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The Procedural *Lex Mercatoria*:

The Past, Present and Future of International Commercial Arbitration

by
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"The Procedural *Lex Mercatoria*: The Past, Present and Future of International Commercial Arbitration"

Dr Luke Nottage*

I. Introduction: The Substantive and the Procedural *Lex Mercatoria*

It is a great honour and pleasure to be invited to present this paper at the first formal Symposium of Kobe University's new Centre of Excellence, the Research Center for Dynamic Legal Processes in Advanced Market Societies ("CDAMS"). On behalf also of Kobe University Law Faculty's sister "law school" in Australia, I extend my warmest congratulations on this successful initiative. I hope that CDAMS will be able to collaborate with other members of Sydney University Law Faculty's own newly established Sydney Centre for International and Global Law.

This paper is also part of work-in-progress towards a chapter in the first ever textbook in Japanese on the *lex mercatoria*, forthcoming next year and co-edited by key CDAMS associate and Kobe University Law Faculty Professor Akira Saito.[1] The main focus of that book, and indeed most discussion about the *lex mercatoria* generally, is what I term the "substantive" *lex mercatoria* – notably the practices and norms developed and applied predominantly by businesspeople to manage their cross-border contractual relationships. Perhaps increasingly, however, nation-states and inter-governmental organisations have drawn on such practices and norms to generate further bodies of norms, restating or further refining those practices and norms, in international instruments of more or less binding force.

For example, perhaps the most successful example of the substantive *lex mercatoria* is the norms found in INCOTERMS. Refined over many decades by the International Chamber of Commerce ("ICC", a private world-wide federation of national chambers of commerce), parties very frequently incorporate these voluntarily into their international sales contracts. However, the United Nations Commission on International Trade Law ("UNCITRAL") drew heavily on that set of norms to develop rules on the passing of risk for the UN Convention on Contracts for the International Sales of Goods ("CISG", agreed upon in 1980 and in force since 1988).[2] CISG now

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[1] (Saito and al 2004).

[2] See eg (Gabriel 2001).

governs much of the world's cross-border sales. It applies where contracting parties have their place of business in (the now many) different countries which have acceded to CISG (Article 1(1)(a)), or – surprisingly expansively – where the rules of private international law of a forum lead to the application of an acceding country's sales law (Article 1(1)(b)), unless the parties clearly exclude its application in favour of rules of some national sales law (Article 6). In turn, CISG's rules on passing of risk – and numerous others – have been largely followed by the International Institute for the Unification of Private Law ("UNIDROIT", a longer-standing inter-governmental organisation) to promulgate in 1994 the UNIDROIT Principles of International Commercial Contracts ("UPICC"). Unlike CISG, an international treaty directly applicable as national law or incorporated as such by further legislative action, UPICC are not automatically binding. Generally, UPICC must be expressly selected by individual parties as part of the governing law for their international contracts, or impliedly so selected by specifying that their contracts shall be governed by "general principles" of international contracting or simply the "*lex mercatoria*", which UPICC are supposed to re-state. The Preamble to UPICC also explains that UNIDROIT envisaged that UPICC could be used to "interpret or supplement international uniform law instruments" or to "provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law". Indeed, empirical and more anecdotal evidence shows that UPICC, and other more or less comprehensive restatements of the substantive *lex mercatoria*, are quite frequently used to interpret and supplement both international instruments (like CISG) and domestic law rules.[3] Thus, the substantive *lex mercatoria* is increasingly made up of inter-related and often overlapping sets of norms continually being refined by a variety of state, pseudo-state, and private actors.[4]

Two major tensions emerge from this interaction. First, although a key feature of the *lex mercatoria* is its transnational or global character – developed through and for cross-border transactions – the involvement of state actors, and the pull of national legal and other cultural traditions on pseudo- or non-state actors, means that local variations can remaining in developing and especially applying substantive norms. For example, Berger's comprehensive empirical study of "the use of transnational law" revealed significantly more reticence on the part of English respondents towards the still quite open-textured norms of the *lex mercatoria* in international contracting. Arguably this reflects the more formal reasoning patterns, and preference for "bright-line rules", in the English law tradition.[5]

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[3] Compare <www.unidroit.org/english/principles/chapter-0.htm> with eg (Berger et al. 2001), and (Bonell 2001).

[4] Cf generally eg (Horn, Schmitthoff, and Marcantonio 1982).

[5] Interestingly, there was not a statistically significant greater reticence on the part of respondents

This brings us to a second, partly related tension: between informality and formality in legal norms. Although some national legal systems (eg England's) prefer more formality in developing and applying legal norms, most legal philosophers and legal sociologists would agree that all legal systems must involve some minimal level of formal reasoning, excluding broader "substantive" – "moral, economic, political, institutional, or other social" – considerations to some extent.[6] An often observed tendency is for legal systems to develop their own reiterative processes, including more and more formal reasoning which generates a growing gap between the law and underlying social practices and expectations. Often, in national legal systems, judges or legislators then step in to try to minimise such gaps. An example is the intervention by English Courts of Equity, to restore greater substantive justice in proceedings through the Courts of Common Law. Even after the two streams of courts were merged from the late 19th century, the judges specialising in matters traditionally assigned to Equity proceedings have tended to bolder in trying to inject more substantive reasoning into the elaboration of English contract law. Seemingly inevitably, however, their efforts are often undermined. Charles Dickens satirised the ossification of Courts of Equity in the 19th century; the 20th century innovations of Lord Denning were the exception (drawing liberally from Equity principles to further his vision of simple and substantive justice) which proved the rule (classical and more formal solutions were mostly reinstated by the House of Lords); and now it seems that the most enduring shifts towards more substantive reasoning come from EU law rather than the internal dynamics of English contract law.[7]

A similar tension appears at the global level, with the substantive *lex mercatoria*. CISG drew heavily on a range of contracting practices and norms, but several rules remained vague or left out. Often, this was because their precise contours could not be determined or agreed upon, especially by representatives from different legal traditions (especially from England).[8] Fifteen years later, UPICC added numerous more detailed rules relating to key concepts in CISG (eg specific factors helping to establish a "fundamental breach" allowing termination of contracts, or to permit specific performance). They also injected also several new concepts not covered in CISG (eg renegotiation and court adjustment for economic "hardship").[9]

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from the US. See (Nottage 2000) (translated by Shunichiro Nakano and Asoka Matoba in: 30(9) Kokusai Shoji Homu (September 2002) 1229-35 (Part One), 30(1) (October 2002) 1387-92). This result is consistent with the thesis that US contract law, with supporting legal institutions, remains much more "substantive" in approach – "open to moral, economic, political, institutional, or other social considerations" ((Atiyah and Summers 1987); (Nottage 2002)).

[6] Eg (Summers 1997; Ziegert 2002).

[7] See, respectively, (Dickens and Page 1971); Denning by Rickett NZULR XXX, cf (Atiyah 1999); (Nottage 1996), updated in (Nottage 2002).

[8] (Rosett 1984).

[9] Compare, respectively, CISG Article 25 with UPICC Article 7.3.1(2); CISG Article 46(1) with

By adding detail, these additions can be seen as reflecting and contributing to greater formalisation of the substantive *lex mercatoria*. It is true that an underlying vision of contract law promoted especially by UPICC, particularly the general idea that the contract should be kept alive as much as possible,[10] is an almost ethical as well as perhaps economic rationale which may open the way to more "substantive" elaboration – or even manipulation – of the specific rules set out. However, such rationales are "second-order reasons", whereas the "first-order reasoning" (the technique of using more bright-line rules to advance such rationales) remains quite formal. More generally, a recently inaugurated online database, designed to more regularly update and elucidate substantive *lex mercatoria* rules,[11] seems likely to further generate more formal reasoning in this area. If such an analysis is plausible, it is also quite predictable that a counter-reaction may occur, with jurists (especially from national legal traditions still more open to "substantive reasoning") and particularly businesspeople calling for a return to more open-textured substantive norms applicable to international contracting.

