



# *The* YEAR IN REVIEW

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PUBLICATION OF THE ABA INTERNATIONAL LAW SECTION

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## *International Legal Developments Year in Review: 2020*

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## **International Section Ethics Committee**

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This article reviews some of the most significant international legal developments made in the area of ethics in 2020.

### **I. Introduction**

2020, the year of COVID, witnessed more than the warp-speed development of several vaccines against the Coronavirus. Indeed, as the world tackled a pandemic, the application of justice and law has carried on. Four areas of interest that merit highlighting in 2020 are: (1) service of process abroad, and how the pandemic has impacted alternative service under Federal Rule of Civil Procedure Rule 4(f); (2) the nomination of Supreme Court justices in the United States; (3) the neutrality or non-neutrality of wing arbitrators; and (4) the tackling of corruption in the execution of contracts that are later arbitrated.

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## **II. COVID Relief? Not From FRCP Rule 4**

### **A. OVERVIEW OF FRCP RULE 4(F)(3)**

Federal Rule of Civil Procedure 4(f)(3) “permits a court to authorize a means of service on a foreign defendant so long as that means of service is not prohibited by international agreement and comports with constitutional notions of due process.”<sup>2</sup> Due process is satisfied when the method of service is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>3</sup>

In deciding whether to exercise their discretion to permit alternative service under Rule 4(f)(3), some courts have looked to whether there has been “(1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court’s intervention is necessary.”<sup>4</sup> However, these considerations guide the exercise of discretion and are not akin to an exhaustion requirement.<sup>5</sup>

### **B. RECENT, PRE-COVID APPLICATIONS OF FRCP RULE 4(F)(3)**

In the years preceding the COVID-19 pandemic, by applying Rule 4(f)(3), trial courts have authorized a wide variety of alternative methods of service including email.<sup>6</sup> Some courts even authorized service of process through social media.<sup>7</sup>

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2. In re BRF S.A. Sec. Litig., No. 18-CV-2213 (PKC), 2019 WL 257971, at \*2 (S.D.N.Y. Jan. 18, 2019) (citing *Devi v. Rajapaska*, No. 11 Civ. 6634, 2012 WL 309605, at \*1 (S.D.N.Y. Jan. 31, 2012)).

3. *Id.* (citing *Luessenhop v. Clinton Cty.*, N.Y., 466 F.3d 259, 269 (2d Cir. 2006)).

4. *Id.* (citing *Devi*, 2012 WL 309605, at \*1).

5. *Id.* (citing *Wash. State Inv. Bd. v. Odebrecht S.A.*, No. 17 Civ. 8118, 2018 WL 6253877, at \*6 (S.D.N.Y. Sept. 21, 2018)); *accord* *United States v. Besneli*, No. 14 Civ. 7339, 2015 WL 4755533, at \*1 (S.D.N.Y. Aug. 12, 2015) (“Exhaustion of the other provisions of Rule 4(f) is not required before a plaintiff seeks court-ordered service.”); *S.E.C. v. Anticevic*, No. 05 CV 6991, 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009) (“A plaintiff is *not* required to attempt service through the other provisions of Rule 4(f) before the Court may order service pursuant to Rule 4(f)(3).” (emphasis in original)).

6. *Id.* at \*3 (internal quotations omitted) (citing *Rio Props., Inc.*, 284 F.3d at 1016).

7. *See, e.g.*, *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240, 2016 WL 5725002, at \*2 (N.D. Cal. Sep. 30, 2016) (discussing decision to grant “service by email, Facebook, and LinkedIn because notice through these accounts was reasonably calculated to notify the defendant of the pendency of the action and was not prohibited by international agreement”); *UBS Fin. Servs. v. Berger*, No. 13-cv-03770, 2014 WL 12643321, at \*2 (N.D. Cal. Apr. 24, 2014) (recounting court’s decision to authorize service via defendant’s “[G]mail address and through LinkedIn’s ‘InMail’ feature”); *Tatung Co. v. Shu Tze Hsu*, No. SA CV 13-1743-DOC, 2015 WL 11089492, at \*2 (C.D. Cal. May 18, 2015) (“Courts routinely authorize email service under Rule 4(f)(3)” (citing cases)).

C. POST-COVID APPLICATIONS OF FRCP RULE 4(F)(3)

Opinions pertaining to alternative service through Rule 4(f) issued during the COVID-19 era in the United States are far from uniform. Take, for example, *Tevra Brands LLC v. Bayer Healthcare LLC*, in which the plaintiff sought an order from the court to authorize the plaintiff to serve the German defendants through their U.S.-based counsel by email.<sup>8</sup> Although a German court clerk confirmed that the German court received the plaintiff's service packets, the clerk explained that the court was partially closed due to the COVID-19 pandemic, that there was a considerable backlog of requests for service of foreign documents, and that it would likely be several months before service could be effectuated.<sup>9</sup> The plaintiff's counsel requested, due to the delay caused by COVID-19, that the German defendants' U.S.-based counsel accept service on the defendants' behalf under Rule 4(f).<sup>10</sup> The defendants' counsel refused to waive service and noted, "the COVID-19 related delays have only materialized in the last six to eight weeks, while the lawsuit has been pending for almost a year."<sup>11</sup>

The court agreed with the defendants' counsel, holding that the plaintiff did not act with diligence or care and that any delay in serving the defendants was due to the plaintiff's own errors—not the global pandemic.<sup>12</sup> The record reflected that the summons was issued in July of 2019, but the plaintiff did not attempt to serve a German translation of its complaint until a month later.<sup>13</sup> The plaintiff then attempted to effect service by contacting an attorney who was on secondment and who represented a non-party affiliate of the German defendants.<sup>14</sup> It was not until that attorney refused to accept service for the defendants—two months after initiating the lawsuit—that the plaintiff attempted service under the Hague Convention.<sup>15</sup> The first two service packets that the plaintiff sent to the German court were rejected due to errors.<sup>16</sup> The court stated that the plaintiff "inexplicably waited another month before making a third attempt at service. And all of these missteps took place before the COVID-19 pandemic caused any disruptions to the service of process in Germany."<sup>17</sup>

The court denied the plaintiff's motion for alternative service, but without prejudice, in case service on the German defendants through the Hague Convention was delayed and the plaintiff had good cause to renew its motion. The court reasoned:

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8. *Tevra Brands LLC v. Bayer Healthcare LLC*, No. 19-cv-04312-BLF, 2020 WL 3432700, at \*2 (N.D. Cal. June 23, 2020).

