

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

W Veeder QC Memorial Volume ICCA Congress Series

An ICCA Congress Series
Tribute to Johnny Veeder (1948 – 2020)

GENERAL EDITORS
THE ICCA BUREAU

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague



VV Veeder QC Memorial Volume,
ICCA Congress Series

AN ICCA CONGRESS SERIES TRIBUTE TO
JOHNNY VEEDER (1948 – 2020)

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Foreword

Johnny's modesty was legendary. And nothing we could say would be better than allowing his words to speak for themselves.

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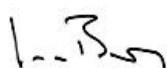
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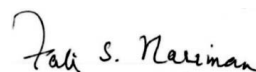
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ICCA 50th Anniversary Conference

Geneva, 2011

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Preventing Delay and Disruption
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Laws and Court Decisions in Common Law Countries and the UNCITRAL Model Law

V. V. Veeder¹

There are two fundamentally different kinds of international arbitration at each opposite end of the arbitral rainbow:

The first kind takes place within relatively narrow commercial communities, between international parties, international arbitrators and specialized lawyers within the same traditional family, invariably known to each other and mutually dependent on each other for the continuing success of their commercial dealings and their methods of resolving international commercial disputes. Here, arbitration may be fought fiercely by the disputant parties – but it will not be total war.

Such is London maritime arbitration, an ad hoc or non-institutional form of arbitration² – as described by the late Cedric BARCLAY, who was one of the most prominent and experienced arbitrators in London Arbitration and a member of ICCA:

“... There is little acrimony in maritime disputes. Arbitration is a way of life. It is a daily occurrence. Many major firms and even state enterprises may start a case every other day. It is easier to refer differences to experienced arbitrators, rather than to exchange lengthy arguments by correspondence...”³

It is this relatively benign kind of arbitration which has represented the majority of international commercial arbitrations, in London as in other jurisdictions, between commercial parties from all over the world.

The second kind of international arbitration, numerically much less significant, is between strangers from different business communities, usually engaged in a one-off dispute forming the end of a soured commercial relationship. Here, sometimes, total

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1. This Rapporteur acknowledges with thanks and appreciation the generous help provided by the following: Sir Johan STEYN, Joseph NEUHAUS (UNCITRAL Model Law), Tony DE FINA (Australia); Murray SMITH (Canada); John SCOTT (Hong Kong); Fali NARIMAN (India); Arthur ROVINE and Robert COULSON (USA); and JAN PAULSSON; and on English law and practice: David BIRD, Bruce HARRIS, Nicholas LEGH-JONES Q.C., Kenneth SEVERN, Pamela KIRBY JOHNSON (GAFTA), George HARDEE (LMAA) and R.A. EDWARDS (LME). All errors should of course be blamed on the Rapporteur or better still, on the “poachers” who requested complete anonymity in return for disclosing their dilatory and other disruptive tactics.
 2. The terms “ad hoc” and “non-institutional” arbitration are used in this Report to mean an arbitration agreement *not* providing for arbitration before a permanent arbitral institution or authority (e.g., the International Chamber of Commerce (ICC) or the Moscow Arbitration Court) or under a standard form set of arbitration rules consensually incorporated into the arbitration agreement (e.g., the UNCITRAL Arbitration Rules).
 3. BARCLAY, “Practical Experience in Maritime Arbitration” (1983) reprinted in 5 *Arb. Int'l.* (1989) p. 116 at p. 117.

war can be waged at its worst; and the conflict between the parties can also invade the tribunal, unbalancing its equilibrium.

For example, it is notorious that the abuse of the party-arbitrator appointment, whereby one party's advocate invades the tribunal disguised as an arbitrator, can bring unfairness, delay and extra cost to the arbitral process.

– Unfairness because the other party will not ordinarily have abused its right to appoint an independent and impartial arbitrator; the tribunal can thus be unbalanced in favour of the miscreant party; and there will then be no level playing-field for both parties in the arbitration.

– Delay and extra cost because the adversarial process between the parties will be mirrored within the arbitral tribunal, unnecessarily duplicating the same adversarial exercise and at worst subjecting the arbitration to further extreme difficulties.

Recently, the English Commercial Court took care to note expressly when enforcing an international majority award the fact that the dissident arbitrator had expressed views “favourable to (his appointor) on virtually every extant issue.”⁴ At The Hague, the UNCITRAL Arbitration Rules are being tested by conduct which their draftsmen can hardly have foreseen, from deliberate leaks from party-appointed arbitrators to their party-appointees, to physical assaults on members of the arbitral tribunal.⁵ In the USA, it has not hitherto been the practice after the award for a party to place an arbitrator under surveillance by private detectives – until now.⁶ Elsewhere, as is well-known, parties to arbitration have resorted to threats and conduct no less rough and unsavoury.

At its very worst, in the view of many commentators, this second kind of arbitration may threaten the effectiveness and acceptability of international commercial arbitration in every national jurisdiction, by introducing innovative tactics and different standards of conduct for parties and arbitrators for all kinds of arbitrations in an increasingly litigious world – particularly in the hands of recalcitrant respondents. There is concern that the national and international framework for arbitration was not designed for such miscreant misconduct. As the US Supreme Court noted in *Mitsubishi*:

“... As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested.”⁷

4. See *Bank Mellat, v. GAA Development* [1988] 2 Lloyd's Rep. 44, 47 (an ICC majority award).

5. See S.A. BAKER and M. DAVIS, “Establishment of an Arbitral Tribunal under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal”, 23 Int'l Law. (1989) p. 81 at p. 111.

6. See *The Mission Insurance Case*, as reported in the Wall Street Journal, 14 February 1990.

7. *Mitsubishi Motors v. Soler Chrysler – Plymouth* 473 U.S. 614, 87 L. Ed. 444 at 462, 105 S. Ct. 3346 (1985).

To the consumer, a fish is always fresh or not fresh; no fishmonger sells fish of a second grade of freshness – for long.

And yet – the arbitral system can adapt to and meet these new challenges. In practice, for example, it is well-known that the appointment of a biased party-appointed arbitrator can unbalance the arbitration tribunal the other way – by alienating the independent chairman of the tribunal against that arbitrator and the party appointing him. The independent chairman's sense of independence and fairness will preclude his working closely with a non-independent colleague; the chairman soon realizes that the award is likely to be a majority decision; and he starts, psychologically, to lean towards the other neutral party-appointed arbitrator for help and guidance. This tactic will then have brought a material disadvantage to the miscreant appointing party. Accordingly it is generally regarded by international practitioners as thoroughly counter-productive for a client to nominate or appoint a biased or dependent arbitrator.

The devil thus does not have all the best tunes; and as new forms of recalcitrant conduct emerge, so too new solutions emerge to deal with them within the existing framework of party autonomy, institutional arbitration rules, national laws and arbitral practice. From this Rapporteur's perspective, there is no evidence of a general crisis in the common law countries having grown to a point where it threatens the effectiveness of international commercial arbitration – although no doubt individual cases exist of serious and deliberate obstruction. The party-appointed arbitrator often lies at the heart of these cases – but so long as international commercial arbitration is consensual and non-institutional, he always will.

In summary, the effective remedies available in most common law countries, although to differing degrees and in various forms, are similar and not complicated. First, the principle of party autonomy permits parties to implement their own consensual solutions, by their arbitration agreement or by institutional rules. Second, where the parties' agreement is silent, the statutory remedies are strikingly similar:

– *Self help*: The parties have self-help remedial measures until the formation of the arbitral tribunal, not requiring the intervention of a state court.

For example, the right of the injured party to appoint his arbitrator as sole arbitrator if the recalcitrant respondent defaults in appointing an arbitrator, under Sect. 7 (b) of the English Arbitration Act 1950; and a modified version under Sect. 8 of the Australian Uniform Acts.

– *Court Assistance*: Where required, the local state courts are available to support the parties and the arbitral tribunal, in completing the formation of the tribunal and assisting the exercise of its powers during the arbitration – without at the same time affording a pretext to recalcitrant parties for delay.

For example, all common law countries provide for court appointed arbitrators where necessary to complete the tribunal; and as to assistance thereafter, for example, a US Federal Court will lend its aid to the arbitral process under Sect. 7 of the Federal Arbitration Act, in relation to discovery and the attendance of witnesses.

– *Ex Parte*: the arbitrators have their own sanctions for their procedural orders, in particular the power to proceed and make an enforceable award *ex parte*.

For example, the right to proceed to an award on the merits, in default of defence or without the attendance or participation of the recalcitrant party, in all common law countries.

– *Interim Award*: The arbitrators have the power to make one or more interim or partial awards on claims where the respondent is unable to advance any defence, including an interim award on costs, e. g., *The Kostas Melas*⁸ in England – as in most common law countries.

– *Costs Order*: The arbitrators have power to award costs, by final or interim award; and in some jurisdictions a costs order can amount to a substantial indemnity for all costs incurred by the successful party, including its lawyers' fees.

– *Interest*: Most common law countries allow the arbitrators to award interest on principal sums due at commercial rates in appropriate currencies. This power removes the recalcitrant party's financial incentive in delaying the arbitration.

– *Majority Award*: All common law countries allow an award to be made by a majority of three arbitrators; and a recalcitrant arbitrator cannot frustrate the arbitration by refusing to sign the award.

The UNCITRAL Model Law has substantially developed many of these solutions, in language more easily understood than the arbitration law and practice of the common law jurisdictions.

The eleven Topics before this Working Group I are considered in regard to the UNCITRAL Model Law and seven different common law countries: namely, Australia, Canada, England, Hong Kong, India, Scotland and the USA – four of which have enacted or are enacting the Model Law. There are few easy or short answers because often the matter is resolved by a mixture of arbitration law and arbitral practice, or sometimes the latter alone.

8. *Sethia Liners Ltd. v. Navigaro Maritime Corpn., The Kostas Melas* [1981] 1 Lloyd's Rep. 18.

ICCA Congress Series No. 7
Vienna, 1994

Planning Efficient Arbitration
Proceedings:
The Law Applicable in
International Arbitration

Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris

V. V. Veeder*

I. INTRODUCTION

It would be an understatement to conclude that the distinction and interrelation between “procedural law” and “substantive law” is not always clear in the practice of international commercial arbitration. In different places, the effect of each can differ significantly; in similar factual circumstances the former can overlap the latter; almost invariably there is an acute problem over comparative legal and linguistic terminology; and even characterization often poses difficulties beyond the modest step of categorizing “substantive law” as the law applicable to the parties’ relations arising from their principal transaction. Under English law, the editors of Dicey & Morris,¹ *The Conflict of Laws*, have regrettably concluded that the distinction remains “by no means clear-cut”; and in England as elsewhere, this is a twilight zone where even legal angels fear to tread. For example, the legal effect of the seat of the arbitration and the characterization of its procedural law applying to the parties, their substantive contract or transaction, the arbitrators (including the arbitral institution), the arbitration proceedings and the award, remain uncertain and can give rise to procedural hazards (as evidenced by recent decisions of the Indian and Pakistani Courts).² And in the absence of express agreement, what law governs the confidentiality of the arbitration? Is it determined by the procedural law, where no general provisions on confidentiality exist? If the answer is substantive law, is commercial arbitration (as the Australian courts have held recently), somewhat less confidential than was generally thought by international users who rank privacy as one of the most important reasons for agreeing to arbitration?³ Although both

* Queen’s Counsel, London; Co-editor, “Arbitration International”.

1. DICEY and MORRIS (Gen. ed. COLLINS) *The Conflict of Laws*, 12th ed. (1993) vol. 1, p. 170.
2. For a recent example, see *Rupali Polyester Limited v. Dr. Bunni, Sir Michael Kerr, Professor Uff, Mitsui Company and Hitachi Limited*, where the ICC arbitration clause provided that the arbitration should take place in London; and the parties’ contract was expressly governed by Pakistani law. Influenced by, *inter alia*, the decision of the Indian Supreme Court in *National Thermal Power Corp v. The Singer Company and others*, 2 Comp. L.J. (1992) p. 256, the Lahore High Court determined in its judgment dated 29 June 1994 that the Pakistan Arbitration Act 1940 applied as the *lex arbitri* to the ICC awards made in England, with the result that these awards were domestic (and not foreign) awards challengeable before the Pakistan courts under the 1940 Act. (This decision is under appeal to the Supreme Court of Pakistan).
3. In *Plowman v. Esso* [1994] 1 VR 1, the Supreme Court of the State of Victoria (Appeal Division) decided that, whilst it was an implied contractual term of an arbitration agreement that arbitration hearings should be in private, there was no term that any documents and information used in the arbitration were confidential (see also SMIT, “*Plowman v. Esso Australia Resources Ltd.: Confidentiality in Arbitration*”, 2 American Rev. of Int. Arb. (1991) p. 491; and PAULSSON and RAWDING, “The Trouble with Confidentiality”, 5 ICC Bulletin (1994) p. 48). The case is under appeal; and the judgment of the High Court of Australia is awaited imminently. Meanwhile, the English case-law

the 1958 New York Arbitration Convention and (still more) the UNCITRAL Model Law assume the application of procedural law without defining its scope,⁴ there remains a pressing practical need for the further harmonization of what is meant by the “procedural law” applicable to an international commercial arbitration.

II. TASK OF COMPARATIVE LAW

However difficult, this comparative task is hardly premature. Over sixty years ago (in 1932), Prof. René David wrote for UNIDROIT:

“... Being a worldwide phenomenon resulting everywhere from the same origins, arbitration should be submitted to a universal law, and particularly so because today it appears to be the favourite method of dispute resolution in international trade. For the needs of international trade, the diversity of laws governing arbitration is a most unfortunate hindrance: this diversity is harmful to the efficacy of arbitration agreements and raises a constant doubt on the validity of arbitration awards.” [English translation]⁵

This proposal looks beyond the 1985 UNCITRAL Model Law, which is far from an exhaustive code (e.g., it says nothing about confidentiality, limitation, interest, costs, set-off or many other important practical aspects of international arbitration, internal and external to the arbitration).

These continuing difficulties in comparative law and practice are illustrated here in comparing an “English” and a “French” international arbitration, taking place in London and Paris respectively, in regard to three separate matters: (i) limitation defences, (ii) interest and (iii) consensual assignment. Before turning to each, it is necessary first to describe two particular features of French and English law which may point the way towards a future solution on the path towards Prof. David’s dream: the French *règle matérielle* and the English “implied contractual term” of the arbitration agreement. To a considerable extent, both are legal innovations.

on confidentiality continues; most recently with *Hyundai v. Active* (9 March 1994; Phillips J) and *Insurance Company v. Lloyd’s Syndicate* (27 October 1994; Colman J).

4. Art. V(1)(a), (d) and (e) of the New York Convention refer to “the law of the country” where the award was made or where the arbitration took place; and Art. 36(1)(a)(i), (iv) and (v) of the UNCITRAL Model Law likewise.
5. DAVID, “Rapport sur l’arbitrage conventionnel en droit privé – Etude de droit comparé”, UDP-Etudes III–S.d.N 1932–C.D. (Rome 1932) p. 8:

... *Phénomène universel, partout inspiré des mêmes causes, l’arbitrage devrait d’autant plus être soumis partout à une loi identique qu’il apparaît aujourd’hui comme le mode de justice préféré du commerce international. La diversité des lois qui le régissent constitue au regard des besoins de ce commerce un obstacle des plus fâcheux: elle nuit à la sécurité des conventions arbitrales, et élève un doute constant sur la valeur des sentences d’arbitres.*

1. *French Arbitration*

In French law relating to international commercial arbitration, both procedural law and substantive law derive essentially from party autonomy, *la volonté des parties*. There is in principle no more difficulty in the parties choosing their procedural law under Art. 1494 of the New Code of Civil Procedure (NCCP)⁶ than in choosing their own substantive rules of law under Art. 1496 NCCP.⁷ Thus, parties to an international commercial arbitration held in Paris can subject its procedure to a foreign procedural law (or none); and the resulting award would still be an award made in Paris before the French courts and abroad (for the purpose of recognition or enforcement under the 1958 New York Arbitration Convention). As a further indication of party autonomy, even where foreign parties choose French procedural law for their international arbitration, Chapters I, II and III of the New Code of Civil Procedure governing domestic arbitrations apply only insofar as the parties have not agreed otherwise, subject always to the permissive provisions of Arts. 1493 and 1494 NCCP (which govern the formation of the arbitration tribunal and its procedure in an international arbitration). These statutory provisions on party autonomy mean that there is a much reduced need within the arbitration to have recourse to French procedural law (including conflict rules) because the parties or, where the parties are silent, the arbitration tribunal can directly agree or settle such questions of substance and procedure. Yet as Me. Jean Robert noted in his commentary on Art. 1494, these provisions do not remove completely the need for conflict rules:

“For those provisions to apply, it will of course be necessary for the parties to have chosen French law, expressly or implicitly. And at all events, where the parties have not yet expressed their choice and if the dispute has not yet been referred to the arbitrators, it will always remain necessary to apply the conflict of law rule arising from the law or from an international convention.”⁸

6. Art. 1494 NCCP reads in part:

La convention d'arbitrage ... peut aussi soumettre celle-ci [càd l'instance arbitrale] à la loi de procédure qu'elle détermine. (“The arbitration agreement ... may also subject it [i.e., the arbitral proceedings] to a given procedural law.”)

— or none, see ROBERT, “De la règle de conflit...” in SCHULTSZ and VAN DEN BERG, eds., *The Art of Arbitration* (1982) p. 283.

7. Art. 1496 NCCP: “*L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; ...*” (“The arbitrator shall decide the dispute according to the rules of law [nb: not “law”] chosen by the parties; ...”).

8. ROBERT, *ibid.*, p. 284:

“... *il faudra bien entendu que les parties se soient directement ou implicitement référées à la loi française pour que de semblables dispositions s'appliquent. Et, en tous cas, il demeurera des situations où, avant que les parties se soient exprimées, et si les arbitres ne sont pas encore saisis, le recours à la règle de conflit, légale ou conventionnelle, restera indispensable ...*”

Thus, the relative freedom allowed by French law as the *lex loci arbitri* is not capable of providing a comprehensive solution; it leaves difficult gaps; and these gaps are filled by an important innovation in the practice of international arbitration in France: the concept of *règles matérielles*.

a. *Règles matérielles*

This French legal concept applies to an international arbitration in France regardless of the application of French substantive or French procedural law – even where, for example, the parties have expressly chosen English or German law. This may require explanation amongst non-French lawyers.⁹ It is not *lex mercatoria*; but (as we shall see) it is neither fish, nor fowl, nor fresh red herring. A *règle matérielle* expresses the will of the French courts and of the French legislator¹⁰ to elaborate special rules for international commercial arbitration in France, operating independently from any national law, on the premise that no system of conflict of laws can be appropriate to international commercial arbitration. As defined by Prof. Oppetit in 1985, it consists of:

“the rule specific to international relations which gives directly the solution to the merits”¹¹

and by Prof. Francescakis in 1974:

“a rule which provides the answer to an issue of law directly, in concrete terms, as opposed to conflict of law rules which only provide a solution indirectly, in the abstract through the designation of the applicable law of a certain state.”¹²

9. There exists the Swiss legal concept of *règle matérielle de droit international privé*. Whilst it may be related, I am not confident that it is an identical twin.

10. In his Report on the draft decree enacting those provisions of the NCCP relating to international commercial arbitration, the French Minister of Justice stated that its provisions preserved the principles established by the *Cour de cassation* in regard to international commercial arbitration, thereby (implicitly) recording the legislator’s approval of, *inter alia*, *règles matérielles*:

“Les dispositions nouvelles sur l’arbitrage international ne concernent que la procédure et ne remettent nullement en cause les principes maintenant bien établis par la jurisprudence de la Cour de cassation en ce qui concerne le régime juridique de l’arbitrage international...” (See the full text of the report published in ROBERT, *L’arbitrage*, 6th ed. (1993) p. 334.)

11. OPPETIT, “Le Développement des Règles Matérielles”, *Travaux du Comité Français de DIP*, séance du 23 novembre 1985, p. 123:

“la norme propre aux rapports internationaux qui énonce directement la solution applicable au fond”.

12. FRANCESCAKIS, “Le principe jurisprudentiel de l’autonomie de l’accord compromissoire après l’arrêt Hecht de la Cour de cassation”, *Rev. arb.* (1974) p. 67:

“une règle qui fournit directement, concrètement la solution d’une question de droit par opposition aux règles de conflit de loi qui ne fournissent qu’indirectement, abstraitement, cette solution par la désignation comme applicable de la loi interne d’un Etat.”

Earlier Prof. Goldman also defined its broad character:

“*Règles matérielles* are rules which, in opposition to those designated by the classical conflict of law system, are designed for international relations and which directly solve the problems arising in an international relation.”¹³

And as summarized by Prof. Fouchard in 1982:

“Its most recent tendencies [i.e., of French jurisprudence] showed a growing favour, in the form of *règles matérielles* specific to international arbitration, and in the substance for the recognition of the widest autonomy of arbitration from State laws.”¹⁴

b. *Place of règles matérielles in substantive law*

Accordingly, *règles matérielles* do not, necessarily, form part of French substantive law. Indeed, at the request of, *inter alios*, the French delegation, “arbitration agreements” were expressly excluded from the scope of the 1980 Rome Convention on the Applicable Law to Contractual Obligations on the grounds that procedural and contractual aspects were difficult to separate in an arbitration agreement, that the doctrine of autonomy (i.e., of the substantive contract) was already accepted in the draft Convention¹⁵ and that by Art. 1(2)(h), the Rome Convention did not apply to *procedure*. From all of which we may deduce that the French doctrine of the autonomy of an arbitration clause (being a *règle matérielle*) was *not* regarded as a pure rule of French substantive law. However, *règles matérielles* do not, necessarily, form part of French procedural law. In his Report on the draft decree enacting those provisions of the New Code of Civil Procedure relating to international commercial arbitration in 1981, the French Minister of Justice stated that these provisions concerned only procedure and left intact the well-established principles regarding the legal regime of international

13. GOLDMAN, “Règles de conflit, règles d’application immédiate et règles matérielles dans l’arbitrage commercial international”, *Travaux du Comité Français de DIP*, séance du 20 novembre 1967, p. 121:

[règles matérielles sont ...] Des règles qui, à l’encontre de celles que désigne le système classique de conflit de lois, ..., sont d’abord conçues pour les relations internationales, qui opposent directement la solution des problèmes qui se posent dans une relation internationale.

14. FOUCHARD, “L’arbitrage international en France après le décret du 12 mai 1981”, *JDI* (1982) p. 376:

“Ses tendances [càd de la jurisprudence française] les plus récentes manifestaient une faveur croissante, en la forme, pour des règles matérielles propres à l’arbitrage international, au fond, pour la reconnaissance de la plus large autonomie de l’arbitrage par rapport aux lois étatiques.”