Two similar tensions – global harmonisation versus national or local variation (which we can abbreviate as the "glocalisation" tension [12]), and informalisation versus formalisation (the "in/formalisation" tension) – can also be discerned in the historical development of international commercial arbitration ("ICA"). Developments in this field, which I term the "procedural *lex mercatoria*" and which form the primary focus for the rest of this paper, have been central to the elaboration of the substantive *lex mercatoria*. As Berger's empirical study demonstrates, the most frequent use of transnational contract law norms (such as UPICC) is not in negotiating or drafting contracts – although his study showed that they are surprisingly often used for those purposes too – but rather by arbitrators when resolving international commercial disputes.[13] Despite the growing volume of judgments rendered by national courts on CISG, and a trickle of judgments now referring to UPICC,[14] vastly more applications of those rules and other norms of the substantive lex mercatoria come from the decisions of international arbitrators. These are increasingly reported (mostly in "sanitised" form preserving the anonymity of the contracting parties) and discussed in a plethora of international conferences. Berger refers to the emerging body of arbitral award "precedents" as another example of the "creeping codification" of the lex mercatoria. He hopes that this codification will be an

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UPICC Article 7.2.2; CISG Article 79 with UPICC Articles 7.1.7 and 6.2.1-3 (and cf eg (Bund 1998)).
[10] (Bonell 2001). See also (Honnold 1999); cf also more generally (Lando 2001).
[11] (Berger 2002).
[12] I thank Professor Kenji Yamamoto (2000 UMelbourne Conference Paper xxx) for this neologism.
[13] (Berger 2001) (reviewed by me in 2002 *Journal of International Arbitration*).
[14] See, respectively, (Honnold 1998) (also www.cisg.pace.edu) and (Bonell 2001) (also www.unilex.info).

open-textured and flexible one, keeping in tune with the evolving needs of the global marketplace.[15] However, it may also exacerbate formalisation not only of substantive contract law norms, but also of arbitral proceedings. Indeed, a key theme since the re-birth of ICA since the 1950s and 1960s has been its growing formalisation, from the 1970s through to at least the late 1980s. However, as this paper will show, there are growing signs of a return to more informality in arbitral proceedings, especially since the late 1990s.

A second key theme has been, and remains, the tension between global dimensions and national (or even more local, and sometimes regional) approaches to ICA. In the 1950s and 1960s, although the "grand old men" serving as arbitrators in the often large-scale cross-border disputes tended to come from a narrow range of countries (notably Switzerland and France), they seem to have been driven by a normative – as well as a pragmatic – preference for developing and applying "universal" standards, not just for the substantive lex mercatoria but also for regulating their arbitral procedures. In both respects, nonetheless, criticism emerged especially from developing countries, arguing that the contract law norms "invented" by some arbitrators were biased against their interests, and that the arbitral forum and processes were unfair too.[16] This partly "political" response contributed to broader-based deliberation facilitated especially through the UN, resulting in CISG in 1980,[17] as well as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and especially the 1985 UNCITRAL Model Law on ICA ("ML"). These last two international instruments thus contributed to some formalisation of the ICA world. So did the 1976 UNCITRAL Arbitration Rules. Designed to assist in *ad hoc* arbitrations (where parties and arbitrators agree on procedures on a case-by-case basis), there were soon adopted for institutional arbitrations (where an organisation helps manage the procedures, usually drafting its own detailed Rules for parties to incorporate into their arbitration agreement).[18] Again, it is true that key underlying principles in all three instruments ("second-order" rationales) were deference to party autonomy, and limited scope for intervention by national courts to hinder the arbitral process. This sets the stage for parties to craft arbitral processes which restore appropriate measures of informality.[19] However, these principles were set out in bodies of norms of more or less binding force, and with growing levels of detail, thus promoting ("first-order") formal reasoning.

More importantly, their elaboration was prompted by the arrival at the core

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[15] (Berger and Center for Transnational Law. 1999); (Berger 2001).
[16] See generally (Shalakany 2000).
[17] (Teubner 1997).
[18] The most prominent example remains the Iran-US Claims Tribunal, which has since generated a significant part of the substantive *lex mercatoria* too: (Brunetti 2002).
[19] This option has been pointed out recently eg by (Leahy and Bianchi 2000).

of the ICA world (notably the ICC in Paris) of large US law firms from the 1970s, followed by large UK law firms in the 1980s. They brought with them new techniques of law firm and case management, designed initially for court proceedings in their home countries. This strongly reinforced the formalisation of arbitral procedures, as well as undermining the impetus to global standards,[20] initiated by the older generation of "grand old men" and furthered by international instruments like the NYC. Indeed, by 1990 a survey had confirmed more anecdotal evidence that ICA was no longer any cheaper and only slightly faster than cross-border litigation in resolving cross-border commercial disputes.

However, ICA has since been pressured by such criticisms, along with the growing attraction of other forms of Alternative Dispute Resolution ("ADR") such as mediation, and more efficient case management and other reforms in many national courts. Particularly since the mid-1990s, ICA therefore seems to have "fought back" strongly, and at multiple levels, to regain some benefits of greater informality (notably time savings), also prompting a return to more global standards.

This paper therefore concentrates on the past, present and future of ICA primarily through its engagement with the two tensions of "glocalisation" and "in/formalisation". Part II sketches in more detail the re-birth of ICA from the 1950s and its growing formalisation and localisation over the 1970s and 1980s, introducing key features of the NYC, the UNCITRAL Rules, and the ML. It then concludes with ICA's responses to those challenges since the mid-1990s – responses which seem set to continue over the next decade. Part III shows how a range of topical issues nowadays in ICA reinforce this sense of a return to greater informality and/or a more global approach. Part IV concludes by reiterating how important ICA is likely to remain. Drawing on its inherent flexibility, rooted in party autonomy, it seems set to remain the pre-eminent means of resolving cross-border disputes and thus as the "engine room" generating further growth in the substantive *lex mercatoria*. ICA is also interesting for the more theoretical insights it can offer into how law itself generally develops, both in domestic and transnational contexts.

II. The Past, Present and Future of ICA[21]

The first part of the story of ICA's remarkable rebirth after World War II is now well-known, thanks primarily to two empirical studies published in the 1990s. First,

[20] See eg (Nariman 2000); (Taniguchi 1997).
[21] This Part draws on Part I.2 of my paper for the 4th Meijo University arbitration conference, presented in Tokyo on 13 September. For the book chapter, I intend to elaborate further, especially introducing more key features of the 1976 UNCITRAL Rules, the 1985 ML, and other international instruments, drawing on material already presented at the seminar at Kobe University on 5 September.

drawing on hundreds of structured interviews, Dezalay and Garth showed how North-South conflict from the 1950s (between industrialised and newly independent states) and East-West tensions (the Cold War) resulted in eminent jurists (notably from continental Europe) being appointed to arbitrate (especially large, politically-charged) infrastructure developments disputes.[22] These arbitrators developed and applied not only the new substantive *lex mercatoria*, but also a "new procedural *lex mercatoria*" – general norms applicable to various stages of the dispute resolution process. The latter included deference to party autonomy and residual discretion left to arbitrators, with limited recourse to national courts. Many of the more politically charged arbitrations were conducted in *ad hoc* proceedings, but arbitral institutions soon realised that they could market their services in administering complex cases. The major beneficiary was the ICC, which the French courts left mostly alone as a purveyor of "private justice", compared to the London Court of International Arbitration ("LCIA") – also a private organisation, but one over which the (real!) English courts had always exercised more control as part of a broader tradition of more active supervision of arbitral processes.[23]

From the early 1950s, moreover, the ICC began pushing for a multilateral treaty to further promote ICA. This resulted in the 1958 NYC, which gained immediate success and became the most widely accepted multilateral convention ever promoted by the UN.[24] One key features were the requirements for local courts at the "place" or "seat" of the arbitration, as specified by the parties in their arbitration agreement, to refer to the arbitrators all disputes covered by that agreement rather than continuing on to judge the case themselves (NYC Art II). Another was for courts in countries where the winning party sought enforcement of the resultant arbitral award to recognise and enforce that award, except for strictly limited grounds – not extending to errors of law by the arbitrators (Art V).[25] Assisted by this Convention, arbitration gained increasing acceptance for more purely commercial disputes (involving eg distributorships or joint ventures among private companies).

