2023 Volume 3 Issue 13

ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
Delivering Excellence in ADR

AIADR Journal of International ADR Forum

A REPERTOIRE OF GLOBAL JURISPRUDENCE

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Published by Asian Institute of Alternative Dispute Resolution (AIADR)

28-1, Jalan Medan Setia 2, Bukit Damansara, 50490 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

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Library of Congress Cataloguing-in-Publication Data

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Tags for Indexing and Categories of ADR

1. Dispute Resolution; 2. Alternative Dispute Resolution; 3. Adjudication; 4. Arbitration.

5. Mediation; 6. Expert Determination; 7. Neutral Evaluation; 8. Expert Witness.

AIADR Journal of International ADR Forum

VOL 3 ISSUE 13, AUGUST 2023

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ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
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WHEN TO MAKE THE FIRST OFFER IN AN INTEGRATIVE NEGOTIATION'

By: Baaldesh Singh

Baaldesh Singh graduated with a high second-upper class from SOAS, University of London. He pursued his LLM at King's College London, where he achieved a distinction overall and specialised in international dispute resolution. Baaldesh has gained work experience in international law firms, barrister chambers, and dispute resolution institutions. He is currently studying for the Legal Practice Course before starting his training contract at a London-based international law firm.

I. INTRODUCTION

Negotiation is a phenomenon that we can observe in multiple aspects of our daily life.[1] This could range from a commercial lawyer negotiating with a huge multi-national bank for a loan agreement, to a child negotiating for more pocket money from his parents. Negotiations can consist of multiple issues, namely, distributive, integrative and compatible, that each have a distinct identity to them. However, a similarity in those scenarios is that a negotiation has to begin somewhere—with the first offer.[2]

This essay will deal with a vexing question that plagues many negotiators: should you make the first offer in an integrative negotiation? In this essay, I begin by describing the difference between distributive and integrative negotiation, I then discuss briefly why first offers are a useful anchoring tool in a distributive negotiation. After exploring the foundational understanding of the first-mover advantage, I discuss its application in an integrative negotiation. I argue that a first offer will only benefit the initiator if due consideration is paid to the social value orientation of the parties, timing of the first offer, and cultural disparity. If

[1] Cotter, M. and Henley, J. 'First-Offer Disadvantage in Zero-Sum Game Negotiation Outcomes' (2006) *Journal of Business-to-Business Marketing*, 15(1), pp.25-44.
[2] Adair, W., Weingart, L. and Brett, J, 'The timing and function of offers in U.S. and Japanese negotiations' (2007) *Journal of Applied Psychology*, 92(4), pp.1056-1068.

these conditions are not met, then it is likely that there will not only be a first-mover disadvantage, but also that creative problem-solving will be hindered in the negotiation. Lastly, I argue that more research is needed to ascertain whether there can be a first-mover advantage for integrative negotiations. In this sense, although there clearly is a first offer effect in an integrative negotiation, more research is needed to evaluate how and when to effectively gain a first-mover advantage.

II. DEFINING DISTRIBUTIVE AND INTEGRATIVE NEGOTIATION

Distributive negotiations are also commonly known as "win-lose" scenarios, as a gain by one party is necessarily a loss for another.[3] Distributive negotiation involves imagining a fixed-pie, and subsequently dividing the value of that pie. In a distributive negotiation, each negotiator battles for the biggest share of the pie.[4] Howard Raiffa has commonly referred to this phenomenon as the "negotiation dance".[5] Distributive negotiations are relatively straightforward and usually involve single-issue problems.

Distributive negotiations are often criticised for being from the "old school" of thought.[6] Fisher and Ury have often argued that distributive negotiations involve positional bargaining, which usually leads to poor outcomes as the underlying interests of the parties is not identified.[7] It is my opinion that, although distributive negotiations are usually seen as involving 'positional bargaining', it is nonetheless a common form of negotiation that at times cannot be avoided. This is because, occasionally, the negotiating factor is necessarily a win-lose scenario, for example, when haggling in a bazaar it is necessary that one negotiator loses and the other gains.

Integrative agreements were initially defined by Walton and Mckersie as the search for creative options that facilitate and produce joint beneficial outcomes by identifying the underlying interests of the parties.[8] Integrative agreements are classically illustrated by Follet[9], who tells a story of two sisters who fought over an orange, with one wanting it for juice and the other wanting the orange peel for

[3] Lax, D. and Sebenius, J, *3-D Negotiation (2006),* 1st ed. Boston, Mass: Harvard Business School Press.
[4] Ibid.
[5] Arifa, H. (1982), '*The art and science of negotiation'* Cambridge, Mass.: Harvard Univ. Press, pp. 37.
[6] Lax and Sebenius (n 3).
[7] Fisher, R., Ury, W. and Patton, B, *Getting to yes (2009).* 3rd ed. London: Rh Business Books.
[8] Walton, R., & McKersie, R, *A behavioral theory of negotiation (1965),* New York: McGraw-Hill.
[9] Eliot Chapple, 'Dynamic Administration: The Collected Papers of Mary Parker Follett' Edited by Henry C. Metcalf and L. Uric Harper, New York and London, (1942) *Human Organization*: April-June 1942, Vol. 1, No. 3, pp. 62-64.

a cake she was baking.[10] The two sisters finally agreed to compromise by splitting the oranges into halves, which allowed one sister to use her half for juice, and the other sister to use her half for the cake. This solution is fair, but represents a total failure to take into account the underlying interests of the parties, and thus wasting half of the orange flesh, and another half of the orange peel.

In contrast, if we are to apply an integrative agreement model to the 'orange' problem, we will find that it is jointly beneficial for both sisters to divide the orange by peel and flesh rather than in halves, allowing both sisters to satisfy their underlying interests.[11] As illustrated by this example, integrative negotiations are often complex and involve multi-issue factors that parties must negotiate. Therefore, integrative agreements usually contain different priorities that the negotiators must balance in order to achieve a creative outcome that satisfies the needs of both parties.

III. ANCHORING EFFECT: SHOULD YOU MAKE THE FIRST OFFER IN A DISTRIBUTIVE NEGOTIATION?

Many practitioners argue that it is unwise to go first. Donald Dell, a big proponent of this position, colourfully illustrated his argument by using an example of his negotiation with the Los Angeles Lakers.[12] In this negotiation, Dell and the managing partner of the Los Angeles Lakers were both adamant in sticking to their stance of not making the first offer. Dell claimed to have comically replied, "we've got all day and all tomorrow if you'd like. We can talk about the weather or movies or your sex life, whatever you want, but we're not going any further until you make an opening offer".[13] Dell waited until the managing partner was eventually forced to make an offer. Dell justified his approach by arguing that the reason he refrained from making the first offer was "because you are really not seeking an offer at all; you are seeking information".[14]

Dell's argument is a good explanation for when not to make the first offer. You should not make a first offer in a situation where you are less informed than your counter-party, as you risk offering private information or a lower sum than your counter-party was prepared to offer.[15] If you do not have sufficient information of

[10] Bazerman, M. H., & Neale, M. A, *Negotiating rationally (1992),* New York: Free Press.
[11] Kirk, D., Oettingen, G. and Gollwitzer, P., 'Mental contrasting promotes integrative bargaining', (2011), *International Journal of Conflict Management*, Vol. 22 No. 4, pp. 324-341.
[12] Dell, D. and Boswell, J, *Never Make the First Offer (2011).* New York: Portfolio.
[13] Ibid.
[14] Dell and Boswell (n 12).
[15] Galinsky, A. and Mussweiler, T, 'First offers as anchors: The role of perspective-taking and negotiator focus' (2001) *Journal of Personality and Social Psychology*, 81(4), pp.657-669.

the ZOPA (zone of possible agreement), then you may be better off waiting for the counter-party to make the first offer.[16]

Thomas Edison's negotiation with Gold & Stock Telegraph Company is an excellent example illustrating this school of thought.[17] When Thomas Edison sold his first invention, the stock ticker, he thought he was shooting for the moon by asking for $5000. He could not bring himself to make the first offer because he "hadn't the nerve to name such a large sum", and because of this, Gold & Stock Telegraph Company made the initial offer of $40,000. In situations such as this, where you lack the relevant information to make an informed first offer, it may be better to wait for the counter-party to make the first offer, or seek more information during the negotiation before making a first offer.[18]

Conversely, an increasingly popular school of thought supported by both academics and practitioners argues that negotiators should seek to make the initial offer, as the first offer has a substantial anchoring effect on negotiations.[19] Lax and Sebenius offered simple advise in such situations, "In cases where you are not hopelessly uninformed, seriously consider going first".[20] A good illustration of this was when Michael Jordan's agent negotiated with the Chicago Bulls for his client's contract.[21] The agent made an initial offer of $52 million, and the parties were able to settle at $30 million, making Michael Jordan the highest earner in the National basketball Association to date. By making an aggressive and ambitious first offer, the agent was able to anchor discussions in his favour.[22]

The theoretical aspect of anchoring in negotiation is well explored by Tversky and Kahneman.[23] In a famous experiment, Tversky and Kahneman asked their participants to spin a wheel, in order to get a number from 0-100.[24] The participants were then asked to estimate the percentage of African countries in the United Nations. It was found, that participants that received a higher number on the wheel gave higher estimates, and those who received a lower number on the wheel gave lower estimates. This experiment was groundbreaking as it

[16] Folberg, J., Golann, D., Sipanowich, T and Kloppenberg, L., *Resolving, disputes (2010)* 2nd ed. New York: Aspen Publishers, Chapter 5.
[17] Lax and Sebenius (n 3).
[18] Lax and Sebenius (n 3).
[19] Tversky, A., & Kahneman, D, 'Judgment under uncertainty: Heuristics and biases' (1974) *Science*, 185, 1124-1131.
[20] Lax and Sebenius (n 3).
[21] Loschelder, D., Swaab, R., Trötschel, R. and Galinsky, A 'The First-Mover Disadvantage: The Folly of Revealing Compatible Preferences' (2014) *Psychological Science*, 25(4), pp.954-962.
[22] Dell and Boswell (n 12).
[23] Tversky and Kahneman (n 19).
[24] Tversky and Kahneman (n 19).

showed that human beings are anchored to figures even though they had nothing to do with the problem at hand.[25]

Therefore, it follows that the first offer may similarly have an anchoring effect on negotiations. Northcraft and Neale showcased this where they asked a group of realtors and students to inspect a property and determine the value of the house.[26] They were given a ten-page document in which the only element that differed was the price listing of the house. The experiment showed that both the experienced realtors and the inexperienced students were anchored by the listing price. The participants justified their valuation of the house by referring to its special features and additionally denied being anchored by the listing price. The listing price issued by the participants can be seen as an initial offer in a potential negotiation.[27]

Previous studies by Liebert have also showcased that negotiators with incomplete knowledge were influenced by unfavourable first offers from their programmed opponent when making their counter-offers.[28] The study showed that the counter-offers made were anchored by the initial offer, resulting in more value gain for the initiator. It was also argued by Yukl, that initial offers are an excellent representation of final outcomes.[29]

Mussweiler and Galinsky argue that the anchoring effect of first offers happens because individuals make estimations based on the initial value (the offer) and adjust their counter-offer from that until an agreement is reached.[30] Mussweiler and Strack argue that the information that people recall will be consistent with the value of the anchor.[31] Thus, if the anchor value is low, then the negotiator may recall a weaknesses of the product that justifies the anchoring value.[32] These two explanations suggests that initial offers can act as powerful tools during negotiations that influence final settlement prices.[33] Research by Gunia has

[25] Tversky and Kahneman (n 19).
[26] Northcraft, GB & Neale, MA, 'Experts, amateurs, and real estate: An anchoring-and-adjustment perspective on property pricing decisions', (1987) *Organizational Behavior and Human Decision Processes*, vol. 39, no. 1, pp. 84-97.
[27] Galinsky and Mussweiler (n 15).
[28] Liebert, R., Smith, W., Hill, J. and Keiffer, M, 'The effects of information and magnitude of initial offer on interpersonal negotiation' (1968) *Journal of Experimental Social Psychology*, 4(4), pp.431-441.
[29] Yukl, G., 'Effects of situational variables and opponent concessions on a bargainer's perception, aspirations, and concessions' (1974) *Journal of Personality and Social Psychology*, 29(2), pp.227-236.
[30] Galinsky and Mussweiler (n 15).
[31] Mussweiler, T. and F. Strack, 'The use of category and exemplar knowledge in the solution of anchoring tasks' (2000) *Journal of Personality and Social Psychology*, 78 (6), 1038–1052.
[32] Galinsky and Mussweiler (n 15).
[33] Galinsky and Mussweiler (n 15).