15. See NORTH, ed., *Contract Conflicts*, p. 10; and the GIULIANO/LAGARDE Official Report on Art. 1(1)(c) of the Rome Convention.

arbitration.¹⁶ The Conseil d'Etat had previously required the Minister to remove from the draft decree provisions which (as it considered) touched upon fundamental principles of contract and not only procedure. These provisions apparently included the *règles matérielle* on the autonomy of an arbitration clause contained in an international contract; and we can therefore deduce that such *règles matérielles* were not regarded as pure rules of French procedural law. Yet, *règles matérielles* have both substantive and procedural effect on an international arbitration in France. Whatever its hybrid nature, it will depend upon the content of the particular *règle matérielle* whether its effect is substantive or procedural (or both).

c. *Source of règles matérielles*

The sources of such *règles matérielles* are equally hybrid in French law, deriving from both international and domestic sources. The former can find their source in the form of international conventions (such as the 1958 New York Arbitration Convention or the 1980 Vienna Sales Convention), whilst the latter include French jurisprudence in commercial arbitration. Amongst *règles matérielles* in French jurisprudence, we find the decisions of the French courts on the validity of arbitration clauses in international commercial contracts: *Mardelé* and *Dambricourt* (1930-31);¹⁷ the autonomy of the arbitration clause from the international contract in which it is physically embedded: *Gosset* (1963);¹⁸ and the capacity of States to enter into arbitration agreements in the field of international trade: *San Carlo* and *Galakis* (1964-66).¹⁹ In addition, there exist *règles matérielles* originating in arbitral jurisprudence. These include the important doctrine of *Groupe de sociétés* which evolved from the Dow Chemicals ICC award of 23 September 1982 (whereby non-parties to an arbitration agreement can nonetheless find themselves parties to the arbitration and bound by the resulting award, for better or worse). Again, this doctrine applies, as a *règle matérielle*,²⁰ even where the parties named in the arbitration agreement have expressly chosen a foreign procedural law and a foreign substantive law for their international arbitration in Paris, within Arts. 1494 and 1496 of the NCCP.

The precise jurisprudential basis for the application of such *règles matérielles* remains disputed in French law. It is certainly linked to France as the *lex loci arbitri*; but some commentators contend that *règles matérielles* apply only indirectly as a result of an implicit conflict of law rule, whilst others contend that the rules apply directly in the field of

16. "... les principes maintenant bien établis en ce qui concerne le régime juridique de l'arbitrage international..." per The Minister's Report (see note 10 *supra*).

17. *Mardelé*, CCass. 19 February 1930; *Dambricourt*, CCass. 27 January 1931, where the *Cour de cassation* recognized the validity of an arbitration clause for an international commercial contract made before the Law of 31 December 1925. (The Law of 1925 recognized the validity of arbitration clauses in specified commercial transactions, ostensibly leaving in force for other transactions the invalidatory effect of Art. 1006 of the Code of Civil Procedure).

18. *Gosset v. Caparelli*, Cass.Civ. 1er, 7 May 1963.

19. *Capitaine du San Carlo*, Cass.Civ. 1er, 14 April 1964; *Trésor public v. Galakis*, Cass.Civ. 1er, 2 May 1966.

20. See note by TSCHANZ on *Société Korsnas Marma v. Société Durand-Auzias*, Paris, 30 November 1988; *Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co. Ltd., and others*, Paris, 14 February 1989, Rev. arb. (1989) p. 691. See also BATIFFOL and LAGARDE, *Droit international privé*, 7th ed. (1983) vol. I, p. 301; and AUDIT, *Droit international privé* (1991) pp. 77-78.

international trade, independently from any conflict rule. The latter approach appears to espouse a “common law” of arbitration, wholly independent of French law; and several distinguished French commentators have recently criticized this impossible attempt to escape French conflict rules completely. Prof. Audit acknowledges that *règles matérielles* are international regarding their purpose, but affirms that their origin remains national; therefore in principle *règles matérielles* cannot escape conflicts of law: their application presupposes that the legal system of which they form a part has previously been applied, with its conflict of law rules indirectly applying the particular *règle matérielle*.²¹ Profs. Loussouarn and Bourel also conclude that the doctrine of *règles matérielles* cannot achieve what certain of its supporters aspire to: a common law of arbitration. This impossibility is not due to the nature of the doctrine, but to its national source; and for this to be different, the rules of private international law would need to have an international, not national, origin.²² The debate continues in France; and it may yet emerge that the true source of *règles matérielles* does lie in a procedural common law, or “*lex mercatoria*”, being inspired by the same philosophy.²³ For the time being, whilst its innovative character renders the concept controversial, its usefulness for international commercial arbitration can hardly be denied. Wherever national laws become less intrusive in the conduct of arbitration, important gaps remain. This French legal concept provides an attractive means for filling those gaps.

21. AUDIT, *ibid.*, p. 8:

“Des dispositions de ce type [règles matérielles édictés pour les rapports de commerce international] sont internationales par leur objet, mais elles demeurent nationales par leur source. En principe, elles n’échappent donc pas aux conflits de loi: leur application à un rapport donné suppose que l’ordre juridique qui les édicte soit préalablement désigné par la méthode indirecte évoquée ci-dessus [méthode des conflits de loi].”

22. LOUSSOUARN and BOUREL, *Droit international privé* (1993) p. 50:

“Toutefois, elle [la méthode de règles matérielles] est impuissante à satisfaire l’une des aspirations des partisans du droit international privé matériel: la création d’un droit matériel commun. Cette impuissance tient moins à sa nature qu’à sa source. Toute règle de droit émanant d’un juge national suppose, quel qu’en soit la nature, la compétence de ce juge et sa saisine... Pour qu’il en aille différemment, il faut que les règles de droit international privé matériel puisent leur racines dans des sources internationales.”

23. In “The New Lex Mercatoria”, *Liber Amicorum for Lord Wilberforce* (1987) Lord MUSTILL classified several *règles matérielles*, without using the term, as rules of *lex mercatoria* (including those relating to *Groupe de sociétés*, Gold Clauses, the capacity of States to enter into arbitration agreements and cross-claims operating as set-off); but it is suggested that he is right to query whether certain of these procedural rules pertain to *lex mercatoria* rather than, in his words, “a principle of international *ordre public*”: see p. 175. In ROBERT, *L’arbitrage*, 6th ed. (1993), the doctrine of *règles matérielles* is considered together with “*ordre public international*”: see p. 315 et seq. Whereas *ordre public* is generally negative and works as a destroyer of bargains, the doctrine of *règles matérielles* is positive, working to fill gaps in order to make such bargains work. It may nevertheless be attractive to see both as different sides of the same coin.

2 *English Arbitration*

A significant change has occurred in the practice of international arbitration in London since the 1979 Act. There is now a much greater incidence of cases where issues of private international law arise; and it would no longer be possible to say, as did Michael Mustill QC in 1975, that “conflicts issues rarely arise in England, even in arbitrations with significant foreign contacts.”²⁴ Their treatment differs from French law. First, English law regards arbitration agreements as substantive contracts, not civil procedural contracts; and it was for this reason that England wished to include “arbitration agreements” within the 1980 Rome Convention, an argument which did not prevail (see Art. 1(2)(d) of the Convention). Second, the English courts have expressed the view that “contracts are incapable of existence in a legal vacuum”, per Lord Diplock in *Amin Rasheed* (1984);²⁵ but so long as a law is chosen (English or foreign), commercial parties have long enjoyed the widest freedom in agreeing the substantive law applicable to their commercial transaction, including their arbitration agreement. Third, English law requires an arbitration taking place in London to have a procedural law; and it will not recognize the concept of an arbitral procedure (in Lord Justice Kerr’s striking phrase) “floating in the transnational firmament, unconnected with any municipal system of law.”²⁶ Under English conflict rules, an arbitration with its seat in London will be ordinarily subject to English procedural law; but the parties can choose a foreign procedural law. If so, the English Courts will give effect to that contractual choice (subject to public policy), however problematic the consequence that a foreign procedural law may impinge on the conduct of the arbitration or the finality of the resulting award. As Mr. Justice Saville recently held in *Union of India v. McDonnell Douglas*:

“English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against that is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities”²⁷

24. See SMEDRESMAN, “Conflict of Laws in International Commercial Arbitration: A Survey of Recent Developments”, Calif. W. Intl. L.J. (1977) p. 263 at p. 291.

25. *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co* [1984] AC 50 at p. 65; see also *Forsikringsaktieselskapet Vesta v. Butcher* [1989] AC 352; and *The “Star Texas”* [1993] 2 Lloyd’s Rep 445 at p. 450.

26. See Kerr LJ in *Bank Mellat v. Helliniki Techniki* [1984] QB 291 at p. 301; and *Naviera Amazonica v. Cie Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116. The accuracy of the former dictum is left untouched by the decision of the House of Lords reversing *Bank Mellat* in *Coppée Lavalin v. KenRen Chemicals* [1994] 2 WLR 631, although in *The Star Texas* [1993] 2 Lloyd’s Rep 445, it was held that an arbitration clause, as distinct from a pending arbitration, could have a floating procedural law (or none) and still be valid under English law: the clause there provided for arbitration “in Beijing or London in defendant’s option”.

27. *Union of India v. McDonnell Douglas* [1993] 2 Lloyd’s Rep 48 at p. 50; ICCA *Yearbook Commercial Arbitration* XIX (1994) p. 235; and in addition to the authorities there cited, see *Dallal v. Bank Mellat* [1986] 1 QB 441 at p. 458 and the subsequent decision of Mr. Justice Potter in *Sumitomo Heavy Industries v. Oil and Natural Gas* [1994] 1 Lloyd’s Rep 45 (which also concerned a similarly unsuccessful argument that Indian law was the *lex arbitri* of a London arbitration). This approach

Such complexities are illustrated by the recent *Singer* and *Rupali* cases, with Indian and Pakistani procedural laws, respectively, applying to arbitrations held and awards made in England, as decided by the Indian and Pakistani courts.

a. Double separability

For international commercial arbitration in England, against this background, there would be an obvious benefit in characterizing as much as possible under the description of substantive law, as chosen by the parties or determined by the arbitrators. That solution would reduce the scope of English procedural law, and it would escape many of the problems of one or more procedural laws interposing itself between the parties' choice of law and the conduct of their arbitration. English law may be working towards such a solution. There is a growing recognition by the English courts that an arbitration taking place under an arbitration clause in a substantive contract necessarily involves two separate arbitration contracts: the doctrine of *double separability*.²⁸ The first contract is the arbitration clause; and it is the *continuous* arbitration contract between the parties which may give rise to more than one arbitration in the event of successive disputes. It has been described as "nearly if not quite a mutual conditional option".²⁹ It has also been analyzed as an offer by one party to agree an arbitration reference if, when and as often as the other party calls upon that first party to do so; the offer being irrevocable and supported by consideration.³⁰ The second contract is the relationship called into existence by the claimant's exercise of the option conferred by the continuous arbitration contract which then takes the shape of a bilateral contract between the disputant parties. That "individual" arbitration contract may become multilateral as the arbitrators and (if applicable) the arbitral institution assume contractual relations with the parties on the same terms. Both arbitration contracts are separable from the substantive contract and from each other; and each can be governed, in theory, by a different substantive law.³¹ Lord Justice Staughton has characteristically raised the ghost of Monsieur Jourdain to suggest that commercial men might be astonished to learn that when claiming arbitration, they were in law accepting a continuous offer to arbitrate and

was implicitly approved by Lord Mustill in *The Channel Tunnel Case* [1993] AC 334 at p. 357H; ICCA *Yearbook Commercial Arbitration* XIX (1994) p. 736.

28. This phrase (of recent invention) is further explained elsewhere: see BOYD and VEEDER, "Le développement du droit anglais de l'arbitrage depuis la loi de 1979", *Rev. arb.* (1991) p. 210 at p. 222.

29. Mr. Justice Phillips in *The London Steamship Owners Mutual Insurance Association Limited v. Bombay Trading Co Limited (The "Felicie")* [1990] 2 Lloyd's Rep 21, approving the passage in MUSTILL and BOYD, *Commercial Arbitration*, 1st ed., at p. 453; for the same passage, see now the second edition at p. 506.

30. See Staughton LJ in *Furness Withy (Australia) Pty Limited v. Metal Distributors (UK) Limited (The "Amazonia")* [1990] 1 Lloyd's Rep 236 at p. 244.

31. See Mr. Justice Mustill in *Japan Line Limited v. Himoff Maritime Enterprises Limited (The "Kehrea")* [1983] 1 Lloyd's Rep 29 at p. 33; Mr. Justice Mustill in *Black-Clawson v. Papierwerke* [1981] 2 Lloyd's Rep 446 at p. 455; Mr. Justice Phillips in *The Almara Prima* [1989] 2 Lloyd's Rep 376 at p. 381, interpreting Mr. Justice Devlin in *Westminster Chemicals v. Eichholz* [1954] 1 Lloyd's Rep p. 99; and Lord Mustill in *The Channel Tunnel Case* [1993] AC 334 at p. 357.

thereby creating a new contract with their disputant.³² The doctrine of double separability is none the worse for that. It is yet another legal fiction, and most businessmen would be no less surprised to learn that an arbitration clause was an autonomous contract from the substantive contract in which it was contained.

b. *English version of règle matérielle*

Like the French *règle matérielle*, this doctrine in English law could also provide a solution towards reducing the difficulties between substantive and procedural law. Whilst both arbitration contracts give rise to rights and obligations, the English doctrine makes the substantive aspects of the arbitration predominate over its procedural aspects as contractual terms of one or both arbitration contracts. It points to a distinction between a “procedural” *lex loci arbitri* imposed as a legal effect of the arbitral seat and a “substantive” *lex arbitri* chosen by the parties. Where the parties have chosen a substantive law, expressly or implicitly, to govern their arbitration contracts, such choice would be recognized by the English courts; and that substantive law, by implying appropriate contractual terms, could significantly reduce, but not eliminate, the clash between the English or foreign procedural law and the chosen substantive law. In particular, it would leave much less room for that procedural law to operate as the *lex loci arbitri*. It remains to be seen whether these proposals can work with any of the three topics under discussion.

III LIMITATION DEFENCES

There is no all-embracing international convention on limitation periods; the UNCITRAL Model Law is silent on this point; and as Prof. Sandrock has recently concluded, there are no general principles on limitation embraced by “*lex mercatoria*”.³³ There is thus no source of law on limitation other than national law.

1. *Paris Arbitration*

Under French law, the defence of *prescription* is not procedural. It is classified as substantive.³⁴ If French law is not the substantive law applicable to the claim (or counterclaim), then limitation has no application as a matter of French law. There is no *règle matérielle*. Nothing could be more straightforward.

2. *London Arbitration*

For a long time, the position under English law was complicated because limitation was generally classified as procedural – but no longer. For practical purposes, English law

32. See *Furness Withy (Australia) Pty Limited v. Metal Distributors (UK) Limited (The “Amazonia”)* [1990] 1 Lloyd’s Rep 236 at p. 244.

33. SANDROCK, “Arbitrator Freedom”, 3 *American Rev. Int. Arb.* (1992) p. 30 at p. 53.

34. MAZEAUD and CHABAS, p. 1203 et seq.; and see BATIFFOL and LAGARDE, *Droit International Privé*, 7th ed., vol. 2, p. 534.

can now be equated with French law for international arbitration where the Foreign Limitation Periods Act 1984 applies. By Sect. 5, the 1984 Act applies to arbitration; and by Sect. 1, it applies the general principle that limitation is decided by reference to substantive law. The English Limitation Statutes are now inapplicable unless English law is the applicable substantive law.³⁵ It was a long journey as a matter of English legal history; and for our purpose, the eventual solution is instructive. The first Limitation Act 1623 did not refer to arbitration; and the first Arbitration Act 1698 did not refer to limitation. Sect. 3 of the Civil Procedure Act 1833 next provided that: “all actions of debt upon any award, where the submission is not by specialty” shall be commenced and sued within six years after the cause of action. Apart from this provision limiting time for the enforcement of an award, it appears to have been a moot point until the Arbitration Act 1934, whether the Limitation Act 1623 applied to arbitrations at all.³⁶ The 1934 Act laid such doubts to rest: an arbitrator was then bound generally to give effect to a defence based upon the Limitation Statutes;³⁷ and Sect. 16 of the 1934 Act introduced a special code for consensual arbitration proceedings.³⁸ In the Notes on Clauses for Clause 1(1) of the Arbitration Bill 1934 (which became Sect. 16(1) of the Act), the Parliamentary draftsman’s intent was expressly stated: “... the effect of this subsection is to make the statutes of limitation apply to arbitrations just as they apply to actions in the High Court”.³⁹ This limitation defence was clearly procedural, applying to any claim in a London arbitration regardless of the substantive law, or *lex causae*.

Eventually, this state of affairs gave rise to consternation where international parties unwittingly chose London as a convenient place for their arbitration, little realizing that the more generous periods of limitation under the substantive law applicable to their principal contract were displaced by the shorter English limitation period. For example, in ICC award no. 4491 of 1984, the seat of the arbitration was London and the substantive law of the principal contract was the law of Finland.⁴⁰ The parties were respectively Finnish and Australian; and there was no link with England save for the parties’ choice of London in their ICC arbitration clause. Under Finnish law, there was

35. See DICEY and MORRIS, *op. cit.*, p. 186 et seq.; and NORTH, *Private International Law Problems in Common Law Jurisdictions* (1993) p. 141.

36. Contrast *Re Astley* (1899) 68 LJQB 252, 80 LT 116 and paragraph 44(c) of the 1927 “McKinnon Committee’s Report on the Law of Arbitration” (Cmnd. 2817).

37. See HOGG, *The Law of Arbitration* (1936) p. 12 et seq.; Sect. 169(1) of the 1934 Act was later reenacted as Sect. 27(1) of the Limitation Act 1939 and is now Sect. 34(1) of the Limitation Act 1980.

38. It included arbitration agreements in the form of “*Scott v. Avery*” clauses, thereby reversing the effect of the decision in *Board of Trade v. Cayzer Irvine (“The Clan Maclachlan”)* [1927] AC 610, affirming [1927] 1 KB 269, 274 (CA); ann. CORBIN (1928) LQR 24 at p. 32. (The case concerned a *Scott v. Avery* clause, but judicial doubts were expressed in the Court of Appeal (particularly by Scrutton LJ) and in the House of Lords whether an arbitrator was generally bound to give effect to a limitation defence where the arbitration agreement was in a more ordinary form (see Scrutton LJ at p. 291 et seq. and Romer J at p. 296). In the House of Lords, Lord Phillimore was prepared only to assume that such might be the law (at p. 629; contrast Lord Cave LC at p. 614).

39. *Notes on Clauses, “Memorandum” on the Arbitration Bill 1934*, p. 14, Public Record Office, Kew; LCO 2/1789.

40. JARVIN and DERAINS, *Collection of ICC Arbitral Awards 1974-1985* (1990) p. 539.

no period of limitation; and thus the claim was not time-barred under the *lex causae*. However the sole arbitrator applied English conflict rules where he found that the English Limitation Act 1980 was procedural; applying English procedural law, he decided that the relevant limitation period was six years under the 1980 Act; and it followed that the claim was time-barred, as a direct result of choosing London as the place of the arbitration.⁴¹ In his commentary on this award, Mr. Jarvin criticized the arbitrator's approach in applying the *lex fori* beyond clear mandatory rules of *ordre public* where the application of that *lex fori* arises only by virtue of the parties' agreement on the seat of arbitration:

“Should not the application of the *lex fori* be restricted to the confirmation of the existence of party autonomy regarding the choice of a *lex causae*, and should not the arbitrator apply the *lex causae* only, except for those provisions of the *lex fori* which directly concern public policy? The application of *lex fori* provisions inconsistent with the *lex causae* would in general be less desirable if it concerns an international relation, and in particular if both parties are foreign. In restricting the application of the *lex fori* to compulsory provisions, the choice of the place in an international commercial arbitration would be of less consequence.”⁴²

Mr. Jarvin's criticism had already been foreseen by the Law Commission. In its Report of June 1982 on the Classification of Limitation in Private International Law,⁴³ it proposed that for both litigation and arbitration the general principle should be the application of the *lex causae*, subject to a public policy exception. The 1980 Rome Convention had already included within its scope of the applicable law, by Art. 10(1)(d): “the various ways of extinguishing obligations, and prescriptions and limitation of actions”, subject also to an exception for public policy under Art. 16 (which includes both English and Community *ordre public*). With English procedural law playing no part on limitation (save for conflict rules), there is now no difficulty in identifying the applicable limitation periods pleaded as a defence. For international arbitration, the benefit of pushing the relevant law into the substantive law chosen by the parties, or their tribunal, is self-evident. The only real difficulty could arise on the public policy exceptions under either the 1984 Act or the 1980 Rome Convention; but none appears to have arisen so far.⁴⁴

41. See DICEY and MORRIS, *op. cit.*, vol. 1, p. 184 et seq.

42. JARVIN and DERAIS, *op. cit.*, p. 542:

“L'application de la *lex fori* ne devrait-elle pas être limitée à la confirmation de l'existence de l'autonomie des parties de choisir une *lex causae* et l'arbitre ne devrait-il pas appliquer uniquement la *lex causae*, sauf pour les dispositions de la *lex fori* ayant clairement trait à l'ordre public? L'application de règles de la *lex fori* incompatibles avec la *lex causae* seraient de façon générale moins souhaitables dans un différend international, dans le cas en particulier où les deux parties sont étrangères. En limitant l'application de la *lex fori* aux dispositions de nature obligatoire, l'importance du choix du lieu d'un arbitrage commercial international se trouverait réduite.”

43. Law Commission Report No. 114 (Cmnd. 8570).

44. In ICC Award no. 5460 of 1987, where the seat of the arbitration was London and the proper law of the principal contract was the law of South Africa, the sole arbitrator applied the *lex fori* to the

IV. INTEREST

In all international arbitrations where a claim for the payment of money is advanced, it is highly probable that the claimant has also suffered a financial loss resulting from late payment of the principal amount. That loss can amount to a significant proportion of the total claim; and in certain cases, it can exceed the principal amount. In a modern arbitration régime, it is unthinkable that a claimant should not have the right to recover that loss in the form of interest. It is surprising that any difficulties can lie in the path of such a claim; but they can.⁴⁵

1. *Paris Arbitration*

Under French law, a claim for interest within the arbitration is characterized as substantive. For example, Art. 1153 of the Code Civil prescribes that interest at legal rates⁴⁶ is the only remedy for late payment of a certain sum. Being substantive French law, it is hardly surprising that the subject barely occurs in the leading works on commercial arbitration.⁴⁷ Where the parties have not chosen a substantive law allowing a claim for interest to be advanced for late payment of money or damages, there can be difficulties. There appears to be no general principle to be extracted from trade usage or *lex mercatoria* – which leaves room for a future *règle matérielle*.

