ARBITRATION INVOLVING GOVERNMENTAL ENTITIES

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I. INTRODUCTION

The adoption of arbitral dispute resolution into the law of Brazil was akin to religious conversion. It was a transformation of faith. In 1996, by means of the Brazil Arbitration Act,[1] Brazil turned away from a long standing disparagement of arbitration that distinguished it from the adoptions of arbitration in other major states of the global economy. Brazil had been at the extreme in rejection of arbitration as too invasive of the state's sovereign prerogatives.[2] Then, in a reversal, marked by the 1996 legislation, Brazil converted to a broad and deep adoption of arbitration for dispute resolution. Within only a few years of passage of the Act, arbitration permeated Brazilian legal culture, to become a principal means for dispute resolution throughout the economy of Brazil. And in 2015, notwithstanding Brazil's history of resistance to arbitration as too threatening to national sovereignty, another arena of resistance was breached, when arbitration was legislated for Brazil as a legitimate means for resolution of disputes involving government and governmental entities throughout Brazil.[3]

Despite the significance of the adoption of arbitration for government and its agencies in Brazil and elsewhere, there has been little if any examination of the engagement of government and its lawyers in arbitration. This lack of focus on governmental arbitration, as a subject worthy of independent examination, is a deficiency not only for Brazil, but globally, given the pervasive and growing role of arbitration as a dispute resolution process for government in most developed national legal systems. Yet there *are very* special and important considerations for the government lawyer in choosing arbitration, considerations that should be

[1] Lei No. 9.307, 23 de Setembro de 1996, D.O.U. de 24.09.1996 [hereinafter *Brazil Arbitration Act*]. *See* Renata Brazil-David, *An Examination of the Law and Practice of International Commercial Arbitration in Brazil,* 27 ARBITRATION INT'L, 57, 61 (2014), for a discussion of early developments under the *Brazil Arbitration Act*.

[2] The historic negativity towards arbitration in Latin America was manifest in the so-called "Calvo doctrine," which prohibited any treatment of foreigners different than Latin American nationals. *See* Bernardo M. Cremades, *Disputes Arising Out of Foreign Direct Investment in Latin America: a New Look at the Calvo Doctrine and Other Jurisdictional Issues*, Vol. 59 No. 2 DISP. RESOL. J. 78, 80 (2004), for background on the Calvo Doctrine. Before enactment of the *Brazil Arbitration Act*, foreign awards could only be enforced the same way as foreign court decisions, requiring confirmation before the local court of the state where the award was issued. Article 34 of the *Brazil Arbitration Act* provided that arbitral awards would be recognized and enforced in Brazil in accordance with international treaties ratified by Brazil, thus providing parties the basis under the law of Brazil for relying on the *New York Convention* for the enforcement of foreign arbitral awards.

[3] Lei No. 13.129, 26 de Maio de 2015, D.O.U. de 27.05.2015 [hereinafter *2015 Amendment to Brazil Arbitration Act*].

identified and evaluated, to maximize the social benefits arbitration affords, yet minimize the risks inherent in governmental engagement in arbitration. This is necessary no less than to ensure that values of rule of law within constitutional democracy will not be undermined by arbitration, and that arbitration can be successfully employed to serve the public good.

The experience of Brazil is particularly of note for examination of government engagement in arbitration because the adoption of arbitration by Brazil has presented so significant a transformation, in such a short time frame, relative to other major states. As the result, Brazil's adoption of arbitration frames in more pronounced relief than perhaps anywhere in global legal culture, the choices available for governmental dispute resolution, and the implications for government of the adoption of arbitration.

Before the adoption of the Brazil Arbitration Act in 1996, arbitration was not systemically incorporated anywhere in the law of Brazil, and was largely relegated, as by the Brazilian Constitutions of 1891, 1934 and 1946 to avoiding armed conflict between Brazil and other states.[4] While there was piecemeal recognition of arbitration as dispute resolution process, as in the Brazil Code of Civil Procedure of 1973, commercial arbitration depended upon judicial confirmation. Generally arbitration was viewed with skepticism and suspicion. A most prominent jurist of the time described the prevailing view of arbitration as "primitive, regressive" and as compromising state power as "an efficient weapon to a late capitalism".[5]

The Brazil Arbitration Act of 1996 was a 180 degree turn away from this mindset. This legislation upended the history of refusal to legitimate arbitral process as a generally legitimized form dispute resolution under Brazilian law. With the adoption of the Brazil Arbitration Act in 1996, arbitration was fully legitimized for Brazil. Yet the fact that arbitration for government attorneys was not authorized until 2015 evidenced continuing resistance and skepticism, particularly that arbitration could not serve the broader public goals of the legal system. Moreover, even after passage of the Arbitration Act in 1996, there was still significant resistance, including immediate challenge to the constitutionality of the Act.[6]

Arbitration in Brazil, whether exclusively commercial or involving government, is now fully recognized as a basis for jurisdiction independent of the

[4] Thus arbitration was used concerning territorial disputes between Argentina and Brazil in 1900 (favorable to Brazil), the United States shipwreck patrimonial dispute against Brazil of 1879 (favorable to USA), and the dispute against Great Britain regarding the arrest of English officers in 1863 (favorable to Brazil). Savio R. Sordi et. al., *The Introduction of Arbitration within the Brazil Legal System*, Vol. 4 No. 5-6 PANORAMA OF BRAZ. L. 306, 313 (2017). The Constitution of 1824 contained provisions on arbitration, the Commercial Code of 1850 made arbitration mandatory for certain commercial disputes, and provisions on arbitration were contained in the Civil Code of 1916 and Code of Civil Procedure of 1939.

[5] Francisco C. Pontes de Miranda, COMENTARIOS AO CODIGO CIVIL DE PROCESSO CIVIL TOMO XV 344 (Rio de Janeiro: Forense ed., 1977).

[6] However, the challenge resulted in complete confirmation of the constitutionality of the entire Act by the Federal Supreme Court of Brazil. *See* the decisive decision, *Kingdom of Spain, MBV Commercial and Export Management Establishment v. Resil Industria e Comécio Ltda*, SE No. 5206-7 AgR (2001).

judicial system, with the same force as a State judge ruling, but also as fully enforceable. Moreover, despite Latin America's historical resistance to domination by the legal culture of the Northern hemisphere, Brazil's Arbitration law, in most basic respects, now replicates US and other Western nations arbitration law and the International arbitration law the US and other Western nations legal systems engendered.

Arbitration is now indeed a principal means for dispute resolution for both private parties and government in Brazil. Brazil has taken arbitration into its national law full scale, having not only legislated the Brazil Arbitration Act in 1996 and the amendments of 2015, but having joined the New York Convention on the Enforcement of Foreign Arbitral Awards,[7] and having overcome the Constitutional and cultural hurdles that constituted post-legislative resistance.[8]

Despite Brazil's status for many decades now as a principal player in the world of contemporary international trade and investment, it remains notable that, because Brazil was near last among the major states of the world to adopt arbitration - either for domestic or international dispute resolution – arbitration is still essentially experimental for Brazil. This is especially true for the government lawyers of Brazil, who are still engaged in testing the value of arbitration. What is particularly notable about this, is that Brazil's legal community adapted to arbitration, also in a remarkably short time span, and Brazil has taken leadership in the utilization of arbitration in Latin America and international utilization of arbitration.

Notwithstanding the relatively swift and profound conversion to arbitration, it remains notable that Brazil did delay, and treat as separate legislation for the adoption of arbitration, the matter of arbitration by government and governmental entities. It appears to have been appreciated, early on, that arbitration by government raised independent concerns.

We see in that hesitancy the concern that arbitration did not always suit the objectives of government involvement in dispute resolution. But why so? Responding to that question can be crucial if arbitration is to serve the public interest in any particular case. Because arbitration means avoidance of the constitutionally mandated legal system of trial and appellate courts, the concern must be not only to

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[7] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N., June 10, 1958 [hereinafter *New York Convention*], (to which every major trading nation except Taiwan is party, requiring national courts to enforce valid arbitration agreements and awards, even if those awards misapply the governing substantive law).

[8] Analysis of the results since the passage of the Brazil Arbitration Act in 1996 confirms that arbitration has been broadly accepted as a major mode of dispute resolution throughout the Brazilian legal system. *See* Luiz Olavo Baptista and Marian Cattel Gomes Alves, *BRAZIL*, THE INT'L ARBITRATION REV., 88, 88-89 (2017). *See also* Carlos Alberto Carmona, ARBITRAGEM E PROCESSO: UM COMENTARIO À LEI 9.307/96, 27 (Atlas ed. 2009) An assessment of a prominent analysis of the first ten years of legitimization of arbitration under the *Brazil Arbitration Act*, declared "[t]he undeniable success of arbitration in Brazil... What was pure theory became practice and everyday routine; what was an impression became a fact; what was speculation entered the world of facts. [...] everything that was foreseen has actually happened accordingly to what was expected: fear has been overcome... the arbitration has been rediscovered.").

elucidate the advantages of arbitration, but to expose what may be sacrificed, in substituting arbitration for the formal legal system of adjudication, and its guarantees of due process and rule of law.

Arbitration involving public administration, as separately brought into Brazil law by the 2015 amending Act, is sometimes described as a 'game changer' for the Brazil government's interaction with its public constituencies. Just as the 1996 Act established arbitration as a principal mode of dispute resolution throughout the private sector, the 2015 amendments established arbitration as a principal and comprehensive recourse for government. The 2015 amendments authorize every public body, including the Brazilian Government as such, to enter into agreements for arbitration of its disputes, whether with private parties and commercial entities or associated government agencies. This authorization includes public concession agreements, public-private partnerships and other public entity involvement in the economic life of Brazil, and especially of importance, critical social and economic sectors such as energy and infrastructure.

In light of the new prominence of arbitration for dispute resolution for public administration in Brazil, what are the special concerns? They are not fully fleshed out in the legislation of 1996 or 2015 or Brazilian dispute resolution experience, given the short existence thus far of arbitration by government and governmental entities in Brazil.

Given the lack of articulation and the abbreviated experience, the best guide to arbitration as it impacts governmental concerns in Brazil is to consider the experience and elaboration of governmental arbitration in other national legal systems, and internationally, where arbitral process has had more time to mature. Accordingly, this article will draw, to better understand the significance of arbitration for the government lawyer in Brazil, particularly on the domestic arbitration in the United States and international arbitration, where the experience of arbitration involving public policy and national interest considerations is long established, prevalent and most instructive.

For the government lawyer, as representative of the state, the analysis should begin with understanding, that the choice to arbitrate is not simply a choice of legal process. Choosing arbitration is a strategic choice about what government, as client, is seeking to accomplish. The choice to arbitrate, and in what form, must be evaluated for the government lawyers working in the trenches of dispute resolution, by weighing the strategic advantages and disadvantages of arbitration in reaching the objectives of government against alternative strategies for dispute resolution.

The alternative strategies range from exercise of power in its most raw form, to the various modalities for utilizing law and lawyers. One must consider broadly the options for dispute resolution and their consequences for good government. To see the challenge in the large, consider that, early in United States labor history, labor disputes were resolved in street fights between iron club wielding workers and company mercenaries - a form of dispute resolution – more or less on the same plane as the dispute resolution process that currently occurs through violence in the drug wars of Rio de Janeiro, Brazil. In the United States, there evolved, however, the

civilizing alternative of the legal obligation of 'good faith negotiation', now the core concept of dispute resolution under the US National Labor Relations Act.[9] And now we all have available, both domestically and internationally, a great variety of modalities for nonviolent dispute resolution - negotiation, mediation, litigation, arbitration. These more virtuous forms of human dispute resolution are now available for virtually every field of activity covered by law. So arbitration, agreed by way of a contract clause, or *ad hoc* after a dispute has developed, is at bottom a political decision, a matter of strategic choice among the available alternatives for dispute resolution, as to which government lawyers need to evaluate the relative costs and benefits.

II. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

What, then, are the advantages and disadvantages? Why should government abandon the alternative prerogatives of sovereignty, and the constitutionally established adjudicatory process to choose the alternative of arbitral process?

There is, of course, the conventional wisdom about arbitration; that arbitration is cheaper, faster, less encumbered by procedural rules, that it can assure greater confidentiality than litigation, and that now under both international law, and by way of the NY Convention, and in Brazil's domestic law, by way of the Brazil Arbitration Act, an arbitral award is equally enforceable as a court judgment. Actually – arbitration is better as to enforceability – because the grounds for appeal of an arbitral award are so narrow.[10] Thus both under the New York Convention and most arbitration systems, national and international, and including Brazil's Arbitration law, arbitration assures greater and generally more expeditious *finality* than litigation. This advantage of arbitration may be particularly advantageous for arbitration involving government and its agencies, when time is critical, as for example, for environmental and water rights disputes.

Another item of the conventional wisdom about arbitration, that the government attorney would be well advised to take into account, is that arbitration can provide greater opportunity to secure a decision-maker known to have knowledge, and also experience, in the field of law and controversy at issue. In contrast to the chance and often arbitrary nature of assignment to a litigation judge, who may or may not have the requisite expertise, arbitration gives all parties the opportunity to weigh in on the arbitrator's appointment, and accordingly the arbitrators qualifications. Indeed, the value of this opportunity goes well beyond the

[9] United States National Labor Relations Act, 29 U.S.C. §§ 151-159 (1935).