shown that the 'robustness of the first offer effect' extends to Eastern negotiators too.[34]

IV. FIRST OFFER EFFECT: INTEGRATIVE NEGOTIATION

It is disappointing that, given the importance of first offers, there is a complete lack of research on the first offer effect within an integrative setting.[35] Nevertheless, past research has established that the first offer is a powerful anchoring tool in single-issue distributive negotiations. Integrative negotiations however, present an entirely different challenge. The characteristics of integrative negotiations are as such that they firstly, require multiple issues to be present, and secondly, parties may have incompatible issues but will prioritise those issues differently.[36]

For example, picture a job a negotiation, where the candidate seeks to negotiate for better health insurance and vacations days.[37] Although negotiating elements are incompatible as the recruiter will prefer to offer less health insurance and vacation days, the candidate prioritises health insurance over vacation days. As such, the candidate will be open to sacrificing vacation days over health insurance, in order to reach an agreement that benefits both parties.[38]

Thus, the complicity of integrative negotiations means that the answer to whether you should make the first offer is not straightforward, and commentators have raised concerns on the first offer effect in integrative negotiations that involve multiple trade-offs and alternative focal points for consideration.[39] However, anchors can be powerful because they simplify the complexities and ambiguity that exist in negotiation.[40] Accordingly, it is well argued that in such situations, judgemental heuristics play a heavier role in the minds of individuals.[41] Given that integrative negotiations are often complex and involve many variables, it is arguable that the first offer effect and the anchoring factor that follows from it should extend to integrative negotiations. This section will seek to discuss when

[34] Gunia, B., Swaab, R., Sivanathan, N. and Galinsky, A, 'The Remarkable Robustness of the First-Offer Effect' (2010) *Personality and Social Psychology Bulletin*, 39(12), pp.1547-1558.
[35] Moran, S. and Ritov, I, 'Initial perceptions in negotiations: evaluation and response to 'logrolling 'offers' (2002) *Journal of Behavioral Decision Making*, 15(2), pp.101-124.
[36] Loschelder, D., Trötschel, R., Swaab, R., Friese, M. and Galinsky, A, 'The information-anchoring model of first offers: When moving first helps versus hurts negotiators' (2016) *Journal of Applied Psychology*, 101(7), pp.995-1012.
[37] Loschelder (n 36).
[38] Loschelder (n 36).
[39] Gunia (n 34).
[40] Gunia (n 34).
[41] Kruger, J, 'Lake Wobegon be gone! The "below-average effect" and the egocentric nature of comparative ability judgments' (1999) *Journal of Personality and Social Psychology*, 77(2), pp.221-232.

to and when not to make a first offer in an integrative negotiation. I will do this in four parts: first-mover advantage in logrolling offers, importance of social value orientation, the timing of the first offer, and cultural disparities in negotiations.

(A) LOGROLLING

In an integrative negotiation where different priorities, agendas and considerations usually come into play, parties often achieve creative joint outcomes through the use of 'logrolling', and can be defined as a phenomenon where: "each party concedes on low priority issues in exchange for concessions on issues of higher priority to themselves".[42]

Just like in a distributive negotiation, the specific composition of the first offer in integrative negotiations will result in subsequent logrolling offers that establish within-issue anchors that lead to more creative and integrative agreements.[43] A study by Polzer and Neale established the consequences of within-issue anchors.[44] In their study, they found that externally set goals achieved higher outcomes than those that did not set any goals due to the anchoring affect it has in the minds of the negotiators.

Following from this, an anchor can act as a point of reference for parties to stick to, and will yield more productive counteroffers. Moran and Ritov argue that it is possible for each issue within an integrative negotiation to be anchored independently.[45] It is noteworthy that their research is theoretical but forms a good foundational basis to why in theory, the first offer effect can extend to integrative negotiations. In their study, they found that an initial first offer benefited the initiator as he would gain a higher overall value gain for each issue. The reasoning behind this is that a higher logrolling initial offer resulted in counteroffers which had a higher value for the initiator (similar to the anchoring effect in a distributive negotiation). It is also commonly argued that the behavioural strategies of a negotiator are largely determined by their interaction with the counter-party.[46] Thus, adopting this line of thinking, if the initial first offer is generous, then it is likely that the recipient will reciprocate with similar levels of cooperation.[47]

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[42] Moran and Ritov (n 35).
[43] Moran and Ritov (n 35).
[44] Polzer, J. and Neale, M. 'Constraints or Catalysts? Reexamining goal Setting Within the Context of Negotiation' (1995) *Human Performance*, 8(1), pp.3-26.
[45] Moran and Ritov (n 35).
[46] Bazerman, M. H., & Carroll, J. S. 'Negotiator cognition' (1987) *Research in Organizational Behavior, 9,* 247–288.
[47] Moran and Ritov (n 35).

This is an interesting study, but it suffers from some limitations. Firstly, their conclusions and findings were based on experiments where no actual negotiations occurred.[48] The within-issue anchoring makes sense in theory, but in a face-to-face negotiation, it is arguable that the level of the anchoring effect from the initial logrolling first offer would be different, taking into account behavioural characteristics and the social value orientation of negotiators. Secondly, I argue that a logrolling first offer cannot effectively work in the way Moran and Ritov describe unless you are aware and have complete information of your counterpart's priorities and Best Alternative to a Negotiated Agreement ("BATNA") Otherwise, your initial first offer may not consist of the priorities that your counterpart values. Thirdly, the study paid no particular attention to the timing of the first offer. As often it can be advisable to engage in informational gathering before making a first offer. Lastly, the study fails to take into account the cultural disparities that may exist in a negotiation, namely, between high-context and low-context cultures.

Nonetheless, this study is useful for its theoretical view on the first offer effect in integrative negotiations, where logrolling produces a better outcome for the initiator. In the next sub-sections, I will explore in more detail the practical aspects of making a first offer in a face-to-face integrative negotiation and seek to address the concerns above.

(B) SOCIAL VALUE ORIENTATION

Loschelder argues that making the first offer will help the sender if it does not reveal "integrative insight"— the incompatible priorities in the negotiation.[49] When the initial offer does not reveal information as to the sender's integrative priorities, then the sender receives a first-mover advantage because the offer only contains anchoring information.[50] In this sense, first offers share the same anchoring effect as they do with distributive issues. This aligns with Moran and Ritov's study of within-issue anchoring for integrative issues.

Contrastingly, if the initial offer reveals the integrative priorities of the sender, then there is a first-mover disadvantage because the receiver obtains information about the sender's priorities.[51] In such a scenario, the receiver will use the information to obtain more value than the sender. Let us use the job negotiation example discussed earlier. Now, picture yourself in a job negotiation where there

[48] Moran and Ritov (n 35).
[49] Loschelder (n 36).
[50] Loschelder (n 36).
[51] Loschelder (n 36).

is a mix of integrative and distributive issues: salary, health insurance and vacation days, and let us say that the recruiter prioritises less vacation days over the other issues.[52] If the candidate sends out an ambitious first offer of a £90,000 salary, premium health insurance and 30 vacation days, the recruiter is unable to gain an integrative insight into the candidate's priorities. However, if the candidate makes a first offer that prioritises the premium health insurance, it provides information that the recruiter can then leverage and exploit.[53]

This line of reasoning is consistent with Dell's argument about not making the first offer. If you make the first offer to an individual that reveals private information, then it is likely that your counter-party will use that information to your disadvantage. Therefore, by waiting for the counterpart to make the first offer, you are put in a better position to use the information he provides against him if he provides valuable private information. In such cases, you possess more informational asymmetry than your counterpart as you are aware of the senders' preferences, whilst he is not aware of yours.[54]

Following from this, in a multi-issue negotiation that contains both distributive and integrative issues, it may be wise to make a first offer that does not reveal integrative insight and anchor specifically on the distributive issue.[55] Once the distributive issue is out of the way, the parties may focus on creative problem solving and reaching an integrative agreement.

However, making a first offer that reveals "integrative insight" does not necessarily mean that there is a first-mover disadvantage.[56] An important factor is the social value orientation of the recipient— whether he is 'prosocial' or 'proself'. Proself individuals are negotiators that are egoistical and employ non-cooperative strategies in order to extract maximum gain, even when their counterpart is cooperative.[57] Prosocial negotiators are those that constantly seek to cooperate during a negotiation in order to maximise both their own and the counterpart's gain in the negotiation.[58]

Loschelder found that if the first offer reveals integrative insight to a recipient that is prosocial, then it is likely that the recipient will use the information to engage in

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[52] Loschelder (n 36).
[53] Loschelder (n 36).
[54] Loschelder (n 36).
[55] Gunia (n 34).
[56] Loschelder (n 36).
[57] Giebels, E., De Dreu, C. and Van De Vliert, E, 'Interdependence in negotiation: effects of exit options and social motive on distributive and integrative negotiation' (2000) *European Journal of Social Psychology*, 30(2), pp.255-272.
[58] Ibid.

problem-solving and cooperative behaviour.[59] Conversely, if the first offer reveals information that offers integrative insight to a counterpart that is proself, it is likely the recipient will exploit that information for more individual gain.[60] This was a novel study conducted with live participants that not only explored the anchoring effect of first offers in an integrative negotiation, but also with examining the psychological behavioural mechanism of different negotiators and their reaction to first offers.

(C) TIMING OF THE FIRST OFFER

Making the first offer should not be confused with making an offer right away, that is a common misconception. This is an important distinction, as making a well-timed first offer can result in better integrated outcomes through early informational exchange. Informational gathering is an important aspect of integrative bargaining as it leads to more creative outcomes that meet the underlying interests of the parties.[61] Thus, it is submitted that the timing of the first offer also plays an important role in achieving a first-mover advantage in an integrative negotiation.[62]

It has been suggested by scholars that thinking creatively beyond the means of the 'fixed pie' is key to achieving an integrative agreement and largely determines the efficiency of a negotiator.[63] Therefore, it follows that making a late first offer can result in efficient early creative problem-solving that leads to a more value-gaining outcome for both parties. This is because the early stages of the negotiation are the ideal time for informational exchange of priorities and interests.[64]

Sinaceur undertook an experiment to determine whether making a late first offer resulted in a better integrative outcome.[65] The study showed that late first offers met the underlying interests of the parties to a greater extent than if the first offer was made earlier. The participants had leeway to add meaningful discussions of issues and ideas that contributed to the identifying of hidden solutions and

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[59] Loschelder (n 36).
[60] Loschelder (n 36).
[61] Fisher, Ury and Patton (n 7).
[62] Sinaceur, M., Maddux, W., Vasiljevic, D., Nückel, R. and Galinsky, A. 'Good Things Come to Those Who Wait' (2013) *Personality and Social Psychology Bulletin*, 39(6), pp.814-825.
[63] Fisher, Ury and Patton (n 7).
[64] Sinaceur (n 62).
[65] Sinaceur (n 62).

integrated interests.[66] The results also found that making a late first offer ensured that the parties did not engage in positional bargaining or a pre-fixed notion that the pie is fixed. Thus, a late first offer allows parties to revise their competitive biases before any discussion of offers can take place.[67] This is important contrast to distributive negotiations, as it is commonly argued that the first offer should be made strong and early, in order to anchor the discussions.[68]

An accurate real-life illustration of the importance of the timing of the first offer can be seen with the attempted negotiation between the Israelis and Palestinians in the year 2000. The initial talks ended in failure, and according to the diplomats, the collapse of the negotiation was largely due to the first offer being made too early, where neither the Israelis or Palestinians were prepared to "own up to the fears and needs of the other".[69] When the parties decided to re-negotiate the following year, the outcome of the negotiation bore more fruit as the parties were able to undertake more informational exchange that led to greater value-gain for both parties. In particular, a joint statement published stated that the two countries were able to make substantial progress on issues such as refugees, security, borders and the status of Jerusalem, a feat that had never before been achieved.[70] In the end, a final negotiated agreement was prevented from being reached at the time due to time restrains and such progressive talks did not continue further due to political indifference and other complex factors.[71] Regardless, I argue that the reason for the unprecedented substantial progress in the subsequent negotiation was largely due to the initial offer being made later in the negotiation,[72] where the underlying interests of the parties were already understood, interpreted and subsequently met.[73]

The timing of the first offer is important and ties well into the previous argument concerning social value orientation. Parties should take time to understand the underlying needs of the counter-party, as making an early first offer to a proself

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[66] Sinaceur (n 62).
[67] Sinaceur (n 62).
[68] Gunia (n 34).
[69] Swift, A. (2010). *Middle East Peace: So Why Have We Failed?* [online] Foreign Policy. Available at: https://foreignpolicy.com/2010/04/19/middle-east-peace-so-why-have-we-failed-3/ [Accessed 29 Feb. 2020].
[70] "Taba Summit - Joint Statement - English (2001)" (*ECF*) https://ecf.org.il/media_items/949.
[71] Sinaceur (n 62).
[72] Sinaceur (n 62).
[73] Israeli–Palestinian Joint Statement at Taba. (2001, January 27). Retrieved from http://www.mfa.gov.il/MFA/MFAArchive/%202000_2009/2001/1/Israeli-Palestinian%20Joint%20%20Statement%20-%2027-Jan-2001

opponent can result in a first-mover disadvantage. Therefore, I argue that late first offers can result in a first-mover advantage when dealing with proself opponents.