2. *London Arbitration*

In England the historical development of the right to interest has been, to say the least, unfortunate. The laws of usury (shared by Scotland and Ireland) have ensured a difficulty in the development of a right to general damages for failure to pay money timeously;⁴⁸ and the difficulty is fully reflected in English law. There is a difference between a claim for simple interest as damages and a claim for compound interest as equitable compensation. The latter claim in equity is substantive;⁴⁹ the former is substantive if it is a claim for special damages at common law (where it could also be advanced as a claim

defence of prescription, namely the six year limitation period prescribed by the English Limitation Acts: JARVIN and DERAIS, *Collection of ICC Awards 1986-1990* (1994) p. 136. Given that the ICC arbitration was commenced after the commencement date of the 1984 Act, the arbitrator's approach seems flawed, although the full explanation may not be available from the edited award.

45. See WETTER, "Interest as an element of damages in the arbitral process", *Int. Financial L. Rev.* (December 1986); and HUNTER and TRIEBEL, "Awarding Interest in International Arbitration", 7 *Journal of Int. Arb.* (1989) p. 7.

46. Such rates are prescribed by decree, made annually under Law No. 75-69 of 11 July 1975.

47. The ICC has published useful extracts from ICC awards on the award of interest under Swiss, Kuwaiti, Libyan, Yemeni, Egyptian, New York, Korean, Swiss, Austrian, Yugoslav and Netherlands substantive law: see 3 *ICC Bulletin* (1992, no. 1) p. 15 and (1992, no. 2) p. 46.

48. From *London, Chatham and Dover Railway Co v. South Eastern Railway Co* [1893] AC 429 to *President of India v. La Pintada Cia Navigacion SA ("La Pintada")* [1985] AC 104.

49. For example, see *Westdeutsche Landesbank Girozentrale v. Islington Borough Council* [1994] 1 WLR 938.

for compound interest).⁵⁰ A claim for simple interest as general damages before the High Court is otherwise a statutory claim under Sect. 35A of the Supreme Court Act 1981, being a mixture of English substantive and procedural law. It is substantive as regards the liability to pay interest as damages but the rate of interest may be determined (semble) by English procedural law.⁵¹ There is room for substantial law reform. Powerful interest groups, however, have frustrated several attempts to effect statutory law reform over the last sixty years;⁵² and the position on interest before the English Court defies description here. At the time of writing, it is regrettably beyond any sensible law reform within the foreseeable future.

Fortunately, the position for London arbitration was substantially clarified with the enactment in 1982 of a new provision in the 1950 Act. Sect. 19A now provides that every arbitration agreement, subject to the parties' contrary agreement, shall be deemed to contain a provision that the arbitrator may award simple interest in certain circumstances up to the date of the award.⁵³ (The position on post-award interest lies outside the scope of this paper).⁵⁴ This amendment was drafted and enacted by Parliament in 1982 with surprising ease. It was perhaps prompted by a decision in 1979 of the Supreme Court in Victoria, Australia,⁵⁵ which persuasively demonstrated that the leading English authority on the arbitrator's power to award interest was fundamentally flawed in its reasoning.⁵⁶ Sect. 19A also enacted recommendations first made by the

50. *Wadsworth v. Lydall* [1981] 1 WLR 588; and see BOYD "Interest for the Late Payment of Money", 1 *Arbitration International* (1985) p. 153 at p. 157.

51. See DICEY and MORRIS, *op. cit.*, vol. 2, p. 1444 et seq.; the editors there strongly criticize *Midland International Trade v. Prince Ahmed Bin Turki Al Sudairy & ors* (11 April 1990; unreported) where Mr. Justice Hobhouse held that Sect. 35A was wholly procedural.

52. The 1934 Act did not include a provision on the award of interest by arbitrators because it was regarded by the sponsoring department as a "major issue" and a more general provision for the English Courts had just been deleted from the Administration of Justice Bill because it would have raised "a very controversial question and would overload the Bill" (Notes on Clauses, "Memorandum", p. 48; Public Record Office, Kew; LCO 2/1789). The Law Commission's proposed reform in 1978 was defeated under political pressure by powerful special interest groups: see NORTH, 101 *LQR* (1985) p. 338 at p. 349 and BOYD, *op. cit.*, p. 156 (who identifies the Confederation of British Industry and accountancy bodies amongst opponents of reform).

53. The Administration of Justice Act 1982; for the text of Sect. 19A of the 1950 Act, see MERKIN, *Arbitration Law* (1991) App. A-10. (For reasons known only to the publishers, this provision is accidentally omitted in the text of the 1950 Act published in MUSTILL and BOYD, *op. cit.*).

54. See Prof. Dr. Y.L.T.S., 1 *Arbitration International* (1985) p. 190, whose proposed reform for post-award interest appears to have been adopted by the DAC for the New draft English Arbitration Bill: *Arbitration International* (1994) p. 189 at p. 231.

55. *Barlin-Scott Air Conditioning v. Robert Salzer Constructions* (26 April 1979; Sir John Young CJ, McInerney & Fullagar JJ; unreported).

56. *Chandris v. Isbrandtsen-Moller* 84 *LIL* 347; [1951] 1 *KB* 240, where the Court of Appeal decided (in an unreserved judgment reversing Mr. Justice Devlin that an arbitrator had an implied power to award simple interest based on an analogy to the powers of a "court of record" under Sect. 3 of the Law Reform (Miscellaneous Provisions) Act 1934.

1927 McKinnon Committee on the Law of Arbitration.⁵⁷ Let no one accuse the English legislator of unseemly haste.

As drafted, this power under Sect. 19A is substantive and not procedural. It is a term of the arbitration agreement, sounding in contract, implied by operation of English substantive law. Where an arbitrator in Scotland was sitting under an arbitration agreement governed by English substantive law, that arbitrator would have power to award interest under Sect. 19A of the 1950 Act, just as if it were set out as a term of the arbitration agreement. Conversely, if an arbitration was taking place in London under an arbitration agreement expressly governed by French law, it is not easy to see how the London arbitrator could exercise a power by reference to Sect. 19A of the 1950 Act. There is room for doubt because Sect. 19A of the 1950 Act may also affect both the “first” and “second” arbitration contracts considered above. As Mr. Justice Mustill held in *Black-Clawson* (1981), even if the principal contract and first “continuous” arbitration contract were there governed by English law, the second “individual” arbitration contract was governed by Zurich law as the agreed seat of that arbitration.⁵⁸ Accordingly, it would be possible to have an arbitration agreement governed by French substantive law (i.e., the first arbitration contract) but to have the second arbitration contract governed by English law as the *lex arbitri*, including Sect. 19A of the 1950 Act. This appears to have been the approach in ICC Award no. 5731 (1989), where the ICC arbitrators sitting in London applied Sect. 19A of the 1950 Act as the *lex fori*⁵⁹ (by which they presumably meant the *lex arbitri* chosen by the parties). Although no English court would ever use the phrase, it is not hard to see that Sect. 19A of the 1950 is a legislative *règle matérielle*.

The position in England is nonetheless unsatisfactory for such an important matter. Where parties do not choose expressly a substantive law which unequivocally grants to the arbitrators a general power to award interest as damages, it would be safer if those

57. See the 1927 McKinnon Report, *op. cit.*, para. 29, where it considered that there was no English arbitral power to award pre-award interest. The same view was expressed by the Divisional Court in *Podar Trading v. François Tagher* [1949] 2 KB 277 and by Devlin J in *Chandris v. Isbrandtsen-Moller* (1950) 83 Ll L 385 at p. 391. Lord Bramwell’s Arbitration (No. 2) Bill 1889, defeated by Lord Halsbury, had earlier proposed a simple provision in Clause 90: “an arbitrator may in his award direct that interest at the current rate be paid on the sum awarded”; See “Arbitration (No. 2) Bill 1989” reproduced in *Arbitration International* (1992) p. 353 at p. 376. (It is noteworthy that Lord Bramwell and his colleagues believed they were only codifying English law, by reference to *In re Badger* (1813) 2 B & Ald 691 – which Lord Denning MR sought vainly to revive in *The Finix* [1978] 1 Lloyd’s Rep 16 at p. 19; See also likewise HOGG, *Arbitration* (1936) p. 129).

58. *Black-Clawson v. Papierwerke* [1981] 2 Lloyd’s Rep 446 at p. 456. The arbitration clause provided:

“... The arbitration on such reference shall take place in Zurich and any question as to the construction or effect of this contract shall be decided [according to the laws of England]...”

59. ICC Case no. 5731, 3 ICC Bulletin (1992, no. 1) p. 18 (*sed quaere*). There would be some support for this approach from Lord Denning MR’s judgment in *International Tank v. Kuwait Aviation* [1975] 1 QB 224, where he held that the power of the English court to extend time for the commencement of an arbitration under Sect. 27 of the 1950 Act was: “an additional statutory term written into the contract” where the principal contract and the arbitration agreement were governed by English substantive law, although the place of arbitration (which had not commenced) might be overseas under a foreign procedural law (p. 233).

parties agreed to a special provision on the right to interest in their arbitration clause or the arbitration rules incorporated by reference into their arbitration agreement, such as Art. 16(5) of the London Court of International Arbitration (LCIA) Rules.⁶⁰ This provision would take effect as a contractual term of their arbitration agreement, with no recourse to the procedural law of the arbitration, including conflict rules of the *lex loci arbitri*. (It would also be helpful if the UNCITRAL Model Law included a special provision on interest, such as was recently added to the Bermudian 1993 Act enacting the Model Law;⁶¹ Scotland may do so by amendment to its Model Law legislation; and England may take a similar approach with Sect. 26 of the draft Arbitration Bill).⁶²

V. CONSENSUAL ASSIGNMENT

There are competing commercial interests to be balanced on the assignment of arbitration agreements. First, international trade requires that debts and other contractual rights be capable of easy transfer by the assignor and enforcement against the debtor by the assignee; and second the debtor has a legitimate right to protection against the stranger thrust upon him. Most legal systems have struggled with this conflict as a matter of court procedure, with common law countries (and German law) generally favouring the assignee and civil law countries generally favouring the debtor.⁶³

The difficulty arises where there has been consensual assignment of contractual rights recognized under the applicable law but no express transfer of the arbitration agreement has been contemplated by the assignor and assignee. The assent of the debtor is not ordinarily necessary for an assignment between assignor and assignee (as distinct from novation); but international arbitration is inherently consensual, involving both rights and obligations. The critical issue is whether the assignee should have both the right *and* the obligation to arbitrate his claim with the debtor. Having agreed to arbitrate under a consensual and private procedure with a named party, why should the law (procedural or substantive) infer that the debtor undertook an obligation to arbitrate with a stranger not of his choosing? Equally, how does that law impose an obligation to arbitrate on the assignee when he has received from the assignor only the benefit of a right under a separate contract? It is surprising that such questions remain largely unresolved in several

60. Art. 16.5 of the LCIA Rules provides:

“... the Tribunal may award that simple or compound interest shall be paid by any party on any sum which is the subject of the reference at such rates as the Tribunal determines to be appropriate, without being bound by legal rates of interest, in respect of any period....”

61. Sect. 31 of the Bermuda International Conciliation and Arbitration Act 1993.

62. Sect. 24 of the draft Bill provides: “The tribunal may on a reference award simple or compound interest at such rate....” This draft has provoked controversy in referring to compound interest, for which reason alone it seems unlikely to survive.

63. See the interesting historical discussion in ZWEIGERT and KOTZ (trans. Weir), *An Introduction to Comparative Law*, 2nd ed., vol. 2, p. 125, in particular p. 139 et seq. (In *Linden Gardens Limited v. Lenesta Limited* [1994] 1 AC 85, the House of Lords recently refused to extend to contractual rights the English rule of public policy striking down prohibitions on the free transfer of real property: see p. 106 et seq. per Lord Browne-Wilkinson).

countries. The survey recently conducted by Dr. Girsberger and Dr. Hausmaninger clearly demonstrates a vast comparative confusion, procedural and substantive, on the legal effect of an assignment of contractual rights on the transfer of an arbitration agreement.⁶⁴ These authors concluded that:

“it would be highly desirable to adopt a uniform substantive rule regulating the issue [of transfer of the arbitration agreement in international commercial arbitration].”⁶⁵

As we shall see, such a conclusion is strongly supported by the position in England and France. (It is suggested Sect. 3(2) of the recent Draft New Swedish Arbitration Act is mistaken in legislating for the contrary result; i.e., by proposing that there only be a right or obligation to arbitrate in the assignee “only in the event that they can be considered to have so agreed”).⁶⁶

(Although Art. 12 of the 1980 Rome Convention governs issues of private international law within the European Union applicable to the voluntary assignment of legal rights, “arbitration agreements” are expressly excluded from its scope: Art. 1(2)(d) of the Rome Convention.⁶⁷ Thus the Rome Convention provides no assistance here; and moreover the acute historical conflict of opinion as to what law should govern the assignment of intangibles, the *lex situs* or the substantive law of the debt, survives intact.)

1. *London Arbitration*

Like French law, an arbitration agreement is generally a wholly separable (or “autonomous”) contract from the substantive contract wherefrom the parties derive their legal relations;⁶⁸ and accordingly, it might have been thought that an assignment of a right under the substantive contract could not by itself operate as a transfer of a right or obligation under the arbitration clause contained in that contract. However, the life of

64. GIRSBERGER and HAUSMANINGER, “Assignment of Rights and Agreement to Arbitrate”, 8 *Arbitration International* (1992) p. 120, where the authors contrast the different positions on assignment generally under the laws of the USA, England (as it stood earlier), Germany, Austria, Switzerland and France. For the recent position under Swiss law, see also the Federal Tribunal’s decision that a contract with an anti-assignment provision precluded the transfer of the arbitration agreement to an assignee: *Clear Star v. Centrala & Centromor*, ann. WERNER, *Journal of Int. Arb.* (1991) p. 13.

65. GIRSBERGER & HAUSMANINGER, *ibid.*, p. 163.

66. See *Arbitration International* (1994) p. 407 et seq.

67. In DICEY and MORRIS, *op. cit.*, vol. 2 at p. 980, it is queried whether Art. 12 does not apply to the assignment of rights under an arbitration agreement, even though such agreements are themselves excluded from the scope of the Convention. Art. 12(1) however applies “the law which under this Convention applies to the contract between the assignor and assignee”; and the Convention applies no law to the arbitration contract.

68. For the most recent statement of the English doctrine of separability applying to a contract initially void or unenforceable for illegality, see *Harbour Assurance v. Kansa* [1993] QB 70. This decision has recently been followed by the Court of Appeal of New South Wales in *Ferris v. Plaister* (17 August 1994; unreported).

the law is not logic; and English law is no exception.⁶⁹ And yet, quite apart from this logical difficulty, the position of an assignee as claimant can still bristle with other difficulties under the law and practice of English arbitration, compounded by the differences under English law between “legal” and “equitable” assignment.⁷⁰ This was not always so. Until recently many commentators assumed, without much or any qualification, that an assignee of a contract was both bound by and might take the benefit of an arbitration clause contained therein.⁷¹ However, whilst the older cases established that an arbitration agreement was ordinarily assignable and bound the assignee to arbitrate at the instance of the debtor, no case clearly established the circumstances in which an arbitration agreement was actually assigned so as to entitle the assignee as claimant to maintain arbitration proceedings in his own name against the debtor. We return to the basic issue: if the debtor wants arbitration as agreed with the assignor, why should the assignee not be obliged to bring the claim against him to arbitration; but why should the debtor be obliged to arbitrate with a stranger? The position in England is now as follows:

Any person “claiming through or under” a party to an arbitration agreement is liable to have his court proceedings against the debtor stayed by the English court under Sect. 4 of the 1950 Act or Sect. 1 of the 1975 Act (enacting the 1958 New York Convention). This phrase originates from Sect. 11 of the Common Law Procedure Act 1854;⁷² and it can apply to a wide class of persons (such as a subsidiary company where the parent is a party to an arbitration agreement with the debtor).⁷³ In 1854, however, the phrase could not apply to legal assignment because such assignments did not exist at English law

69. The Departmental Advisory Committee on the Law of Arbitration was sufficiently concerned over the logic of the argument that it expressed a warning to the United Kingdom Government, to the effect that the English doctrine of separability should be codified without accidentally frustrating consensual assignments of substantive contractual rights: see the DTI Consultation Document of February 1994: *Arbitration International* (1994) p. 189 at p. 228.

70. A legal assignment must be absolute (not by way of charge); it must be in writing by the assignor; and express written notice of the assignment must have been given to the debtor. An equitable assignment is either an assignment of a legal interest which fails to meet one or more of these criteria or an assignment of an equitable interest. (There can also be assignments by statute and by operation of law, which lie outside the scope of this paper).

71. See, for example, *Chitty on Contracts*, 26th ed. (1989) vol. 1, para. 1071; and *Halsbury's Laws of England*, 4th ed., vol. 2, p. 336. The doubts appear in MUSTILL and BOYD, *op. cit.*, 2nd ed., p. 137 et seq.; and MERKIN, *op. cit.*, para. 2.25 et seq.; see also the qualification expressed earlier by HOGG, *op. cit.*, p. 58 et seq. (“... at least where by the terms of the assignment it is clear that the benefit of the arbitration clause is intended to be transferred.”). The intriguing old case of *Banfill v. Leigh* (1800) 8 Term Rep 571; 101 ER 1552, where the equitable assignee was allowed to enforce an award in his own name against the debtor, is complicated by the facts that the arbitration agreement was made between the assignee and debtor and that the assignee was the attorney for the assignor.

72. It was reenacted as Sect. 4 of the 1889 Act, and again as Sect. 4 of the 1950 Act; and the same phrase was used for Sect. 1 of the 1975 Act. It is not “happily worded”, as rightly observed by MUSTILL and BOYD, *op. cit.*, p. 471.

73. *Roussel-Uclaf v. Searle* [1978] 1 Lloyd's Rep 225, a case criticized by MUSTILL and BOYD, *ibid.*, p. 137 and other commentators. Nevertheless, the case is the closest reflection under English law of the subsequent French *règle matérielle* on *Groupe de sociétés*, considered above.

until 1873.⁷⁴ Even thereafter there was no pressing reason to interpret the phrase as a synonym for legal assignments because there were still other classes of persons who could claim “*through or under*” the named party besides assignees; and in any event the statutory phrase could not create (by itself) an assignment or novation of the arbitration agreement.⁷⁵ Nevertheless, the English courts eventually decided that both a legal and an equitable assignee fell within the statutory phrase; and with the decision of Mr. Justice Bingham in “*The Leage*” (1984) under Sect. 1 of the 1975 Act,⁷⁶ the point now seems relatively clear: the burden of arbitration does fall upon a legal and an equitable assignee if he wishes to advance a claim against the debtor falling within the arbitration agreement made with the assignor; and the assignee can similarly apply to the English court for a stay of court proceedings if the debtor commences such proceedings against him in respect of any matter falling within the arbitration agreement (e.g., for a negative declaration of liability).

As for a legal assignee becoming entitled to the benefit of an arbitration agreement, Sect. 136(1)(b) of the Law of Property Act 1925 provides that “all legal and other remedies” for the debt or legal thing in action duly assigned passes from the assignor to the assignee from the date of written notice of the assignment to the debtor. There is no statutory definition of “legal thing in action” in the 1925 Act. It remains at least arguable as a matter of English statutory interpretation that the transfer of legal and other remedies is limited to proceedings in court for a legal thing in action and that it does not extend to remedies under a separate consensual arbitration agreement, particularly where the arbitration clause is governed by a substantive law other than English law or takes the form of a *Scott v. Avery* clause (where an award is stated to be a condition precedent to a cause of action).⁷⁷ It would take a brave advocate to advance the argument because, if successful, it could leave the assignee with no effective remedy to enforce the assigned rights against the debtor, neither litigation nor arbitration.⁷⁸

This statutory provision is limited to legal assignments; and it does not apply to equitable assignments. An equitable assignee cannot become, automatically, the claimant

74. Sect. 25(6) of the Supreme Court of Judicature 1873; and see *Chitty on Contracts*, vol. 1, para. 1391.

75. As was held by Mr. Justice Phillips in “*The Felicie*” [1990] 2 Lloyd’s Rep 21 at p. 25, relying upon a passage in the first edition of MUSTILL and BOYD, *op. cit.*, p. 137, note 7. (This particular passage has been dropped from the second edition: contrast p. 138 note 8).

76. *Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines (“The Leage”)* [1984] 2 Lloyd’s Rep 259 (Mr. Justice Bingham); see also the decisions of the Court of Appeal in *Aspell v. Seymour* (1929) W.N. 152 and *Shayler v. Woolf* [1946] Ch 320; contrast *Cottage Club Estates v. Woodside Estate* [1928] 2 KB 462 and *Bonin v. Neame* [1910] 1 Ch 732 at p. 738 et seq.

77. For *Scott v. Avery* clauses, see MUSTILL and BOYD, *op. cit.*, p. 161 et seq.

78. Moreover, there are powerful dicta the other way. In *Court Line v. Aktiebolaget Gotaverken (The “Halcyon The Great”)* [1984] 1 Lloyd’s Rep 283 at p. 289, Mr. Justice Staughton expressed the tentative view that upon a legal assignment under Sect. 136 of the Law of Property Act 1925, the assignor loses the right to arbitrate and the assignee acquires it; in *The Kelo* [1985] 2 Lloyd’s Rep 85, the same judge assumed that the assignee of a claim under a bill of lading was entitled to bring arbitration proceedings against the shipowner by virtue of Sect. 136; *The Jordan Nicolov* (1990), cited below, is explainable only on the basis that Mr. Justice Hobhouse shared this same view (less tentatively); and MUSTILL and BOYD, *op. cit.*, submit that a legal assignment under Sect. 136 is wide enough to include the right to invoke an arbitration clause, without citation (p. 137).

to an arbitration (prospective or pending) at the moment the assignment becomes effective in equity. The equitable assignee must exercise his equitable right, by bringing the arbitration in the name of the assignor; or by becoming co-claimant with the assignor in the arbitration; or (as we shall see below) it is possible that the assignee can give notice to the debtor of the equitable assignment and maintain the arbitration in his own name alone.

The ensuing practical difficulties are best illustrated by those cases where the assignment, or notice of the assignment, has taken place during the arbitration proceedings. In the case of a legal assignment during the arbitration proceedings, it was held by Mr. Justice Hobhouse in *The Jordan Nicolov* (1990) that written notice of the assignment must be given not only to the debtor-respondent so as to perfect the legal assignment but also that the assignee should intervene in the arbitration by serving written notice to the arbitration tribunal, by analogy with English High Court proceedings.⁷⁹ In that event, the assignee becomes the new claimant in the pending arbitration and the party (if successful on the merits) in whose favour the award would be made. There is no need for fresh arbitration proceedings to be commenced by the assignee. In the event of any time-bar advanced by the respondent, time would stop running as at the commencement of the arbitration by the assignor and not upon notice of the assignment. However, the assignor would remain potentially liable as the original claimant for all costs and expenses of the arbitration incurred prior to receipt of the notice.