Especially by the 1980s, however, large US law firms venturing into European markets had introduced their sophisticated techniques for managing complex – but mostly domestic – litigation. This led to increasing criticism of a heightened level of formalisation particularly of ICA procedures. Such techniques, and more generally the "tournament of lawyers" encouraging exponential growth in

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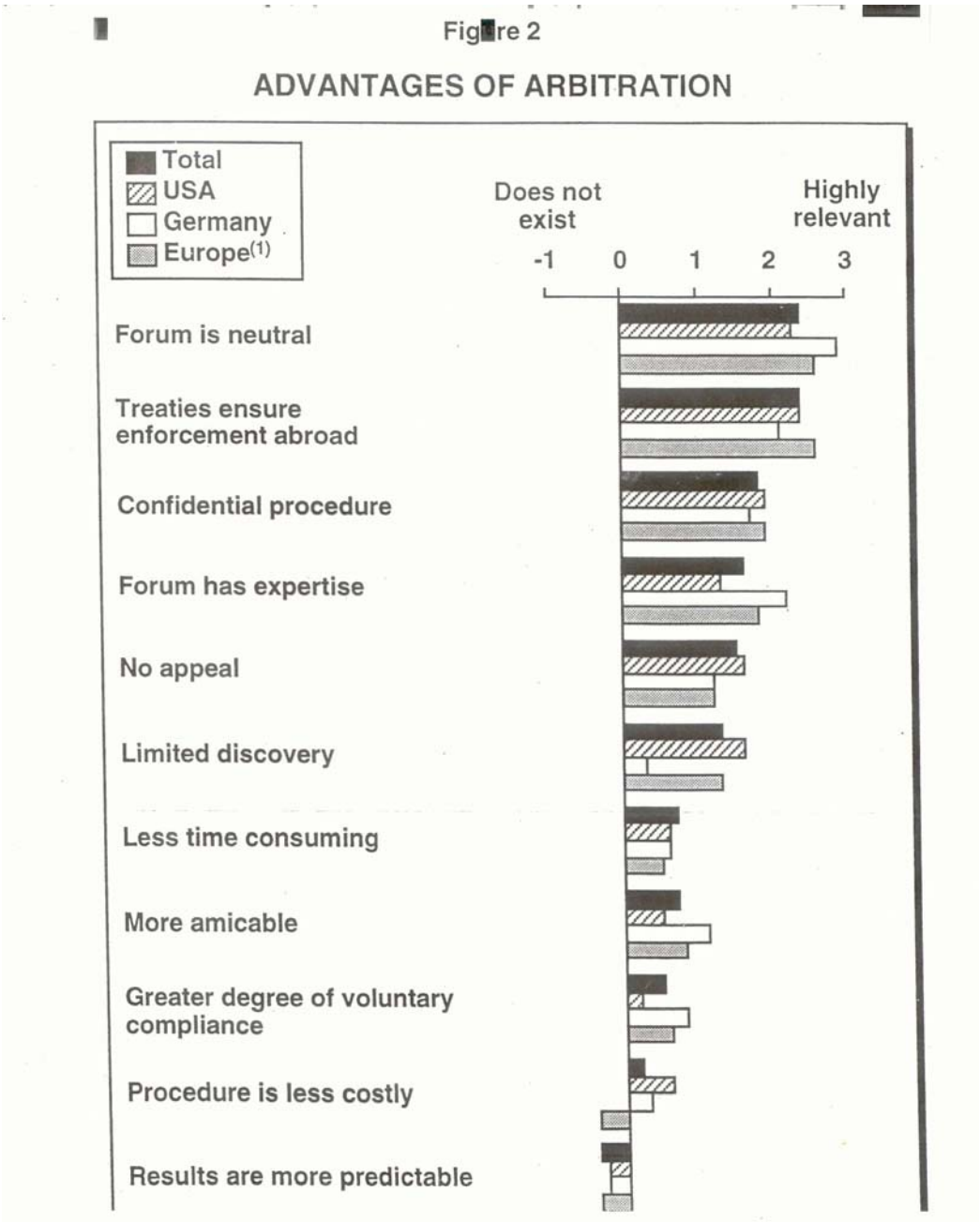
[22] (Dezalay and Garth 1996).
[23] See generally (Mason 1999).
[24] Over 160 countries have acceded. (Nariman 2003) = forthcoming in *Arbitration International* (early 2004).
[25] See eg (Cobb 2001); (Nienaber 2000).

law firm size, were soon extended by large English firms as well.[26] In this respect, ICA began to lose its universalist character. On the other hand, the circle of participants in ICA continued to grow in other ways. Those from the "periphery" (the South or the East – including our region) took back experiences and ideas from their encounters with the "centre" (Western Europe, and later the US), to help foster the growth of ICA – and often ADR more generally – in their home countries. This perhaps helps explain what might be termed the present phase of considerable "re-globalisation" several decades later,[27] illustrated by the issues analysed in Part III below. During the 1980s, however, large Anglo-American law firms in the ICA was seen as dominant, and the major culprits behind a shift towards greater formalisation of arbitral procedures. From surveys as well as interviews conducted around 1990 into the advantages perceived for ICA, Buehring-Uhle added a second set of empirical results evidencing this phenonomenon. Notably, his respondents indicated that ICA had become only slightly faster, and no cheaper, than cross-border litigation:[28]

Figure 1: Advantages of ICA vs Litigation (around 1990)

[26] (Galanter and Palay 1991); (Galanter 1992).
[27] Cf eg (Gelinas 2000).
[28] (Bühring-Uhle 1996).

Figure 2


ADVANTAGES OF ARBITRATION
Total
USA
Germany
Europe(1)
Does not exist
Highly relevant
-1
0
1
2
3
Forum is neutral
Treaties ensure enforcement abroad
Confidential procedure
Forum has expertise
No appeal
Limited discovery
Less time consuming
More amicable
Greater degree of voluntary compliance
Procedure is less costly
Results are more predictable

So much for the past. It is more difficult to perceive and evaluate the present, namely what has happened to the evolving world of ICA world over the 1990s and into the first decade of the 21st century, let alone its foreseeable future. There appear to have been significant reactions seeking to restore key benefits related to more informal procedures, and to develop and spread new global standards amongst this more heterogenous group of participants.[29] Although the 1985 ML was a quite detailed template for updating arbitration legislation at the "seat" of international arbitrations, it further entrenched key principles of party autonomy and limited judicial intervention for a growing number of countries, especially in the Asia-Pacific region.[30] Although not fully exploited over the 1980s, these features have been revived particularly since the latter half of the 1990s, to allow and promote more informality in arbitral proceedings around the world. Further, some of the latter countries experimented by adding provisions to ML-inspired legislation which allowed for more informality in engaging the arbitral process (eg more liberal writing requirements for arbitration agreements triggering the process) or in pursuing it (eg allowing arbitrators to act as mediators).[31]

Arbitral institutions, especially at the "centre" but also in our "periphery", competed over the late 1990s in improving their Rules. In particular, they streamlined time limits for general proceedings, and creating "expedited procedures" for smaller or less complex claims.[32] These institutions, and others involved in the more traditional ICA world, have also had to confront growing interest world-wide, among businesspeople and their legal advisors, in "multi-tiered dispute resolution" clauses and processes.[33] They are also increasingly involved in hybrid or pseudo-arbitration processes such as domain name dispute resolution,[34] where the emphasis is often on prompt and more informal dispute resolution.

Further inspiration, and opportunities for individuals to build up more experience in novel contemporary forms of dispute resolution, come from new processes which directly or indirectly involve state interests. Examples include:

- arbitration of disputes between private investors and host states (with an escalating number of ICSID cases under the multilateral 1965 Washington Convention, ongoing controversy under the regional NAFTA regime, and growing complications due to proliferating bilateral agreements involving states);
- sports arbitration (where awards affecting individual athletes often have

[29] See further (Nottage 2000); (Nottage 2002).
[30] See generally eg (Barrington 2002); (Sanders 2001).
[31] See eg Singapore's International Arbitration Act 1994 (outlined eg in (Secomb 2000)).
[32] See, respectively, eg ICC 1998 Rules, and TOMAC 2001 Expedited Rules.
[33] See eg (Pryles 2001).
[34] See eg HKIAC and SIAC.

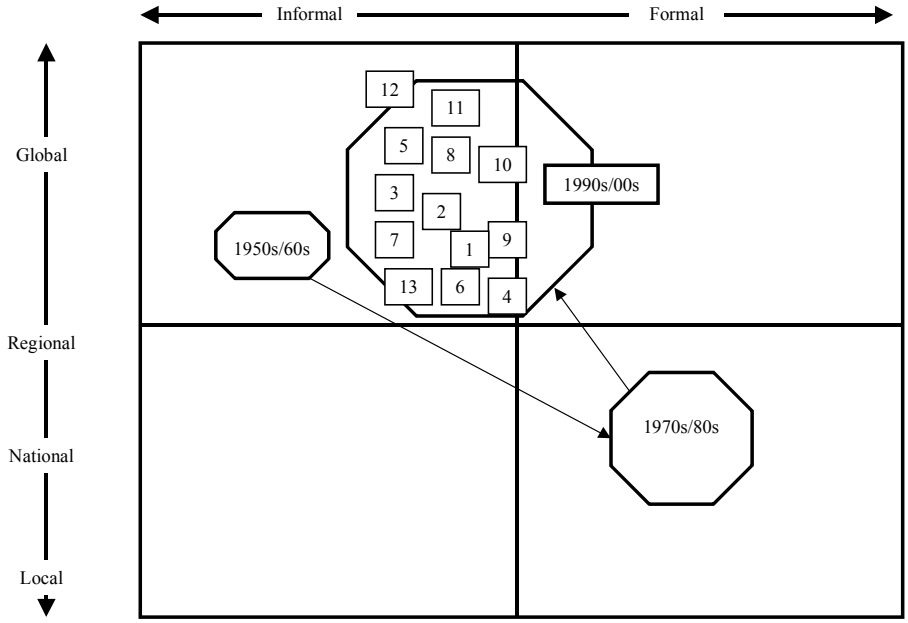
significant ramifications for their countries);