9. *Id.*

10. *Id.* at \*2.

11. *Id.*

12. *Id.* at \*4.

13. *Id.*

14. *Tevra Brands LLC*, 2020 WL 3432700, at \*4.

15. *Id.*

16. *Id.*

17. *Id.* (omitting citation).

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These are certainly unprecedented times as the hardships of COVID-19 weigh heavily on all facets of life. But where a plaintiff fails to show that service through the [Hague] Convention would be unsuccessful or result in unreasonable burden or delay, simply citing COVID-19 as an obstacle is not sufficient to bypass the requirements of the Hague Convention.<sup>18</sup>

The Eastern District of Michigan reached a similar conclusion in *Aerodyn Engineering, LLC v. Fidia Company*.<sup>19</sup> In *Aerodyn*, the plaintiff requested that the Italian defendants waive personal service, citing circumstances surrounding the COVID-19 pandemic.<sup>20</sup> The defendants declined to waive service, accept service electronically, or allow their attorney to accept service papers on their behalf.<sup>21</sup> The plaintiff asked the court to “permit it to forgo service through Hague Convention procedures and instead serve [the Italian defendants] through the e-mail addresses provided” on the defendant’s website because “judicial efficiency would be served by permitting e-mail service, especially during the current COVID-19 pandemic.”<sup>22</sup> The court denied the motion for alternative service, finding that the plaintiff failed to “show[ ] that achieving service through the [Hague] Convention would be unsuccessful or result in unreasonable burden or delay.”<sup>23</sup>

Unlike in *Tevra Brands LLC*, the *Aerodyn* court did not extend sympathies to plaintiffs attempting service on foreign defendants during the COVID-19 pandemic. However, as in *Tevra Brands*, the *Aerodyn* court required a plaintiff, at a minimum, to attempt service through the Hague Convention before seeking an order approving alternative service under Rule 4(f).<sup>24</sup> Although Rule 4(f) does not explicitly require it, it seems some courts will nevertheless insist a plaintiff must make diligent service attempts through the Hague Convention prior to seeking an order approving alternative service, notwithstanding a global pandemic. Both court decisions illustrate that a plaintiff errs to presume that a U.S. court will permit service on a foreign defendant by alternative means solely because the pandemic continues to cause litigation delays.

But a different result was reached in *Convergen Energy LLC v. Brooks*.<sup>25</sup> In *Convergen*, U.S. plaintiffs emailed Spain’s Central Authority to see whether it was accepting requests for service through the Hague Convention or anticipated delays to such service due to the COVID-19 pandemic.<sup>26</sup> The

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18. *Id.* at \*5 (internal quotation omitted).

19. *Aerodyn Eng’g, LLC v. Fidia Co.*, No. 20-10896, 2020 WL 3000509, at \*1 (E.D. Mich. June 4, 2020).

20. *Id.* at \*1.

21. *Id.*

22. *Id.* at \*1-2.

23. *Id.* at \*2.

24. *Id.*

25. *Convergen Energy LLC v. Brooks*, No. 20-cv-3746, 2020 WL 40838353, at \*1 (S.D.N.Y. July 17, 2020).

26. *Id.* at \*2.

Central Authority responded that it “will not be able to ensure the processing of every request received for the duration of this exceptional situation. Legal proceedings are currently limited in Spain; therefore, only urgent requests, with due accreditation of said urgency, that have been electronically filed will be processed.”<sup>27</sup> Notwithstanding that service in Spain under the Hague Convention was unlikely while the pandemic persisted, the plaintiffs submitted a formal request to serve Spanish defendants and requested additional guidance from the Central Authority regarding which requests were deemed “urgent.”<sup>28</sup> In light of “[p]laintiffs’ attempts, the current pandemic, and the Central Authority’s response,” the Court concluded that service through Central Authority was unlikely to be effected any time soon, if at all.<sup>29</sup> The court ruling allowed service through alternative means and evaluated whether the proffered alternatives were not prohibited by international agreement and that they comported with constitutional notions of due process.<sup>30</sup>

Collectively, these opinions, focusing on alternative service under Rule 4(f) and decided during the COVID-19 pandemic, uniformly require the domestic plaintiff to make some attempt to serve the foreign defendant through the Hague Convention before seeking an order permitting service through alternative means. However, the courts have not yet reached a consensus on whether to exercise their discretion to allow alternative service where the plaintiff has not been diligent or has only expressed vague or hypothetical difficulties affecting service on foreign defendants due to the global pandemic. Surely, international litigants across the globe are united in their hope that the courts are not given many more opportunities to reach a consensus on this issue because the pandemic will have reached its end.

### **III. Changing the Supreme Courts: Comparison between the United States and the United Kingdom**

Sprinkled into the laundry list of events that will inevitably define 2020 for years to come is the appointment of the 115th Associate Justice to the U.S. Supreme Court. A week before one of the most contested presidential elections of our time, Justice Amy Coney Barrett was appointed to the Supreme Court by President Donald Trump.<sup>31</sup> Justice Barrett’s appointment marked the third appointment by the President and secured the 6-3 conservative majority of the Court—for the not so foreseeable future.<sup>32</sup> Filling the seat left open by the passing of the iconic Justice Ruth

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27. *Id.*

28. *Id.* at \*4.