This approach leaves unresolved certain practical difficulties. In the case of institutional arbitration, should the notice also be served on the arbitral institution? If the respondent-debtor has a counterclaim against the assignor, then should not the assignor remain a party to the arbitration after receipt of the notice? If so, there is then no exact substitution between assignor and assignee. Conversely, where the respondent relies on a defence by way of equitable set-off against the assignor, that defence must apply also to the claim by the new claimant-assignee, whether or not the assignor remains a party to the arbitration. Are any of these answers different if the assignment relates not to a claim but a counterclaim: does the arbitration then necessarily become triangular, with the assignee as counterclaimant, the assignor as respondent and the debtor as claimant? What does this mean for the appointment, or re-appointment, of the arbitrators where each party is entitled to nominate or appoint its arbitrator under the arbitration agreement? And what is the position in regard to interim awards or orders made prior to receipt of notice: does the claimant-assignee intervene in the arbitration subject to all that has taken place beforehand from the commencement of the arbitration proceedings? Is the

79. *Montedipe v. JTP-RO Jugotanker (The "Jordan Nicolov")* [1990] 2 Lloyd's Rep 11 at p. 18:

"The service of the notice and the intervention in the arbitration provide as effective and satisfactory a method of carrying on the proceedings as that which is provided in relation to litigation by Order 15 rule 7(2) of the Rules of the Supreme Court."

This rule provides for the change of parties on assignment, whereby the court may order that the assignee be made a party to the court proceedings and those proceedings be carried on as if the assignee had been substituted for the assignor from the outset: see *The 1995 Supreme Court Practice*, vol. 1 at p. 213 et seq.

claimant-assignee secondarily liable for costs and expenses incurred in the arbitration if the assignor should refuse or fail to pay them? These and other difficulties are inherent in the awkward attempt to assimilate consensual arbitration to the non-consensual procedures of the English High Court.

In the case of an equitable assignment, it was held by the Court of Appeal in *Baytur v. Finagro Holdings* (1992) that at least notice of the equitable assignment must be given to the arbitration tribunal in order for the assignee to submit to the jurisdiction of the arbitrators and to constitute the assignee a claimant in the arbitration. But the Court of Appeal was careful to guard against being understood that even this step would suffice. Lord Justice Lloyd questioned whether the assignee's submission was enough: "Because of the nature of arbitration, as a consensual method of settling disputes, it may be that the consent of the arbitrator, and the other party to the arbitration is required."⁸⁰ Whilst approving of the approach in *The Jordan Nicolov* for legal assignment, the Court of Appeal left unclear the approach for equitable assignment. (The position is particularly troublesome because the Court of Appeal held earlier in *Warner Bros v. Rollgreen* [1976] 1 QB 430 that an equitable assignee by itself could not exercise a legal option; and if a continuous arbitration agreement were indeed a "mutual conditional option", the reservation made by Lord Justice Lloyd is completely justified.)

Moreover, the approach for both legal and equitable assignment appears to be rooted in English procedural law. In *The Jordan Nicolov*, the assignment had taken place in Italy between Italian parties; and in *Baytur*, the assignment took place in France under French law between French parties. Indeed, both judgments expressly refer to the procedural rules of the English High Court; and at first instance in *Baytur*, the Deputy High Court Judge had expressly referred to "English arbitration procedural law" as one basis for his decision that an assignee cannot become party to a pending arbitration unless and until he effectively submits to the jurisdiction of the arbitrators.⁸¹ If the principle derives from English procedural law when English arbitrations are pending, does the same principle apply when the assignment takes place abroad between foreign parties, under a foreign law before the English arbitration has even commenced? The difficulty is compounded by the alternative basis on which the Deputy High Court Judge reached his decision in *Baytur*: the learned Judge, himself a highly experienced practitioner in the field of international commercial arbitration, held that it was an implied contractual term of the reference to London arbitration (i.e., the second "individual" arbitration contract discussed above) that: "the benefit of a pending reference is only capable of transfer by assignment if and when notice is given to the other party and there is a submission of the assignee to the jurisdiction of the arbitrators."⁸² This approach appears to be rooted in English substantive law; and again, although the phrase would never be used by the English courts, it resembles a *règle matérielle*.

There can be at present no confident answers to any of these queries under English law. Accordingly, both equitable and legal assignees have still to consider their rights most carefully in regard to a London arbitration; and consideration should be given to

80. *Baytur v. Finagro Holdings* [1992] 1 QB 610 at p. 619.

81. *Baytur v. Finagro Holdings* [1992] 1 Lloyd's Rep 134, per the Deputy High Court Judge (Kenneth Rokison QC) at p. 144.

82. *Ibid.*, at p. 144.

the express legal assignment of the benefit of the arbitration agreement from the assignor to the assignee (in the absence of consent from the debtor). From the English perspective, law reform also remains highly desirable at the national or international level. This is not covered by the draft New Arbitration Bill recently published by the United Kingdom Government. The Law Commission has proposed that the rights of a third party (including an assignee) against the promisor should be subject to all the promisor's defences, set-offs and counterclaims which would have been available to the promisor in proceedings by the original promisee – including, by inference, the obligation to refer any dispute to arbitration under any applicable arbitration agreement.⁸³ It would be a relatively small step to give such a third party the right to arbitrate his claim against the debtor as a matter of English substantive law; but it might be thought more appropriate to find such a provision in an arbitration statute than a statute abolishing the English doctrine of privity of contract.

2. *Paris Arbitration*

There is no express French legislative provision on the transfer of arbitration agreements where one party assigns contractual rights to another party. The French courts have generally taken the view that there is an automatic transfer of the arbitration clause from the assignor to the assignee where such rights are assigned.⁸⁴ This approach appears to be based upon the application by analogy of Art. 1692 of the Civil Code, which provides that the assignment of a debt includes ancillary rights (such as, a charge, mortgage or guarantee securing the same).⁸⁵ Several commentators have questioned such a mechanical solution under French law because the international arbitration agreement is an autonomous contract; and it is not necessarily governed by the same substantive law (or any) as the principal contract. The logical difficulty posed by the autonomy of the arbitration agreement was succinctly recognized by Prof. Fouchard at the 1988 Paris Colloquium on Arbitration and Third Parties: "This is where the complications begin ...";⁸⁶ and Me Matthieu de Boissésou has expressed the same qualification in his great work on arbitration.⁸⁷

83. See Para. 5(24) of the Law Commission's Consultation Paper No. 121, "Privity of Contract: Contracts for the Benefit of Third Parties", HMSO, 1991.

84. See DE BOISSESON, *Le droit français de l'arbitrage* (1990) p. 545; and GIRSBERGER & HAUSMANINGER, *op. cit.*, p. 130.

85. Art. 1692 of the French Civil Code provides:

"La vente ou cession d'une créance comprend les accessoires de la créance, tels que caution, privilège et hypothèque."

86. "C'est ici que les choses se compliquent ...". "L'arbitrage et les tiers", *Rev. arb.* (1988) p. 431 at p. 469.

87. DE BOISSESON, *op. cit.*, p. 546:

"Il n'est pas interdit, toutefois, de formuler quelques interrogations sur cette solution, au regard de la nature juridique de la convention d'arbitrage."

This mechanical approach was applied by the *Cour d'appel de Paris* in its judgment of 28 January 1988, in *Filmkunst*.⁸⁸ The assignment concerned contractual rights in a doubtless highly cultural film, *Mädchen in Uniform*, which was the subject-matter of a co-production agreement between the French assignor and its German assignee; and the agreement included an arbitration clause in general terms. The court decided that an assignment necessarily implied the transfer from the assignor to the assignee of the arbitration clause which was indivisible from the structure of the contract.⁸⁹ Under Russian law, the same point had earlier arisen before the Foreign Trade Arbitration Commission in *SNE v. Joc Oil* (1984), where the FTAC arbitrators ruled in a “closed” award that an arbitration agreement could not be transferred by the mere assignment of contractual rights under Art. 211(3) of the RSFSR Civil Code. This Russian provision, in terms almost identical to Art. 1692 of the French Civil Code, means that the assignee of the debtor’s obligation also acquires all rights securing performance of that obligation. The FTAC arbitrators concluded:

“An arbitration agreement . . . cannot at all be the subject of cession [assignment]. Being an autonomous procedural contract, it requires the independent agreement of the assignee for submitting him to the jurisdiction which was chosen by the parties to the contract.”⁹⁰

Given that Art. 1692 of the French Civil Code cannot ordinarily transfer a burden onto the assignee, the Russian approach also points to a second weakness in the mechanical approach.⁹¹ Because arbitration consists of both rights *and* obligations, the analogy based on the transfer of mere rights leaves unresolved the position where the debtor seeks to impose upon the assignee an obligation to arbitrate to which neither assignee nor debtor have agreed.

In its subsequent judgment of 20 April 1988 in *Clark*, the *Cour d'appel de Paris* formulated a more subtle solution. The substantive law of the principal contract was here Swiss law; the arbitration was to take place in Switzerland under ICC Rules; and the matter came before the French court on an application by the co-contractor to dismiss the assignee’s claim for want of jurisdiction. The court decided that the

88. *CCC Filmkunst v. Société EDIF*, Rev. arb. (1988) p. 565; see also rapport de GOUTAL: “L’arbitrage et les Tiers”, Rev. arb. (1988) p. 439 at p. 445.

89. *CCC Filmkunst v. Société EDIF*, *ibid.*, p. 565, where the *Cour d'appel* stated:

“Une telle cession implique nécessairement transmission par le cédant au cessionnaire du bénéfice de la clause d’arbitrage indissociable de l’économie du contrat.”

90. *SNE v. Joc Oil* (1984) (Profs. Pozdniakov, Bratus and Naryshkina) eventually reported in *ICCA Yearbook Commercial Arbitration XVIII* (1993) p. 92 at p. 99 et seq. Sect. 211(3) of the Russian Civil Code provides:

“The assignee of the claim also acquires all rights securing performance of the obligation.”

(trans. KIRALFY, *Law in Eastern Europe*, vol. 11 (1966)).

91. See the ICC Award in Case no. 6962 of 1992, para. 7 et seq., *ICCA Yearbook Commercial Arbitration XIX* (1994) p. 187.

arbitration clause contained in an international contract had its own validity and effectiveness which required that it be extended to apply to a person who had entered into the rights (or part of the rights) of a contracting party, provided that the dispute fell within the scope of the arbitration clause. .⁹² This decision was clearly based upon the international character of the transaction and the effect of an international commercial arbitration clause in French law. In form, this solution expresses a classic *règle matérielle*. Indeed the opening phrase used by the *Cour d'appel* ("*La clause compromissoire insérée dans un contrat international a une validité et une efficacité propres . . .*"), is the golden formula for *règles matérielles*; the same phrase was later used by the *Cour d'appel de Paris* in its judgments on the extended doctrine of *Groupe de sociétés*, another *règle matérielle*⁹³ (If French law did apply directly to the transfer of the arbitration agreement, the question could arise whether the assignee's position was affected by Arts. 1597 or 1699 of the Civil Code. The former provides that all assignments of a disputed claim are void where the intended assignee are judges, bailiffs, avocats or notaires; and the latter provides that the debtor can discharge his debt by paying the assignee what the assignee paid for the debt (plus costs and interest) rather than the amount of the debt itself. These provisions, it seems, would not apply to an international arbitration in France (at least where the substantive law applicable to the assignment was not French law). The usefulness of the French *règle matérielle* again proves itself.

VI. CONCLUSION

In the search towards a general solution to these different difficulties, the common approach would first seek to reduce the legal effect of the place of the arbitration (or the *lex loci arbitri*), in favour of the substantive and procedural law (or *lex arbitri*) chosen by the parties. The legal effect of the arbitral seat cannot be completely eliminated; its procedural law, including its conflict rules, must fill gaps even in France; and in England (as in France), there are mandatory rules of the arbitral seat which impinge upon the arbitration, whatever the procedural law chosen by the parties. Next, the general approach would favour a solution under the substantive law chosen by the parties for their principal contract and their arbitration agreement (the first "continuous" contract or the second "individual" contract under English law). That substantive law operates at the beginning of the parties' transaction, whereas a procedural law might not be chosen or applicable until after the arbitration had commenced or with the selection of its seat.

92. *Société Clark International Finances v. Société Sud Matériels Service*, Rev. arb. (1988) p. 570, where the *Cour d'appel* stated:

"*La clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application à la partie venant – même partiellement – aux droits de l'un des contractants, à condition que le litige entre dans les prévisions de la convention d'arbitrage.*" (see GOUTAL, *op. cit.*, p. 439 at p. 445).

93. See the *Cour d'appel*'s decisions of 30 November 1988 in *Société Korsnas Marma v. Société Durand-Auzias* and 14 February 1989 in *Société Ofer Brothers v. Tokyo Marine and Fire Marine Insurance Co*, see Rev. arb. (1989) p. 691 at pp. 694 and 696.

Within this general approach, what follows is a tentative, possibly tendentious, solution to the problems discussed above.

In regard to consensual assignment, unless and until the assignee and debtor are brought together within the existing arbitration agreement originally agreed between the debtor and assignor, there can be no complete answer founded only upon that arbitration agreement; and thus no easy room for any *règle matérielle* or implied contractual term. The preferred solution must be a positive rule of law, deriving from the substantive law applicable to assignable rights, rather than the procedural law of the arbitration (which might not yet exist). As Dr. Girsberger and Dr. Hausmaninger have proposed, there should be a *Uniform Substantive Law Rule* for the transfer of an arbitration agreement consequent upon the assignment of contractual rights falling, in the event of dispute, within the scope of the arbitration agreement. Such a substantive rule would provide for automatic transfer save where the original contractual parties had expressed a contrary intent; it would require the assignor and the assignee to give written notice to the debtor of the assignment and (if applicable) to the arbitrators and arbitral institution; the transfer would both entitle and oblige the assignee and debtor to arbitrate any dispute over the assigned rights; and to protect the debtor, the assignee would receive the benefit of the assignment subject to all substantive and procedural rights then enjoyed by the debtor, i.e., the assignee would step into the shoes of the assignor as at the date of the debtor's receipt of the notice of the assignment. (The precise wording would, as always, be drafted by UNCITRAL).⁹⁴

Limitation and interest affect only parties to the arbitration agreement. Here there is full scope for the parties' arbitration agreement; and we should take heed of the Psalmist's timeless warning against vain hopes for law reform in arbitration: "Put not your trust in princes ...".⁹⁵ Where provisions exist in arbitration rules contractually incorporated into the parties' arbitration agreement, no difficulty exists in applying such terms on limitation or interest (such as, the LCIA Rule on interest). Where the parties are silent, it is a small step to import into such arbitration agreements, save where the parties have expressly stated otherwise, a like provision to the effect that interest and limitation are governed by the substantive law, or *lex causae*, of the relevant claim. Such an approach accords with the reasonable expectations of commercial parties and, broadly, with Arts. 10(i)(c) and (d) of the Rome Convention. Where the substantive law cannot import such contractual terms in the arbitration agreement (such as, the current law of Australia on the confidentiality of an arbitration), the doctrine of *règle matérielle* can import a rational presumption as to what commercial persons reasonably intend by making arbitration agreements in the field of international trade. It is too useful a doctrine to quibble about its true nature or parentage or nomenclature. In this way, it

94. Some commentators advance another solution: the limitation of the legal fiction that is the doctrine of the autonomy of the arbitration clause from the substantive contract. For practical purposes, that doctrine is required for the creation and validity of the arbitration agreement – but the fiction should go no further. It should not stop an arbitration clause forming an integral part of the contract for the purposes of assignment: see, for example, M. ANCEL, "L'actualité de l'autonomie de la clause compromissoire", *Travaux du Comité Français de DIP*, séance du 20 mars 1992, p. 75 at pp. 101-102. For assignment, however, it is both the obligation and the right to arbitrate which falls to be transferred; and this proposal falls short of a complete solution.

95. Psalms 146:3.

may be possible to advance further down the path towards Prof. David's proposed universal law. Otherwise we shall still dream tomorrow what we dream today – and what Prof. David dreamt more than 60 years ago.

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Improving the Efficiency of
Arbitration Agreements and
Awards:
40 Years of the Application of the
New York Convention

Summary of Discussion in the First Working Group

*V.V. Veeder**

It is difficult to summarize the comments and interventions during the three sessions of the First Working Group. As can be seen below, the Reports and Commentaries were rich and interesting; and they provoked much discussion, particularly during the first session which concerned the elements of an effective arbitration clause. It would have been possible to hold a whole Congress on this subject alone; and the moderator, Prof. Martin Hunter, and the speakers decided to abandon the usual format of papers read by Rapporteurs and Commentators followed by questions, in favour of a free discussion between the panel and the audience on 17 elements selected in turn. This was no usual audience; these were participants almost as active as the panel; and over this first session alone we heard over 23 interveners on only 8 elements. It was not possible to cover the remaining elements; and on almost all of these 8 topics, the moderator had to wrench forward the discussion to the next topic with many questions unasked and many more unanswered.

What did we learn? There were two elements of particular significance: first that the choice between institutional and ad hoc arbitration clauses is in practice a sterile debate. Parties want, at least initially, an arbitration clause which can produce a valid and enforceable award. In the words of our first Rapporteur, Me. Gélinas, the primary objective for inserting an arbitration clause in a contract is to ensure that when a dispute divides the parties, neither will be able to escape arbitration. Statistically, as Mr. Bond told us, it has been shown by the work undertaken by Sophie Crépin in France, that institutional awards survive better the rigours of French court scrutiny than ad hoc awards. This is also true in England, as shown by the recent *Westacre* case in the Commercial Court on the public policy defence under the New York Convention, where the fact that the award was an ICC award was treated as a relevant factor in favour of enforcement. Prof. Bernardini also supported the case for institutional arbitration as one better able to overcome obstacles, having suffered difficulties with ad hoc arbitration in France, a war story still awaiting its Austerlitz. But the view was also expressed that the choice of one form of arbitration should not now be made automatically. In the English phrase, there are different “horses for courses”; and in appropriate cases an ad hoc arbitration could be preferable. But what kind of ad hoc arbitration? In practice, as Prof. Szász explained, it means the UNCITRAL Arbitration Rules with a designated appointing authority; not a “white” clause such as “arbitration in Paris” or the single word “arbitration”. Accordingly, the practical choice lies between the UNCITRAL Arbitration Rules and the ICC Rules; but even alchemists in the worst of their medieval debates shied away from that kind of choice. In the presence of two former ICC Secretary Generals (Mr. Bond and Mr. Schwartz), with their interventions marked even more by virtue of their objectivity and post-ICC experience as practitioners, so did we.

* Queen’s Counsel, London.

We turned next to the requirement for “writing” under Art. II(2) of the New York Convention on which our second Rapporteur, Guillermo Aguilar Alvarez, had prepared a magnificent Report. It raised the imminent question of whether Art. II requires amendment. Debate from the floor, consistent with Mr. Alvarez’ conclusions, showed clearly that Art. II has to be approached benevolently and its wording interpreted by courts with good intentions. Inevitably, its language reflects the means of communication in 1958 and not 1998. After forty years, the world of letters and telex messages is being replaced by e-mail and paperless trades. All this is demonstrated, as Prof. Kassedjian told us, by the broad and practical definition of writing used in the new UNCITRAL Model Law on Electronic Commerce. The debate also showed that courts were interpreting Art. II in a purposive manner which does not require any amendment to unfreeze Art. II from its 1958 glacier. As Judge MBaye suggested, Art. II lives and breathes the air of 1998 and “writing” does not mean now what it meant in 1958. No-one spoke in support of a literal or mechanical interpretation of Art. II; and of course all welcomed the recent change in Italian law removing the old problem caused by Arts. 1341 and 1342 of the Civil Code. It is nonetheless difficult to find a uniform rule for all courts when the different official languages of Art. II use different forms of definition. The French version suggests an exhaustive definition of an agreement in writing; whereas the English version is clearly non-exhaustive: an arbitration agreement there “includes” an agreement signed by the parties or contained in an exchange of letters or telegrams. In other words, to use Prof. van den Berg’s language, the English version of Art. II(2) is a maximum but it is not a minimum definition of writing.

Of course, whatever the answer on Art. II(2), Mr. Schwartz made us look also at Arts. IV(1) and VII(1) of the New York Convention. How can a party produce an arbitration agreement to enforce an award under Art. IV(1) if that arbitration agreement does not exist in writing, physically? But again the wording of the New York Convention is subtle: Art. IV requires the application to “produce” the award; the same word “*fournit*” is used in the French version – whereas Art. V requires the defendant to “prove” or “*fournit ... la preuve*” for grounds entitling the court to refuse enforcement. Is this not a clue? It must mean that Art. IV does not require an enforcing party to prove the arbitration agreement. If the original and all copies have been destroyed in flood or war, Dr. Reiner argued that such loss could not mean that the award could never be enforced. The arbitration agreement can be produced in a different form from the original agreement; indeed the mechanics of a telex even in 1958 were such that the paper telex received was not the original document sent – so why is e-mail juridically different? And if evidence of a destroyed document can be supplied under Art. IV, then why not a physical reproduction of a deleted e-mail? Provided there can be produced a permanent record of the arbitration agreement, whatever that document may be and whether or not it is primary or secondary evidence of the parties’ arbitration agreement, the view was expressed by several participants that the applicant had satisfied Art. IV; and in many countries now, the applicant will in any event have satisfied it by virtue of Art. VII.

This was a fascinating debate; but it was possible to come to a short conclusion. Art. II(2) of the New York Convention is working and it will continue to work without amendment: so if it ain’t broke – don’t fix it. We also learnt other things. As to the place of arbitration, we already knew that an arbitrator does not have to sit at the seat. But Michael Mustill warned us that the distinction between arbitral seat and geographical

place rests on a legal fiction, even with the benefit of Art. 14 of the new ICC Rules – and with uncertain borders in a field of law already crowded by legal fictions, little understood by lay users of international commercial arbitration. And what of Me. Gélinas' real free-floating arbitration conducted in 1986 upon a cruise-liner from Anchorage to Vancouver – a true story where the arbitration tribunal sat at the seat but the place changed with each wave.

The second session on the law applicable to the arbitration clause was not an easy topic. As Prof. Szász, our moderator, rightly said: it raised complex questions with conflicting solutions, with possibly different answers depending on whether the arbitration tribunal or a court was addressing the question. Prof. Lew presented a masterly survey of the field, which benefited much from the prolonged period of cogitation to which he had subjected his final Report. He concluded that the form and substance of the arbitration clause are generally governed by the same principles as regards applicable law whether this issue is entertained by arbitration tribunals or national courts. This derives from the ultimate purpose of the arbitration process, that is to say, the rendering by the arbitration tribunal of an award enforceable by national courts, which explains the propensity of arbitration tribunals to abide the minimum requirements imposed by national courts. In this respect, the general tendency is to validate the arbitration agreement and to enforce the award. Accordingly, the control of the form and substance of the arbitration clause seems in practice to be merged into one minimum requirement establishing the “consent” of the parties to submit their disputes to arbitration.