- mass claims processes (eg for dormant bank accounts in Switzerland, especially in the first stage before a US class action resulted in a large global settlement of interest also to the German government);[35] and even
- WTO dispute resolution (with some possibilities for arbitration per se, but even Panel and Appellate Body procedures often showing similar tensions between formalisation and informalisation, as well as overlaps with the narrower ICA world in terms of personnel involved either as adjudicators or advocates).[36]

As described further below (Part III.12), many of these processes involve more informality. That is apparent particularly in a commitment to speedier proceedings, in turn often linked to improvements in information technology.[37] However, informality is also often furthered by the more global substantive law norms applied (framed, for example, by more general principles of public international law). However, the mix is still considerably more formal than half a century ago,[38] when ICA was being established by the older generation of "grand old men" mostly arbitrating infrastructure development disputes in ad hoc proceedings. On the other hand, ICA has perhaps become even more globalised than in those early days. It integrates a more varied group of arbitration practitioners from around the world, who mostly now agree on key principles such as respect for party autonomy (as opposed to court intervention) and who also can draw on (albeit more formalised) norms of the substantive *lex mercatoria*. There are also emerging traces of regional "cross-fertilisation", notably in Asia since the 1990s, but this is "open regionalism" consistent with global standards like the ML.[39] World-wide, the volume of arbitration work seems to be expanding steadily too. Overall, therefore, a sense of major shifts since the 1950s can be tentatively illustrated by the three hexagons below:

[35] See further eg (Buergenthal 2000). Even more closely related to state interests, see eg (Leurent 2000).
[36] See further eg (Chow 1999). But cf (Weiler 2001) (noting delays in formalisation within the WTO bureaucracy).
[37] See eg (Alford 2001).
[38] See also eg (Mayer 2001).
[39] Cf eg (Schaefer 1999; Polkinghorne and FitzGerald 2001); (Garnaut 1996).

Figure 2: From Informal/Global to Formal/National –
and to More Informal/ Open Regional?



However, this overall assessment will also be affected by how a range of topical legal issues, numbered 1-13 above and discussed next in Part III, are resolved by arbitrators, courts, legislators and commentators worldwide.

III. Pressure Points in ICA: Glocalisation and In/formalisation

These issues represent most of the main "pressure points" hotly debated in the ICA world particularly since the late 1990s. Although it will probably take another decade for all of them to be more fully resolved, in many cases it is already becoming reasonably clear where a consensus is emerging in terms of the "glocalisation" and "in/formalisation" parameters. This reinforces the hypothesis, introduced in Part II, about the ways in which the ICA world has been "fighting back" against the trend which developed over the 1970s and 1980s.

Thirteen topical issues will be located with respect to these two main parameters. For my oral presentation, I will begin with some overarching issues (issues nos 11-13), then track issues arising from the main stages in the arbitral

process: recognition of a valid arbitration agreement (nos 1-4), arbitral procedure (nos 5-9), and a major contemporary problem arising particularly when enforcing arbitral awards (no 10):

Table 1: Locating Thirteen "Pressure Points"

A. Arbitration Agreement	1. Severability 2. Arbitrability 3. Writing Requirements 4. Multiple Parties
B. Arbitral Procedure	5. Arbitrators 6. Interim measures 7. Time limits 8. Evidence 9. Mediation during arbitration
C. Enforcement of Awards	10. Local annulment
D. Overarching Issues	11. Extending ML to domestic arbitration 12. New types of arbitration 13. Confidentiality

1. **Severability** (restitution, illegality)

A fundamental principle in ICA is the doctrine of "severability". There is now broad consensus that the arbitration agreement should be conceptualised as separate to the underlying contract (eg of sale), even if – as is usual – the arbitration agreement is included as a clause within one document evidencing the underlying contract. This means that the arbitration agreement survives, triggering the arbitral process to resolve disputes concerning the underlying contract, even if that contract is terminated (eg by one party, for the breach of another). Otherwise, a breaching party could contravene not only the underlying contract, but also avoid the consequence of having the dispute heard by agreed arbitrators – and instead have it heard by national courts (perhaps in its home jurisdiction, depending on rules of private international law).

Gradually, courts around the world have extended this severability doctrine to allow arbitrators to decide disputes even if the underlying contract is challenged not just for termination after formation, but also for being void *ab initio* due to fraud or illegality. There remains some debate particularly when the underlying contract is

claimed to be illegal.[40] with some (perhaps older) examples of arbitrators refusing to proceed to hear the dispute and instead deferring to national courts.[41] However, arbitrators nowadays should be heartened by tendencies for national courts (eg in England) to enforce awards where the underlying contract may have been illegal under their law (the *lex fori*) and/or the law of the place of its performance (*lex loci solutionis*), provided the underlying contract was legal under its governing law (*lex contractus*), unless it was of such an egregious nature (eg involving slave trading) that all nations should be taken not to condone such contracts and associated arbitration agreements.[42] This expansive tendency is also reinforced by recent pronouncements from transnational bodies like the International Law Association.[43]

Even clearer is the willingness of arbitrators and courts around the world to let disputes be referred to arbitration even when these involve claims of restitution or unjust enrichment, rather than claims on an underlying sales contract. This question gave rise to considerable debate over the 1990s in countries like Australia, as arbitration is still often used in the construction industry, where restitutionary claims are quite common (eg for payment for work done by builders mistakenly assuming they had a valid contract), and because restitution or unjust enrichment as a body of private law distinct from contract law was only recognised by the High Court in 1987.[44] Some Australian courts and commentators found it hard to accept that arbitrators should be able to hear claims involving restitution, where the arbitration agreement only covered disputes connected to contracts between the disputing parties, on the logic that there was no contract between them – hence, the claims only for restitution.[45] However, even in domestic arbitration cases, the trend emerged of courts taking a more practical approach, expansively interpreting the wording of arbitration agreements to encompass also restitutionary claims, to allow arbitrators to hear such claims as well as any contract claims. This is consistent with ML article 7(1), allowing for arbitration of any disputes relating to a "defined legal relationship", which of course should include restitution (or tort) as well as contractual relationships. Australia therefore appears to be rejoining now a global trend.

As well as indicating a quite strong degree of globalisation, these two examples should also encourage more informality. If national courts (even in

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[40] See eg (Sturzaker and Cawood 2000); (Kabraji 2001; Kantor 2001). Cf also (Diwan 2003).
[41] (Sornarajah 2003). Cf eg (Kreindler 2003).
[42] (Enonchong 2000).
[43] See International Law Association, "Public Policy as a Ground for Refusing Enforcement of Arbitral Awards", Resolution at its 70th Conference held in New Delhi, 2-6 April 2002 (text, and Reports in 2000 and 2002, available through <http://www.ila-hq.org/html/layout_committee.htm>).
[44] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. This predated *Lipkin Gorman v Karpendale* [1991] 2 AC 548, where the House of Lords established unjust enrichment as a distinctive non-contractual basis for restitutionary claims.
[45] (Baron 2000).

Australia) interpret arbitration agreements broadly to cover restitutionary as well as contractual claims, then less time will be spent disputing such issues in challenges to the arbitrators' jurisdiction. Indeed, the parties will not need to spend so much time carefully drafting (or re-drafting) arbitration agreements. Further, if both restitutionary claims and issues of illegality tainting any underlying contract can be dealt with by arbitrators, rather than those aspects being separated off to be dealt with by national courts, there should be less time wasted, or duplication of effort and evidence, in ironing out the entire set of disputes and relationships between the parties.

