports from NMEs and as a result, the DOC might no longer interpret the statute as providing such authority.¹²⁴ CAFC found the CIT's reasoning on double remedies "problematic both because the extent to which the statute may prohibit double remedies is unclear, and because Commerce has determined that it is far from clear that double counting has in fact occurred."¹²⁵ The ruling of CAFC thus prohibits DOC from imposing CVDs on the imports under investigation even if it were able to reasonably resolve the double counting problem or if there is no concurrent antidumping order on the goods under investigation. This ruling has a broader implication that despite of the existence of double counting problem or offsetting mechanism, CVD law is not applicable to imports from NMEs. As a result, DOC must seek legislative authority to apply CVDs to NME countries if it believes that the law should be changed. The decision does not affect the authority of the DOC to impose antidumping duties on NME country goods.

VI. SUBSEQUENT LEGISLATIVE AND JUDICIAL DEVELOPMENT

A. Amendment of CVD law and AD law

The U.S. responded to the *GPX* decision by introducing H.R. 4105 (Camp) on February 29, 2012, which was quickly enacted by both Houses (passed the House on March 6 and the Senate on March 7). The legislation was signed by the President on March 13, 2012, and designated P.L. 112-99. The new law amends Section 701 of CVD law to add a new subsection (f) providing that merchandise imported, or sold for importation, into the U.S. from a NME country is covered by Section 701(a).¹²⁶

¹²⁴ *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) [hereinafter *GPX III*].

¹²⁵ *Id.* at 737.

¹²⁶ 19 U.S.C. § 1671f-1 (2012).

The statute does not require DOC to impose CVDs on NME merchandise, however, if it cannot identify and measure government subsidies in an NME country “because the economy of the country is essentially comprised of a single entity.”¹²⁷ Despite of the fact that this exception will rarely be invoked in practice, China certainly does not fall into this category in any case. The statute is clear on the matter of applying CVDs to imports from NME countries. These provisions apply to all CVD proceedings initiated by DOC on or after November 20, 2006, all resulting actions by U.S. Customs and Border Protection (CBP), and all civil actions, criminal proceedings and other federal court proceedings relating to the initiated CVD proceedings or resulting CBP actions.

After the WTO AB’s decision on Chinese imports, double counting is not allowed under WTO law. In order to comply with the WTO decision, the U.S. also changed the corresponding section in AD law by prescribing certain adjustments on NV calculation under NME method. The bill amends the U.S. AD law, as codified at 19 U.S.C. Section 1677f-1, to direct DOC to reduce an antidumping duty imposed on NME goods calculated by using surrogate-based NV if the department determines that (1) a countervailable domestic subsidy “has been provided” with respect to the goods at issue; (2) the subsidy “has been shown” to have reduced the average price of imports of that merchandise “during the relevant period”; and (3) DOC can “reasonably estimate” the extent to which the countervailable domestic subsidy, in combination with the use of surrogate country methodology to determine NV, has increased the weighted average dumping margin for the goods.¹²⁸ The duty is to be reduced by the amount of increase in the dumping margin estimated by DOC. The bill also provides that the reduction in the antidumping duty may not exceed the portion of the CVD rate attributable to the countervailable subsidy that is provided with respect to the merchandise

¹²⁷ *Id.*

¹²⁸ A summary of H.R. 4105 issued by the House Ways and Means Committee indicates that the foreign exporter would demonstrate that the requisite reduction in export prices had occurred. House Committee on Ways and Means, Summary of “A Bill to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and For Other Purposes, http://waysandmeans.house.gov/UploadedFiles/FINAL_CVD_One_Pager.pdf.

at issue and that meets the three above-stated conditions.¹²⁹

The change of the statutory language makes it clear that the U.S. has abandoned its long-standing practice of not applying CVDs to imports from NMEs. The main argument for this in the case of China is that the Chinese economy has evolved to the point where government subsidies could be identified and measured. As a principle, when the problem of identifying and calculating subsidies become plausible, applying CVDs to imports from NME countries should not be forbidden by law. From the beginning, some courts have considered this problem to be more technical than legal; for example, the CIT commented in 1984 in *Continental Steel Corp.* case that whether to apply CVDs to NMEs was only a technical measurement problem.¹³⁰ As long as the DOC has a mechanism in identifying and measuring subsidies in NMEs, CVDs are perfectly applicable to NMEs.

B. Legal Analysis of the New Amendment

The new amendment provides DOC with statutory authority to impose CVDs on imports from NMEs, except “the economy of that country is essentially comprised of a single entity.”¹³¹ Before the amendment, judiciary interpretation was struggling with Congress’ intent to provide this authority, and in general, the courts answered to this question in negative. The language of the exception in the amendment reflects an aspect of *Georgetown Steel*, but the rest is in support of DOC’s rationale in *Georgetown Steel* memo in 2007, that the economy in China has enough market elements for DOC to apply CVD law. At the same time, Chinese economy is not market enough to be considered as a ME country for anti-dumping purposes. Under this rationale, the U.S. enjoys the benefits both ways. This inconsistency in position now is supported by statutory language in the new legislation. Although the U.S. could reconcile it by saying that AD law and CVD law are designed to remedy different trade injuries, hence do not have to apply the same standard all the time, it does not address the double counting problem effectively.

¹²⁹ 19 U.S.C. § 1677f (2012).

¹³⁰ *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 554 (Ct. Int’l Trade 1985).

¹³¹ See H.R. 4015, 112th Cong. (2012).

The new law directs DOC when finding both dumping and subsidies, to “reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority . . .”¹³² This reduction depends, however upon the DOC’s ability to “reasonably estimate the extent to which the countervailable subsidy . . . in combination with the use of normal value has increased the weighted average dumping margin for the class or kind of merchandise.”¹³³ When it cannot make that estimate, it cannot make the adjustment, but by statute it must still assess countervailing duties. While the judicial decisions conclude that when DOC does not have an effective mechanism to avoid the double counting problem, it should not apply CVDs to imports from NMEs simultaneously with ADs, the language of the new legislation, however, plainly states even if DOC does not know how to adjust ADs, it still must apply CVDs. The CIT in *GPX* had ordered DOC to find a solution to the double counting problem before finding subsidies. The new legislation orders DOC to find subsidies first and then find a solution. According to this legislation, CVDs against imports from NMEs will be measured and imposed by DOC with or without the adjustment of ADs affected. Producers in NMEs will have to contest the illegal double counting on a case-by-case basis.

Finally, the new CVD law contains a provision regarding its effective date that it “applies to . . . all proceedings initiated . . . on or after November 20, 2006.”¹³⁴ DOC thus is ordered by statute to revisit all countervailing duty petitions filed against China and Vietnam since November 20, 2006 and find subsidies without regard to double-counting and without regard to decisions of the CIT and the CAFC. It then, to the extent it can think of how, must try to adjust for double-counting. Petitioners are granted the benefit of a law that did not exist when they filed their petitions. At the time when the petitions were made, CVDs cannot be imposed by DOC and thus cannot be provided as a remedy for those petitioners. But after the new amendment, DOC can impose CVDs and the petitioners now can enjoy them as a remedy. The adjustment provision, however, is effective on the day of the enactment, that is, March 3, 2012. The difference between the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

effective dates put all the exporters whose investigations started during this period in a much worse situation. DOC can apply CVDs on their exports without making any efforts to adjust ADs affected under the law.

In conclusion, the U.S. changed its trade remedy laws in two respects. The first aspect is to authorize trade investigation agencies legislative power to impose CVDs on imports from NMEs. This aspect is unlikely to cause any inconsistency with the WTO decision on double counting since the WTO did not suggest that the U.S. should stop the CVD law application to Chinese imports in order to avoid double counting. The WTO merely suggested that the U.S. should take measures to avoid double counting when it does arise, which is highly likely in WTO's view. The second aspect is the correspondent change in AD law section by adding the adjustment provision. This change can be considered as a move to comply with the WTO decision made by the U.S. Despite the efforts made by it, the U.S. fails to address the double counting problem effectively, which will become evident from the analysis below.

The two changes of the U.S. law also reflect the two main rationales behind the non-application of CVD law on imports from NMEs in the U.S. domestic jurisprudence. The first rationale is that the law does not empower trade investigation agencies to apply CVDs to NMEs, which is discussed and approved by the U.S. case law. The second rationale is that the law does provide authority for DOC to impose CVDs on NMEs, but DOC cannot do it in any case because it does not have a mechanism to identify and measure the subsidies in NMEs. Under the first rationale, DOC can apply CVD law to products from NMEs when Congress expressly provides the power by legislation, which it did by passing the new bill on CVD law and AD law. The new legislation has effectively overturned the previous case law under the first rationale. The second rationale is not directly addressed by Congress. But, after the first rationale is negated, there is not much to go on with the second one. Under the U.S. law, there are no further obstacles in the application of CVD law to NMEs.

Applying CVDs to NMEs may be allowed, but double counting is another issue reading in conjunction with the WTO AB report discussed above. First of all, the AB report only ad-

dresses the narrow ground of double counting, rather than a broader claim of the application of the CVD laws on imports from China which China did not raise in front of the WTO. Secondly, even if China has raised the broader claim, it is unlikely to succeed. From the discussions above on the WTO law, the application of CVD laws on imports from NMEs is not itself forbidden. Therefore, from the WTO perspective, the concern is only with the double counting problem. The new legislation has touched upon it by ordering DOC to make corresponding adjustment in dumping margin determination to avoid possible double counting to the extent DOC knows how. If DOC cannot determine the overlap and make the deduction, CVDs would still be applied. Whether this is consistent with the WTO decision is difficult to conclude. As discussed above, the WTO decision only reasoned that the double counting is “likely” to happen with the concurrent imposition of CVDs and ADs on imports from China, and the new legislation of the U.S. further qualifies that reasoning in the proviso under the adjustment section. As a result, when double counting actually happens, DOC will try to make an adjustment, but the failure to do so will not prevent it from applying any CVDs to Chinese imports.

China can challenge any future double counting under WTO law, but it may not change anything. The WTO has already concluded that the double counting is likely to arise and the investigating agency has the burden to prove there is no double counting or they have an effective mechanism to avoid it. In general, WTO remedies are limited in time, scope, and character. At best, a prevailing party can impose tariffs on products of a losing party. However, double counting cases have a more defensive nature. Even if Chinese exporters are successful in WTO, the WTO cannot force the U.S. to stop any imposition of CVDs on products from China. China could choose to retaliate, but it will not do good to the exports that are subject to the disputes. Several Chinese exporters have started to try another angle and seek domestic remedies in the U.S., but they have not been very successful as discussed below.

C. Implications in Practice

The U.S. government petitioned for a rehearing in GPX case and Congress changed the CVD law and AD law when the

request was pending.¹³⁵ At the same time, GPX then argued in front of CAFC that the new legislation is unconstitutional because 1) the retroactive effect of the new amendment on CVD law would change the outcome of the GPX case after the Federal Circuit already had rendered its decision in favor of GPX last December based on the law as it was when GPX had been investigated; and 2) the new law improperly creates a special rule applicable only to GPX and to a few other cases in which DOC may impose both countervailing and antidumping duties on the same goods from a NME country without attempting to avoid double counting.¹³⁶ In effect, GPX argued that the different treatment between GPX and other companies whose cases were initiated between the two effective dates and all other companies for which investigations will be initiated after March 13, 2012, violated the Equal Protection Clause of the U.S. Constitution because GPX and those few other companies will be treated differently for no reason.¹³⁷ The Federal Government, which includes Congress as well as the Executive Branch, must treat everyone equally or have a powerful rationale for doing otherwise. The fact that the imports are from China is not such a powerful rationale for such discrimination.

The CAFC rejected the first argument because the GPX case still was pending when Congress changes the law, so it did not effectively change the outcome of a decided court case.¹³⁸ Regarding the second argument, the court sent the case back to CIT with instructions to the lower court to make “a determination of the constitutionality of the new legislation and for other appropriate proceedings.”¹³⁹

Two Chinese companies, GPX International Tire Corpora-

¹³⁵ GPX Int'l Tire Corp. v. United States, Corrected Petition for Rehearing en Banc of Defendant-Appellant, United States, No. 2011-1107, at 1 (filed March 5, 2012) [hereinafter U.S. Corrected Petition for Rehearing].

¹³⁶ Response of Plaintiffs-Appellees GPX International Tire and Hebei Starbright to Court's Request for Letter-Brief on New Legislation, GPX Int'l Tire Corp. v. United States, No. 2011-1107, -1108, -1109 (Fed. Cir. March 23, 2012); Plaintiff-Appellee Tianjin United Tire & Rubber Int'l Co., Ltd's Response to Court's Request for Letter-Brief, GPX Int'l Tire Corp. v. United States, No. 2011-1107, -1108, -1109 (Fed. Cir. March 23, 2012).

¹³⁷ *Id.*

¹³⁸ GPX Int'l Tire Corp. v. United States, No. 2011-1107 (Fed. Cir. May 9, 2012).

¹³⁹ *Id.*

tion and Hebei Starbright Tire Co., Ltd., argued in their August 17 brief that the new law violates the equal protection requirement of the U.S. Constitution because the law treats companies differently depending upon when petitions were filed against them.¹⁴⁰ Another two companies, Tianjin United Tire & Rubber International Co., Ltd. and Beijing Tianhai Industry Co., Ltd., made essentially the same argument in separate briefs filed in the GPX case.¹⁴¹

All four companies argue the new law violates the equal protection clause of the U.S. Constitution because the provision applying the countervailing duty law to NMEs is made retroactive to 2006, whereas the provision requiring DOC to try to avoid double counting when antidumping and countervailing duties are imposed on the same products applies prospectively only. The law thus discriminates against companies subject to cases initiated before March 13, 2012, exposing them to both antidumping and countervailing duties without any provision to avoid double counting. By contrast, DOC must at least make an attempt to avoid double counting in cases filed after March 13, 2012.

In the opinion rendered by CIT on Jan. 7, 2013, the court ruled in favor of the constitutionality of the new legislation.¹⁴² The CIT concluded that first the Constitution did not prohibit “the imposition of all retrospective laws” and only prohibited the imposition of retrospective penal legislation, which usually took the form of criminal law.¹⁴³ The plaintiff here failed to prove the punitive nature of the CVD law and AD law amendment, therefore the retroactivity of the new legislation was not unconstitutional. Secondly, the court noticed that the due process argument made by GPX could not succeed because there were no predictable results in CVD investigations, therefore GPX could not argue its legitimate expectations of the level of duties that would be imposed were altered by the new law.¹⁴⁴ Lastly, the CIT answered the violation of equal protection clause in negative. The

¹⁴⁰ Brief for Plaintiff, *GPX Int’l Tire Corp. v. United States*, No. 08-00285 (Ct. Int’l Trade Aug. 17, 2012).

¹⁴¹ Brief for Plaintiff, *Beijing Tianhai Industry Co., Ltd. v. United States*, No. 12-00203 at 1334 (Ct. Int’l Trade Aug. 20, 2012).

¹⁴² *GPX International Tire Co. and Hebei Starbright Tire Co., Ltd. v. United States*, 893 F. Supp. 2d 1296, 1334 (Ct. Int’l Trade Jan. 7, 2013).