Prof. Hanotiau, our second Rapporteur, examined exhaustively the laws applicable to the issues of arbitrability. He noted that many national laws provide for the possibility of setting aside an award if it is contrary to public policy or if the dispute was not capable of settlement by arbitration. The national court concerned will now normally apply its own national law to decide the issue, but what would happen if the arbitral tribunal decided that the arbitrability of the dispute was governed by a foreign law according to which it was capable of settlement by arbitration? In this case, the decision of the arbitrator as to the contents of the foreign law will not be questioned by the court. It will not prevent the court however from deciding that the dispute was not capable of settlement by arbitration or that the award was contrary to public policy in accordance with its own law. As far as the enforcement court is concerned, it would apply Art. V(2) of the New York Convention. It is generally considered that the grounds of Art. V(2) should be narrowly construed, affecting only the forum State's most basic notions of morality and justice. So far, there has been only one significant case in which Art. V(2) has been applied to refuse enforcement on the basis of non-arbitrability, that is a Belgian Supreme Court decision of 28 June 1979 (in relation to the well-known statute on exclusive distributorship agreements). Prof. Hanotiau concluded that it was certain that the field of arbitrable matters was expanding considerably; and that the role of public policy in the field of arbitrability has in practice been considerably narrowed. But he also posed the question whether we should now not conclude that the arbitrability of disputes is a transnational principle directly applicable without reference to any national law? This was indeed the conclusion reached by the late Prof. Berthold Goldman many years ago.

We then heard our Commentator, Dr. Blessing, who courageously advanced his brave thesis. He contended that the topic of the law applicable to the arbitration clause

and to arbitrability was merely a wonderful playground for academic theories. Theory alone can only be the starting point; it cannot itself offer or lead to an appropriate answer. The most essential (and indeed most exacting) task of an arbitral tribunal is not theoretical research, but rather research into the facts and dynamics of the individual case. Thus, the key issue, and indeed the most difficult task in each case, is the assessment and determination of the parties' objectively fair and subjectively reasonable expectations. He summarized his point in one sentence: the difficulty is not to select the right doctrine, nor to find the correct answer as to the applicable law or rules of law, nor to find the correct provision of such law, but to properly understand the entire mosaic of the individual contractual relationship and its specific dynamics. Accordingly, it all depended on the particular circumstances. There was little room here for the scientific approach of scholarly professors, it required in Dr. Blessing's words the artistic touch of a practitioner. Our two other Commentators followed in brilliant contrast: Marc Lalonde and Prof. Bernardini, a scholarly practitioner and a practical professor, each the physical embodiment of the joint approach, science and art, academic and practitioner, which lies and will always lie at the heart of international commercial arbitration. And of which Dr. Blessing himself is also an outstanding example.

Our third session on the effect of the arbitration proceeded under the efficient moderation of Dr. Briner. Me. Antonias Dimolitsa and Prof. Pierre Mayer (a stand-in at short notice for our missing second Rapporteur unavoidably detained elsewhere), brought us up to date with the ever-fascinating topics of *Kompetenz-Kompetenz* and the separability of the arbitration clause. However much we think we know about these topics, there is always something new. Me. Dimolitsa related how the *Orri* case had ended in Greece; and her Report is essential reading – it is a good story. Our Rapporteur from Brazil, Mr. Nehring, reminded us that Brazil still remains outside the New York Convention, along with Pakistan. Latin America is the future for international commercial arbitration; and listening to Mr. Nehring, it was easy to agree with the proposal then current in Paris that ICCA should soon hold an evangelical congress in South America, as opposed to preaching to the converted. Our distinguished Rapporteur from Benin, Me. Robert Dossou, showed us also how much could be changed with new forms of regional cooperation, with the 1993 "OHADA" treaty on arbitration linking Benin and thirteen other West African countries.

Finally, there was nothing in our Working Group that suggested the need for an urgent amendment to the New York Convention, although of course eventual amendment or supplement remains inevitable. The New York Convention is still a good and supple tree, bending in the wind when it must; but in practice it still ain't broke.

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International Commercial
Arbitration:
Important Contemporary
Questions

Postscript

V. V. Veeder*

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I. INTRODUCTION

As the last speaker, it is my solemn duty in this “Postscript” to summarize each and every idea, argument, question and answer to which you have been exposed over the last three days. All in thirty minutes. And like me, you must be wondering: how is he going to do it? Until a moment ago, I was hoping to be introduced by Arthur Marriott with the same succinct introduction which he inflicted on the LCIA’s Acting President last Sunday night; but to my despair, Arthur is not here; and I still have twenty-nine minutes to go. And now I think: if they really wanted a summary or a synthesis, they were wrong to choose me. And anyway, now that I am up here, I can probably say whatever I want. I can change the topic of this “Postscript” standing here; and at an ICCA Conference, possession of the lectern is 10/10ths of the law.

And so that is what we are going to do. In the next twenty-eight minutes, I shall not refer to anything or to anybody you have heard since Sunday at this ICCA Congress. It is possible that, like Yogi Berra, you will experience a sensation of *déjà entendu* all over again; but as arbitration specialists, we can only talk about one subject. And if at the end you really do not like this postscript, please remember that the alternative was much, much worse; and anyway, that it is Arthur Marriott’s fault for not introducing me.

II. TURKEY ARBITRATION

Long ago, in Ireland, as recalled by Mr. Justice Megarry and recorded in Lord Bingham’s Freshfields Arbitration Lecture,¹ disputes were resolved by placing a hungry turkey at

* Turkey-Handler and Turkey, Essex Court Chambers, London.

the end of a long table facing a single line of corn leading to the far end of the table. There the stream of corn split into two separate streams: one leading sharply left towards the respondent party and the other sharply right to the claimant party. As the turkey ate its way down the table, its eventual destination after the critical T-junction, left or right, determined the result of the arbitration.

As a method of dispute resolution, Turkey Arbitration was quick, cheap and final: it was final because, regrettably, the parties ate the turkey. Until very recently, this is all we knew about Turkey Arbitrations. But a few weeks ago, an important arbitration archive was discovered. It seems that Turkey Arbitration was widespread in the earliest of times. Indeed, we need to go back far beyond the 14th century, Lord Mustill's usual starting-point for any proper understanding of the roots of modern commercial arbitration.

From these archives, it appears Turkey Arbitration was widely used by the Druids. They called themselves the International Cluck-Cluck Arbitration or I-C-C-A. In Ancient Britain, as you will know, it was probably the Druids who built the Great Stone Circle at Stonehenge.² But, with this archive, we can predict that the Druids will soon become known as the true founders of Turkey Arbitration and as far as we can know, the forebears of modern international commercial arbitration. (As far as we know, because like most good things in those times, it may well be that Turkey Arbitration came from China – or even Turkey).

These archives include a near verbatim account of a Famous Turkey Arbitration, taking place at a Special Congress of senior Druids. This account was recorded by three scribes named as Sister Freedberg, Sister Borelli and Sister Kurzbauer, working with another Druid as general editor, Brother van den Berg. And this is what they described:

III. THE DEBATE

The Turkey Arbitration began, as always, with the Turkey standing at the head of the table, assisted by the parties' respective Turkey-Handlers, and of course, the Turkey's Secretary. However, at that moment, a furious debate broke out between four senior Druids. It concerned a question which might seem odd to us now, maybe a question designed more for entertainment than intellectual analysis; but it was plainly a very important question to these Druids. The question was: "Do the parties, not the Turkey, control the Turkey?"

Under the watchful eye of the Chief Druid, Brother Alvarez, Brother Smit and Sister Kaufmann-Kohler argued it was the parties who controlled the Turkey. Brother Smit, as

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1. Lord BINGHAM, "The Problem of Delay in Arbitration", *Arb Int* (1989) p. 333. (The eventual demise of Turkey Arbitration is surmised in the present author's "Evidence: the Practitioner in International Commercial Arbitration", *Forum du droit international* (1999) p. 228 at p. 231, having much to do with the problems of the "truncated turkey"). I am most grateful to Daniel Wehrli for bringing to my attention Benjamin Zephaniah's poem.
 2. Actually, it wasn't; but with Druids, myth is stronger than fact.

a skilful ruse to confuse his opponents, also argued exactly the contrary; but by the end of his address, his meaning was clear – more or less. Sister Kaufmann-Kohler contended that the Turkey could never be bound by any procedural agreement between the parties: Turkeys could not read; and indeed most Turkeys were intellectually challenged. Brother Mustill and Sister Fitzgerald argued nonetheless that it was the Turkey that controlled the Turkey. In previous years, however, Brother Mustill had apparently argued the exact opposite. He was a very wise Druid; and apparently, it did not always appear to him now as it appeared to have appeared to him then.

The debate raged furiously all morning amongst the other Druids. Brother Beresford-Hartwell said the Turkey was a mere employee of the parties, a servant if not in fact a domestic animal. But Brother Mustill said that was impossible: the Turkey was an independent professional person, with a juridical status in Druid law far above the mere rules of Druid contract. Brother Staughton, speaking in a language few Druids could understand, argued that it was the dispute of the parties and not the Turkey; and the parties could compromise their dispute by a settlement at any time, bringing the arbitration and the Turkey to an immediate end. At this point, in his usual unprovocative way, Brother Lalive said the question under debate was totally misleading raising a totally false problem.

And Brother Mustill now said the question was totally misconceived. It depended on what you meant by the word “control”, and the word “parties”, and the word “turkey”, and also the word “the”; and also on the significance of the “?”. Indeed, it all depended. Another Druid here interrupted to say that it also depended on the meaning of the word “is” (a word which appears to be entirely missing from the text of the question, as recorded); and anyway he had never touched that Turkey – but this quotation from Brother Clinton is very obscure. It was probably some private Druid joke. At the reference to misconception, however, Brother Brower brought up the question of sex. Some Druid always did.

It is again not easy for us thousands of years later to understand the subtle relevance of this particular argument. It is clear from the archives, however, that many Druids had already noticed that this very elderly Turkey had a strange smile. One Druid said it was clear that this old Turkey had never had sex, ever. Brother Smit said that he thought the Turkey had it almost every day – almost on Monday, almost on Tuesday, almost on Wednesday etc. – but always only almost. But another Druid said: “No: I know this old Turkey: he only has it once every ten years.” “But why does he look so happy?”, asked a Druid; “Because after ten long years”, came the reply “tonight is the night”.

The debate then descended into an orgy of insults; and the Druids divided into two opposing camps. Some Druids criticized Turkeys generally, they called it “Turkey-bashing”. Other Druids blamed the specialist Turkey-Handlers, the elite corps of well-paid Druids who conducted Turkey Arbitration for disputant parties. These Druids even thought that the whole process of Turkey Arbitration had been taken over by the Turkey-Handlers. They described a desperate power-struggle between the Turkeys and the Turkey-Handlers. This part of the debate is of course quite impossible for us now to understand. We all know very well that any complex arbitration today requires both

skilled arbitrators and skilled advocates; and one cannot work without the other. No one today would think of blaming all lawyers or all arbitrators. Of course, we would all criticize *bad* lawyers and *bad* arbitrators; but none of us here would fall into the same facile criticism exchanged by these ancient Druids.

The result of the debate was apparently inconclusive. It was plainly a great and exciting debate; but perhaps the Druids eventually thought the question of limited practical importance – or conversely, as Brother Holtzmann suggested, so important that this Druid ICCA Congress could not possibly pronounce on it, one way or the other, without compromising the whole future of Turkey Arbitration, if not the whole Druid world. Or maybe it was time for the Druid’s lunch.

IV. INTERIM MEASURES

The Druids understood very well that Turkey Arbitration was a careful, contemplative process. The Turkey took time as it deliberated over and gobbled up each grain on its way to its decisive destination. It took even longer in a special new form called “slow-track” arbitration, which eventually became the normal method of Turkey Arbitration. But what happened to the dispute in the meantime, as the Turkey deliberated with itself? An urgent temporary decision might be required to preserve the status quo. So the Druids invented something called “interim measures of protection”.

Here Brother Donovan³ produced a preliminary draft carved in stone, most of which seemed good common sense to most Druids, except for one part of the obelisk called the “*ex parte*” part, an obscure Druid term which we cannot now understand. Whatever this was, it was roundly condemned by Sister van Hof,⁴ a Dutch Druid. Another Druid from Gaul, Brother Gaillard explained that the answer lay not in heavy stone carvings but in private contract; and he described the *reféré* procedure newly practised by the Gaulish Druids.

This was how it worked in Paris. Pending the Turkey’s determination of the dispute, a starving mouse would be released on a thin, parallel stream of corn, to make a provisional decision which would constitute “interim measures”. Being smaller and faster than a Turkey, with a leaner appetite, this decision could be available quickly and cheaply. Although a mouse was not the intellectual equivalent of a Turkey, this procedure was becoming popular in Gaul; and Brother Briner, it seems, kept a permanent stable of starving mice ready for instant appointment to this most useful procedure. Through all this, the Third Druid, Brother Sekelec, kept the debate calm. What skills he had to deploy over these coarse and unruly Druids: he must have been some kind of Druid Diplomat.

3. See this volume, pp. 82-149.

4. See this volume, pp. 150-162.

V. WRITTEN FORM

But still the Turkey could not start his contemplative perambulation down the table. At this point, Brother Landau⁵ raised the question of the form of the Turkey Arbitration Agreement.

He argued that it should never take the written form; and he spoke eloquently with a mass of research to support his arguments. Indeed, he achieved the near impossible: he spoke in footnotes. As the sun rose and fell, he proved his case to the entire satisfaction of almost all the Druids. No one could justify the waste of obelisks, stone masons, money and time required to satisfy a rule that Turkey Arbitration Agreements should be made in writing; and no Druid could think of a good reason why there should ever be a written form, notwithstanding the parties' oral consent, as a ritualistic pre-condition of Turkey Arbitration.

But since the Druids had no such written rule and could not believe that anyone would be foolish enough ever to introduce such a rule in the future, this debate raised no practical problem for the Druids; and the exchange was less lively than before. Possibly the Druids were by now intellectually exhausted. Or maybe it was time for their tea.

VI. CONCILIATION

The next debate concerned the Model Law on Turkey Conciliation. There was a great contribution from Sister Matias,⁶ but Brother Sekolec stopped the most interesting part of the debate: how conciliation settlements could be enforced throughout the Druid world. Or perhaps they could not be enforced; and as the Druid diplomat, he was rightly protecting the Druids' feelings against premature disappointment. The archives reveal nothing more; and it is possible that this part of the debate was being reserved for another future congress or working group elsewhere.

VII. OTHER DRUID TOPICS

The Congress continued over the next several days, much facilitated by the absence of alcohol at midday. Whether this was a local tradition or the frugality of the occasion, the scribes do not reveal. The archives next describe a debate about illegality. Brother Kreindler⁷ described in detail what naughty parties did; and how Turkeys could be corrupted by evil and particularly evil doings by Turkey-Handlers. Sister Mills⁸ expressed the despairing conclusion that corruption was rife throughout the world of Druids. It was true that the Druid world was venal and corrupt; but most Druids felt

5. See this volume, pp. 19-81.

6. See this volume, pp. 190-208.

7. See this volume, pp. 209-260.

8. See this volume, pp. 288-299.

that was not true of Turkey Arbitration. Corruption could make good headlines and fine stories; but it was the rare exception amongst Turkeys, if and when it occurred at all. Indeed, if Turkey Arbitrators had grown rich from corruption in Turkey Arbitration, how come they were still Turkeys practising Turkey Arbitration with that process's inevitable finality?

Brother Hanotiau⁹ then described how love was also impermissible in Turkey Arbitration, particularly between a Turkey and the parties or their respective Turkey-Handlers. Love was thoroughly incompatible with the Turkey's duty of independence and impartiality. The Druids were puzzled at his survey: If love and evil were both forbidden, what was left?

Sister Majeed here interposed to say that, culturally, it was very important for the Turkey to attend with cultural sympathy to both sides of each grain of corn, particularly the eastern, rather than the western side. And Brother Hussain expressed concern that some Turkeys attended more to the north side of the grain and less to the south. All this sounds reasonable to us now; but apparently to many Druids then, there was much concern at these statements.

There was then reference to a famous story of the allegedly kidnapped Turkey. Apparently, it was said, one party had abducted a Turkey midway through an arbitration, wrung its neck, plucked its feathers, stuffed and roasted it in order deliberately to thwart the arbitral process. The Druids felt there was probably another side to this story. There usually was. Maybe this party did not actually stuff the Turkey; or maybe the whole thing was only a question of timing. But if this other side of the story is never told, then only the first side can be publicly known; and the Druids felt that no one could complain at being misunderstood. Nevertheless, it was not felt that Turkey-kidnapping had become a practical problem for Turkey Arbitration, not yet.

Questions of general naughtiness were then pursued by Brothers Lew and Paulsson. Surprisingly one Druid, Brother Tytell,¹⁰ even showed the others how to forge documents. Seen from our modern perspective, was this really wise? It could have lead to the most important disputes being subjected to forgeries. And then there was more bashing, again, of the specialist Turkey-Handlers; and still more discussion of cultural differences between both Turkeys and Turkey-Handlers. It seems that we are wrong in thinking that Druids formed a homogeneous society: in fact their flowing white robes hid vast differences between North Druids, South Druids, East Druids and West Druids – and Turkey-Handlers. Brother Craig was nevertheless very optimistic: he expressed great confidence in the new facilities for training young Turkey-Handlers, especially in Vienna; and he also described breeding developments to produce a Model Super-Turkey which would eliminate many national differences in Turkeys.

Sister Diamond¹¹ spoke next on the psychology of the Turkey: it had to be neutral, it had to earn the trust of the parties and it had to treat them with respect and dignity. Less was said about the parties' treatment of the Turkey: the age of deference to Turkeys was

9. See this volume, pp. 261-287.

10. See this volume, pp. 314-324.

11. See this volume, pp. 327-342.

clearly over; and the Druids all knew of cases where the losing party had not hesitated to denigrate the adjudicating Turkey. This is of course all foreign to us now: no party would now criticize arbitrators for anything. Brother Abraham, Sister Whitesell¹² and Sister Giovannini¹³ then added their generous contributions; and all were well received by the Druids.

The last debate was conducted by Brothers Blackaby,¹⁴ Böckstiegel,¹⁵ Lalive,¹⁶ Park, Aguilar Alvarez,¹⁷ Yanase¹⁸ and Williams.¹⁹ Space does not permit us to describe this debate here; but it is surprising that these Druids in ancient times had such sophisticated concepts for international investment. Or is it possible that these archives were doctored by a malevolent Druid who attended Brother Tytell's lecture? Whatever the explanation, we must be cautious in reading this account of so-called "Turkey Arbitration under Investment Treaties".

Here the records suddenly come to an end. Maybe Brother van den Berg's editorial functions were diverted to completing the second edition of his famous comparative work on the enforcement of Turkey Arbitration Awards; but then maybe not. There was obviously supposed to be a summary of this ICCA Congress in the form of a postscript; but the designated Druid probably failed or refused to do it. Or perhaps he was introduced by Brother Marriott.

VIII. PLUS ÇA CHANGE, PLUS C'EST LA MÊME CHOSE

Let us now leave Turkey Arbitration and move forward several thousand years, to an issue which, unlike Turkey Arbitration, increasingly bedevils transnational commercial arbitration. In 1925, Alfred Hayes wrote a poem which became a famous American song:

"I dreamed I saw Joe Hill Last night
Alive as You and Me
Says I: 'But Joe, you're ten years dead'
'I never died' says he ...

'In Salt Lake City, Joe by God' says I
Him standing by my bed

12. See this volume, pp. 343-347.

13. See this volume, pp. 348-352.

14. See this volume, pp. 355-365.

15. See this volume, pp. 366-375.

16. See this volume, pp. 376-391.

17. See this volume, pp. 392-425.

18. See this volume, pp. 426-443.

19. See this volume, pp. 444-467.

‘They framed you on a murder charge’
says Joe: ‘But I ain’t dead’”

But Joe Hill was dead: he was executed at sunrise on 19 November 1915 in the Utah State Penitentiary; and Joe Hill was not his real name. He was baptised Joel Emmanuel Haggland in Gavle, in Sweden; and he was a Swedish national. After his trial in Salt Lake City, widely perceived as a denial of justice around the world, the Swedish Government appealed for clemency towards their citizen, as did President Woodrow Wilson. But the Governor of Utah disregarded all appeals; and Joe Hill was executed. *Plus ça change* As we heard from Donald Donovan at this ICCA Congress, history repeated itself recently with the two cases brought before the International Court of Justice by Paraguay and Germany; and the United States’ subsequent refusal to stay the execution of their foreign nationals in violation of the ICJ’s orders on interim measures. These cases represent an unprecedented assertion of national sovereignty by a state otherwise firmly committed to justice and the rule of international law, in word and deed.

How all this relates to international commercial arbitration was well put by Fali Nariman at the UN birthday celebrations for the New York Convention a few years ago, when he cited the Paraguay case. As he explained, public policy, or state policy, or overriding national interest, even or particularly if democratically expressed, can arise in any country at any time, North, South, East and West. Let not the first world, with false indignation, point the finger too readily at countries other than its own, including now Pakistan or Bangladesh or Indonesia as we have heard this week. Equally, let us be aware that the whirlwind of powerful state interests can deprive the developing and the developed world of the best advantages of international commercial arbitration in banking, investment and trade, so vital to their long-term common interests. There is no easy or quick solution; but in the conflict between short-term state interests and these long-term advantages, let us not like the Druids disembowel the Turkey and destroy international commercial arbitration where that process is most needed.

ICCA is the world’s arbitration forum where, thankfully, everyone can speak out, right or wrong – from North and South, East and West, both Turkeys and Turkey-Handlers. If right, we all learn; and if wrong, it is possible that an answer can eventually be found. In the field of international commercial arbitration, there is only one reality; and that is the perception of reality, even if it is sometimes a misperception. It is not easy today being an international arbitrator or practitioner; it may become increasingly difficult; but at ICCA Congresses such as this, possible solutions and apparent problems can be debated across all the world’s frontiers, cultures and misperceptions. And that open debate ensures that international arbitration today is far better than the Druids’ Turkey Arbitration.

POSTSCRIPT: V.V. VEEDER

An Irrelevant Annex
(Or the Anthem of the Turkey Arbitrator)

Talking Turkeys

Benjamin Zepaniah

Be nice to yu turkeys dis christmas
Cos turkeys jus wanna hav fun
Turkeys are cool, turkeys are wicked
An every turkey has a Mum.
Be nice to yu turkeys dis christmas,
Don't eat it, keep it alive,
It could be yu mate an not on yu plate
Say, Yo! Turkey I'm on your side.

I got lots of friends who are turkeys
An all of dem fear christmas time,
Dey wanna enjoy it, dey say humans destroy it
An humans are out of dere mind,
Yeah, I got lots of friends who are turkeys
Dey all hav a right to a life,
Not to be caged up an genetically made up
By any farmer an his wife.

Turkeys jus wanna play reggae
Turkeys jus wanna hip-hop
Can yu imagine a nice young turkey saying,
"I cannot wait for de chop"?
Turkeys like getting presents, dey wanna watch christmas TV,
Turkeys hav brains an turkeys feel pain
In many ways like yu and me.