[10] *See BRAZIL*, *supra* note 8, at 95. *See Brazil Arbitration Act*, *supra* note 1, at Art. 30 ("[t]he only exception is the right of the parties to file a request for clarification to resolve material errors, ambiguities, contradictions or doubts in the arbitral award."); *See Brazil Arbitration Act*, *supra* note 1, at Art. 32 (providing narrow grounds to set aside the arbitral award that are primarily procedural issues, such as the award being issued by someone who could not have acted as an arbitrator. Further limiting the appealability under the BAA, the request to set aside an arbitral award must be filed within ninety days of receipt of the award). *See also An Examination of the Law and Practice of International Commercial Arbitration in Brazil, supra* note 1, at 61 (stating the courts have no power to review arbitral awards on the merits).

technical or legal expertise of the decision-maker, to the even more fundamental and important questions of competence and minimization of bias. The comprehensive professional competence of the litigation judge assigned one's case is the risk any lawyer runs in going to court. It may be of critical value to avoid that risk, particularly for the government lawyer, often charged with politically provocative cases. The ability to vet and choose the decision-maker, accordingly, can also be of greater value for the government lawyer.

However, like all conventional wisdom, the conventional wisdom about arbitration must be qualified in context. And considered in particular context, the conventional wisdom about arbitration is sometimes just plain wrong. The reality of arbitration, both under national law, and in international arbitral fora, demonstrates the shortcomings of the conventional wisdom, particularly as arbitration has become an increasingly dominant form of dispute resolution, not only for individuals and small legal entities, but also for very large entities. Today there is more likely a complexity of substantial economic and political interests at stake in arbitration, and it has become increasingly infused with the more formal procedures of litigation such as discovery, motions practice, submission of briefs and written awards. This has importantly altered the character of arbitration in ways that contradict the conventional wisdom as to the supposed advantages of simplicity and expedition.[11]

Thus it is important to view with skepticism the most common proposition of the conventional wisdom about arbitration – that it is faster and more cost effective. That proposition may or may not be true, depending on the scope and import of the matter at hand. Arbitration ***is*** usually faster and cheaper, and that may be of considerable significance. One study reports that in 2010, litigation in Brazil averaged 12 years, while the average arbitration took 14 months.[12] So the evidence apparently is that arbitration still does normally result in very substantial reduction in time and costs, particularly as cases are smaller and less complex.

But fully considering the actual experience and record of arbitration, the evidence is that for any particular matter, arbitration is often not faster nor more cost effective than other modalities of dispute resolution.[13] This may be so for any number of reasons. One of the most significant reasons, at least in US arbitration, apart from the increasing formalities akin to litigation, is that one of the few bases on which an arbitrator's award can be reversed, is if the arbitrator has refused to entertain relevant evidence.

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[11] Concerning the reality that arbitration is commonly just as costly and time consuming as court litigation, and increasingly dominated by legal formalities, See, e.g., Alan Frecon, Delaying Tactics in Arbitration, Vol. 59 No. 4 DISP. RESOL. J. 40 (2005); Gerald F. Phillips, Is Creeping Legalism Infecting Arbitration, Vol. 58 No. 1 DISP. RESOL. J. 37 (2003); Perry A. Zirkel and Andriy Krahmal, Creeping Legalism in Grievance Arbitration: Fact or Fiction?, Vol. 16 No. 2 OHIO. ST. J. ON DISP. RESOL. 243 (2001).

[12] *See* Wilson Fontes Ribeiro, *Alternative Dispute Resolution in the Public Sector: The American Experience*, Vol. 3 THE GEORGE WASHINGTON UNIVERSITY, INSTITUTE OF BRAZILIAN BUSINESS AND PUBLIC MANAGEMENT (2005) (providing deeper analysis on trial times and aspects of alternative dispute resolution); Sophie Pouget, Arbitrating and Mediating Disputes, World Bank Group, International Finance Corporation, (2013) (analyzing arbitration timelines in various countries).

[13] *See supra* note 11.

In general arbitrators are accorded broad discretion as to evidentiary decisions in favor of expeditious hearing.[14] However courts do find due process violations where arbitrators exclude material evidence, and this may be a basis for a court to vacate an arbitral award.[15] So the inclination of the arbitrator, interested of course in avoiding reversal of his or her award, is to admit into the proceedings all evidence offered, however tenuous its relationship to the issues.[16]

Furthermore, for the arbitrator, the exaggerated admission of evidence is compounded by the reality that the arbitrator is typically paid on an hourly or daily basis. So the arbitrator may be inclined to accept any opportunity to run up additional time. The salaried judge, whose salary is the same no matter how heavy or light the caseload is, to the contrary, inclined to do all he or she can to lighten the caseload. So moving a matter to arbitration improves the income for an arbitrator and lightens the caseload for a judge, an attractive result for both. Moreover, as to cost, it is also important to keep in mind, that in arbitration, each party is paying the arbitrator by the hour or day - maybe three of them, depending upon how the arbitration is structured - along with substantial administrative fees when an arbitral institution is involved. In judicial litigation, of course, the state pays both for the justice system and the judge.

Another item of conventional wisdom about arbitration being superior to judicial litigation that the government lawyer needs to consider more critically, is that arbitration can better serve to preserve a working relationship between the claimant and respondent, while resolving disputes. This is best illustrated by the standard construction contract of the American Institute of Architects, wherein the architect is in effect designated as arbitrator in being charged to resolve disputes between owner and contractor, so that construction can proceed to completion,

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[14] *See, e.g.*, Legion Ins. Co. v. Insurance General Agency, Inc., 822 F.2d, 541, 543 (5th Cir. 1987); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268 (2nd Cir. 1971).

[15] *See, e.g.*, Confinco, Inc. v. Bakrie & Bros., 395 F.Supp. 613 (S.D.N.Y. 1975); Harvey Aluminum v. United Steel Workers of America, 263 F.Supp. 488 (N.D. Cal. 1967). *Also see* Federal Arbitration Act, 9 U.S.C. § 10(a)(1)–(4) (2002) "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration... where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in reusing to hear evidence pertinent and material to the controversy."

[16] This can extend the time and cost considerably beyond a comparable litigation. Adjudication before a litigation judge is much more constricted by rules limiting the admission of evidence – for example, the rule precluding hearsay evidence where a witness would state what he claims to have heard from someone else. *Compare,* Commercial Arbitration Rules and Mediation Procedures, Rule 34 (2013 Am. Arbitration Ass'n) (stating "Conformity to legal rules of evidence shall not be necessary... The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."), with JAMS Comprehensive Arbitration Rules & Procedures, Rule 32 (2014 JAMS) (stating "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.")

notwithstanding the disputes that almost invariably arise before arriving at completion.[17] However, whatever the field, it is the widespread experience that once the contractor and owner hire their own lawyers, the relationship between contractor and owner is destroyed, rarely allowing its reconstruction. The project simply stops, irrespective of the availability of architect as arbitrator.

But for governmental arbitration, stopping may not be possible. The need to get along with the various constituencies that government governs, on a continuing basis, is one factor that makes arbitration more attractive for government than judicial litigation. This can be true for disputes between government agencies that must continue in a cooperative relationship, for disputes between a government agency and a public/private partnership, or between government and an entity with which the government necessarily has a long term evolving relationship; for example such as between the government of Brazil and the oil company Petrobras.[18] So the conventional wisdom that arbitration can help sustain an important relationship can be correct, and especially advantageous for government and its agencies.

But also what needs to be addressed, with greater skepticism, is the conventional wisdom that a principal value of arbitration is that it can better assure confidentiality than other modalities of dispute resolution, particularly as compared with judicial litigation. There does appear to be a presumption of confidentiality in arbitration. All major institutional arbitration rules guarantee the confidentiality of arbitral hearings,[19] and typically the award is kept private, although as with all matters in arbitration, the parties can agree otherwise. In commercial litigation, the principle of confidentiality serves to secure such matters as trade secrets and reputation, and avoiding stock impacts. But should a government lawyer prefer the confidentiality that arbitration can more likely assure? It is always tempting, of course, to extend a blanket of confidentiality over one's affairs, whether arising in the office or in the bedroom.[20] But the better angels of one's nature, as a government attorney, instruct otherwise. For a government lawyer, confidentiality

[17] Under the American Institute of Architects standard form contracts, the architect serves as the initial arbiter of disputes between contractors and owners. If the architect arbitrator's decision is unacceptable, the standard form contract then calls for formal mediation, followed by arbitration. This method of dispute resolution is intended to resolve disputes "without delay and expense of courtroom proceedings". American Institute of Architects, You and Your Architect, at 7.

[18] See generally Anderson Cooper, Brazil's "Operation Car Wash" Involves Billions in Bribes, Scores of Politicians, CBS 60 MINUTES, May 21, 2017, available at https://www.cbsnews.com/news/brazil-operation-car-wash-involves-billions-in-bribes-scores-of-politicians/. Also see infra, notes 20 and 21.

[19] See, e.g., G.A. Res. 65/22, 2010 UNCITRAL Arbitration Rules (2010), art. 21(3), 28(3).

[20] The Daily: Friday, Mar. 9, 2018, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/podcasts/the-daily. Michael Barbaro of The Daily reviews the elaborate system that has developed to silence women who level accusations against powerful men. One of those women is Stephanie Clifford (known as Stormy Daniels), a pornographic actress who claims to have had an affair with American President, Donald J. Trump. Trump's lawyer negotiated a contract with Stephanie Clifford to prevent exposing their relationship to public scrutiny and potential legal charges. Barbaro emphasizes that the freedom to privately resolve disputes and avoid judicial or public scrutiny of even the most egregious conduct has become engrained in dispute resolution at the highest level of U.S. political and social society. Barbaro opines that the ability to pay for zero transparency of such conduct is a system unlikely to disappear from U.S. culture in the long-term because of its widespread use. See also Toby Luckhurst, The Stormy Daniels-Donald Trump story explained, BBC NEWS (Mar. 11, 2018), http://www.bbc.com/news/world-us-canada-43334326.

commonly is vice, not virtue. Confidentiality, though touted as private virtue, is generally a public vice for the government lawyer who is naturally working in the various arenas of public interest. For the arenas of public interest, publicity and transparency are essential virtues, not to be avoided, but to be cherished for democracy to work well.[21] As Brazil has learned the hard way in confronting the car wash scandal, for the best government, transparency *must* be made pervasive at all levels of government.[22]

There may be situations, more likely in the criminal law than civil law context, where the assurance of confidentiality to the parties or third parties, may be productive in securing information that would otherwise be concealed from public view. Money-laundering, as in the Petrobras scandal, is a systemic disease where securing disclosure through the legal process of arbitration, while assuring the disclosing party or witness of confidentiality, can indeed be critically therapeutic. The public interest and the interests of the parties and third parties may also be served by confidentiality where it is important to maintain the relationship of the parties, where it might be disrupted and potentially destroyed by publicity. For labor disputes, for example, arbitration may be valued as allowing the preserving of a viable employer-employee relationship and providing a more congenial environment for employee reinstatement. It may also be specially justified, as it is in purely commercial arbitration, for the protection of trade secrets, other proprietary information, or reputational concerns.

However, for the attorney representing government in arbitration, the general presumption should be against confidentiality. Blanket confidentiality is normally not necessary nor appropriate to secure such interests. If there is information requiring secrecy, there is the much to be preferred alternative of selective preclusion of such information from the arbitral award and its reasoning. Making exceptions and denying transparency for such reasons as 'reputational concerns' can too easily become the euphemisms for avoiding disclosure of corruption and other activity harmful to the public. Exceptions favoring confidentiality, therefore, for governmental arbitration, should be narrowly construed to prevent their becoming an escape from public accountability. And further in service of the public interest, the

[21] Alexis C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, 16 AM. U. INTL. L. REV. 969, 1014, 1019 (2001) (stating transparency is also of value to the arbitral process, as by improving the predictability of arbitral proceedings). Id. at 1019 (discussing id in training arbitrators). Christopher B. Kaczmarek, Public Law Deserves Public Justice: Why Public Law Arbitrators Should be Required to Issue Written, Public Opinions Vol. 4 No. 2 EMP. RIGHTS & EMP'T. POLICY J. 285, 314 (2000) (suggesting to create pressure to improve the quality of arbitral awards by exposing the award and its reasoning to critique). Hans Smit, The Future of International Commercial Arbitration: A Single Transnational Institution? 25 COLUMBIA J. TRANSNATIONAL L. 9, 31-32 (1986) (providing exposure to judge the qualification of arbitrators). For lessons as to the adverse social consequences of arbitral confidentiality in international arbitration involving governments, see Anthony DePalma, NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say, N.Y. TIMES (Mar. 11, 2001), http//www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far. Html?pagewanted=all&src=pm.

[22] See Samantha Pearson, Brazil, Widening the Hunt for Corruption, Finds It Under Every Rock, WALL ST. J. (Mar. 7, 2017), https://www.wsj.com/articles/widening-brazilian-probes-uncover-staggering-level-of-corruption-1488914293.

burden of proving the merit of the exception should be placed squarely on the proponent of 'confidentiality'.