(D) CULTURAL DIFFERENCES IN MAKING FIRST OFFERS

We have examined the social value orientation of different negotiators and their reaction to first offers, however, an equally important attribute to behavioural studies amongst negotiators stems from their cultural values. I will now expand on Sinaceur's previous research on the timing of the first offer in different cultural settings.

The study of the first offer effect has mainly derived from studies of Western negotiations, and as such, little consideration is paid to cross-cultural negotiations.[74] In Western negotiations, direct informational exchange is the driving force for generating creative solutions that meet the underlying interest of both parties, resulting in joint outcome gain.[75] In this sense, Western negotiators use offers to consolidate information rather than as a source of information, which aligns with Sinaceur's research.[76] By contrast, Eastern negotiators value indirectness, restrain and collectivism,[77] therefore, direct informational exchange on priorities is rare.[78]

Adair conducted a study examining the first offer effects on Japanese and U.S negotiators in an integrative negotiation.[79] The research showcased that early first offers stimulated informational exchange amongst Japanese negotiators that led to more integrative outcomes. This was because cultures with high-context norms, such as the Japanese, have a tendency to not trust individuals unless a strong bond is formed, and as such, the negotiators may feel uncomfortable with discussing what is important to them to their counterparts.[80] Therefore, first offers can act as a mechanism to search for integrative information that allows the

[74] Gunia (n 34).
[75] Bazerman and Neale (n 10).
[76] Adair, Weingart and Brett (n 2).
[77] Gunia (n 34).
[78] Brett, J. M., & Okumura, T, 'Inter- and intracultural negotiation: US and Japanese negotiators' (1998) *Academy of Management Journal*, 41, 495-510.
[79] Adair, Weingart and Brett (n 2).
[80] Kimmel, M. J., Pruitt, D. G., Magenau, J. M., Konar-Goldband, E., & Carnevale, P. H. 'Effects of trust, aspiration, and gender on negotiation tactics' (1980) *Journal of Personality and Social Psychology*, 38, 9–22.

negotiators to uncover information about priorities and interests.[81] The counter-offers that follow will reveal opportunities for trade-offs as the Japanese negotiators carried on the issues from one offer to another.[82] In this fashion, creative and mutually beneficial solutions are generated as the parties gather information through the logrolling offers.[83]

Adair also argues that if a high-context negotiator (Eastern culture) comes across a low-context negotiator (Western culture) at a negotiation table, a key element that determines the timing of the first offer is the level of trust between the two parties.[84] If there is sufficient trust between the two parties, then engaging in informational exchange early on and making a late first offer would be advisable as it would achieve the best joint outcome. However, if there was insufficient trust between the two parties, then Western style of direct informational gathering is not feasible. Instead, the parties should use early offers to exchange information.

V. INCONSISTENCY WITH THE LIMITATIONS OF THE FIRST OFFER EFFECT AND THE NEED FOR FUTURE RESEARCH

Overall, although practitioners have begun exploring the first offer effect in integrative negotiations, most research regarding initial offers revolve around distributive negotiations. It is clear that there is indeed a first offer effect in integrative negotiations, given the right conditions exist, but there is still too many contradictory research and gaps in experiments to say conclusively when to or when not to issue the first offer. It is thus submitted that future research is needed in order to ascertain the potency of the first offer effect when dealing with integrative issues.

Loschelder's research paper on social value orientation and its role in making a first offer in an integrative negotiation is helpful, but further research on the experience levels of negotiators is required. It is commonly argued that in a distributive negotiation, the first offer anchoring effect extends to both experienced and inexperienced negotiators.[85] However, integrative negotiations are a different breed. Studies have shown that experienced negotiators are more creative problem-solvers and detect integrative potential far more efficiently than

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[81] Lax and Sebenius (n 3).
[82] Adair, Weingart and Brett (n 2).
[83] Adair, Weingart and Brett (n 2).
[84] Adair, Weingart and Brett (n 2).
[85] Mussweiler, Strack and Pfeiffer (n 31).

inexperienced negotiators.[86] Ironically, in contrast, it is also argued that experienced negotiators are far more likely to take advantage of their counterpart's integrative insight for their own benefit.[87] Therefore, future research must identify how first offers work within that context.

Secondly, further research must be conducted on whether making a late first offer leads to a more integrative outcome when dealing with a more fixed set of issues rather than an open one. Sinaceur's study could have benefited from a more in-depth study on whether late first offers will still facilitate effective trade-offs for fixed issues.[88] Additionally, future studies should address whether making a late first offer is un-advisable if the counterpart is prosocial rather than proself.

Thirdly, more time should be devoted to the analysis of a first-mover advantage or disadvantage in a multi-issue negotiation that involves both distributive and integrative elements. In a recent study, it was hypothesised by the authors that in a multi-issue negotiation, the first offer effect will extend to the distributive issues of the negotiation but not the integrative elements.[89] The results showed that the individual who made the first offer claimed more value than their counter-party on the distributive issue but had no significant effect on the integrative issues.[90]

An important drawback of the study was that the distributive issue was not as important to the parties as the integrative elements. Therefore, further research should seek to address this, as the outcome of the study may have differed if the distributive aspect of the negotiation had more importance.[91] Additionally, due regard was not paid to the social value orientation of the parties, and as such, the study's conclusion does not correlate with that of Loschelder's. Once again, further research is needed to address this issue.

The study also indicates that when dealing with a multi-issue negotiation that contains both distributive and integrative issues, making the first offer can aid the negotiator in anchoring the distributive issue without suffering penalties on the

[86] Loschelder (n 36).
[87] Loschelder (n 36).
[88] Sinaceur (n 62).
[89] Gunia (n 34).
[90] Gunia (n 34).
[91] Gunia (n 34).

integrative elements of the negotiation.[92] Further research should focus on whether anchoring on the distributive issue in a multi-issue negotiation will allow parties to engage in more problem-solving for the integrative elements of the negotiation or hinder the process. This is because, an integrative negotiation that involves multiple issues, each focal point may carry a different value of importance to the negotiators.[93] The result of this is that the negotiator who receives the first offer may easily discount it and focus on the alternative focus points.[94] So for example, if Negotiator A decides to make an unfavourable first offer to Negotiator B regarding a sum of payment, Negotiator B can re-focus on another issue and make trade-offs to make the sum of payment more favourable to him.

VI. CONCLUSION

Negotiations dominate most parts of our lives, and with that in mind, it is important to understand the mechanisms that go behind the making of the first offer. Evidence shows that there can be a first-mover advantage in integrative negations provided due attention is paid to the social value orientation of the parties, timing of the first offer and cultural differences of the negotiators. Thus, I conclude that there are certain situations in which a first offer should be made, and other situations in which it is unadvisable to do so. However, the first offer effect on integrative issues still proves to be an enigma that needs further research to confidently ascertain and argue exactly when, where and how a first offer should be made.

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[92] Gunia (n 34).
[93] Gunia (n 34).
[94] Gunia (n 34).

THE SINGAPORE CONVENTION ON MEDIATION: A WAY FORWARD FOR QATAR TO BECOME AN INTERNATIONAL MEDIATION HUB

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ABSTRACT

The Singapore Convention on Mediation aims to bring in a harmonized legal framework of amicable settlement of cross-border disputes arising out of commercial relationship between parties of different jurisdictions. This Convention intends to address the gap of an effective mechanism for recognizing and enforcing settlement agreement resulting from mediation. As a precursor to Singapore Convention, the UNCITRAL Model law was amended in 2018 and renamed as UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation. This Convention was signed by 46 States on 7th August 2019 at an official signing ceremony in Singapore and it is now known as Singapore Mediation Convention. This Convention is similar to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Qatar was among the first countries to sign this Convention and the third country to ratify it. Qatar has also legislated a domestic law on Mediation in 2021. So far 56 States have signed the Singapore Convention, however, only 11 States have ratified it. This article aims to discuss the evolution of this Convention and its impact on the parties in resolving cross-border disputes quickly, effectively and efficiently without creating hassles on their businesses. Further, it discusses how Qatar as a State can benefit by become a mediation hub.

I. INTRODUCTION

United Nations Commission on International Trade Law (UNCITRAL) was established by a resolution 2205 (XXI) of the General Assembly of United Nations (UN) on 17 December 1966.[95] It was given a mandate to foster progressive harmonization and unification of international trade law with a view to look after the interest of all people, especially the developing countries for an extensive development of international trade. On 4 December 1980, another resolution was passed by UN General Assembly on a comprehensive UNCITRAL Conciliation Rules[96] keeping in view the diverse legal, social and economic systems followed by different countries, so that such uniform rules would contribute significantly to development of a harmonious international economic relations among member countries. A Model Law on International Commercial Conciliation[97] was adopted by UNCITRAL at the UN General Assembly resolution held on 19 November 2002 to give a meaningful value to international trade and the methods of settlement of commercial disputes where parties to the dispute could choose a third person or persons to assist them in resolving their disputes in an amicable manner. This could derive many benefits such as preserving the commercial relationship intact while resolving disputes amicably before it escalated into litigation. This had also facilitated many States to legislate their own domestic laws based on the methods of conciliation and mediation laid down in the UNCITRAL Model Law, though the scope of the Model Law was limited to international commercial conciliation.

The terms 'conciliation' and 'mediation' were used interchangeably by the UNCITRAL. The Model Law has been amended in 2018[98] and renamed "Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation". To promote and increase the visibility of the Model Law, UNCITRAL had decided to use the term 'mediation' instead of 'conciliation' for settlement of disputes resulting from international mediation.

Against this backdrop, UN General Assembly sensed the need to concurrently prepare a convention on international settlement agreements resulting from

[95] UN General Assembly Resolution 2205(XXI) 'Establishment of the United Nations Commission on International Trade Law' (1967) UN Doc A/RES/2205(XXI).
[96] UNGA Res 35/52 'Conciliation Rules of UNCITRAL' (1980) UN Doc A/RES/35/52.
[97] UNGA Res 57/18 'Model Law on International Commercial Conciliation of the UNCITRAL' (19 November 2002).
[98] UNGA Res 73/199 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the UNCITRAL' (20 December 2018).

mediation and an amendment to the Model Law on International Commercial Conciliation to overcome the issue of enforceability. This was mainly intended to accommodate different facets of settlement in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements without creating any expectation that interested States may adopt either instrument.[99]

II. BIRTH OF SINGAPORE CONVENTION

The above background has paved way for an International Convention in line with the existing New York Convention[100] on enforcement of Foreign Arbitral Awards. The approval of the United Nations Convention on International Settlement Agreement Resulting from Mediation[101] (now popularly known as Singapore Convention) is all set to change the path of cross-border dispute settlement. A new chapter in the history of International Conventions was created on 7 August 2019, when 46 countries came together including the largest economies like United States of America, China, India and Qatar which is ranked 9th in the World Competitiveness Ranking 2022,[102] in Singapore to sign an international treaty that would enable the member countries to enforce the mediated settlement agreement amongst the signatory countries. Another 24 countries joined the ceremony to show their support for the Convention. Subsequently, 10 more countries have signed the treaty, increasing the number of countries from 46 to 56.[103] Singapore being the Convention country has enacted the “Singapore Convention on Mediation Act 2020” to give effect to this Convention and has exhibited its commitment to strengthen the international commercial dispute resolution framework. Singapore and Fiji became the first two countries to deposit their instrument of ratification of the Convention at the UN Headquarters in New York on 25 February 2020.

Qatar became the third country to deposit its instrument of ratification to the Singapore Convention with the UN Headquarters on 12 March 2020 paving the way for entering this Convention into force after six months of deposit of its

[99] Model Law and UNGA Res 73/198 ‘United Nations Convention on International Settlement Agreements Resulting from Mediation’ (20 December 2018).
[100] ‘Convention on the Recognition and Enforcement of Arbitral Awards’ (entered into force 7 June 1959).
[101] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted on 20 December 2018, opened for signature 7 August 2019).
[102] ‘World Competitiveness ranking 2022’ https://www.imd.org/centers/wcc/world-competitiveness-center/rankings/world-competitiveness-ranking/ (last accessed on 01 May 2023)
[103] United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) Status As At: 02-05-2023 09:15:31 EDT

ratification by a third State[104] as per the provisions of the Convention. Belarus, Saudi Arabia and Ecuador[105] have also ratified the treaty by depositing their instrument of ratification. Thus, the Singapore Convention has now come into force from 12 September 2020.