29. *Id.*

30. *Id.* at \*5.

31. Joan Biskupic, *Amy Coney Barret joins the Supreme Court in unprecedented times*, CNN (Oct. 27, 2020), <https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html>.

32. *Senate Confirms Amy Coney Barret for Supreme Court*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/> (White

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Bader Ginsberg, the nomination and inevitable appointment of Justice Barrett was anything but peaceable.<sup>33</sup> The actions of the President and members of the Senate put the appointment process and composition of the Court on the stand (for lack of a better word).<sup>34</sup> And unlike most other Supreme Court appointments, which rarely spark an interest in the mainstream, the appointment of Justice Barrett did just that.<sup>35</sup>

This article breaks down the process of nominating a Supreme Court Justice in the United States and the long-term implications on its legal system as a whole. It also compares the process with the relatively new system adopted by the United Kingdom.

**A. U.S. SUPREME COURT**

Under Article II Section 2, or the “Appointment Clause,” of the U.S. Constitution, the President “shall nominate and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court,”<sup>36</sup> showing the process by which Supreme Court Justices are selected.<sup>37</sup> Notably, the Constitution is silent with respect to the number of Justices that should sit on the Court.

Simply put, the appointment of a Supreme Court Justice is the coalition of power between the President and the Senate, where all it takes is a majority vote by the Senate to bestow a lifetime of power.<sup>38</sup> However, as 2020 taught us, the process is far more political than it appears on paper.<sup>39</sup> In fact, since

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House Website confirming the appointment of Justice Barrett to the Supreme Court); *see also* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> (An appointment which will undoubtedly affect the outcome of future decisions.).

33. *Amy Coney Barrett confirmed to US Supreme Court*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54700307>.

34. *See id.* (quoting Vice President Harris: the “confirmation was a ‘disgrace, not only because of what [Barrett] will do when she gets on the bench, but because of the entire process”).

35. Scott Clement and Emily Guskin, *Majority Says Winner of Presidential Election Should Nominate Next Supreme Court Justice, Post-ABC Poll finds*, WASH. POST (Sept. 25, 2020), at 2:00 pm EST, [https://www.washingtonpost.com/politics/poll-supreme-court-ginsburg-trump-biden/2020/09/25/0f634e6c-fe6a-11ea-8d05-9beaaa91c71f\\_story.html](https://www.washingtonpost.com/politics/poll-supreme-court-ginsburg-trump-biden/2020/09/25/0f634e6c-fe6a-11ea-8d05-9beaaa91c71f_story.html) (Ginsburg’s death jolted the issue of Supreme Court nominations to the forefront of the presidential campaign . . . ).

36. U.S. Const. art. 2 § 2, cl. 2.

37. Barry J. McMillion, U.S. Congressional Research Service, *Supreme Court Nominations, 1789 to 2018: Actions by the Senate, the Judiciary Committee, and the President* (RL 33225; October 9, 2020), <https://fas.org/sgp/crs/misc/RL33225.pdf>.

38. *Id.* (The President will nominate an individual, then the Judiciary Committee (a special committee of senate members) will vet the candidate, which is followed by a Senate vote. If tied the Vice President, supervising the vote, is the tiebreaker.).

39. Barry J. McMillion, U.S. Congressional Research Service, *Final Action by the Senate on Supreme Court Nominations During Presidential Election Years (1789-2020)* (IN 11519; October 20, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11519>; *Why US Top Court is so much more political than UK’s*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035>.

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2010, the appointment of a Supreme Court Justice is a President's self-fulfilling prophecy.<sup>40</sup>

It is not surprising that one of the most contested factors of this process is the President's role in selecting who will be appointed to the Court.<sup>41</sup> In fact, the question that immediately hit the mind of many as President Trump shared his shortlist of candidates was: why does he get to decide?<sup>42</sup> The answer: "[t]here is no clear view as to why the president was granted this power."<sup>43</sup> All we know is they have this power under the Constitution and have wielded it to promote their ideological beliefs far beyond the time they leave office.<sup>44</sup>

However, while the President picks the marionette, the Senate is the real puppet master pulling the strings.<sup>45</sup> Without the Senate's approval, a Supreme Court nominee is nothing more than that. The Senate holds the ultimate control in approving a new Justice, and we saw this reality all too well in 2016 when the Senate ignored President Obama's nomination of Merrick Garland.<sup>46</sup> But why wasn't that the reality in 2020? Why did the Senate not push back? Two words: partisan split.

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40. Elizabeth Diaz and Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html>; see also *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> ("Things changed in 2010, with the retirement of [Justice] Stevens . . . . Since then, all nominations by Democrats have been liberal while all those appointed by Republicans are conservative. . . .").

41. *Id.*; Henry B. Hogue, U.S. Congressional Research Service, *Supreme Court Nominations Not Confirmed, 1789- August 2010* RL 31171 (August 20, 2010), <https://fas.org/sgp/crs/misc/RL31171.pdf> ("The 20th Century saw six confirmation failures: John J. Parker by President Hoover in 1930, Abe Fortas to be Chief Justice by President Lyndon Johnson in 1968, Homer Thornberry by President Lyndon Johnson in 1968, Clement F. Haynsworth Jr. by President Nixon in 1969, G. Harrold Carswell by President Nixon in 1970, Robert H. Bork by President Reagan in 1987, John G. Roberts, Jr., by President George W. Bush in 2005 and Harriet E. Miers, also by President Bush in 2005.").

42. Jared Mondschein, *This is why the fight over the Supreme Court could make the US presidential election even nastier*, THECONVERSATION.COM (Sept. 19, 2020), <https://theconversation.com/this-is-why-the-fight-over-the-supreme-court-could-make-the-us-presidential-election-even-nastier-146541>.

43. *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> (quoting Bruce Ackerman, Sterling Professor of Law at Yale University.).