¹⁴³ *Id.* at 1309.

¹⁴⁴ *Id.* at *19.

court considered the finality of the 24 investigations during the period between 2006 and 2012 (the different effective dates between new CVD law section and new AD adjustment section) as a legitimate reason for making the new CVD section effective retrospectively, because if not, the results of these investigations could be overturned.¹⁴⁵ Regarding the new adjustment section in AD law, the court noticed that it would put too much burden on DOC if it was applied retrospectively, as a result, in addition to the finality and efficiency concern of Congress, the CIT determined that there was no violation of equal protection requirement of the Constitution in setting different effective dates for the two sections.¹⁴⁶

The challenge on equal protection has failed in the CIT and it means that double counting challenge by GPX has also failed. The U.S. government in this case did mention that the adoption of the new section in AD law was a response to the recent WTO adverse decision. The letter of law cannot be said to have addressed double counting problem effectively, since it authorizes DOC to apply CVD law to imports from NMEs even when the double counting still exists, provided that DOC has made its best efforts in trying to solve this problem. This most recent CIT decision in GPX case indicates that even assuming the letter of law in the new legislation of the U.S. has complied with the WTO decision, double counting is difficult to challenge on a case-by-case basis in the application of the law. Further appeal of this case and further developments in WTO law regime can be expected, but the long-standing practice of not applying CVD law on NMEs has changed, and now NME countries, like China, can only challenge the imposition of CVDs on their exports on a much narrower ground, namely, the double counting problem.

VII. CONCLUSION

During the 23 years between 1983 and 2006, the U.S. did not apply CVDs to products from NMEs. At the beginning, the law is clear that subsidies cannot be found in NMEs because the economy is controlled by the State and every State decision can be subsidies if CVD law applies. Along with the development of

¹⁴⁵ *Id.* at *21.

¹⁴⁶ *Id.* at *22.

economies in NMEs like China, the U.S. has changed its position on CVD matter, reasoning that the economy in China is market oriented enough for the finding and measuring of subsidies. Despite of all the political and economic reasons behind this logic, it would work if the U.S. keeps the same position in the application of AD law against China. Since the U.S. still considers China as a NME country in antidumping matters, the simultaneous application of CVDs to Chinese products creates the double counting problem which is condemned by the WTO law. The new legislation in March 2012 confirms the application of CVDs to imports from NMEs, but it does not resolve the double counting problem. Furthermore, the retroactivity of the law puts producers in China in a difficult position because they are going to face CVD investigations filed from the past and they have to challenge the findings on the narrow ground of double counting case by case both in the U.S. courts and WTO dispute settlement body.

According to the Protocol, the U.S. will accord China ME status in 2016, and until then, double counting will always be an obstacle for Chinese exporters in international trade. In legislative process, several Congressmen explained the reason for amending CVD law was because China did not play by the rules. However, the fact that the U.S. twisted the law to suit Chinese facts is definitely not playing by the rules, especially when the law is clearly inconsistent with the WTO regime.

After the amendment of its CVD and AD law, the U.S. has started several dumping and countervailing investigations against imports from China. Taking an example of the recent AD and CVD investigations against Chinese imports in photovoltaic industries, the punishment for Chinese producers is severe. The truth is that the U.S. is trying to develop its own photovoltaic industries and it has been providing financial support to them for the past few years. This is a legitimate cause, and if the U.S. plays by the rules, it should use only ADs to deal with the potential unfair trade practice by Chinese industries. The application of CVDs to imports from China without ADs could be allowed, but the simultaneous application of ADs contradicts the WTO law by creating the double counting problem. The U.S. ignored the contradiction in its own legislation, and by doing so, it sends a negative signal in the area of free trade that the trade is never truly free.

China's Prospective Strategy in Employing Investor-State Dispute Resolution Mechanism for the Best Interest of Its Outward Oil Investment

Fu Chenyuan

TABLE OF CONTENTS

ABSTRACT.....	268
I. Introduction.....	270
II. A Snapshot of China's Transnational Oil Investment	273
A. China's Energy Resources, Consumption, and Import Reliance	273
B. China's Oil Investment Policy and the Twelfth Five-Year Plan.....	274
C. Chinese Oil Companies' "Go-Abroad" Endeavors	275
D. Legal Risks Embedded in China's Transnational Oil Investment Activities	277
1. The Municipal Law of the Host State	277
2. Administrative Approval of Host Government	278
3. The National Policy of Home State.....	279
E. The Dynamism between Chinese Oil Companies and Western Oil Companies	279
III. China's Treaty Practice Regarding Investor-State Dispute Settlement.....	280
A. Introduction to Chinese BIT framework.....	280
B. Applicable Law Clause in China's BITs with Oil Investment Recipient Nations.....	281
C. Investor-State Dispute Resolution Clause in China's BITs with Oil Investment Recipient Nations.....	284
1. China's Evolving Attitude towards Investor-State Arbitration.....	285
2. Consent to ICSID.....	287
3. Peculiarities of ICSID	288
4. Prior Administrative Review Procedure.....	290
D. China's Future Policy Position towards Investor-State Arbitration	290
1. Emerging Opposing Voice towards Investor-State Arbitration	290
2. Should China Be Hospitable or Hostile to Investor-State Arbitration in Future? —What is in China's best interest?.....	293
3. Unlikely Acceptance of Ad Hoc Arbitration by China.....	296
4. Mediation and Conciliation.....	297
IV. How China's Treaty Practice Impacts On the Drafting and Negotiation of China's Transnational Oil Investment Contract?.....	299
A. The Relationship between Private Investment Contract and BITs & FTAs with Investment Chapters	299

B. Applicable Law Clause in Transnational Oil Investment Contract	300
C. Disputes Resolution Clause in Transnational Oil Investment Contract	301
1. Function of Dispute Resolution Clause in Contracts	301
2. Choice between Litigation and Arbitration	302
3. Forum.....	303
4. Composition of Arbitration Tribunal.....	303
5. Qualification of Arbitrators	304
6. Arbitral Rules	304
7. Finality of Arbitration Awards	305
D. Stabilization Clause	305
E. Application of the Investor-State Dispute Settlement Clause to Non-signatories.....	307
V. Reflection Upon The Recent Development of World Investment Treaty Practice.....	308
A. Canada-China FIPA	308
1. Transparency of Laws and Regulations	308
2. Transparency of Arbitral Proceedings.....	310
B. U.S. Model BIT	311
1. Transparency Requirement	311
2. More Robust Environment and Labor Standard.....	312
C. Trans-Pacific Partnership Negotiation (TPP Negotiation)	313
D. ASEAN Agreement.....	314
VI. Suggestions for Modification of Chinese Model BIT	315
A. Arbitrability	315
B. National Security Concern.....	316
C. Umbrella Clause	317
VII. Conclusion	318

China's Prospective Strategy in Employing Investor-State Dispute Resolution Mechanism for the Best Interest of Its Outward Oil Investment

*Fu Chenyuan**

ABSTRACT

This paper aims to explore the desirable dispute resolution mechanism for Chinese outward oil investment cases. China is now becoming as a significant investor in global oil market. The analysis of this paper centers on Chinese current treaty practices and its future strategy towards dispute resolution mechanism. In addition, oil exploration and development contract templates provided by host countries are also studied. The paper focuses on investment treaty and contract practices because they are the two pillars that build up the legal framework for cross-border oil investments.

The paper composes of six parts. Part I of the paper gives introduction to China's national policy in making energy investment abroad, major players in the field, scale of the investment, and legal risks embedded in the investment. Part II examines the treaty language from nineteen Chinese BITs with oil investment recipients and the Chinese model BIT (1997 version). The study of treaty practice enlightens China's policy position towards investment dispute resolution. Part III discusses the impact of BIT and investment chapter of FTA on private contracts. How BITs influence the drafting and negotiation of investment contract clause would be discussed at depth. Part IV focuses on the recent development of investment treaty for Canada, U.S., and Trans-Pacific Partnership negotiators. Readers could gain an understanding of the new movements in the area. This discussion also gives inspirations for the drafting of China's future investment treaties. Part V, following the Part IV, puts forwards certain suggestions and ideas concerning treaty drafting and contract negotiation so as to facilitate

* Ms. FU Chenyuan is a 2013 graduate of Peking University School of Transnational Law's JD program in US common law and JM program in Chinese civil law. Ms. Fu works in Shanghai as a counsel, advisor, and teacher for Shanghai High School. Ms. Fu served as research assistant to Professors Peter Malanczuk and Ray Campbell during her studies. She also participated in various international law-related academic activities. She studied European trade law in University of Lausanne, Switzerland. She also participated in the "Rule of Law" program sponsored by the U.S.-Asia Institute. Furthermore, Ms. Fu teamed with U.S. law students in an explorative project hosted by Miami Law School for law school students all over the world.

China's oil investment abroad. Finally, this paper closes with the summary of the key points raised in each part.

I. INTRODUCTION

“Energy Security,” “Go Abroad,” and “Overseas Investment” have been the buzzwords seen in China’s national development strategies for recent years. Indeed, China’s investment in oil resources abroad gains more and more attention both nationwide and worldwide.

This paper chooses the dispute-resolution perspective of China’s cross-border oil investment for study. Good legal condition—an access to an effective and fair mechanism of dispute settlement—indeed constitutes half success of the investment activity. The significance of dispute resolution for oil investment activities is evidenced by the ICSID caseload. For year 2010, 2011, and 2012 in a row, 25% of ICSID cases arise out of oil, gas, and mining sectors, the biggest proportion among all sectors.¹

Most literature on transnational dispute management focuses on the western countries’ practice. For instance, Prof. Thomas Wälde contributes to the field of world energy and resources law by introducing to readers the role arbitration plays in transnational investment activities.² The joint paper written by Doak Bishop and Thomas Wälde sheds lights on the evolving history of transnational oil and gas disputes.³ Doak Bishop has also written another article observing the development of *Lex Petrolea* for international petroleum cases.⁴ Dr. Vlado Vivoda’s paper highlights the changing dynamism between international oil companies and host states.⁵ David Mildon summarizes in his

¹ See *The ICSID Caseload—Statistics Issue 2011-I*, INT’L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTE 12 (2011), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>; *The ICSID Caseload—Statistics Issue 2012-I*, INT’L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTE 12 (2012), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>; *The ICSID Caseload—Statistics Issue 2013-I*, INT’L CTR. FOR SETTLEMENT OF INVESTMENT DISPUTE 12 (2013), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>.

² See Thomas W. Wälde, *The Role of Arbitration in the Globalization of Energy Markets: Perspective in the Year of 2000*, TDM 1 (2009), <http://www.transnational-dispute-management.com/article.asp?key=1426>.

³ See R. Doak Bishop & Thomas W. Wälde, *History of International Oil & Gas Disputes*, OGEL 4 (2007), <http://www.ogel.org/article.asp?key=2645>.

⁴ See R. Doak Bishop, *International Arbitration of Petroleum Disputes: the Development of a Lex Petrolea*, OGEL Archive issue, <http://www.ogel.org/article.asp?key=2366> (last visited Feb. 2, 2014).

⁵ See Vlado Vivoda, *International Oil Companies and Host States: A New*

article the unique issues that arise in the context of oil and gas disputes.⁶

How China should employ the dispute settlement mechanism to facilitate its overseas investments in oil industry is a new arena for research and practice. Some preliminary study has been done on the influence of China's bilateral investment treaty (hereinafter "BIT") on China's overseas resource investments. For example, the article written by Dr. Nils Eliasson examines investment treaty language and studies these treaties' influence on China's natural resources investments.⁷ Dr. Nils Eliasson argues that the first generation BITs cannot provide satisfactory investment protection in that their arbitration clauses are very narrowly worded.⁸ The second generation BITs, on the other hand, could provide higher investment protection.⁹ The problem is that among the BITs China has entered with recipient countries, very few are second generation BITs. Stephan Schill's article points out the same problem China's early BITs has.¹⁰ This paper, without making specific focus on natural resources sector, drills deeper into the issue of treaty protection. It discusses not only procedural aspect of investment treaties, but also focuses on the substantive aspect of Chinese BITs.¹¹

The traditional legal research makes surveys on the existent treaty practices and evaluates their potential impacts on China's overseas investments. However, a comprehensive discussion on BIT; private investment contract; FTA is lacking. Further, the literature written on this topic also does not address much what future policy position China should adopt. This paper purports to fill in these two vacancies. It studies the legal regime composed by treaties and contacts as well as explores China's future draft-

Bargaining Model, OGEL 5 (2011), <http://www.ogel.org/article.asp?key=3174> (last visited Feb. 2, 2014).

⁶ See David Milton, *Unique Issues in Oil & Gas Disputes*, TDM 5 (2006), <http://www.transnational-dispute-management.com/article.asp?key=940>.

⁷ See Nils Eliasson, *Investment Treaty Protection of Chinese Natural Resources Investments*, 7 TDM 4 (2010), <http://www.transnational-dispute-management.com/article.asp?key=1642>.

⁸ *Id.* at 24–26.

⁹ *Id.*

¹⁰ See Stephan W. Schill, *Tearing down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 86–93, (2009).

¹¹ *Id.* at 83–113.

ing and negotiation strategy in a manner that accommodate China's national energy policy and China's oil companies.

In terms of research methodology, this paper conducts group study on nineteen BITs signed between China and oil recipient countries. These BITs can be accessed to through the BIT online database. The paper also carefully examines the wording of three model BITs (Chinese, Canadian, and U.S.), four model investment contracts (Pakistan, Indonesia, Nigerian, and Iranian) as well as relevant arbitral jurisprudence. Due to the factor of privacy and party autonomy, a discussion on the actual investment contracts China has signed is beyond the scope of this paper. Future work needs to orient at collecting and studying a significant amount of data and information concerning real bargaining cases and signed contracts.

The thesis discusses China's investment in oil industry from the perspective of dispute resolution. Part I gives background introduction to China's overseas investments in oil industry. Relevant statistics and policies are under review, such as China's oil production capacity, consumption amount, China's Twelfth Five-Year Plan, China's Foreign Investment Catalogue, etc. Part II will analyze China's BITs concluded with host states that receive China's investments. The applicable law clause and the dispute resolution clause are specifically studied in this part. In addition, China's future policy position towards investor-state arbitration is also covered. Part III will discuss how Chinese oil companies draft and negotiate their investment contracts with host states under the shadow of investment treaties signed between China and the host states. Part IV will address the recent developments in investment treaty field, including the highlights of Canada's new BIT with China, America's model BIT, and ASEAN's framework agreement. Part V will make proposals on how to upgrade China's current model BIT. Certain changes, if made into the current BIT text, could desirably facilitate China's overseas petroleum investments. Part VI will summarize the main points raised by the five parts above.

In summary, this paper aims to articulate China's current position on dispute resolution mechanism for overseas oil investment. It explores the possibility of using ADR (e.g.: mediation and conciliation) in the future practice. This paper further argues that China will continue its usage of ICSID for oil dis-

putes, in spite of the opposition to ICSID raised by some countries. It is the author's hope that the study on dispute management method plays a supportive role in China's overseas oil investments and calls for more study on this topic.