2. Arbitrability (competition law, IP, bankruptcy, consumer/labour law)

Similar conclusions can be drawn regarding arbitrability of disputes, particularly the issue whether statutes at the "seat" of the arbitration expressly or impliedly prevent arbitrators dealing with certain types of dispute (cf ML article 34(2)(b)(i)), or whether other statutes in the enforcing state prevent enforcement (cf NYC article V(2)(i)). A world-wide trend since the 1980s has been to limit such challenges to the decision-making powers of arbitrators. Regarding competition law issues, a US Supreme Court respecting arbitration of a distributorship contract under Japan Commercial Arbitration Association Rules drew world-wide attention.[46] Over the 1990s, some US courts have also expanded arbitrability regarding certain bankruptcy disputes.[47] Intellectual property disputes, except challenges to the validity of patents, are now accepted world-wide as susceptible to resolution by arbitrators too. The main limit to arbitrability now arises in "semi-commercial" disputes pitting companies (mostly) versus private individuals, especially consumers and employees. Even here, as in Japan's new Arbitration Law of 2003, arbitration agreements are prima facie binding, so disputes can go before the arbitrators unless the private party objects at that later stage.[48]

3. Writing requirements

A fairly clear global consensus has also emerged about liberalising the requirements that arbitrations agreements be formalised in writing. NYC Article II(2) introduced quite strict requirements, including arbitral clauses in a contract "signed by the

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[46] *Mitsubishi v Soler case*, 1985, revisited recently in (Posner 1999).
[47] Cf generally eg (Baron and Liniger 2003).
[48] See the new Law's Suppementary Provisions, article 4. The wording of the legislation also suggests an expectation that these articles will be liberalised in future years. See eg (Eastman 2003).

parties or contained in an exchange of letters or telegrams". ML Article 7(2) added that clauses also in an exchange of "telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another". Some national legislation adopting the ML in the 1990s further liberalised these standards. Section 2(4) of the Singaporean International Arbitration Act 1994, for example, recognised arbitration agreements created by "reference in a bill of lading to a charterparty or some other document containing an arbitration clause … if the reference is such as to make that clause part of the bill of lading".[49] New Zealand's Arbitration Act 1996 went to an extreme, abandoning writing requirements altogether for international arbitration agreements, although even stricter writing requirements than in the ML are retained for domestic arbitration agreements involving consumers.[50] The Swedish Arbitration Act 1999 also sets no writing requirements for international arbitration agreements.[51] However, these two countries are exceptional. Provisions on arbitration retained in Japan's old Code of Civil Procedure, derived from German law over a century ago, did not impose writing requirements for (international or domestic) arbitration agreements. But new Act of 2003 now does, as does recent legislation in other countries following the German law tradition in civil procedure.[52]

Since 1999, an UNCITRAL Working Group has debated the writing requirements under the ML, along with several other issues.[53] In 2001 the Group proposed a revision to Article 7(2) which significantly liberalises the requirements, without abolishing them altogether.[54] The Group is also considering an "interpretative statement" by the UNCITRAL Secretariat, urging national courts and others to interpret the NYC writing requirements broadly (in light of a revised ML),

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[49] Available through the website of the Singapore International Arbitration Centre (www.siac.org.sg).

[50] Article 7(1) in Schedule 1 (which, pursuant to section 6, applies to international arbitrations with their seat in New Zealand unless parties opt out) state that "An arbitration agreement may be made orally or in writing". However, section 11(1)(c) imposes a writing stricter than under the ML regarding an arbitration agreement involving a consumer, demanding that: "The consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it". The New Zealand Law Commission is considering further tightening of writing requirements for arbitrations involving consumers (NewZealandLawCommission 2003).

[51] It only contains writing requirements for the proceedings and the award. See <http://www.sccinstitute.com/uk/Laws_and_Conventions/The_Swedish_Arbitration_Act_1999_116_/ > and generally (Jarvin and Young 1999).

[52] Compare old Code article 786 (no form requirement mentioned) with article 14(2)-(5) of Japan's Arbitration Law 2003 <check not renumbered from Bill>. See also Germany's arbitration legislation (amended especially in 1998) article 1031 (<http://www.dis-arb.de/materialien/schiedsverfahrensrecht98-e.html>), and Korea's Arbitration Law 1999 article 8 (<http://www.kcab.or.kr/English/M6/M6_S1.asp>). On the latter, see generally (Oh 2003).

[53] See generally (Sorieul 2000).

[54] See eg <http://www.uncitral.org/english/workinggroups/wg_arb/wp-118e.pdf> (2001).

as some already done tend to.[55] This may not be enough, in which case the NYC may have to be amended to achieve more uniform liberalisation of writing requirements; but such liberalisation – substantial, if not total – is clearly the global trend nowadays.

That trend also promotes informality in ICA. A first level at which this can occur is in the initial engagement of the arbitral process, by allowing parties to negotiate initial arbitral agreements with fewer formal exchanges of documentation. A second level can be in adjusting the process after disputes arise or as the arbitration proceeds, by allowing more informal renegotiation by parties of their initial arbitration agreement. However, the pressure towards more informality may be relatively limited in practice, as parties and especially arbitrators may tend to memorialise agreements in writing anyway.[56]

4. Multiple parties

There is considerably less global consensus on how to resolve problems arising from multiple parties affected by disputes that should or could be referred to arbitrators. A particular problem is consolidation of arbitral proceedings. There has been more scope for this under some countries' legislative regimes designed primarily for domestic arbitrations.[57] Some countries, including those following the ML approach, have tried to extend such possibilities to international arbitrations. However, they usually require separate "opting-in" to these consolidation regimes by all parties, which is rarely found in practice; and, even then, the requirements before arbitral proceedings can be consolidated are quite restrictive.[58] Similar problems, and considerable diversity, also arise at the level of institutional rules.[59]

This lack of global consensus, still, also prompts more formality in this aspect of ICA. In negotiating initial or renegotiated arbitration agreements, or claiming consolidation before arbitrators or courts based on such agreements, more time and arguments will be involved. In Figure 2 above, therefore, this issue (no 4) is positioned as involving distinctly more formality and less globalisation compared to the others (nos 1-3) which arise mostly when considering the scope and nature of arbitration *agreements*.

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[55] Cf eg (VanHoutte 2000); (Hill 1999).
[56] This is particularly likely in ICC arbitrations, where "Terms of Reference" are drawn up. See eg (Greenberg and Secomb 2002).
[57] See eg Australia's uniform Commercial Arbitration Acts ("CAA").
[58] See eg Australia's IAA section 24. For a quite strict approach to multiple parties in arbitrations in Australia recently, see eg *Origin Energy Resources Ltd v Benaris International NV & Woodside Energy Ltdr* TASSC 50 [2002].
[59] See generally eg (Hanotiau 1998).

5. Arbitrators (backgrounds, challenges, immunities)

A next set of issues (nos 5-9) mainly relates to the arbitral *process*, once engaged by a valid arbitration agreement. Commentators generally agree that good arbitrators are essential to an effective process. That generally means one that is managed efficiently, while reassuring the parties that their arguments are being given a fair hearing, so that even the losing party will accept the arbitrators' award – maximising chances of voluntary compliance when it is enforced against that party's assets.[60] Such voluntary compliance is extremely common in ICA, with losing parties very rarely contesting enforcement through local courts. This pattern is certainly helped by a growing international consensus clarifying the limited grounds under which enforcement can be refused under the NYC. However, it is also a tribute to effective management of arbitral processes by arbitrators, even over the 1980s when strong criticisms were being raised about over-formalisation of some ICA processes and their "capture" by national (especially US) legal traditions.

Some of the enduring high level of satisfaction with ICA, overall, probably stems from steady globalisation in terms of the background of arbitrators – and arbitration practitioners (lawyers, judges, academics, etc) who often end up as arbitrators. This globalisation has accelerated over the 1990s. A new generation of practitioners has emerged in Europe, and then the US, where the "grand old men" have largely passed on their legacy to a new generation. A similar changeover seems inevitable in more "peripheral" areas of the world. In the Asia-Pacific region, for example, some even refer to the "regionalisation" of arbitrators. However, this is clearly another instance of "open regionalism", with the popular arbitrators in the region very much linked – through institutional or more informal affiliations – with the "core" of the ICA world, and thus involved in global standard-setting.[61]

Such ongoing diversification of arbitrators nonetheless has contributed to more challenges brought by parties against arbitrators for lack of impartiality or independence,[62] often seeking a tactical advantage in arbitral proceedings. However, a more important factor generating such challenges was probably the "formalisation" culture, which appears to have peaked in the 1980s and early 1990s. As the ICA world has tried to meet that more general challenge over the last decade, we might expect fewer challenges to arbitrators. Arbitral institutions are also keenly aware of the need

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[60] See eg (Veeder 2002). More generally on the importance of minimal "procedural justice", see eg the classic study by (Lind and Tyler 1988).
[61] Cf (Jones 2003); (Garnaut 1996). See generally (Pryles 2002) (reviewed by me in 2003 *Uniform Law Review*).
[62] See generally (Partasides 2001).

to discourage vexatious challenges, retaining or amending their Rules accordingly. Perhaps increasingly, national courts are also starting to defer to decisions by well-regarded institutions rejecting challenges to arbitrators.[63] That sort of emerging global counter-trend should, in turn, give arbitrators more confidence to manage their proceedings more informally, speeding up the process even at the expense of giving parties less opportunity to present all possible arguments and evidence.