I once knew a turkey called Turkey
He said "Benji explain to me please.
Who put de turkey in christmas
An what happen to christmas trees?"
I said, "I am not too sure turkey
But it's nothing to do wid Christ Mass

Humans get greedy an waste more dan need be
An business men mek loadsa cash.”

Be nice to yu turkey dis christmas
Invite dem indoors fe sum greens
Let dem eat cake an let them partake
In a plate of organic grown beans,
Be nice to yu turkey dis christmas
An spare dem de cut of de knife,
Join Turkeys United and dey’ll be delighted
An yu will mek new friends FOR LIFE.

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New Horizons in International
Commercial Arbitration and
Beyond

The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court In Support of the International Arbitral Process

V.V. Veeder QC*¹

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I. INTRODUCTION

It is generally assumed that no modern legal system can operate fairly without enforceable interim measures, particularly in the cosmopolitan field of transnational trade. It is there too easy for a malevolent defendant to thwart the national legal process, by dissipating its assets and rendering itself judgment-proof “in the twinkling of a telex”;² or for any malicious party, claimant or respondent, to skew the result of that process by destroying or simulating material evidence essential to the fair resolution of the dispute; or, even leaving all bad faith aside, for a party to need some form of temporary judicial help during legal proceedings.

It is therefore surprising that the global system of international arbitration has succeeded (so far) without any universal system for the cross-border enforcement of interim measures, such enforcement being generally limited to national jurisdictions where the interim measure is made, namely by the state court at the arbitral seat. What

* Essex Court Chambers, London.

1. I am much indebted to Ms. Anne Hoffmann for her assistance in researching materials for this report.
2. In the famous words of Lord Denning MR (but it would now be an E-mail). In the English Court of Appeal, Lord Denning invented the English Court’s *Mareva* jurisdiction, first in *NYK v. Karageorgis* [1975] 2 Lloyd’s Rep 137 and, with more deliberation four weeks later, on 22 May 1975, in *The Mareva* [1975] 2 Lloyd’s Rep 509. Both applications were made ex parte and without any prior notice to the defendant; and the new remedy was only argued inter partes in *Rasu Maritima v. Perusahaan (Pertamina)* [1978] 1 QB 644 where the Court of Appeal upheld the new power whilst also ensuring, by declining to make the order on the facts of that case, that no appeal would be made to the House of Lords, eagerly awaiting an opportunity to strike down Lord Denning’s judicial innovation. The English Court’s *Mareva* jurisdiction was only confirmed by legislation with Sect. 37 of the Supreme Court Act 1978.

is not surprising are the inherent difficulties in developing such a universal system, given different legal traditions regarding interim measures made in support of the arbitral process and, more significantly, the extreme variety of interim measures ordered by different state courts under their own national procedural laws. For litigation in England and Wales, the English Court has developed broad powers to order a wide range of interim measures to ensure the efficacy of its own legal process, backed by the draconian sanctions of contempt for breach by both parties and third persons, particularly with the “*Mareva*” and “*Anton Piller*” orders.³ The *Mareva* “freezing” injunction does not, however, exist in Scotland; there are significant differences regarding other interim measures between the civil law systems of Continental Europe, including France, Germany and Switzerland; and there are still greater differences in the legal systems of many other countries, both within and without Europe. For example, the Dutch order for interim payment (*kort geding*) has no historical equivalent in England or Switzerland; and whilst the English worldwide *Mareva* injunction can operate extra-territorially with no assets in England, the French court’s powers to make a freezing order will usually depend on the presence of the defendant’s assets within French jurisdiction. Nonetheless, these different legal systems share some common features regarding some interim measures; and yet the international arbitration system has manifestly failed to develop any global means of cross-border enforcement of interim measures, commensurate with the 1958 New York Arbitration Convention. How can this be so?

In part, this is the result of legal history: private arbitrators are not state judges and cannot by themselves exercise the authority of states to enforce their orders or awards. In part, this is the result of the consensual nature of arbitration, arbitral jurisdiction being limited to the disputing parties only and not extending to aiding and abetting third persons who can separately thwart the arbitral process. In part, the success of certain arbitral seats as a neutral place can ensure that no party has any business link with the arbitral seat, thereby rendering a respondent relatively immune from the seat’s legal process. And in large part, it is the result of the relatively slow and cumbersome procedures required to start an arbitration when the tribunal is almost invariably missing at the time when interim measures are most needed. This timing factor is particularly problematic for institutional forms of arbitration, where the tribunal is ordinarily formed several months after the outbreak of the parties’ dispute. To a significant extent, none of this matters compared to the failure of any universal system for the enforcement by a foreign court, outside the arbitral seat, of an interim measure ordered by the court of the seat made in support of the arbitral process, whether before or after the commencement of the arbitration.⁴ In practice, this is the heart of the problem.

3. The “*Mareva*” order is an order freezing the defendant’s assets, directed at the defendant and third persons holding the defendant’s property, particularly bankers; it can take various forms, including an order requiring the defendant to disclose on oath the locations of all his property worldwide. The “*Anton Piller*” order is a “search and seize” order, invented by the Court of Appeal (Lord Denning again) in *Anton Piller v. Manufacturing Processes* [1976] Ch 55. For both measures generally, see GEE, *Mareva Injunctions & Anton Piller Orders*, 4th ed. (London).

4. The 1958 New York Convention does not apply to enforce orders for interim measures: *Resort Condominiums v. Boldwell*, *ICCA Yearbook Commercial Arbitration* XX (1995) (hereinafter *Yearbook*) p. 630 (Queensland, Australia). But see also *Publicis v. True North*, *Yearbook* XXV(2000) p. 1152 (USA)

The failure to resolve this problem is graphically represented by the Hague Conference's preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 1999,⁵ following the International Law Association's Principles on Provisional and Protective Measures in International Litigation adopted at Helsinki in 1996. The project is far from reaching a happy end. It was preceded by the evasions in Art. 26 of the 1976 UNCITRAL Arbitration Rules and Arts. 9 and 17 of the 1985 UNCITRAL Model Law;⁶ and such failures continue, for the time being, with the slow and divided progress at the UNCITRAL Working Group on Arbitration. The latter's project on interim measures remained unfinished at its fortieth session at New York in February 2004, a two-part project first begun at the "New York Convention Day" held on 10 June 1998 to celebrate the fortieth anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷

These are not, however, failures which are inevitable. All trading nations share a common interest in making international arbitration work; international arbitration needs support from the state courts of both the arbitral seat and abroad; and each arbitral jurisdiction shares a need to harmonize its own laws on interim measures with cross-border enforcement of both court and arbitral orders for interim measures. Moreover, recent developments within the European Union, affecting both common law and civilian jurisdictions with disparate traditions of international commercial arbitration, demonstrate how multi-jurisdictional solutions can be found. This report will seek to show how developments in the arbitration laws of different states of the European Union, supported by the Brussels Convention (now Brussels Regulation) and the Lugano Convention, have created a modern system of interim measures available to state courts, backed by court sanctions and cross-border enforcement, which has significantly enhanced the effectiveness of international commercial arbitration in Europe. Conversely, however, the Brussels and Lugano Conventions also demonstrate the difficulties in extending too far any cross-border system for interim measures, particularly in regard to provisional payment orders (effectively equivalent to final orders) and measures ordered *ex parte*, without any prior notice to the defendant. There is a risk that certain interim measures can unbalance the arbitral process, making it too pro-plaintiff and ultimately discrediting its use with users, as happened at first with the

and Note by PINSOLLE, *Rev.arb.* (2000) p. 657 ("*Il ne fait guère de doute que le raisonnement des juges australiens est beaucoup plus conforme à l'esprit, sinon à la lettre, de la Convention de New York...*").

5. For a useful account, see David McCLEAN, "The Hague Conference's Judgments Project" in FAWCETT, ed., *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP 2002) p. 255.
6. SANDERS, *The Work of UNCITRAL on Arbitration and Conciliation* (Kluwer 2004) pp. 29, 93 and 99; SANDERS "Arbitration" in *Int Encycl Comp Law*, Vol. XI, Chapter 12, p.115.
7. Report of the Working Group of 19 March 2004 (A/CN.9/547); and see *Enforcing Awards under the New York Convention: Experience and Prospects* (UN; 1999), pp. 21 and 23 and particularly, DONOVAN "Provisional Measures: Proposals for Moving Forward" in *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series no. 11 (The Hague 2003) (hereinafter *ICCA Congress Series no. 11*) p. 82 at p. 143 et seq.

Mareva injunction in England and, in a different field, as occurred notoriously with the “labour injunction” in England and the United States.⁸

Of course, the Brussels Convention is not juridically perfect in a union of twenty-five states with different national legal systems; it is geographically incomplete in a global economy; and it may be deficient in practice as regards certain European countries. Nonetheless, it provides a useful starting-point, pointing unequivocally to the future. It is unthinkable that an equivalent working solution cannot be found and agreed by states outside the European Union, whether on a regional basis (such as the draft ASEAN Convention) or on a wider basis amongst the member and observer states of UNCITRAL itself.

II. ART. 24 OF THE BRUSSELS CONVENTION (REGULATION)⁹ AND LUGANO CONVENTION

Although the Brussels¹⁰ and Lugano¹¹ Conventions expressly provide in Art. 1(4) that the scope of neither applies to arbitration (i.e., the “Arbitration Exception”), both conventions are nevertheless relevant to the cross-border enforcement of interim measures relating to arbitrations. Art. 24 of the Brussels Convention provides that:

“Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of the State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.”

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8. See (for England) *Gouriet v. POEU* [1978] AC 435, per Lord Wilberforce at p. 484 re Sect. 17(1) of the Trade Union and Labour Relations Act 1974 (restricting *ex parte* interim injunctions); and (for the United States) FRANKFURTER and GREENE, *The Labor Injunction* (NY 1930) p. 200 (“The restraining order and the preliminary injunction invoked in labor disputes reveal the most crucial points of legal maladjustment. Temporary injunctive relief without notice ... serves the important function of staying defendant’s conduct regardless of the ultimate justification of such restraint.”).
 9. The Brussels Convention was revised by Council Regulation (EC) 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 22 December 2000, but the wording of Art. 24 was not changed and simply repeated in Art. 31 of the Regulation. For convenience, reference is here made to the Brussels Convention only; and it contains the same wording as the Lugano Convention in relevant parts.
 10. The “Brussels” Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done in Brussels on 27 September 1968, adopted under Art. 220 of the Treaty of Rome. This Convention, as amended, now extends to twenty-five European states: Austria, Belgium, Cyprus (Greek Part), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Bulgaria and Romania may join by 2007 and Turkey at an indeterminate date thereafter.
 11. The “Lugano” Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done in Lugano on 16 September 1988. This Convention ratified by Member States of the European Union and Member States of the European Free Trade Association, the latter now comprising Norway, Iceland and Switzerland.

In the *Van Uden* case (1998), when confronted with the application of the Brussels Convention to pending arbitration proceedings in the Netherlands, the European Court of Justice determined that “where the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and Art. 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators”.¹² Accordingly, the European Court decided that the *kort geding* interim procedure whereby the Dutch court can order summary payment in favour of a claimant against a respondent in a pending arbitration could fall for enforcement purposes in Germany under Art. 24 of the Brussels Convention. As explained below, this was an elegant piece of judicial legislation, not readily apparent from the text of the Brussels Convention itself and still less from the European Court’s previous decision in the *Marc Rich* case (1991);¹³ and it solved at one stroke a real practical problem for the cross-border enforcement of interim measures granted by the local state court in support of an international arbitration held within its territorial jurisdiction.

Contrary to the arguments submitted by the German and UK Governments, the European Court decided “that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights they serve to protect.”¹⁴ Therefore the Brussels Convention was applicable, notwithstanding its Arbitration Exception; and such interim measures were considered distinct from measures which were “ancillary to arbitration proceedings”, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards or proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards.¹⁵ The *Van Uden* decision, as subsequently followed,¹⁶ has opened the door for arbitral parties to obtain and enforce interim measures (i) from an EU state court, (ii) at a place different from the arbitral seat and (iii) most importantly, measures of a kind not obtainable from the arbitration tribunal and subject to means of enforcement not possible within the arbitration itself, including enforcement against third persons. It is perhaps significant that this innovative reform took place without prolonged negotiations between the EU member states; and that it was conceived by judges, not arbitrators.

12. Case C-391/95, *Van Uden v. Deco-Line*, [1998], E.C.R I-7122 et seq., I-7139.

13. *Marc Rich AG v. Soc It Impianti* [1991] E.C.R. 1-3835, see esp. the Opinion of the Advocate General Darmon, at no. 77, p. 1-3886, *ibid*.

14. *Van Uden*, *op. cit.*, fn. 12, para. 33; Case C-261/90, *Reichert and Kockler v. Dresdner Bank* [1992] E.C.R I-2149, para. 32.

15. Case C-391/95, *Van Uden*, Opinion of Advocate General Léger, [1998] E.C.R I 7105, para. 56.

16. See Case C-99/96, *Mietz v. Intership Yachting Sneek BV*, [1999] E.C.R I 2277 et seq.

The phrase “interim measures” ordinarily encompasses a broad class of court orders short of final relief. It includes a temporary freezing order, such as the *Mareva* injunction under English law. Does it extend beyond preventing the dissipation or disclosure of assets or providing security, to payment itself by the alleged debtor to the alleged creditor? In France, the *référé-provision* and, in the Netherlands, the *kort geding* order are interim procedures whereby the plaintiff can obtain promptly payment of part or the full amount allegedly owed by the defendant. Legally, the order has a provisional nature; and it can be overturned in a later action (or arbitration); but there is usually no obligation on the plaintiff to commence or continue such proceedings. The court has the power to so provide, but it rarely exercises this power.¹⁷ Hence, if neither plaintiff nor defendant proceeds to final judgment or award, the order will be definitive in practice. In fact, in ninety-five per cent of these cases in the Netherlands and about seventy per cent of those in France, the parties do not commence proceedings on the merits; and in reality, therefore, the provisional order is final despite its legally provisional nature.¹⁸

Such an order for payment therefore resembles more a final order than any interim measure; and it is obvious, in the commercial world, that the Dutch procedure may inflict grievous cash-flow repercussions on a defendant. It also reverses the risk of insolvency and the burden of the litigation. In *Van Uden*, the European Court had to consider what was the essential quality of an interim measure; was an order for payment by the defendant (not merely security for payment) more in the nature of an interim judgment; could any measure be interim if it did not merely seek to preserve the status quo but effectively granted the final remedy sought by the plaintiff;¹⁹ and how could a measure be interim, in the sense of “temporary”, when it was in practice usually final? Art. 24 of the Brussels Convention does not contain a definition of a provisional or protective measure; and previously there was room for considerable debate generally as to the scope of any definition.

The European Court of Justice had addressed this issue in *Reichert v. Dresdner Bank (No. 2)* (1992).²⁰ The Court there held that the expression “provisional, including protective measures” in Art. 24 referred to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.²¹ In more general terms, it had elsewhere been recognized that provisional and protective measures perform mainly two functions: (i) providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied;

17. T. HARTLEY, *Interim Measures under the Brussels Jurisdiction and Judgments Convention*, 24 E.L.Rev. (1999) p. 674 et seq. at p. 675.

18. A. STADLER, “*Erlaß und Freizügigkeit einstweiliger Maßnahmen im Anwendungsbereich des EuGVÜ*”, 54 JZ (1999) p. 1089 et seq., at p. 1095 and p. 1096 respectively, both with further references. The author also points out that the number of *kort geding* proceedings undertaken rose from 3,412 in 1975 to 14,774 in 1996 (p. 1090).

19. In *Van Uden*, the Dutch court before which the *kort geding* proceedings were brought awarded the Dutch firm a little less than half the disputed sum as an interim payment due from the German defendant.

20. Case 261/90 [1992] E.C.R I-2149 et seq.

21. *Ibid.*, para. 34.

and (ii) maintaining the status quo pending final determination at trial.²² (The current new draft of Art. 17 of the Model Law being considered by the UNCITRAL Working Group adds two other functions: the preservation of evidence and the prevention of imminent harm, which are particular examples of the second function).²³ Also, in *Denilauler v. Couchet* (1980),²⁴ the European Court of Justice had decided that:

“The courts of the place B or, in any event, of the Contracting State B where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.”²⁵

This approach towards national court procedures led to an interpretation whereby measures under Art. 24 required both a provisional and a protective character, which was also not readily apparent from the express wording of Art. 24 itself.²⁶

Prior to the *Van Uden* decision, this definition of interim measures and the controversial character of interim payment procedures caused doubts as regards the application of Art. 24 of the Brussels Convention. In France, the *Cours d'appel* were divided on this issue and the *Cour de cassation* had yet to give a definitive ruling;²⁷ and in Luxembourg, the state courts had ruled against including this form of interim measure within the scope of Art. 24 of the Brussels Convention.²⁸ Many scholars argued that measures based on “summary” proceedings should not be regarded as interim measures and that any request for an interim order should only be brought before the state court

22. See International Law Association, *Report of the 67th Conference*, (1996) p. 202, clause 1. This definition is taken from Lawrence COLLINS, in “Provisional and Protective Measures in International Litigation” in *Essays in International Litigation and the Conflict of Laws* (Clarendon Press 1994), pp. 11-12. See also G.G. MAHER, and B. RODGER, “Provisional and Protective Remedies: The British Experience of the Brussels Convention”, 48 ICLQ (1999) p. 302 et seq. at p. 302.

23. It is now also being proposed that “imminent harm” be extended to include “prejudice [to] the arbitral process”: see para. 92 UNCITRAL A/CN.9/547 of 19 March 2004.

24. Case 125/79 [1980] ECR 1553 et seq.

25. *Ibid.*, p. 1570, para. 16; *Van Uden v. Deco Line*, *op. cit.*, fn. 12, p. 7135, para. 39 where the court uses the word “authorised” and not as in *Denilauler* “ordered”: the French text in both cases uses the word “*autorisées*”.

26. HARTLEY, *op. cit.*, fn. 17, p. 677.

27. C. KESSEDJIAN, *Hague Conference on Private International Law - Note on Provisional and Protective Measures in Private International Law and Comparative Law*, <www.hcch.net/e/workprog/jdgm/html>, p. 49> referring to *Chambéry* 2 March 1992, *Gaz. Pal.* 1992, II, p. 511, Note MOURRE, in favour of applying Art. 24 to interim payments and *Rennes* 4 November 1992, *Gaz. Pal.* 19 October 1993, Note MOURRE; both reprinted in *JDI* (1994) p. 173 et seq. with comment by HUET.

28. KESSEDJIAN, *ibid.*, p. 49 referring to Luxembourg Court of Appeal, 7th Chamber, Case No. 12898, 26 November 1991 (*Bernard Ruckert v. Gilbert Karmann*), *Bulletin du Cercle Française Laurent* (1993) II, p. 141.

hearing the case with jurisdiction on the merits, rather than another court of a member state.²⁹ Other scholars acknowledged that parties should have the option to claim provisional payment as an interim measure under Art. 24 if the matter was sufficiently urgent.³⁰ This requirement for urgency was also not self-evident from the express wording of Art. 24; but it had generally been argued that this criterion should be read into the article, thereby making it a prior condition for granting any provisional and protective measures.³¹ For example, the European Commission, in its Communication of 26 November 1997 which contained its proposals for the renegotiation of the Brussels Convention, while noting a general tendency to take a generous view when applying the requirement of urgency, suggested an amendment to the Convention containing a uniform definition of provisional and protective measures:

“For the purposes of this Convention, provisional, including protective, measures mean urgent measures for the examination of a dispute, for the preservation of evidence or of property pending judgment or enforcement, or for the preservation or settlement of a situation of fact or of law for the purposes of safeguarding rights which the courts hearing the substantive issues are, or may be, asked to recognise.”³²

This proposal was however not adopted by the EU member states.

The legal systems of member states were (and remain) different in regard to provisional payments as interim measures. The position in France and the Netherlands ranks at one end of the scale. At the other end, Germany has a more restrictive approach: the general rule with regard to interim measures is that such measures must not anticipate the outcome of the main proceedings, i.e., the plaintiff should not receive by way of interim measures what it may be entitled to receive only when a final decision is reached on the merits of the case. However, due to practical necessity, one exception (*Leistungsverfügung*) has been recognized: it has been acknowledged that, in cases where other measures would be unreasonable, the creditor can receive payment before a final decision; but the plaintiff has to fulfill strict requirements to prove its entitlement:³³ such a *Leistungsverfügung* will only be granted when the plaintiff needs the payment so urgently that it cannot wait for the outcome of the main proceedings without suffering disproportionately high, possibly irreparable, damages.³⁴ To this extent, the summary

29. COLLINS, *op. cit.*, fn. 22, p. 38; *ILA Resolution of August 1996* (see Appendix F); *Lord Chancellor's Department (UK) Consultation Paper on the Renegotiation of the Brussels and Lugano Conventions*; A. HÜET, *Chronique de jurisprudence française*, JDI (1989) p. 9, at p. 96.

30. H. GAUDEMET-TALLON, *Les Conventions de Lugano et de Bruxelles*, 2nd edn. (Montchrestien 1996) pp. 194-195; P. GOTHOT and D. HOLLEAUX, *La Convention de Bruxelles du 27 septembre 1968* (Jupiter 1985) pp. 116-117.

31. GAUDEMET-TALLON, *ibid.*; GOTHOT and HOLLEAUX, *ibid.*

32. Proposed Art. 18 COM (97, 609); see W. KENNETT, *The Enforcement of Judgments in Europe* (Oxford 2000) p. 133.

33. A. BAUMBACH/W. LAUTERBACH/J. ALBERS/P. HARTMANN, *Zivilprozessordnung*, 60th ed. (Munich 2002) p. 2351, para. 5-6.

34. H. THOMAS/H. PUTZO, *Zivilprozessordnung*, 22nd ed., (Munich 1999) p. 1512, para. 6.

procedure does exist in German court procedures, but it is treated as a special exception and most often used to claim maintenance in family proceedings and not contractual claims for debt or damages in commercial disputes. In Switzerland, the granting and enforcement of claims for provisional payment is little known, being limited to circumstances within the framework of the law for debt collection and bankruptcy (*Schuldeneintreibungs- und Konkursgesetz*). These only allow the measures of attachment (by way of arrest or *Pfändung*).³⁵ In England, whilst the High Court had statutory powers to order provisional payments to a plaintiff before trial, these were not considered interim measures.³⁶ Accordingly, before the European Court of Justice decided in *Van Uden* the issue whether and if so under what circumstances summary proceedings involving orders by a state court for payment to the plaintiff should be regarded as interim measures within the meaning of Art. 24, the position generally was both unclear and confused within the EU member states. Under the ILA Principles on Provisional and Protective Measures, it may also be recalled that orders for interim payments were specifically excluded from enforcement by Principle 22.³⁷

The *Van Uden* decision³⁸ of the European Court of Justice answered affirmatively, in part, the question whether the Dutch *kort geding* procedure could be regarded as provisional measures under Art. 24 of the Brussels Convention. As already indicated, the British Government had argued, supported by the German Government, that payment of a contractual consideration could not be regarded as a provisional or protective measure within the meaning of Art. 24. This argument was rejected by the European Court on the ground that a provisional order for a sum of money claimed to be due, under certain circumstances even for the amount corresponding to the principal relief claimed by the plaintiff, may be necessary to ensure the practical effect of the final decision.³⁹ Nevertheless, the European Court recognized the dangers of this approach, principally that such an order could preempt the decision on the substance of the dispute. If the plaintiff were entitled to obtain interim payment by an order made by the courts of its own domicile (where those courts had no jurisdiction over the substance of the case under Arts. 2 to 18 of the Brussels Convention) and have thereafter that order recognized and enforced in the defendant's state court under Art. 24 and Title III, the jurisdictional rules of the Brussels Convention could be entirely circumvented.⁴⁰ The Brussels Convention is of course intended to reduce and not increase resort to forum-shopping by plaintiffs.

