ARBITRATORS AS LAW-MAKERS

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Abstract

As the majority of international commercial arbitrations remain private, the significance of the legal issues considered and decided by arbitrators is often unknown. In light of this, the purpose of this paper is twofold. First, it addresses the reality of arbitrators confronting questions of law, by providing examples of instances where arbitrators have had the responsibility of "making law" in disputes concerning the oil and gas industry, maritime law, construction law and arbitration law. Secondly, it considers whether there is a role for the publication of redacted awards in the international arbitral community. Despite criticisms about the impact of arbitration on the development of common law and the importance of confidentiality, the paper suggests that reforms to the writing and publication of awards in institutional rules could lead to arbitral awards usefully contributing to the development of law in a range of contexts.

I. Introduction

The idea of arbitrators as potential law-makers has become the topic of growing controversy in the international arbitration community. The most recent manifestation of this controversy undoubtedly arose from the Bailii lecture given by the Lord Chief Justice of England and Wales in March of 2016. The Lord Chief Justice posited that important legal issues were being determined in arbitration, and as a result, arbitration had become a "*serious impediment*"[1] to the development of English Law. His thesis was that the English had retreated too far from the opportunity to review the legal aspects of arbitrators' decisions, and, amongst many suggestions, favoured a loosening of the restrictions on appealing awards in the English Arbitration Act, such that courts could have a wider ambit to review legal questions of general public importance decided in arbitration.[2] This, he felt, was a healthy middle ground, as it "*would enable the courts more readily to develop the law whilst leaving arbitration as an important means of dispute resolution*".[3] His Lordship's view proved contentious, albeit a view also shared by others from time to time.[4] Critics in the international arbitration community were quick to rebut this proposal of reform to appeal mechanisms, expressing concerns that extensively reviewing points of law could undermine party autonomy in arbitration and the finality of the arbitral process, result in increased costs and delays, and ultimately jeopardise the competitiveness of London as an arbitration hub.[5]

Leaving this particular controversy aside for the moment, there is a perception that arbitrations frequently centre on issues of fact and contract interpretation,[6] rather than cutting edge legal

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1 The Right Hon. Lord Thomas of Cwmgiedd, Chief Justice of England and Wales, The Bailii Lecture 2016, *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, 2 (Mar. 9, 2016), *available at* https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

2 *Id.* at 13.

3 *Id.*

4 Robert Finch, *London: still the cornerstone of international commercial arbitration and commercial law?*, 70(4) ARB. 256, 264-5 (2004).

5 Alison Ross, *Lord Thomas denies "attack on arbitration"*, GLOBAL ARB. REV. (Oct. 6, 2016), *available at* http://globalarbitrationreview.com/article/1069015/lord-thomas-denies-attack-on-arbitration.

6 *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23(3) ARB. INT'L 357, 375 (2007).

principles. Perhaps this is a product of the factually-intensive nature of construction disputes, the traditional arena in which arbitration was used. However, the reality is that arbitrators have long been tasked with deciding questions of law, ranging from novel to substantial.[7] Most certainly for Lord Thomas, a significant contributing factor to his frustrations is that in light of this reality, common law and the public domain are unable to benefit from the decisions of "*excellent retired judges who now sit as arbitrators*",[8] who regularly deliver high-level analysis of legal principles in awards "*which are known only to the cognoscenti*".[9] Thus, the question is not whether arbitrators are in fact law-makers (that much is arguably given). Instead it should be asked, how might we be able to access the benefits to be derived from awards in which arbitrators address issues of law? One view that finds support in this paper is the potential publication of redacted versions of awards, the practice of which could be useful to the international commercial community and adjudicators of commercial law disputes, and improve the nuances and predictability of the law.

The purpose of this paper is twofold. First, it addresses the reality of arbitrators confronting questions of law by providing examples of instances where arbitrators have had the responsibility of "*making law*". Secondly, it considers whether the publication of redacted awards has a role in the international arbitral community. Ultimately, if arbitrators opine on general legal principles in deciding the issues between the parties, it is suggested that the publication of redacted versions of those views could be one way in which arbitral decisions can influence the development of commercial law.