II. A SNAPSHOT OF CHINA'S TRANSNATIONAL OIL INVESTMENT

A. China's Energy Resources, Consumption, and Import Reliance

China is the world's most populous country. The big population, together with its rapid economic growth and the acceleration of industrialization, makes the countries' demand for energy high. China ranks world's second largest consumer of oil, next to United States.¹²

From the production side, China is the world's 4th largest producer of oil. But the oil reserve stays relatively low—ranking 15th in the world. China is right now actively exploiting its offshore oil reservoirs in Bohai Bay and the South China Sea, listed as one key item on the agenda of China's twelfth-five year plan (2011–2015).

The following chart shows the development trend of China's oil production and consumption from 2001 to 2010.¹³ As the chart demonstrates, both the consumption curve and production curve are on the progressive increase, while the consumption experiences a more steep growth. Moreover, the scale of consumption curve far exceeds that of production curve.

Given the shortage between the production and consumption, China has to rely on oil resources of other countries. In fact, starting from 1993, China has become the net import country of oil resource. In that year, the external dependence ratio for oil import was 6%. In 2009, the ratio broke through the alert line of 50% for the first time.¹⁴ Beyond 2009, the following years witness the ever-increase of the external dependence of Chinese oil industry. As China's Energy Policy (2012) White Paper points out,

¹² U.S. Energy Information Administration, *Country Analysis – China*, <http://www.eia.gov/countries/cab.cfm?fips=CH> (last updated April 22, 2013).

¹³ British Petroleum, *BP Statistical Review of World Energy July 2012* <http://bp.com/statisticalreview> (last visited Feb. 2, 2014).

¹⁴ 黄烨 (Huang Ye), 原油对外依存度十年提高 9 倍 [The External Dependence Ratio for China's Crude Oil Has Increased 9 Times over the Past Ten Years], 人民网 [PEOPLE.COM], Feb. 5, 2013, <http://energy.people.com.cn/n/2013/0205/c71661-20430435.html>.

China's petroleum external dependence has reached a worrying level of 56.6%.¹⁵ Aside from the high degree of external reliance, China largely relies on political instable countries for the sourcing of petroleum resources. Among the top ten partnering countries for China's oil import in the year of 2010, five are middle-east countries: Saudi Arabia (No.1), Iran (No.3), the Sultanate of Oman (No.6), Iraq (No.7), Kuwait (No.8). Three are African countries: Angola (No.2), Sudan (No.5), Libya (No.9). The remaining two countries are Russia and Kazakhstan.¹⁶ The import of petroleum resources thus could be vulnerable to the changes of the political climate in oil export countries.

Chinese state-owned oil companies also started to make overseas investments in oil industries in early 1990s. They now operate in total forty-five oil exploitation projects abroad, spreading out in twenty-three countries.¹⁷ According to the study conducted by Chinese scholars, China's overseas oil operation field totals 75.5×10^4 km, covering fifty-four risk exploitation area as well as thirty-one rolling exploitation areas.¹⁸

B. China's Oil Investment Policy and the Twelfth Five-Year Plan

The governmental authorities that regulate China's overseas investment are the Ministry of Commerce (MOFCOM), the Ministry of Foreign Affairs, the National Development and Reform Commission (NDRC) and the State Administration of Foreign Exchange (SAFE), the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC).

The MOFCOM, the Ministry of Foreign Affairs, and the NDRC co-published three consecutive "Catalogue of Industrial

¹⁵ See 雷敏 (Lei Min), 中国的能源政策 (2012) 白皮书 [China's Energy Policy (2012) White Paper], 新华新闻 [XIN HUA NEWS], Oct. 25, 2012, http://news.xinhuanet.com/energy/2012-10/25/c_123867168.htm; See also 张艳 (Zhang Yan), 能源消费总量中国世界第二 [China's Total Energy Consumption Ranks Second in the World], 新华新闻 [JING HUA NEWS], Sept. 3, 2012, http://epaper.jinghua.cn/html/2012-09/03/content_1196092.htm.

¹⁶ 黄烨 (Huang Ye), 原油依存度再创新高 [Oil Outward Reliance Increased to An Unreached Level], 人民网 [PEOPLE.COM], Jan. 20, 2012, http://paper.people.com.cn/gjjrb/html/2012-01/20/content_996652.htm.

¹⁷ 薄启亮 (BO QILIANG), 海外石油勘探开发技术及实践 [OVERSEAS PETROLEUM EXPLORATION AND DEVELOPMENT TECHNOLOGY AND PRACTICE] at 1 (2010).

¹⁸ *Id.*

Guidance of Countries and Regions for Outbound Investment and Cooperation” in 2004, 2005, and 2007. The Catalogues are to encourage Chinese enterprises to carry out targeted outward investments.

According to the Catalogues, the following countries are identified as China's oil investment partners:

Catalogue I (2004): Burma, Indonesia, Brunei, Bangladesh, East Timor, Iran, United Arab Emirates, Saudi Arabia, Egypt, Sudan, Algeria, Nigeria, Russia, Kazakhstan, Uzbekistan, Azerbaijan, Australia, Papua New Guinea, Canada, Cuba, Trinidad and Tobago, Brazil, Venezuela and Suriname.¹⁹

Catalogue II (2005): Yemen Republic, Syria, Gabon, Congo, Angola, Turkmenistan, and Colombia.²⁰

Catalogue III (2007): Kuwait, Qatar, Oman, Morocco, Libya, Niger, Norway, Ecuador, and Bolivia.²¹

Chinese government has actively engaged with world major oil producing states to explore cooperation in oil and gas industry. This is evidenced by China's diplomatic agenda, which frequently enlists overseas energy development as one important item.

C. Chinese Oil Companies' "Go-Abroad" Endeavors

Chinese oil companies are becoming world investors. The financial crisis in 2008, by pushing down the global oil price,

¹⁹对外投资国别产业导向目录一 [Catalogue of Industrial Guidance of Countries and Regions for Outbound Investment and Cooperation (I)] (promulgated by the Ministry of Commerce, Ministry of Foreign Affairs, July 8, 2004, effective July 8, 2004), available at <http://www.mofcom.gov.cn/article/b/bf/200408/20040800258538.shtml>.

²⁰对外投资国别产业导向目录二 [Catalogue of Industrial Guidance of Countries and Regions for Outbound Investment and Cooperation (II)] (promulgated by the Ministry of Commerce, Ministry of Foreign Affairs, May 12, 2005, effective May 12, 2005), available at <http://www.mofcom.gov.cn/article/b/bf/200408/20040800258538.shtml>.

²¹对外投资国别产业导向目录三 [Catalogue of Industrial Guidance of Countries and Regions for Outbound Investment and Cooperation (III)] (promulgated by the Ministry of Commerce, Ministry of Foreign Affairs, State Development and Reform Commission, Jan. 31, 2007, effective Jan. 31, 2007), available at http://www.sdpc.gov.cn/zcfb/zcfbtz/2007tongzhi/t20070227_118707.htm.

offers a good opportunity for Chinese oil SOEs to expand and acquire assets from other big international petroleum companies.²² Their enhanced standing in the world investment, in turn, pushes China to become the top source of FDI for other countries.²³

Among them, three SOEs are particularly active. They are: Chinese three oil giants, China National Petroleum Corporation (CNPC), China Petrochemical Corporation (SINOPEC), and China National Offshore Oil Corporation (CNOOC). Both CNPC and CNOOC are regarded as largest 100 TNCs from developing and transition economies.²⁴

The internationalization of China's oil companies is indeed part of the greater national strategy to tap into countries with rich petroleum resources. It is government initiative that backs up Chinese oil SOE's billion-dollar investment to acquire important energy stakes. For example, along with CNOOC's winning of its \$2.7 billion contract in the Niger Delta of Nigeria in 2006, Beijing made commitment to invest \$4 billion to upgrade infrastructure in the region. Starting from 2001, China has completed 200 infrastructure projects in Africa.²⁵

Nevertheless, the government initiative should not be understood as government control of the oil SOEs. Literally speaking, Chinese oil SOEs are owned by the State Assets Supervision and Administration Commission (SASAC). But in terms of bureaucratic ranking, CNPC and Sinopec are equal to SASAC, all at ministry level. Moreover, the leaders in charge of the SOEs are appointed by the Organization Department of the CPC, a higher-level bureaucracy than SASAC. They are given sufficient freedom in running the companies and structuring business.²⁶

²² See Dilip Hiro, *China Rising: Have Cash, Buy Oil*, YALEGLOBAL ONLINE (Oct. 9, 2009), <http://yaleglobal.yale.edu/content/china-rising-have-cash-buy-oil>; See also Mona Agha Seyed Jafar Kashfi, *The Differences between the Behavior of Chinese NOCs in Overseas Operations and That of IOCs – and The Reasons for These Differences*, OGEL 1 (2011), <http://www.ogel.org/article.asp?key=3084>.

²³ *World Investment Report 2012: Towards A New Generation of Investment Policy*, U.N. CONF. ON TRADE AND DEV., 21(2012), <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

²⁴ *Id.* at 25.

²⁵ Hiro, *supra* note 22.

²⁶ *Overseas Investments by Chinese National Oil Companies*, INT'L ENERGY

It is this autonomy enjoyed by Chinese oil SOEs that distinguishes them from SOEs of other countries. When making overseas investment, Chinese SOEs takes the lead and controls the whole process.²⁷ The NRDC and the NEA participate in negotiation when Chinese oil SOEs ask for it.²⁸

D. Legal Risks Embedded in China's Transnational Oil Investment Activities

1. The Municipal Law of the Host State

Host states revise their national legislations on frequent base. Legislations related to transnational oil investments include the civil law, the civil procedural law, the arbitration law, the foreign investment law, and natural resources law. All these changes might have an impact on the oil projects on their land invested by Chinese investors. For example, there is a long list of U.S. federal legislations that have a stake in oil investment, such as Federal Law, Federal Oil and Gas Statutes, Federal Environmental Statutes, Federal Oil and Gas Regulations, Federal Oil and Gas Policies and Guidelines, Forest Oil and Gas Policies and Guidelines, and EPA Laws and Guidelines.²⁹ Imaginably, there will be a parallel list for the relevant U.S. state legislations where China's oil investment project operates.

In light of constant change of host law, legal devise such as "stabilization clause" has been invented under international law. Stabilization clause is contractual provision that insulates foreign investments and foreign investors from adverse change of laws of host state.³⁰ Whether such legal tool could actually take effect and protect investments and investors still depends on individual cases. More detailed study on stabilization clause will be addressed under the section D under Part IV of the paper.

AGENCY, 25 (2011), <http://www.iea.org/publications/freepublications/publication/name,3947,en.html>.

²⁷ *Id.* at 26.

²⁸ *Supra* note 26.

²⁹ *Federal Oil and Gas Statute, Law & Policy, INTERMOUNTAIN OIL AND GAS BMP PROJECT*, http://www.oilandgasbmps.org/laws/federal_law.php (last visited Feb. 2, 2014).

³⁰ David Clinch & James Watson, *Stabilization Clauses—issues and trends*, *LEXOLOGY* (June 30, 2010), <http://www.lexology.com/library/detail.aspx?g=c5976193-1acd-4082-b9e7-87c0414b5328>.

2. Administrative Approval of Host Government

Chinese oil companies' going abroad policy cannot succeed without obtaining administrative approvals from the host government. Many oil deals fail because of this regulatory hurdle.

Early in 2002, CNPC had attempted to acquire shares of Russian Snavnef Oil Corporation. But the plan was blocked by the Russian government.³¹ Later on, CNPC tried to acquire shares of Stumil Oil Corporation located in Orenburgskaya Oblast. The plan fails again since the deal was disapproved by Russian Anti-Monopoly Bureau.³²

On Jun 23, 2005, CNOOC announced an \$18.5 billion all-cash acquisition bid for U.S. petroleum company UNOCAL.³³ The bid, once announced, sparked widespread political discussion in the United States. Some dislikes the idea that Chinese state-owned enterprise holds seventy per cent share of the U.S oil company. Others worry that the CNOOC have gain access to sensitive technology through the acquisition. Ultimately, the U.S. House of Representatives vetoed down by with the explanation that "the acquisition might threaten to impair the national security of the United States."³⁴

The other example is CNOOC's attempt to acquire Nexen, Canada's largest energy company. The acquisition has already been approved by the Canadian authority that considers the deal to bring "net benefit" to Canada.³⁵ The prior concern over the deal relates to the size of the acquisition and the state-owned status of CNOOC. CNOOC shows its commitment to Nexen's current corporate structure.³⁶ It guarantees the Canadian authority that Nexen will continue to operate as a Canadian company. The company's stock is listed in Toronto, employees keep their

³¹ 王多云 & 张秀英 (WANG DUOYUN & ZHANG XIUYING), 中国油气资源国际合作: 现实与路径 [CHINA'S INTERNATIONAL COOPERATION IN OIL-GAS RESOURCE: REALITY AND PATH], at 91 (2011).

³² *Id.*

³³ Isabella Steger, *Cnooc's Unocal Lesson*, WALL STREET J. (July 23, 2012), <http://blogs.wsj.com/deals/2012/07/23/cnoocs-unocal-lessons>.

³⁴ H.R. REP. NO. 151, pt. 11, at 14975 (2005).

³⁵ Paul Vieira, *Canada Approves Big Energy Mergers*, WALL STREET J. (Dec. 8, 2012), <http://online.wsj.com/article/SB10001424127887323501404578165700174741568.html>

³⁶ *Id.*

job, and Calgary remains to be the headquarter.³⁷ The U.S. Committee on Foreign Investment has also approved the CNOOC-Nexen deal.³⁸ Because Nexen owns assets in U.S., approval from U.S. regulators is also required for the deal to go through.³⁹

These examples evidence the weight of regulatory approval in the transnational oil investments. Chinese investors shall never overlook this issue when making bids and making green-field investments.

3. The National Policy of Home State

The law of home state may sometimes pose barriers to its overseas investment too. One example is CNPC's investment in Iran. China's oil investment in Iran keeps growing from 1997 to 2007. In 2002, Iran was China's top foreign oil supplier country.⁴⁰ At the time, China and Iran were closely partnering in the downstream sector, such as oil exploitation, oil refinery, export equipment upgrading, and port construction, etc.⁴¹

Nevertheless, driven by its fear of Iran's nuclear test, China became less favorable of its oil SOE to invest in Iran. Not long after the national policy, CNPC discontinued its South Pars project in Iran.

E. The Dynamism between Chinese Oil Companies and Western Oil Companies

One major practical problem Chinese oil companies face is

³⁷ Jack Perkowski, *Canada Greenlights CNOOC's Purchase of Nexen*, FORBES (Dec. 11, 2012), <http://www.forbes.com/sites/jackperkowski/2012/12/11/canada-greenlights-cnoocs-purchase-of-nexen>.

³⁸ *CNOOC-Nexen Deal Approved by US Regulators*, CHINA DAILY (Feb. 13, 2013), http://www.chinadaily.com.cn/bizchina/2013-02/13/content_166221580.htm.