44. Henry B. Hogue, U.S. Congressional Research Service, *Supreme Court Nominations Not Confirmed, 1789- August 2010* RL 3117, (August 20, 2010), <https://fas.org/sgp/crs/misc/RL31171.pdf>.

45. Barry J. McMillion, U.S. Congressional Research Service, *Supreme Court Nominations, 1789 to 2018: Actions by the Senate, the Judiciary Committee, and the President* RL 33225 (October 9, 2020), <https://fas.org/sgp/crs/misc/RL33225.pdf>.

46. Eric Bradner, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> (The senate refused to



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The key difference between 2016 and 2020 was the party affiliations of the President and Senate.<sup>47</sup> Unlike in 2020 where both the President and Senate shared an affiliation to the Republican Party, in 2016 President Obama, a Democrat, was met with opposition from a Republican-dominated Senate.<sup>48</sup> The partisan split, which led to the inevitable failure in President Obama's attempt to fulfill his constitutionally mandated right, and resulted in the appointment of conservative Justice Gorsuch by President Trump shortly thereafter.<sup>49</sup> This is the very issue at the heart of the appointment process.<sup>50</sup>

But how do we address it? Many argue the best way is to go out and vote: the more votes cast for our representatives, the more likely we reach the democratic idealism the Constitution was founded upon. Others prefer to "pack the courts"—where the size of the Court is increased to allow for a more neutral operation.<sup>51</sup> Despite not being a Constitutional requirement, however, the Court's composition, made up of nine justices, has remained unchanged since the Civil War. Yet another possibility is to change the appointment process altogether, which would, of course, require a Constitutional amendment. If this alternative were chosen, the United States could look to its brothers and sisters across the pond.<sup>52</sup>

#### B. UK SUPREME COURT

Prior to 2009, a group of judges known as the "Law Lords" ruled on all final appeal hearings and judgments in the United Kingdom.<sup>53</sup> In 2009, however, the Law Lords were replaced by the Supreme Court, modernizing the court to simulate that of other modern nations.<sup>54</sup> This modernization acted as the final separation between the judicial and legislative branches of

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accept or vote on Merrick Garland, claiming that a nomination during an election year was inappropriate.).

47. *Amy Coney Barrett confirmed to US Supreme Court*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54700307>.

48. *Id.*

49. Tessa Berenson, *How Neil Gorsuch's Confirmation Fight Changed Politics*, TIME (April 7, 2017), <https://time.com/4730746/neil-gorsuch-confirmed-supreme-court-year/>.

50. Eric Bradner, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html>.

51. Elizabeth A. Moore, *What is Court Packing?*, RUTGERS (Oct. 27, 2020), <https://www.rutgers.edu/news/what-court-packing> (There has only been one failed attempt in 1937: "FRD proposed the plan in response to a series of Supreme Court decisions that struck down New Deal legislation. . . The plan failed in Congress . . .").

52. *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035>.

53. UK Parliament, *Law Lords*, PARLIAMENT.UK (2009), <https://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/law-lords/>.

54. *Id.* (The court "acts as a final court of appeal in cases of major public importance.").

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parliament.<sup>55</sup> Today, an independent commission “chaired by the president of the court” takes on the role of selecting a candidate for the Court.<sup>56</sup> Upon selection, the name is sent to the justice secretary who either accepts or rejects the name.<sup>57</sup> If accepted it is sent to the prime minister, who passes the recommendation to the Queen, in charge of making the final appointment.<sup>58</sup> However, this change did not come without its resistance and would raise a number of red flags if attempted by the United States.<sup>59</sup>

Specifically, the purpose the U.K.’s Court serves differs greatly from that in the United States. In the United Kingdom, there is no codified constitution,<sup>60</sup> and the Supreme Court does not have the ability to strike down a law as unconstitutional—a power which is vested in the U.S. Supreme Court.<sup>61</sup> This power undeniably renders the US Supreme Court more political than its UK counterpart—where the court only has the power to interpret laws with no involvement in key political decisions.<sup>62</sup> Further, the UK’s Supreme Court rarely sits *en banc*, and no justice can be over the age of 75.<sup>63</sup>

These differences not only affect the dynamic of the Court itself, but similarly, they play an important role in the process of selecting and nominating individuals to sit on the highest court in the land. There is a strong argument to be made that the current process in the United States is arbitrary based on the composition of the Senate at the time of an appointment; however, without an alternative that can effectively keep the constitutional process in place, we are left to deal with the repercussions of codified procedures left to us by our forefathers.

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55. Edwin Moore-Gillon, *Transition of the Appellate Jurisdiction of the House of Lords to the Supreme Court of the United Kingdom*, LEXOLOGY (2009), <https://www.lexology.com/library/detail.aspx?g=AC33b5c5-417c-4547-b6f6-034e4a06b916>.

56. *Id.*

57. *Id.*

58. *Id.* (quoting Alison Young, Professor of Public Law at the University of Cambridge) (“We have a completely independent process. . . It’s almost seen like an internal promotion system rather than a politicized process.”).

59. Michael Ryle, *Should the Law Lords have left the House of Lords?*, SUPREMECOURT.UK (Nov. 14, 2018), <https://www.supremecourt.uk/docs/speech-181114.pdf>.

60. *Why US Top Court is so much more political than UK’s*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> (“[T]he UK has no codified, written constitution.”).

61. *Id.*

62. *Id.*; see also Dominic Casciani, *What is the UK Supreme Court?*, BBC NEWS (Jan. 13, 2020), <https://www.bbc.com/news/uk-49663001> (“Only Parliament can pass or cancel law. . . . If the justices think a law conflicts with human rights safeguards, it can tell Parliament . . . but the government is under no legal obligation to act.”).

63. *Id.*; Michael Ryle, *Should the Law Lords have left the House of Lords?*, SUPREMECOURT.UK (Nov. 14, 2018), <https://www.supremecourt.uk/docs/speech-181114.pdf>.

