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The New York Convention: 50 Years Of Experience

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The New York Convention: A Basis For The Enforcement By National Courts Of A Justiciable Liberty Of Decision Of The Arbitral Tribunal?

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*"Liberty means responsibility.
That is why most men dread it."
— George Bernard Shaw,
Man and Superman (1903)*

A. Introduction

Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") provides:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

This provision of the New York Convention is generally regarded as giving effect to a policy favouring the indirect enforcement of arbitration agreements internationally. Hence, if one of the parties to an arbitration agreement brings proceedings in a national

court in breach of that agreement those proceedings will be stopped at the request of any other party to the arbitration agreement (unless there is good reason why they should not be).¹

This Commentary questions whether this "indirect enforcement" of arbitration agreements is, or ought to be, the sole concern of national courts in applying Article II (3) in circumstances where one party has brought judicial proceedings in breach of a valid arbitration agreement to which it is a party. It argues that Article II (3) implicitly provides the basis for the enforcement by national courts of a justiciable right (or "freedom" or "liberty") of the arbitral tribunal constituted pursuant to a valid arbitration agreement to decide the matter in respect of which the parties have entered into such an agreement, i.e., the liberty of decision of the arbitral tribunal.

The Commentary begins with an analysis of institutional rules in force throughout the world in which "the liberty of decision of the arbitral tribunal" is expressly recognized. It later considers the meaning, nature and implications for international arbitration of such a right.

B. Recognition Of The Liberty Of Decision Of The Arbitral Tribunal

Article 27 of the ICC Rules of Arbitration states that:

*"Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form."*²

The arbitration rules of arbitral institutions and commissions situated in a number of jurisdictions around the world, including Australia, China, Croatia, Lebanon, Luxembourg, Mexico, Singapore, Tehran, and Tunis also refer to the “*liberty of decision*” of the arbitral tribunal. And yet in none of these arbitral rules is there any preceding, specific provision which confers or provides for such a “*liberty of decision*.”³

At first glance, or course, one might be tempted to dismiss the “*liberty of decision*” mentioned in Article 27 (and corresponding provisions of other arbitration rules) as referring to nothing more than the exercise by the arbitral tribunal of an implied discretion. In other words, it is intended only to acknowledge that the tribunal is “*at liberty to decide*” and that the Court’s review is not intended to interfere with the exercise of that discretion. However, in the author’s view, such an interpretation is not supported by the text of Article 27 itself.⁴ The French version of the Rules refers to “*la liberté de décision du tribunal arbitral*,” which translated means “*the freedom of decision of the arbitration tribunal*.”⁵ The French version of the Rules appears therefore to confirm the existence of a “*freedom of decision*,” rather than simply a discretion enjoyed by an arbitral tribunal.⁶ Moreover, the object and purpose of Article 27⁷ seem intended to facilitate the decision making power of the arbitral tribunal by ensuring its effectiveness, rather than interfere with the determinative function reserved exclusively to the arbitral tribunal.

C. The Meaning Of ‘The Liberty Of Decision Of The Arbitral Tribunal’

The European Convention on Human Rights refers interchangeably to individual “freedoms” and “rights.” For instance, it enumerates the rights to “*freedom of thought, conscience and religion*” and “*freedom of assembly*.”⁸ Does this suggest that the ICC Rules and other arbitration rules presuppose the existence of a right or freedom of decision of the arbitral tribunal? A justiciable “right of decision” has been recognised, for example, in other areas of law.⁹ Why should the same not arise in the case of an arbitral tribunal in fulfilling its duty to the parties to render a decision?¹⁰

What then are the meaning and legal basis of such a right or freedom? Is it a justiciable right, i.e., one that is being capable of being considered judicially? And, if so, in what circumstances ought it to be considered

judicially and what, if any, interference or restriction of such a right by permitted? The possible meaning of the arbitral tribunal’s “*liberty of decision*” is considered first.