II. Law Making in Practice

In the strictest sense, arbitrators make "*hard law*" as their awards are binding on parties and are enforceable in law.[10] They are also engaged in a "*softer variant of lawmaking*",[11] which typically occurs in one of two situations. In one situation, there is a "*gap*" or uncertainty in the legal issue which the courts have not resolved. Arbitrators fill that gap with their own reasoning. In the other situation, parties have chosen arbitration precisely so that they are not bound by a particular set of national laws. The parties seek a private dispute resolution mechanism with a set of alternative legal rules, therefore providing arbitrators with the legitimacy to make laws.[12]

Under either form however, arbitrators in international commercial disputes can contribute to law-making and create a soft form of precedent. A well-known example is the *Dow Chemical* award, which supported the holding of the "*group of companies doctrine*".[13]

The Tribunal in that case stated:

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7 *See* DOLORES BENTOLIA, ARBITRATORS AS LAW MAKERS 1 (2017).

8 The Right Hon. Lord Thomas of Cwmgiedd, Chief Justice of England and Wales, *Launch of the City UK's Legal Services Report,* 16 (July 10, 2016), *available at* https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-launch-of-thecityuk-legal-services-report-2016.pdf.

9 *Id.*

10 D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 N.Y.U. J. INT'L L. & POL. 875, 882 (2013).

11 *Id.* at 883.

12 W. Mark. C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1949 (2009).

13 Klaus Peter Berger, *The International Arbitrators' Application of Precedents* 9(5) J. INT'L ARB. 5, 19 (1992).

"*Decisions of these [commercial] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves […] should respond*".[14]

The section below provides several practical examples of law-making in international commercial arbitration. It is not impossible for arbitrators to "*make law*" even if their awards are not made public[15] and their decisions do not act as a form of precedent. As will be demonstrated, the value and utility of well-reasoned resolutions to significant legal questions by arbitrators has, to the detriment of legal jurisprudence around the world, largely been missed. However, in the alternative scenario, if these matters had been decided by judges, they would have generated substantial interest.

A. The oil and gas industry

International arbitrators are commonly tasked with deciding large value pricing disputes in the context of the oil and gas industry. Indeed, it was noted by the United States Court of Appeals for the Second Circuit that there is a "*there is a dearth of authority in New York relating to oil and gas leases*".[16] This has been attributed to the prevalence of arbitration clauses in international oil and gas contracts.[17] In the field of gas price review arbitrations, rare examples of publicly available awards, such as the *Atlantic LNG* award,[18] have assumed importance in the industry and are often cited by both counsels and arbitrators alike.[19]

In dealing with such pricing disputes, the principles which arbitrators are called upon to apply extend beyond merely applying the contract to the facts. General principles must be decided in the context of both the contract and the applicable law. Once decided, these legal principles govern the relationship of the parties going forward.

In many instances, especially in long-term contracts, arbitrators need to develop principles governing the manner in which parties will write their contracts for the future. This obviously includes the issues that the parties have been unable to agree upon on the commencement of proceedings. Therefore, it is rarely a question of simply applying the facts and finding an answer between the parties. It is also a question of developing the relevant principles to the writing of the commercial terms needing to be fixed for the future, and applying those principles to the contract in question, in conjunction with the facts.

As an example, a tribunal on which the author sat needed to decide whether forfeiture provisions in relation to a non-contribution by a joint venture partner to exploration costs were

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14 Dow Chemical v. Isover Saint-Gobain, 9 Y.B. COMM. ARB. 131, 136 (ICC Int'l Ct. Arb. 1984) (Sanders, Arb., Goldman, Arb., Vasseur, Arb.).

15 *Contra* King & Moloo, *supra* note 10, at 886.

16 Beardslee v. Inflection Energy, LLC, 761 F. 3d 221, 228 (2d Cir. 2014) (internal quotation marks omitted) (*citing* Wiser v. Enervest Operating, L.L.C., 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011)).

17 Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration - Could the Cause also Bring the Cure?*, 7 Y.B. ARB. & MEDIATION 73, 81 (2015).