The Brazil Arbitration Act is so principled. It stipulates transparency to be the proper and legitimate presumption for dispute resolution through arbitration. The Act was designed to instill and protect the virtue of full disclosure, providing specifically at Article 2 that "arbitration that involves public administration... will be subject to the principle of publicity".[23]

The setting of transparency as a transcendent principle is surely to be commended. But the devil, of course, is in the details of implementation. Here, Brazil can look for guidance to the experience and instruction of governmental arbitration in other legal systems, and also look to modern international agreements employing arbitration for dispute resolution for international trade and investment agreements. There are now available guidelines for maximizing transparency in arbitration. [24] And transparency has become a predominant mandate for the

[23] Brazil Arbitration Act, *supra* note 1, Art. 2.

[24] An example of a recent development of standards to ensure public accountability and transparency in arbitration are the transparency requirements developed for the investment settlement section of the Trans-Pacific Partnership Agreement that were developed for the Trans-Pacific Partnership Agreement, stating as follows:

Article 9.24: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

a. The notice of intent;

b. The notice of arbitration;

c. Pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);

d. Minutes or transcripts of hearings of the tribunal, if available; and

e. Orders, awards and decisions of the tribunal

Trans-Pacific Partnership Agreement, Nov. 5, 2015, at Chapter 9: Investment, https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership.

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") is another leading example of provision for transparency, particularly instructive in its detail, that Brazil government lawyers might well advance for future regulation of arbitration. UNCITRAL, Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") (2014), http://www.uncitral.org/pdf/English/texts/arbitration/transparency-convention/transparency-convention/Transparency-Convention-e.pdf. The Convention incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. These rules require the following publication of documents:

Article 3. Publication of documentsSubject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

1. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

2. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and not to make available exhibits and any other documents provided to, or issued by the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified time.

implementation of international agreements through national law. Thus, for example, the legislation for implementing the NAFTA agreement between the United States, Canada and Mexico specified the need to ensure 'the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, by – (i) ensuring that all requests for dispute settlement, submissions, findings, and decisions are promptly made public; (ii)ensuring that all hearings are open to the public; and (iii) establishing a mechanism for acceptance of amicus curiae submissions from businesses, unions, and governmental organizations'.[25]

Bilateral Investment Treaties and Free Trade Agreements entered into by the United State and its post-Nafta partners have detailed the implementation of these objectives, and provide helpful reference points for further developing and implementing critically important transparency, that can be adapted for arbitral dispute resolution in Brazil.[26] Submissions in NAFTA and CAFTA-DR (The Dominican Republic – Central America FTA) as well as awards, can be found on the websites of the respective countries. Hearings that can provide further enlightenment have been made public, either by closed-circuit TV or webcast.

III. DRAFTING THE ARBITRATION CLAUSE OR ARBITRATION AGREEMENT

As the necessary qualifications to the conventional wisdom about arbitration indicate, the government attorney's challenge is to assure that the choice to arbitrate will secure the advantages of arbitration, but not to the detriment of distinctly governmental objectives. The practical steps in meeting this challenge begin with drafting the arbitration clause or arbitration agreement, and defining its scope. The drafting may be designed to cover an entire contractual relationship, or particular disputes. It may be prospective, drafting the clause before a dispute has arisen, or it may be to create the foundation for *ad hoc* arbitration after a dispute has arisen.

Draftsmanship is of the greatest importance, because what is most distinctive about arbitration as a modality of dispute resolution, is its most fundamental premise

[25] Trade Act of 2002, 19 U.S.C. §3802(b)(3)(H). Bilateral Investment Treaties and Free Trade Agreements entered into by the United States post-NAFTA have accordingly required that the following documents be made available to the disputing Party(ies) and the public: the notice of intent to submit a clam to arbitration; the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by any disputing party, non-disputing Party, or *amicus curiae*; minutes or transcripts of hearings of the tribunal, where available; and orders, awards and decisions of the tribunal. *See, e.g.*, U.S.-Chile Free Trade Agreement, Art. 10.20 Para. 1, Para. 3-5. Canada has approved a similar and guidelines in Canada's model Foreign Investment Protection Agreement issued in 2003. *See* Canada's Model Foreign Investment Protection Agreement at Art. 38-39, https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf

[26] Post-Nafta International Investment Agreements have included, for example, that "(T)he tribunal shall conduct hearings open to the public" U.S.-Chile Free Trade Agreement, Art. 10.20 Para. 2, that the tribunal shall "have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party." U.S.-Chile Free Trade Agreement, Art. 10.19 Para. 3; U.S.-Colombia Free Trade Agreement, Art. 10.20 Para. 3; U.S.-Peru Trade Promotion Agreement, Art. 10.20 Para. 3.

and principle – p*arty autonomy*.[27] That is, in contrast to judicial litigation, the parties choosing arbitration can control the entire dispute resolution process, depending upon how the agreement to arbitrate is drafted. The parties can designate the scope of the tribunal's jurisdiction, and the applicable law, both substantive and procedural. It is all subject to their consent in establishing arbitration as the means for resolving their dispute. They can determine the substantive and procedural law that governs both the arbitration process and the merits of the dispute. This can include the utmost significant detail, such as, for example, burden and standard of proof, the extent of disclosure, the nature and presentation of evidence, time limits, and decisions on weight and admissibility of evidence. The parties can choose that the substantive law governing the merits of the dispute will be differently sourced than the procedural law, or different from the procedural law and substantive law that will govern the arbitral process.[28]

So there are many choices to be made by the government lawyer in drafting the arbitration clause. Should the arbitration be left *ad hoc*, to be agreed, if at all, once a dispute arises, or agreed as part of the greater deal? Should arbitration be designated to occur under the aegis of an arbitral institution and/or its rules? That is, to what extent is it desirable to utilize an existing arbitral institution and its rules, which may be expensive, or maintain more robust and complete control over the procedural and substantive issues – though going it alone and *ad hoc* may require reinventing the wheel, and may heighten the risk of leaving out something important? What should be the scope of the arbitration as to jurisdiction including substantive issues? What should be the remedial authority of the arbitrator? Should a time frame and/or time limits be specified? Should the parties empower the arbitrator to interpret or clarify its award?[29] Should the arbitrator be authorized to resolve future related disputes between the parties?[30]

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[27] Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, Vol. 52 No. 3 DISP. RESOL. J. 24, 25 (1997); Alan Redfern, LAW AND PRACTICE OF COMMERCIAL ARBITRATION 135, 315 (Sweet & Maxwell ed., 4th ed., 2004) 135,315; *International Arbitration in EC Merger Control: A "Supranational" Lesson to be Learnt*, EUR. COMPETITION L. REV., 324, 335-36 (2006); Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law,* Vol. 17 No. 1 EUR. J. OF INT'L. L., 121, 140 (2006); Institut de Droit International, *The Autonomy of the Parties in International Contracts Between Private Persons or Entities*, Basel Session 1991, available at <http//www.idi-iil.org/idiE/resolutionsE/1991_bal_02_en.PDF (characterizing party autonomy of arbitration as one of 'the fundamental principles of private international law').

[28] *See, e.g., An Examination of the Law and Practice of International Commercial Arbitration in Brazil, supra* note 1 (stating "Under article 2, arbitration can be based on law or equity and the parties are free to decide which legal rules will apply in the arbitration. Article 2 also states that the parties can agree that arbitration will be based on general principles of law, customs and international commercial rules."); *see also* Venezuelan Commercial Arbitration Law, Chapter Three (CENTRO DE ARBITRAJE) (unofficial translation by Victorino J. Tejera Pérez); ICC Rules of Arbitration, Art. 21 (Mar. 1, 2017 INTERNATIONAL CHAMBER OF COMMERCE); and Commercial Arbitration Rules and Mediation Procedures, Rule 34 (2013 Am. Arbitration Ass'n).

[29] *See* J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 100 (2017).

[30] In *Rainbow Warrior*, the arbitration ruling focused on creating a framework to regulate the parties' future relationship and behavior. *Rainbow Warrior* was a dispute between France and New Zealand that arose when an undercover French military operation sank a Dutch ship berthed in the Auckland Harbor. Rainbow *Warrior (NewZealand v. France)* (1990) 82 ILR 499. For further discussion, *see* J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 96-97, 107 (2017).

Any one of these parameters may prove critical to sustaining an arbitral award. If the tribunal exceeds the granted authority, by going beyond the designated jurisdiction and issues, any eventual award may be set aside or refused recognition and enforcement, as by way of article V(1)(a), (c) and (d) of the New York Convention and every well-established arbitral system, domestic or international.[31] This naturally follows from the principle of party autonomy, whereby it is the limits established by the parties that control. So each limit proposed in drafting the arbitration clause warrants close analysis as to its potential consequences. Potential abuse of process may be subtle and packaged as innocent. This means, for arbitration involving government, that any parameter must be examined closely in reference to public policy and governmental objectives.

What is revealed in the case law, when there is neglect in examining adoption of arbitration and its details, is highly cautionary and instructive. And it is remarkable how commonly it can be seen that lawyers fail to consider potential consequences that must be recognized from the very outset, when adopting arbitration and drafting the arbitration clause. Even in the performance of prestigious law firms and their highly compensated attorneys, there is well demonstrated lack of awareness of the significance of the content of the arbitration clause or arbitration agreement; until it is too late.

Consider one example of this sort of lawyer negligence, where the lawyers left out just about everything, but were nevertheless compelled to arbitrate. This was a significant governmental arbitration that took place in San Francisco, California, in the early 1980's, concerning the very substantial matter of debt obligations of the then newly installed Sandinista government of Nicaragua. That government sought to compel arbitration of its expropriation of a fruit company, one of the US enterprises that had previously dominated the Nicaraguan economy. Meeting in San Francisco, the lawyers on both sides of the dispute thought they had achieved a settlement. But the deal was never finalized, and contracts never executed. However, the lawyers had vaguely agreed to arbitrate disputes.

The agreement to arbitrate was wholly deficient, with virtually nothing specified. The lawyers couldn't even remember the name of the London arbitration agency some of them thought they might use, so they didn't designate an arbitral forum. Nevertheless, the US Ninth Circuit Court of Appeals, sitting in San Francisco, determined that arbitration was required, on the basis of the strong United States federal policy in favor of arbitration, and the related so-called 'severability doctrine". That doctrine provides that though a contract may be held to be invalid or never even consummated, if arbitration was agreed, arbitration will be treated as severable and enforceable.

[31] *New York Convention supra* note 7.

That same "separability doctrine" is accepted in most national jurisdictions.[32] That same doctrine is now also the law of Brazil under Article 8 of the Brazil Arbitration Act.[33] Moreover under the widely established principle of *Kompetenz-Kompetenz,* a doctrine which many jurisdictions link as implied by the separability doctrine, it is for the arbitral tribunal itself to determine any question concerning validity of the arbitration clause or arbitration agreement.[34]

Brazil has now effectively adopted the Kompetenz-Kompetenz doctrine by way of Article 8 of the 2015 legislation.[35] Under the 2015 law, though such determination is subject to ultimate review by competent judicial authority,[36]

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[32] See, e.g*., Judgment of Cour de Cassation of Republic of France of 7 May 1973*, Recueil Dalloz Jr. 545 (1963); *Judgment of 24 February 1994*, XXII Y.B. Comm. Arb. 682l (Paris Cour d'Appel) (1997) ("In international commercial arbitration , the principle of the autonomy of the arbitration agreement is a principle of general application, being an international substantive rule consecrating the legality of the arbitration agreement, beyond all reference to a system of conflict of laws."); *Judgment of 21 December 199, No. 1786* (court of Appeal, Bologna)("the arbitral clause is autonomous with respect to the contract – so that the nullity of the latter does not automatically affect the former"); *Judgment of 2 July 1981, No. 4279* (Supreme Court of Italy)(arbitration clause is 'not affected by any nullity and, therefore bars the admissibility before the court, of an action aimed at having a contract declared null and void because its subject matter is unlawful"); *Judgment of the Supreme Court of the Federal Republic of Germany of 27 February 1970*, 53 BGHZ 315; Preliminary Asard of 14 January 1982, XI Y.B. Comm. Arb 97, 102 (1986) ("The Autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of the most qualified publicists on international arbitration, in arbitration regulations adopted by international organizations and in treaties").

[33] An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the Contract. A decision that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. *Brazil Arbitration Act supra* note 1, at Art. 2.

[34] *Final Award in ICC Case No. 5294 of 22 February 1988*, XIV Y.B. Comm. Arb. 137 (1989); *Final Award in Case No. 3896 of 1982*, X Y.B. Comm.Arb. 47 (1985); *Final Award in Case No. 5485 of 18 August 1987*, XIV Y.B. Comm. Arb. 156, 159 (1989) ("in international commercial arbitration the arbitrators have the authority to determine their own jurisdiction "); *TOPCO/Calasiatic v. Libya*, Nov. 27, 1975 Preliminary Award, *reprinted in* J. Gillis Wetter, *The International Arbitral Process: Public and Private,* Vol. 74 No. 2 AM. J. OF INT'L. L. 441 (1979). *See generally* Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 74-95 (2nd ed. 2001); *See also*, J. Gillis Wetter, *The Importance of Having A Connection*, Vol. 3 No. 4 ARB. INT'L. 329 (1987); Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring That International Commercial Arbitration is Effective*, SIXTY YEARS OF ICC ARBITRATION – A LOOK AT THE FUTURE 255, at 263 (1984); Stephen Schwebel, *International Arbitration: Three Salient Problems*, Vol. 3 No. 3 ARB. INT'L. 1-60 (1987).