III. SALIENT FEATURES OF SINGAPORE CONVENTION

Going ahead without looking into the salient features of the Singapore Convention would be like walking in the dark. The Singapore Convention is simple, lucid and concise with only 16 Articles. The scope of application of this Convention covers any mediated settlement agreement –

(i) which is in writing[106],
(ii) international[107] in nature,
(iii) and commercial in nature.

The Convention explicitly clarifies that[108] *any mediated settlement agreement, containing the following are excluded –*

(i) approved by Court or concluded in the course of proceedings before a Court or
(ii) enforceable as a judgment in the State of a Court or
(iii) have been recorded and enforceable as an arbitral award.

In other words, only mediated settlement agreements are covered, not any other settlement agreement.

Mediation is always a win-win situation for the parties as their commercial relationship does not terminate abruptly over a dispute. Amicable settlement preserves and foster a congenial atmosphere of trust and good faith. The Singapore Convention defines Mediation[109] as "*a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute*".

[104] Art 14 (1) of Singapore Convention.
[105] UN Convention (n. 103).
[106] Includes electronic communication as laid down in Art 2(2) of Singapore Convention.
[107] Internationality is determined by the place of business in different States as defined in Art 1(1) of Singapore Convention.
[108] Art 1 (3) (a) & (b) of Singapore Convention.
[109] Art 2(3) of Singapore Convention.

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The enforcement mechanism of the Singapore Convention provides flexibility and autonomy to the States that have ratified the Convention. The enforcement[110] is in accordance with rules of procedure of the member State and the conditions laid down in the Convention. There is a clear distinction between New York Convention and Singapore Convention when it comes to enforcement of awards/settlement. The former is done on the basis of the procedural law of the seat of arbitration whereas the latter is governed and determined by the State where enforcement is sought for.

A party seeking enforcement of a mediated settlement agreement must furnish the following to the competent authority of the State where such enforcement is sought for-

(i) the mediated settlement agreement signed by parties;
(ii) evidence that the settlement agreement resulted from mediation;

The evidence(s) as mentioned above may be –

(i) the signature of the mediator on the settlement agreement
(ii) any other document signed by the mediator indicating that the mediation was carried out
(iii) an attestation on the settlement agreement by the institution that administered such mediation or
(iv) any other evidence acceptable to the competent authority.

However, the enforcement of the mediated settlement agreement can be refused on the following grounds by the competent authority at the request of the party against whom the enforcement is sought and such party furnishes proof that:

(i) a party to the settlement agreement was under some incapacity;
(ii) the settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected;
(iii) is not binding, or is not final, according to its terms; or
(iv) has been subsequently modified;
(v) that the obligations in the settlement agreement have been performed or are not clear.

[110] Art 3(1) of Singapore Convention

(vi) granting relief or enforcement would be contrary to the terms of the settlement agreement;
(vii) that there was a serious breach by the mediator of standards applicable to the mediator or the mediation;
(viii) that there was a failure by the mediator to disclose to the parties' circumstances that arise justifiable doubts as to the mediator's impartiality and independence;
(ix) that granting enforcement would be contrary to the public policy of that Party;
(x) that the subject matter of the dispute is not capable of settlement by mediation under the law of the that Party;

The grounds mentioned in (ix) and (x) above can be invoked by the State *suo motu*, if the domestic law is in conflict with the subject matter of such mediated settlement agreement, when enforcement of the mediated settlement agreement is brought before the appropriate judicial forum.

When parallel applications or claims relating to a settlement agreement have been filed by a Party to a Court, an Arbitral Tribunal or any other competent authority which may affect the relief sought for under Article 4 of the Convention, the competent authority, if it considers proper, adjourn the decision and on request of the party, order the other party to furnish proper security.[111] This applies for both enforcement and recognition when such a defense is invoked in respect to a mediated settlement agreement before the competent authority by a party.

This Convention shall not deprive or interfere any right of the interested party it may have to avail itself in respect of a settlement agreement in the manner and to the extent allowed by such law or any other treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.[112] This manifests the flexibility of the Convention.

A State party to this Convention can declare its reservation that it shall not apply to any government agencies or any party acting on behalf of a government agency of such party. Such reservation shall apply to the extent that the parties to the settlement agreement have agreed to the application of the Convention. No other reservations are permitted except those expressly specified.[113]

[111] Art 6 of Singapore Convention.
[112] Art 7 of Singapore Convention.
[113] Art 8 (2) of Singapore Convention.

Reservation may be made at any time. If it is made at the time of signing, it shall be subject to confirmation upon ratification, acceptance or approval and such reservation shall take effect simultaneously with the entry into force of this Convention.[114] However, reservations deposited after the entry into force of the Convention, it shall take effect, six months after the date of the deposit.

IV. THE ADVENT OF A BORDERLESS MEDIATION

Resorting to mediation is on the rise in different domains of commercial transactions by the business community across the globe including areas where mediation was not traditionally used as an alternative dispute settlement mechanism. These include intellectual property rights (IPR) matters and insolvency proceedings (both individual and corporate insolvency). IPR matters include infringement of patent of a product or its process, copy right of any author/writer or publisher and registered trademark of a particular brand or a product which are identical or similar and uses for commercial gain by any other party. World Intellectual Property Organization Arbitration and Mediation Centre (WIPO AMC) administers a varied range of IPR matters for large sized-companies, small and medium establishments, startups, Research & Development Centers, pharmaceutical companies etc., across the jurisdiction. The parties can opt for the WIPO AMC Rules[115] for resolving their disputes on a fast paced and time bound manner. The insolvency process is initiated when a person or the corporate owe money to another person or corporate and unable to make such payment, the creditor initiates proceedings to recover such payment through a legal process. Mediation is resorted to in such matters too in the United Kingdom, United States of America and several European countries like France and Germany.

Mediation is cost effective, confidential, quick and non-confrontational without affecting the business relationship of the parties. However, the main obstacle was of its global access and enforcement in another jurisdiction. A survey conducted as part of Pound Conference[116] organized by International Mediation Institute

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[114] Art 8 (3) of Singapore Convention.

[115] WIPO Mediation, Arbitration and Expedited Arbitration Rules and Clauses 2021: https://www.wipo.int/edocs/pubdocs/en/wipo-pub-446-2022-en-wipo-mediation-arbitration-expedited-arbitration-and-expert-determination-rules-and-clauses.pdf (accessed on 02 July 2023).

[116] Global Pound, (International Mediation Institute 2016-2017) https://imimediation.org/research/gpc/ (accessed 20 April 2023). See also Angela Cipolla, 'Updating the Global Pound Conference: A Survey on Mediation in Cross-Border Disputes' (CPR Speaks, 10 November 2017) https://blog.cpradr.org/2017/11/10/updating-the-global-pound-conference-a-a-survey-on-mediation-in-cross-border-disputes/ (accessed 01 May 2023).

(IMI) in Hague during 2016-2017 found that many stakeholders have expressed that the main shortcoming of the mediation in a global perspective is lack of its cross-border enforcement mechanism. In absence of such global enforcement mechanism, the parties used to rely on the domestic laws for enforcing such settlement agreement resulting from mediation. For example, in the Middle East, United Arab Emirates (UAE) through its Federal Law No. 26 of 1999[117] concerning to the Establishment of Conciliation and Arbitration Committee at Federal Courts, Saudi Arabia through its Saudi Centre for Commercial Arbitration (SCCA) rules[118], and Qatar through its Qatar International Center for Conciliation and Arbitration Rules (QICCA)[119] have been resorting to settling the commercial disputes. However, these were inadequate for enforcement of cross-border mediated settlement agreements. Except UAE, Saudi Arabia and Qatar were resorting to their institutional rules framed for Alternate Dispute Resolution System and such rules lack the statutory sanction of the State legislature.

A partial mediated settlement agreement enforcement mechanism exists in European Union[120] where member states ensures that the parties or one of them with the explicit consent of the other, requests that the content of written agreement resulting from mediation be made enforceable. However, it is not without a catch, all such settlement agreements are to be approved by a public authority or certified by a notary or judge and takes into the form of a judgment or decision or decree.[121] In such cases, all existing EU regulations on intra-EU recognition and enforcement will be applied to such settlement agreement.

On the other hand, the Singapore Convention is seen as a new era in the borderless mediation where commercial disputes shall be resolved amicably, confidentially, efficiently, faster, and cheaper and in a manner which fosters the business relationship intact. The Singapore Convention will give an impetus to stretching of the definition of ADR to 'appropriate dispute resolution' at the volition of the party, because the parties are the best judges in deciding on which form of

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[117] Federal Law No. 26 of 1999: On the Establishment of Conciliation and Reconciliation Committees at the Federal Courts http://seafarersrights.org/wp-content/uploads/2018/03/ARE_LEGISLATION_FEDERAL-LAW-NO-26-OF-1999_ENG.pdf (accessed on 02 July 2023).

[118] SCCA Rules 2018: https://sadr.org/assets/uploads/download_file/Arbitration_Rules_2018_-_English.pdf (accessed on 02 July 2023).

[119] QICCA Rules 2012: https://qicca.org/wp-content/uploads/2016/08/QICCA_Rules_Eng.pdf (accessed on 02 July 2023) (the Rule is undergoing an amendment currently).

[120] European Union Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/281.

[121] Article 6 (2) European Union Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/281 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0052 (accessed on 02 July 2023).

dispute resolution to pursue. It does not mean that this will cast a shadow on the arbitration and cross-border enforcement of foreign arbitral award in the near future. The arbitration and mediation have to be seen in different perspectives. Though, the parties mutually agree to refer the dispute to arbitration, the parties have no control over the outcome of the arbitral proceedings conducted by a third party called the Arbitrator, whereas in the mediation, the mediator does not impose any decision on the parties but only facilitates the parties to reach an amicable resolution to their disputes.

The Singapore Convention is presumed to be a panacea under such circumstances where parties can resort to mediation and such resolution resulting from a mediated settlement agreement can now be enforced by the other party by approaching the competent authority where such assets or interest of the party lies. The remarkable point is that the mediated settlement agreement is not imposed by the mediator but the parties themselves, arrived at it with the assistance of an independent and impartial mediator but a teeth to enforce it in another party's jurisdiction.

The Singapore Convention aims to fill the gap of recognition and enforcement of mediated settlement agreements resulting from mediation internationally among the contracting parties in line with the New York Convention[122] which deals with the recognition and enforcement of foreign arbitral awards. International business involves different sets of laws in different jurisdictions and disputes are bound to occur in the course of such businesses. Faster and efficacious dispute resolution mechanism is the new mantra of ease of doing business globally without resorting to protracted litigation between the parties. The significance of the Singapore Convention comes into play at this juncture.

V. BUMPY ROAD AHEAD IN ENFORCEMENT

Though the Singapore Convention came into force with effect from 12 September 2020, the road ahead for its smooth transition into an effective enforcement mechanism is way far. Though traditionally the concept of mediation was used in resolving certain disputes among communities in Middle East such as Iran, Oman, UAE and Qatar, there were no statutory backing in such States. These jurisdictions follow the civil law system and as such lack of any statutory legislation on mediation law was an obstacle for the Courts to adopt such methods in resolving disputes. The Convention gave an impetus to legislate

[122] UN Convention (n. 100).

separate mediation laws in Qatar and UAE recently. Other countries in the region will also follow suit soon. In the case of Iran, there is no statutory legal procedure for the enforcement of the settlement agreements resulting from mediation. Parties are allowed to resolve their dispute amicably or through negotiation of any kind, but such settlements cannot be enforced directly. Any breach of such settlement agreement would have to go through the normal procedure as laid down in Iranian Civil Code. While signing the Singapore Convention, Iran had made a declaration as to its 'reservation' and yet to be ratified.[123]

The contracting States or jurisdictions having no existing dispute settlement mechanism resulting from mediation or a separate domestic mediation law, will face difficulties in recognizing and enforcing the mediated settlement agreement resulting from mediation under this Convention for some time until they legislate a new mediation law or make necessary amendment to their existing law in tune with the Convention. In absence of a mediated settlement mechanism, no such competent authority[124] can be found or identified in the contracting State for approaching them for enforcement of an international mediated settlement agreements. It cannot be enforced as a court decree or judgment or arbitral award. Without having a proper domestic mediation law, the existing Courts or any other authority has no choice but to proceed with the case as a normal breach of contract and apply existing legal remedies to such settlements. This will certainly vitiate the spirit of the Convention. To tide over this situation, the contracting parties to the Convention need to legislate new mediation laws or make necessary changes to their existing law.