35. M. GULDENER, *Schweizerisches Zivilprozessrecht*, 3rd ed. (Zurich 1979) p. 575.

36. However, under the new CPR Part 25, interim payments are now grouped with other interim remedies; and the current position is therefore equivocal under English law (but see *Dyson v. Hoover* (No. 4) [2004] 1 WLR 1264, on costs).

37. International Law Association, *op. cit.*, fn. 22, p. 186 et seq.

38. Case C-391/95, *op. cit.*, fn. 15.

39. *Ibid.*, p. 7136, para. 45 referring to Case C-393/96P(R) *Antonissen v. Council of the European Union* [1997] E.C.R. I-441, para. 37 of the judgment. The case, however, did not concern the Brussels Convention.

40. *Ibid.*, p. 7136, para. 46.

For these reasons, the European Court held that an order for interim payment does not constitute an interim measure within the meaning of Art. 24 unless two conditions are met: (i) the repayment to the defendant of the sum awarded should be guaranteed if the plaintiff is unsuccessful with regard to the substance of the claim; and (ii) the measure should relate only to specific assets of the defendant located or to be located within the territory of the forum.⁴¹ The *Van Uden* decision left unanswered other difficult questions: how exactly was the requirement of “specific assets” to be interpreted? What was the precise meaning of the phrase “located or to be located” within the territorial jurisdiction of the court to which the application was addressed? In particular, did it permit a plaintiff to apply for a “floating” interim measure which can be put into effect as and when assets of the defendant are moved into the territorial jurisdiction of the court to which the application has been made?⁴² Legal scholars have since debated the several possible answers; but whilst these particular uncertainties remain, the general force of the *Van Uden* decision remains clear.

The European Court clearly contemplated as interim measures the French attachment order (*saisie conservatoire*) and the English *Mareva* “freezing” injunction, both of which are based on specified assets, for example bank accounts. However, the essential connecting link can be more difficult to establish when it concerns an interim order for payment: “If money has no earmark, it certainly has no domicile.”⁴³ It remains disputed whether the mere possibility that the debtor will in the future acquire assets in the jurisdiction of the ordering court is sufficient (as already decided by the *Gerechtshof Den Haag*, which referred the case to the European Court of Justice).⁴⁴ Almost certainly, the European Court’s decision requires payment orders to be limited to an amount which will probably be enforceable within the jurisdiction of the state court making that order.⁴⁵

The European Court’s decision also established “that the granting of provisional and protective measures on the basis of Art. 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought”.⁴⁶ The Court did not define this “real connecting link”. It seems plausible that “specific assets” can be considered to be such a “real connecting link”. But if this restriction were limited to interim measures in the form of provisional payments, what other “real connecting link” might be adequate in other cases not involving any payment?⁴⁷

This poses particular questions with regard to certain forms of *Mareva* injunction made by the English Court, where it has been argued with force that this limitation rules out the enforcement of the “worldwide” *Mareva* injunction under Art. 24: such forms of

41. *Ibid.*, p. 7137, para. 47.

42. KENNETT, *op. cit.*, fn. 32, p. 140.

43. A. STADLER, *op. cit.*, fn. 18, p. 1089 et seq. at p. 1093.

44. *Ibid.*, p. 1094; HARTLEY, *op. cit.*, fn. 17, p. 679 who considers that the reasoning of the Dutch courts in this regard was vindicated.

45. *Ibid.*

46. Case C-391/95, *op. cit.*, fn. 15, p. 7138.

47. KENNETT, *op. cit.*, fn. 32, p. 140.

injunction operate in personam and do not require any assets to be present within the jurisdiction of the English Court. However, given that such *Mareva* injunctions are so different from the measures before the European Court in *Van Uden*, it could be unwise to regard the Court's comments as necessarily applying directly to them.⁴⁸ One German scholar has argued that the answer to this question depends upon the interpretation of the word "real", i.e., should it be understood in a concrete, proprietary way ("*gegenständlich*") or in the sense of "actual"? If the former, only measures related to attachment of assets would be included, whereas all other injunctive orders would fall outside Art. 24.⁴⁹ As there suggested, it does not seem likely that the European Court intended to exclude these broad measures from the framework of Art. 24. Hence, the latter solution seems more plausible whereby there must be an actual possibility of judicial intervention at the place where the order was made; and if so, it therefore may be sufficient that sanctions for contempt of court for breach of the injunction (including payment) can be enforced in the territory where the order has been made. However, it would not be sufficient if judicial access to the defendant and his assets were only theoretically possible. Hence, *Mareva* injunctions can only be ordered under Art. 24 of the Brussels Convention if they are in fact enforceable against the defaulting defendant in England, in one way or another.⁵⁰ Conversely in France, after the *Van Uden* decision, the *Cour de cassation* in the *Virgin Atlantic* case (2002)⁵¹ decided that the French court did not have power to order as an interim measure the appointment of experts to investigate an air crash in England, there being on the facts no real connecting link between the subject matter of the measure sought and the territorial jurisdiction of the French court, notwithstanding the presence in France of certain defendants.

Another question raised, but left unanswered by the European Court, is exactly what measures qualify as provisional and protective for the purpose of Art. 24. The requirement that the plaintiff must provide a guarantee for repayment of the amount of money awarded indicates that a remedy cannot fall under Art. 24 unless it is juridically provisional in the sense that it can be overturned in subsequent proceedings, whether litigation or arbitration.⁵² However, the European Court did not explain whether there must also be an obligation imposed on the plaintiff to commence or continue such proceedings within a reasonable time in order to repay the money (or not) or whether it would be sufficient if the defendant had the legal right to commence proceedings to overturn the interim payment order. If such an obligation is not imposed upon the plaintiff, the defendant's only remedy would be to commence proceedings itself which could confront considerable difficulties. Amongst these, cash-flow would be reversed; the defendant would turn into the plaintiff; the legal or evidential burden of proof could shift from the plaintiff to the defendant; and many of the risks of insolvency reversed.⁵³ It has therefore been suggested that interim measures awarding a sum of money or other

48. HARTLEY, *op. cit.*, fn. 17, p. 679, fn. 34.

49. STADLER, *op. cit.*, fn. 18, p. 1094.

50. *Ibid.*, p. 1094.

51. *Virgin Atlantic Airways Limited c/G.I.E. Airbus Industries* (2002) *Rev crit* 371.

52. HARTLEY, *op. cit.*, fn. 17, p. 680.

53. *Ibid.*

definitive remedy should not be considered to fall within Art. 24 unless the order is temporary and automatically terminates if the plaintiff does not itself bring or continue proceedings within a reasonable time before the court or arbitration tribunal having jurisdiction to hear the substantive dispute.⁵⁴ This approach appears desirable as it would not allow the plaintiff to avoid litigating in the appropriate forum but still give security to both plaintiff and defendant that any final order given by the appropriate forum will be satisfied, in conformity with the true purpose of an interim measure.

The decision made in the *Van Uden* case was followed by the European Court only a few months later in the *Mietz* decision (1999).⁵⁵ The latter case did not concern arbitration proceedings, but again referred to Art. 24 of the Brussels Convention and the circumstances upon which provisional measures, i.e., interim payments, may be granted and enforced under Art. 24. The European Court reiterated that interim payments will only fall within the meaning of Art. 24 if they are subject to the two conditions outlined above.⁵⁶ The decision clarified that where the court of origin had expressly indicated in its judgment that it had based its jurisdiction on Art. 24 in conjunction with its national law and a contractual payment was ordered, but no repayment guarantee given and no specific assets in the jurisdictional territory of the court addressed, the foreign court to which application for enforcement was made would have to conclude that the measure ordered (namely unconditional interim payment) was not an interim measure within the meaning of Art. 24 and was therefore not capable of being the subject of an enforcement order under Title III of the Brussels Convention.⁵⁷ The European Court also decided that the foreign court asked to enforce such an order must adopt a cautious approach. Hence, where the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the Brussels Convention's jurisdictional rules are not circumvented requires the foreign court to presume that the court founded its jurisdiction to order interim measures on its national law governing interim measures and not on any jurisdiction derived from the Brussels Convention.⁵⁸

There is a further special condition regarding the cross-border enforcement of interim measures under Art. 24 of the Brussels Convention, established long before the *Van Uden* decision. Under national laws of the EU member states, it is not unusual for certain interim measures to be sought and ordered by the state court *ex parte*, without any prior notice to the defendant, particularly where it is necessary to preserve an element of surprise. This procedure is an extraordinary exception to the otherwise fundamental rule requiring notice to the defendant, enshrined in Art. 6 of the European Convention on Human Rights. In relation to the Brussels and Lugano Conventions, it is well established, however, that such *ex parte* orders cannot be enforced by the state courts of other Contracting States. In *Denilauler v. Couchet Frères* (1980),⁵⁹ the European Court of Justice concluded that *ex parte* orders for protective measures did not fall within the scope of

54. *Ibid.*; contra this approach: Advocate LÉGER at para. 136 of his opinion.

55. Case C-99/96, [1999] E.C.R. I-2277 et seq.

56. *Ibid.*, p. 2314, para. 42.

57. *Ibid.*, p. 2316 et seq., para. 49 et seq.

58. *Ibid.*, p. 2318, para. 55.

59. Case 125/79, [1980] E.C.R. 1553 et seq.

the simplified procedures for recognition and enforcement set out in the Brussels Convention:⁶⁰ these procedures were predicated on the assumption that the defendant had already had an opportunity to be heard in the state court of origin; and there was no justification for their enforcement in another state's court when that precondition was not satisfied.⁶¹ This conclusion was further supported by the existence of special rules in Art. 24 of the Convention which took account of the particular policy issues relevant to provisional and protective measures. Whilst such procedures could be found in the legal systems of member states and might be regarded, where certain conditions were fulfilled, as not infringing the "rights of the defence", the European Court emphasized that the granting of this type of measure requires particular care on the part of the national court and detailed knowledge of the actual circumstances in which the measure was to take effect.⁶²

The need to reappraise this restriction has been suggested by certain scholars.⁶³ It is recognized that on the one hand, the legal systems of all Member States make use of protective measures and that there is a degree of similarity as to the kinds of measures made available.⁶⁴ On the other hand, there are considerable differences between States concerning their details;⁶⁵ and allowing ex parte orders to be enforced under the Brussels Convention would necessarily assume greater trust between national jurisdictions, an ingredient possibly missing amongst the Member States of the enlarged European Union. At present, there is no immediate prospect of Art. 24 being extended to interim measures made ex parte; and it is significant that the Preliminary Draft of the 1999 Hague Judgments Convention did not even seek to do so.⁶⁶ Art. 13 provides for the cross-border enforcement of provisional and protective measures; but recognition or enforcement of such an interim measure may be refused by a foreign court under Art. 28(1)(d) where "the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence".⁶⁷ Thus, this requirement will not be fulfilled by an applicant seeking to enforce an ex parte measure, obtained without prior notice to the defendant. Where angels at The Hague feared to tread, certain other angels at UNCITRAL (so it appears) do not.⁶⁸

60. *Ibid.*, p. 1571, para. 17.

61. *Ibid.*, p. 1569, para. 13.

62. *Ibid.*, p. 1570, para. 15.

63. KENNETT, *op. cit.*, fn. 32, p. 148 et seq.

64. *Ibid.*, p. 150.

65. *Ibid.*

66. See <www.hcch.net/e/workprog/jdgm/html>.

67. *Ibid.*

68. In Europe, the topic of "ex parte" (i.e., without notice) interim measures in arbitration remains highly controversial: Hans van HOUTTE "Ten Reasons Against a Proposal for *Ex parte* Interim Measures of Protection in Arbitration", *Arb Int.* (2004) p. 85; DERAÏNS, "Arbitral Ex Parte Interim Relief", *Dis Res Jo* 61, p. 203 (also *Gaz. Pal.* 2003/2 I, 14); and VAN HAERSOLTE-VAN HOF, "Interim Measures of Protection – a European and Continental Perspective" in *ICCA Congress Series no. 11*, p. 150 at pp. 155 and 156; but for the United States, see contra, CASTELLO, *Disp Res Jo* (2003) p. 60. There is no like controversy over interim measures ordered at a hearing

III. NATIONAL OVERVIEW: ENGLAND, SCOTLAND, GERMANY, SWITZERLAND AND FRANCE

Three of these nations (including Scotland as part of the United Kingdom) are EU member states subject to the Brussels Convention (Regulation); the fifth (Switzerland) is linked to the three by the Lugano Convention; and all five have different legal traditions in the field of transnational commercial arbitration, with Scotland and Germany as Model Law jurisdictions. This part of the report is intended to contrast the two-part requirements of a national arbitral system of interim measures: (i) orders by the arbitration tribunal; and (ii) orders by the state court in support of the arbitral process. As a working definition, interim measures are here taken to be measures “to prevent or minimize any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result”.⁶⁹

The first question is: who has the power to grant interim measures? For many years the arbitration tribunal did not usually have the power to order interim measures in many jurisdictions, or if it did, this power was extremely limited.⁷⁰ Although this is still the case in certain jurisdictions,⁷¹ the overall approach has long changed. It is now generally acknowledged that the arbitration tribunal should have power to grant specific interim measures. Nonetheless, various national laws differ considerably as to the extent of such powers. In this regard, three different approaches can be distinguished: first, arbitration laws where the law itself vests the arbitration tribunal with a broad power to order interim relief, subject to any agreement to the contrary by the parties; second, laws which grant the power to order certain types of interim relief, but require an agreement of the parties for all other types; and third, laws where an agreement by the parties is required for the tribunal to order interim relief as no powers are implied by law.⁷² This exercise again demonstrates that comparative laws on interim measures are complicated, including the national laws of the EU member states.⁷³

notified to the respondent where the latter declines to participate, also confusingly called “ex parte”: see SCC Case 96/2001 in 2 Stockholm Arbitration Report (2003) p. 47 at p. 52.

69. UNCITRAL Secretariat Report “Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration”, UN Doc. A/C.N. 9/264 (25 March 1985), see H. HOLTZMAN, and J. NEUHAUS, *A Guide to the UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary* (Deventer 1989) p. 542.

70. See, e.g., the old German arbitration law, where pursuant to Arts. 1039, 1040 and 1042 of the ZPO, solely final arbitral awards could be declared enforceable; and in Switzerland, see Art. 26 of the Swiss Concordat on Arbitration (replaced by PIL Art. 183 concerning international arbitration).

71. See, e.g., Art. 818 of the Italian Code of Civil Procedure: “The arbitrators may not grant attachments or other interim measures of protection.” similarly Art. 753 of the Argentine Code of Civil Procedure.

72. See LEW, MISTELIS and KRÖLL, *Comparative International Commercial Arbitration* (The Hague 2003) p. 589 et seq.

73. For a magnificent explanation, see NEWTON, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Hart 2002) pp. 281-372. See also DICEY & MORRIS, *Conflict of Laws*, 13th ed., vol 1, p. 182 et seq.

1. England

a. *Interim relief and the arbitration tribunal*

The general powers of an English arbitration tribunal to order interim measures are contained in Sect. 38 of the Arbitration Act 1996, particularly Sect. 38(4) and (6) as regards the inspection, photographing, preservation, custody, detention, sampling, observation of or the conduct of experiment on certain defined property. That property must be the subject of the arbitral proceedings or property as to which any question arises in the proceedings; and it must be owned by or in the possession of a party to the proceedings. Sect. 38(3) grants the tribunal power to order security for the costs of the arbitration. These general powers do not apply if the parties have agreed otherwise; and as regards these measures, England falls within the first category described above. However, for certain other measures, England falls into the second category.

Under Sect. 39 of the Arbitration Act 1996, the parties may agree in writing to confer on the arbitration tribunal a greater power to order on a provisional basis any relief which the tribunal would have power to grant in a final award. These powers include a provisional order for the payment of money by one party to another (including payment on account of the costs of the arbitration) or the disposition of property as between the parties to the arbitral proceedings. These powers have to be conferred by the parties' written agreement, in their arbitration agreement or by arbitration rules incorporated into such agreement (such as Art. 25.1(c) of the LCIA Rules)⁷⁴; and it is not otherwise a power enjoyed by a tribunal in England: see Sect. 39(4) of the 1996 Act. This restriction was imposed during the consultation process after strong concerns had been expressed by users that these greater powers could be abused by arbitration tribunals. It is not considered possible for an arbitration tribunal in England, under the 1996 Act, to grant any interim measure *ex parte*, without prior notice to the defendant.

In a recent case, *Kastner v. Jason* (2004),⁷⁵ the English court decided that the consensual jurisdiction of the arbitration tribunal included a power by its final award to make "freezing directions" pending satisfaction of the final award or the provision of security to that end; and accordingly, by virtue of Sect. 39(1) of the 1996 Act, the tribunal

74. Art. 25.1(c) LCIA Rules: the Arbitral Tribunal shall have the power ...

"(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties."

75. *Kastner v. Jason & Sherman v. Kastner* [2004] EWHC 592 (Ch), *The Times*, 26 April 2004 (Lightman J.: 23 April 2004; unreported). The arbitration tribunal was the *Beth Din*; and the arbitration agreement under Jewish law included a power to grant an *ikul*, as provided in the *Shulchan Aruch*, *Chosen Mishpat* chapter 73.10:

"Where there is an outstanding debt that is not yet at term, but the lender appears before the Beth Din claiming that the borrower is running down his assets 'and I will not have from what to collect my debt' ... it is a requirement of the Beth Din to hold the funds until time for the repayment comes ... the same applies if the borrower intends to travel overseas."

enjoyed a power by a provisional award to order the “freezing” of the respondent’s only asset in England, namely his home. In circumstances where the allegations against the respondent raised issues of fraud and where he was taking steps both to dispose of his assets in England and emigrate to the United States, the tribunal prohibited him from dealing or disposing of his home without the written permission of the tribunal. The defendant nonetheless sold his home to innocent third parties and escaped to the United States with the proceeds of sale, thereby evading the enforcement in England of the eventual final award. No doubt, the final award could still be enforced against the respondent in the United States under the 1958 New York Convention, if he or his assets can be found; but neither the final nor provisional award can be enforced under English law against the third parties: a “freezing” order creates no charge, lien or other security interest in the property which is the subject matter of the order. It would have been wiser for the arbitration tribunal, with hindsight, to order the respondent to make a monetary payment by a provisional award under Sect. 39(2)(a) of the 1996 Act, which (if unpaid) could have been enforced by the English court before the final award and registered as a legal charge on the property, thereby becoming effective against third parties.

b. The competence of the state courts

Under Sect. 44 of the 1996 Act, the English court has the same powers to make interim measures in support of the arbitral process as it enjoys for its own legal proceedings. These broad powers include the preservation of evidence, the inspection of any property at issue (even where non-parties are involved, e.g., where situated on a third person’s property), the sale of goods at issue, the appointment of a receiver, *Mareva* injunctions and *Anton Piller* orders. If the case is urgent, the court may make orders *ex parte* for the purpose of preserving evidence or assets, including *Mareva* injunctions: Sect. 44(3). The court can make these orders before the commencement of the arbitration or appointment of the tribunal; but it should not intervene unless a tribunal or any other person with like authority has no power or is unable for the time being to act effectively: Sect. 44(5) of the Act. It may also order that when constituted a tribunal may decide, in whole or in part, that the court order should cease to have effect: Sect. 44(6) of the 1996 Act. The court has no power to order security for the costs of the arbitration, such power being reserved to the arbitration tribunal.

The court may grant these measures to assist both an English arbitration and a foreign arbitration outside England: Sect. 2(3) of the 1996 Act. In both cases, the English court may enforce its orders under its draconian powers to punish a defaulting party for contempt of court.

c. The enforcement of interim measures

Under Sect. 42 of the 1996 Act, unless otherwise agreed by the parties, the English court may order a defaulting party to comply with a “peremptory order” for interim measures made by an arbitration tribunal in England, with the sanctions of contempt of court if the defaulting party fails to comply with the court order. A tribunal may make a peremptory order under Sect. 41(5) of the 1996 Act where a party fails or refuses to comply with any order made by the tribunal, including an order for interim measures under Sects. 38 and 39 of the 1996 Act.

2. Scotland

a. *Interim relief and the arbitration tribunal*

In Scotland, the powers of the arbitration tribunal to order interim measures of protection in an international arbitration are contained in Art. 17 of the Model Law, as enacted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The range of possible measures is not statutorily defined, although the Model Law's *travaux* are thought by scholars to provide useful examples: "measures for the conservation of goods, such as their deposit with a third person, or the sale of perishable goods", "the opening of a banker's credit", "the use or maintenance of machinery or works or the continuance of a certain phase of construction if necessary to prevent irreparable harm", "securing evidence which would otherwise be unavailable at a later stage of the proceedings" and the protection of trade secrets and proprietary information".⁷⁶ Art. 20 of the Scottish Arbitration Code (a consensual document without the force of law) provides additional examples of interim measures, with the agreed sanction for non-performance of an order barring the claim or defence, as the case may be.

b. *The competence of the state courts*

By virtue of Art. 9(1), it is not incompatible with an arbitration agreement for a claimant to request or obtain interim measures from the Scots court before or during arbitration proceedings. Art. 9 confers itself no powers on the Scots court to grant interim measures, it being considered that the court will enjoy the same powers as those applicable to its own legal process and domestic Scots arbitration. These do not include the English form of *Mareva* injunction or ordering security for legal costs, although it could include the provision of security to ensure payment of any award. It is not clear whether the parties can by agreement agree to exclude the powers of the Scots court to order interim measures in support of the arbitral process.⁷⁷

c. *The enforcement of interim measures*

Art. 17(2) provides that the arbitration tribunal's decision shall take the form of an award and be enforced by the Scots court accordingly. Outside Scotland, despite its statutory nomenclature, it is questionable whether such an "award" could be enforced under the 1958 New York Convention: it would be self-evidently not a final award but a provisional order. It is also questionable whether the Scots court would enforce or recognize a decision by the arbitration tribunal made *ex parte*, without prior notice to the respondent party. In two recent cases, *Karl Construction v. Palisade Properties* (2002) and *Barry D Trentham v. Investments* (2002),⁷⁸ the Scots court considered the limited extent

76. DAVIDSON, *Arbitration* (Edinburgh 2000), p. 256. (Domestic arbitrations are not governed by the 1990 Act but fall under the ancient 1695 statute, awaiting reform by the Arbitration (Scotland) Bill 2002, as yet not enacted: see DERVAIRD, et al., "Arbitration in Scotland – A New Era Dawns", 70 *Arb* (2004) p. 115).