In the absence of any definition of the “liberty of decision” in the ICC Rules or, to the author’s knowledge, under international arbitration law, it is necessary to consult various reference works. While there appear to be no definitions of “*liberty of decision*,” as such, there are obviously many definitions of “*liberty*,” including:

*“a: freedom from external (as governmental) restraint, compulsion, or interference in engaging in the pursuits or conduct of one’s choice to the extent that they are lawful and not harmful to others b: enjoyment of the rights enjoyed by others in a society free of arbitrary or unreasonable limitation or interference.”*¹¹

A critical aspect of the tribunal’s liberty of decision is, therefore, freedom from external interference or restraint. This is evident, for example, in the wording of Article 27 of the ICC Rules of Arbitration. Hence, one might say that an arbitral tribunal’s “*liberty of decision*” may be defined as:

“The freedom from external restraint, compulsion, or interference of an arbitral tribunal constituted pursuant to a valid arbitration agreement to decide the matter in respect of which the parties have entered into such an agreement to the extent that the tribunal exercises such freedom in a manner that is lawful, in accordance with the arbitration agreement, and which respects the rights of others, including the parties to the arbitration agreement.”

Notice how the proposed definition refers to the arbitral tribunal: it is submitted that tribunal’s freedom of decision is vested in the arbitral tribunal, rather than its constituent members. For example, Article 25 of the ICC Rules provides that where the tribunal is composed of more than one member its award shall be by majority decision. Article 26.3 of the LCIA Rules contains a similar provision. At best, an individual tribunal member can express a dissenting

opinion, but would not appear to be entitled to issue a separate binding decision. Hence, there appears to be no individual freedom to make a decision binding the parties; it is submitted that as matters currently stand, the right, if one exists, vests in the tribunal.¹²

D. Possible Legal Bases Of The Liberty Of Decision Of The Arbitral Tribunal

Having briefly considered the possible meaning of the arbitral tribunal's freedom of decision, what then might be regarded its legal basis?¹³ In the area of international arbitration law, the legal bases of arbitrator's rights and duties generally have been variously described as: (a) what has been referred to as "*status*," that is to say, a *sui generis* source of rights and obligations;¹⁴ (b) law;¹⁵ (c) contract¹⁶ or quasi-contract;¹⁷ or (d) lying "somewhere in the middle."¹⁸

Moreover, Fouchard *et al* speak of the "*moral*" rights of the arbitrator (in addition to his or her "*pecuniary*" rights).¹⁹ They do not state what they mean by this term. A "*moral right*" is normally a term associated with the field of intellectual property. For example, Black's Law Dictionary defines a "*moral right*" as "*the right of an author or artist, based on natural law principles, to guarantee the integrity of a creation despite any copyright or property-law right of its owner*" (emphasis added). Is this to imply that the arbitral tribunal's freedom of decision might be an enforceable right based on unenumerated principles of natural law or justice?

On the other hand, of course, one might question whether such a freedom is comprised in or incidental to an enumerated right protected under international and/or domestic law? The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights all recognize the right to freedom of expression. Article 19 of the International Covenant on Civil and Political Rights provides:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in*

print, in the form of art, or through any other media of his choice.

Might it be said that such a provision or its equivalent in, say, the European Convention on Human Rights,²⁰ provides the legal basis for the liberty or freedom of decision of the arbitral tribunal? Of the rights and freedoms protected under international law, the right to freedom of expression seems to be the most closely aligned to freedom of decision in an arbitral context given that it manifests itself in the written award communicated to the parties.²¹ In the absence of any precedent at an international or domestic level, to the author's knowledge, the earlier question remains to be answered.

E. Justiciable Nature Of The Liberty Of Decision Of The Arbitral Tribunal

Whatever the precise legal basis for such a right of decision, it is strongly arguable that the arbitral tribunal's liberty of decision is a justiciable right. While it is not clear whether Fouchard's description of the arbitrator's "*moral rights*" is intended to denote a non-justiciable right, such a concept certainly equates to a justiciable right, in the field of intellectual property with which the concept is associated, of the author to protect the integrity of his or her work. Why not then regard the tribunal's liberty of decision as a justiciable right?