When it comes to the grounds for refusal to grant relief under Article 5 of the Convention, all these grounds are permissive rather than mandatory. A court may, but need not, refuse relief if any of the grounds apply. A court can refuse relief based on the invalidity of the settlement agreement under applicable law.[125] The enforcement can also be refused if there is a serious breach by the mediator or standards applicable to the mediator or the mediation. Lack of appropriate domestic legislation regulating mediation and enforcement of mediated settlement agreement can derail the mediated settlement agreement made under the Convention and sometimes the domestic court may act *suo motu* against the party seeking relief.

[123] Art 8 of Singapore Convention. See also Status: Singapore Convention https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 01 May 2023).
[124] Art 4(1) of Singapore Convention.
[125] Refers to a domestic law (i.e., if its "null and void, inoperative or incapable of being performed").

The need of the hour is that the contracting parties to this Convention should simultaneously legislate a comprehensive domestic law on dispute settlement mechanism resulting out of mediated settlement agreement while ratifying the Convention.

VI. AN OVERVIEW OF MEDIATION IN QATAR

Qatar has been at the forefront of signing and ratifying this Convention. Qatar is the third Country to ratify the Convention and deposited its instrument of ratification with the UN depositary on 12 March 2020 paving the way for entering the Convention into force with effect from 12 September 2020.[126] Qatar is also a signatory of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), which makes provisions for conciliations. Qatar ratified this ICSID Convention in 2011. Qatar International Center for Conciliation and Arbitration (QICCA) functions under the auspices of Qatar Chamber of Commerce and Industry had formulated rules for conciliation and arbitration which is in force from 1st May 2012.[127] Apart from QICCA, Qatar International Court and Dispute Resolution Centre (QICDRC)[128] established under Qatar Financial Center (QFC)[129] in 2009 deals with mediation in Qatar. Such mediation under QICDRC is regulated by its own mediation rules.[130]

VII. A WAY FORWARD FOR QATAR

A separate Civil and Commercial Arbitration Law (Law No. 2 of 2017) was legislated in Qatar by repealing Articles 190 to 210 of the first Book of the Civil and Commercial Procedures Law taking cues from UNCITRAL Model Law on international commercial arbitration.

As the Singapore Convention came into force on 12 September 2020, Qatar has initiated a new legislation titled as "Mediation Law in the Settlement of Civil and Commercial Disputes"[131] which came into effect from 18 October 2021, drawing

[126] Art 14(1) of Singapore Convention.
[127] Qatar International Center for Conciliation and Arbitration, Rules for Conciliation and Arbitration Rules (2012) https://qicca.org/wp-content/uploads/2016/08/QICCA_Rules_Eng.pdf (accessed 01 May, 2023).
[128] Qatar International Court and Dispute Resolution Centre.
[129] QFC is a separate jurisdiction with its own laws and dispute resolution mechanism within the State of Qatar.
[130] Qatar International Court and Dispute Resolution Centre, Mediation Rules (2020) https://www.qicdrc.gov.qa/sites/default/files/2021-12/mediation_booklet_english.pdf (accessed 01 May 2023).
[131] Law No. 20 of 2021: Mediation Law in the Settlement of Civil and Commercial Disputes.

inspiration from UNCITRAL Model Law on international commercial mediation and international settlement agreement resulting from mediation paving the way for enforcement of domestic mediation. This will certainly boost confidence and optimism in parties to use mediation as a preferred dispute resolution in the coming days.

QICCA has already initiated amendment in its rule in line with the latest trends, international standards and best practices in international arbitration on the 5th anniversary of issuing Law No. 2 of 2017, Civil and Commercial Arbitration Law. This amendment shall come into force shortly this year. QICCA can also incorporate appropriate clauses in consonance with Singapore Convention and its new domestic mediation law making it a comprehensive set of rules to trigger growth of mediation among the business community for an inclusive '*appropriate dispute resolution*'.

QFC can include more sectors into its fold so that QICDRC will get more slots to widen its jurisdiction truly making Qatar as an international mediation hub in line with Singapore Mediation Center (SMC), Center for Effective Dispute Resolution (CEDR), London, and London Court of International Arbitration (LCIA), to name a few of the prestigious institutions in the field of ADRs. Qatar has the growth potential to be one among them in the near future.

Law No. 1 of 2019 on Regulating Non-Qatari Capital Investment in Economic Activity legislated by Qatar is in the right direction to tap more inflow of foreign direct investments (FDIs) into the country by showcasing its tangible business friendly actions and concrete measures towards 'ease of doing business' by way of liberalizing the commercial laws and ensuring faster and cheaper dispute resolution mechanism.

If the Qatar government continues to take such measures, it will certainly attract more diversified talents and experts in the field of ADRs fully exploiting the opportunity set in motion by ratifying the Singapore Convention, which has already come into force.

VIII. CONCLUSION

Unlike any other multilateral treaty or Conventions, the Singapore Convention is not without its flaws and shortcoming as discussed above. What needs to be weighed is the intention of the deliberations of UNCITRAL and the aspirations of the international, more specifically, the transnational business community for a

cheaper, effective and speedy remedy to their disputes arise out of business or contractual relationship.

To begin with, a contracting State has to legislate a domestic legal framework for mediated settlement agreements resulting from mediation in line with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018.[132] This will act as a legal platform for the operation of mediation and enforcement of mediated settlement agreements so that the competent authority or the Courts as the case may be, can draw inspiration for application of the Convention in true spirit.

The Lawyers, Judges and other Experts of the contracting States should undergo mandatory training and continuous professional development in the area of mediation both domestic and international mediation so as to keep pace with the ever-expanding business transactions and thoroughly understand the need for mitigating the hurdles quickly and effectively. Thus, a comprehensive legal system and an appropriate mechanism is created domestically to deal with the enforcement of international mediated settlement agreements. More institutions of excellence in the arena of mediation are to be created by the contracting States either at the Government level or with the private parties having the requisite expertise in the field. This will boost the competency of such bodies dealing exclusively with the mediation or such other alternative dispute resolution mechanism.

However, the efficacy of any Convention depends upon the number of member States joining and ratifying it and then aligning their domestic laws in line with the true spirit of Convention. Sooner or later, mediation will emerge as a front-runner in ADR mechanism.

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[132] Singapore Convention.

THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: IMPACT ON NON-EU ENTITIES, CONTRACTUAL CASCADING AND SUPPLY CHAIN ARBITRATIONS

By: Dr Adolf Peter

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ABSTRACT

*Criteria relating to Environmental, Social and Governance ("**ESG**") have increasingly been gaining relevance in international supply chains across different industrial sectors. Due to the ever-increasing pressure by different stakeholder groups (including investors, NGOs, etc.), ESG-related issues have*

*the increasing potential to cause lawsuits, supply chain disruptions, retenders, major project delays and damage claims. The first part of the article shows drastic examples of how ESG aspects can delay major projects or lead to climate litigations. The second part summarizes the author's proposed ESG model. The third part explores the EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive ("**CSDD Directive**") and addresses its impacts on non-EU entities. In this context, the example of the Chinese electric car manufacturer NIO is discussed. Furthermore, the article examines contractual cascading of ESG-related provisions (contained in codes of conduct) along supply chains (in particular construction and automotive supply chains). The fourth and final part demonstrates that the proposed ESG-related EU law will give rise to ESG-related supply chain arbitrations involving multiple parties and contracts. Consolidations of several pending arbitrations and joinders of third parties will play a significant role in ESG-related international commercial supply chain arbitrations. Against this background, the author emphasizes the usefulness of the criterion referring to a "series of related transactions" contained in some arbitration rules of international arbitration institutions and introduces his template clause for the consolidation of several pending ESG-related arbitrations and the joinder of third parties ensuring the cascading of arbitration clauses throughout a supply chain.*

1. Impact of ESG on Companies: Some Examples

1.1 The Social Component of ESG: Halt of Borealis Construction Project

The recent developments in a mega project in Kallo, Belgium, involving Borealis (one of the world's leading providers of advanced and circular polyolefin solutions and a European market leader in base chemicals, fertilizers and the mechanical recycling of plastics; head offices in Vienna, Austria; 6,900 employees; operations in 120 countries) provide overwhelming evidence that ESG-related allegations may give rise to major disruptions in international supply chains. According to the media releases of Borealis dated 4 August[133] and 18 August[134]

[133] Borealis, Borealis suspends construction in Kallo after serious allegations against contractor and continues to support Belgian authorities in investigation (4 August 2022), https://www.borealisgroup.com/news/borealis-suspends-construction-in-kallo-after-serious-allegations-against-contractor-and-continues-to-support-belgian-authorities-in-investigation.

[134] Borealis, Borealis to retender the majority of contracts for PDH construction site in Kallo, Belgium, after termination of all contracts with IREM (18 August 2022), https://www.borealisgroup.com/news/borealis-to-retender-the-majority-of-contracts-for-pdh-construction-site-in-kallo-belgium-after-termination-of-all-

2022, an alleged misconduct (social fraud and human trafficking) by Borealis' main contractor IREM Group (responsible for piping and mechanical, electrical and instrumentation works in the project) and their subcontractors (Anki Technologies and Raj Bhar Engineering) urged Borealis to temporarily halt the construction of a new propane dehydrogenation plant in a **EUR 1 billion mega project**. Borealis' contracts with the IREM Group included protective clauses applicable to all business partners, in particular Borealis' Business Ethics Code of Conduct. As a result, Borealis first suspended and in a second step terminated the contracts with the IREM Group on the basis of these ESG-related clauses in the contract and ongoing investigations by the Belgian Social Inspectorate. The contractual termination resulted in significant delays of the mega project because Borealis was forced to retender the construction works leading to a substantial increase in costs and major damage claims.[135]

1.2 The Environmental/Climate-related Component of ESG: Climate Litigations Involving Shell and TotalEnergies

Environmental, in particular carbon emissions-related litigations are on the rise as well. The most prominent example is the groundbreaking court judgment[136] against Shell in the Netherlands rendered by the Hague District Court in 2021. The court ordered the Shell group "to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels."[137] It is in particular remarkable that the court-ordered emission reductions also concern Shell's scope 3 emissions, including indirect upstream and downstream emissions materializing in Shell's worldwide value chain covering affiliated companies, direct and indirect business partners, suppliers and end-users.[138] In spite of the fact that Shell appealed against the Dutch court judgement, the ruling is immediately enforceable and cannot be suspended pending an appeal.[139] Although being a best-efforts obligation and

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contracts-with-irem.

[135] Borealis, Re-tendering process for construction works in Kallo concluded (28 April 2023), https://www.borealisgroup.com/borealis/news/re-tendering-process-for-construction-works-in-kallo-concluded; Borealis, About the Kallo Case (23 January 2023), https://www.borealisgroup.com/news/about-the-kallo-case.

[136] Milieudefensie et al. v Royal Dutch Shell plc, C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339 (26 May 2021), https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339.

[137] Ibid., para. 5.3.

[138] Greenhouse Gas Protocol, FAQ, https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf.

[139] Frequently asked questions (FAQ) on Dutch district court legal case, Q2,

not an obligation of result (such as in the case of scope 1[140] and scope 2[141] emissions), Shell will have to ensure that its corporate climate policy is implemented throughout its value chain by contractually passing on provisions imposing the required CO2 emission targets throughout Shell's supply chains by means of contractual cascading. Due to the international nature of its supply chains, Shell will be well-advised to conclude arbitration agreements to enforce its corporate climate policy based on the court-ordered emission reductions.

Another prominent example for climate litigations involves a legal action brought by Greenpeace, Friends of Earth and other NGOs against the French oil and gas group TotalEnergies. The plaintiffs accuse TotalEnergies of greenwashing alleging that TotalEnergies' carbon neutrality commitments would mislead the public due to its continued investments in fossil fuel projects.[142] Moreover, Greenpeace published a report in November 2022 alleging TotalEnergies' CO2 emissions to be almost four times higher than reported by the latter. In particular, Greenpeace disputes TotalEnergies' methodology to calculate CO2 emissions.[143]

2. Proposal for an ESG Model

Being aware of the fact that ESG would be one of the hottest upcoming topics (in particular in light of the climate change), the author had already proposed in early 2021 an ESG model addressed at national legislators, large companies involved in international supply chains and stock exchanges. ESG-related legislation should provide the mandatory foundation (minimum requirements) for ESG-related reporting facilitating comparability, ESG-related due diligence and ESG-related contractually binding codes of conduct for supply chains to achieve a same-level playing field (uniform minimum standards). Listing requirements for stock exchanges may raise the ESG-related reporting requirements for stock

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https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case/_jcr_content/root/main/section/simple/text_1377231351_copy.multi.stream/1657006823005/460167304a697f411be1b9f80c6e05be0ac057fb/dutch-district-legal-case-faq.pdf.