Arbitrators should also be encouraged in that direction by another noticeable tendency: providing for their immunity from civil liability when managing the arbitral process and issuing their awards. Legislation providing for such immunities may still not be very clear,[64] and one of the remaining "grand old men" argues that they can promote "irresponsibility" on the part of arbitrators.[65] His point about not readily extending immunity to private arbitral institutions is even more compelling, and that is still not such a clear tendency.[66] Overall, however, extending such immunities appears to be gaining momentum world-wide, and it too should encourage arbitrators and institutions to risk managing proceedings with less concern for a full panoply of formal safeguards.

6. Interim measures

Another important issue, particularly at the outset of arbitral proceedings, is the issuing of interim measures. As experienced practitioners well know, an interim measure of protection (like an order to preserve assets or evidence) can often force the party against whom it is issued to concede or settle the dispute.[67] By potentially shortening proceedings, such measures can therefore promote greater informality in ICA. This can also be promoted because the measures often have to be made urgently through an *ex parte* application, without the opportunity of hearing the party against whom they are being sought.

Unfortunately, there is no global consensus yet on the scope of measures of protection, and especially how to apply for them and to enforce them. There is

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[63] See *AT&T Corp & Anor v Saudi Cable Co* [2000] 2 Lloyd's Rep 127, discussed by (Eastwood 2001) and (Harrison 2001). The English Court of Appeal upheld a ICC ruling (given without reasons) that Yves Fortier QC (then President of the LCIA!) retaining him as arbitrator. [Check with Matt Secomb for other egs where ICC rulings upheld by national courts.]

[64] See eg NZ Arbitration Act 1996 section 13: "An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator."

[65] (Lalive 1999).

[66] But see eg proposed amendments to the CAA, taking the English Arbitration Act 1996 sections 29 and 74 (extending immunity to arbitral institutions), available via <http://www.sccinstitute.com/uk/Laws_and_Conventions/Arbitration_Act_1996_of_England_/>.

[67] A notorious example is the Bangkok Expressway dispute, lost by Kumagai-gumi in the 1990s. See eg XXX.

disparity even in the arbitral rules.[68] The ML provides limited guidance, and national legislatures have added little extra flesh to those bones.[69] There are also considerable difficulties in enforcing such measures through the NYC, requiring "final" awards.[70] The UNCITRAL Working Group has made considerable progress in debating revisions to the ML, but a major sticking point is whether arbitrators should be able to readily grant interim measures *ex parte*.[71] Until a compromise can be reached at this transnational forum, and states then agree to update their arbitration legislation in light of an amended ML (and probably, necessarily, an amended NYC), we are left on this issue with considerable national variation and restricted potential for greater informality.

7. Time limits (especially by institutional Rules, arbitrator practice)

The urge to speed up arbitration procedures recently is much more noticeable world-wide. In a few countries, this is given legislative support, either as a new general principle, or as time limits imposed for completing arbitral proceedings (unless the parties agree to extend those limits).[72] Much more important have been attempts by arbitral institutions to shorten time limits for various stages of the proceedings. Even the ICC, which prided itself on providing "value-added quality control" by having a council of senior arbitration practitioners (confusing known as the "Court") approve arbitrators and determine their Terms of Reference, now has a more streamlined process involving a greater role for its Secretariat to manage those and other aspects of the proceedings. As well as amending its general Rules in 1998, prompting other "competing" institutions to upgrade theirs around the same time also often to speed up processes,[73] the ICC amended its rules for determining arbitrator remuneration. The basis was changed from a time-charge system, to a flat rate depending largely on the amount at stake. Some commentators credit this amendment with improvements in speedily resolving disputes, first in ICC arbitration, then extending to international arbitrations through other institutions (even the LCIA, which retains a time charge system), and even now in some larger domestic arbitrations managed by experienced international arbitrators.[74] Arbitral

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[68] (Marchac 1999).
[69] Compare ML articles 9 and 17, with eg Australia's IAA section 23.
[70] Cf eg (Webster 2001).
[71] See eg <http://www.uncitral.org/english/sessions/unc/unc-36/acn9-524-e.pdf> (2003).
[72] See, respectively, English Arbitration Act 1996 section 1(a) ("(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal *without unnecessary delay or expense*"); Thai Arbitration Act 2002 (available via <http://www.eldi.or.th/>).
[73] See generally eg (Goldstein 1999; Greenblatt and Griffin 2001).
[74] Doug Jones Sydney Balloon Debate August 2003 (check for update - XXX); fast-track Anaconda arbitration in Melbourne (Bannon in CU Insights July 2003 - XXX).

institutions have also introduced expedited procedures since the late 1990s, typically for smaller amounts in dispute, although they appear not to have been heavily used and therefore are probably more important for signalling a change in mentality applicable to the full range of ICA proceedings. Thus, in the best tradition of the *lex mercatoria*, a new global norm – promoting greater speed and informality in arbitral proceedings – has spread quite rapidly, driven largely by the initiative of private parties, their advisors, an expanding set of other arbitration practitioners, and arbitral institutions.

8. **Evidence** (including 1999 IBA Rules)

Submission of evidence in ICA proceedings is another area in which private initiatives have played a key role. Even recent legislative enactments set very few mandatory requirements, other than "natural justice" – especially in the sense of parties being given sufficient opportunity to be heard.[75] Institutional rules, and UNCITRAL's Secretariat Notes for Organizing Arbiral Proceedings,[76] leave this area primarily to the parties and their arbitrators. Interestingly, another private organisation has stepped in to fill the void. The International Bar Association promulgated in 1999 a revised set of "Rules of Evidence in International Commercial Arbitration".[77] Parties can incorporate a reference to them in their original arbitration agreement, or (eg at the arbitrators' urging) when commencing arbitral proceedings. Although no empirical studies have been made as to their usage so far, they appear to be getting good reviews by practitioners. These Rules are seen to strike an acceptable balance, restating a world-wide consensus particularly between the common law and civil law traditions (and sub-traditions). They provide for quite limited scope for pre-hearing "discovery" or dislosure of evidence at the request of the other party, and early exchange of written witness statements combined with opportunities for cross-examination.[78] This global "best practice" standard indicates more formality in proceedings compared to the more robust approach of arbitrators in the 1950s and 1960s, able to rely on their personal authority and reputations to elicit appropriate amounts of evidence. Yet these IBA Rules probably signal, and reinforce, a shift back towards less formality or US-style proceedings than in the 1970s and 1980s.

9. Mediation during arbitration

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[75] See NYC Article XXX; and ML Article XXX.
[76] See <http://www.uncitral.org/english/texts/arbitration/arb-notes.htm> (1996).
[77] Reproduced at <http://www.asser.nl/ica/IBA%20rules-of-evid-2.pdf>.
[78] (Buehler and Dorgan 2000); (Raeschke-Kessler 2002).

A more contentious issue since the mid- to late-1990s has been combining arbitration with mediation. Prompted by the growing popularity world-wide of a range of ADR processes, facilitated by private service providers or annexed to court proceedings,[79] parties and their legal advisors began increasingly providing for "multi-tiered" dispute resolution clauses. A popular variant involves the parties first attempting (more or less structured) negotiations; then bringing in a third party mediator; then – if no settlement agreement can be reached – turning to an arbitrator authorised to make a decision binding on the parties. Courts around the world increasingly enforce such agreements, even at the mediation stage.[80]

The main debate instead centres around whether arbitrators can also seek to mediate the dispute they have been charged to resolve. This dual role has been quite common in various countries, with different backgrounds and for different reasons. In some countries, it carries over from a civil procedure tradition (like Germany's) more or less expressly requiring judges also to attempt to settle disputes.[81] In others, sometimes within that tradition (eg Japan) but also outside it (eg some Asian or Middle Eastern countries), the mediatory role played by at least some arbitrators is linked to – often very generalised – perceptions of *general* rather than legal culture.[82] In other countries again, notably the People's Republic of China, a more pervasive practice cannot be divorced from the political philosophy of a communist regime.[83] By contrast, however, the notion of the arbitrator acting as mediator continues to meet with strong resistance from practitioners within the common law tradition (in both English and US variants),[84] which has only recently moved towards a more active role also for judges in regular court proceedings. Although this dichotomy may be breaking down,[85] it still remains. It is therefore unsurprising that the 2002 UNCITRAL Model Law on International Commercial Conciliation expressly excludes from its scope the situation of arbitrators acting as mediators.[86] This presently limits the potential for injecting what would amount to the highest degree of informality in ICA proceedings. Such informality would follow from both the norms applied (mediators being free to openly go beyond the application of legal norms), and the flexibility of the process (mediators typically being able to "caucus" or meet separately with individual parties, which even sympathetic commentators see as problematic

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[79] See eg (Nottage 2003), and other country reports in that session.
[80] See eg (Pryles 2001).
[81] (Schneider 1998).
[82] (Sato 2001) (reviewed by me in [2002] *International Arbitration Law Review*)..
[83] See generally eg (Lubman 1991).
[84] (Bühring-Uhle 1996).
[85] Since 1990, for example, parties to arbitrations in Australia governed by the CAA can expressly agree for the arbitrator to act as mediator. See (Redfern 2001); and more generally (Schneider 1998).
[86] See UN General Assembly Resolution adopting Model Law on International Commercial Conciliation <http://www.uncitral.org/stable/res5718-e.pdf>; Articles XXX and XXX.

given the mandatory requirements of "natural justice" under the ML and the NYC[87]).