³⁹ See *MOC Welcomes Canada's Approval of CNOOC-Nexen Deal*, XIN HUA NEWS (Dec. 10, 2012), http://news.xinhuanet.com/english/china/2012-12/10/c_132031668.htm; See also Leslie Hook et al, *Cnooc Heeds Lessons of Failed Unocal Bid*, FINANCIAL TIMES (Jan. 23, 2012), <http://www.ft.com/intl/cms/s/0/bd0bc91a-d4e1-11e1-9444-00144feabdco.html>.

⁴⁰ See 钱学文 (Qian Xuewen), 新世纪中国对中东产油国的石油外交 [China's Oil Diplomacy with Middle East Oil Producing States in the New Century], 6 ARABIC WORLD STUD. 65, at 67 (2008).

⁴¹ See WANG DUOYUN & ZHANG XIUYING, *supra* note 31, at 68–69.

the limited oil resources available. “Good oil resources of the world have already been carved up by international oil giants, and there are not many choices left for Chinese companies,” observed by Lin Boqiang, director of the China Center for Energy Economics Research at Xia Men University.⁴²

In order to catch up with western competitors and to secure advantageous position in the global oil market, Chinese oil companies are showing more flexibility. They are willing to live up with low expected profits. CNPC took over the Iraq’s West Qurna-1 oilfield in late 2012 from Exxon.⁴³ Exxon Mobil, for example, left its oilfield project in southern Iraq due to the reason of “slim profits.”⁴⁴

Another risk is nationalization. When countering the risk of arbitrary regulatory act, oil companies are often pressured by their home countries to withdraw. Take Libya for instance. As senior energy analyst observed, “Libya’s regime has a history of treating IOCs as extensions of their home governments.”⁴⁵ The political instability posed a bigger challenge to western oil companies than Chinese oil SOE. While western oil companies are pressured by their home governments to quit investments in Iraq, China stayed neutral regarding the situation.⁴⁶

III. CHINA’S TREATY PRACTICE REGARDING INVESTOR-STATE DISPUTE SETTLEMENT

A. Introduction to Chinese BIT framework

Over the past half century, bilateral investment treaty (BIT) has become one of the most commonly used legal vehicles for countries to develop strong investment and trade relationship amongst themselves. China is of no exception. By January 2012, China has concluded 128 BITs.

⁴² *China to Become Major Consumer of Iraqi Oil*, OIL & GAS TECH. (Jan 15, 2013), <http://www.oilandgastechology.net/business-strategy/china-become-major-consumer-iraqi-oil>.

⁴³ *Id.*

⁴⁴ Peg Mackey & Timothy Gardner, *Exxon Seeks to Quit Flagship Iraq Oil Project*, REUTERS (Dec. 19, 2012), <http://www.reuters.com/article/2012/10/18/us-exxon-iraq-urgent-idUSBRE89HoUD20121018>.

⁴⁵ S Sylvia Pfeifer & Javier Blas, *Oil Companies Fear Nationalization in Libya*, FIN. TIMES (Mar. 20, 2011), <http://www.ft.com/intl/cms/s/0/67d1d02a-5314-11e0-86e6-00144feab49a.html#axzz2s5WpdX5s>.

⁴⁶ *Id.*

BITs set out two sets of provisions, substantive and procedural provisions. Substantive provisions cover obligations host states must undertake to protect investors from the co-signatory, e.g.: national treatment, most-favored nation clause, fair and equitable treatment. Procedural provisions, on the other hand, are rules that regulate the dispute settlement, such as applicable law, composition of tribunal, appointment of arbitrators. This paper will focus on the procedural aspect of the BITs by assessing relevant treaty language.

Given the context of the paper, this paper selects BITs with the following nineteen countries grouped based on the continents for study: Middle East (United Arab Emirates, Iran, Kuwait, Qatar, Syrian Arab Republic); Africa (Egypt), Euro-Asia Continental (Russian Federation, Kazakhstan, Norway, Denmark); Central Latin America (Argentina, Ecuador, Columbia), Asia-Pacific (Viet Nam, Indonesia, Brunei, Australia), North America (Canada, Mexico).⁴⁷ The nineteen countries are selected because they are world major oil producing countries and also because their host of Chinese oil investment.

B. Applicable Law Clause in China's BITs with Oil Investment Recipient Nations

According to the OECD survey, applicable law clause first appeared in a treaty signed in 1979.⁴⁸ Since then, the number of treaties that incorporate applicable law clause grows on a slow but sound base.⁴⁹ Summarizing from treaty samples, there are altogether seven sources of applicable law, listed in the order of frequency: i) investment treaty; ii) principles of international law; iii) domestic law of the host State; iv) domestic rules on conflict of law of the host State; v) a special agreement concluded in relation to the specific investment concerned by the dispute; vi) a common interpretation that the States parties to the IIA have agreed on; vii) other treaties that the States parties to the IIA have

⁴⁷ The nineteen treaties assessed in the paper can be accessed through INVESTMENT INSTRUMENTS ONLINE, http://www.unctadxi.org/templates/DocSearch_____779.aspx.

⁴⁸ Joachim Pohl et al, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 28 (OECD INT'L INVESTMENT, Working Paper No. 2012/2, 2012), available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf.

⁴⁹ *Id.*

concluded.

The current Chinese model BIT points out four sources of applicable law, including “the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.”⁵⁰

Most of China’s BITs with oil investment recipient countries include a provision on applicable law. Different treaties come up with different combination of bodies of law as applicable law, through. The applicable law clauses under the negotiated Chinese BITs usually incorporate the following legal resources:

- i) Investment treaty;⁵¹
- ii) Principles of international law;⁵²

⁵⁰ China Model BIT, art. 9.3, 1997.

⁵¹ See, e.g., Agreement between the Government of Australia and the Government of the People’s Republic of China on the Reciprocal Encouragement and Protection of Investments, July 11, 1998, Austl.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Austl.-China BIT); Agreement between the People’s Republic of China and the Government of Australia and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, Ger.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Ger.-China BIT); Bilateral Investment Treaty between China and Indonesia, Nov. 18, 1994, Indon.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Indon.-China BIT); Agreement between the Government of the United Arab Emirates and the Government of the People’s Republic of China for the Promotion and Protection of Investments, U.A.E.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter U.A.E.-China BIT); Agreement between the Government of Russian Federation and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Russ.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Russ.-China BIT); Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China concerning the Encouragement and Reciprocal Protection of Investments, June 9, 1994, Peru-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Peru-China BIT), Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx (hereinafter Can.-China FIPA).

⁵² See, e.g., Austl.-China BIT, *supra* note 51; Ger.-China BIT, *supra* note 51; Indon.-China BIT, *supra* note 51; U.A.E.-China BIT, *supra* note 51;

- iii) Domestic law of the host state;⁵³
- iv) The international agreements both Contracting Parties have concluded;⁵⁴
- v) Domestic rules on conflict of law of the host state.⁵⁵

Moreover, the wording of the applicable law also varies from treaty to treaty. For example, the Canada-China FIPA (2012) distinguishes different bodies of law and dispatch different verbs ahead of them.

A Tribunal established under this Part shall decide the issues in dispute in accordance with this Agreement, and applicable rules of international law, and where relevant and as appropriate, take into consideration the law of the host Contracting Party.⁵⁶

Arguably “take into account” implies lighter adhesion than “decide in accordance with.” Under the China-Australia BIT (1988), by comparison, uses “take into account . . . ” for every source of law that applies:

The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Contracting Parties have concluded and the generally recognized principles of international law.⁵⁷

For the China-UAE BIT, like the China-Australia BIT, uses half of the Canada-China BIT formulation:

The Arbitral Tribunal shall reach its award based upon the provisions of this Agreement, the relevant domestic laws, the agreements both Contracting States have concluded and the generally recognized princi-

Russ.-China BIT, *supra* note 51; Peru-China BIT, *supra* note 51; Can.-China FIPA, *supra* note 51.

⁵³ See, e.g., Indon.-China BIT, *supra* note 51; U.A.E.-China BIT, *supra* note 51; Russ.-China BIT, *supra* note 51; Peru-China BIT, *supra* note 51; Can.-China FIPA, *supra* note 51.

⁵⁴ See, e.g., Austl.-China BIT, *supra* note 51; U.A.E.-China BIT, *supra* note 51.

⁵⁵ See, e.g., Austl.-China BIT, *supra* note 51; Peru-China BIT, *supra* note 51.

⁵⁶ See Can.-China FIPA, *supra* note 51, art. 30.1.

⁵⁷ Austl.-China BIT, *supra* note 51, annex B (7).

ples of international law.⁵⁸

There are of course some Chinese BITs that do not include a provision on the applicable law. For example: the China-Iran BIT (2000). Under such occasion, the choice of law rules under the ICSID Convention and the UNCITRAL would kick in by default. The parties to the dispute can seek an agreement on applicable law following the instruction of the ICSID Convention and the UNCITRAL Arbitration Rules. Even if no agreement could be reached, under the ICSID Conventions, rules of international law and rules on conflicts of law will be set as applicable laws.

C. Investor-State Dispute Resolution Clause in China's BITs with Oil Investment Recipient Nations

Investor-state dispute resolution is a modern development in investment law. It has been commended as one of the most important treaty clauses that bring procedural protection to investors.⁵⁹ A typical BIT usually offers State-to-State dispute settlement, and also investor-state dispute settlement.⁶⁰ For foreign investors, the latter dispute settlement mechanism is more significant. It grants one Contracting party the direct legal personality under international law.⁶¹ In the past, investors cannot sue host state directly. They could only resort to diplomatic protection and rely on their home state to lift up their cases. When equipped with the investor-state arbitration, foreign investors have much more latitude and power.

Treaty signatories usually agree to ICSID or other international arbitration as the forum for investor-state disputes, such as ICC, the Arbitration Institute of the Chamber of Commerce in Stockholm, the Permanent Court of Arbitration, etc.⁶² Furthermore, some investment treaties provide *ad hoc* arbitration or specifically designed arbitration tribunal.⁶³

⁵⁸ U.A.E.-China BIT, *supra* note 51, art. 9 (3).

⁵⁹ See Schill, *supra* note 10, at 87.

⁶⁰ *Id.*

⁶¹ Loretta Malintoppi & August Reinisch, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, at 694 (P. Muchlinski, F. Ortino & C. Schreuer ed., 2008).

⁶² See Pohl, *supra* note 48, at 20.

⁶³ *Id.*

1. China's Evolving Attitude towards Investor-State Arbitration

For current Chinese Model BIT (1997), investors are given the options to either bring their disputes to the court of the host state or to ICSID under the Convention on the Settlement of Disputes between States and Nationals of Other States done in 1965.⁶⁴ As its article 9.2 holds:

If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor:

(a) to the competent court of the Contracting Party that is a party to the dispute;

(b) to the International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965, provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to the ICSID.

Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final.

The scenario was not as investor-friendly under the age when China began BIT practice. For China's first generation BITs, investor-state arbitration clauses were either non-existent or much restricted in scope.⁶⁵ According to the first generation of BITs, only disputes "concerning/involving the amount of compensation for expropriation" could be claimed through the inves-

⁶⁴ *Supra* note 50, art. 9.2.

⁶⁵ Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, TDM 4 (2010), <http://www.transnational-dispute-management.com/article.asp?key=1636>.

tor-state arbitration.⁶⁶ The very limited dispute resolution clause was later on replaced by the broad dispute resolution clause characterized by China's second generation BITs, where all kinds of disputes can be submitted to arbitration. For example, the China-Iran BIT offers investor-state arbitration for "any dispute [that] arises between the host Contracting Party and investor(s) of the other Contracting Party with respect to an investment."⁶⁷

Speaking of the treaties China entered into with major oil investment recipient countries, a big proportion of these treaties allows only very restricted usage of investor-state arbitration. They are China-Norway BIT (1984), China-Denmark BIT (1985), China-Kuwait BIT (1985), China-Australia BIT (1988), China-Kazakhstan BIT (1992), China-Argentina (1992), China-Viet Nam BIT (1992), China-United Arab Emirates BIT (1994), China-Indonesia BIT (1994), China-Egypt BIT (1994), China-Peru BIT (1994), China-Syrian Arab Republic (1996), China-Sudan BIT (1997).⁶⁸ These BITs were signed at the early stage of China's opening up (between 1988 and 1997), permitting arbitration on disputes concerning or involving the amount of compensation for expropriation.⁶⁹

Those BITs that are signed after 1997, by comparison, loosen up their permission of investor-state arbitration. During this time period, investors can choose to submit any dispute to the investor-state arbitration. The BITs include China-Qatar BIT (1999), China-Iran BIT (2000), China-Nigeria BIT (2001), China-Russian Federation (2006), China-Mexico BIT (2008), China-Columbia BIT (2008), China-Libya BIT (2010), Canada-China FIPA (2012).

The optional access to investor-state arbitration indeed means pro-investment environment of the host state. Without effective investor-state arbitration clause in BITs, substantive

⁶⁶ See, e.g., Peru-China BIT, *supra* note 51, art. 8(3) (only allowed disputes "involving the amount of compensation for expropriation" to be referred to arbitration).

⁶⁷ Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People's Republic of China and the Government of the Islamic Republic of Iran Preamble, June 22, 2000, art. 12.1, Iran-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/template/DocSearch_____779.aspx.

⁶⁸ See Eliasson, *supra* note 7.

⁶⁹ *Id.*

protection provisions of the BIT might end up inoperative, which in turn might inhibit investment activities from abroad.⁷⁰

2. Consent to ICSID

There are two ways to give consent to ICSID through BITs: offer by host state and acceptance by investors.

The article 9.2 of Chinese model BIT takes the latter approach. It implies China's consent to ICSID as well as displays China's support for investor-state arbitration. For investors, they could accept the offer of consent embedded in the BIT by instituting ICSID proceeding.⁷¹

The majority of BITs, by contrast, takes the former approach.⁷² The Canadian model BIT (2004) and the U.S. model BIT (2012), for instance, incorporate treaty provision with the heading of "Consent to Arbitration" that explicitly conceives parties' consent to ICSID. As the Canada model BIT (2004) provides:

Article 28 Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
 - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties.

So does the U.S. model BIT (2012):

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

⁷⁰ *Id.* at 5.

⁷¹ Christoph Schreuer, *Course on Dispute Settlement: Consent to Arbitration*, U.N. CONF. ON TRADE AND DEV. 20 (2003), http://unctad.org/en/docs/edm_misc232add2_en.pdf.

⁷² *Id.* at 17.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute.

Withdrawing consent to ICSID has severe consequence in international law. The host state's withdrawal constitutes a breach of treaty.

Moreover, the issue of consent to ICSID interweaves with the issue of fora and arbitral rules. Since the first-generation treaty allows ICSID under very limited occasion, ICSID is often not available as fora where investor can bring his investment claims. Correspondingly, ICSID Convention and ICSID Additional Facility Rules are also frequently used because the rules are used in the context of investor-state arbitration. The BITs signed after 1997 display another scenario. Under these BITs, ICSID is made as fora that could hear all kinds of disputes. Understandably, ICSID Convention and the ICSID Additional Facility Rules will apply to a broader range of disputes.