18 Atlantic LNG Company of Trinidad & Tobago v. Gas Natural Aprovisionamientos SDG SA, UNCITRAL, Final Award (Jan. 17, 2008); *See also Extracts from the ICC Arbitral Awards: Price Setting and Price Revision in the Energy Sector,* in 20/2 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 69-76; 93-109 (2009).

19 Mark Levy, *Gas Price Review Arbitrations: Certain Distinctive Characteristics, in* GLOBAL ARB. REV., THE GUIDE TO ENERGY ARBITRATIONS 185, 191 (J William Rowley QC ed., 2d ed. 2017).

void. This was a standard form contract widely used in the industry worldwide. The parties made substantial submissions in the proceedings and the matter was decided according to the principles applicable under the relevant law. The conclusion reached after formidable analysis was that the forfeiture provisions offended principles relating to penalties and were therefore unenforceable. There is indeed potential for this award to establish principles relevant for the diverse users of that standard form contract. However, the award has not yet seen the light of day, and whether it will is yet to be seen. No doubt, if a judge had decided the same, it would have resonated in the industry immediately.

B. Maritime law

The realm of maritime law is already recognised as an area in which rendering awards with reasons, due to its precedential value, has emerged as a practice.[20] This is again due to the use of standardised contracts across the industry which requires uniform construction to provide predictability for industry transactions.

The variety of legal issues decided in maritime arbitrations is increasingly diverse. One area of particular commercial tension arises when the markets for ship hire fluctuate. Shipbuilders or purchasers of ships realise they suddenly cannot find anyone to lease their ship, or conversely find that they have an abundance of potential charterers. In both scenarios, significant commercial issues arise as a consequence. They are faced with two possibilities: either to avoid responsibility for the ship or to exploit the crucial need for the ship. The shipbuilding disputes that arise from China and Korea in particular are very significant in this regard. These disputes create the need to decide general principles about changed circumstances and the prevention by one party of the other, which could inform the way in which parties conduct their commercial activities in that area in the future.

C. Construction law

In the context of construction law, arbitrators have decided issues at the leading edge of the particular applicable laws. These include issues of good faith, prevention by one party of the other, changed market conditions, interpretation of standard form contracts and the concepts of penalties or liquidated damages. Decisions are made more complex where there are gaps in the law or an absence of useful expositions by academics or courts of the relevant seat, regarding matters such as how to interpret good faith or how to re-adjust contractual rights. This is particularly the case under civil code provisions, which are extensively applicable in the Middle East.

Decisions of tribunals have expressed views on how these complex legal principles should be applied. Where awards have been published, such as on the issue of the construction of Clause 67 FIDIC with respect to the time-bar within the two-tier conflict resolution system, arbitrators have referred to these awards rather than judgments of the court to justify their decisions.[21] In a majority of cases however, tribunal decisions remain unpublished. Had these cases been decided

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20 Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579, 587 (1985).

21 Berger, *supra* note 13, at 20.

by judges, they would have been regarded as major developments in the law in the areas in which they are decided.

For example, a recent arbitration which the author heard involved the question of the re-adjustment of provisions for liquidated damages in a Middle Eastern country where the provisions for re-adjustment of rights are clear yet undecided. The question was whether they could be enforced where the amount recoverable is disproportionate to the actual loss suffered. Instead of guidance from any established law in that jurisdiction, the principles which should be applied were argued with skill and detail by the parties themselves. The view of the tribunal was that the award is of relevance to the application of international standard forms of construction contract in projects in the region, but again, users must miss out on such analysis.

Another unpublished award from many years ago decided a point of law related to a fundamental commercial law principle in both civil and common law jurisdictions. The case was decided on a preliminary point under Singapore law as to whether the deficiency in the extension of time provision meant that liquidated damages could not be recovered as a matter of law. This rule, called "*the prevention principle*", entails that if one party prevents the other from performing, that party cannot then complain of the other's breach. The tribunal was required to decide only the question of law - whether the principle applied to the contract. The tribunal was referred to many common law case authorities by counsel for both parties and was able to express an extremely comprehensive view. When finished, the parties were asked whether they would be prepared to publish a redacted award for the sake of clarification and development of the law, but they declined for commercial reasons. If the tribunal had been a court, the decision would have had an ongoing impact on the development of this area of common law.