[35] "The arbitrator has jurisdiction to decide *ex officio* or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as the contract containing the arbitration clause." *Brazil Arbitration Act*, *supra* note 1. Brazil courts have made clear that acknowledgement of the existence of an arbitration agreement requires recognition of the arbitral tribunal's jurisdiction to decide on the existence, validity and efficacy of an arbitration agreement. *See, e.g.*, Interlocutory Appeal in Special Appeal No. 1.239.319/SC, decided on 14 March 2017, Interlocutory Appeal No. 2262605-42.2015.8.26.0000, decided on 4 July 2016 by the Sáo Paulo State Court of Appeals.

[36] "When the challenge is not accepted, the arbitration shall proceed normally, subject however to review of that decision by the competent Judicial Authority if a lawsuit referred to in Article 33 of this Law is filed." *Brazil Arbitration Act supra* note 1, at Art. 20 Para. 2. "The interested party may request the competent Judicial Authority to declare the arbitral award null in the cases set forth in this law." *Brazil Arbitration Act supra* note 1, at Art. 33.

challenge may be waived if not done promptly after commencement of the arbitration, and cannot be a review of the merits of the dispute.[37]

In light of the general inclination of the courts to defer to arbitration, it can be expected, particularly that after an arbitration has come to judgment, the competent court would be highly disinclined to nullify an arbitration provision except in the most egregious case of the arbitral tribunal exceeding its evident jurisdiction, or having succumbed to one of the otherwise stated limited grounds for overturning an award, such as extortion or corruption.[38] Moreover once an arbitration has reached judgment and award, courts naturally are reluctant to nullify the arbitration provision. In other words, once you agree to arbitration, you are in all likelihood, stuck with it for the duration.

Negligence in drafting the clause, as in the example just related illustrates, is all too common. When lawyers are negotiating an agreement, they focus on making the deal, not the dispute resolution that might be engaged if the deal falls apart. Normally, so long as they are not thinking about arbitration, there really isn't all that much to think about, since the existing litigation system is a given. Lawyers, including government lawyers, naturally are inclined to assume the more familiar details and dynamics of the dispute resolution process of court litigation. For the lawyers intent on the deal, not much may be thought or said about dispute resolution, unless someone puts arbitration on the table. And even with that, arbitration is often treated as a minor matter, an option, often at best, an afterthought – especially where it has been late in arriving in the array of dispute resolution experience, as in Brazil.

But arbitration opens design of the dispute resolution process to the parties creating their own legal system – the foundational principle of arbitration being 'party autonomy'. If the lawyer doesn't do the preparatory work required to secure his client's interests in designing the arbitration, the lawyer will have missed the boat that has already sailed. If the boat later sinks with the client's cargo, the lawyer is poorly positioned to deny responsibility. The truth of the matter is that when things go wrong, the arbitration agreement, however ill-formed, may likely become the most important clause in the contract. So it is imperative that the lawyers, especially government lawyers being charged with the public interest, do the necessary preparation, when thinking of engaging arbitration; giving the most fulsome consideration to drafting the arbitral regime by way of the arbitration clause or agreement, in all its critical aspects.

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[37] "The party wishing to raise issues related to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first opportunity, after the commencement of the arbitration." *Brazil Arbitration Act supra* note 1, at Art. 20.

[38] *See, e.g., Brazil Arbitration Act supra* note 1, at Art. 32.

IV. WAIVER OF GOVERNMENTAL PREROGATIVE

The drafting of the arbitration clause is important for any contract, whether or not government is involved. But what are the critical drafting elements for a government lawyer considering arbitration? It is essential for the government lawyer to understand and evaluate these considerations before agreeing to include an arbitration clause in any contract, or agreeing to arbitration by way of an *ad hoc* submission agreement after a dispute arises. For once the government submits to arbitration, not only is that agreement binding, but under Brazil law it can be deemed 'bad faith' and against the public interest to challenge that agreement.[39]

First, the government lawyer should consider that by choosing to employ arbitration the government lawyer risks waiving powers, defenses or rights that are unique to government. These powers, defenses or rights must therefore be identified before agreeing to arbitration. The government lawyer must then evaluate the risks and consequences of waiver, such as they may be.

This is especially so as to otherwise viable claims of sovereign immunity. Brazil, along with all countries fully engaged in the global economy, has adopted the restrictive theory of sovereign immunity, meaning that immunity can be claimed when the nature of governmental action involved can be characterized as "public," *ius imperium* of Roman Law, but not for governmental activity, *ius gestionis*. This principle is now embodied in article 37 of the Brazil Arbitration Act. Brazil law has also adopted the related 'principle of legality' whereby arbitrability is limited to 'relevant assets', that is, economic, and 'disposable rights' (rights of a commercial, economic or financial nature) as distinguished, for example, from matters such as family law or labor rights.[40] Also reflecting the protection of public rights and assets is that their disposition, under the law of Brazil, is said to require special legal authorization.[41]

But for matters of any complexity involving public and private interests, whether the dispute is deemed 'public or private', often depends on simply how a judge or arbitrator characterizes the facts. Consider a telling example of this in a decision of the United States Supreme Court rendered in 1993.[42] The plaintiff was a US citizen who was hired by Saudi Arabia in the US to monitor safety at a Saudi hospital. While working in Saudi Arabia he was allegedly thrown into a Saudi prison and physically abused when he actually did the job he was supposed to do, in that he flagged safety violations, though the flagging embarrassed one or more of the

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[39] *See*, Companhia Paranaense de Gas Natural-Compagas v. Consorico Carioca Passarelli, (Special Petition) No. 904.813-Pr (2011).

[40] *See generally, Brazil Arbitration Act*, *supra* note 1, at Chapter 2.

[41] *See* note I supra, Renata Brazil-David, An Examination of the Law and Practice of International Commercial Arbitration in Brazil, 27 Arbitration Int'l, 57 at 63. And concerning international arbitration, under the Brazilian Private-Public Partnership Law, arbitration is allowed provided that three requirements are fulfilled: the arbitration proceeding must be held in Brazil, must be conducted in Portuguese and must comply with the Brazilian Arbitration Act. Lei No. 11079, 30 de Dezembro de 2004, D.O.U. de 31.12.2004, Art. 11(111)

[42] Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

ruling Saudi princes. The Supreme Court of the United States concluded Saudi Arabia was immune from suit, because what was involved was the 'public activity' of Saudi police in Saudi Arabia. This was despite the fact that the plaintiff's hiring was a commercial contract, i.e., clearly "commercial activity", and that the contract was negotiated and signed in the United States.[43]

As this case well illustrates, the immunity determination is highly manipulable. It turns on which facts the Court chooses to make the basis for its public or private determination. The choice, as this case also demonstrates, is often made for political reasons. It was no accident that the claim of Saudi immunity was upheld within the same time frame that the Saudis allowed US forces to be located on Saudi soil for the first Gulf war.

However, it is essential for government lawyers to understand, that the contractual adoption of an arbitration clause, entirely pre-empts the issue of immunity. In US domestic law, and in general in international arbitrations, an agreement to arbitrate is read broadly by courts as a waiver of any possible claim of immunity.[44] The pendulum has swung so far in this direction, that in 1988 the United States Congress passed a statute that specifically provides that if a government or government agency has agreed to arbitration – the agreement to arbitrate completely eliminates sovereign immunity from the dispute, whether as a defense or otherwise.[45]

So the instruction for a lawyer representing a government or government agency is; never agree to arbitration without fully assessing your potential claims for immunity, or other special rights of a governmental entity that may be thereby waived.

V. POLITICAL DEFLECTION

In general, the more significant the national interest involved in a dispute, the less likely a government lawyer will be or should be inclined to agree to arbitration, or indeed to any third party neutral dispute resolution process. Thus Colombia and Venezuela were willing to arbitrate a territorial dispute, but not maritime boundaries in the Gulf of Venezuela after discovery of oil reserves there in the 1960's[46]. One technique, however, to still enjoy the benefits of arbitration in matters of such significance, if it can be accomplished, is to break up the dispute into its components, resolving the lesser for arbitration and the greater for negotiation.[47]

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[43] *Id*.

[44] *See* Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 2120, 2296 n. 945 (2nd ed. 2014).

[45] For discussion of sovereign immunity in the realm of international arbitration, s*ee generally*, Tai-Heng Cheng & Ivo Entchev, State Incapacity and Sovereign Immunity in International Arbitration, 26 SINGAPORE ACAD. OF L. J. 942 (2014).

[46] BORDER DISPUTES: A GLOBAL ENCYCLOPEDIA 113-21 (Emmanuel Brunet-Jailly, ed.).

[47] For example, in the Torres Strait dispute, a maritime delimitation between Australia and Papua New Guinea, the arbitral tribunal approached the dispute resolution process by splitting the issues and separating out items for negotiation. For further discussion, *see* J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 12 (2017).

But the smartest strategy, in the right case of high profile governmental interest, may be quite the contrary – to adopt arbitration for resolution of the entire dispute. This is a strategy that could be best described as "political deflection". The right dispute for this strategy, is when, as an American colloquialism expresses it, "the dispute is too hot for diplomacy to handle".

Consider two examples from international arbitration – the arbitration between Israel and Egypt concerning jurisdiction over the Taba area on the coast of the Sinai Peninsula,[48] and the 'Georges Bank' dispute over fishing rights on the adjoining coasts of Canada and the United States.[49] Both were situations where the dispute was so hotly loaded with the economic and political interests of domestic constituencies, that diplomacy was not likely to succeed. For the case of Taba, the symbolic significance of any conflict of jurisdiction between Israel and Egypt was potentially too great for diplomatic resolution, given the history of conflict. For the Georges Bank Arbitration, which concerned, on the one side the interests of Canadian fishermen, and the other the interests of United States fishermen, a concession by either side would have been viewed as a betrayal of its fishermen. In both Taba and the Georges Bank, even if any diplomatic compromise could be achieved, it would have inevitably left the domestic constituencies blaming their government for failure to adequately vindicate their rights. But by moving the matter to the neutral third party process that arbitration affords, the governments of Israel, Egypt, Canada and the United States, in response to any result less than 100%, could all proclaim to their domestic constituents, "we did the best we could. It was that incompetent arbitrator who failed to fully vindicate your rights".

It is thus that arbitration can be utilized as an escape from political accountability. And why not when the objective for all is successful dispute resolution. For the government lawyer the resolution of the dispute, on any of a variety of possible terms, may be even more important than the terms of the award. If such political deflection is what it takes, so be it.

VI. PARTY AUTONOMY AND PUBLIC POLICY

Beyond these matters of strategy in selecting arbitration from among dispute resolution alternatives, a government lawyer, especially, should be aware of the serious consequence of party autonomy in affecting the mindset of an arbitrator. Arbitration is likely to be much less sensitive to the concerns of government than litigation before a judge. This is because the social legitimacy of arbitration is based exclusively on the parties consent, not national

[48] J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 100 (2017) (discussing the issues the international tribunal was asked to decide and the lack of guidance of the tribunal).

[49] Richard Bernstein, *World Court Settles Dispute on U.S.-Canada Boundary*, N.Y. TIMES, Oct. 13, 1984 (noting the dispute was decided by a five-judge panel drawn entirely from Western democracies that based its decision largely on technical and geographic grounds and rejected the US and Canadian historical ties arguments).

sovereignty. For an arbitrator, the standard of the decision is the contract. Judicial litigation, to the contrary, while considering the contract, makes primary the interests of the state and subordinate values of the legal system and rule of law, particularly when government or a governmental agency is one of the parties.

The arbitrator's preoccupation is - - - what did the parties intend their contract to mean? A judge on the other hand, is not just interpreting the contract, but is doing so guided by concerns of public policy reflected in statutory or regulatory law, or the relatively amorphous concepts of 'public policy' and 'good morals'. A judge, as a government official, has the responsibility to secure the mandates of the law and the integrity of the official legal system. Yes, the judge looks to the intent of the parties, but gives priority to the mandates of the law with awareness that whatever he or she decides, will be a matter of precedent for the future of society and for similar disputes to come. The arbitrator is not bound by prior decisions, and normally is not concerned with instructing non-parties for the future.

The judge is also aware that any decision he or she renders is subject to reversal if found at odds with the letter or policies of the law. In judicial litigation, the judge writes for other judges, developing the law. The judge is concerned with the institutional duty to the legal system, and perhaps above all, the very personal and professional concern not to be reversed. In that regard, judicial litigation has a more conservative inclination in its results. The formality and procedural requirements of judicial litigation in comparison to arbitration also make it more likely that the litigation judge will be restrained by established norms than will the arbitrator, quite apart from the degree to which *stare decisis* may be controlling in a particular jurisdiction.