It is submitted that the justiciable (or enforceable) nature of such a right is most strongly evidenced in the New York Convention on the Recognition and Enforcement of Arbitral Awards, the cornerstone of the international arbitration system. As noted at the beginning of this Commentary, Article II (3) of the Convention provides that:

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It is submitted that the New York Convention provides recognition under international arbitration law of the arbitral tribunal's "liberty of decision." It

is implicit in Article II (3) that a domestic court, in foregoing its liberty of decision in accordance with the requirements of that provision,²² does so in favour of the arbitral tribunal's liberty of decision. In other words, the Convention implicitly requires a domestic court to respect and, in effect, enforce the arbitral tribunal's liberty of decision unless, of course, the arbitration agreement, the basis of the tribunal's very existence, is invalid for one or more of the reasons enumerated in that provision.

Further evidence of the justiciable nature of the arbitral tribunal's freedom of decision is manifested in the checks and balances on the enforcement and recognition of arbitral awards, which are remarkably similar to the checks and balances placed on the exercise of other justiciable rights, such as the right to freedom of expression. For instance, Article 19(3) of the International Covenant on Civil and Political Rights provides:

3. The exercise of the rights provided for in paragraph 2 quoted earlier of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- 1. For respect of the rights or reputations of others;*
- 2. For the protection of national security or of public order (ordre public), or of public health or morals. (emphasis added)*

Compare this with the structure and wording of this provision with that of Article V of the New York Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the

said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

[. . .]

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article V of the New York Convention appears to recognise in an arbitral setting the "special duties and responsibilities" of the kind to which Article 19 of the

International Covenant refers. It is submitted that Article V elaborates in detail the corresponding duties and responsibilities (in the form of restrictions) implicitly imposed on the arbitral tribunal in the exercise of its freedom of decision. These are largely, although not exclusively, focussed on protecting the rights of others (e.g., the parties to the arbitral proceedings to whom the responsibility that accompanies such a right it owed) and on respecting the public policy of the relevant jurisdiction to the extent they conflict with exercise of such a right.

F. Implications Of Affording Indirect Enforcement Of The Liberty Of Decision Of The Arbitral Tribunal

If one regards the arbitral tribunal as enjoying a justiciable right to liberty of decision, i.e., the freedom from external restraint, compulsion, or interference in making its decision, the implications for international arbitration could be significant. Although there has been some criticism of alleged interference by the ICC Court of Arbitration with the arbitral tribunal's "liberty of decision,"²³ state interference in the exercise of such a right, in the form of the so-called "anti-arbitration injunction," for example, while obviously only one possible external restraint, is a critical one in the area of international arbitration.²⁴

Judicial recognition of the arbitral tribunal's freedom of decision, as proposed in this essay, might therefore introduce a significant further consideration at the pre-decision stage for a domestic court faced with, for instance, an application by a party opposing an application under Article II of the New York Convention or conversely applying for an injunction restraining any related or potential arbitral proceedings or applying to stay extant international proceedings.²⁵

In assessing an application for an anti-arbitration injunction a domestic court can be expected to focus on balancing the rights of the parties under the arbitration agreement,²⁶ as well taking into consideration domestic and international law, including the New York Convention.²⁷ It is submitted that with regard to considering issues of domestic law, and, more significantly in this context, international law,²⁸ a domestic court ought also to take into consideration, for the reasons outlined earlier in this Commentary, the arbitral tribunal's right to liberty of decision in mak-

ing its decision. In doing so, the court's task would thus be extended to balancing the tribunal's right to liberty of decision against the rights of the applicant and also the other party or parties to the arbitration agreement.

Recent decisions by the English²⁹ and the Swiss³⁰ courts, refusing to grant anti-arbitration injunctions, also appear to be informed by the desire to respect the widely accepted principle of "Kompetenz-Kompetenz." In other words, these decisions appear to be based, at least in part, on the view that an arbitration tribunal cannot determine its own jurisdiction, which it is entitled to do under the "Kompetenz-Kompetenz" principle, if restrained from carrying on the arbitration.