D. Arbitration law

In the area of arbitration law, arbitrators must constantly decide issues that "*make*" law. On the question of jurisdiction, a common preliminary question in an international arbitration, the scope of an arbitration clause according to the applicable law under which it should be interpreted, is a regular area of debate. The question of construing arbitration clauses in order to determine what disputes might fall within them is inevitably one of broader application than just the determination of the issue in question. In this regard, published arbitral awards have considered a range of contract interpretation principles such as ascertaining the parties' genuine intentions and notions of good faith.[22]

The application and effect of conditions precedent to arbitration, together with the question of arbitrability are other common areas of decision-making by international arbitrators, particularly with multi-tiered arbitration clauses. In a recent hearing in London, the question of arbitrability featured prominently in the preliminary points argued before the tribunal. Is the question of arbitrability dependent wholly upon the law governing the agreement to arbitrate, or is it also influenced by questions of enforcement where a state is involved? The English Court of Appeal case of *Sulamérica* v. *Enesa*,[23] decided that the arbitration agreement was governed not by Brazilian law (the law governing the contract), but by English law being the law of the seat.

22 *See, e.g.,* Interim Award in ICC Case No. 7929, XXV Y.B. COMM. ARB. 312, 317 (2000).

23 Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others, [2012] EWCA Civ 638.

While from a civil law perspective, the law of the seat would always govern the law applicable to the arbitration agreement, there is less certainty in the common law world. The tribunal's decision carries the legal principles further than they have been taken by the courts of England, and the courts of the other country involved.

When it comes to choice of law, if the International Chamber of Commerce (ICC) Rules *voie directe* method[24] of choosing the applicable law is used, the principles which the arbitral tribunal should use are not those which come from the general feeling of the tribunal. Rather, their decision should be informed by principles which can be used for the purpose of predictability in the future.

In the author's experience, illegality is becoming a major issue in international arbitration, as are the effects of illegality on the enforcement of civil remedies. There are varying views in different jurisdictions about this complex issue. A current arbitration considers the issue under New York law, Singapore law, and English law, in which the tests are all potentially different. In 2016, the English Supreme Court in *Patel* v. *Mirza*[25] expressed a perspective on the effect of illegality upon the enforcement of contractual rights and the recovery of a *quantum meruit* that considered the issues in a new light, highlighting the development of the illegality doctrine over time. However if one looks at that case, there is significant disparity between the views of the judges,[26] and arbitrators deciding that point will have to interpret and develop tests for the purpose of applying that law to their cases. Further, an arbitral tribunal will no doubt need to consider the principles that the English Supreme Court used in relation to the illegality question drawing on Canadian law, New Zealand law, Australian law and New York law, which were reviewed and formed part of the basis of the English Supreme Court's reasoning. This holistic consideration would inevitably lead to the development of commercial law.

In the area of procedure, arbitrators are continuously creating law. This is driven in part by the inherent flexibility of arbitral procedure to meet the needs of the parties in the circumstances of a given case. This frequently involves a careful balancing exercise between ensuring each party is given equal opportunity to present its case, achieving efficiencies in time and cost, and giving effect to party autonomy which underlies procedure from start to finish. In the creation and interpretation of soft law about procedure in international arbitration, within these bounds, arbitrators indeed make law.

Particularly in the absence of an International Bar Association (IBA) guideline, and contrary to criticisms of the undesirability of soft law, arbitrators by their own procedural rulings create the opportunity for others to learn from that practice. This is critical as nothing is given in international arbitration procedure. Developing effective procedure is therefore the creation of

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24 *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶17-01 (3d ed. 2000).