The arbitrator, in contrast to the litigation judge, proceeds unencumbered by precedent, not concerned about making it or following it, and relatively free to act contrary to established standards. The arbitrator is accordingly freer to take on a quasi-legislative role and shape the dispute to the interests of the parties at hand. The arbitrator, though distinguished from mediator by the power to dispose, can act as problem solver *vis a vis* the parties. The pro-active litigation judge, especially in the common law system, is inclined to act, when the situation warrants, as policy-maker within the law most cognizant of established legality. The arbitrator's freedom to depart from established standards and proceed untroubled by future policy implications, most of all,

results because the arbitrator can act without fear of review of the merits, given the very narrow and limited grounds for reversal of an arbitral award.[50]

However, this also means there is relative freedom of the arbitrator to ignore imperatives of public policy. This is a concern specifically addressed in the arbitration law of Brazil. The Brazil Arbitration Act as amended recognizes this potentially deficiency in public policy sensibility of the arbitrator compared to the litigation judge. This recognition is embodied in Article 2 of the Act, which provides that the rules chosen by the parties to govern their arbitration must not violate "good morals and public Policy".[51] Article 39 additionally provides that a foreign arbitral award cannot be recognized or enforced if "the decision violates national public policy".[52] In making such provision, Brazilian law is consistent with the public policy limitation on enforcement as stated in the NY Convention,[53] and is similarly consistent with the public policy defense as stated and administered in virtually all arbitration regimes.

But are such 'public policy' limitations effective? The actual record of arbitrations, both national and international, belies the effectiveness of public policy as a policing concept. Public policy is rarely invoked with success to prevent the rendering or enforcement of an arbitral award.[54]

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[50] Exemplary as to the narrow grounds for review of an arbitral award are the grounds stated in the New York Convention on Recognition and enforcement of Foreign Arbitral Awards now adopted by most other states significantly engaged in international trade and investment, and which Brazil joined in 2002. *New York Convention supra* note 7. Five defenses are found in Article V(1) and two in Article V(2) The five Article V(1) defenses are (1) incapacity and invalidity, (2) lack of notice or fairness, (3) arbitrator acted in excess of authority, (4) the tribunal or the procedure was not in accord with the parties' agreement, and (5) the award was not yet binding or had been set aside. The two Article V(2) defenses are (1) lack of arbitrability and (2) violation of public policy. The party resisting enforcement under any of the defenses has the burden of proof, though the two defenses in Article V(2) can also be raised by the court *sua sponte*. Most notable in relation to appeal is that none of the defenses are based on the merits, and there is universal acknowledgment in national and international litigation that the defenses are to be narrowly construed. *See*, for relevant summary of results, particularly under the New York Convention defenses, Margaret L. Moses, THE PRINCIPLES AND PRACTICE OF COMMERCIAL ARBITRATION (Cambridge, 3rd ed) at 231-44. In addition to the Article 39 public policy defense, the other defenses under Article 38 of the Brazil Arbitration Act generally replicate the New York Convention defenses. Article 38 includes that the parties to the agreement lacked capacity; (ii)the arbitration agreement was not valid under the law to which the parties have subjected it, or, failing any indication thereof, under the law of the country where the award was made; (iii) proper notice was not given of the appointment of the arbitrator or the arbitral procedure, or there was a violation of the adversarial proceedings principle rendering full defense by a party impossible; (iv) the arbitral award exceeded the terms of the arbitration agreement, and it is not possible to separate the portion exceeding the terms from what has been submitted to arbitration; (v) the commencement of the arbitral proceedings was not in accordance with the submission to arbitration or the arbitral clause; or (vi) the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.

[51] *Brazil Arbitration Act supra* note 1, at Art. 2.

[52] *Brazil Arbitration Act supra* note 1, at Art. 39.

[53] *New York Convention supra* note 7.

[54] *See, e.g.,* Model Law, Art. 34(3)(b)(ii); China's Civil Procedure Rules (allowing refusal of enforcement of foreign award that runs counter to social and public interests of the country); There are exceptional cases where public policy has been determinative. *See*, *Özmak Makina Ve Elektrik Anayi AS v Voest Apline Industrieanlagenbau GmBH* and anor, Case No. 4P_143/2001, Decision of the Swiss Federal Supreme Court, 18 Sept. 2001 (2002) 20 ASA Bulletin 311; and Francelino da Silva Matuzalem v Federation Internationale de Football Association (FIFA), Case No. 4A_558/2001, Decision of the Swiss Supreme Court, 27 Mar. 2012 (holding that restriction of a person's economic freedom violated public policy, because FIF banned the payer from all football-related activity until full amount of obligation to the organization was repaid).

This has been dramatically demonstrated in United States law with respect to the United States antitrust laws. These are the laws that the US Supreme Court has referred to as the nation's "Charter of liberty"; of importance just below the United States Constitution. Most commentators therefore long thought implementation of the antitrust laws to be off-limits for domestic arbitration, and especially for international arbitration, which could remove public policy control completely from the United States. Then, after international arbitration was deemed to be legitimately advantageous in a broad range of US federal statutory areas, including the securities laws[55] and labor laws,[56] came the big test everyone was waiting for - anti-trust - where US policy was uniquely firm and extreme compared with most other nations.

The case that ultimately tested arbitration against the concern that it could undermine public policy was an antitrust case filed against the Mitsubishi Automobile Corporation ("Mitsubishi"), a Japanese corporation with its principal place of business in Tokyo, Japan.[57] The plaintiff, who sought protection under the US antitrust laws, was a distributor doing business in the United States Commonwealth of Puerto Rico. The prevalent view before the Mitsubishi decision was rendered, on whether the antitrust laws could be trusted to arbitration, was that because the antitrust laws are designed to promote and protect competition, and in light of the fact that the US has a strong interest in enforcing its antitrust laws to

[55] Diana B. Henriques, *When Naivete Meets Wall Street*, N.Y. TIMES, Dec. 3, 1989 (explaining the use of arbitration in securities disputes and the relative leverage held by investors and brokers as a result).

[56] Jessica Silver-Greenberg, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Dec. 3, 1989 (discussing the use of arbitration clauses in employment contracts and the long-run effect to employees).

[57] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth 473 U.S. 614 (1985). Mitsubishi was a joint venture by Chrysler International, S.A. ("CISA"), a Swiss corporation, and Mitsubishi Heavy Industries, Inc., a Japanese corporation. Soler Chrysler-Plymouth, Inc. ("Soler"), the plaintiff, was a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico, that sold automobiles. Soler and CISA entered into a distributor agreement which provided for the sale of Mitsubishi automobiles, by Soler, within Puerto Rico. Mitsubishi, CISA, and Soler entered into a sales agreement which provided for the sale of Mitsubishi products to Soler (for Soler to sell under the distributor agreement terms). The sales agreement included an arbitration clause that provided for all disputes under the agreement to be resolved by arbitration in Japan. The sales agreement stated, "All disputes, controversies or differences which may arise... shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Mitsubishi* at 617.

Due to difficulties in the new car market, Soler sought to delay shipment of Mitsubishi products and to sell the Mitsubishi automobiles outside of Puerto Rico to meet its expected sales goals. Mitsubishi and CISA disallowed shipment of the products by Soler outside of Puerto Rico and ultimately withheld shipments before bringing legal action. Mitsubishi brought an action in the United States District Court for the District of Puerto Rico to compel arbitration of several disputes under the agreement. Soler counterclaimed and asserted causes of action under the Sherman Act, the United States federal antitrust law. Soler alleged Mitsubishi and CISA violated the Sherman Act because they conspired to restrain free trade by dividing markets. Soler alleged Mitsubishi and CISA refused to sell ancillary products that would enable Soler to sell the automobiles outside of Puerto Rico and that Mitsubishi and CISA attempted to replace Soler with a wholly owned subsidiary as the exclusive Mitsubishi retailer in Puerto Rico. *Mitsubishi* at 620. Though Soler conceded that disputes of contract interpretation are generally arbitrable, Soler contended that the arbitration clause must specifically contemplate the arbitration of disputes arising out of statutes that were designed to protect the party resisting arbitration.

maintain a competitive position in the world market, arbitration would not be allowed. Moreover, the thinking was that because arbitration is based on the autonomy of private parties to design and control both process and substance, it is vulnerable to the very same leverage the antitrust laws are purposed to prohibit, and therefore would not serve adequately to provide deterrence for potential antitrust violations.

The United States Supreme Court, addressing these concerns, nevertheless declared the provision for foreign arbitration valid and enforceable, much to the surprise of the international arbitration community. It so disposed of two contentions that the antitrust dispute was nonarbitrable.[58] First, the court considered whether the scope of the US federal Arbitration Act imposes a presumption of nonarbitratbility of claims arising under statues that are not specifically mentioned in parties' agreements. Second, the US Supreme Court considered whether the public interest in enforcing US antitrust laws was so paramount as to render antitrust disputes nonarbitrable.[59] Interpreting the scope of the Federal Arbitration Act broadly, the Court held that the Act does not imply a presumption against arbitration of statutory claims. It declared that the Court has a duty to "rigorously enforce agreements to arbitrate" because Congress's primary intent in enacting the Federal Arbitration Act was to enforce private parties' agreements to arbitrate, and that doubts concerning whether issues are arbitrable are to be resolved in favor of arbitration.[60] The Court allowed only that clear congressional policy and intent could be the basis to determine that legislative mandates such as embodied in the antitrust laws are categorically non-arbitrable. It concluded the United States Congress had not evidenced any relevant intent to limit the broad scope of arbitration.[61] In this respect the decision was somewhat myopic given the longevity of the antitrust laws, and their origination before arbitration was legislated as national policy in the US Federal Arbitration Act.[62] But the analysis and the result in Mitsubishi does demonstrate how far the Court was willing to go to support arbitration despite the countervailing public interests embodied in the antitrust laws.

In considering whether the significant public interest in enforcing US antitrust laws renders such disputes categorically unsuitable for arbitration, the Court further concluded that international trade interests took precedence over the public policy interests in enforcing US antitrust law in Mitsubishi. Thus, it concluded, there was no need to consider the categorical arbitrability of antitrust, declaring, "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the

[58] *Mitsubishi* at 614.
[59] *Id.* at 617.
[60] *Id.* at 626.
[61] *Id.* at 627.
[62] *Federal Arbitration Act supra* note 15.

parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." [63]

The consequence, therefore, of the party autonomy principle of arbitration under US law, is that even the most significant public policy, even if embodied in the most significant statutory law, can be made subject to arbitration. And today, not only *Mitsubishi*, but other cases both in the US and elsewhere, instruct that public policy as a limitation on arbitration, is not much of a limitation at all.[64] One reason for this is simply that burdened courts get to love arbitration as means to lighten their caseload. Accordingly, they tend to read the arbitrator's jurisdiction as broadly as possible.

Another reason the courts are inclined to read the jurisdiction of the arbitrator as broadly as possible is—as previously noted with respect to the admission of evidence[65] — there is no deduction from the judge's salary for the lesser work resulting for the judge deferring to arbitration. The judge is paid by the state at a fixed salary no matter the lesser or greater his or her caseload. But the arbitrator bills by the hour, or by the day. So judge and arbitrator alike are content with the broadest reading of arbitral jurisdiction, notwithstanding the enhanced risk that public policy will be ignored in arbitration. For public administration arbitration, therefore, often the only safety, the only control, is that responsible government attorneys will protect the public interest and public trust, by declining to agree to arbitrational or limiting its engagement where the public interest or third party interests deserving of protection are substantially at risk.

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[63] *Mitsubishi* at 629. The Court cited two earlier cases that involved the securities regulation statutes, also constituting a body of law embodying significant public policy interest. (The Court compared Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) and Wilko v. Swan, 346 U.S. 427 (1953).) The earlier case, Wilko had concerned securities regulation in a domestic context, and the Supreme Court held the alleged securities law violations non-arbitrable. The latter case Scherk, involving an international securities regulation dispute, was held to be arbitrable. The Court reasoned similarly for its determination in Mitsubishi that predictability of dispute resolution from contractual forum selection clauses is imperative for international business dealings. In so doing it reflected the similar view based in economics of international trade that The US antitrust laws are "designed to promote the national interest in a competitive economy." *Mitsubishi* at 635. It acknowledged that private causes of action, particularly through the treble damages remedy, play an important role in enforcing antitrust, but reasoned that the choice to arbitrate disputes does not forgo substantive rights afforded by statutes, but only trades the procedural opportunities for review of a court opinion for the expediency of arbitration, and that so long as private parties effectuated their intent to be that the arbitral body would decide claims arising under the US antitrust laws, the tribunal should be bound to decide the claims in accordance with those laws. Therefore, the Court reasoned, arbitration serves both remedial and deterrent functions. It concluded that a minimally intrusive review of the arbitration decision should be sufficient to ascertain the tribunal acknowledged and decided on the antitrust claims. *Mitsubishi* at 638. The Court therefore established as the prevailing standard a presumption that where parties designate arbitral jurisdiction broadly enough to decide claims arising under US antitrust laws, or any public policy laden legislation, and the arbitration decision will ultimately not impact parties' substantive rights and remedies. In doing so, the Court ceded great power to international arbitration tribunals to appropriately enforce antitrust laws. *See supra* note 57.

[64] For a list of court decisions from countries reversing previous law to permit arbitration of contracts even where implicating antitrust issues, *see Redfern supra,* note 26 at 165-68.

[65] *See supra* note 16.