[140] "Scope 1 emissions are direct emissions from owned or controlled sources." See Greenhouse Gas Protocol, FAQ, supra n. 138.

[141] "Scope 2 emissions are indirect emissions from the generation of purchased energy." See Greenhouse Gas Protocol, FAQ, supra n. 138.

[142] TotalEnergies target of lawsuit to test 'greenwashing' in advertising (3 March 2022), https://www.ft.com/content/bdef4e7a-7bc9-4061-968a-a68d9aa32771.

[143] Greenpeace International, Greenpeace finds TotalEnergies emissions almost 4 times higher than reported (3 November 2023), https://www.greenpeace.org/international/press-release/56491/greenpeace-finds-totalenergies-emissions-almost-4-times-higher-than-reported/.

exchange listed entities. Binding legal force of ESG-related codes of conduct/ESG-related provisions can be achieved along supply chains by contractually passing on the respective obligations from the first tier (supply chain leader) to the next tier (e.g. main contractor) until the final tier (e.g. subcontractor, lower-tier subcontractor, sub-supplier) of a supply chain is reached. This is known as contractual cascading. Enforcement is best guaranteed by means of international commercial arbitration (see below at 4). The meeting of certain ESG targets should trigger variable remuneration to be payable to corporate management and supervisory bodies. Bank loans and their interest rates should be linked to ESG-related criteria. Rewarding ESG-related initiatives exceeding the statutory minimum standards ought to give rise to corporate tax incentives to be mandatorily reinvested in ESG-related projects. Internal corporate control mechanisms should (i) make available anonymous whistleblowing systems (covering the entire supply chain) including monetary incentives and (ii) involve independent supervisory board members (two-tier board structure) or outside directors (one-tier board structure). For the avoidance of greenwashing (companies deceptively promote the perception that their policies successfully implement ESG targets), external control has to encompass ESG-related independent third-party audits across the entire supply chain (audits should ideally be on the same level of depth with financial audits which means that ESG-related audits should provide a reasonable instead of a limited assurance). The author's ESG model uses the term CSR (corporate social responsibility) interchangeably with the term ESG relying on the EU Commission's definition of CSR.[144]

[144] "The Commission puts forward a new definition of CSR as 'the responsibility of enterprises for their impacts on society'. Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of: – maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large; – identifying, preventing and mitigating their possible adverse impacts." See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25 October 2011 COM(2011) 681 final, 6, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681.

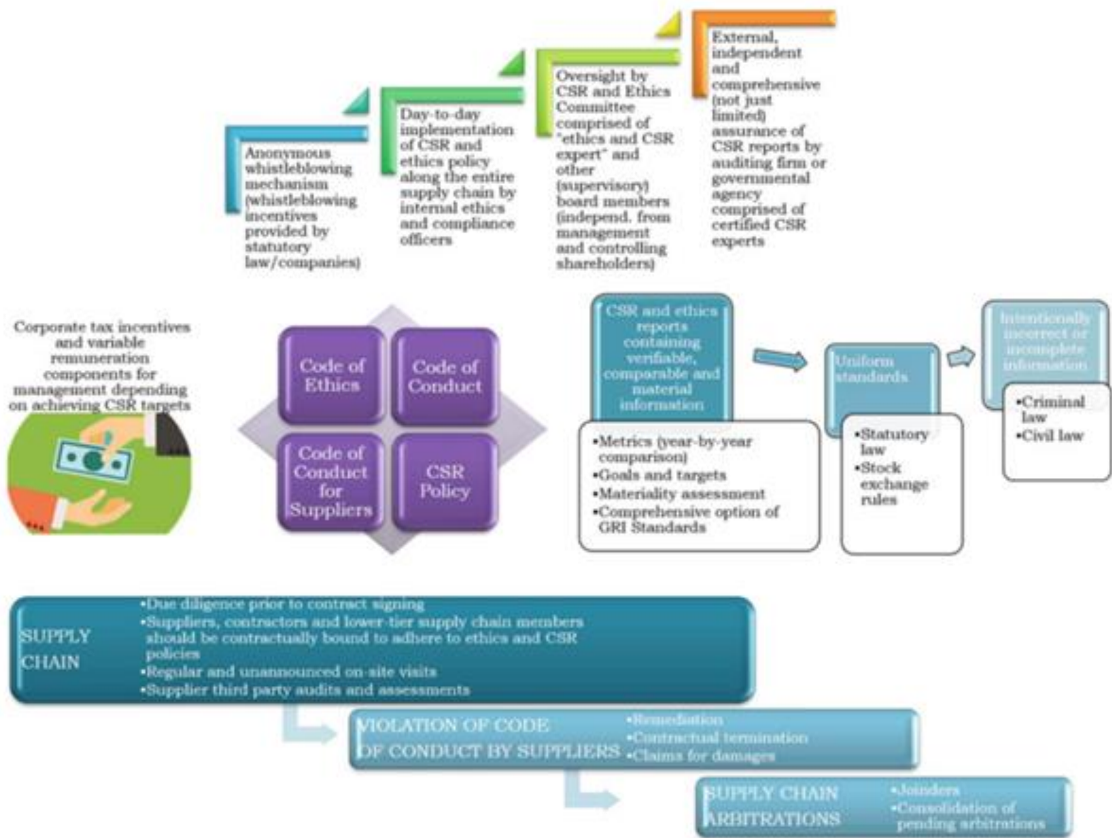

Fig. 1: CSR/ESG System and Supply Chain Arbitrations
Source: Adolf Peter, CSR and Codes of Business Ethics in the USA, Austria (EU) and China and their Enforcement in International Supply Chain Arbitrations (Springer Singapore 2021) 208.

Coming closest regarding the fulfilment of the author's suggestions is existing and upcoming EU law. Although this article's focus is on the Proposal for a **CSDD Directive**[145], in the context of the author's ESG model, further existing and upcoming EU legislation must be mentioned:

a) The Corporate Sustainability Reporting Directive ("**CSRD**")[146] entered into

[145] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022, COM(2022) 71 final, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF
[146] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU ["**Accounting Directive**": Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain

force on 5 January 2023. In comparison to the previous directive, the Non-Financial Reporting Directive ("**NFRD**"),[147] the CSRD extends the scope of reporting entities and reporting areas. In terms of non-EU entities, the CSRD will apply if they (i) generate an annual net turnover of more than EUR 150 million in the EU and (ii) have a subsidiary[148] or a branch[149] in the territory of the EU. [150] The CSRD requires reporting entities to report ESG matters from two perspectives (double materiality perspective): how the reporting entities' activities impact the people and the environment (inside-out perspective, e.g. environmental damage), and how the reporting entitles are affected by sustainability issues/events/developments/legislation (outside-in perspective exposing the risks for the reporting entities, e.g. reputational or monetary damage in the event of greenwashing, corruption or human rights-related violations). [151] ESG reports on the basis of the CSRD mandate independent third-party audits providing a limited assurance.[152]

b) The Proposal for a Green Claims Directive ("**GCD**")[153] acknowledges that for businesses claiming to be green and sustainable has become a significant component for being competitive. The GCD aims at combatting greenwashing by targeting companies' voluntary environmental claims about their products or business in business-to-consumer commercial practices.[154] It should be pointed out that green claims will have to be substantiated, inter alia, by relying on widely recognised scientific evidence, using accurate information and taking into account relevant international standards. [155] The GCD will have extraterritorial effect because it also applies to non-EU companies who target EU

types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19–76] as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15–80.

[147] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1–9.

[148] The subsidiary must be a large undertaking or a small or medium-sized entity (with the exception of a micro undertaking) listed on an EU regulated market.

[149] The branch of a non-EU entity must have an annual net turnover of more than EUR 40 million.

[150] Art. 40a (1) Accounting Directive (as amended by the CSRD). Pursuant to Art. 5 CSRD, the reporting of non-EU entities is due from 2029 for the financial years starting on or after 1 January 2028.

[151] Recital 29 CSRD.

[152] Art. 34 (1) (a) (ii) (aa) Accounting Directive (as amended by the CSRD).

[153] Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), Brussels, 22.3.2023 COM(2023) 166 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0166.

[154] Art. 1 (1) GCD.

[155] Art. 3 (1) (b) GCD.

consumers.[156] NGOs will be entitled to submit substantiated complaints to the competent authorities in the respective EU member states.[157] Penalties and measures for infringements include fines, confiscation of revenues and a "temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering procedures, grants and concessions."[158]

3. The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive

The EU Commission adopted its Proposal for the CSDD Directive on 23 February 2022. The CSDD Directive will oblige large companies meeting certain turnover and employee criteria[159] to have in place a supply/value chain-related due diligence policy with regard to adverse environmental and adverse human rights impacts[160] resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental and human rights conventions listed in the CSDD Directive's Annex. Among other things, the due diligence policy must contain a code of conduct and the measures taken to verify compliance with such code.[161] Companies must seek contractual assurances from their direct business partners and corresponding contractual assurances from lower-tier supply chain members (contractual cascading).[162] In the event of adverse environmental (excluding climate) and adverse human rights impacts, a company may be required to temporarily suspend or even terminate business relationships.[163] Furthermore, the companies covered by the CSDD Directive will have to adopt a plan which includes emission reduction objectives to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.[164]

3.1 Impact on Non-EU Companies

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[156] Els van Poucke, The Green Claims Directive proposal in a nutshell (26 May 2023), https://www.deloittelegal.be/lg/en/blog/Deloitte-Legal-Newsflashes/2023/the-green-claims-directive-proposal-in-a-nutshell.html.
[157] Art. 16 (1) and (2) GCD.
[158] Art. 17 (3) GCD.
[159] Art. 2 CSDD Directive.
[160] Art. 1 (1) CSDD Directive.
[161] Art. 5 (1) (c) CSDD Directive.
[162] Art. 7 (2) (b) CSDD Directive.
[163] Art. 7 (5) (a) and (b) CSDD Directive.
[164] Art. 15 (1) and (2) CSDD Directive.

Non-EU companies (incorporated outside of the EU) will either be directly or indirectly impacted by the CSDD Directive: first, non-EU companies which exceed a EUR 150 million annual net turnover (number of employees is irrelevant) in the EU (or EUR 40 million, if they are involved in defined high-impact sectors) will be directly covered by the CSDD Directive.[165] Second, any non-EU company which is not directly covered by the CSDD Directive may be impacted by the due diligence procedures (these could lead to contractual terminations as a last resort) performed by companies directly covered by the CSDD Directive, if the respective non-EU companies are involved in supply chains as contractors, subcontractors, lower-tier subcontractors or sub-suppliers.

3.2 Effective Implementation of the CSDD Directive?

In order to guarantee an effective implementation, the CSDD Directive will oblige companies to install effective whistleblowing mechanisms,[166] the company directors will be responsible for adopting and overseeing the due diligence policy,[167] compliance with the CSDD Directive's human rights and environmental requirements along value chains will have to be verified by independent third parties (auditing firms),[168] and the EU member states will have to install independent national supervisory authorities entitled to carry out investigations and to impose pecuniary sanctions.[169] Moreover, the member states will have to introduce rules governing the civil liability of companies for damages arising from their failure to comply with the due diligence process.[170]

However, the enforcement of administrative fines will not be possible in countries such as China. Civil liability will result in national court judgments in EU member states. This will create enforcement issues as well. For example, most of the EU member states do not have a bilateral agreement with China on the recognition and enforcement of foreign court judgments.[171] Recognitions on the basis of the principle of reciprocity are very rare.[172] As a consequence, the author expects

[165] Art. 2 (2) CSDD Directive.
[166] Art. 23 CSDD Directive confirms that the so-called EU Whistleblower Directive [Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26.11.2019, p. 17–56] will apply to the reporting of all breaches of the CSDD Directive and the protection of persons reporting such breaches.
[167] Art. 25 CSDD Directive.
[168] Art. 7 (4) CSDD Directive.
[169] Art. 17 and 18 CSDD Directive.
[170] Art. 22 CSDD Directive.
[171] Such treaties exist between China and the following EU member states: France, Italy, Spain, Hungary, Poland, Greece, Cyprus, Romania and Bulgaria.
[172] Adolf Peter, Pitfalls in Arbitration Agreements Involving Sino-Foreign Joint Venture Companies – The

EU-wide sales bans for products of non-complying non-EU entities.