25 Patel v. Mirza, [2016] UKSC 42.

26 The majority judgment, delivered by Lord Toulson, supported a policy-based approach in which a range of factors would be balanced to determine whether allowing a claim would be contrary to the public interest. Lords Mance, Clarke and Sumption, in separate judgments, concurred in the outcome but were concerned that the approach of the majority was too vague. Lord Neuberger favoured the minority's principled approach but also accepted Lord Toulson's approach as "reliable and helpful guidance"; *See* James Lee, *The Judicial Individuality of Lord Sumption*, 40(2) UNSW L. J. 862, 877 (2017).

procedural law. The benefits of this are evident in practice when one identifies issues of, for instance, disclosure, and there are a variety of views taken by arbitrators that supplement the views of the IBA Rules of Evidence on disclosure. These often struggle with the cultural issues that arise from counsel's differing domestic perspectives. The same can be said for other procedural issues such as privilege and confidentiality and the treatment of bribery.[27]

International arbitrators, as opposed to national court judges, are always operating in a comparative law context. In many instances, arbitrators will be dealing with a law different to which they have been trained in. For a common law trained lawyer, experiencing principles of civil law, including the administrative law principles that come with many civil law jurisdictions, is both humbling and fascinating. It is through the exchange and overlap of experiences in the international arbitration community that arbitration has generated its own set of evidentiary procedures, a hybrid of civil and common law traditions.[28] The international comparative law context in which arbitral decisions are made, gives them a unique character, distinct from the pronouncements of procedural law frequently made by curial courts, and through these international arbitrators make important contributions to international jurisprudence.

III. Publication of Awards

A. Publication and precedent

The examples above illustrate the rich source of law to be found in the decisions of international commercial arbitrators; however, the vast majority of these decisions are not made public. It is generally accepted that where arbitral decisions are accessible to the public, or at least to the arbitration community, they are more likely to act as a form of precedent.[29]

In investor-State arbitrations, where most of the awards are either known or publicly available, public international law principles are commonly debated and developed. These cases often provide useful guidance on principles of calculating damages, with some being the subject or authority of books on such legal principles.[30] The Iran-US Claims Tribunal is considered a valuable source of law as it provides an "*extensive body of published case law on arbitral procedure and substantive international law topics*"[31] for the first time.

Another field of arbitration in which publication of decisions has created a valuable body of case law is international sports law. Although not binding, the Court of Arbitration for Sport (CAS) panels have consistently adopted the same reasoning as previous CAS decisions in order to strengthen the predictability of the law.[32] Gabrielle Kaufmann-Kohler has gone as far as to say that CAS cases "*demonstrate the existence of a true stare decisis doctrine within the field of sports arbitration*".[33]

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27 Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20(5) AM. U. INT'L L. REV. 957, 1001 (2005).
28 *Id.*
29 *See* Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration*, 24(2) J. INT'L ARB. 129, 135 (2007).
30 *See, e.g.,* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed. 2017).
31 *Id.* at 886.
32 *Id.* at 878.
33 Kaufmann-Kohler, *supra* note 6, at 366.

It may be questioned whether arbitral decisions on issues of national law governing a contract, which are already the subject of steady development through the doctrine of precedent by public courts, can be compared to these highly specialised bodies of law in which arbitral tribunals are the primary arbiters and therefore play a particularly important role as a source of precedent. In the author's view, while there are differences, the essential role of arbitrators in deciding and thereby developing novel issues of law remains constant amongst them.

The examples above of law making in practice and the effect of publication illustrate two points. First, arbitral decisions are of value and do make determinations on substantive issues of law, particularly when courts have yet to conclusively resolve them. Secondly, increasing the publication of awards tends to increase their capacity to act as persuasive reasoning for future arbitrators.

Accepting those two outcomes, the question now turns to whether we ought to embrace the role of arbitrators as law-makers and seek to increase and improve the process of publishing arbitral awards.

B. Merits of publication

Numerous judges, including Lord Chief Justice Thomas, have expressed the concern that the increasing prevalence of arbitration is stifling the development of common law. The recent judgment of the Supreme Court in relation to the withdrawal of the UK from the EU[34] gives special meaning to the question of the continuing development of English law and its ability to be attractive to parties around the world who might apply English law to their contracts. This is a more difficult prospect if the law is not being made by the courts and is being made and developed instead in the privacy of arbitration.

