MORE RIGHTS FOR MORE PEOPLE?: THE STRUGGLE OF INDEPENDENT CONTRACTORS TO ARBITRATE EMPLOYMENT CLAIMS AGAINST INTERNATIONAL ORGANISATIONS

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Abstract

*This article discusses an arbitration that took place under the Employment Arbitration Rules ["**Employment Rules**"] of the American Arbitration Association ["**AAA**"], in which I was the Claimant's pro bono attorney. The parties to this arbitration were an individual and her employer—an international organisation based in the United States. This article focuses on the organisation's argument that the parties' different nationalities and the individual's post-employment relocation outside the U.S. rendered the dispute 'international'. Accepting this characterisation would have been fatal to the arbitration to the extent that each party would have been responsible for 50% of the arbitrator's fees and arbitration costs under the AAA's International Arbitration Rules—something prohibitive for most employee-claimants—whereas under the Employment Rules only the organisation would have been financially responsible. Unfortunately, when the AAA decided to administer the case under the Employment Rules, the organisation asserted its immunity of jurisdiction and withdrew from the arbitration. Contrasted with the recent arbitration cases in which the workers of large corporations have sought to annul arbitration clauses, this case speaks about an individual who, unable to have her day in court, struggled—and failed—to preserve her right to settle her employment claims in arbitration.*

I. Introduction

After finishing her graduate studies in 2008, Joana[1] ["**Joana**" or "**Claimant**"] accepted an offer to intern with a certain international organisation ["**Organization**" or "**Respondent**"] in Washington D.C. ["**Washington**"]. The prospect of acquiring her first professional experience and the possibility of securing a permanent staff position with the Organization prompted her to relocate to the United States. Following the internship, Joana was offered a three-month independent consultant contract.

This was the first in a long series of contracts. Indeed, Joana would sign 46 similar contracts over the course of her relationship with the Organization. Despite the control the Organization always exercised over Joana being consistent with an employer-employee relationship, each of these contracts invariably called her an independent contractor. Each of these contracts contained identical arbitration agreements, which were silent on the applicable arbitration rules.

After almost ten years of being classified as an independent contractor, the Organization told Joana that it was ready to normalise her employment status. Despite this promise, in late 2018,

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1 "Joana" is a fictional name used to preserve the Claimant's real identity.

the supervisor told Joana that she had not been selected to keep her job and that her contract of ten years was being terminated with immediate effect and "*that [was] it*".[2]

Following a series of unsuccessful attempts to have her claims adjudicated through the Organization's internal administrative procedure,[3] Joana commenced an arbitration pursuant to the Employment Rules.[4] Throughout this article and for the sake of simplicity, I shall refer to this case as *Joana* v. *Organization,* or by its short form, *Joana*.

Soon after the filing of Joana's request for arbitration, the AAA sent a letter to the parties stating that the outcome of the preliminary administrative review was to apply the AAA Commercial Arbitration Rules[5] ["**Commercial Rules**"] along with the Employment/Workplace Fee Schedule[6] ["**Employment Fee Schedule**"] to this dispute.[7] Suddenly, however, the International Centre for Dispute Resolution ["**ICDR**"][8]—not the AAA—followed up with a letter to the parties,[9] assigning the case to an international case manager and indicating that the Procedures for Large, Complex Commercial Disputes[10] would apply to this case given the amounts at stake.[11] This decision likely prompted a letter from the Organization disregarding the AAA/ICDR's prior determinations regarding the applicable rules and declaring its intention to apply for security for costs and attorneys' fees pursuant to Article 34 of the ICDR Rules ["**International Rules**"].[12] Without providing any authority in support, the Organization's external counsel concluded that this was "*undoubtedly an 'international' dispute*".[13] The Claimant opposed categorically.

This article argues that a broadly-worded AAA arbitration clause, like the one present in Joana's contracts, cannot prevent individual claimants from arbitrating employment-related claims against the Organization who drafted the ambiguous clause. Below, I discuss the arguments that I advanced in *Joana* acting as Joana's pro bono attorney. The arguments reported in this article

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2 From Claimant's recollection conveyed in the attorney-client intake interview with the author.

3 *See* Claimant's petition for an administrative hearing with the Organization's Secretary-General (Jan. 29, 2018) (on file with author); *see also* Memorandum from the Organization's Human Resources, denying Claimant's petition of hearing (Feb. 28, 2018) (on file with author) [*hereinafter* "HR Memorandum"].

4 American Arbitration Association (AAA), Employment Arbitration Rules 2009, *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [*hereinafter* "AAA Employment Arbitration Rules"].

5 AAA, Commercial Arbitration Rules 2013, *available at* https://adr.org/sites/default/files/Commercial%20Rules.pdf [*hereinafter* "AAA Commercial Arbitration Rules"].

6 AAA, Employment/Workplace Fee Schedule: Cost of Arbitration 2019, *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf [*hereinafter* "Employment Fee Schedule"].

7 *See* E-mail from the AAA Employment filing team to the counsel (Jan. 11, 2019) (on file with author).

8 International Centre for Dispute Resolution (ICDR) is the AAA's branch for the administration of international disputes. *See* ICDR, *available at* https://www.icdr.org.

9 *See* Letter from the ICDR case manager (Jan. 25, 2019) (on file with author).

10 AAA, Procedures for Large, Complex Commercial Disputes 2013, *available at* https://adr.org/sites/default/files/Commercial%20Rules.pdf.

11 The Claimant's total claim for damages for employment misclassification, breach of implied employment contract, constructive discharge, and employment discrimination, among others, exceeded $1,000,000.