The ostensible control by imposition of 'public policy' is even less consequential at the enforcement stage of arbitration than when asserted as basis for 'non-arbitrability'. Though the Brazil Arbitration Act, the New York Convention,[66] and most other arbitration formulations provide for public policy or 'good morals' as basis for non-enforcement or annulment of an arbitral award, these doctrines are rarely employed, and rarely successful.[67] In *Mitsubishi*, the US Supreme Court said the public policy mandate of the anti-trust laws could be guaranteed because at the time the prevailing party would seek enforcement of the award, the reviewing court could check whether the US antitrust laws had been taken into account by the arbitrator, and if not taken into account, could deny enforcement.[68] But given that an arbitral award is most often in the form of an amount of currency to be paid, or a denial of any compensation, this claim of control is pure fiction. How would a reviewing court determine whether a number or zero, the typical antitrust result, represents the arbitration having taken into account the anti-trust laws? And of course, the arbitrator is now aware that the US Supreme Court's *Mitsubishi* decision could be a basis of reversal of his or her award if the anti-trust laws are ignored, and to protect the award can simply state in the award that the arbitration did take into account the antitrust laws.

Furthermore, though in the past many US courts were inclined to reverse when there was so-called "manifest disregard of the law." "Manifest disregard of the law" is no longer generally recognized as a valid objection to recognition and enforcement of an arbitral award.[69] Indeed, there are typically no formal limits to prevent an arbitrator from making an error in choosing the governing substantive law except as explicitly stipulated by the parties, and no limit in interpreting the law,

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[66] National courts may refuse to enforce an arbitration award if the ward is deemed contrary to national public policy. *New York Convention supra* note 7, at Art. V(2)(b). Similarly the UNCITRAL Model Law provides in article 34(2)(b)(ii) that courts of the situs of an arbitral award can refuse recognition or enforcement of an award on grounds of public policy. A somewhat differently stated but similarly representative provision is section 1(b) of the English Arbitration Act of 1996 that states in section 1(b) that arbitration, regardless of the parties agreement, is subject to safeguards deemed necessary in the public interest. *UNCITRAL Arbitration Rules supra*, note 19.

[67] *See, e.g., supra* notes 54-56.

[68] The Supreme Court purported to afford protection for public policy in stating, "(h)aving permitted the arbitration to go forward, [U.S.] courts will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Article V(2)(b). While the efficacy of the arbitral process requires that substantive review at the award enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." *Mitsubishi* at 638.

[69] Thus, in a case governing arbitration under federal law in the United States, Hall St Associates v. Mattel Inc, 128 S. Ct. 1396, 1400 (2008)**,** the United States Supreme Court, resolving a division between federal Circuit Courts, held that judicial review of an arbitral award under the US Federal Arbitration Act is limited to the narrow grounds listed in the statute. Similarly, reflecting broader national practice, English Courts have found that arbitral agreements and awards cannot be challenged, unless the parties previously so provide by agreement. Sheppard, A, *Rights of Appeal under Section 68 of the Arbitration Act 1966*, *Case Comment on Lesotho Highlands Development Authority v. Impregilo SpA*, Vol. 8 INT'L ARB. L. REV. 64 (2005).

or applying the law to the facts. [70] The arbitrator can even apply general principles of law that go beyond the law which a judge may apply. For example, particularly in a commercial arbitration involving international parties, an arbitrator may recognize and apply general principles of international commercial law, so-called 'lex mercatoria', the 'new law merchant', 'a-national law', or 'transnational law'.[71] This may be to the advantage of the government attorney when there is risk that the matter at hand may be subject to the jurisdiction of a foreign state or adverse general principles, even to the point where the government attorney may wish to achieve a stipulation that such general principles rather than national laws will or will not be applied.

It is also necessary for the government attorney to keep in mind that any reference to such 'general principles', given their generality, is inherently an invitation to the expansion of the arbitral tribunal's flexibility and discretion in the exercise its power.[72] And notwithstanding challenge, judicial approval can generally be expected to follow given the contemporary favoring of arbitration for its value in achieving expeditious finality.

So there is a complex of reasons why judges are inclined to leave it all to arbitration, despite what may be their better instincts for protecting the public interest, providing many means that may allow arbitrators to maximize their exercise of power. Most importantly, the grounds for review and reversal of an arbitral award are so limited, and the inclination of judiciaries to avoid any review of the merits so strong, that the ultimate result of party autonomy and independence of the arbitrator, is that the arbitrator can be described as the proverbial "500 pound gorilla". Arbitration is a 500 pound gorilla because the arbitrator need not worry about reversal on the basis of public policy, or any argument grounded in the merits, so as long as there is no demonstrable bias, offense to due process, or lack of jurisdiction – all rarely successful grounds for reversal or nullification of an arbitral award.

Therefore the instruction for a lawyer representing government or its agencies is that, by choosing arbitration over judicial litigation, that lawyer runs a significant risk that public policy or good morals will fall outside the purview of the arbitrator, who is focused primarily, and most often exclusively, on what the parties intended by their contract. This is good reason to be cautious about adopting arbitration. If the dispute importantly concerns public policy of the state, rather than simply contractual rights, the government lawyer must beware of the arbitrator. The arbitrator is less likely than the judge to pay heed to the remedial and deterrence functions of the law, and less likely to seek to deter conduct that is inimical to public policy and society as a whole. For example, in a labor dispute the arbitrator is less

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[70] *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,* Vol. 23 MICH. J. INT'L L., 414-15 (2002) (stating "Even clear mistakes of law in arbitral awards are virtually immune from appellate review.").

[71] "The Brazilian arbitration law allows the use of national rules, non-national rules, general principles of law, uses and customs, and international rules of commerce for resolving the dispute." Rodrigo Bernardes Braga, *Teoria e Pratica da Arbitragem,* BELO HORIZONTE: DEL REY 17 (2009).

[72] Philip McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration* Vol. 93 No. 2 NW. L. REV. 453, 471 (1999).

likely than the judge to rule in a manner to put employees or employers outside the arbitration on notice of correct behavior. The arbitrator is also less likely to act to prevent future public law violations.

The Brazil Arbitration Act recognizes and does attempt to avoid such risks to public policy that arbitration presents.[73] For arbitration involving public administration, the Brazil Arbitration Act specifically prohibits arbitration from ignoring the mandate of the law. It provides that "arbitration that involves public administration will always be at law,"[74] thereby rejecting equitable discretion, known to dispute resolution in reference to its Roman origin, as *ex aequo et bono.* This principle, roughly translated as 'acting according to the fair and the good', was first developed in Roman law for guidance of the Roman magistrates for the rendering of greater justice than the explicit law might allow. The Brazil Arbitration Act rejects any such subjective power for the arbitrator. It provides at Article 26 that the arbitral award must contain "the grounds of the decision with due analysis of factual and legal issues."[75] Presumably this requirement, for a so-called 'reasoned award', is also there to assure strict adherence to the law, and any public policy mandate of the law.

For arbitration involving government, the Brazil Arbitration law thereby purports to preclude any exercise of equitable discretion by the arbitrator, despite the fact that equitable discretion of the arbitrator to act *ex aequo et bono* is recognized as legitimate in most arbitral systems, not only in the private sector, but also in international arbitration that includes governments and their agencies.[76] Particularly in international arbitrations involving governments, *ex aequo et bono* thrives, is valued as assuring the flexibility of decision to frame a result as 'fair' for both parties, instead of being compelled to designate winner and loser, as the litigation judge most often must do. Such discretion of the arbitrator is also valued as providing the flexibility to adjust to changed circumstance, and make provision to avoid future conflict.[77]

But does the Brazil Arbitration Act truly eliminate the potential for an arbitrator to ignore the public policy mandate of the law, in favor of his or her notion of what is fair? It does not. A prohibition of *ex aequo et bono* can be ignored by the arbitrator without penalty, because there is no review on the merits.

A potential antidote to the uncontrolled discretion of the arbitrator is to require the arbitrator to provide a 'reasoned award', that is, to include the arbitrator's elucidation of its reasoning with the award. No doubt the requirement of statement of reasons does provide inhibition for the arbitrator. Knowing that the reasons will be scrutinized encourages rational and objective analysis, if for no other reason, than

[73] As does The New York Convention in minor measure by providing that courts may decline to enforce an arbitration agreement that under the court's national law, does not concern 'a subject matter capable of settlement by arbitration", because it affects rights or interests of the general public. An example would be the validity of patents or trademarks**.** *New York Convention supra* note 7, at Art. V(2)(a).
[74] *Brazil Arbitration Act, supra* note 1, at Art. 2, para. 3.
[75] *Brazil Arbitration Act supra* note 1, at Art. 26.
[76] J.G. Merrills, INTERNATIONAL DISPUTE SETTLEMENT 158, 160-61 (2017).
[77] *See e.g., Rainbow Warrior supra* note 29.

the arbitrator's personal concern to maintain a reputation of integrity and competence. No doubt the requirement of statement of reasons is also a significant consideration in ensuring objectivity. Even apart from the reputational concern for integrity and competence of the arbitrator, this dynamic is enhanced by the promise of more business for the arbitrator perceived by prospective parties on both sides of a case as fair, objective and competent. In that the appointment of an arbitrator depends on the consent of both sides, this is one respect in which arbitration can be markedly superior to adjudicative process, considering that judges in the formal legal system, gaining office by election or appointment, are less dependent on reputation for competence. The Brazil arbitration act engages these benefits of arbitration, by explicitly requiring that the arbitrator state reasons for his or her award.

However, notwithstanding the requirement of a reasoned award stated in the Brazil Arbitration Act, there is ultimately no guarantee to prevent the arbitration from actually exercising equitable discretion in making its award, despite any rationalization offered in the award. Ultimately the limits on review are most critical. Arbitrators, universally, render their awards with full awareness their awards cannot be reviewed and reversed on the merits. It is the very nature of arbitration to provide this assurance, the assurance of no review on the merits being what distinguishes arbitration as providing greater and more expeditious finality than judicial litigation, or negotiation, or mediation.

There is therefore a contradiction and tension under the law of Brazil between the prohibition on the exercise of equitable discretion for public administration, and the limits of review. The Brazil Arbitration Act attempts to accomplish the impossible – requiring decision exclusively at law, while still providing what arbitration most importantly provides – a guarantee of expeditious finality. While the contradiction and tension between the prohibition of equitable discretion and the narrow grounds for review and reversal may be mitigated by the requirement of a reasoned award, that tension cannot be eliminated.

The instruction for the government lawyer is therefore not to be misled by the Brazil Arbitration Act's prohibition of equitable discretion. *Ex aequo et bono* is still there, alive and well, but as an even more threatening discretion of the decision-maker than in litigation. The arbitrator's subjective sense of equity can affect the admission of evidence, the cross-examination of witnesses, examination of documents, and most importantly, the result. In arbitration, *ex aequo et bono* is not within the discretion of a judge subject to judicial review, but simply and finally, is within the discretion of the 500 pound gorilla.

VII. NEUTRALITY

But even recognizing the arbitrator's power includes significant discretion or even where prohibited, does arbitration assure neutrality? If the arbitrator assumes the power to do equity, isn't 'fairness' the worthy objective after all, no matter however great the arbitrator's discretion in rendering judgment as to what is 'fair'?

Ironically a common criticism of the arbitral process is that it is "too neutral". The charge is commonly made, especially among the practicing bar, that arbitrators tend to render 'compromise awards', perhaps as a result of the contextual nature of the arbitral process – the decision-maker and the parties attorneys in much closer and less formal interaction than in judicial litigation, more often of previous professional acquaintance. Much more so than in judicial litigation, the lawyers and the 'neutral' deciding their case share specific expertise, values and relationships. Arbitrators are chosen for their particular expertise, and they and the lawyers that appear before them typically belong to the same epistemic communities, certainly more so than when the lawyers appear before a judge of general jurisdiction drawn from the formal legal system. The arbitrators may indeed have an investment in not seriously displeasing one of their colleagues. A motivation for 'compromise awards', or indeed for non-neutral awards, may also be the arbitrator's motivation to maintain future business, by trying to please the many, and offend the few. Whether this leads to greater or lesser 'neutrality' is debatable, but there is the pervasive view that arbitrators are less inclined to issue an award that manifests a clear 'winner' or 'looser'.

The common speculation that arbitration leads to compromise awards, in contradistinction to the winner and loser dynamic more common in court litigation, is belied to some degree by the common ambivalence often found even in judicial results of the legislated judicial process. Moreover this speculation can at least be said to be unsubstantiated, given the empirical studies designed to expose the phenomenon of arbitral compromise verdicts. Studies have concluded that "arbitrators do not engage in the practice of 'splitting the baby'", and that in general arbitral awards result in clear 'winners' and 'losers' no less than in the formal litigation system.[78]

But the widespread though unsubstantiated belief that arbitrators are more likely than the litigation judge to 'split the baby' merits special caution for the government lawyer. The prospect of a compromise result should be of special concern when the government lawyer is dealing with a matter of significant social policy and impact, and should be seeking a clear result that sends a certain social message. The caution is to avoid arbitration for such matters, or if there is good reason nevertheless to seek secure the advantages of arbitration, to be especially careful in examining the reputation of a particular arbitrator before agreeing to his or her appointment.