The solution suggested by some judges is for the parties to return to litigation.[35] The widespread use of arbitration limits the feasibility of this approach. Parties value the autonomy, flexibility and finality of arbitration. They frequently choose arbitration for the purpose of avoiding the application of one set of domestic laws and procedures. As Thomas E. Carbonneau states, "*the parties' desire is not to be outside the law, but rather to be governed by substantive and procedural provisions which are free of national bias and which are moulded to suit the particular features of their sui generis commercial relationship*".[36] In the construction industry in particular, parties frequently seek arbitrators with experience in construction disputes due to the highly technical nature of many of these disputes.[37] The consistency with which parties have resorted to international arbitration has reinforced its legitimacy for international parties.[38] Therefore, the more realistic solution is to continue supporting arbitration and consider publishing more redacted or sanitised awards. Publishing awards would allow the law to continue developing in the common law tradition and also allow parties the choice between arbitration over litigation.

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34 R (on the application of Miller and another) v. Secretary of State for Exiting the European Union [2017] 2 WLR 583 (Wales).

35 *See* Andrew Stephenson & Astrid Andersson, *Arbitration: Can it assist in the development of the common law - An Australian point of view*, 33(4), INT'L CONSTR. L. REV. 413, 421 (2016).

36 Carbonneau, *supra* note 20, at 603.

37 Stephenson & Andersson, *supra* note 35, at 422.

38 Rogers, *supra* note 27, at 1007.

The publication of arbitral awards is not always seen as desirable to users. Confidentiality is often considered one of the most valued aspects of international commercial arbitration[39] and an inherent benefit of arbitration. In a 2015 survey conducted by Queen Mary University of London, 33 percent of respondents cited confidentiality and privacy as one of the top three most valuable characteristics of international arbitration.[40] The principles of self-determination and party autonomy would appear to run counter to the enforcement of publication. Some have suggested that the principle of confidentiality is not as important as it seems. Lord Thomas has stated that "*the market tends to know which parties are involved in which arbitrations and what the arbitration is about*"[41] due to leaking of information. In other circumstances, the contents of the arbitration enter the public sphere if a party seeks to enforce or annul the award through national courts.[42]

Concerns about confidentiality can be circumvented by publishing awards anonymously and with a time delay, as is the ICC's current practice.[43] However, there are countervailing concerns that anonymised and sanitised awards are either devoid of useful context and reasoning[44] or do not remove the possibility of identifying the parties.[45] Some proposals are offered in the following sections of this paper which may balance these competing concerns to maximise the overall utility of arbitral awards.

C. Format of publication

A number of suggested reforms to enable increased publication of awards have related to the content of what is actually published and the format of the document. One possibility suggested by Elina Zlatanska is to produce two versions of the arbitral awards. One award would contain all confidential information and would be viewed by the parties. Another would include redactions of any information the parties themselves deem to be sensitive. The redacted version could then be published.[46] Arbitrators would be able to prepare their awards as usual, without consideration to removing sensitive information while writing. Once the reasons have been prepared, arbitrators or another party (such as the staff of the arbitral institution) could perform the redactions based on the parties' objections.

Instead of publishing a redacted version of the original award, it is suggested that a summarised version of the decision be considered for the second version of the award. This could resemble the digest format used by the London Court of International Arbitration (LCIA), which published digests of decisions on arbitrator challenges in 2011.[47] It could also take on a format similar to a headnote or judgment summary, currently issued following judicial decisions. A

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39 *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2780 (2d ed. 2014).

40 Queen Mary University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 6 (2015), *available at* http://passthrough.fw-notify.net/download/378483/http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

41 Lord Thomas, *supra* note 1, at 14.

42 King & Moloo, *supra* note 10, at 894.

43 *See* Stephenson & Andersson, *supra* note 35, at 428.

44 Elina Zlatanska, *To Publish, or Not to Publish Arbitral Awards: That is the Question*…, 81 ARB: INT'L J. ARB. MEDIATION & DISP. MGMT. 25, 36 (2015).

45 *Id.* at 32.

46 *Id.* at 35.

47 King & Moloo, *supra* note 10, at 889.

summarised format could be effective for highlighting and distilling relevant points of law and non-sensitive material facts, without releasing a lengthy award.