To be detailed, three different approaches could be summarized regarding Chinese BITs take in setting down arbitral rules.

- i) Delegate the Power to arbitral tribunal completely;
- ii) ICSID Convention/the UNCITRAL arbitration rules;⁷³
- iii) ICSID Convention/the Additional Facility of ICSID/the UNCITRAL arbitration rules.⁷⁴

3. Peculiarities of ICSID

China is a party to ICSID. Therefore, Chinese BITs choose ICSID no exceptionally as the arbitration forum to settle Investor-State arbitration.⁷⁵

⁷³ U.A.E.-China BIT, *supra* note 51, art. 9.3.

⁷⁴ Can.-China FIPA, *supra* note 51, art. 22.

⁷⁵ See, e.g., Austl.-China BIT, *supra* note 51; Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, Nov. 25, 1985, Sing.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch_____779.aspx; Agreement between the Government

The UNCTAD Issues Note (2012) observes that ICSID and ICSID Additional Facility is by far the mostly used forum amongst a range of investment dispute settlement venues.⁷⁶ Ordering by the number of cases, ICSID ranks at the top, followed by UNCITRAL (126 cases), the Stockholm Chamber of Commerce (21 cases), ICC (7 cases), etc.

One unique feature of ICSID is that ICSID is a self-contained system.⁷⁷ This means that unlike other institutional arbitrations, ICSID is not affected by any outside bodies. In oil investment dispute settlements, neither the host state government nor the host state domestic court can interfere with the ICSID proceedings.⁷⁸

The second feature of ICSID is its “public-private nature.”⁷⁹ Characters of public litigation and private commercial arbitration are both reflected in ICSID. On the one hand, ICSID hearings are normally conducted in camera.⁸⁰ Arbitrators are party-appointed, but not government appointed state judges. All these display the private aspect of ICSID. On the other hand, third parties may attend arbitral proceeding if parties agree. ICSID awards could also be accessible in public under parties’ consent. Furthermore, ICSID decisions may be reviewed by review committee but cannot be overturned. These display the public aspect of ICSID.

Finally, the advantage of ICSID lies in the automatic recognition of the ICSID awards among the member states of the Convention.⁸¹ The Enforcement State cannot invoke public

of the People’s Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, June 4, 1984, Belg.-Lux.-China, U.N. Conf. on Trade and Dev., available at http://www.unctadxi.org/templates/DocSearch____779.aspx.

⁷⁶ Federico Ortino, *Latest Developments in Investor-State Dispute Settlement*, U.N. CONF. ON TRADE AND DEV. 2 (Apr. 2012), <http://www.transnational-dispute-management.com/article.asp?key=1921>.

⁷⁷ Christoph Schreuer, *Course on Dispute Settlement: Overview*, U.N. CONF. ON TRADE AND DEV. 17 (2003), http://unctad.org/en/docs/edmmisc232overview_w_en.pdf [hereinafter Schreuer, Overview].

⁷⁸ *Id.*

⁷⁹ Leon E. Trakman, *The ICSID in Perspective*, TDM 7 (2012), <http://www.transnational-dispute-management.com/article.asp?key=1917>.

⁸⁰ See Schreuer, Overview, *supra* note 77, at 7.

⁸¹ See Schill, *supra* note 10, at 88.

policy defense to refuse enforcement.⁸²

4. Prior Administrative Review Procedure

The majority of China's second and third generation BITs requires foreign investors to go through host state's domestic administrative review before submitting the case to arbitration.⁸³ The significance of such precondition does not affect investors' resort to investor-state arbitration to a great extent.⁸⁴

D. China's Future Policy Position towards Investor-State Arbitration

1. Emerging Opposing Voice towards Investor-State Arbitration

The ICSID mechanism is not without challenges. There are so far three Latin America countries that have left ICSID. They are Bolivia, Ecuador, and Venezuela, who denounced the ICSID Convention on 2 May 2007, on 6 July 2009, on 24 January 2012 respectively.⁸⁵ Argentina might be the fourth country that joins the worrying trend. It is recently reported to seek withdrawal from ICSID. At present, there are twenty-five pending cases filed against Argentina in ICSID.⁸⁶ Under the situation, the Argentina government might submit proposal legislation to its Congress this year to annul fifty-nine BITs that establish ICSID as the forum to settle disputes between Argentina state and foreign investors.⁸⁷

A wider opposition to investor-state dispute settlement is also emerging. On 21 April 2011, Australia announced its discon-

⁸² *Id.*

⁸³ Elodie Dulac, *The Emerging Third Generation of Chinese Investment Treaties*, TDM 4 (2010), <http://www.transnational-dispute-management.com/article.asp?key=1636>.

⁸⁴ *Id.*

⁸⁵ *List of Pending Cases*, INT'L CENTER FOR SETTLEMENT AND INVESTMENT DISP., <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Jan. 31, 2014).

⁸⁶ *List of Pending Cases*, INT'L CENTER FOR SETTLEMENT AND INVESTMENT DISP., <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Jan. 31, 2014).

⁸⁷ El Cronista, *The Government Wants to Leave ICSID to Avoid A New Battle with the Creditors*, AMERICAN TASK FORCE ARGENTINA (Jan. 25, 2013), <http://www.atfa.org/the-government-wants-to-leave-icsid-to-avoid-a-new-battle-with-the-creditors>.

tinuation of inserting investor-state arbitration clause in its future treaty practice in the “Gillard Government Trade Policy Statement.” According to the Statement, “the [Australian] Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.”⁸⁸

The rationale behind Australian's policy position against investor-state position could be traced back to the Productivity Commission Research Report dated November 2010.⁸⁹ The Report enumerated four problems with investor-state dispute settlement.⁹⁰

i) Regulatory Chill (In fear of triggering arbitration, Government might be chilled from making ex-post changes to its environmental law, taxation arrangement, and licensing scheme that could enhance welfare.)

ii) Domestic investors are put in disadvantaged position relative to foreign investors.

iii) The host government has to counter foreign investors' huge claim for compensation.

iv) Inherent deficiencies of arbitration, such as lack of transparency; inconsistency and matters of jurisdiction; institutional bias; conflicts of interest; no opportunity of appeal.

Based on the drawbacks, the Report reached the conclusion that “there are considerable policy and financial risks arising from ISDS provisions.”⁹¹ It further recommended that Australia should refuse ISDS provisions in trade agreements that confer extra procedural rights on foreign investors over and above those already provided by the Australian legal system.⁹²

The voice of opposition is also heard during the

⁸⁸ Austl. Gov. Dept. of Foreign Aff. & Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, AUSTRALIAN CHAMBER OF COM. AND INDUSTRY 14 (April, 2011), <http://www.acci.asn.au/getattachment/b9d3cfae-fcoc-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>.

⁸⁹ *Id.* at 16.

⁹⁰ *Research Report: Bilateral and Regional Trade Agreements*, AUSTRALIAN PRODUCTIVITY COMM'N (Nov. 2010), http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf.

⁹¹ *Id.* at 274.

⁹² *Id.* at 276–77.

Trans-Pacific Partnership (TPP) Negotiation. On 8 May 2012, a group of influential lawyers submitted to TPP negotiators an open letter urging the rejection of investor-state dispute settlement.⁹³ The open letter enumerates seven problematic aspects of ISDS (not exactly the same as pointed out by Australian government). The objection reasons that have not been raised by Australian government before include: i) Definition of investment is too broad. Investors do not have to make significant contribution to the host state before they could enjoy legal standing in ISDC; ii) The grant of injunctive relief could create severe conflicts of law; iii) The interpretation of a government “measure” might be over-broad to include jury decisions in private contract litigation; iv) The interchangeable hats of lawyers and arbitrators hamper professional ethnicity.

In addition, the UNCATAD paper “Investor-State Disputes: Prevention and Alternatives to Arbitration” also outlines seven possible or perceived weakness of investor-state dispute settlement.⁹⁴

i) The cost of investor-state arbitration has been on steep rise in recent years.⁹⁵

ii) The prolonged process to settle investment disputes.

iii) The investor-state arbitration is difficult to manage. Disputed parties might eventually lose control of the arbitration proceeding.

iv) The relationship between host state and foreign investors is almost unavoidably jeopardized.

v) Regulatory chill.

vi) The legitimacy of investor-arbitration cannot always be guaranteed (e.g.: inconsistency among different arbitral holdings).

⁹³ See *An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TTP LEGAL, <http://tpplegal.wordpress.com/open-letter> (last updated May 8, 2012).

⁹⁴ *Investor-State Disputes: Prevention and Alternatives to Arbitration*, U.N. CONF. ON TRADE AND DEV. 17–20 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf [hereinafter UNCTAD, Prevention].

⁹⁵ *Id.* Noting that aside from arbitrators’ fee, administration fee, additional fee regarding witnesses and experts, the expense caused by arbitration proceeding alone amounts to “60% of an average of total cost of litigation.”

vii) Available remedies are limited.

2. Should China Be Hospitable or Hostile to Investor-State Arbitration in Future? —What is in China's best interest?

Every dispute resolution mechanism has its pros and cons. Investor-state arbitration is no exception.⁹⁶ The question to consider is whether the investor-state arbitration fits with the need of China's oil investment better than other dispute resolution methods.

It is the author's view that investor-state arbitration will remain the dominant dispute settlement mechanism for China's future treaty practice, in spite of its weaknesses listed above.

Firstly, investor-state arbitration could reduce the risks of such overseas investment the most among various dispute resolution mechanisms. The future will see China engage in more and more resource-seeking FDI. This is in order to fill up the domestic demand-supply gap and to guarantee affluent oil resource. Natural resource FDI are much more vulnerable than other FDI.⁹⁷ The up-front capital investment is bigger, the sunk cost is not recoverable, and investment duration is longer. Investors also need to wait a long time before they could collect profits from the projects. Further, "vulnerability" is also attributed to "deep ex post immobility" of FDI in resource sectors.⁹⁸ Investor-state arbitration could mitigate the power imbalance between weaker investor and tougher host state. It is like a leverage that balance out the originally imbalanced scale.

Secondly, investor-state arbitration coordinates China's outward and inward investment policies. In 2011, China revises the regulation on Sino-foreign cooperation in the exploitation of continental petroleum resources and the regulation on offshore petroleum resources. The two revised regulations envisage the use of arbitration when the amicable settlement of disputes fails. The Regulation on Exploitation of Continental Petroleum Re-

⁹⁶ See UNCTAD, Prevention, *supra* note 94, at 13–21.

⁹⁷ Jürgen Kurtz, *The Australian Trade Policy Statement on Investor-State Dispute Settlement*, AM. SOC'Y OF INT'L L., at 3 (2011), available at <http://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement>.

⁹⁸ *Id.*

sources stipulates that investment disputes can be submitted to the Chinese arbitration body or other arbitration body based on the arbitration clause in contract or the written arbitration agreement reached afterwards, in case parties refuse the negotiation or mediation, or when the negotiation and mediation fail to settle the dispute.⁹⁹ So does the Regulation on Exploitation of Offshore Petroleum Resources. According to its dispute resolution clause, “if [the dispute] cannot be resolved through consultation, mediation and arbitration may be conducted by an arbitration body of China, or the parties to the contract may agree upon arbitration by another arbitration body.”¹⁰⁰

Thirdly, China’s recent FTA practices also favor investor-state arbitration for dispute settlement. Chinese government views FTA as “an effective approach to integrate into global economy and strengthen economic cooperation with other economies, as well as particularly an important supplement to the multilateral trading system.”¹⁰¹ At present, China has 14 FTA partners comprising of 31 economies, among which 8 Agreements have been signed already.¹⁰² Among them, the investment chapter of the China-ASEAN FTA (2009), China-Pakistan FTA (2009), China-Peru FTA (2009), and China-New Zealand FTA (2008) lays down ICSID as one optional dispute resolution method for investors.¹⁰³

⁹⁹ 对外合作开采陆上石油资源条例(2011修订) [Regulation on Sino-foreign Cooperation in the Exploitation of Continental Petroleum Resources] (promulgated by the St. Council, Sept. 21, 2011, effective Oct. 7, 1993) art. 25, CLI.2.159210 CHINALAWINFO.

¹⁰⁰ 对外合作开采海洋石油资源条例(2011修订) [Regulation on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises] (promulgated by the St. Council, Sept. 21, 2011, effective Nov. 1, 2011) art. 24, CLI.2.159225 CHINALAWINFO.

¹⁰¹ Chinese Ministry of Commerce, *China FTA Network*, available at <http://fta.mofcom.gov.cn/english/index.shtml>.

¹⁰² *Id.*

¹⁰³ Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN, China-ASEAN, art. 14, Nov. 4, 2002, <http://fta.mofcom.gov.cn/topic/chinaasean.shtml>. Agreement on the Early Harvest Program for the Free Trade Agreement between China and Pakistan, China-Pak., art. 54, Feb. 22, 2009, <http://fta.mofcom.gov.cn/topic/enpakistan.shtml>. Free Trade Agreement between The Government of the People's Republic of China and the Government of New Zealand, China-N. Z., art. 153, Apr. 7, 2008, <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml>. Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru, China-Peru, art.

Fourthly, investor-state arbitration well responds to the historical shift from oil concession contracts to production-sharing agreement and service fee contracts. Under the traditional concession agreements, host state retains little control over their natural resources. By contrast, they take much more rein under the new types of oil contractual agreements. Oil companies no longer enjoy the autonomy to run their investment projects at it used to.¹⁰⁴ The investor-state arbitration, therefore, could guide the investor-state relationship back to the status of equilibrium upon the shift of contractual model.

Fifthly, investor-state arbitration establishes the credibility of China's national security review system.¹⁰⁵ Like U.S., Canada, Australia, Russia, and several other countries, China has also set up its own national security review on foreign mergers and acquisitions by foreign investors in major industries having influence on "national economic security."¹⁰⁶ Petroleum, as core energy resource, is certainly under the China's national security regime. Because China adopts a case-by-case approach when conducting national security screening, foreign investors could use the investor-state arbitration offered by Chinese BIT to ascertain decisions made by China's administrative authority, such as the definition of "national security," the impact of the proposed investment on national security, etc.¹⁰⁷

Therefore, despite certain nations' skeptical view of investor-state dispute mechanism, it will remain the most suitable conflict management method for China.

139, Apr. 28, 2009, <http://fta.mofcom.gov.cn/topic/enperu.shtml>.

¹⁰⁴ Marcia Ashong, *Cost Recovery in Production Sharing Contracts: Opportunity for Striking It Rich Or Just Another Risk Not Worth Bearing?*, at 2, <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=31271>.

¹⁰⁵ Wang Xiaoqiong, *National Security Review of Foreign Mergers and Acquisitions in China: Progress and Reform 20* (IND. U. RES. Center for Chinese POL. & BUS., Working Paper No. 20, 2012).

¹⁰⁶ *Id.* at 6. The recent regulations in relevance are the "Notice on the Establishment of the Security Review System on Foreign Investors Acquiring Domestic Enterprises" issued by the State Council in 2011 and the "Safety Review System and the Provisional Regulations on the Acquisitions of Domestic Enterprises by Foreign Investors" promulgated by MOFCOM in the same year.