10. Locally annulled awards

The final stage of dispute resolution through arbitration involves *enforcement* of the award. Many of the topical issues introduced above, like writing requirements for arbitral awards (no 3) or arbitrators acting as mediators (no 9), can give rise to problems not only in engaging the arbitral process, but when it comes to enforcing an award which might have eventuated from the process (even unchallenged, at that stage). However, a very interesting problem highlighting especially the enforcement phase relates to awards which have first been set aside by national courts at the "seat" of the arbitration (often a developing country, with an older arbitration law allow for more scope for review than the ML), yet the winning party has nonetheless sought enforcement of the award (often in a developed country, party to the NYC).

Courts in France, Sweden, and the US have allowed enforcement of such "locally annulled awards", reinforcing the notion that ICA can and should be "delocalised" as much as possible from national courts.[88] World-wide agreement on this approach would significantly reinforce globalisation. It should also prompt more informality in arbitral proceedings, because arbitrators would be less concerned about challenges to their management of proceedings at the seat – secure in the knowledge that they could still find their locally annulled awards enforced overseas. However, more recent court judgments in the US and Germany have rejected such "delocalisation", indicating ongoing global dissensus,[89] and more potential still for formality in proceedings.

11. Extending the ML (international) regime to domestic arbitrations

Amongst *overarching* issues for ICA, one interesting trend recently is for jurisdictions to upgrade their arbitration legislation by extending all or most ML rules and principles, designed for international arbitrations, to domestic arbitrations. Article 1 states that the ML is to apply to arbitrations if parties to the arbitration agreement have their places of business in different states, or in three situations where the seat is outside the (same) state. Many countries, especially in the English law tradition, updated their arbitration legislation from the late 1980s through to the mid-1990s simply by enacting legislation based closely on the ML. Its application is therefore

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[87] See eg (Newmark and Hill 2000).
[88] (Read 1999).
[89] See eg (Freyer 2001) and (Weinacht 2002). See also the (typically English) criticisms from (Goode 2001).

mostly limited to international arbitrations having their "seat" in such countries. They left more or less intact their legislation for domestic arbitrations, derived primarily from English models and including more extensive powers for judicial supervision of the arbitral process, such as appeals for errors of law by arbitrators.[90] More recently, however, courts or legislators in some of these jurisdictions are beginning to extend ML principles to domestic arbitrations as well.[91] This trend is even clearer in countries following more the continental European tradition in civil procedure.[92] This should help correct aberrant court judgments recently in both Singapore and Australia, which ruled that parties' selection of ICC Rules indicated their intention to "impliedly opt-out" of the ML regime otherwise provided by legislation designed for international arbitrations, and to adopt instead the regime still provided in those jurisdictions for domestic arbitrations.[93]

One key point is that a shift towards the ML regime, even for domestic arbitrations, indicates more globalisation – further displacing for example the tradition peculiar to English law, despite its attraction throughout many former colonies still bound together in legal affairs through the Commonwealth. The other point is that this shift should bring greater scope for a more informal process – by limiting court supervision (especially regarding errors of law by arbitrators), and giving more scope for parties (or otherwise arbitrators) to adopt ad hoc or institutional rules allowing maximum flexibility (especially in arbitral procedure).

12. New types of arbitration (new areas, hybrids, state involvement)

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[90] See eg Hong Kong and Australia (1989), Singapore (1994) and New Zealand (1996). The latter abolished separate legislation, but largely kept to the English tradition by making divergences to the ML (including appeals for errors of law) applicable to domestic arbitration unless the parties "opted out" of that divergent regime. Malaysia retained almost all of its existing legislation based on old English law, but in the 1970s incorporated principles compatible with the ML by adding an amendment stating that (international) arbitrations administered by the Kuala Lumpur Regional Arbitration Centre would be governed by the UNCITRAL Rules, with no furthur court intervention permitted (such as appeals for arbitrators' error of law). Malaysia is now about to adopt a new regime, just for international arbitrations, based more extensively on the ML: (Hwang 2003).

[91] In New Zealand, for example, the Court of Appeal has drawn on the ML principle of "finality" in arbitral proceedings in support of the conclusion that appeals for error of law, even for domestic arbitrations, will not readily be granted (*Gold & Resource Developments NZ Ltd v Doug Hood Ltd* (2000) 3 NZLR 318). In Hong Kong, this trend has been more overt and pervasive, in initiatives to amend the entire legislative framework. In Australia, the Commercial Arbitration Acts ("CAA") – enacted uniformly in all States and Territories from 1984 and designed for domestic arbitrations – are likely to be amended from 2004 drawing still on the English Arbitration Act 1996. However, it seems quite likely that amendments to the ML-based International Arbitration Act expected by around 2005 will prompt then a further round of CAA amendments, which will extend the ML approach also to domestic arbitrations. See further (Nottage 2003).

[92] In the German law tradition, see eg Germany itself (1998), Korea (1999), and Japan (2003). Taiwan's new law (1998) is also perceived as largely compatible with the ML (Li 1999). In the French/Spanish law tradition, see eg Thailand (2002) and Venezuala.

[93] In fact, the Singaporean legislature has already acted to amend (twice!) the Interantional Arbitration Act there, to over-rule such judicial reasoning: (Smith, Lim, and Choong 2002). This should help keep international arbitrations within the ML regime otherwise provided by the Act.

These pressures are also apparent in some areas where arbitration has sought to attract "new business".[94] One such growth area is in resolving new *types* of disputes, such as those involving professional athletes. Best-known are disputes resolved by the Lausanne-based Court of Arbitration for Sports ("CAS").[95] Most of these involve claims by athletes seeking to overturn decisions by national disciplinary bodies preventing them from competing in international sporting events, after holding that these athletes had taken illicit performance-enhancing drugs. This is a pseudo-commercial dispute because such decisions, if upheld by CAS, are usually fatal for very lucrative sponsorships and other contracts between the athletes and third parties. Benefiting from expertise in the sporting world, CAS can also be selected as the arbitration institution to resolve disputes directly involving such sponsorship contracts, although the cases have been fewer than arbitrations involving doping or similar claims.

A prominent feature particularly of the latter group of arbitrations is that CAS Rules provide for very speedy awards.[96] These often have to be rendered during the sporting event when allegations have been made about doping or other grounds for athlete disqualification. Further, because the seat of CAS arbitrations is Switzerland, even if the *hearings* may be held in other countries (like Australia during the 2000 Olympics), its Private International Law Act of 1987 applies and appeals for error of law cannot be appealed.[97] This allows arbitrators some leeway or discretion in making their awards, thus reinforcing potential for a more informal approach. In addition, the CAS arbitrators are drawn from all over the globe, meeting at or for international events associated with transnational events (like the Olympics), and have built an impressive jurisprudence based on norms not dominated by any particular national law. Sports arbitration therefore provides an excellent example of a more globalised new area of practice, as well as one allowing for significant informality.

Specialists in arbitration have also paid close attention to new hybrid processes like domain dispute resolution.[98] This was developed to deal quickly and effectively with "cybersquatting" and other abuses of the system which developed to register a domain name on the internet, which expanded exponentially from the mid-1990s. The registrant agrees to submit to a private panel any claims that might be brought by a third party arguing that the registrant had registered a domain name

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[94] See also eg (Alford 2001); (Block 2002); (Bryne-Sutton 1998); (Smith 2000); (Horn and Norton 2000).
[95] See generally (Sturzaker 1999).
[96] Cf also eg (Kaufmann-Kohler and Peter 2001) and (Tompkins 2000).
[97] See eg *Raguz v Sullivan* 2000 NSWCA, discussed in (Sturzaker and Godard 2001).
[98] See eg (Reynolds 2003).

identical or confusingly similar to the third party's trademark, in bad faith and without legitimate grounds – usually, to offer transfer of the registered domain name to the third party at an unconscionable price. This process is only a hybrid or "proto-arbitration", by contemporary standards, because (a) some courts have held that they cannot force the registrant to abide by the panel process if it instead wishes to take the dispute before the courts, and (b) the panel decision can be appealed to national courts within 10 business days of it being rendered, even if the registrant had allowed the panel process to go forward.[99] However, both these features were found in older international "arbitration" law regimes, before legislation – reinforced by the NYC and/or ML – was amended to (a) require courts to defer the matter to arbitrators if parties had so agreed, and (b) limit appeals to courts (especially for errors of law). Moreover, very many panel processes are completed, with only a very few results "appealed" to national courts, giving the process and awards considerable *de facto* binding force – like "pure" arbitrations in other fields, nowadays. In addition, many of the panelists selected to resolve domain disputes have experience in more conventional forms of ICA, and several of the institutions accredited to administer the panel processes are also involved in other ICA.[100] Accordingly, although one of those institutions (the World Intellectual Property Organisation) is careful to refer to the panel process as "administrative" – perhaps also because it is fearful of criticisms, especially from the US, that registrants are being "forced" into the process when they register domain names – this system should be seen as very closely interrelated with the broader ICA world.