Also to be recognized is that party autonomy means that if there is inordinate leverage between the parties that results in the choice of arbitration, it can naturally lead to unfairness as to any procedural or substantive aspect of arbitration. For example, the health care contracts of the Kaiser System in the US state of California formerly provided that only Kaiser doctors could act as arbitrators. Besides the

[78] *See* Stephanie Keer & Richard Naimark, ARBITRATORS DO NOT "SPLIT THE BABY": EMPIRICAL EVIDENCE FROM INTERNATIONAL BUSINESS ARBITRATION: COLLECTED EMPIRICAL RESEARCH (2001), *reprinted in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, 311 (Drahozal & Naimark eds., 2005).

obvious problem of inherent bias, an apparent result was that delays in the system engineered by the doctors in their self-defense, allowed an inordinate number of patients to die before there could be arbitration of their claims.[79]

Similarly in reference to bias and leverage, US investment houses have provided that arbitrators in securities cases were required to be members of the National Association of Securities Dealers. To the same unfair effect, consumer contracts leveraged by large consumer product producers include arbitration clauses with waivers of class actions and punitive damages, making economically unsupportable the pursuance of consumer claims. Also to the same effect, certain industries, applying their leverage against employees and labor unions, insert clauses limiting labor complaints to arbitration, thereby constricting labor rights.

Here Brazil's law is marked by the failure to counter such inherent bias. In the course of the approval of the amendments of 2015, the President of Brazil vetoed three provisions that would have significantly countered the undue leverage that can undermine fairness in arbitration involving government. One of these provisions would have directly addressed the problem of leverage through adhesion contracts, specifically providing that an arbitration clause, to be effective, would be required to appear in bold type or clearly demarcated in a separate document. Secondly for consumer adhesion contracts, a vetoed provision was that the arbitration clause in an

[79] Thus in Engalla v. Permanente Medical Group, Inc. (Permanente is also known as Kaiser), the California Supreme Court considered whether such circumstances of disproportionate leverage renders an arbitration agreement unenforceable. Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (1997). Patient Engalla claimed Kaiser committed medical malpractice because its employees were negligent in detecting and diagnosing Engalla's lung cancer over the course of several years. In accordance with the terms of Engalla's service agreement with Kaiser, the malpractice dispute was sent to arbitration. Engalla made every effort to comply with the Kaiser-designed arbitration system and seek a speedy hearing because he was terminally ill from the undiagnosed lung cancer. After Engalla died, with the medical malpractice dispute not having been heard by the tribunal, the Engalla family brought an action in the California state court system. The Engallas alleged Kaiser's self-administered arbitration system was corrupt and Kaiser intentionally delayed the arbitration process so the hearing would occur after Engalla's death. *Engalla* at 960. The California Supreme Court affirmed the policy of enforcing arbitration agreements, but stated that where a party acts wrongfully and fraudulently, the enforceability of the arbitration clause may be limited.
The court's finding was that Kaiser's arbitration program was "designed, written, mandated and administered by Kaiser." *Engalla* at 962. Kaiser did not disclose that it designed and administered the arbitration procedure to Engalla through the arbitration clause in the service agreement, nor through any publications on the procedure. Kaiser's reserved control of the arbitration system enabled Kaiser to repeatedly delay steps in the arbitration process, such as the timeliness of selecting the arbitrators. The arbitration agreement provided for each party to select an arbitrator, then the two arbitrators select a third, neutral arbitrator. "[I]n reality, the [neutral third arbitrator] selection is made by defense counsel after consultation with the Kaiser medical-legal department. Kaiser has never relinquished control over this selection decision." *Engalla* at 965. The court further noted that the arbitration panel should have been established within sixty days. But, due to Kaiser's systemic delays, the process took three additional months, until the day before Engalla's death. Evidence revealed these delays were widespread and commonplace, and that Kaiser knew of the problem. The California Supreme Court remanded the case to resolve factual disputes related to Kaiser's fraud. *Engalla* at 981. If the lower court found Kaiser was fraudulent, it could strip Kaiser of its ability to compel arbitration.
Engalla, and the broad abuse it exposed, thus demonstrates that where one party is completely autonomous in its forum selection and arbitration procedures, significant unfairness, such as delaying arbitration until a terminally ill patient dies, can easily result.

adhesion contract would only be effective if the consumer took the initiative of filing for arbitration or expressly agreed with its filing, post-contract. Thirdly vetoed was a provision restricting arbitration for labor contracts to the limited situation where an employee is or may become a statutory director or administrator, and that arbitration could be engaged only if the employee took the initiative of filing for arbitration or expressly agreed with its filing.[80]

An even more insidious unfairness, than outright bias or inherent leverage, can result from the economic interest of the arbitrator harnessed by a party who presents the implied promise of repeat business as the reward for a favorable result. This is a dynamic absent from judicial litigation, but that as present in arbitration, favors the party who controls the greater potential for future business for the arbitrator. The implicit economics of a dispute involving the arbitrator with a once-only party on the one side, and the potential repeat customer on the other, may well bias results. This typically means favoring the large over the small, the company over the consumer or employee, and even the state over its citizens.[81] The potential for the operation of this dynamic in any particular case should certainly be taken into consideration by the government lawyer before choosing arbitration.

Notwithstanding the extraordinary power that may be conferred on the arbitral tribunal in contrast to the litigation judge, arbitration can engender therapeutic constraint on the wayward tendencies for bias in favor of the arbitrator's own economic interest. Though there is no review of the arbitrator's judgment on the merits, there is the informal constraint of the arbitrator's reputational concern, which also relates to the arbitrator's economic concern to be chosen for future business. An able government counsel should certainly therefore advance any policy or fairness concern that can trigger the arbitrator's own sense of responsibility and reputational interest, though this course puts a premium, in choosing arbitration, on skills of interpersonal diplomacy.

The same reputational concern, however, includes its own dynamic for bias. Arbitrators, counsel, and expert witnesses in any given proceeding may have previously worked on the same matters, and crossed paths in one professional

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[80] The three vetoed provisions designed to mitigate leverage read as follows: "Art. 4. Para. 1. In adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause." "Art. 4. Para. 3. In a consumer relationship, established by means of an adhesion contract, the arbitration clause will only take effect if the adhering party takes the initiative to file an arbitration proceeding, or to expressly agree with its institution." Art. 4, Para. 4. "As long as an employee occupies or comes to occupy a position or function of an administrator or a director appointed pursuant to the by-laws, in individual labour contracts an arbitration clause may be agreed to, which will only enter into force if the employee takes the initiative to file an arbitration proceeding, or if the employee expressly agrees to an arbitration proceeding being filed." *See*, Camila Tomimatsu and Mariana Cattel Alves, *The Recent Amendments to the Brazilian Arbitration Act- One Step Back, Two Steps Forward*, KLUWER ARBITRATION BLOG (Jun. 30, 2015), arbitrationblog.kluwerarbitration.com/2015/06/30/the-recent-amendments-to-the-brazilian-arbitration-act-one-step-back-two-steps-forward

[81] *Arbitration Everywhere, Stacking the Deck of Justice, supra* note 56 (analyzing the effects of arbitration across multiple industries, especially noting the disproportionate leverage held by credit card companies, employers, and other commercial entities).

context or another. Arbitral systems, such as that of the American Arbitration Association, are meticulous in requiring pervasive disclosures that serve to police such associations that could create conflicts of interest. However, the nature of professional relationships and unconscious bias involved may not be fully comprehended by objective standards such as past joint participation in a litigation, or formal representation of interested parties. Arbitrators hired for their expertise, often confront in different cases, the same counsel.

Indeed, as previously noted in relation to the potential for 'compromise awards, the arbitrators, themselves are drawn from the same communities as the lawyers appearing before them. The litigation judge is generally prohibited from operating as an advocate or expert witness through his or her entire service as judge, and is prohibited from fraternizing with advocates appearing before the judge or potential witnesses. But arbitration is a career dependent on personal relationships, and the nature of those relationships varies considerably from social to legal. Because arbitrators are drawn from the practice community based on their experience and reputation, there is a natural fraternity of interest, and accordingly, a significant potential source of bias.[82] In contrast to the litigation judge, an individual who is appointed to arbitrate your case may have also participated in arbitrations as an advocate, consultant, or expert witness (hired by the parties or by the tribunal itself). Often such experience is what is deemed to qualify an individual to serve as arbitrator. Because arbitrators are drawn from the epistemic community that relates to the matter at hand, this experience presents a rich potential for bias.

In response to such concerns about the objectivity of arbitral process, arbitrators and arbitral institutions have developed and continue to develop procedural and other constraints on arbitration. This has been accomplished by means of rules on conflicts of interest and professional ethics,[83] rules of procedure to ensure fairness,[84] transparency and improved informational resources for the selection of arbitrators, and increased transparency for the challenge of arbitrators.[85] Arbitral institutions have established training and certification programs, which are often made mandatory for would-be arbitrators.[86] As part of the amendments of the Brazil Arbitration Act in 2015, it was provided that the parties can appoint as arbitrator someone who is not on the list of arbitrators of a certain arbitral institution or chamber, subject to review by that institution, to protect party autonomy in the selection of arbitrators. The Brazil Law of Corporations was also amended to add

[82] Thus in recognition of the subconscious bias this may engender, the British House of Lords has held that lawyers who serve as part-time judges may not appear as counsel before an Employment Appeal Tribunal, because that would create a risk of bias and undermine public confidence regarding the independence of arbitrators. Lawal v. Northern Spirit Ltd. (2003) UKHL 35, 21-23.

[83] *See generally*, Catherine A. Rogers, *Transparency in International Commercial Arbitration*, Vol. 54 No. 5 U. KANSAS L. REV. 1401 (2006).

[84] *See,* Emmanuel Jolivet, *Access to Information and Awards,* Vol. 22 No. 2 ARB. INT'L. 265 (2006). This development importantly includes improving the efficiency of arbitration as to time and cost. *See* Harold S. Crowter & Anthony G.V. Tobin, *Ensuring that Arbitration Remains a Preferred Option for International Dispute Resolution*, Vol. 19 No. 4 J. of INT'L. ARB. 301 (2002).

[85] *See, e.g.*, 11(2)LCIA News 1 (June 2006).

[86] Florian Grizel, *Control of Awards and Re-Centralisation of International Commercial Arbitration*, Vol. 25 CIV. JUST. Q. 166, 167 (2006).

protections for dissenting shareholders while enhancing the potential use of arbitration for resolving corporate disputes.[87]

It is clearly in the interest of government lawyers to support such developments. The party autonomy that is the fundamental foundation of arbitration means that the government lawyer is positioned to accomplish a great deal as to all provisions to ensure fairness by selecting and demanding adherence to the fairness requirements as the sin qua non of willingness to arbitrate. As the example of requiring a reasoned award illustrates, there are clear therapeutic requirements, such as stipulating for reasoned awards and their publication when possible, that can serve importantly in minimizing the risks of bias here discussed. But the government lawyer, given party autonomy as the foundation of arbitration, must often take the initiative to insist on such requirements when they can serve to reduce or eliminate bias.

Finally, faced with arbitral power, the government lawyer should appreciate the value of adoption of the procedural rules of a well-established arbitral system. Over time these rules evolve to integrate concerns of fairness and procedural restraints on discretion derived from what has been learned from arbitrations gone wrong. The administering bodies of various arbitral systems typically respond to complaints about process, and modify their procedures accordingly. So there is a special safety in not trying to reinvent the procedural wheel, and instead to rely on adoption of an established arbitral institution.

VIII. INTERAGENCY ARBITRATION – THE MODEL OF THE NAFTA SIDE AGREEMENTS ON ENVIRONMENT AND LABOR

So in general, it is possible to avoid or largely minimize most of the concerns here elaborated by designing arbitration to the end of serving governmental interest through more collaborative process. However, there is a special arena that warrants even further distinction - governmental interagency arbitration. Are there additional or different considerations when an arbitration is interagency, and there are governmental interests and public policy concerns, not just inherent in the dispute, but governmental interests being advocated by the different and contending parties?

Firstly, and most importantly, interagency arbitration, because it typically involves ongoing intergovernmental relationships, may benefit from a distinctly different design. That design can be a greater fusion of negotiation and arbitration.

In commercial arbitration, usually negotiation and mediation are kept separate and distinct from arbitration; and for good reason. The most significant reason is that negotiation for dispute resolution is facilitated when the parties do not risk that positions stated and information disclosed in mediation as a collaborative process will undermine their positions in arbitration as an adversarial process. Accordingly, most provisions by contract or procedures designed by court systems

[87] *See* note 3, *supra*.

and legislatures that engage mediation and arbitration provide for the former to precede the latter and protect the non-binding nature of mediation, including non-disclosure.

However, for governmental interagency arbitration, or arbitration between and amongst governments, the fusion with more collaborative processes akin to mediation can be especially opportunistic for dispute resolution. The outstanding model for such fusion is the formulation that became the 'Side Agreements on Labor and the Environment' for the NAFTA trade agreement of the United States, Canada and Mexico. The appeal of that formulation was well demonstrated by the fact that it became key to securing the NAFTA Treaty approval by the three governments, despite resistance from labor and environmental constituencies.