#### **IV. Birds of a Feather: Do Wing Arbitrators Flock Together—Neutrally?**

“As an initial matter, it is not surprising that CEL’s party-appointed arbitrator dissented from the Panel majority’s decision, as ‘[i]n the main party-appointed arbitrators are supposed to be advocates.’”<sup>64</sup>

Choosing an arbitrator is one of the most important, if not *the* most important, decisions parties make in an arbitration. When the arbitral tribunal is composed of three arbitrators and two are unilaterally party-appointed (so-called wings), the question arises as to the role of the wing arbitrators. Expectations of wing arbitrators have shifted over the years, especially in the United States with the 2004 reversal of the American Bar Association’s (ABA) position on the role of wing arbitrators. Now, wings are expected to be fully neutral and impartial. However, over fifteen years later, attitudes have proven hard to change, especially in the United States. In international arbitration the calculus becomes more complicated, considering the legal culture of the potential arbitrators and the parties.<sup>65</sup> This article will address the evolving role of the wing and what paths we may chart for tripartite panels in the future.

##### **A. PERCEPTIONS OF WING ARBITRATORS**

Scholars have long debated the effect of unilateral party-appointment of arbitrators.<sup>66</sup> A full 88.8 percent of respondents to a 2013 survey believe that party-appointed arbitrators are at least sometimes “predisposed toward the party that appointed them even when the applicable procedures require them to be independent and impartial.”<sup>67</sup> This is not an insignificant

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64. *Pioneer Navigation Ltd. v. Chem. Equip. Labs, Inc.*, No. 119CV02938DABSDA, 2019 WL 8989864, at \*12 (S.D.N.Y. Dec. 11, 2019), report and recommendation adopted, No. 119CV02938GHWSA, 2020 WL 1031082 (S.D.N.Y. Mar. 3, 2020) (quoting *Certain Underwriting Members of Lloyds of London v. Fla., Dep’t of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018) (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002))).

65. See, e.g., Lisa Bench Nieuwveld, *Oral Hearing and Party-Appointed Arbitrators: Guess?? Yep! That’s Who Appointed Them!*, Kluwer Arbitration Blog (April 20, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/04/20/oral-hearing-and-party-appointed-arbitrators-guess-yep-thats-who-appointed-them/>.

66. See Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, AM. REV. OF INT’L ARB. 368-73; Jan Paulsson, *Moral Hazard in International Dispute Resolution*; Presented to the Institute for Transnational Arbitration – Dallas; June 2010, 7(1) WORLD ARB. & MEDIATION REV. 205 (2013); Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59 (1995); Dominique Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27 AM. U. INT’L REV. 789 (2012). See also Seth H. Lieberman, Note, *Something’s Rotten in the State of Party-appointed Arbitration: Healing ADR’s Black Eye that Is “Nonneutral Neutrals,”* 5 CARDOZO ONLINE J. CONF. RES. 10 (2004).

67. Thomas Stipanowich, and Zachary Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* (2014) at 426, COLUMBIA AM. REV. OF INT’L

number. A full 27.3 percent believed this to be the case at least half of the time.<sup>68</sup> Two other studies show that dissenting opinions are almost always (in upwards of ninety-five percent of cases) written by the arbitrator nominated by the losing party.<sup>69</sup> Statistical analyses of ICJ judgments similarly show that in approximately ninety percent of cases, ad hoc judges vote with the party that appointed them.<sup>70</sup>

These statistics call into question whether unilateral party appointments are actually party advocates by a different name. This may be the result, at least in part, of two related facts: (1) there is lingering disagreement about the role of party-appointed arbitrators, and (2) there is inherent conflict between the ethical expectation of neutrality and the practical reality on the ground—namely, parties want to win and will use every advantage they can, and arbitrators want to be re-appointed.<sup>71</sup>

As a whole, the perception seems to be that—contrary to the “Beckett Effect” (i.e., the supposed realization of an arbitrator, once appointed, that his or her “overriding objective should be to arrive at a good decision, not to . . . serve the narrow interest of the party who appointed them”<sup>72</sup>)—wing arbitrators do sometimes, even often, act in ways that favor the appointing party. Is this partiality desirable, and if so, why?

## B. THE ROLE(S) OF THE WING

As noted above, the ABA famously revised its Code of Ethics for Arbitrators in Commercial Disputes in 2004, reversing its traditional position that unilaterally party-appointed arbitrators are expected to favor their appointing party.<sup>73</sup> As Jan Paulsson later stated, “overt acceptance

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ARB., Vol. 25, 2014, Pepperdine University Legal Studies Research Paper No. 2014/30, available at <https://ssrn.com/abstract=2519196>.

68. *Id.*

69. See Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly*, 2003 Freshfields Lecture, 20 Arbitration International 223 (2004); Eduardo Silva Romero, *Brèves observations sur l'opinion dissidente*, Les arbitres internationaux in Société de législation comparée at 179-186 (2005).

70. Yuval Shany, *Squaring the Circle? Independent and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473 (2008), available at <http://digitalcommons.lmu.edu/ilr/vol30/iss3/8> (hereinafter, “Shany”).

71. Two recent cases illustrate these tensions. In *Pao Tatneft v. Ukraine*, No. CV 17-582 (CKK), 2020 WL 4933621, at \*2 (D.D.C. Aug. 24, 2020), (a decision rendered in August 2020 and currently on appeal, the wings chose the president of the tribunal. While the parties were preparing their final submissions on the merits, the law firm representing Pao Tatneft offered an appointment in a different arbitration.).