12 ICDR, International Arbitration Rules 2014, *available at* https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [*hereinafter* "International Rules"].

13 *See* Letter from the Organization's external counsel to the AAA/ICDR (Jan. 29, 2019) (on file with author).

are published with Joana's prior informed consent[14] and absent any language of confidentiality in the arbitration agreement.[15]

The balance of this article is as follows. Part II explains the role that the AAA/ICDR played in the case and Parts III to V discuss the main arguments regarding the non-internationality of employment disputes against the Organization. Finally, in Part VI, I offer a few policy recommendations highlighting the issues that still warrant additional research, and then I conclude.

II. Obstacles to claiming and the erratic role of the AAA

Joana encountered multiple obstacles in her search for redress for the violation of her employment rights. *First*, the Organization denied her petition for an administrative hearing indicating that only those whom the Organization considers its "*staff*" were entitled to them.[16] *Second*, when the independent contractors realise that arbitration is the only option for dispute resolution contemplated in their contracts, it becomes clear to them that retaining a lawyer is essential. Yet, lawyers are expensive in Washington and are typically unwilling to take this type of employment misclassification cases against the Organization on a contingency fee basis. Similarly, third-party arbitration funders are also reluctant to fund these cases, as discussed below in further detail, given the slim chances of success in enforcing an arbitral award against an international organisation.

In this environment, pro bono lawyers are probably one of the last resources through which similarly situated claimants can proceed with their claims in arbitrations against international organisations. After many unsuccessful attempts to retain a lawyer,[17] I finally accepted to represent Joana on a pro bono basis.[18]

As noted previously, the Organization's main defence in *Joana* was to challenge the commencement of the arbitration under the Employment Rules. The Organization also objected to the AAA's preliminary determination to administer this case under the Commercial Rules along with the Employment Fee Schedule.[19] According to the Organization, this decision was inadequate and impermissible in a case that was, in its opinion, "*clearly international*".[20]

Neither the Employment Rules nor the International Rules provide for the procedure that must be followed when a party disputes the administration of the arbitration under certain arbitration provisions. Rule 5(c) of the Commercial Rules, however, says that in such cases, the arbitration must continue "*in accordance with the arbitration provision submitted by the initiating party subject to a final*

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14 *See* E-mail from the Claimant to the author (May 31, 2019) (on file with author).

15 *See* discussion *infra* Part III (reproducing the arbitration agreement present in Joana v. Organization); *see also* 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2264 (2009) (citing United States of America v. Panhandle Eastern Corp., 118 F.R.D. 246 (C.D. Cal. 1998) for the proposition that U.S. courts have generally appeared reluctant to recognize an implied obligation of confidentiality arising out of arbitration agreements).

16 *See* HR Memorandum, *supra* note 3.

17 The Claimant visited at least three lawyers, but all declined to take her case on contingency fee basis. One attorney offered his services upon the payment of a $5,000 retainer that the Claimant could not afford.

18 At the time Joana v. Organization was filed, I was a newly admitted attorney in the District of Columbia (the seat and the applicable law to the arbitration). That I accepted to represent the Claimant on a pro bono basis means that I did not receive any compensation for this representation.

19 *See supra* note 13.

20 *Id.*

determination by the arbitrator".[21] In the case at hand, instead of affirming its preliminary decision subject to the arbitrator's review, the AAA/ICDR invited the parties to provide commentaries as to the rules applicable to the case.[22] In its commentaries, the Organization reiterated its position that the dispute was international while citing to no authority in support of the application of the International Rules.[23] The Claimant instead submitted a substantial brief in support of administering the arbitration pursuant to the Employment Rules—never under the International Rules.[24]

The AAA/ICDR case manager escalated the parties' contentions to the ICDR International Administrative Review Council ["**IARC**"]. Based on the parties' previous submissions, the IARC sided with the Claimant and determined that the arbitration was to proceed under the Employment Rules and the Employment Fee Schedule.[25] Parts III to V summarise the Claimant's (arguably)[26] successful arguments to defeat the Organization's first attempt to end this arbitration before the hearing on the merits even took place.

III. Only domestic employment arbitration rules should apply to the arbitration of purely domestic employment disputes

Subject matter appropriateness is perhaps the obvious reason why the Employment Rules and the Employment Fee Schedule should always apply to domestic employment disputes. But this is not the only reason. The Employment Rules together with the Employment Fee Schedule were designed to preserve the employees' due process rights by placing the arbitration's financial burden entirely on the employers.[27] Yet, the correct application of the Employment Rules is not always straightforward. To illustrate this last point, consider the arbitration clause present in Joana's contracts:

> "*Upon written notice by either Party to the other, any dispute between the Parties arising out of this Contract may be submitted to either the Inter-American Commercial Arbitration Commission or the American Arbitration Association, for final and binding arbitration in accordance with the selected entity's rules. The law applicable to the arbitration proceedings shall be the law of the District of Columbia, USA and the language of the arbitration shall be English.*" (emphasis added)

While seemingly functional, the critical shortcoming of this arbitration agreement is that it fails to specify which of the many AAA arbitration rules should apply to the arbitration. But this alone should not be fatal to the arbitration inasmuch as all AAA/ICDR arbitration rules contain provisions designed to cure this kind of silence in the arbitration agreement. Unfortunately, the very fact that each of the different AAA arbitration rules contains similar provisions clouds the limited guidance that they were intended to provide. That is why I now try to unpack the AAA/ICDR's official position on this issue by looking at the relevant provisions, one at a time:

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21 AAA, Commercial Arbitration Rules, *supra* note 5, r. 5(c).