¹⁰⁷ OECD, *Freedom of Investment, National Security and "Strategic" Industries: An Interim Report*, at 59, <http://www.oecd.org/dataoecd/1/24/40476055.pdf>.

3. Unlikely Acceptance of Ad Hoc Arbitration by China

Ad hoc arbitration normally conducts without the administration of arbitral institution. Instead, it is administered by arbitrators and parties themselves. One significant competitive advantage *ad hoc* arbitration has over institutional arbitration is that it gives parties autonomy in determining the rules governing arbitral proceeding.

But it should be noted that the Chinese arbitration law does not recognize *ad hoc* arbitration.¹⁰⁸ Any agreement that agrees on *ad hoc* arbitration might be viewed as void for failing to identify qualified arbitral institution. In other words, Chinese arbitration law makes it a mandatory requirement to use institutional arbitration.

There are some discussions among the Chinese arbitration commission CIETAC and arbitration law scholars on changing the rigidity.¹⁰⁹ UNCITRAL rules, for example, which are frequently utilized in *ad hoc* arbitration, seem to be very competent in resolving a wide range of disputes.¹¹⁰ But given the substantial difference between China's arbitration law and UNCITRAL Model Law, it is quite unlikely that China will accept *ad hoc* arbitration applying UNCITRAL rules in the short term.¹¹¹ Hence, enforcing *ad hoc* arbitration awards made outside of China involving Chinese party could be a problem.¹¹²

¹⁰⁸ 仲裁法 [Arbitration Law] (promulgated by Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995) art. 16, CLI.1.9590 CHINALAWINFO. See also 最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排 [Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region] (promulgated by the Sup. People's Ct., Jan. 24, 2000, effective Feb. 1, 2000), CLI.3.26466, CHINALAWINFO.

¹⁰⁹ Sandrina Antohi, *An Analysis of the New CIETAC Arbitration Rules 2012*, 9 TRANSNAT'L DISP. MGMT. J., issue 7, 24 (Dec. 2011).

¹¹⁰ MICHAEL J. MOSER, *MANAGING BUSINESS DISPUTES IN TODAY'S CHINA—DUELLING WITH DRAGONS*, 103 (1st ed., Kluwer Law International, 2007).

¹¹¹ See Huang Tao & Dai Yue, *Forum Shopping in China: CIETAC vs. UNCITRAL*, King & Wood, <http://www.kingandwood.com/article.aspx?id=Forum-Shopping-in-China-04-china-bulletin-2008&language=en>.

¹¹² See MOSER, *supra* note 110, at 103.

4. Mediation and Conciliation

In his paper entitled “Reflections on 50 Years’ Involvement in Dispute Resolution,” the Right Honorable Sir Michael Kerr wrote, “in the same way as I have had my mind changed about litigation in favor of arbitration, my long devotion to arbitration is now being eroded by the realization that the future will belong to ADR.”¹¹³

ADR is defined as a consensual process that involves the intervention of a third-party neutral to assist parties in resolving their conflict. Typical ADR involves negotiation, mediation and conciliation. Relative to mainstream dispute resolution (litigation and arbitration), ADR is more flexible, faster and less costly. It also offers a broad range of available remedies.¹¹⁴ This does not imply that ADR and adjudicative methods are mutually exclusive. Instead, they can be and often are used sequentially or in a customized combination with the mainstream dispute resolution mechanism.¹¹⁵ Using ADR before arbitration will not impair the effectiveness of arbitration. It enables “de-escalate” disputes and achieves dispute prevention.

ADR scholars view ADR as valuable in managing international investment disputes from preventative perspective. Mark Clodfelter, who observed the underutilization of ADR, suggested that certain types of disputes—contractual breaches, measure affecting few investors or investments involving long-term relationship—could be uniquely situated to benefit from ADR.¹¹⁶

Given ADR’s conformity to the Chinese way of managing conflicts, China could add ADR as a preceding procedure to the investor-state arbitration clause in its BITs with oil recipient countries. As a matter of fact, China has already written ADR into the dispute settlement provision of its regulation on hosting foreign investment to exploit oil resource in China. To be detailed, the Regulation on the Exploitation of Continental Petroleum

¹¹³ A.F.M. Maniruzzaman, *Resolving International Business and Energy Disputes in Asia—Traditions and Trends*, 8 *TRANSNAT’L DISP. MGMT. J.*, issue 5, 11(Dec. 2011).

¹¹⁴ UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, at 31–35, <http://investmentadr.wlu.edu/UNCTAD/> (outlining the strength and weakness of the investor-state dispute settlement).

¹¹⁵ *Id.* at 7.

¹¹⁶ *Id.* at 3.

Resource stipulates that: “Any dispute arising between the parties to a contract on cooperative exploitation of continental petroleum resources out of the execution of the contract shall be settled through negotiation or mediation.”¹¹⁷ Also, the Regulation on Offshore Petroleum Resource arranges that “Any dispute arising between foreign and Chinese enterprises during the cooperative exploitation of offshore petroleum resources shall be settled through friendly consultations.”¹¹⁸

Certain characters of ADR do not seem to match with the nature of oil investment disputes. Firstly, the result of mediation and conciliation is not binding on the parties.

Secondly, host state might not agree to be subject to ADR. Certain investment disputes arise from host state’s change of its national legislation. Given the power imbalance between investor and host state, the host state is unwilling to sit down at the conciliation or the mediation table, and restrict its own legislative power concerning natural resource, environmental protection, taxation arrangement, and other public interest issues.

Thirdly, in certain jurisdiction, government officials might be held personally liable for reaching a settlement that a State considers it as a sub-optimal resolution. Such risk could de-incentivize the government officials from engaging in ADR and leads every dispute to investor-state arbitration.¹¹⁹

Fourthly, the effectiveness of ADR largely depends on the parties’ knowledge and capacity of using ADR. Therefore, for ADR to be successfully used, Chinese oil companies need to be at least familiar with ADR.

Fifthly, there might be not enough oil experts in ADR. Solving oil investment disputes largely depends on expert determination. Expert opinion is particularly in need for the following technical questions: (1) reservoir redeterminations; (2) crude oil pricing; (3) production and cost recovery allocations under production sharing contracts; (4) accounting issues arising out of joint operating agreements.¹²⁰

¹¹⁷ See *supra* note 99.

¹¹⁸ See *supra* note 100.

¹¹⁹ See UNCTAD, *supra* note 114, at 7–8.

¹²⁰ Hew R. Dundas, *Dispute Resolution in the Oil & Gas Industry: An Oil-man’s Perspective*, 1 *TRANSNAT’L DISP. MGMT. J.*, issue 3, 11(July 2004).

IV. HOW CHINA'S TREATY PRACTICE IMPACTS ON THE DRAFTING AND NEGOTIATION OF CHINA'S TRANSNATIONAL OIL INVESTMENT CONTRACT?

BIT, as treaty between two countries, operates like a contract between investors from home state and the host government in practice.¹²¹

It might be tempting to think that transnational oil investment contracts are like other civil contracts. Nevertheless, drafting and negotiation of such contracts often take place in the context where host state boasts more leverage.¹²² It is no secret in oil industry that the host states will take out a boilerplate contract for foreign investors to consider and comment on.

Due to the unavailability of signed investor-state contract Chinese oil companies have entered into, the paper uses the contract templates of four world major oil countries. The four model oil and gas contracts are (i) Kazakhstan Oil and Gas Exploitation Concession Agreement, (ii) Indonesia Production Sharing Contract, (iii) Nigerian Service Contract, (iv) Iranian Exploration Service Contract.¹²³

A. *The Relationship between Private Investment Contract and BITs & FTAs with Investment Chapters*

As noted above, China has concluded altogether 128 BITs so far. It has also been concluding FTAs containing investment chapters, with Pakistan (2006), New Zealand (2008), Peru (2009), and Costa Rica (2010). In addition, the FTA between China and Singapore in October 2008 incorporates by reference in its investment chapter the investment agreement to be concluded between China and ASEAN.

BITs and the investment chapters of FTAs provide guidance to host states and private investors in their contractual negotiation by setting out legal boundaries and laying out legal pro-

¹²¹ Justin Carter, *A Concluded Canada-China FIPA and Its Implications for Canadian Business*, at 3, http://www.chinalinks.ubc.ca/files/2011/11/J.Carter_FIPA1.pdf (last visited Feb. 3, 2014).

¹²² Thomas W. Wälde, *Managing International OGEMI-Investment Disputes*, 1 OGEL 1 (2004), <http://www.ogel.org/article.asp?key=1064>.

¹²³ WANG NIANPING, *COMPARISON AND RESEARCH IN INTERNATIONAL PETROLEUM CONTRACT MODES* (Law Press CD-ROM, 1st ed., 2009).

cedures. Contracting parties flesh out the skeleton outlined by the BITs and FTAs.

B. Applicable Law Clause in Transnational Oil Investment Contract

The rule on applicable law clause in contracts is best articulated by the three old famous arbitral awards—BP, TOPCO and LIAMCO. The arbitral jurisprudence establishes the important principle of internationalization of the law applicable to contracts between host state and foreign investors. According to the TOPCO tribunal, the contract between host state and private investors can be “internationalized” in the manner of being subject to international law.¹²⁴

This paper selects applicable law clauses from four oil model contracts proposed by host states. The scope of applicable law varies. The broadest one includes four sources of laws: (1) the provisions of the contract, (2) the national law of the host state, (3) the generally recognized principles of international law, (4) positive practice in the development of deposits. This is for the model Kazakhstan contract (2002). Its applicable law clause reads “The rights and obligations of the Parties in this Contract shall be strictly defined on the basis of reading of the provisions of this Contract. If a contested point is not discussed in the Contract, it shall be decided on the basis of the Applicable Law of the Republic of Kazakhstan, generally accepted principles of international law, as well as Positive Practice in the development of deposits.” Although different parties might hold different understanding towards “positive practice in the development of deposits, the clause overall delivers a welcoming attitude of host state to Chinese investors.

For the other groups of applicable clause, only the national law of the host state is mentioned in the applicable law clauses. For instance, the applicable clause in the Nigerian model contract notes that: “This Contract shall be governed by and construed in accordance with the laws of the Federal Republic of Nigeria, and any dispute arising wherefrom shall be determined in accordance

¹²⁴ See *Texaco Overseas Oil Petroleum Co / California Asiatic Oil Co (TOPCO) v. Government of the Libyan Arab Republic*, 53 I.L.R. 389 (1979); See also Bishop & Wälde, *supra* note 3.

with such laws.”¹²⁵ The Iranian model oil contract employs very similar language—“This Service Contract shall be governed by, interpreted and construed in accordance with the laws of IR of Iran.”¹²⁶ For the Indonesian model contract, the wording is slightly different. It puts down “the laws of the Republic of Indonesia shall apply to this Contract.” It is unclear whether this clause excludes other sources of laws from applying. It can be argued that it does not.

Compared to the Kazakhstan-type clause, these three applicable law clauses are much narrower in their scope. Apparently they do not appear satisfactory for purpose of protecting Chinese investors' rights. Chinese contract negotiator should check what the bilateral investment treaty between China and the specific host state say on the applicable law issue. Take the China-Indonesia BIT (1995) for example. Its Article IX provides a more comprehensive list of applicable laws than the Indonesian model oil contract: “The tribunal should adjudicate in accordance with (1) the laws of the Contracting Party to the dispute, (2) the provisions of this agreement as well as (3) generally recognized principle of international law accepted by both contracting parties.”¹²⁷ When negotiating contract language with the Indonesian side, Chinese oil companies could and should propose a more comprehensive applicable law clause on the basis of the China-Indonesia BIT.

C. Disputes Resolution Clause in Transnational Oil Investment Contract

1. Function of Dispute Resolution Clause in Contracts

In transnational oil investment contracts, dispute settlement provision serves three important functions. Firstly, the dispute resolution provision put forward a forum for dispute resolution. Secondly, this *ex ante* arrangement promotes the greater willingness of the parties to accept an arbitral award. This is because the

¹²⁵ See WANG, *supra* note 123, Nigerian Model Contract, art. 22.1.

¹²⁶ *Id.* Iranian Model Contract, art. 22.

¹²⁷ Agreement between the Government of the People's Republic of China and the Government of the Republic of Indonesia on the Promotion and Protection of Investments, China-Indon., art. 9.3 (d), Nov. 10, 1994, <http://tfs.mof.com.gov.cn/aarticle/h/at/201002/20100206778892.html>.

dispute resolution provision are drafted, negotiated, and acknowledged by the contracting parties. Thirdly, the dispute settlement provision provides an instrument for investors to stabilize the terms of the agreement. Although it might not be able to bar host state from breaking its promise, it could at least serve as a deterrent. Investors can point to the adverse effects of a potential arbitration awards against the host state when confronting host state's decision to change its municipal law.

2. Choice between Litigation and Arbitration

There are mainly two ways to settle disputes: litigating in the court of the host state and submitting the investment dispute to arbitration. For transnational oil contracts, international arbitration is, relatively speaking, a more suitable dispute settlement mechanism.

Litigation in the host state is a typical way to settle domestic disputes. For transnational disputes, litigation is used when the contracts envision a national law to be the applicable law. Or it can be used when the investment contracts are subject to the jurisdiction of domestic courts by virtue of law governing the investment relationship.¹²⁸ The down sides of litigation are lack of oil experts and also lack of real or perceived neutrality.¹²⁹

Compared to court litigation, international arbitration boasts unique characters that appeal to oil investors. Firstly, parties' information does not have to be disclosed to the public. This is very important to oil companies. Oil investment disputes usually involve sensitive information concerning oil pricing, transportation fee, pipeline construction, etc.¹³⁰ Secondly, foreign oil investors could avoid bias of domestic court by utilizing international arbitration. Foreign oil investors fear the interference of host state government with domestic court's decision. Such worries are not unwarranted since oil is a scarce natural resource for a nation. Thirdly, international arbitration enables the final settlement of any investment disputes. Litigation, on the other hand, permits each party to appeal to a higher court if they

¹²⁸ Wälde, *supra* note 122, at 6.

¹²⁹ *Id.*

¹³⁰ *China-Russia Energy: CNPC Settles Oil Supply Disputes Again with Russian Oil Company*, MELING NET, <http://info.hp.hc360.com/2011/05/31121189841.shtml> (last visited Dec 18, 2012).

disagree with the court opinion. No opportunity to appeal is available in arbitration. Foreign oil investors do not need to worry about being stuck in a protracted process and spend tons of money to argue their cases.

3. Forum

As explained in the section above, majority of the Chinese BIT provides ICSID as the forum for investor-state arbitration. Under the Chinese current model BIT (1997 version), there are two alternative ways Chinese investors can choose to settle their investment disputes: domestic court of the host state or the ICSID.¹³¹

4. Composition of Arbitration Tribunal

ICSID Convention rules set by default i) a three-member arbitral panel, ii) each party appoints one arbitrator; iii) the parties agree upon the chairman of the tribunal. The composition rules under the UNCITRAL Arbitration Rules (2010) are quite similar to the one under the ICSID Convention rules. One notable difference is that the tribunal chairman is selected by the two appointed arbitrators, but not parties themselves.