72. Manuel Conthe, *Paulsson's Nirvana Fallacy*, SPAIN ARB. REV. N.º 29/2017 (June 2017), p.45.

73. See Stephen G. Yusem, *Comparing the Original with the Revised American Bar Association-American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes in Metropolitan Corp. Couns.* (July 2004), pp. 38, 38–39, 64 (“the judiciary has generally supported the concept of non-neutrality both before and after the adoption of the original Code. The original Code assumed that the business community desired and expected non-neutrality;

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‘non-neutral arbitrators’ . . . is no longer accepted in the international community.”<sup>74</sup>

Being a new position that supplants decades of practice, it comes as no surprise that adjudicators often have deeply ingrained instincts to overcome. Indeed, as recently as 2020, the Southern District of New York issued an opinion stating, with respect to an international arbitration award under challenge, that: “[i]t is not surprising that CEL’s party-appointed arbitrator dissented from the Panel majority’s decision, as ‘[i]n the main party-appointed arbitrators are supposed to be advocates.’”<sup>75</sup>

Several scholars have argued in favor of party-appointed wing arbitrators. Yubal Shany summarized certain aspects of these benefits succinctly, stating that party-appointed wings:

[s]erve the parties’ interests in two important ways. First, they monitor the proper and fair conduct of the adjudicative process. Second, they ensure that the appointing parties’ positions and interests are properly understood and considered by the tribunal. On a more abstract level, they also help to maintain the confidence of the parties in the adjudicative process and preserve some, albeit modest, degree of control over the process.<sup>76</sup>

Similarly, Manuel Conthe suggests that party-appointed arbitrators should act as the appointing party’s “due process watchdog,” “monitor,” or “Ombudsperson.”<sup>77</sup> Similarly, Catherine Rogers has argued that party-appointed wings serve the important function of devil’s advocate to counteract Groupthink, confirmation bias, free riding, and other psychological traps:<sup>78</sup>

By systematically but constructively second-guessing the majority, and expressly challenging it when appropriate, party-appointed arbitrators

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however, the modern rules of the major institutional ADR providers require neutrality for party-appointed arbitrators”).

74. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (Apr. 29, 2010), ICSID REVIEW - FOREIGN INVESTMENT L. J., Volume 25, Issue 2, Fall 2010, available at <https://doi.org/10.1093/icsidreview/25.2.339>.

75. *Pioneer Navigation*, 2019 WL 8989864, at \*12; *Certain Underwriting Members of Lloyds of London v. Fla., Dep’t of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018) (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002)).

76. Shany, *supra* note 70 (citing Anseas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59, 62 (1995)).

77. Conthe, *supra* note 72, at 55-56.

78. Catherine A. Rogers, *Ethics in International Arbitration*, Oxford University Press, 2014, Chapter 8, par. 8.51-8.69. (Rogers describes Groupthink as “a phenomenon developed by cognitive psychologist Irving Janis. Through his research, Janis demonstrated that Groupthink is a ‘mode of thinking that people engage in when they are deeply involved in a cohesive ingroup, when the membersp [sic] striving for unanimity override their motivation to realistically appraise alternative courses of action’. Groupthink ‘occurs when the decision-making capabilities of a panel become affected by subtle peer pressure’”).

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can improve the process . . . . The threat and potential reality of publishing a dissent is part of this process of challenge that promotes accountability. It can also promote party confidence in a process that lacks any form of appellate review[] and is regarded as creating some potentially perverse incentives for overly eager agreement by arbitrators with co-panelists in order to secure future appointments.<sup>79</sup>

Others have pointed out that party-appointed wings democratize the process and allow for each party to feel culturally understood. Certainly, party-appointed arbitrators satisfy a party's craving for a sense of control. Many of these benefits can be achieved by institutionally appointed wing arbitrators, but parties will chafe at the lack of control. Ultimately, none of these benefits or solutions address the inherent conflict of interest that unilaterally appointed arbitrators face when they know who hired them. Can we accomplish these worthy goals while avoiding such a conflict?

#### C. TOWARD A BETTER STRUCTURE

If unilaterally party-appointed arbitrators are guardians of due process for their appointing party, then why not simply say as much in the arbitration clause? Perhaps we fear that doing so would render them "partisans once removed from the actual controversy."<sup>80</sup> Conthe has suggested a neutrality pledge as a possible antidote.<sup>81</sup> Others have suggested blind appointments where the arbitrators do not know which party appointed them,<sup>82</sup> which will not always work, as an arbitrator's track record could give him or her away. There may be other solutions not considered here. However, a larger issue remains: what if each party appoints its arbitrator with a different approach to the proceedings, and as a result, one wing is a champion of the party that appointed it, and the other a stalwart neutral? This would create a significant imbalance in the proceedings. In theory, this prisoner's dilemma could be resolved by open communication about each party's selection,<sup>83</sup> but in practice, it is difficult to envision such collaboration.

The best choice seems to be, not that all arbitrators on a tri-partite tribunal be appointed by an institution, but instead that both wings be appointed jointly by the parties and the wings choose the chair. This would ensure that the parties have input in the selection of the arbitrators, bolstering confidence in the proceedings, while preventing bias in favor of one appointing party. The benefits of party-appointed arbitrators that Conthe and Rogers point out can still be achieved by an internal division of labor. At a minimum, the international and domestic arbitration communities must come to a unified approach on the purpose and role of

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79. Rogers, *supra* note 78, par. 8.60-8.61.

80. *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

81. Conthe, *supra* note 72, at 59.

82. Paulsson, *supra* note 74.

83. See Conthe, *supra* note 72, at 58-59.

wings: they should be flying in the same direction—either both as cheerleaders, or both as neutral as the chair of the tribunal.

## **V. Ethical Obligations of Arbitrators in Cases Tainted by Corruption**

As global trade continues to expand, those looking to illicitly gain from that trade seem to find endless possibilities. While the volume of global trade in 2019 was estimated at USD \$18.89 trillion,<sup>84</sup> the annual cost to global trade from corruption and bribery for the same period was an estimated USD \$3.6 trillion<sup>85</sup> and USD \$1.5 trillion<sup>86</sup>, respectively. The United Nations (U.N.) has listed corruption as one of the biggest impediments to reaching its 2030 Sustainable Development Goals.<sup>87</sup> Given the amount of corruption in the world, it is likely many contracts are tainted by corruption in international commerce. It is no wonder then that disputes arising from international transactions and investments may be touched by corruption.