From this perspective, one key feature of the domain name dispute resolution system is again that it is informal, particularly by setting very tight time limits to generate panel decisions (typically, cancelling the registration so the registrant can no longer use it). It is also thoroughly globalised, in terms of the origins for the panellists and administering institutions, and especially the general principles applied and a growing body of published awards.

Another growth area for ICA is in processes involving private interests on one side, and nation-states on the other. As mentioned in Part II above, the rebirth of ICA in the 1950s and 1960s was driven initially by such disputes,[101] so it is not surprising that the renewed emergence of this combination of parties again brings pressures towards more informality, and especially global standards. Nowadays, a burgeoning area of ICA practice again involves disputes between private investors and nation-states or their instrumentalities. The 1965 Washington Convention

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[99] See para 4(k) summary at <http://www.icann.org/udrp/udrp-policy-24oct99.htm>; and US court judgments, from LegalTrac recent citations XXX.
[100] See eg HKIAC (<http://www.hkiac.org/>), SIAC, KCAB.
[101] Cf eg (Boeckstiegel 2000).

required states to further "consent" to arbitration under the auspices of the World Bank's ICSID, and this has been provided increasingly since the collapse of the communist bloc in Eastern Europe, particularly through Convention member states enacting liberal foreign investment legislation or concluding bilateral investment treaties submitting to arbitration claims by private investors from another member state. Because a nation-state is involved, so that public international law rules are often applied (eg to determine compensation for its expropriation of a private investment), these ICSID arbitrations have a strong globalised flavour. This is reinforced by an autonomous annulment procedure within ICSID,[102] substituting for review of an award by a nation's courts as in enforcement under the NYC. Again, moreover, the arbitrators are drawn from a diverse pool from around the world. These features can also allow for more informality in procedures, although the often huge amounts at stake and publication of arbitral awards do result in more formality than the sports or domain name dispute resolution processes just described.

13. Confidentiality

A final overarching "hot issue" in ICA is precisely whether or not details of arbitrations can be publically disclosed. The fact that arbitration has been agreed to, or even commenced, is usually not contentious. The main problem concerns confidentiality of evidence and arguments presented during the arbitral process, and details of the award.[103] As shown by Figure 1 in Part II above, confidentiality has been widely perceived as a major advantage of ICA compared to cross-border litigation. Many reasons for this can be imagined, ranging from less possibility of commercial information getting into the public domain (fatal, for example, if it constitutes knowhow which might be licenced), to less scope for political controversy if a state is party to the arbitral procedures. Advantages may also vary depending on other factors, such as the amount in stake. In particular, greater confidentiality may be required by parties if more is in dispute. Higher-value stakes might also bring calls for greater formality in arbitral proceedings. Thus, greater confidentiality obligations may be associated with more *formality*. However, for any given amount in dispute, greater confidentiality should create scope for more *informality* in proceedings. This is because parties will be less worried about disclosing information without elaborate qualifications. More disclosure of information, in turn, should open the way to more chance of settling disputes or otherwise concluding the arbitral process more quickly.

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[102] 1965 Washington Convention, articles 50-55 (at <http://www.worldbank.org/icsid/basicdoc-archive/9.htm>).
[103] See generally eg (Trakman 2002).

However, along the "glocalisation" parameter, the 1990s revealed persistent divergence among national legal systems. France has one of the strongest systems for preserving confidentiality, extending even to certain annulment proceedings. New Zealand's 1996 legislation introduced a statutory implied term of confidentiality, and England maintains a similar duty through case law. Sweden has a more open-textured rule derived from the contractual obligation on parties to arbitration to act in good faith. By contrast, since a High Court decision in 1995, Australia does not recognise an implied duty of confidentiality (as opposed to privacy of arbitral proceedings), meaning that parties must expressly contract for confidentiality when drafting their arbitration clauses. This decision also drew on decisions in some US jurisdictions.[104] Express confidentiality duties can be incorporating by adopting rules of arbitral institutions, but not all such rules add or restate sufficiently those duties, and problems remain when parties adopt ad hoc arbitrations (still common in several countries, especially in sectors like construction). Thus, in Figure 2 above, the situation for this issue (no 13) is positioned as considerably less "globalised" than issues 11 (new types of arbitration) and 12 (extending the ML to domestic arbitrations), and even somewhat less "informal" than them.

IV. Conclusions

The analysis presented in Part III may seem too schematic or impressionistic. Two of the deceits of comparative lawyers are to focus on case law or other more readily accessible "issues", and then try to over-generalise from such a biased sample, despite longstanding calls to adopt a more contextual or "functional" approach.[105] Nonetheless, in the absence of systematic empirical studies of what has happened to ICA especially since the mid- to late-1990s, the analysis hopefully weaves together a rich vein of evidence suggesting that the pendulum has swung back considerably since the 1980s.

First, more informality has been re-injected into ICA. This is especially true in relation to speediness of proceedings. Although that may have been reinforced simply by more certainty of applicable ICA standards,[106] helped along by some of the "formalisation" over the 1970s and 1980s, it also seems to arise from a more or less deliberate shift in preferences among arbitration practitioners, conscious of urgings from the business community. Speedier arbitral proceedings, in turn, can also lead to

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[104] (Brown 2001). [Check also re Philippines.] New Zealand is very likely to retain some statutory implied term of confidentiality: (NewZealandLawCommission 2003).
[105] (Nottage 2003-forthcoming).
[106] Cf eg (Hunter 2000); and more generally (Nottage 2000).

greater cost savings.[107] However, the experience of "case management" in civil court procedures worldwide[108] suggests that this may not always follow, as lawyers and arbitrators may end up generating similar costs but just at the earlier stages of the (somewhat faster) proceedings. Individual parties and their arbitrators should decide on appropriate trade-offs of formal safeguards, versus time and cost savings, and then carefully design and adapt their arbitral process.[109]

Secondly, this shift has been paralleled by considerably greater globalisation of the ICA world over the last decade. This seems to have run together with greater informality. Global standards remain quite open-textured, thus allowing more scope for arbitrators to apply more substantive justice.[110] Parties and practitioners from non-Western countries may still be more comfortable with this situation.[111] The scope of participants in ICA has certainly expanded world-wide. Yet significant consensus has been achieved on difficult and often initially contentious issues. Even when dissensus still prevails, an international *lingua franca* of ICA concepts is used to debate them effectively. A new generation is emerging, fully conversant with this common language, thanks to more broadly based "events" like the annual Vis Arbitral Moot competition.[112]

However, as Figure 2 in Part II shows, not all issues line up wholly consistently along these two parameters, and almost all of them are still being debated. Over the next decade, the pendulum may switch direction again, towards a re-formalisation of ICA and/or more nationalism or "closed regionalism". The latter possibility is a particular concern in the early years of the 21st century, as the US in particular turns away from multilateral solutions and towards a revival of unilateral and "selective regional" approaches to resolving geo-political problems world-wide. This broader context of the *lex mercatoria* must be kept in mind, even though it has been and will probably always be driven primarily by the practices and expectations of cross-border commerce.[113]

What does remain clearer is that ICA is well equipped to adapt its vitality, rooted in the incentive structures built in through a strong commitment to party autonomy,[114] to adapt to the changing needs of business *and* states. This "procedural *lex mercatoria*" should therefore continue also to be the primary generator of the "substantive *lex mercatoria*"; and both can allow us to better understand how law

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[107] See more generally eg (Peter 2002); and (Li 2001).
[108] See eg (Zander 1997).
[109] See also generally (Leahy and Bianchi 2000).
[110] This possibility, despite more procedural safeguards and formalisation of arbitral processes, is alluded to by eg (Nariman 2000) and especially (Mayer 2001).
[111] See eg (McConnaughay 1999). But cf eg (Nakamura 2001).
[112] (Nottage and Sono 2000).
[113] Cf generally (Berger 2001).
[114] (Mustill 2002).

evolves, especially in our increasingly globalised world.

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