For Chinese contract negotiators who agree to use ICSID as the forum to settle their dispute, if they are pleased with the default rule, they could spare the article on composition of arbitration tribunal in the contract.¹³² With regards to UNCITRAL Arbitration Rules, it might come into play when the contract parties determines to use *ad hoc* arbitration that administers based on UNCITRAL Arbitration Rules.

The language of the Kazakhstan model contract adopts the ICDIS approach as it stipulates that: "the third arbiter, who shall act as the chairman of the Arbitration Tribunal, shall be selected by agreement of the other two arbiters." So do the Indonesian model contract and the Nigerian model contract.¹³³ The Iranian

¹³¹ Wang, *supra* note 123, China Model BIT, art. 9.2(a), 9.2(b), 1997.

¹³² Pohl et al, *supra* note 48, at 26.

¹³³ See Wang, *supra* note 123, Indonesian Model Contract, art. 11.2: "PERTAMINA on the one hand and CONTRACTOR on the other hand shall each appoint one arbitrator and so advise the other Party and these two arbitrators will appoint a third." See also Wang, *supra* note 123, Nigerian Model

model contract, on the other hand, does not have a clause regarding composition of tribunal. Chinese investors who negotiate contracts with Iran could propose adding a clause on composition of tribunal. Provided that the contract writes down ICSID as the chosen forum, Chinese investors can also rely on the composition rule under ICSID Convention takes effect by default in disputes.

5. Qualification of Arbitrators

The Indonesian model contract envisages the third arbitrator to be appointed by the President of the International Chamber of Commerce if the first two arbitrators fail to agree.¹³⁴

Under the Nigerian model contract, if two arbitrators fail to agree on the third arbitrators, the third arbitrator shall be “appointed by the Chief Judge of the Federal High Court of Nigerian accordance with the provision of the Arbitration and Conciliation Act Cap 19 laws of the Federation of Nigeria 1990.”¹³⁵

Some oil investment contracts may have restriction on the nationality of arbitrators. For example, the Kazakhstan model oil contract requires “the chairman of the Arbitration Tribunal, shall not be a citizen of Kazakhstan or the USA.”

6. Arbitral Rules

Among the model contracts, the Indonesia model contract, the Nigerian model contract, and the Iranian model contract all keep silent on arbitral rules available for the investor-state arbitration. The Kazakhstan model contract sets down UNCITRAL for arbitration rules. According to its article 31.3, disagreement related to the contract, its interpretation, legal force, cessation of effect or violation, not resolved by negotiation, “shall be subject to final resolution according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) for arbitration.”¹³⁶

When Chinese oil companies negotiate contracts, it is better

Contract, art. 23.1: “Within thirty (30) days of such demand being served, each Party shall appoint an arbitrator and the two arbitrators thus appointed shall within a further thirty (30) days appoint a third arbitrator.”

¹³⁴ See Wang, *supra* note 123, Indonesian Model Contract, art. 11.2.

¹³⁵ See Wang, *supra* note 123, Nigerian Model Contract, art. 23.1.

¹³⁶ See Wang, *supra* note 123, Kazakhstan Model Contract, art. 31.3.

to lay down arbitral rules for selection in the contract. This will prevent application of arbitral rules Chinese investors dislike.

7. Finality of Arbitration Awards

The Nigeria model contract contains a clause under the investor-state dispute settlement section reading: "The arbitration award shall be binding upon the PARTIES, however, arbitration award shall not preclude the Parties right of appeal."¹³⁷ The provision runs counter to the principle of finality for international arbitration. When encountering such contract clause proposed by the host state, Chinese oil companies should raise question and reject when needed.

D. Stabilization Clause

Stabilization clause is "contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract."¹³⁸ The parties put stabilization clause in contract function "in order to prevent the application to the contract of any future alterations of this system."¹³⁹ By doing so, the parties "internationalize" the contract between them.¹⁴⁰

Stabilization clause is particularly common in transnational oil investment contract.¹⁴¹ This is because both host states and foreign investors need to make years-long commitments in the oil exploration and development projects. Without the stabilization clause guarantee, foreign investors will have to bear with any changes made to the municipal law of the host state. By contrast, with the stabilization clause, foreign investors could argue that the new law does not apply due to the stabilization clause based on the existence of stabilization clause in the relevant contract.¹⁴²

¹³⁷ See Wang, *supra* note 123, Nigerian Model Contract, art. 23.1.

¹³⁸ Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 239 (1987).

¹³⁹ *Id.*

¹⁴⁰ Abdullah Al Faruque, *Typologies, Efficacy, and Political Economy of Stabilization Clauses: A Critical Appraisal*, 5 OIL, GAS & ENERGY L. INTELLIGENCE, issue 4, 17 (2007).

¹⁴¹ ASIF QURESHI & Andreas ZIEGLER, INTERNATIONAL ECONOMIC LAW, 494 (3d ed. 2011).

¹⁴² See *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of Libya*, 53 I.L.R. 389 (1979).

Even if such argument fails, at least the foreign investors could step back and suggest a transition period for its adjustment before the application of the new law.¹⁴³

In terms of investor protection and investment protection, stabilization clauses can be described by using the analogy of spectrum. On the one end of the spectrum, stabilization clause provides the strongest protection for foreign investors. The so-called “full freezing clause” freezes both fiscal and non-fiscal law with respect to investment throughout the investment terms.¹⁴⁴ On the other end of the spectrum lies the “limited hybrid clause” which offers the weakest protection for foreign investors. Such stabilization clause only protects against a very narrow set of changes. Only when those changes occur could foreign investors claim compensation from host states.¹⁴⁵ For those changes that are not specified in the stabilization clause, foreign investors would have no resort for exemption or recovery.

In oil investment contract practices, however, these two extreme situations rarely take place in transnational oil investment contract practice. More often the contracting parties would agree to certain milder stabilization clause that fall between the ends.¹⁴⁶ For example, they might agree to freeze a limited set of laws but not all. In alternative, the contracting parties could agree to a stabilization clause that requires compensation or adjustments resulting from negative financial implications triggered by all changes of law.¹⁴⁷

In the Kazakhstan model contract, the stabilization clause goes “The provisions of this Contract shall remain unaltered throughout the entire Term of the Contract.”¹⁴⁸ Additionally, the stabilization clause envisages non-application of altered Kazakhstan national law to the contract, except tax law issues.¹⁴⁹

¹⁴³ Andrea Shemberg, *Stabilization and Human Rights—A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights*, at 35, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClauseandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClauseandHumanRights/$FILE/Stabilization+Paper.pdf).

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 5–9.

¹⁴⁷ *Id.*

¹⁴⁸ See Wang, *supra* note 123, Kazakhstan Model Contract, art. 32.1.

¹⁴⁹ *Id.*

For the Nigerian model contract, the stabilization clause is less protective of investors' rights.¹⁵⁰ The contract requires parties to use their best effort to agree on the change and compensation where there is alteration of Nigerian laws.¹⁵¹ If the agreement fails, either party is entitled to bring the dispute to arbitration.¹⁵²

E. Application of the Investor-State Dispute Settlement Clause to Non-signatories

Oil deals often compose of multiple sales and sub-sales. Therefore, it is common to observe multiple corporations, trusts, partnerships, and governments on the business chain. Problem comes when investment dispute arises. Instead of having conventional two-party arbitration, it will be a multiparty arbitration. The problem gets even more complicated if the parties come from different jurisdictions and legal traditions.¹⁵³

The essence of arbitration lies in its consensual basis.¹⁵⁴ Parties who do not give their consents to arbitration cannot be dragged into arbitral process even if they are parties to the oil contract. This is especially true in cases involving sovereign state.¹⁵⁵ Against this fundamental principle of international arbitration, however, some thorny legal questions might arise in the context of transnational oil investment projects. For example, whether the parent company can be brought into arbitration without consent when its subsidiary is one party to the arbitration?¹⁵⁶

Instead of leaving the uncertainty of the questions to the arbitral tribunal, it is a more ideal solution to draft investor-state arbitration clause in the manner that accommodate the multiparty situation. All the contracts relevant to the oil deal should incorporate identical arbitration clauses envisaging one arbitration

¹⁵⁰ See Wang, *supra* note 123 in Nigerian Model Contract, art. 22.

¹⁵¹ *Id.* art. 22.1.

¹⁵² *Id.* art. 22.2.

¹⁵³ Wälde, *supra* note 122, at 2.

¹⁵⁴ Bishop, *supra* note 4.

¹⁵⁵ Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No.5, at 19 (July 23). In the case, the Permanent Court of International Justice held that "no state can, without its consent, be compelled to submit its disputes . . . to arbitration, or any other kind of pacific settlement."

¹⁵⁶ *Id.* at 8.

place, giving everyone chance to say yes or not to arbitration beforehand.

V. REFLECTION UPON THE RECENT DEVELOPMENT OF WORLD INVESTMENT TREATY PRACTICE

A. *Canada-China FIPA*

Canada and China commenced their discussion on the bilateral investment treaty in 1994.¹⁵⁷ The talk was paused afterwards and did not resume again until 2004.¹⁵⁸ After years of efforts, the two countries finally conclude their foreign investment promotion and protection agreement (FIPA) on Sep 9, 2012.¹⁵⁹ Because the Canada-China FIPA is the most recent BIT China enters into, the Canada-China FIPA will shed light on China's new stance on bilateral investment treaty. Furthermore, since Canada receives large-scale oil investments from Chinese national oil companies, the Canada-China FIPA could serve as a useful reference for oil investment contracts signed with Canadian government.

1. Transparency of Laws and Regulations

One highlight of the 2012 Canada-China FIPA is the "Transparency of Laws, Regulations, and Policies" article, laid down in its article 17.¹⁶⁰

1. Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect a covered investment:

(a) make such laws and policies public and

¹⁵⁷ Foreign Affairs and International Trade Canada, *Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiation Background*, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?view=d> (last visited Dec. 18, 2012).

¹⁵⁸ *Id.*

¹⁵⁹ PRC Ministry of Commerce, *MOFCOM Conducts Interpretation on China-Canada FIPA*, http://www.gov.cn/gzdt/2012-09/10/content_2220644.htm (last visited Jan. 2, 2013).

¹⁶⁰ Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, China-Can., art. 17, Sept. 9, 2012, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx>.

readily accessible;

(b) if requested, provide copies of specified laws and policies to the other Contracting Party; and

(c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

2. Each Contracting Party shall ensure that its laws, regulations and policies pertaining to the conditions of admission of investments, including procedures for application and registration, criteria used for assessment and approval, timelines for processing an application and rendering a decision, and review or appeal procedures of a decision, are administered in a manner that enables investors of the other Contracting Party to become acquainted with them.

3. Each Contracting Party is encouraged to:

(a) publish in advance any measure that it proposes to adopt; and

(b) provide interested persons and the other Contracting Party a reasonable opportunity to comment on the proposed measure.

This is not the only Chinese BIT that has a rule on transparency of laws. However, it is the most comprehensive one. The “Transparency of Laws” clause in China-Australia BIT (1988) has only one paragraph stipulating parties’ treaty obligation to make laws and policies publicly available.¹⁶¹

Treaty signatories are encouraged to publish measures in advance and provide the opposing party reasonable opportunity to comment. The wording is the result of compromise. For Canada Model FIPA, publishing and giving chance to comment are absolute obligation. By comparison, the Canada-China FIPA uses more mild language and hence makes the requirement less strict.¹⁶² At the same time, one should bear in mind that the

¹⁶¹ Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, China-Austl., art. 6, July 11, 1988, http://unctad.org/sections/dite/ia/docs/bits/australia_china.pdf.

¹⁶² James J. Saulino, *The Canada-China Investment Treaty—Lesson for A*

Chinese model BIT (1997 version) does not include articles that deal with the transparency issue. The one incorporated by Canada-China BIT therefore can be seen as a new movement for China's BIT practice.

2. Transparency of Arbitral Proceedings

The other highlight of Canada-China FIPA is its emphasis on transparency of arbitral proceeding. The treaty requires arbitral awards to be publicly available with the subtraction of confidential information. As the treaty writes in article 28.1: "Any Tribunal award under this Part shall be publicly available, subject to the redaction of confidential information."¹⁶³

The treaty then moves on the arbitral hearings and documents submitted to arbitral tribunal. In accordance with article 28.2, it gives host state the determining power whether to make arbitral hearings and documents publicly available or not.¹⁶⁴

Where, after consulting with a disputing investor, a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.

Compared to Canada model FIPA, this clause probably did not go far enough to ensure the transparency of arbitral proceeding. Under the former, arbitration hearings and documents, like arbitral awards, are requested to be publicly available also.¹⁶⁵

Nevertheless, it would be unfair to say that Canada-China FIPA is not an achievement. There was no treaty clause on transparency of the arbitral proceeding in the past BITs that China enters into, nor in the three versions of Chinese model BITs.

For the new Chinese BIT, adding clause on the transparency of proceeding will be a step forward. It could enhance the

U.S.-China BIT?, TRANSNAT'L DISP. MGMT. J., at 11(Dec. 2004).

¹⁶³ China-Can., note 160, art. 28.1.

¹⁶⁴ *Id.* art. 28.2.

¹⁶⁵ Saulino, *supra* note 162, at 13.

credibility of arbitration awards, and also promote the faith of host states and investors. In light of the 2012 Canada-China FIPA wording, publishing arbitral award is the maximum negotiation position China could give in. It probably takes a while before Chinese treaty negotiators to agree to publication of arbitral proceeding and documents submitted to tribunal. By saying that, if the China new model BIT would contain a clause on making tribunal award available, it is still quite an accomplishment. The containment of such requirement answers the call for well-developed investor-state dispute settlement mechanism. According to the survey on investor-state dispute clause, only 35 bilateral investment treaties require publication of arbitral awards. And only 8 bilateral treaties contain provisions on public access to arbitral hearings.¹⁶⁶

B. U.S. Model BIT

Based on its 2004 predecessor, the U.S. new model BIT has furnished the treaty provisions on labor and environmental standards, transparency requirement for laws and regulations and also for arbitral proceeding, as well as treatment of state-owned enterprises.¹⁶⁷

1. Transparency Requirement

The new U.S. model BIT (2012 version) added more detailed requirements on transparency based on the old U.S. model BIT (2004 version). There are mainly three new development regarding transparency.

One development is about the policy of periodical consultation. The new U.S. model BIT obliges treaty signatories to engage in dialogue on how to improve transparency practices.¹⁶⁸ Such dialogue should explore potential legal measures to be taken that might affect investment (substantive dimension) and also Investor-State dispute settlement (procedural dimension).¹⁶⁹

¹⁶⁶ Pohl et al, *supra* note 48, at 36.

¹⁶⁷ See United States Trade Representative, *2012 U.S. Model Bilateral Investment Treaty*, art. 11, 12, 13, 29, n.8, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

¹⁶⁸ *Id.* art. 11(1).