An alternative solution is to standardise the format of arbitral awards.[48] This would require arbitrators to separate the description of the facts from the relevant procedural and legal issues and the reasons for the decision.[49] Structuring an award in this way may simplify the process of determining what is suitable for publication. For example, the first section, containing a description of facts, would normally remain entirely confidential. The second and third sections, identifying and resolving procedural and legal issues, would generally be published, subject to the redaction of any identifying information.[50] However, this solution may be highly implausible. As Zlatanska has posited, mandating a template on all arbitrators worldwide would be extremely challenging given the varying writing styles of each individual. The best structure for the award may also vary depending on the specific arbitration itself.[51]

Arbitral institutions also have different approaches to disclosing the identity of the arbitrators. The International Chamber of Commerce International Court of Arbitration (ICC) publishes select redacted awards on specific topics which anonymise all names, including the arbitrators'.[52] The International Centre for the Settlement of Investment Disputes (ICSID) publishes awards or excerpts of legal reasoning, including the name of the arbitrators.[53] Anonymising the identities of the arbitrators is a potential method of overcoming resistance to publication from arbitrators. However, it is suggested that anyone who aspires to being an international arbitrator should seek to write awards capable of bearing the scrutiny of one's colleagues. The knowledge that their award will be publicly scrutinised may impose a higher discipline on the arbitrator and their reasoning.[54]

D. Reforms to arbitral institutions

There is currently no uniform practice for publishing awards among arbitral institutions. In order to increase publication and thereby increase the utility of arbitral decisions as a form of lawmaking, a number of potential reforms are suggested.

First, in order for publication to occur, arbitral institutions and the United Nations Commission on International Trade Law (UNCITRAL) will need to amend their rules and supply model clauses addressing confidentiality. Institutions could require consent from parties to the limited publication of their award as a condition of administering their dispute.[55] In order to reassure parties of their autonomy, parties should always be given the opportunity to review and object to the text of the redacted award or summary prior to its publication.

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48 Zlatanska, *supra* note 44.

49 *Id.*

50 Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28(3) ARB. INT'L 447, 479 (2012).

51 Zlatanska, *supra* note 44.

52 Carbonneau, *supra* note 20, at 588.

53 Stephenson & Andersson, *supra* note 35, at 428.

54 Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required To Issue Written, Publishable Opinions*, 4 EM. RTS. & EMP. POL'Y J. 285, 317 (2000).

55 Karton, *supra* note 50, at 478.

Secondly, instead of publishing all decisions by default, the tribunal could recommend to the arbitral institution any decisions which may contribute particularly to the development of the law in a certain area if published. The institution could filter decisions and select the most useful for publication. This is analogised to the process of selecting court judgments for inclusion in law reports. Arbitral institutions could also certify questions of law arising from decisions, similar to the practice of inter-jurisdictional certification or ascertainment.

Thirdly, the practice should be made uniform amongst institutions. Joshua Karton has argued that a roadblock to the publication of awards is the possibility of a "*collective action problem*".[56] Arbitral institutions require greater incentives to increase publication and put to rest concerns that their market share would diminish due to parties' concerns over confidentiality. As Karton suggests, what is required is the development of a common protocol between several leading institutions, or a group of institutions in the same region.[57] Alternatively, there have been suggestions that the job of sanitising and publishing awards should be outsourced to an international regulatory body, which would hold a depository of awards.[58] This body may be better equipped to publish a representative sample of awards. It may also provide a platform for the publication of awards rendered in ad hoc arbitrations. However, the creation of such a body is likely to require lengthy negotiation and the adoption of a new treaty. Its feasibility may be limited as a result.

IV. Conclusion

International commercial arbitrators certainly do make law. They are often tasked with making crucial decisions on complex areas of law. They espouse principles that are developed to fill gaps in national laws. They are deeply involved in comparative law and create principles that are useful, or could be useful, to those involved in international commerce. In order to maximise the use of the law made by arbitrators and supplement the development of significant areas of international commercial law, the limited and standardised publication of redacted arbitral decisions is one route which finds much support and merit.

56 *Id.* at 481.
57 *Id.* at 484.
58 Zlatanska, *supra* note 44, at 35; Karton, *supra* note 50, at 479.