3.3 EU Parliament's Position

The final version of the CSDD Directive will have to be adopted by the EU Parliament and the Council. Both institutions have adopted their respective position to the Commission's proposal. The EU Parliament's position[173] varies in many important aspects from the Council's position. Consequently, it will be very interesting to watch the outcome of the interinstitutional negotiations. The adoption can be expected in late 2023/early 2024.

It is in particular noteworthy that the EU Parliament's position extends the CSDD Directive's direct scope in relation to non-EU entities by only having to generate an annual EU-wide turnover amounting to EUR 40 million, if the respective worldwide (not EU-wide) turnover reaches at least EUR 150 million. Most importantly, the EU Parliament's position integrates the climate targets of the Paris Agreement into a company's due diligence policy for its value chains. Companies will also have to have transition plans including "time-bound targets related to climate change set by the company for scope 1, 2 and, where relevant, 3 emissions, including where appropriate, absolute emission reduction targets for greenhouse gas for 2030 and in five-year steps up to 2050."[174] Variable remuneration for directors should be linked to such transition plans. In terms of sanctions against non-complying companies, the EU Parliament's position calls for public statements exposing non-complying entities (naming and shaming) and the suspension of products from free circulation or export (equivalent to sales bans in order to punish non-complying non-EU entities where enforcement of other sanctions is not possible).

3.4 The Example of NIO

The high significance of EU law and its impact on non-EU entities is well illustrated by the following example: Among the Chinese electric car manufacturers pushing into the EU market is NIO. NIO has already set up a global design center in Munich. Being listed on the New York Stock Exchange,

Shanghai International Arbitration Center (SHIAC) as Alternative to Offshore Arbitrations, SchiedsVZ (German Arbitration Journal) 3/2022, 164 et sqq.

[173] Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf.

[174] *Ibid.*

NIO must meet the comprehensive reporting requirements of foreign private issuers: in its annual report (Form 20-F),[175] NIO raises the following concern regarding ESG-related violations of their independent suppliers which NIO **does not control**:

> "[…] We do not control our independent suppliers or their business practices. Accordingly, we cannot guarantee their compliance with ethical business practices, such as environmental responsibilities, fair wage practices, and compliance with child labor laws, among others. […] Violation of labor or other laws by our suppliers or the divergence of an independent supplier's labor or other practices from those generally accepted as ethical in the markets in which we do business could also attract negative publicity for us and our brand. This could diminish the value of our brand image and reduce demand for our electric vehicles if, as a result of such violation, we were to attract negative publicity. If we, or other players in our industry, encounter similar problems in the future, it could harm our brand image, business, prospects, results of operations and financial condition."

In the same report NIO confirms that that it operates with codes of conduct for suppliers and stresses that "[w]e hold our suppliers to high ethical standards of code of conducts in areas such as human rights, labor conventions such as prohibition of forced labor and child labor, environmental protection and anti-corruption, and incorporate these standards in our cooperation agreements with our suppliers."[176] Not controlling its suppliers could give rise to **potential greenwashing claims** in the event that NIO's suppliers do not adhere to NIO's standards.

In addition, like most other companies, NIO does not disclose its scope 3 emissions. This is of greatest interest given that NIO collaborates with Shell by installing charging and battery swapping stations both in China and Europe.[177] A business relationship with a company that does not control its suppliers could be explosive for Shell considering the Dutch court judgment mentioned above. Although Shell's obligations arising from this judgement in relation to scope 3 emissions are only best-efforts obligations, even best efforts certainly call for Shell to contractually oblige NIO to report on its scope 3 emissions with the consequence of NIO having to control/assess its suppliers in this respect.

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[175] NIO Annual Report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2022, 41, https://ir.nio.com/static-files/19213364-af76-4805-9b52-e4338588695e
[176] *Ibid.*, at 82.
[177] Shell and NIO collaborate to improve charging experience for EV drivers (25 November 2021), https://www.shell.com/energy-and-innovation/mobility/mobility-news/shell-and-nio-collaborate-to-improve-charging-experience-for-ev-drivers.html.

It should be stressed that the battery production process for electric vehicles is CO2 emissions-intensive because the batteries contain nickel, manganese, cobalt, lithium, and graphite, which emit significant amounts of CO2 emissions in their mining and refining processes.[178] On top of that, the energy sources (renewable energies or fossil fuels) for the production process are highly relevant as well.[179] Although China's non-fossil energy sources slightly exceed 50 % of its total installed electricity generation capacity, coal still accounted for 56.2 % of China's total energy consumption in 2022. The share of renewables was 25.9 % (including nuclear energy).[180]

As a large EU entity, Shell will certainly be subject to the CSDD Directive. Sooner or later, NIO is also likely to exceed the annual sales threshold of EUR 150 million in the EU, which means that NIO will also be covered by the respective EU law. As a result, NIO would have to change its due diligence policy and control its suppliers, including the use of independent third-party audits.

3.5 Contractual Cascading and the Chancery Lane Project

ESG-related codes of conduct may gain contractual force by expressly referring to them in the commercial contracts or the terms and conditions. Alternatively, a code of conduct may be directly signed by companies involved in a supply chain. ESG-related provisions may also be directly included in the commercial contracts or may be part of the terms and conditions of such contracts. In order to avoid greenwashing claims and reputational damages causing pecuniary losses, companies are well-advised to **ensure the adherence to their ESG policies along the entire supply chain by means of contractual cascading** and regular control and due diligence measures.[181]

For example, supply chains in the construction industry are characterized by the involvement of multiple parties of different tiers involving the employer, the main

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[178] McKinsey & Company, The race to decarbonize electric-vehicle batteries (23 February 2023), https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/the-race-to-decarbonize-electric-vehicle-batteries.

[179] *Ibid.*

[180] Andrew Hayley, China's installed non-fossil fuel electricity capacity exceeds 50% of total (12 June 2023), https://www.reuters.com/business/energy/chinas-installed-non-fossil-fuel-electricity-capacity-exceeds-50-total-2023-06-12/#:~:text=However%2C%20inconsistent%20utilisation%20of%20the,energy%2C%20the%20NBS%20data%20showed

[181] Adolf Peter, CSR and Codes of Business Ethics in the USA, Austria (EU) and China and their Enforcement in International Supply Chain Arbitrations (Springer Singapore 2021) 54 et sq. and 137 et sqq.

contractor, subcontractors/suppliers and lower-tier subcontractors/sub-suppliers. Contractual relationships usually only exist between the neighbouring tiers. Under the design-build model (Fig. 3), the main contractor is responsible for both the design and construction works whereas under the build-only model (Fig. 2), the employer enters into two separate contracts with the designer and the main contractor,[182] who in turn enters into legal relationships (subcontracts) with subcontractors/suppliers.

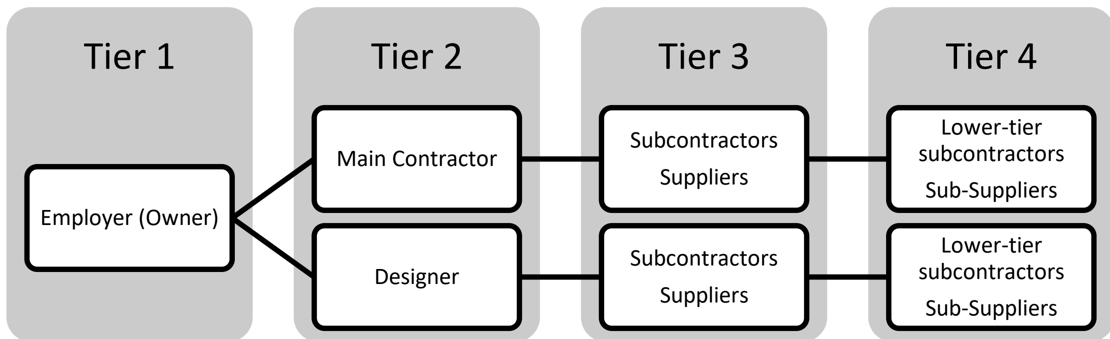

Fig. 2: Build-only Model

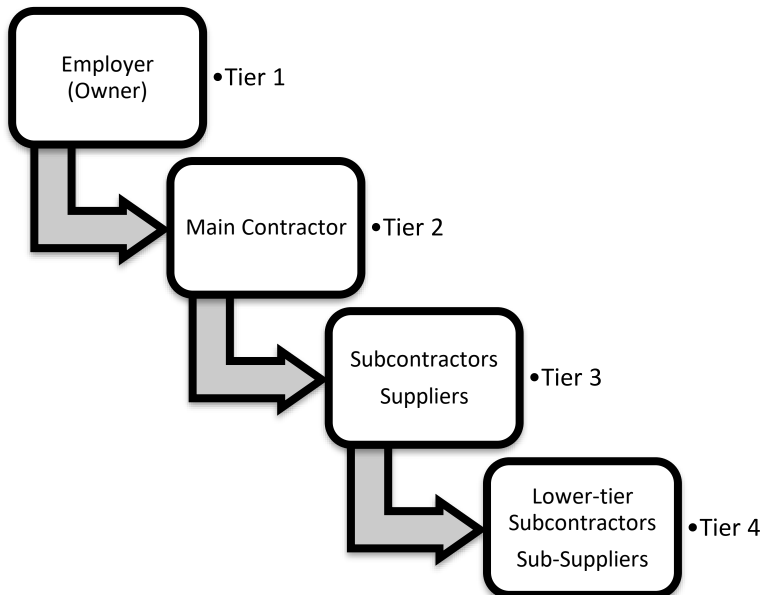

Fig. 3: Design-Build Model

[182] Dimitar Kondev, Multi-Party and Multi-Contract Arbitration in the Construction Industry (Wiley-Blackwell 2017) 41 et sq.; A.C.E. Building Service, What Is Design-Build Construction? https://www.acebuildingservice.com/what-is-design-build-construction.

A supply chain in the automotive sector (Fig. 4) consists of suppliers, car manufacturers/original equipment manufacturers (OEM), dealerships and customers. First-tier suppliers supply prefabricated systems/moduls (e.g. brake systems, engines, car seats or infotainment consoles). Second-tier suppliers provide first-tier suppliers with the necessary components (e.g. integrated circuits) for their prefabricated systems/moduls. Third-tier suppliers deliver raw materials (e.g. plastics, metals) and parts (e.g. screws) to second tier-suppliers.[183]

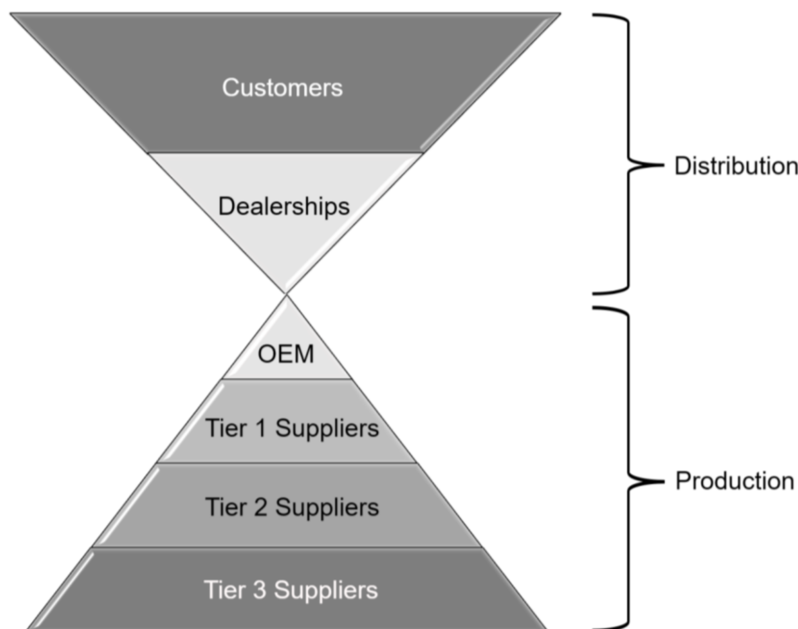

Fig. 4: Automotive Supply Chain

ESG-related contractual cascading along supply chains requires well-drafted contractual clauses to be passed on from tier to tier. The Chancery Lane Project[184] is a global network of lawyers and business leaders providing more than 100 template climate clauses. Of course, the clauses still need to be adapted depending on the individual cases and whether the applicable substantive law

[183] Kevin Baxter, What Is the Supply Chain in the Automotive Industry? (7 March 2022), https://blog.intekfreight-logistics.com/what-is-supply-chain-automotive-industry; What is a first tier supplier? https://www.time-matters.com/emergency-logistics-glossary/tier-1-supplier/; Peter Lipp, Delivery Chains in Automotive Manufacturing Run Smoothly (15 April 2022), https://www.editel.eu/edi-makes-delivery-chains-in-automotive-manufacturing-run-smoothly/.
[184] About The Chancery Lane Project, https://chancerylaneproject.org/about/.