¹⁶⁹ U.S. Department of State, *Model Bilateral Investment Treaty Fact Sheet*,

“Article 11.1: Transparency

The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.”

The other new development is about standard setting. According to the new U.S model BIT, treaty signatory is allowed to participate in standard-setting and technical regulation development of its counterpart.¹⁷⁰

“Article 11.8: Standard Setting

(a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies”

Thirdly, notice and comment. The new model U.S BIT obliges treaty signatories to publish proposed regulations, explain their purposes and rationales, and open comment period for relevant stakeholders, and finally address comments and feedbacks.¹⁷¹

“Article 11.8: Standard Setting

(a). . . Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.”

2. More Robust Environment and Labor Standard

Article 11, 12, and 13 of the new U.S. model BIT is observed to be more robust than its predecessor but less liberal than those recent free trade agreements U.S. has signed.¹⁷² The

<http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm> (last visited Nov. 20, 2012).

¹⁷⁰ See United States Trade Representative *supra* note 167, art. 11.8(a).

¹⁷¹ *Id.*

¹⁷² Mark Kantor, *The New U.S. Model BIT: “If Both Sides Are Angry with You, You Must Be Doing Something Right,”* 9 TRANSNAT’L DISP. MGMT. J., issue 7, 13 (2012).

changes that worth China's attention are concluded as follows:

Firstly, countries' commitments under multilateral environment agreements and the International Labor Organization Declaration on Fundamental Principles and Rights at Work and Its Follow-Up are attached great importance.¹⁷³ As the article 13.1 of the new BIT buttresses "The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental."¹⁷⁴

Secondly, the 2012 U.S. model BIT, it is parties' obligation "not waive or derogate from" their domestic labor and environmental laws as an encouragement for investment.¹⁷⁵ In comparison, the 2004 U.S. model BIT uses milder language, where countries only need to "strive" to do so.

Thirdly, the U.S. model BIT imposes an affirmative obligation on parties to ensure the compliance with domestic environmental law and domestic labor law.¹⁷⁶ While the 2004 U.S. model BIT employed the language "strive to ensure," the 2012 U.S. model BIT used a much stronger wording "effectively enforce."¹⁷⁷

Fourthly, the 2012 model BIT lays down more extensive consultation procedures with respect to environmental and labor issues than the ones stipulated in the 2004 model BIT.¹⁷⁸

All these changes to the 2012 U.S. model BIT demonstrate U.S.'s commitment for more robust environment and labor protection.

C. Trans-Pacific Partnership Negotiation (TPP Negotiation)

One hurdle for the TPP negotiation comes from Australia's unwillingness to sign the investor-state dispute resolution provi-

¹⁷³ See United States Trade Representative, *supra* note 167, art. 13.1.

¹⁷⁴ *Id.*

¹⁷⁵ U.S. Department of State, *supra* note 169.

¹⁷⁶ See United States Trade Representative, *supra* note 167, art. 12(2), 13(2).

¹⁷⁷ Paolo Di Rosa, *The New 2012 U.S. Model BIT: Staying the Course*, <http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-cours/> (last visited Feb. 3, 2014).

¹⁷⁸ U.S. Department of State, *supra* note 169.

sions. As TPP negotiation is an ambitious free trade agreement negotiated by eleven countries, it is desirable to have all negotiators to hold universal policy position.¹⁷⁹ Currently, the remaining ten nations favor the ISDS. But no one could guarantee that they will not follow Australia's path in the future term. The potential ripple effect, if it takes place, may lead to the two-tier dispute resolution mechanism and jeopardize the development of the international investment regime under the TPP.¹⁸⁰

Thirty-one U.S. corporate groups from different economic sectors wrote to President Obama, criticizing "Australia's rejection of investor-state dispute settlement is not only thwarting the ability of the TPP negotiations to produce strong enforcement outcomes, it is also having a corrosive effect on the level of ambition and other key aspects of the TPP negotiations. If Australia were able to extract such a major exemption, other countries would press forward to seek their own major exemptions from core commitments."¹⁸¹

Through the TPP, the United States seeks to advance its core value, including transparency, labor rights and environmental protection.¹⁸²

D. ASEAN Agreement

By January 2012, China has concluded one multilateral investment treaty. That is the "Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-Operation" between ASEAN and the People's Republic of China. In 2002, the Contracting Parties concluded the Framework Agreement. Later in 2009, the Contracting Parties concluded the

¹⁷⁹ The eleven Trans-Pacific Partnership Negotiators are Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Singapore, Peru, United States, and Vietnam.

¹⁸⁰ Leon E. Trakman, *Resolving Investor-State Disputes under A Trans-Pacific Partnership Agreement: What Lies Ahead?*, 9 TDM 7 (2012), <http://www.transnational-dispute-management.com/article.asp?key=1916>.

¹⁸¹ Investment Treaty News, *Australia to reject investor-state dispute resolution in TPPA*, <http://www.iisd.org/itn/2012/04/13/news-in-brief-7/> (last visited Feb. 3, 2014).

¹⁸² Office of U.S. Trade Representatives, *TPP Chief Negotiators Pleased to Report Continued Progress*, <http://www.ustr.gov/about-us/press-office/press-releases/2012/december/tpp-negotiators-report-progress>.

Agreement on Investment.¹⁸³

With respect to the procedural protection of investment, Article 14(4) of the Agreement on Investment Article provides that the investor may submit disputes to international arbitration under, inter alia: (i) the ICSID Convention and the ICSID Rules; (ii) under the ICSID Additional Facility Rules; or (iii) under the UNCITRAL Arbitration Rules.

VI. SUGGESTIONS FOR MODIFICATION OF CHINESE MODEL BIT

The discussion on modeling Chinese model BIT has gone on for a while. There are three key questions surrounding this discussion. Firstly, how much influence does the model BIT exert on draft and negotiation of real BIT?¹⁸⁴ Secondly, what changes should be made to the current model BIT? Thirdly, what effect would the new Chinese model BIT bring?

China's new draft BIT should functions to create a stable, predictable, and transparent regulatory framework for investment activities. The drafting should follow the principles: i) facilitate investments between the Parties; ii) increase transparency of Parties' investment policies; iii) increase transparency of arbitral proceeding.

Furthermore, China's current status is more and more like a capital-exporting country, as demonstrated by its huge overseas oil investment projects.¹⁸⁵ A model BIT which balances the rights and obligations of host state and investor is most welcomed. A BIT that tilts towards the host state might render insufficient protection for Chinese investors.

A. Arbitrability

China's overseas oil investment raises very complicated international public law issue as oil resources are usually interwoven with the host state's sovereignty and self-autonomy.

¹⁸³ Michael Hwang S.C. & Nicholas Thio, *Investment Treaty Arbitration in Asia: Contemporary Issues and Challenges*, 9 TDM 3 (2012), <http://www.transnational-dispute-management.com/article.asp?key=1829>.

¹⁸⁴ Leon Trakman, *China and Investor—State Arbitration*, at 34, http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2157387 (last visited Dec. 18, 2012).

¹⁸⁵ NORAH GALLAGHER & SHAN WENHUA, *CHINESE INVESTMENT TREATIES POLICIES AND PRACTICE*, 385 (1st ed. 2009).

For example, the Russian Production Sharing Act rules that “those rights and obligations of the parties to a Production Sharing Agreement, that have a private law character, are regulated by the Production Sharing Act and by Russian private law.”¹⁸⁶ In other words, for those rights and obligations that have a public law character are not governed by Russian private law and hence non-arbitrable, such as licensing, taxation, export of production, etc.¹⁸⁷

The other example would be the Kazakhstan Law No. 249-IV (dated Feb 5, 2010). This law introduces modifications to the current Kazakhstan Civil Code, Civil Procedure Code involving sovereign immunity, and the Law on International Arbitration.¹⁸⁸ One provision of the Kazakhstan Law No. 249-IV rules as follows: “In civil-law relations with a foreign element the Republic of Kazakhstan shall enjoy the jurisdictional immunity in relation to itself and its property against the jurisdiction of courts of another state.”¹⁸⁹ Since the language explicitly points out foreign court, international arbitration should not be affected by this new legislation.¹⁹⁰ But this example still evidences the importance of arbitrability issue. It deserves the due diligence of investors and demands updated knowledge of the host states’ legal system.

Current Chinese BITs do not have one specific clause on arbitrability. For Chinese oil companies that go aboard, this might be a bit dangerous. In oil arbitration, it will not be too surprising for host states to invoke arbitrability defense when the arbitral proceeding comes to enforcement stage.

B. National Security Concern

One change China’s new model BIT could make is a provision on national security concern. Nowadays host states often invoke their national security exception to turn down oil invest-

¹⁸⁶ Giuditta Cordero Moss, *Arbitrability of Disputes Regarding Petroleum Investments in Russia and the Validity of An International Arbitral Award*, 3 OIL, GAS & ENERGY L. INTELLIGENCE, issue 1, 4 (2005).

¹⁸⁷ *Id.*

¹⁸⁸ Andres R. Romero-Delmastro, *Validity and Effects of International Arbitration Clauses in Petroleum Contracts in Kazakhstan Pursuant to International Law*, 8 TRANSNAT’L DISP. MGMT. J., issue 1, 6 (2011).

¹⁸⁹ *Id.* at 7.

¹⁹⁰ *Id.*

ment proposals from abroad as well as foreign oil companies' tempt to acquire its national oil company.

Some host states make national security exception in their national investment legislations. Take Kazakhstan for example. In 2007, the Kazakhstan government amended the Law on Subsurface Resources and Their Use and added the national security exception. According to the new law article 23.1 (1), foreign investors' application concerning alienation of a subsurface use right (a part thereof) and/or an item related to subsurface use rights needs to be scrutinized in light of national security criterion.¹⁹¹

Since there is not external check for the invocation, the national security exception might be misused. Conservative nations may employ the exception as a disguise for their hostility towards foreign investment. Therefore, the Chinese BITs could consider incorporating a clause that standardizes the invocation of the national security exception.

C. Umbrella Clause

Umbrella clause is a treaty provision that requires each Contracting State to observe all investment obligations it undertakes related to investors from the other Contracting State.¹⁹² A standard umbrella clause in investment treaties looks like this: "Each Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any other Contracting Party."¹⁹³

The umbrella clause, as the metaphor implies, has the function to bring a pure contractual claim under the umbrella of treaty protection.¹⁹⁴ In other words, a breach of contract, which might

¹⁹¹ Law of the Republic of Kazakhstan on Subsurface and Subsurface Use, No. 291-IV ZRK, art. 23.1 (1) (June 24, 2010).

¹⁹² Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes*, 137 GEO. MASON L. REV. 179, 142 (2006).

¹⁹³ Thomas W. Wälde, *The "Umbrella" (or Sanctity of Contract/Pactasunt Servanda) Clause in Investment Arbitration—A Comment on Original Intentions and Recent*, at 22, http://www.biicl.org/files/946_thomas_walde_presentation.pdf.

¹⁹⁴ See, e.g., *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003).

not constitute a violation of treaty otherwise, can be transformed to a breach of BIT.¹⁹⁵

The current Chinese model BIT does not incorporate umbrella clause. In case of future insertion, there are a couple of reminders to keep in mind.

Based on the review of past arbitral awards, two thirds of arbitral awards take the view that “it is a precondition for the operation of the umbrella clause that the contract be concluded between the investor and the host State.”¹⁹⁶ As the tribunal in *Gustav F W Hamester GmbH v. Ghana* illustrated: “a contractual obligation between a public entity distinct from the State and a foreign investor cannot be transformed by the magic of the so-called ‘umbrella clause’ into a treaty obligation of the State towards a protected investor.”¹⁹⁷ It is quite common for oil investment contracts to be signed by the national oil company of the host state, instead of the host state itself. If this is the case, umbrella clause probably could not be upheld by the arbitral tribunal.

Furthermore, umbrella clauses in various treaties have been interpreted very differently in the past arbitral cases. The liberal view usually accepts the umbrella clause and allows conversion, while the restrictive view rejects the umbrella clause and refuses transformation.¹⁹⁸ Accordingly, the presence of an umbrella clause in the investment treaty cannot guarantee its actual usage in arbitration cases.

VII. CONCLUSION

China’s rapid economic growth and its urbanization push up the nation’s demand for oil resource. In such context, Chinese oil companies have begun to go abroad and look for foreign

¹⁹⁵ Omar E. García-Bolívar, *Jurisdiction and Recent ICSID Cases*, 2 OIL, GAS & ENERGY L. INTELLIGENCE, issue 2, 5 (2004).

¹⁹⁶ Inna Uchkunova & Oleg Temnikov, *The Umbrella That Won’t Open*, <http://kluwerarbitrationblog.com/blog/2012/12/20/the-umbrella-that-wont-open/>.

¹⁹⁷ *Gustav F W Hamester GmbH v. Ghana*, ICSID Case No. ARB/07/24, ¶ 346 (June 18, 2010).

¹⁹⁸ See, e.g., *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/01/13 (Aug. 6, 2003); *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Jurisdiction, ICSID Case No. ARB/02/6 (Jan. 29, 2004).

petroleum resources. On top of the enthusiasm of the brave endeavor, legal risks and disputes regarding transnational oil investments also come along. It is, therefore, important for us to think in *ex-ante* mode of the best way China and Chinese investors could use to deal with the investment disputes. The discussion of Part I unfolds itself against this background setting.

Moving on from the general scenario, Part II focuses specifically dispute settlement mechanism for China's oil investment disputes. A change in China's attitude towards investor-state dispute resolution clause can be observed. Among the group of BITs signed between China and oil recipient countries, the ones concluded before 1997 stipulate narrow dispute resolution clause; those entered into after 1997 broaden the scope of dispute settlement clause and permit disputes of all kinds to be submitted to ICSID.

Such change reflects China's current dominant method in dealing with investment disputes. In terms of future, the author predicts that ICSID will stay as the first choice for Chinese treaty draft and negotiation, particularly for oil disputes. This is due to the match between the feature of ICSID and the nature of oil investment disputes. This, however, does not exclude the simultaneous usage of both ADR and investor-state arbitration.

Since the drafting and negotiation of private investment contracts usually take place in the shadow of investment treaties, the dispute resolution clause in the treaties will also influence the way how investment contracts are drafted. For the purpose of illustration and analysis, Part III selected four model oil exploitation and development contracts and examined their wording on dispute resolution mechanism, applicable law, and stabilization clause.

Part IV explores the recent development of various countries in developing dispute resolution mechanism for investment activities. The discussion on the U.S. model BIT, Canadian model BIT, the design of ASEAN dispute settlement framework as well as core issue at the TPP negotiation table aims to provide inspirations for China's future treaty practice.

The last part of the paper (Part V) puts forward four suggestions for the remodeling of Chinese current model BIT. Update is required to bring the Chinese current model BIT in line

with international treaty practice.

In summary, it is the author's hope that the study on dispute mechanism could gain attention in the legal academic field, raising awareness of its significance in facilitating transnational energy investment. The issue of China's treaty practice regarding investor-state dispute resolution was not addressed enough before. It will be desirable if this paper could facilitate further study on how a well-designed dispute settlement mechanism would facilitate China's overseas oil investment.