It is submitted that this principle, while clearly very significant, should constitute only one factor in the courts' assessment. In some cases, for example, the arbitral tribunal may already have been established and have accepted jurisdiction, expressly or implicitly, by the time an application for such an injunction is made, such as to render considerations based on the "Kompetenz-Kompetenz" somewhat moot. It is suggested that the courts ought to have regard to all rights enjoyed by an arbitral tribunal under domestic and international law, including, as submitted in this essay, its liberty of decision, in determining the question of whether to restrain an arbitration from commencing or proceeding further. Indeed, it is strongly arguable that the right of the arbitral tribunal to decide on its own jurisdiction, in accordance with the "Kompetenz-Kompetenz" principle, is merely one facet — albeit an important one — of the liberty of decision of the arbitral tribunal.³¹

It is also submitted that there is no reason why the tribunal's right to freedom of decision should not also be taken into account also at the post-decision stage, for example, where an award was challenged before a domestic court. It is clear from international civil rights law and practice — to draw an analogy — that post-publication measures can also constitute interferences with right to the freedom of expression.³² However, it is likely that prior restraints on the exercise of such a freedom would or ought to be scrutinized more closely,³³ than those arising at post-award stage. Indeed, it is evident from Article V of the New York Convention that there are significantly more grounds on which a

court may set aside an award, than apply in relation to decisions taken under Article II, i.e., prior to the date of the arbitral award.

This raises the further question of whether, in either case, i.e., at the pre-decision or post-decision stage, it would be necessary to join the tribunal, if constituted, to an application for an anti-arbitration injunction, or an application under Articles II or V, in order for its rights to be considered, in addition to those of the applicant and the other party or parties to the arbitration agreement.³⁴ Indeed, would or should the tribunal be entitled to participate as a party, including *qua* appellant in the event of a decision restricting its freedom of decision?³⁵ The answers to these questions are likely to depend on the procedural rules of the domestic court to which the relevant application is made. In any event, if only for reasons of costs,³⁶ not to mention arbitral decorum, it seems unlikely that many international arbitral tribunals would wish or actively seek to join in such court proceedings.³⁷

G. Conclusion

This Commentary raises what the author hopes are some interesting and potentially significant issues for the conduct of international arbitration and its widely recognized cornerstone, the New York Convention in this the year of its 50th anniversary.

Others, of course, might regard them as being, to borrow Bentham's famous description of natural rights, "*nonsense upon stilts*," with little connection with the real world of international arbitration. Given that international arbitration is a private process, though, why should the realm of civil, as well as contractual, rights not extend to all participants, not just the parties, in that process?

If "liberty means responsibility", then surely the converse is true: with the responsibility of accepting appointment as an arbitral tribunal and the corresponding duty to render an award should come the liberty to fulfil that duty, that is to say, the liberty of decision of the arbitral tribunal. National courts ought to be mindful of this in exercising their duties under the New York Convention — which, as submitted in this Commentary, arguably forms the basis of the enforcement by national courts of a justiciable liberty of decision of the arbitral tribunal.

Endnotes

- * This article is dedicated to the memory of Professor Thomas Wälde. His untimely death deprived us of a wonderful friend and mentor. May he rest in peace, and may his ever questioning and challenging spirit live on in the hearts and minds of all those fortunate enough to have known him. The author is grateful to Professor Wälde for his suggestions in relation to an earlier draft of this article. Responsibility for any errors and omissions is solely that of the author, and the views expressed are personal. This is a revised version of a paper kindly published by Professor Wälde in *Transnational Dispute Management* (www.transnational-dispute-management.com).
1. See e.g., Redfern and Hunter (with Blackaby and Partasides), *Law and Practice of International Commercial Arbitration* (4th ed.), § 1-12. The authors note that an agreement to arbitrate, like any other agreement, must be capable of being enforced at law. Otherwise, it will be a mere statement of intention which, whilst morally binding, is without legal effect. However, an agreement to arbitrate is a contract of imperfect obligation. If it is broken, an award of damages is unlikely to be a practical remedy, given the difficulty of quantifying the loss sustained; and an order for specific performance is equally impracticable, since a party cannot be compelled to arbitrate if it does not wish to do so. In arbitration this problem has been met, both nationally and internationally by a policy of indirect enforcement.
 2. Emphasis added; the French version of Article 27 provides: "*Avant de signer toute sentence, le tribunal arbitral doit en soumettre le projet à la Cour. Celle-ci peut prescrire des modifications de forme. Elle peut, en respectant la liberté de décision du tribunal arbitral, appeler son attention sur les points intéressant le fond du litige. Aucune sentence ne peut être rendue par le tribunal arbitral sans avoir été approuvée en la forme par la Cour.*"
 3. Article 27 of the ICC Rules underscores that ICC arbitration is, in the words of one leading commentary (Buhler and Webster, *Handbook of ICC Arbitration* (1st ed) (2005), p.318) "administered and supervised arbitration." The same commentators remark in this regard that: ". . . one of the key