What a tribunal can and should do when faced with these ills of international commerce is as important to stamping out corruption as are government initiatives. Some would argue even more so, since, given the largely confidential nature of arbitrations, not dealing with corruption in contract disputes can not only be ethically precarious, but it gives ne'er-do-wells an avenue to litigate illicit activities that they would otherwise be foreclosed from litigating.

### **A. SHOULD A TRIBUNAL INVESTIGATE?**

International arbitration tribunals may be faced with the issue of corruption in one of two ways. First, when it is raised by one of the parties to the arbitral proceeding. Second, a tribunal may spot indicia of corruption while reviewing the facts.<sup>88</sup> Once identified, the tribunal will be faced with the dilemma of the scope of its duties and jurisdiction to act because arbitrators may only exercise jurisdiction over the issues submitted to it for

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84. Press Release, WTO, Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy (Apr. 8, 2020).

85. Stephen Johnson, *Corruption is Costing the Global Economy \$3.6 Trillion Dollars Every Year*, WORLD ECONOMIC FORUM (Dec. 13, 2018), <https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n>.

86. Norman Eisen et al., *The TAP-Plus Approach to Anti-Corruption in the Natural Resource Value Chain*, BROOKINGS (June 28, 2020), <https://www.brookings.edu/research/the-tap-plus-approach-to-anti-corruption-in-the-natural-resource-value-chain/>.

87. See Johnson, *supra* note 85.

88. Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, WOLTERS KLUWER 225, 233-234 (Kluwer L. Int'l 2017) ("It is uncontroversial that the tribunal may, and indeed should, examine allegations of corruption when raised by a party . . . corruption entails public interests beyond those of the parties, setting corruption apart from standard legal arguments which a party may fail to raise or prove.").

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resolution.<sup>89</sup> Given this restriction, does an arbitrator, who, on their own, identifies corruption, have to ignore his/her perceived red flags?

Some international arbitration practitioners have stated that “it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged.”<sup>90</sup> This reasoning, *ultra petita*, embraces one of the main tenets of arbitration, which is that a tribunal may not delve into an issue not referred to arbitration.<sup>91</sup>

But is tackling corruption an issue of exceeding the arbitrator’s scope of power or does the question of corruption and stamping it out rise above arbitrable issues, and instead reach a question of an arbitrator’s role in protecting the process?<sup>92</sup> The trend and modern-day consensus is that arbitrators have a duty to investigate red flags on their own initiative.

One way some tribunals have reached the question of corruption, even when not brought up by a party, is framing the inquiry in terms of jurisdiction. If a tribunal took the view that the issue of corruption concerns the very existence of a contract, then the tribunal’s jurisdiction might be implicated. In that case, only an investigation of the corruption may provide clarity “as to the validity of the main contract, the claims under that contract and/or the arbitration agreement.”<sup>93</sup>

Nevertheless, some tribunals still decline to investigate corruption. In *TSA Spectrum de Argentina S.A. v. Argentine Republic*, for example, the tribunal declined to investigate the corruption where “the available materials” did not establish illegality, and “investigations and proceedings in Argentina were still going on.”<sup>94</sup> In short, the tribunal in that instance punted the corruption issue to state authorities, avoiding the many difficult questions that arise once the tribunal decides to investigate corruption, such as what standard of proof to apply and how to fashion a remedy, discussed further below.

Interpretation of current laws and policies seem to support a more inquisitorial position. For example, one of the grounds for setting aside an award under the New York Convention is that recognition or enforcement of the award would be contrary to the public policy of the country where

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89. Jiménez, Felipe, *Arbitration: A Creature of Contract?* (July 21, 2020), <http://dx.doi.org/10.2139/ssrn.3657506> (“... and, therefore, arbitration—is a creature of law.”).

90. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 153 (3d ed. 1999).

91. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(c), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

92. See Baizeau & Hayes, *supra* note 88, at 235 (“Whether arbitrators have an accompanying duty to report suspicions of corruption to national authorities is somewhat controversial. Some consider that such an obligation ‘would be totally incompatible with the private nature of their mission and the trust the parties have in them,’ while the opposing view is that arbitrators have duties to the international community beyond their responsibilities to the parties.”).

93. AJ van den Berg, *International Commercial Arbitration: Important Contemporary Questions* 239 (1st ed. 2003).

94. *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, ¶ 175 (Dec. 19, 2008).



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enforcement is sought.<sup>95</sup> It goes without saying that corruption violates public policy in most countries, even ones that routinely embrace it in practice.<sup>96</sup>

Indeed, recent decisions highlight the fact that fraud and corruption, no matter when identified, can serve as grounds to set aside an award, if not dealt with in the underlying claim. An English High Court recently granted Nigeria an extension of time to challenge a USD \$6.6 billion arbitration award based on Sections 67 and 68 of the 1996 United Kingdom Arbitration Act under a theory of fraud in the procurement of the contract.<sup>97</sup> Incredibly, Nigeria's application for extension of time was more than four years past the 28-day time limit for challenging an award in England.<sup>98</sup> Nevertheless, because Nigeria's central contention for the late challenge is that it had previously been unaware that the initial contract had been procured by fraud, the High Court was persuaded Nigeria should be allowed to present its challenge.<sup>99</sup>

Perhaps, seeking to avoid challenges to arbitral awards years later, a growing body of decisions indicate that tribunals should make the inquiry into corruption on their own when confronted with information that would give them pause in ruling.<sup>100</sup> The case of *World Duty Free Company v Republic of Kenya* is indicative of how the old norm of *ultra petita*, with respect to investigating corruption, is giving way to a more affirmative duty for arbitrators to investigate corruption when facts surface that would warrant such an investigation, even in the absence of claims or defenses being raised by the parties. In *World Duty Free*, the alleged corruption was not pleaded or in any way submitted to the tribunal for determination. In reference to the corruption, the tribunal held that “. . . an Arbitral Tribunal does not normally roam around to find and determine issues the parties have not for themselves raised for determination.”<sup>101</sup> In a subsequent set-aside application, however, a Kenyan High Court disagreed with the tribunal,

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95. See New York Convention art. V(2)(b) (“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: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”).