22 *See* E-mail from the ICDR case manager (Jan. 30, 2019) (on file with author).

23 *See* Letter from the Organization's external counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).

24 *See* Letter from the Claimant's counsel to the AAA/ICDR (Feb. 14, 2019) (on file with author).

25 E-mail from the ICDR case manager containing the letter from the International Administrative Review Council (IARC) (Feb. 27, 2019) (on file with author).

26 Unfortunately, the IARC's decision was unmotivated.

27 Employment Fee Schedule, *supra* note 6 (capping the employee's filing fee at $300; placing the burden of paying the $750 case management fee entirely on the employer; and making the latter responsible for paying the arbitrator's fees unless in cases where the parties agree otherwise).

1. Rule 1 of the Employment Rules says:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Employment Arbitration Rules and Mediation Procedures or for arbitration by the AAA of an employment dispute without specifying particular rules*. […]*" (emphasis added).

2. Rule 1 of the AAA Commercial Rules states:

> "*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. […]*" (emphasis added).

3. Article 1(1) of the International Rules also contains similar language:

> "*Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.*" (emphasis added).

In *Joana*, the Respondent obviously relied on Article 1(1) of the International Rules in support of its argument that these rules—not the Employment Rules—should have applied to the case given the international nature of the dispute. Conversely, the Claimant cited to Rule 1 of the Employment Rules in support of applying these rules. This part of the article continues to focus on the appropriateness of applying the Employment Rules to cases similar to *Joana*.[28]

From the Claimant's perspective, the curing language in Rule 1 of the Employment Rules is particularly relevant. In order to activate this provision, it is critical to ascertain whether the dispute that the parties agreed to arbitrate is, in fact, an "*employment dispute*". But what is an employment dispute after all?

The AAA's website for Employment Arbitration gives the following answer:

> "*Disputes can arise out of an employer plan (the employer has drafted a standard arbitration clause for use with all its employees) or an individually-negotiated employment agreement or contract (the employee has had the ability to negotiate the terms and conditions of the employment agreement) or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims.*"[29] (emphasis added)

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[28] *See* discussion *infra* Parts IV and V (discussing in further detail the impropriety of applying the International Rules to this type of cases).

[29] *See Practice Areas: Employment Arbitration under AAA Administration*, AM. ARB. ASS'N, *available at* https://www.adr.org/Employment.

Similarly, the introduction to the Employment Rules includes the following language:

> "*These dispute resolution procedures were developed for arbitration agreements contained in employee personnel manuals, an employment application of an individual employment agreement, independent contractor agreements for workplace disputes and other types of employment agreements or workplace agreements, or can be used for a specific dispute. They do not apply to disputes arising out of collective bargaining agreements.*"[30] (emphasis added)

In *Joana*, the Claimant was an individual independent contractor whose claims were, by definition, work or employment-related (i.e. employment misclassification, breach of employment contract, constructive discharge, etc.). The Employment Rules would thus have applied effectively and fairly to Joana's case. Notwithstanding, the asterisk appended to Rule 1 of the Commercial Arbitration Rules generates additional ambiguity:

> "*Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*"[31] (emphasis added)

With this language, the AAA suggests again that either the Employment Rules or the Commercial Rules could apply to the arbitration of work-related disputes. In *Joana*, the Claimant argued that the Commercial Rules should not be applied to her case in lieu of the Employment Rules because her claims had nothing to do with the obligations set forth in her written contracts. In other words, the Claimant was suing for the breach of an employment contract implied-in-fact.

The doubts that the AAA introduces with the conflicting language flagged in this part of the article dissipate where the Organization, as in *Joana*, uses standard contract forms to memorialise the relationships with all of its performance contractors (*contratos por resultado*) ["**CPRs**"]. It is generally understood that CPRs cannot negotiate the terms of their contracts for these standard contracts are the quintessential example of an adhesion contract. An adhesion contract is one that is so one-sided for the strong party that the weak party must sign or else decline.[32] In short, a CPR has no more control over the wording of the arbitration clause placed within the Organization's standard contract than a consumer does when she opens a bank account or a brokerage account. The standard contract form(s) present in *Joana* derive from the

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30 *See* AAA, Employment Arbitration Rules, *supra* note 4, at 9.

31 *See* AAA, Commercial Arbitration Rules, *supra* note 5, art. 1.

32 Rob Jagtenberg & Annie de Roo, *Employment Disputes and Arbitration an Account of Irreconcilability, with Reference to the EU and the USA*, 68 ZBORNIK PFZ 171, 175-176 (2018) ("[…] arbitration clauses can increasingly be found in individual contracts, but the terms of these contracts are not genuinely negotiated. Rather, they follow a set model imposed by the employer; these are contracts of adhesion. For a candidate aspiring to a job position under such conditions with an employer, it is often simply a case of 'Take it or leave the building.' One could say that a referral to arbitration emanating from a clause in an adhesion contract comes effectively down to mandatory arbitration. […]").

Organization's internal deliberation process and is publicly available.[33] To the extent that arbitration constitutes a meaningful alternative forum for dispute resolution available to the CPRs, the publicity of the arbitration clause is probably being used to justify the grant of immunity and privileges that the Organization enjoys under U.S. law. This point is discussed in further detail in Part VI below.

That the Organization uses contracts of adhesion invariably for the hiring of every CPR can reasonably be construed as the equivalent to the sort of employment plans alluded to in the asterisk that adorns Rule 1 of the Commercial Rules.[34] According to the AAA, an employment plan is one whereby "*the employer has drafted a standard arbitration clause for use with all of its employees*".[35] That is why the Claimant in *Joana* argued that the Employment Rules should apply to her case despite the deficiency of the arbitration clause and the ambiguity introduced by the AAA's conflicting language signalled before.