elements in the involvement of the administering institution in the arbitral process concerns the scrutiny and approval of draft Awards by the ICC Court. This is part of the organisational framework that the ICC provides. The ICC Court's scrutiny is consistent with the ICC's role and distinguishes it from other forms of international arbitration. As the French Supreme Court stated in the *Cubic* case: "the [Court of Appeal] noted that the arbitration rules of the ICC maintain a distinction between the function of the organisation of the arbitration through the "International Court of Arbitration" and the decision-making function which is left exclusively to the arbitrators, the Court having no decisional power; that, in this respect, the Court of Appeal properly held that the transmission of a draft of the award to the International Court of Arbitration did not result in any interference in the decisional role of the arbitrator but had as its purpose solely to ensure the effectiveness of the arbitration; and that the Court correctly upheld in its reasons the validity of the contract organising the arbitration as regards the requirements of public international law." (Emphasis added by author) Hence, the members of the ICC Court review the draft Award in detail, subject to the limitations noted, above. Indeed, the Paris Court of First Instance has recently determined that scrutiny by the ICC Court of a draft award before it becomes final, in accordance with Article 27 of the ICC rules, is limited to issues of form rather than substance (*SNF SAS v. CYTEC Industrie*, case 05-13498, Oct. 10, 2007 (as discussed by Van Houtte and ors in "What's new in European Arbitration," *Dispute Resolution Journal*, Feb-Apr 2008). This serves to emphasise that the ICC Court does not intervene in the determination of disputes, which is reserved solely to the ICC arbitral tribunal.

4. One of the leading commentaries on ICC arbitration notes the "careful choice of words" in the provision: Paulsson, Park & Craig, *International Chamber of Commerce Arbitration* (2000), § 20.01.
5. The tribunal's "liberty to decide" would translate in French as "liberté à décider," which corresponds to "à la liberté à décider," that is to say, "at liberty to decide."
6. French and Swiss courts appear to have recognized the arbitrators' "liberty of decision" or "freedom of decision" in considering judicial challenges to the

ICC Court's review of draft arbitral awards under Article 27: *Societe Schutte Lenz v. Veuve Gallais*, 1973 REV. ARB. 84, 1974 REV. ARB. 296 ("La liberté de décision des arbitres devant être absolument respectée, la Cour ne doit pas être considérée comme un arbitre au deuxième degré"); and *Banque Yougoslave de l'Agriculture v. Robin International Inc. et al*, cited in Paulsson, Park & Craig, *supra*, at § 20.05.