(law governing the contract) is based on common or civil law. The following extract of the Chancery Lane Project's net zero standard clause for suppliers ought to illustrate its usefulness for supply chain scenarios:

> "1.1 **The Supplier acknowledges and understands the Customer's Net Zero Target** [emphasis added]. Accordingly, the Supplier agrees to measure, manage and report the Total Emissions in accordance with the provisions of this clause [1] [and to develop and implement a plan of continual improvement with the objective of reducing the Total Emissions as rapidly as possible to contribute to efforts to limit global temperature increase to 1.5 degrees Celsius above pre-industrial levels].
>
> 1.2 **The Supplier shall measure and calculate the Total Emissions** [emphasis added] in accordance with the Reporting Standard during each Contract Year.
>
> […]
>
> 1.4 **The Supplier represents and warrants** [emphasis added] that **the content of any Annual Emissions Report provided by the Supplier** [emphasis added] to the Customer in accordance with this Clause [1] **is in all material respects complete, accurate and not misleading** [emphasis added].
>
> 1.5 The Annual Emissions Report shall be **verified by the Auditor** [emphasis added], the costs of which shall be met by [the Supplier/ the Customer/ both parties jointly].
>
> […]
>
> The Supplier shall [as far as possible/ use best endeavours to] ensure that **this Annex will be added into any and all of its [supply chain/ procurement] contracts that relate to its obligations under this agreement** [emphasis added]."[185]

The defined "Total Emissions" in the template clause contain scope 1, 2 and 3 emissions. The term "Auditor" is defined as "an impartial third-party auditor not affiliated with either party providing independent climate impact assessment and emissions reporting services.[186]

The last paragraph of the template clause ensures the passing on of the

[185] The Chancery Lane Project, The Net Zero Standard for Suppliers, Matilda's Annex, https://chancerylaneproject.org/climate-clauses/the-net-zero-standard-for-suppliers/.
[186] *Ibid.*

obligations to the supplier's contractual partners. This should enable the supply chain leading company to assess its **scope 3** emissions (by collecting the scope 1 and 2 emissions of all supply chain members) and to report them. Without going into too much detail, in the interest of the supply chain leading company, the clause ought to ideally contain mandatory annual minimum emission reduction targets. In the event that such targets are not met, the contract should contain an escalation mechanism to resolve this issue (remediation, suspension of contractual obligations as well as contractual penalties and contract termination as means of last resort).

4. ESG-related Supply Chain Arbitrations

Breaches of ESG-related provisions may, for example, lead to damage claims based on

- a severe loss of reputation causing pecuniary losses by losing customers and the termination of significant business relations/projects;

- delays in connection with the removal of defaulting subcontractors, the temporary halt of projects and ongoing investigations.

In addition, goods may be deemed defective based on contractually agreed criteria connected with certain ESG standards.

This will certainly give rise to complex multi-party disputes involving several supply chain members. ESG-related disputes between international parties are best solved by means of international commercial arbitration. Taking into consideration that more than 170 countries have acceded to the New York Convention,[187] supply chain leading companies are well-advised to conclude arbitration agreements with their direct business partners. They should also make sure by means of contractual cascading that identical (or at least compatible)[188] arbitration agreements are concluded along the entire supply chain to be able to consolidate (combine) several pending arbitrations into a single arbitration heard by the same arbitral tribunal or to enable joinders of third parties (e.g. the joinder of subcontractors in the arbitration between the employer and the main contractor).

[187] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[188] Arbitration agreements are, for example, incompatible if they refer to different arbitration institutions and rules, different seats of arbitration, different languages of arbitration or a different number of arbitrators.

Consolidations and joinders prevent the rendering of inconsistent or contradictory arbitral awards in closely related disputes. Procedural efficiency is another advantage (e.g. witnesses only have to testify in one arbitration). Consolidation and joinders (involving the employer, the main contractor and subcontractors) may be particularly useful for employers in construction projects if they have direct contractual relationships with subcontractors by obtaining collateral warranties mirroring the subcontractors' obligations contained in the subcontracts with the main contractor. Collateral warranties are vital for the pursuit of the employer's claims if the main contractor is in financial difficulties or in cases where the employer nominates subcontractors resulting in the main contractor's limitation of liability for acts of the nominated subcontractors. Consolidations and joinders may also be of interest for main contractors: a main contractor may be involved in a dispute with the employer and assert **recourse claims** against subcontractors.

Consequently, the author recommends the inclusion of the following clause into the arbitration agreement explicitly agreeing on consolidations and joinders along the supply chain:

> The Parties irrevocably consent to the consolidation of two or more pending arbitrations in relation to [insert defined Subject Matter/Project/Transaction/Related Contracts] in accordance with Art. [insert the consolidation provision of the applicable institutional arbitration rules] (effective as from [insert date on which the applicable institutional arbitration rules entered into force]).
>
> The Parties irrevocably consent to join [insert defined Related Parties eligible to be joined] as an additional party in relation to [insert defined Subject Matter/Project/Transaction/Related Contracts] in accordance with Art. [insert the joinder provision of the applicable institutional arbitration rules] (effective as from [insert date on which the applicable institutional arbitration rules entered into force]).
>
> Each of the parties to this Arbitration Agreement shall enter into an identical form of this Arbitration Agreement with [insert defined Related Party] with whom they contract for [insert defined Subject Matter] in relation to the [insert defined Project/ Transaction].[189]

[189] Adolf Peter, supra n. 181, at 178.

In practice, arbitration agreements are often silent on consolidations and joinders. Moreover, after a dispute arises, a party may object to multi-party proceedings. Granting consolidations or joinders without the parties' consent would violate the major principle of party autonomy and give rise to potential setting aside proceedings. Moreover, the recognition and enforcement of an arbitral award may be in jeopardy based on Art. V (1) (d) of the New York Convention.[190] However, there is the possibility of an **advance consent**[191]: the parties' agreement (in the arbitration agreement) to apply certain institutional arbitration rules providing specific criteria for the granting of consolidations or joinders may imply the parties' advance consent to a consolidation or a joinder if the relevant criteria in the applicable arbitration rules are met and the arbitration agreement does not contain any contrary terms.

For supply chain scenarios with different parties and contracts (arbitration agreements must at least be compatible), the most promising criterion to enable the consolidation of supply chain-related arbitrations against the objection of a party refers to a **series of related transactions**. This criterion can, for example, be found in the arbitration rules of the Singapore International Arbitration Center[192] ("**SIAC**"; Rule 8.1 (c) (iii)[193]), the Hong Kong International Arbitration Center[194] ("**HKIAC**", Art. 28.1 (c)[195]) and the China Maritime Arbitration

[190] Art. V (1) (d) New York Convention: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that […] the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place […]"

[191] Gary B. Born, International Commercial Arbitration, 3rd ed. (Wolters Kluwer 2021) 2799 et sq; Dimitar Kondev, supra n. 50, at 315; Stavros Brekoulakis/Ahmed El Far, Subcontracts and Multiparty Arbitration in Construction Disputes (19 October 2021), https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/subcontracts-and-multiparty-arbitration-in-construction-disputes; Adolf Peter, supra n. 181, at 170; Adolf Peter, Procedural Considerations in CIETAC Arbitrations Seated in Vienna, Asian International Arbitration Journal, Vol. 17, Issue 1 (2021) 41, at 45; Thomas H. Webster/Michael W. Bühler, Handbook of ICC Arbitration, 5th ed. (Sweet & Maxwell 2021) Art. 7 – 10, mn 7-7, classify such consent as indirect (reference to arbitration rules containing appropriate provisions).

[192] Arbitrations Rules of the Singapore International Arbitration Center, 6th ed., 1 August 2016.

[193] Prior to the constitution of any Tribunal in the arbitrations sought to be consolidated, a party may file an application with the Registrar to consolidate two or more arbitrations pending under these Rules into a single arbitration, provided that any of the following criteria is satisfied in respect of the arbitrations to be consolidated: c. the arbitration agreements are compatible, and: […] (iii) the disputes arise out of the same transaction or series of transactions."

[194] 2018 HKIAC Administered Arbitration Rules, effective from 1 November 2018.

[195] "HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations pending under these Rules where: […] (c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible."

Commission[196] ("**CMAC**", Art. 19 (1) (d)[197]).

It is more than evident that supply chain-related pending arbitrations involving multiple parties from different supply chain tiers and concerning the breach of ESG-related provisions (in particular contained in the supply chain leader's code of conduct made contractually binding along all supply chain tiers by means of contractual cascading; in other words: the ESG-related obligations/standards are contractually passed on through the entire supply chain; the subcontracts and lower-tier subcontracts mirror the ESG-related terms of a supply chain's main contract) are sufficiently related as they concern common questions of law (the breach of a certain ESG-related contractual provision) and fact (they relate to one and the same project; as seen in the above mentioned example involving Borealis, the ESG-related violations by subcontractors may lead to a significant delay of a major project causing substantial damage claims).

With regard to the arbitration rules of the HKIAC, Michael J. Moser/Chiann Bao[198] corroborate the author's understanding pursuant to which supply chain contracts may indeed fall under the criterion of a series of related transactions. Similarly, John Choong/Mark Mangan/Nicholas Lingard[199] take this view in relation to the arbitration rules of the SIAC.

In terms of joinders, one of the most flexible sets of arbitration rules are the Vienna Rules of the Vienna International Arbitral Centre[200] ("**VIAC**", Art. 14 (1)[201]). A joinder based on the Vienna Rules requires the arbitral tribunal's decision (after hearing all parties and the third party to be joined) considering all relevant circumstances. If a party opposes the joinder application by another party, an advance consent to a joinder (by the opposing party/third party) may be implied in the event of compatible arbitration agreements and sufficiently related legal relationships.[202] Without being bound by an arbitration agreement which is

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[196] China Maritime Arbitration Commission (CMAC) Arbitration Rules, effective from 1 October 2021.
[197] "Except where the arbitration agreement expressly precludes consolidation of arbitrations, CMAC may, at a party request, consolidate two or more pending arbitrations subject to these Rules into one single arbitration if one of the following conditions is satisfied: […] (d) all the disputes involved relate to the same transaction or series of transactions […]"
[198] Michael J. Moser/Chiann Bao, A Guide to the HKIAC Arbitration Rules, 2nd ed. (Oxford University Press 2022) mn 10.118.
[199] John Choong/Mark Mangan/Nicholas Lingard, A Guide to the SIAC Arbitration Rules, 2nd ed. (Oxford University Press 2018) mn 7.69.
[200] VIAC Rules of Arbitration and Mediation 2021, in force as of 1 July 2021.
[201] "The joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances […]"
[202] Paul Oberhammer/Christian Koller in VIAC Handbook (2019) Art. 14, mn 18.

at least compatible in relation to the arbitration agreement giving rise to the arbitration, the forced joinder of a third party may lead to the non-recognition and non-enforcement of an arbitral award in many jurisdictions. The Swiss Rules of the Swiss Arbitration Centre[203] ("**SAC**", Art. 6 (3)[204]) provide a similar flexibility.

5. Conclusion

It is evident that the CSDD Directive will not only give rise to court judgments (civil liability) and administrative fines imposed on non-complying companies by national supervisory authorities but will certainly lead to arbitral proceedings with multiple parties based on the violation of ESG-related provisions contractually passed on throughout supply chains. Non-EU-entities which are not directly bound by the CSDD Directive will be subject to a complying company's due diligence and will indirectly have to adhere to the CSDD Directive's standards in order to not being removed from EU-related supply chains and to avoid major damage claims. It seems that the EU is the trendsetter for a future where profit maximization – against the approach of Nobel Prize winner (economics) and ardent supporter of free economics, late Milton Friedman[205] – may no longer be achieved without complying with certain mandatory and voluntary ESG standards. Potential competitive disadvantages for EU entities will be mitigated by the CSDD Directive's and other related EU legislation's extraterritorial reach.

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[203] Swiss Rules of International Arbitration, in force as of 1 June 2021.

[204] "After the constitution of the arbitral tribunal, any cross-claim, request for joinder or request for intervention shall be decided by the arbitral tribunal, after consulting with all parties, taking into account all relevant circumstances."

[205] According to Milton Friedman "[t]he view has been gaining widespread acceptance that corporate officials and labor leaders have a 'social responsibility' that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud." See Milton Friedman, Capitalism and Freedom, 40th anniversary ed. (University of Chicago Press) 133.

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