For these reasons, the Claimant asked the AAA/ICDR to change its original preliminary determination—to apply the Commercial Rules—and to start administering her arbitration pursuant to the Employment Rules. In the alternative, the Claimant urged the AAA/ICDR to affirm its preliminary determination to apply the Commercial Rules along with the Employment Fee Schedule subject to the arbitrator's review. Simultaneously, the Claimant urged the AAA/ICDR to dismiss the Organization's request to administer her matter under the International Rules. The next part explains the reasons why the International Rules should not apply to this kind of cases.

IV. A dispute shall be deemed domestic where the parties' place of business and "place for delivery and/or performance of the work" is the same

The Respondent in *Joana* posited that Article 1(1) of the International Rules was dispositive of the issue of the applicable rules because the Claimant was a national of a Latin American country now residing outside the U.S. and the Organization was an "*entity in Washington, D.C.*"[36] According to the Organization, the parties' connection with different states at the time of the arbitration rendered the dispute "*undoubtedly*" international.[37] The reason behind this defence strategy is clear. As a sophisticated party, the Organization knew that the application of Article 34 of the International Rules would have been fatal to the *Joana* arbitration simply because the Claimant—as most similarly situated CPRs—could not afford the cost of an international arbitration.

The foregoing presents a complex dichotomy. As I noted previously, that an independent contractor is not able to defray the cost of an international arbitration against her employer is a due process problem that is best solved by applying the Employment Rules. On the other hand, from a policy perspective, the type of economic consideration raised by the Organization's defence should be the least of the reasons to rule out the application of the International Rules.

33 *See* the Organization's standard contract form (on file with the author).
34 *See supra* note 28.
35 *See supra* note 29.
36 *See* s*upra* note 13.
37 *Id.*

Nevertheless, the Organization's position regarding the internationality of the dispute in *Joana* leaves a number of analytical holes that I try to cover next for the sake of the argument.

As explained in Part III, the parties in *Joana* did not expressly grant authority to the AAA/ICDR to apply the International Rules to their arbitration. In light of the silence in the arbitration agreement, the question was whether the dispute between the parties to this arbitration was an "*international dispute*" within the meaning of Article 1(1) of the International Rules. The answer to this question is intrinsically difficult[38] and by all means not as obvious as the Organization suggested.[39]

The International Rules do not define the term "*international dispute*" and the AAA/ICDR's position on the issue is not clear either.[40] Fortunately, specialised commentators do provide guidance regarding the course that the ICDR has followed in similar past cases.

Gusy et al., for example, note that the ICDR commonly sends a letter[41] to the parties stating the two criteria that are used to define what an international dispute is: (i) "*analyzing the nationality or [the] residence of the parties*"; and (ii) "*the nature of the dispute*".[42] (emphasis added). The same commentators stress that the nationality of the parties is not the critical element for determining the dispute's "*internationality*", for an arbitration "*between parties resident of the same country could be genuinely or intrinsically international*".[43] In fact, better indicators of the so-called internationality are the objective factors related to the second criterion above—"*the nature of the dispute*".[44] In other words, a dispute between "*parties resident of the same country could be genuinely or intrinsically international*" where the contract that binds them calls for performance abroad.[45]

Stated differently, the residence of the parties is as good an indicator of the dispute's internationality as the parties' citizenship or nationality; and the different places of residence or nationalities of the parties are not as strong an indicator of internationality as the objective international connections the contract has or lacks with more than one country.

The analysis presented so far is not free of nuanced interpretations and criticism. Nevertheless, most commentators[46] agree when they refer to Article 1(3) of the United Nations Commission

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38 *See* MARTIN F. GUSY, FRANZ T. SCHWARZ & JAMES M. HOSKING, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 20, ¶ 1.79 (2011).

39 *See* s*upra* note 13.

40 *See supra* note 12.

41 *See* GUSY ET AL., *supra* note 38, at 20-21, ¶ 1.81. In Joana v. Organization, the ICDR did not send a letter containing this kind of language to the parties.

42 *Id.*

43 *Id.* at 21, ¶ 1.84 (noting the example of "two companies from the same jurisdiction relating to a contract to be performed abroad").

44 *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 51, § 2, ¶ 99 (Emmanuel Gaillard & John Savage eds., 1999) (these factors are what Fouchard et al. call "objective factors of internationality" and consider them necessary and sufficient for the dispute to be intrinsically international).

45 *See* GUSY ET AL., *supra* note 38, at 21, ¶ 1.84.

46 *See* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 10, ¶ 1.32 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "REDFERN AND HUNTER"]; GUSY ET AL., *supra* note 38, at 21, ¶ 1.85 (specifically referring to the scenario where the arbitration agreement is silent as to the set of applicable AAA arbitration rules).

on International Trade Law Model Law on International Commercial Arbitration[47] ["**Model Law**"] as the guiding beacon on the issue of internationality of a dispute. For example, Article 1(3) says:

> "*(3) An arbitration is international if:*
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> *(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
>
> *(b) one of the following places is situated outside the State in which the parties have their places of business:*
>
> *(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;*
>
> *(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
>
> *(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.*
>
> *(4) For the purposes of paragraph (3) of this article:*
>
> *(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;*
>
> *(b) if a party does not have a place of business, reference is to be made to his habitual residence.*" [omissis] (emphasis added).