96. *The Federal Republic of Nigeria v Process & Indus. Devs.*, [2020] EWHC 2379 (Comm); *World Duty Free Co. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (The tribunal held that World Duty's expropriation claim based on “contracts obtained by corruption” could not be upheld by the tribunal because such bribery contravened international public policy).

97. *Nigeria v Process & Indus.*, EWHC 2379 at 277.

98. *Id.*

99. See *id.*

100. *China Mach. New Energy Corp. v Jaguar Energy Guat. LLC & AEI Guat. Jaguar Ltd.*, SGHC [2018] SGHC 101.

101. *World Duty Free Co. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 34 (Oct. 4, 2006).

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holding that a “tribunal ought to pause and interrogate corruption if it is present even if it was not pleaded.”<sup>102</sup>

**B. WHAT STANDARD SHOULD A TRIBUNAL APPLY?**

Where a tribunal decides to investigate allegations of corruption, it is often confronted with a key question, what standard of proof should apply to the facts to determine whether they sustain the allegation? There is no consensus on the applicable standard, and it has been difficult to fashion a standard when each State has a different standard. One method, the “red flags” method, in corruption analysis, originated with the U.S. Foreign Corrupt Practices Act as warning signs of possible illicit activity by an intermediary.<sup>103</sup> They are recognized by numerous international soft law instruments.<sup>104</sup> “As a preventive tool, they warn a principal of potential risks that, if ignored, could result in liability in statutes that criminalize corruption based on willful ignorance as well as knowledge.”<sup>105</sup> On the other hand, the “connect the dots” approach was coined by the Tribunal in *Methanex Corporation v. United States of America*.<sup>106</sup> This theory held that “while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support” a claim.<sup>107</sup> In *Oostergetel v. Slovak Republic*, the tribunal observed that “[f]or obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence.”<sup>108</sup>

Regardless of which standard of proof is applied, at a minimum, something at or above “clear and convincing” evidence is required.<sup>109</sup> In *ECE Projektamngement v Czech Republic*, the tribunal cautioned that the “mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.”<sup>110</sup> While the tribunal there was willing to “connect the dots,” it noted, “the dots have to exist and they

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102. *Kenya Airport Auth. v World Duty Free Co.*, (High Court of Kenya, Nairobi, misc. application no. 67 of 2013) ¶ 38, (Oct. 5, 2018).

103. See U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the Foreign Corrupt Practices Act 22–23 (2012).

104. See, e.g., Int’l Chamber of Commerce, Guidelines on Agents, Intermediaries and Other Third Parties (2010).

105. Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, AJIL UNBOUND 113, 341–345 (2019).

106. *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005).

107. *Id.* at part III, ch. B, ¶ 2.

108. *Oostergetel & Laurentius v. Slovak Republic*, UNCITRAL, Final Award, ¶ 303 (Apr. 23, 2012).

109. See *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009) (“There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.”).

110. *ECE Projektamngement v. Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, ¶ 4.876 (Sept. 19, 2013).

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must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.”<sup>111</sup>

C. THE TRIBUNAL FOUND THE CONTRACT TAINTED BY  
CORRUPTION. NOW WHAT?

In every incident of corruption, there is a giver and a receiver. But how does a tribunal reach a fair result when both sides have engaged in corruption? In other words, to what extent can an arbitral tribunal do “justice” in a dispute tainted by corruption? Should it dismiss the arbitration, or should it ignore the bribery and consider the merits of the dispute? Or should it seek a middle ground – for instance, disgorgement or contributory fault?

In some instances, tribunals have looked to one enduring principle of arbitration: that the parties’ bargain is not technical justice of the state but justice as the merchant understood it.<sup>112</sup> This expectation is the wellspring of the doctrine of *lex mercatoria*, which in turn fundamentally underpins the non-precedential nature of arbitration—because it was never intended that any case should be the authority for the other.<sup>113</sup>

For example, in *World Duty Free Company*, the tribunal held that the corruption (bribes) to the President of Kenya was not attributable to Kenya. As a result, the tribunal found that based on international public policy, *World Duty Free Company* was not entitled to maintain any action against Kenya, and Kenya was entitled to rescind the agreement, and in doing so, the tribunal put the parties back in the place they would have been, had the contract never existed, fashioning a result that did not award either party for their respective malfeasance.<sup>114</sup>

In a somewhat novel solution, the tribunal in *In Spentex Netherlands B.V. v. Republic of Uzbekistan* ordered the state to either (1) donate USD \$8 million to a United Nations anti-corruption fund, or (2) pay the costs of the proceedings and reimburse seventy-five percent of the investor’s legal fees.<sup>115</sup>

The continuing progression and development of the “right” way to deal with corruption in an arbitral proceeding will continue to develop over time. And, although arbitrators may be guided by *lex mercatoria* in fashioning the appropriate relief, prior cases provide good exemplars of what can be done.

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111. *Id.* ¶ 4.879.

112. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

113. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, J. INT’L DISP. SETTLEMENT, vol. 2, 5, 8 (2011) (“judicial decisions state, but do not create law”).

114. See *EDF (Servs.) Ltd.*, *supra* note 109, ¶ 188 (“In conclusion: The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the ‘House of Perfume Contract’”).

115. David M. Orta, et. al., *Allegations of Corruption in Investment Treaty Arbitration: The Need for Reform*, EXPERTGUIDES (Sept. 17, 2019), <https://www.expertguides.com/articles/allegations-of-corruption-in-investment-treaty-arbitration-the-need-for-reform/arkesfdy>.