7. See footnote 3, *supra*.
8. Notice also the "freedom of" construction where individual freedoms are enumerated in the Convention.
9. See e.g., *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 (in which a medical patient's freedom of decision was recognised as a right protected by the common law of England & Wales (with a corresponding duty upon the doctor). The Court conceded that this was a rather novel interpretation). The concept of "liberty of decision" also features in other areas of the humanities; see e.g., Thomas Aquinas, *Summa Theologiae*, 1. 83. 2 (trans. T. Suttor); Bolberitz, P., "Liberty of Decision in the Philosophy of St. Thomas Aquinas." *Verbum* (Budapest) 7/1 (2005) 27-36.
10. For example, Article 35 of the ICC Rules provide ". . . the Tribunal shall make every effort to ensure the award is enforceable at law"; see also Article 32.2 of the LCIA Rules.
11. Merriam Webster Dictionary of Law.
12. That a freedom may vest in what is essentially an unincorporated body is not without precedent. For example, it would appear that in England & Wales as a result of the Human Rights Act, read in the light of the Interpretation Act, the rights and freedoms conferred by the European Convention of Human Rights may be enforced in the English courts by a "body of persons corporate or unincorporate": see the Interpretation Act 1978, Schedule 1.
13. The scope of the tribunal's liberty of decision is not discussed in this essay. Issues that might be considered in that regard include: what may the arbitral decide upon; when and for how long is

- the tribunal entitled to exercise such a freedom; and where may the tribunal exercise its freedom of decision.
14. Mustill & Boyd, *Commercial Arbitration* (1989), pp. 220-223.
 15. Hausmmaniger, *The Status of the Arbitrator: A Civil Law Viewpoint*, ICC Bull. 37 (Supp. 1995).
 16. Tradax Export S.A. [1986] 2 Lloyd's Report 301; *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd.* [1991] Lloyds Rep. 524. For a criticism of such an approach, see Mustill & Boyd, *op. cit.*, pp. 222-223.
 17. Mustill & Boyd, *op. cit.*
 18. Platte, "An Arbitrator's Duty to Render Enforceable Awards," *Journal of International Arbitration*, Vol. 20 No. 3 (2003) (citing the decision of the English Court of Appeal in *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd.* [1991] Lloyds Rep. 524.). The same commentator goes on to say that "*whichever way one prefers to look at it, it does not matter much whether the duty to render an enforceable award stems from contract, status or law.*" (p. 307) While it is beyond the scope of this brief essay to explore these possible distinctions further, they are, *de jure*, significant, as they might limit the "vertical" and "horizontal" effects of such a right, that is to say, the enforcement of such a right against the State and private individuals and bodies, respectively.
 19. Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.) (1999), § 1157 et seq.
 20. Article 10.
 21. On the freedom of commercial expression, see *Balantyre et al v Canada* (359, 385/89) para. 11.3.
 22. It is generally accepted that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of human rights provisions, such as Article 6 of the European Convention on Human Rights, which guarantee the right to a fair trial. In other words, the parties are free to choose arbitration as a means of settling their legal disputes: see e.g., *Osmo Suovaniemi and Others v. Finland*, Application No. 31737/96, decision of 23 February 1999.
 23. See e.g., Kassis, *Journal of International Arbitration*, Vol. 6 No. 2 (1989), pp. 79 – 100.
 24. See Schwebel, "Anti-Suit Injunctions in International Arbitration — An Overview" in Gaillard, E. (Ed) *Anti-Suit Injunctions in International Arbitration*, Juris Publishing 2004 (commenting on such measures, Judge Schwebel remarks: "*The threats to and breaches of the efficacy, the integrity and in some cases the very viability of international arbitration are profound . . .*").
 25. See e.g., *Elektrim SA v Vivendi Universal SA & ors* [2007] EWHC 571 (Comm) (in which Aikens J refused to grant an injunction restraining the defendants from proceeding with a LCIA arbitration, holding that Elektrim had failed to establish any legal or equitable right which was breached by the continuance of the LCIA arbitration. Nor was there any basis for saying that the arbitration was vexatious, oppressive or unconscionable, and the grant of an injunction would be inconsistent with the scheme of the Arbitration Act 1996); in contrast, in *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd & Anor (No 4)* [2007] EWHC 1879 (Ch), Lightman J granted an anti-arbitration injunction. However, in that case the injunction was addressed to a party rather than to an arbitrator. This judgment was upheld on appeal: see *Albon (t/a NA Carriage CO) v Naza Motor Trading SDN BHD* [2007] EWCA Civ 1124. The Court of Appeal considered among other things: "*the argument relating to the autonomy of the arbitration tribunal. It is said that the caution exercised by the court relating to anti-suit injunctions should be increased or even re-doubled in the case of an anti-arbitration injunction. It is further said that the judge is effectively case managing the arbitration and that it should be for the arbitrators, not the English Court, to decide whether the arbitration should proceed pending resolution of the genuineness of the JVA. . . . In the ordinary case there would be much to be said for this argument. But this is not an ordinary case. . . . It is properly arguable that the agreement to arbitrate has been forged in order to defeat proceedings properly brought in England and, in addition to this, it is at present agreed that*