Roth's commentary on the Model Law is helpful to unpack the wealth of information contained in Article 1(3)-(4) of the Model Law. Accordingly, it is important to note that Article 1(4)(a) considers a party's place of business the place with the closest relationship with the arbitration.[48] For an individual without a place of business, the relevant place is that of her habitual residence.[49] Another important provision that would render an arbitration "*international*" would be a foreign situs.[50] Finally, a critical factor to render a dispute "*international*" is the place of performance. On this point, Roth refers to *Fung Sang Trading Ltd.* v. *Kai Sun Sea Products & Food Co. Ltd.*[51] ["**Fung Sang**"] as the leading authority. In *Fung Sang*, the court held that an arbitration with most of its elements set in Hong Kong (parties, applicable law, and payment) was nonetheless international where the delivery of the goods was to take place in China.[52]

In *Joana*, the Respondent was a *sui generis* international organisation, which, by definition, is incapable of being "*incorporated*" or having the nationality or citizenship of any country. By that

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47 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

48 *See* Marianne Roth, *UNCITRAL Model Law on International Commercial Arbitration*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 963, ¶ 14.37 (Frank-Bernd Weigand ed., 2d ed. 2009).

49 *See id.*

50 *Id.* at 963, ¶ 14.39.

51 Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd. [1991] 2 HKC 526 (H.K.).

52 Roth, *supra* note 48, at 964, ¶ 14.41.

same logic, an international organisation is also incapable of having the same or a different nationality as any individual person. Therefore, the inquiry into the parties' nationalities in *Joana* was not an adequate approach to ascertain the internationality of the dispute. Instead, in line with Article 1(3)(a) of the Model Law, what was relevant in that case was to determine the parties' place of business at the time of signing the relevant CPR contracts.

By the same token, the Organization's non-incorporation could not mean that it did not or could not have a place of business. Much to the contrary, the Organization may well have had—indeed has—numerous places of business. Washington, for one, was arguably the Organization's principal place of business because it has its principal headquarters ["**HQ**"] there and conducts the overwhelming majority of its activity from there.

Admittedly, the *Joana* arbitration could have been deemed international based on the Organization's multiple places of business in the territories of most of its member states. For purposes of the *Joana* arbitration, however, Article 1(4)(a) of the Model Law considers the place that has the strongest connection with the arbitration agreement as the relevant place of business. For the Organization, in this case, that place was Washington. Consistent with this, every contract between Joana and the Organization mentions the HQ as "*the place for performance and/or delivery of the 'work'*".[53] Similarly, the contracts, as well as the arbitration agreements, both designate D.C. Law as the governing law.[54]

On the other hand, as an individual, Joana could not have a place of business. Although, *arguendo*, if one were to accept the Respondent's logic and consider Joana as a non-incorporated entity working as an independent contractor for the Organization, then Joana too may have had a place of business. And that place of business would also have been Washington because Article 1(4)(b) of the Model Law considers the individual's 'habitual residence' analogous to an incorporated entity's place of business. In fact, throughout the parties' entire working relationship, Joana had fixed her domicile in Washington.

As it is the case with similarly situated CPRs who are not U.S. citizens or permanent residents, Joana held a G-4 visa that the Organization itself sponsored and procured.[55] This visa obliged Joana to establish her domicile in Washington's metropolitan area. The G-4 visa also constrained Joana to work exclusively and full-time for the Organization.[56] Thus, there is no doubt that the Claimant was present and domiciled in Washington at all relevant times.

The local nature of the parties' relationship in *Joana* was also apparent from the way the parties performed under the contracts. As mentioned previously, the place for performance and/or delivery of the work was the HQ. In fact, Joana physically worked at the HQ for approximately ten years. There, she shared office space with other Organization staff and was provided with a workstation that included a computer and other resources. Furthermore, the Organization

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53 *See supra* note 33.

54 *Id.*

55 *See* OFF. FOR. MISSIONS, ACCREDITATION POLICY HANDBOOK 6–7 (U.S. State Dep't Dipl. Note 16-886, June 7, 2016), *available at* https://www.state.gov/wp-content/uploads/2019/05/Diplomatic-Note-18-1686-Accreditation-Policy-Handbook.pdf.

56 *See also 9 FAM 402.3-7(B) (U) G Visa Classifications (b)*, FOR. AFF. MANUAL: U.S. DEP'T OF STATE, *available at* https://fam.state.gov/fam/09FAM/09FAM040203.html.

compensated Joana for her work with payments issued in the U.S. currency that were deposited into her U.S. checking account. Additionally, during the course of her employment relationship, Joana received constant supervision and direction from her Washington-based supervisors. Finally, Joana performed the overwhelming majority of her duties just as any other employee stationed at the HQ. On a few occasions, the Organization designated Joana to represent it in meetings held outside the United States.

In sum, at all relevant times, both parties in *Joana* had their respective places of business/residence in Washington, the city in which they conducted a purely local employment-related relationship that spanned almost ten years. That is why, as in *Joana*, neither the nationality of similarly situated CPRs nor their relocation outside the U.S. following their termination[57] should have any bearing over the internationality of the dispute.

But there is at least one additional argument to make against the internationality of this kind of dispute based on an ambiguous or vaguely drafted arbitration agreement.

To interpret an arbitration agreement that is silent on the applicable arbitration rules as an agreement to submit employment-related claims to arbitration under the International Rules would be contrary to the common law rule, *contra proferentem*, that a court should construe an ambiguous contract term against the party who drafted it.[58]

As the sole drafter of the arbitration agreement, all the Organization needs to do—if it wants to ensure that arbitrations like *Joana* are conducted under the International Rules—is to specify that the Organization only consents to arbitrate pursuant to those rules. Of course, such a blanket imposition on an adhesion contract would reflect poorly on an international organisation that gives the option to arbitrate "*any claims*"[59] as a "*quid pro quo*"[60] of sorts for the privileges and absolute immunities that it enjoys under the laws of the host country and which it so conveniently invoked in Joana's arbitration.