The further essentials of that design can be stated briefly, though their elaboration warrants study for any replication of what was achieved.[88] The scheme is to begin dispute resolution with negotiations at the highest governmental level available, then to proceed to arbitration if those negotiations do not resolve the dispute, but to have the arbitrators provide not an award, but their proposal for a mutually satisfactory action plan. If the complained against party rejects that plan, that party then has the burden of proposing its own solution, which the arbitrators can accept or reject. If the arbitrators reject the complained against party's proposed solution, the failure of the complained against party to comply with the arbitrator mandated plan, through the end of the process, can result in sanction, first by fine, and if that doesn't secure the arbitrator plan, ultimately a loss of trade benefits. This design incorporates a number of opportunities to negotiate along the course of this process, which is supposed to take a maximum total of 1225 days.[89]

The uniqueness and advantage of this model is to achieve a fusion of political and legal process. It maximizes the expression and accommodation of the political interests of the parties, while providing continuing opportunity for consensual resolution. Arbitration is employed more to drive the process of resolution than to provide an award, more to educate the parties concerning constructive resolution and enforce that outcome only if they cannot reach resolution.[90] The objective is to avoid the need to employ the ultimate sanction of loss of trade benefits, a result that would be counterproductive to the very purpose of NAFTA to further free trade. This is a design that acknowledges the political reality that it is the governmental parties who best understand the respective interests they represent, but engages arbitration and potential sanction to compel the parties to find a practical solution. It is a design that maximizes the capacity of arbitration, in contrast to litigation, to achieve a solution instead of a winner. Presumably that would be the most desirable end-game for inter-governmental arbitration anywhere, including in Brazil for interagency disputes handled exclusively by government lawyers representing the disputing agencies.

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[88] Jack I. Garvey, *Trade Law and Quality of Life–Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, Vol. 89 No. 2 AM. J. OF INT'L. L. 439 (1995).
[89] *Id*. at 444.
[90] *Id.* at 439.

IX. CULTURAL AWARENESS

There is, finally, a subtle but critical aspect to the potential value of arbitration for the government lawyer, that goes well beyond any substantive or procedural aspect. Whether the government attorney is engaged in arbitration in commercial context or *vis a vis* other governments or representatives of other governmental agencies, the matter of cultural awareness is of special importance. Cultural sensitivity is more likely of special importance for government attorneys considering the choice of arbitration, than for private sector attorneys, because of the different interests they represent. In commercial arbitration, the parties, their attorneys and the arbitrator, generally represent a homogeneous cut of the national population, whether measured in terms of education, professionalism, or social class. In other words, commercial arbitration, being commercial, is mainly about wealth - - - those who enjoy the advantages of wealth, and those who have enough wealth to afford to be fighting about it through legal process and lawyers. In arbitration involving government, however, the government lawyer represents the diverse interests of society at large. The client base, for a government attorney, in the ultimate respect of citizenship, includes not only the wealthy and educated, but also the poor and middle class populations, many without the advantage of being able to employ lawyers to handle their disputes, many isolated and alienated from the legal system.

These parties and their interests, whether physically participating in a given arbitration or not, may be detached and alienated from the court litigation system, except as represented by the government lawyer. The same is true for the government lawyer in arbitration, who is by nature of the office of government lawyer, charged with defending and enforcing the public trust. The challenge for the government lawyer in arbitration is to work on behalf of a much more diverse population of interests than the private commercial attorney, and to do so, for reasons here explained, before a third party neutral not mandated by public policy, but by party autonomy, and accordingly freer than the litigation judge to ignore the public trust. The greatest challenge, therefore, especially for the government attorney engaged in arbitration, is to represent those members of society who are more outside the legal system than within it - - - except when they get in trouble. The need for legal representation of the thus disenfranchised and disabled, because of the vulnerability that the cases of inordinate or unconscionable leverage reveal, presents as great a challenge in Brazil and the United States, as it does in the rest of the world, given the well documented increasing disparity of opportunity everywhere on our planet, between those who have and those who have not. The consequence is a greater responsibility for the government lawyer in arbitration, and that responsibility includes special sensitivity to the variety of cultures and constituencies the government lawyer represents.

There are procedural means to best realize the diversity of interests that the government lawyer must represent. One technique that can be very effective to ensure that the ruling of the arbitrator conforms to the practical needs represented, is to ask the parties themselves, before the rendering of the arbitral judgment, to provide the arbitrator with a draft order of the result that would work best for their

circumstances. This may well produce results much more accommodative to the diversity of interests involved, and for all the parties involved directly or impacted indirectly, than an arbitrator ruling without such refined understanding of the problems and potential solutions at hand.

Relatedly and ultimately, on the question of inherent bias and how best to limit its influence on arbitration and its result, there is the basic human psychology that any good lawyer needs to take into account – the realization that we all experience a selective and biased process in our perception of external stimuli. This was as long ago recognized in the fundamental moral imprecation of the major religions - deemed the 'golden rule', requiring of us, and particularly the lawyer representing 'the other', the need to stand in the shoes of the other. The same revelation appears in modern psychology, by way of the evidence of selective perception, whereby the same events can be interpreted very differently by two individuals.[91] We tend see what is familiar, what is personally, and culturally most akin to our community, whether cultural and/or professional. But as the 'golden rule' requires, representation requires empathy. For the government lawyer, who represents the large national community of a more diverse mix of social class and ethnic and cultural affinity than any lawyer in private practice, the need to step into the shoes of the other, is, more than for any other lawyer, a moral and psychological imperative.

An innovative effort, as an example of how to provide for maximizing cultural sensitivity in arbitration, is the provision for the 'Blue Book' for dispute resolution that has been made within the major 'Belt and Road' initiative of China. This trade and investment initiative, unveiled in 2013, seeks to facilitate and generate trade and investment across a broad swath of Asia, by means of measures for a broad integration of international trade between China and its neighbors, stretching through multiple and diverse cultures. These measures include, as importantly embodied in The Blue Book, a new set of rules covering conciliation, arbitration and appeal procedures, plus a set of transparency rules and code of conduct for conciliators and arbitrators.[92] Most notably in relation to the cultural challenges the 'Belt and Road' initiative presents, the Blue Book permits the parties to agree that 'at least one arbitrator shall have specific professional qualifications or expertise and/or understanding of local or regional culture and practices'. This is in addition to the qualification requirements of objectivity, reliability and observance of rules of conduct.[93]

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[91] *See, e.g.*, James W. Bagby, *Cross-Cultural Study of Perceptual Predominance in Binocular Rivalry*, Vol. 54 No. 3 J. OF ABNORMAL AND SOC. PSYCHOL. 331, 331-34 (1957). A classic study in which one eye of subjects from the United States viewed, for a second, stereograms in which one eye was exposed to a baseball game and the other to a bull fight. The subjects from the United States generally saw only the baseball game and the Mexican subjects saw only the bullfight.

[92] *See* Guiguo Wang, *The Belt and Road Initiative in quest for a dispute resolution mechanism*, Vol. 25 No. 1 ASIA PAC. L. REV. 1-16 (2017).

[93] International Academy of the Belt and Road, Dispute Resolution Mechanism for the Belt and Road (October 2016), Annex I, 231-241, Arbitration – Article 16.

Furthermore to be considered, social science literature and jury psychology studies all indicate a fundamental truth about adjudicative neutrality – that the more diverse the group that engages in judgment, and therefore the more diverse the perceptions, observations and opinions engaged, the more likely the adjudicative body is to arrive at an objective assessment of the facts and more objective analysis.[94] It follows that the government attorney, seeking to represent society at large, should be especially inclined to maximize the diversity of experience and viewpoints available through arbitration. This counsels, therefore, that in agreeing to arbitration, one should, as a government attorney, seek to appoint an arbitrator who has a diversity of experience, both social and legal, and where economically viable for the parties, appoint more than one arbitrator to achieve the greatest diversity of social and professional experience available.

X. CONCLUSION

Ultimately, and ironically, it is party autonomy, the source of arbitral power, that also is the key for controlling arbitration to ensure that it serves, rather than undermines, good government. Because the arbitral process can be what the parties design it to be, it is the government lawyer, if he or she takes into account and acts on the dynamics of arbitration here addressed, who is best positioned to minimize the risks to governmental interest that arbitration presents, and to maximize its advantages.

The foundational principle of party autonomy empowers the government attorney to affect all aspects of arbitration and its use. This even includes, when appropriate and desirable, rejection of arbitration for resolution of a particular dispute, or its limitation through exclusions to protect public by narrowing or limiting the issues to be arbitrated. Party autonomy empowers the use of arbitration to achieve social good, so long as the government lawyers appreciate the pro-active role that arbitration requires of them. Party autonomy makes possible negotiation and stipulation as to virtually all substantive rights and obligations, and remedies of the parties, and all significant procedural aspects, such as presentation of witnesses, confidentiality, cross examination, preclusion of potential conflicts of interest and bias, and cultural representation. Creative control through design of the arbitral proceedings can include the most useful requirements to serve the public interest at a significant level of specificity, for example, even detailed requirements such as concerning admission and use of expert witnesses and whether the arbitral panel can call its own expert, or witnesses, or conduct its own research.

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[94] *See* Jeffrey Abramson, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 104 (Basic Books ed., 1994) (stating "research indicates that when jurors of different ethnic groups deliberate together, they are better able to overcome their individual biases," and citing, among other studies Nancy J. King, P*ost-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Decisions*, 92 MICH. L. REV. 63 (1993); Jon Van Dyke, *Jury Section Procedures: Our Uncertain Commitment to Representative Panels* (1977); Shirley S. Abramson, *Justice and Juror*, 20 FA. L. REV. 257-98; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90(4); Doak Bishop & Edward G. Kehoe eds, THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, 519-581 (2d ed. 2010).

As examination here reveals, there is much that can be accomplished by the government lawyer working within arbitral process to serve the public trust. Of particular note, the Brazil Arbitration Act, in providing for reasoned awards and their publication, provides great opportunity in this regard, affording the opportunity to promote and enhance predictability in all relevant arenas of governmental interest, ranging from employer/employee relations to public private partnerships and social services. Even if not of precedential value, such opinions can create at least informal law for regulation of virtually all areas of governmental concern and regulation; in the workplace, in government or commerce, setting guidelines for economic development and social welfare in all its diverse aspects. The requirement of a reasoned award, as articulated and exploited by the government lawyer, can serve to engage awareness of the arbitral tribunal that it will be compelled to justify its award, can serve to motivate engagement and a higher level of analysis and scrutiny than the mere issuance of an award, and can force the arbitral tribunal to obtain better knowledge of the law as the background for the award notwithstanding that the award is not susceptible to reversal on the merits. The exposure a fully reasoned and published award is indeed protection against unprincipled decision, confronting the arbitral tribunal with the prospect of critique compelling self-examination and requiring justification. Such accountability encourages well-reasoned decisions, as well as providing a basis for the lawyers on both sides of the dispute to better evaluate the quality of an arbitrator for future selection, and for rejecting the incompetent.

The net result of a process subject to scrutiny, in terms the public perception and the public interest, is greater legitimacy for arbitration and its results, and a greater willingness to employ its advantages of more expeditious dispute resolution than in the formal litigation system, while achieving the cost savings that usually results in arbitration. However, to maximize these benefits, it is up to the government lawyer to pro-actively articulate and refine the detail of desired award, both in the drafting of the arbitration clause and when engaged within the arbitral process.

A pro-active role of the government lawyer similarly can enhance the process by which the arbitral tribunal deliberates the merits, most importantly in achieving maximal transparency. The demand for transparency, just as for a thoroughly reasoned award, should be articulated in drafting the arbitration clause and throughout the process. Transparency and publication can also provide information for policymakers for collaterally evaluating public law and public administration. Moreover, it is the government lawyer who is best situated to engage and promote the public interest by encouraging and allowing information and argument, such as through amicus filings by civil society organizations and other affected third parties, especially where there are significant impacts on third parties and society at large, as for example, in cases of regulatory takings. All this also can be accomplished in the drafting of the arbitration agreement and creative interjection of the government lawyer during the operation of the arbitral process.

The government lawyer indeed can play a critical role in ensuring the fullest transparency in the public interest, by drawing on instruction from other fora than the domestic legal system itself, instruction that is now available to be drawn especially from international legal development. Comprehensive guidelines to maximize transparency have been fulsomely developed by way of standards recently elaborated for international arbitration.[95] The government lawyers of Brazil accordingly should be at the forefront of articulating and requiring such standards for Brazil's legal development. The power to do so is inherent to the principle of party autonomy, and the government lawyer engaging in arbitration possesses the power to require these standards as the *sin qua non* in drafting an arbitration clause or agreement.

For the government lawyer, therefore, arbitration *is ultimately* an empowerment to serve the public interest. Success, however, depends on the government lawyer's in-depth understanding of the complex opportunities presented within the arbitral process, and understanding where the critical judgments in designing that process must be made. There are no doubt risks. Arbitration, despite its advantages, may override constraints that have enlightened the formal legal system through lessons learned in evolving the formal legal system towards better rule of law and justice. The government lawyer engaged in arbitration, appreciating the risks, but understanding the capacities and incapacities of arbitration to serve the public interest, can fill an important role in bringing that same enlightenment to the alternative dispute resolution universe of arbitration.

[95] *See supra* note 24.