- the English Court will determine that question. The autonomy of the arbitrators has thus already been undermined because they are, in any event, precluded for the present from determining that question. In these circumstances it is not right to say that the judge is attempting to case-manage the arbitration. It would be more accurate to say that he is case-managing the application before him which will determine in England the question whether the JVA is authentic or not.*" (paragraphs 16 and 17).
26. See e.g., *Elektrim SA v Vivendi Universal SA & ors* [2007] EWHC 571 (Comm) (in which Aikens J considered, inter alia, whether granting the injunction would cause injustice to the claimant).
 27. See e.g., *Weissfisch v Julius and others* [2006] All ER (D) 123 (Mar); [2006] EWCA 218 (in which the Court of Appeal held that for an English court to grant an anti-arbitration injunction restraining an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction, to which the parties had agreed, would infringe the principles of the law of international arbitration, as reflected in both the Arbitration Act 1996 and the New York Convention).
 28. See e.g., Schwabl, op. cit. (noting that the practice of granting anti-arbitration injunctions "appears to violate conventional and customary international law, international public policy and the accepted principles of international arbitration.")
 29. *Elektrim SA v Vivendi Universal SA & ors* [2007] EWHC 571 (Comm); *Weissfisch v Julius and others* [2006] All ER (D) 123 (Mar); [2006] EWCA 218.
 30. Case C/1043/2005 — 15 SP, Decision of the Tribunal of First Instance of the Republic and Canton of Geneva, Switzerland.
 31. By way of analogy, in the area of philosophy, Aquinas equates freedom or liberty of decision with self-determination ("because man by his free decision moves himself into action"); see Summa Theologiae, 1.83. 1 (trans. T. Suttor).
 32. See e.g., Jacobs and White, *The European Convention on Human Rights* (4th ed.), p. 319.
 33. *Ibid.*, p. 320.
 34. The French *Cour de cassation* has held that one cannot be both judge and party ("... *que nul ne peut être juge et partie*"), Cass 1e civ., Dec. 16, 1997 *Van Luijk v Raoul Duval*, No. 1988D, unpublished, cited in Fouchard et al, *supra*. However, this is not a universal rule, see e.g., *Redahan v. Minister for Education and Science & Ors* [2005] 3 IR 64, [2005] IEHC 271 (in which the High Court joined the arbitrator to court proceedings, albeit to later discharge him on the basis that he had no liability to the plaintiff). Article VI of the New York Convention, interestingly, does permit the tribunal to adjourn an application under Article V, which might be employed to invite the tribunal to submit its comments or be joined to the proceedings.
 35. The French *Cour de cassation* has held, for example, that arbitrators are not entitled to appeal against a decision setting aside their award on the grounds that they are the authors of that "judicial act" ("*que la cour d'appel a justement retenu que l'arbitre exerce une fonction juridictionnelle, ce qui lui interdit de demander que lui soit déclarée inopposable la décision dont l'objet même était de censurer la sentence à laquelle il avait participé*"): *Van Luijk, supra*, cited in Fouchard et al, *supra*. For a sensible criticism of drawing an analogy between arbitrator and judge too far, see Mustill & Boyd, op. cit., p.223.
 36. See e.g., Fed. Trib., Dec. 7, 1994, X v. Y, 1995 BULL. ASA 233.
 37. Moreover, at post-award stage, the tribunal might very well be *functus officio*, having rendered its award and, as a result, might lack *locus standii*, depending on local procedural rules. ■