To recapitulate, the internationality of a dispute has little to do with the parties' nationalities, place of business, or residence, and a whole lot more with the nature of the dispute. The facts in *Joana* support a finding that the nature of the dispute was purely domestic. Moreover, a party cannot reap the benefits of an ambiguous clause it drafted to the detriment of the other party.

The following Part V discusses how the unenforceability of arbitral awards against the Organization renders the "*international*" characterisation of the underlying disputes illusory or superfluous.

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57 A very likely event as upon being terminated, non-U.S. CPRs typically lose their eligibility to continue in the United States under a G4 visa.

58 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995), 115 S. Ct. 1212 (1995) *as cited in* 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1063–64 (2009).

59 *See* arbitration agreement reproduced in Part III of this article.

60 William M. Berenson, *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, *in* THE WORLD BANK LEGAL REVIEW 133 (Hassane Cissé, Daniel D. Bradlow & Benedict Kingsbury eds., 2011).

V. A dispute should not be deemed international where the resulting award cannot be enforced under international conventions

According to Redfern and Hunter, the ability to obtain a final and binding award is the main motivation that parties have for taking their disputes to international arbitration and bearing the expense that is associated with this form of dispute resolution.[61] In this vein, the arbitrators' main duty is to hand down an award that is internationally enforceable.[62] Accordingly, the AAA/ICDR acknowledges that the main advantage of arbitrating under the International Rules is that such an arbitration would lead to the making of an internationally enforceable award.[63] For practical purposes, that an award is internationally enforceable means that the award falls under the New York Convention[64] or the Panama Convention[65] [collectively referred to as the "**Conventions**"].

Under the current international arbitration regime, the award that would have resulted from *Joana* could not have been enforced under the Conventions. This important indicator of the dispute's internationality—enforceability—fails to materialise in cases where, as the Organization noted in *Joana*,[66] the respondent enjoys privileges and immunities that shield it from being sued in the national courts of the U.S.[67] Moreover, a panoply of international instruments further entitles the Organization to the same privileges and absolute immunity of jurisdiction that it enjoys in the U.S. in virtually every country in which the Organization has offices, holds assets, or otherwise "*does business*".

Indeed, the Organization derives its absolute immunity in the U.S. from the International Organizations Immunities Act of 1945 ["**IOIA**"] and the Headquarters Agreement with the U.S. government.[68] Similarly, at least 13 of the Organization's member states have entered into a multilateral agreement[69] granting the Organization immunity of jurisdiction in the following terms:

> "*Article 2. The Organization and its Organs, their property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the immunity has been expressly waived. It is understood, however, that no such waiver of immunity shall make the said property and assets subject to any measure of execution.*
>
> *Article 3. The premises of the Organization and of its Organs shall be inviolable. Their property and assets, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation,*

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61 *See* REDFERN AND HUNTER, *supra* note 46, at 501, ¶ 9.01.

62 *Id.* at 502, ¶ 9.04.

63 *See ICDR, Rules, Forms & Fees*, INT'L CTR. FOR DISP. RESOLUTION, *available at* https://www.icdr.org/rules_forms_fees (noting that "[t]he ICDR Rules were created with and maintain UNCITRAL Rule philosophies that empower parties and arbitrators to control their own process. The results have allowed for ICDR awards to be enforced in jurisdictions around the world.").

64 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"]; 9 U.S.C. §§ 201–08 (1970).

65 *See* Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [*hereinafter* "Panama Convention"]; 9 U.S.C. §§ 301–07 (1990).

66 *See supra* note 13.

67 *Id.*

68 *See* Headquarters Agreement Between the Organization […] and the Government of the United States of America (on file with author).

69 *See* list of multilateral agreements granting immunity of jurisdiction to the Organization (on file with author).

> *expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action*." (emphasis added).

An additional 23 member States have entered into bilateral agreements with the Organization granting the latter full immunity from jurisdiction. The following article is a typical example of these agreements:

> "*Article 7. The Secretariat and its Office, as well as their property, funds and assets, wherever located and by whomever held, shall enjoy in Jamaica immunity from judicial and administrative process, except in those particular cases in which such immunity is expressly waived by the Secretary General of the Organization […]. No such waiver, however, shall make the said property, funds and assets subject to any measure of execution.*"[70]

Therefore, the hypothetical enforceability of an arbitration award under the Conventions cannot justify treating the underlying dispute in any case against the Organization as "*international*".

Notwithstanding the unenforceability of arbitration awards against the Organization on account of immunity, there is one additional reason to deny the enforceability of an employment-related arbitration award under the Conventions. At least according to one court, inasmuch as employment disputes concern the internal administration of international organisations, such disputes are deemed non-commercial.[71] Following this reasoning, disputes like the one present in *Joana* are non-commercial, and therefore, the resulting awards would fall outside the scope of the Conventions, regardless of the dispute's internationality.[72] In sum, arbitral awards, especially if employment-related, are unenforceable against the Organization.

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As noted previously, the foregoing arguments were tested in *Joana*. The IARC sided with the Claimant and decided to revert the AAA/ICDR's preliminary determination to run the *Joana* arbitration under the Commercial Rules.[73] In so doing, the IARC determined that the rules applicable to that case were the Employment Rules and the Employment Fee Schedule.[74] Unfortunately, as I noted previously, one can only speculate as to the persuasiveness of the arguments presented in this article because the IARC decision was unmotivated. I discuss the Organization's reaction to this determination in the following Part VI.

VI. More rights but not for all people: The Organization walks away from the arbitration

In response to the IARC determination, the Organization submitted a series of letters to the arbitral institution threatening to withdraw from the *Joana* arbitration if the AAA/ICDR did not

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70 *See* Agreement Between the General Secretariat of the Organization […] and The Government of Jamaica on the Functioning in Kingston of the Office of the Secretariat in Jamaica (on file with author).

71 *See* Broadbent v. Organization of American States, 628 F.2d. 27 (D.C. Cir. 1980) (U.S.).

72 *See* New York Convention, *supra* note 64, art. I(3) (the United States signed the New York Convention with the following reservation: "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."); *see also* Panama Convention, *supra* note 65, art. 1 (as the names indicates, the Inter-American Convention on International Commercial Arbitration only applies to commercial arbitration awards).

73 *See* s*upra* note 25.

74 *Id.*

reconsider its decision.[75] The Organization's reasoning for repudiating the arbitration boils down to the idea that arbitrating this matter under the Employment Rules "*would be wholly inconsistent with the privileges and immunities afforded to the Organization […] pursuant to its treaty with the United States, which unambiguously grants the Organization […] [']exclusive jurisdiction over the resolution of any and all disputes and matters arising out of, related to, or deriving from employment in, by, or with the Organization […].[']*"[76] In its final plea, the Organization engages in a series of blatant mischaracterisations such as that the Organization "*never consented to arbitrate what the ICDR has […] decided to recharacterize as an employment dispute*"[77] and this decision by the ICDR "*vitiates any consent that the Organization […] gave to participate in these proceedings*".[78]

At this point, the Organization proceeded to warn that "*the immunities afforded to the Organization under the Headquarters Agreement, particularly with respect to employment disputes, prevent the enforcement of an arbitral award of this nature in United States courts*".[79] To top it all, the Organization concluded its admonition to the AAA/ICDR and the Claimant with a statement that speaks for itself:

> "*The Organization […], in good faith, commits to final and binding arbitration in its commercial contracts precisely to avoid the need for any post-award enforcement proceedings*".[80]

This statement evidences that the Organization is either unable to understand the most basic tenets of arbitration law as well as the law of privileges and immunities, or else it understands them well and decided to ignore the rules that bind most litigants, as they did in *Joana*.

For whatever purpose, this behaviour raises the issue of whether an arbitration agreement, of which an international organisation is a signatory, constitutes a waiver of the right to invoke its immunities. This issue was not particularly relevant in *Joana* because the non-participation of the Organization in the arbitration did not prevent the constitution of the sole-arbitrator tribunal and the Claimant did not seek to compel arbitration when, as noted below, the Respondent failed to pay the arbitrator's fees. I feel, however, that addressing the interplay between organisational immunity and waiver is important for the generality of future arbitration cases that may be brought against the Organization.

In their article on international organisations and immunity, Professors Gaillard and Pingel-Lenuzza readily conclude that an arbitration agreement constitutes a waiver on the part of the organisation of the right to invoke its immunity before the arbitral tribunal.[81] The authors point to the dominant view that the existence of dispute resolution alternatives like arbitration is precisely what justifies the absolute immunity that international organisations are often accorded.[82] According to this view, international organisations should not be allowed to have it

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75 *See* Letter from the Organization in response to the IARC decision (Mar. 12, 2019) (on file with author); Letter from the Organization, following the AAA/ICDR's confirmation of the IARC decision (Mar. 26, 2019) (on file with author).

76 *See* 'Final Letter' from the Organization (Apr. 12, 2019) (on file with author).

77 *Id.*

78 *Id.*

79 *See* s*upra* note 75.

80 *See* s*upra* note 76.

81 Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, 51 INT'L & COMP. L. Q. 1, 12 (2002).

82 *See id.* at 3.

both ways; that is, to maintain absolute immunities that they can invoke to interfere with the mechanisms that are supposed to counterbalance that immunity in the first place.[83]

Pierre Schmitt notes that international organisations like the United Nations generally—but not always—add non-waiver language to their standard arbitration clauses.[84] When such language is absent, the issue of the international organisation's immunity of jurisdiction is likely to emerge in court.[85] Schmitt references two cases in which French and Swiss courts disposed of the issue of waiver of organisational immunity in different ways.[86] In *UNESCO* v. *Boulois* ["**UNESCO**"], the UNESCO refused to appoint an arbitrator thereby impeding the proper functioning of the arbitration.[87] The Paris Court of Appeals held that the UNESCO could not be allowed to defeat the *pacta sunt servanda* principle as it had waived its immunities in entering into an arbitration agreement.[88] The Court concluded that allowing the UNESCO to invoke its immunity to defeat the arbitration would have constituted a denial of justice as well as a human rights violation pursuant to Article 6(1) of the European Convention on Human Rights.[89]

Conversely, in *Groupement Fougerolle and Consorts* v. *CERN* ["**CERN**"], the Swiss Federal Supreme Court held that the arbitration agreement alone did not amount to a waiver of the international organisation's immunity.[90] Unlike *UNESCO*, the proceedings in *CERN* were initiated by a private party for the annulment of an arbitral award obtained against an international organisation.

In *International Tin Council* v. *Amalgamet, Inc.*, an international organisation headquartered in the United Kingdom petitioned a court in the state of New York to stay the arbitration that had been initiated against it in New York for breach of contract.[91] The Court dismissed the petition finding, in relevant part, that the grant of immunity enjoyed by the Petitioner in the host country did not extend to the U.S., and even if it did, the immunity had been waived by virtue of the arbitration agreement. In sum, despite the diverging holdings, the three courts sought to preserve a similar value: to ensure the arbitral instance remains undisturbed by either the international organisation or the private party.[92]

Reading these three cases together, one can appreciate how the courts can restrict on a case-by-case basis the scope of the immunity of international organisations and reinforce the effectiveness of arbitration. In other words, the recommendations that Gaillard and Pingel-Lenuzza posited as alternatives[93] do not necessarily need to be mutually exclusive if the courts

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83 *See id.* at 4.

84 PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 180 (2017).

85 *Id.* at 181.

86 *Id.* at 181–82.

87 *See* Cour d'appel [CA][regional court of appeal] Paris, 14e ch. A, June 19, 1998, REVUE DE L'ARBITRAGE 1999, 343 (Fr.) *as cited in* SCHMITT, *supra* note 84, at 181.

88 *Id.* at 344.

89 *Id.*

90 *See* Tribunal fédéral [TF] [Federal Supreme Court] Dec. 21, 1992, 118 Ib 562 (Switz.) *as cited in* SCHMITT, *supra* note 84 at 182.

91 Int'l Tin Council v. Amalgamet, Inc., 524 N.Y.S.2d 971 (Sup. Ct. N.Y. Co. 1988) (U.S.) [*hereinafter* "Tin Council"].

92 For a detailed commentary on Tin Council, *see* Steven R. Ratner, *International Tin Council v. Amalgamet Inc. 524 N.Y.S.2d 971,* 82 AM. J. INT'L L. 837 (1988).

93 *See* Gaillard & Pingel-Lenuzza, s*upra* note 81, at 4.

take a position more or less deferential to the immunity of international organisations. It remains to be tested in the U.S. courts whether an international organisation can be compelled to arbitrate if, as the Organization in *Joana,* it invokes immunity and fails to pay the arbitration fees.

Arbitral institutions also can do their part in solving the issue of non-waiver of organisational immunity. Schmitt notes how the Permanent Court of Arbitration, having enacted its 'Optional Rules for Arbitration between International Organizations and Private Parties'[94] modelled after the UNCITRAL Arbitration Rules, is one of such examples.[95] The solution provided in Article 1(2) of these Optional Rules is simple: agreement to arbitrate under the Optional Rules constitutes a waiver of the organisation's right to invoke its immunity of jurisdiction.[96]

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Despite the Organization's efforts to defeat the arbitration in *Joana*, an arbitrator was appointed, and a preliminary hearing took place. The Organization did not participate in this preliminary hearing despite the arbitrator's assurances that such an appearance would not constitute a waiver of any arbitrability defences. The Organization only responded with a note to the case manager indicating that "*the position of the General Secretariat in respect of [the Joana] arbitration as expressed in [its] communications dated […] remain[ed] unchanged*".[97] Shortly thereafter, the ICDR case manager wrote an e-mail indicating that because the Organization had failed to make a deposit to cover the arbitrator's compensation as is stipulated in the Employment Fee Schedule, the Claimant was invited to advance the arbitrator's fees. For a case like this, the arbitrator's fees were estimated to run anywhere between $4,500 and $20,000. Because the Claimant could not afford to pay the arbitrator's steep fees, the arbitrator closed the case for lack of payment.[98]

VII. Conclusion

Independent contractors beware! The avenues for obtaining redress for the violation of their employment rights can be extremely limited if not inexistent. The Organization is prepared to deploy unorthodox legal strategies to prevent independent contractors from airing their claims both internally and externally. The double layer of protection afforded to the Organization under the IOIA and the Headquarters Agreement with the government of the U.S. makes it impossible for a claimant to compel arbitration against the Organization in the U.S. courts. The Organization, however, will concentrate its efforts on shifting the financial burden of the arbitration to the claimants. While *Joana* proves that the Organization's attempt to accomplish this strategy by turning the arbitration into an international dispute will not bear fruit, the Organization can always achieve the same goal by resorting to the privileges and immunities that it enjoys under the U.S. laws.

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94 Permanent Court of Arbitration, Model Arbitration Clauses: For Use in Connection with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties, *available at* https://docs.pca-cpa.org/2016/02/Model-Arbitration-Clauses-for-Use-in-Connection-with-the-Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-between-International-Organizations-and-Private-Parties.pdf.

95 *See* SCHMITT, *supra* note 84, at 148.

96 *Id.*

97 *See* E-mail from the Organization to the ICDR case manager (May 17, 2019) (on file with author).

98 Joana v. Organization, Arb. Ord. No. 2 (Aug. 21, 2019) (on file with author).

This article makes two policy recommendations. First, the AAA/ICDR should publicly explain the institution's position after the *Joana* arbitration for the benefit of similarly situated claimants who trust the arbitration clause in their contracts as their only guarantee of redress if their employer violates their employment rights. The second recommendation is simple and entirely within the Organization's power to implement: revise the arbitration clause discussed in this article so as to indicate the specific arbitration rules under which the Organization is willing to arbitrate.

Future empirical research needs to address two important research questions that remain unanswered. Why did it take the Organization so long in *Joana* to advance what is probably its bread-and-butter immunity defence? And why more CPRs have not sued the Organization for what strikes as one perverse employment misclassification scheme? Regarding the first question, I venture to speculate that because this was a case of first impression both for the Organization and the AAA, having prevailed on the 'internationality' argument would have been a more desirable outcome for the Organization. As to the second question, I cannot be sure as to one specific factor; rather, a mix of personal, financial, and reputational factors may be at the root of the problem.