77. DAVIDSON, *ibid.*, p. 58.

78. 2002 SLT 312; 2002 SLT 1094 (Neither were arbitration cases; and the Scots court does have a qualified power at a hearing to act *ex parte*, without prior notice to the defendant).

to which the provisional remedies of protective attachment under Scots law complied with the European Convention on Human Rights; and by legal analogy, the same considerations would apply to an arbitration tribunal, if not more so. It is therefore highly doubtful whether an arbitral tribunal in Scotland could ever make an interim measure *ex parte*, without any prior notice to the defendant.

3. *Germany*

a. *Interim relief and the arbitration tribunal*

Under the 1998 new arbitration law, enacting the UNCITRAL Model Law, the provision regarding interim measures is Sect. 1041 of the German Code of Civil Procedure (ZPO),⁷⁹ corresponding to Art. 17 of the Model Law. Sub-sect. 1 provides that unless the parties agree otherwise, the arbitral tribunal is entitled, at the request of a party, to grant provisional or protective measures it considers necessary in respect of the subject matter of the dispute. The arbitral tribunal can request adequate security from each party in relation to this measure. Sub-sect. 2 provides that each party may request the German court to permit enforcement of a measure referred to in Sub-sect. 1 unless application for a corresponding measure has already been made to the court. The court may recast such an order if necessary for the purpose of enforcing the interim measure. According to Sub-sect. 3 the court may, upon request, repeal or amend the decision referred to in Sub-sect. 2. According to Sub-sect. 4, if a measure ordered under Sub-sect. 1 proves to have been unjustified from the outset, the party which obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure or from its providing security in order to avoid enforcement. This claim may be put forward during the pending arbitral proceedings. These provisions were based on Art. 17 of the UNCITRAL Model Law.⁸⁰

A slight restriction to the exercise of arbitral discretion may result from the requirement that it must be a measure “in respect of the subject matter of the dispute”. It will be recalled that similar words were omitted from the new Art. 23 of the 1998 ICC Rules;⁸¹ but in practice, this restriction may not be material. It nonetheless constitutes a substantive requirement with regard to the conditions for issuing interim measures by an arbitration tribunal; and as no further requirements are expressly specified, it has been argued that this is the only restriction.⁸² Conversely, it has been argued that the arbitration tribunal should apply Sect. 916 et seq. ZPO which govern interim relief by German courts and provide for additional requirements, such as urgency, the likelihood that the claimant will suffer substantial harm if the relief is not

79. All references in relation to the German law on arbitration are to the German Code of Civil Procedure (ZPO).

80. The first protocol of the Reform Commission at the Federal Ministry of Justice stated that: “under no circumstances should a provision such as Art. 17 of the UNCITRAL Model Law be omitted from the New Act”.

81. See DERAINS and SCHWARZ, *A Guide to the New ICC Rules of Arbitration*, 1st ed. (Kluwer 1998) p. 274.

82. S. BANDEL, *Einstweiliger Rechtsschutz im Schiedsverfahren* (Munich 2000) p. 32 B 34.

granted and a good arguable case on the merits.⁸³ When ordering interim relief the arbitration tribunal is given the same power as state courts, including orders for attachment,⁸⁴ but it is not limited to the measures provided by Sect. 916 et seq.⁸⁵ This can be inferred from Sect. 1041(2)(2), which allows the court to recast an order made by the arbitration tribunal if necessary for proper enforcement.⁸⁶ This legal provision ensures that the arbitral order complies with the German enforcement system with its principle of strict certainty (*Bestimmtheitsgrundsatz*).

Sect. 1041 is silent on the issue whether an arbitration tribunal is entitled to order ex parte interim relief. However, Sect. 1042(1) stipulates that the parties have to be treated equally and have to be heard which suggests that ex parte relief would infringe this principle. However, it has been argued that this principle is only a general procedural rule and that such general rules necessarily provide for exceptions even without mentioning them expressly.⁸⁷ As an example of this relationship between rule and exception, the German constitutional guarantee of *audiatur et altera pars* is cited, which broadly corresponds to the general rule of Sect. 1042(1).⁸⁸ Art. 103(1) of the German Constitution enshrines this general guarantee without mentioning any exceptions; and it was argued before the Constitutional Court that a judge's order granted on an ex parte basis infringes the constitutional guarantee. The Constitutional Court held that, as an exception to the rule of Art. 103(1), an ex parte order does not infringe this constitutional provision if an ex parte procedure was necessary to secure interests that would otherwise be endangered, as an exception to the rule born from necessity to ensure the effectiveness of the judicial process. A similar line of argument could be developed to provide for an exception with regard to Sect. 1042(1),⁸⁹ although Art. 103 does not apply to arbitrations.⁹⁰ Conversely, ex parte provisions regarding the enforcement of interim measures exist in Sect. 1063(3), as discussed below, so that it could be argued that if the legislature had intended to allow ex parte relief to be granted by the arbitration tribunal, it would have explicitly done so. The fact that the German legislature did not do so in Sect. 1041 speaks, of course, for itself.

b. The competence of the state courts

Although Sect. 1041 now hands to the arbitral tribunal the power to grant interim measures, the power of the state courts to grant interim measures both prior to and during the arbitral proceedings is not excluded, as provided by Sect. 1033

83. R. A. SCHÜTZE, *Schiedsgericht und Schiedsverfahren*, 3rd ed. (Munich 1999) para. 237.

84. BT-Drs 13/5274, 45.

85. A. BAUMBACH/W. LAUTERBACH/J. ALBERS/P. HARTMANN, *op. cit.*, fn. 33, Sect. 1041, para. 2.

86. *Ibid.*, para. 4.

87. J. SCHAEFER, "New Solutions for Interim Measures of Protection in International Commercial Arbitration", 2 *EJCL* 2, p. 21.

88. *Ibid.*

89. *Ibid.*

90. H. THOMAS/H. PUTZO, *op. cit.*, fn. 34, Einl. I, para. 10.

(corresponding to Art. 9 of the Model Law). Sect. 916 et seq. is here applicable.⁹¹ The power given to the courts is not subsidiary, but original (*originär*, i.e., equal to the power given to the arbitral tribunal⁹²) and therefore gives to parties the freedom of choice. Sect. 1033, restating the wording of Art. 9 of the UNCITRAL Model Law, limits the court to ordering interim measures relating to the subject matter of the dispute in the arbitration proceedings (This mirrors the power given to the arbitration tribunal under Sect. 1041, as discussed above). However, Sect. 1033 does not provide for the court's jurisdiction to grant interim measures: it has only a declaratory function; and the court's jurisdiction must be established under provisions of the ZPO dealing with competence for interim measures of protection (Sect. 1062).

The principle of concurrent jurisdiction stated in Sects. 1033 and 1041 ensures that parties are entitled to apply to the German court to obtain interim measures, despite the existence of an arbitration agreement. These provisions therefore prevent the old argument that courts lacking jurisdiction to hear disputes within the scope of an arbitration agreement are thereby prevented from ordering any provisional or conservatory measures in support of the arbitral process.⁹³ The concurrent jurisdiction is limited as the parties are free to agree to remove certain measures from the jurisdiction of the arbitrators, an application of the more general principle of party autonomy.⁹⁴ It is also suggested that, conversely, parties can agree not to apply to the courts for provisional or protective measures during the course of the arbitration.⁹⁵ However, German scholars express the view that parties cannot opt out of Sect. 1033.⁹⁶

c. *The enforcement of interim measures*

Under the old German arbitration law, the enforcement provisions were interpreted to apply only to final awards so that its provisional character excluded any interim measure from enforcement by the German court.⁹⁷ Under the new law, the ruling regarding interim measures is classified as a decision ("*Beschluß*"); and interim measures are neither enforceable awards nor are they equated with them.⁹⁸ However, as already mentioned above, the new law contains provisions regulating the enforcement of provisional measures ordered by arbitration tribunals. Sect. 1041(2) allows a party to turn to the German court to request enforcement. The court has a certain degree of discretion: it

91. *Ibid.*, Sect. 1033, para. 2.

92. *Ibid.*, para. 4.

93. This argument was raised under the New York Convention where it has sometimes been held that by ordering a protective measure the state court contravenes Art. II(3) of the Convention: see FOUCHARD, GAILLARD and GOLDMAN, *International Commercial Arbitration* (The Hague 1999) para. 1307 (hereinafter, *Fouchard Gaillard Goldman*). See also for the United States, *McCreary & Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974) and DONOVAN, *op. cit.*, fn. 7, p. 141.

94. *Fouchard Gaillard Goldman*, *ibid.*, para. 1319.

95. *Ibid.*

96. BAUMBACH/LAUTERBACH/ALBERS/HARTMANN, *op. cit.*, fn. 33, Sect. 1033(2); SCHAEFER, *op. cit.*, fn. 87, p. 20.

97. *Bundesgerichtshof*, 22 May 1957, ZZP 427 (1958), see also S. BESSON, *Arbitrage international et mesures provisoires* (Zurich 1998) para. 494 et seq.

98. BAUMBACH/LAUTERBACH/ALBERS/HARTMANN, *op. cit.*, fn. 33, Sect. 1041(2).

is allowed to verify the validity of the arbitration agreement and to refuse interim measures which have a disproportionate character.⁹⁹ Sect. 1041(2) allows the court to recast an order for interim measures, if necessary, for the purpose of enforcing that measure. As indicated above, this reflects the conflict between the flexibility of interim relief available to arbitration tribunals and the limited class of measures available to German courts. Thus, even though an arbitral tribunal sitting in Germany may issue a “freezing” order, it is more than doubtful that a German court will enforce such an interim measure since this kind of order is unknown in German procedural law.¹⁰⁰ Furthermore, the German court may, upon request by one party, in accordance with Sect. 1041(3), cancel or amend a decision on enforcement.

Sect. 1025(1) implements the territorial theory, i.e., that the new German law applies only to arbitrations having their seat in Germany. That leaves questions with regard to the enforcement of arbitral interim relief orders made by an arbitration tribunal sitting abroad or measures which need enforcement abroad. It has been concluded by some scholars that the enforcement system established by Sect. 1041 applies only to interim measures which have been issued by an arbitral tribunal sitting in Germany and which are to be enforced by the German courts in Germany;¹⁰¹ and by others that it has yet to be seen whether the new law allows the enforcement of interim measures granted by an arbitration tribunal sitting abroad.¹⁰² It has also been concluded that the assistance of the German courts in accordance with Sect. 1041 cannot be invoked unless the arbitration tribunal is based in Germany because of a conclusion *e contrario* from the fact that this provision is not contained in the catalogue of exceptions outlined in Sect. 1025(2)-(4) which provide (*inter alia*) that Sect. 1033 will also be applicable when the seat of the arbitration is outside Germany.¹⁰³

However, Sect. 1062(2) provides:

“If the place of arbitration in cases referred to in subsection 1 ... No. 3 [enforcement of an order for interim measures of protection by the arbitral tribunal] is not in Germany, the competence for decisions lies with the Court of Appeal in the area where the party opposing the application has its place of business or habitual residence, or where assets of that party or the property in dispute or affected by the measure are located....”

Hence Sect. 1062(2) may provide for the competence of the German court to enforce an interim measure ordered by an arbitration tribunal where the seat of arbitration lies outside Germany, provided the parties chose German procedural law to apply to their arbitration.¹⁰⁴ Further, Sect. 1062(2) provides that Sect. 1033 also applies to cases where

99. K.P. BERGER, *The New German Arbitration Law in International Perspective* (The Hague 2000) p. 11.

100. *Ibid.*

101. *Ibid.*

102. A. REINER, “*Les mesures provisoires et conservatoires et L’arbitrage international, notamment l’Arbitrage CCP*”, 125 J.D.I. p. 853, et seq., at p. 870.

103. S. BESSON, *op. cit.*, fn. 97, para. 505.

104. See SCHAEFER, *op. cit.*, fn. 87, p. 22.

the arbitral seat lies abroad or has yet to be determined, suggesting that a party may then apply directly to the German court for interim measures. Nonetheless, the important questions regarding arbitration tribunals not applying German law as the *lex arbitri* and the enforcement of interim measures abroad remain unsolved. For these cases, German scholars have suggested the drafting of a new international convention for the enforcement of interim arbitral orders, beyond Art. 24 of the Brussels Convention.¹⁰⁵

Although it appears doubtful, as discussed above, whether arbitral tribunals can grant *ex parte* relief, German law provides for enforcement proceedings which involve only one party. Sect. 1062(3) provides:

“The presiding judge of the civil court senate (*Zivilsenat*) may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been reached, the applicant may pursue enforcement of the award or enforce the interim measure of protection of the arbitration court pursuant to Section 1041. In case of an award, enforcement may not go beyond measures of protection. The party opposing the application may prevent enforcement by providing as security an amount corresponding to the amount that may be enforced by the applicant.”

This provision will help to prevent a party from frustrating an order made by a tribunal before it becomes effective. However, as the right to be heard needs to be given at least minimal acknowledgment, the unheard party is to be heard as soon as possible after the enforcing order has been issued. At that point the order can be confirmed, cancelled or varied by the court. Additionally, the court should always require security for claims for compensation arising in those circumstances.¹⁰⁶

4. *Switzerland*

a. *Interim relief and the power of the tribunal*

Swiss law applicable to international arbitrations allows the arbitration tribunal broad authority with regard to the granting of interim measures of protection. Like German law, it falls into the first category outlined above of the various national arbitration laws. Art. 183(1) of the Swiss PIL¹⁰⁷ provides:

“Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures.”

Therefore, at least theoretically, the powers conferred are wider than those given by the UNCITRAL Model Law and hence also by German law, because Art. 183(1) omits the phrase “it considers necessary in respect of the subject matter of the dispute”. This is probably not of great practical significance: it is assumed that provisional measures are

105. BERGER, *op. cit.*, fn. 99, p. 12.

106. LEW, MISTELIS and KRÖLL, *op. cit.*, fn. 72, p. 615.

107. Unless stated otherwise, all articles referred to subsequently are those of the Swiss PIL.

necessarily tied to the subject matter of the principal dispute.¹⁰⁸ Paras. 2 and 3 of Art. 183 also provide:

“(2) If the addressee of such an order fails to comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court; the latter applies its own law.

(3) The arbitral tribunal or the state court can make the order of precautionary or conservatory measures contingent upon the furnishing of appropriate security.”

A right to an interim measure exists if the order is necessary in order to prevent detriment to the applicant which would be very difficult to make good; and the jurisdiction of the arbitral tribunal may only be exercised when this criterion is fulfilled.¹⁰⁹

Although there exists in Switzerland no court procedure comparable to the *référé-provision* in France, in certain situations monetary claims may be secured by way of a provisional attachment order. Attachment orders directed against foreign companies and persons residing outside Switzerland may be granted provided the plaintiff is able to show a reasonable probability that it has a claim against the other party and that its claim is due and payable. The plaintiff is not required to establish that the assets are in jeopardy of being removed or disposed of.¹¹⁰ Only in exceptional circumstances, are attachment orders made by the Swiss court against Swiss residents or Swiss companies.¹¹¹ Before the Swiss court, in certain cases of particular urgency, the requirement of the opposing parties’ right to be heard can be restricted and the order can be made by the court *ex parte*, without prior notice to that party. Then, however, the affected parties’ right to be heard must be granted as promptly as possible.¹¹²

In contrast to Swiss court procedures, Art. 183 does not stipulate in which form interim measures have to be ordered by an arbitration tribunal. Normally, these measures will be issued in the form of an order. If the party fails to comply with the order made by the arbitration tribunal, the tribunal does not have the power to impose penal sanctions. Although Art. 292 of the Swiss Penal Code contains a provision allowing for a penalty for failing to comply with an official order, the arbitral tribunal does not make official orders in this sense.¹¹³ Additionally, legal scholars consider that the arbitral tribunal cannot order a party to refrain from disposing of particular assets.¹¹⁴ However,

108. B. PETER, “Switzerland”, in A. BÖSCH, ed., *Provisional Remedies in International Commercial Arbitration - A Practitioner Handbook* (Berlin/New York 1994) p. 697 with further references.

109. S. BERTI, *International Arbitration in Switzerland – An introduction to and commentary on articles 176 – 194 of the Swiss Private International Law Statute* (Basel 2000) Art. 183, para. 7.

110. H. FREIMÜLLER, “Attachments and other interim court remedies in support of arbitration”, IBL (1984) p. 119 et seq. at p. 120.

111. *Ibid.*

112. BERTI, *op. cit.*, fn. 109, para. 8.

113. *Ibid.*, para. 9.

114. *Ibid.*, para. 12 with reference to, inter alia, G. WALTER/W. BOSCH/J. BRÖNNIMANN *Internationale Schiedsgerichtsbarkeit in der Schweiz* (Berne 1991) p. 130 et seq.

Art. 183 speaks generally of conservatory measures, one form of which is the attachment of assets. Hence it has been argued that there is no reason why an arbitration tribunal in Switzerland could not order a party to refrain from disposing of specific assets.¹¹⁵ Art. 183(3) gives both the arbitral tribunal and state court the competence to grant an interim measure dependent on appropriate security for a possible claim for damages should the order subsequently prove to have been unwarranted.¹¹⁶ According to many scholars, Art. 183, especially with para. 2, is not limited to interim measures granted by an arbitration tribunal based in Switzerland. It allows equally a tribunal outside Switzerland to order interim measures which will then be enforced with the assistance of the Swiss court, as provided by Art. 183(2).¹¹⁷

b. The competence of the state courts

It is accepted that state courts have the competence to act before an arbitral tribunal is established.¹¹⁸ Although not specifically enshrined in the Swiss legislation on international arbitration, the majority opinion agrees that the competence of the courts exists side by side with the one of the arbitral tribunal, when formed.¹¹⁹ The competence of the court is not subsidiary, but equal and concurrent to the competence given to the arbitration tribunal, so that the Swiss court can be requested directly to grant interim relief in support of the arbitral tribunal.¹²⁰ Nevertheless, another opinion exists which denies this possibility by virtue of Art. 183(2) and argues that the arbitration tribunal has exclusive competence starting from the moment when the arbitration tribunal is established.¹²¹ The competence of the Swiss court in cases when the arbitral tribunal is seated abroad is derived from Art. 10.¹²² It states that Swiss judicial or administrative authorities may enter provisional orders even if they do not have jurisdiction on the merits, a provision consistent with Art. 24 of the Lugano Convention.

c. The enforcement of interim measures

Although the provisional measure ordered by an arbitral tribunal is binding on the respondent party, the tribunal has no sanctions to secure its enforcement. Therefore,

115. *Ibid.* with reference to T. RÜEDE/R. HADENFELDT, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed. (Zurich 1993) p. 253.

116. *Ibid.*, para. 14.

117. A. REINER, *op. cit.*, fn. 102, p. 868 with further references; but see contra FREIMÜLLER, *op. cit.*, fn. 110, p. 123.

118. BESSON, *op. cit.*, fn. 97, para. 231.

119. *Ibid.* with further references, inter alia, WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, fn. 114, p. 143; CRAIG, PARK and PAULSSON, *International Chamber of Commerce Arbitration*, 3rd ed. (New York 2000), p. 579, para. 33.03.

120. BESSON, *op. cit.*, fn. 97, para. 310 with further references, inter alia, WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, fn. 114, p. 146 and W. WENGER, *Die Internationale Schiedsgerichtsbarkeit*, (RJB 1989) p. 337 et seq. at p. 350.

121. BESSON, *op. cit.*, fn. 97, with further references, inter alia, RÜEDE/HADENFELDT, *op. cit.*, fn. 115, p. 252.

122. *Ibid.* with further references, inter alia, P. KARRER, "Les rapports entre le tribunal arbitral, les tribunaux étatiques et l'institution arbitrale", RDAI (1989) p. 761 et seq. at pp. 768-769.

Art. 183(2) provides that the tribunal may request the assistance of the competent Swiss court, which applies its own procedural law. The wording of this provision excludes an application by the parties themselves. However, the rights of the parties are not endangered due to the existing concurrent power of judges and arbitrators, described above. In case the tribunal refuses to require the assistance of the court, the party seeking to have the order enforced may require the necessary support from the competent court which will then act in accordance with its local law for interim measures independently from the legal regime set for international arbitration.¹²³ The competent Swiss court will be the court at the place where the order is to be enforced, which is not necessarily the seat of the arbitral tribunal.¹²⁴ When assisting the tribunal, the court should confine itself summarily to establish that a valid arbitration agreement existed and that the order was made by a tribunal which was validly constituted.¹²⁵ Although the law does not restrain the arbitration tribunal with regard to the content of the order it grants, the court will be confined to the methods of enforcement which its own law provides.¹²⁶ However, the court has no power to examine the substance of the order except from the point of view of Swiss public policy.¹²⁷ Swiss law does not contain a provision on the enforcement of provisional measures in Switzerland ordered by a foreign state court, save for Art. 24 of the Lugano Convention.¹²⁸

5. France

a. Interim relief and the power of the tribunal

French law does not contain an express provision allowing the arbitral tribunal to grant interim relief; and hence it falls into the third category, French law nonetheless recognizing the conferral of powers on the tribunal by the parties.¹²⁹ It has long been accepted that the arbitral tribunal can grant interim measures, as long as the arbitration clause or arbitration rules incorporated contain words to that effect; and that this can be done in the form of a partial award¹³⁰ or procedural order.¹³¹ In practice, only the French court can order urgent measures which are immediately enforceable; and given the court's concurrent jurisdiction with a tribunal, such urgent measures are usually ordered by the court before the formation of the tribunal.

The types of provisional remedies generally available from the court under French law are (a) attachments (*saisies conservatoires*), (b) judicially granted guarantees (*sûretés judiciaires*) such as provisional judicial mortgages (*hypothèques judiciaires provisoires*) or

123. BESSON, *op. cit.*, fn. 97, para. 511.

124. BERTI, *op. cit.*, fn. 109, para. 17.

125. *Ibid.*, para. 18 with reference to WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, fn. 114, p. 149.

126. BERTI, *op. cit.*, fn. 109, para. 18 with reference to Sect. 306 et seq. ZPO ZH.

127. *Ibid.*

128. PETER, *op. cit.*, fn. 108, p. 709. Peter states that this is also the case when provisional measures ordered by a foreign tribunal are to be enforced in Switzerland.

129. LEW, MISTELIS and KRÖLL, *op. cit.*, fn. 72, p. 591.

130. REINER, *op. cit.*, fn. 102, p. 866.

131. BUCHMAN, "France" in A. BÖSCH, ed., *op. cit.*, fn. 108, p. 264.

judicial pledges (*nantissements judiciaires*) and (c) injunctions and temporary restraining orders (*ordonnances de référé*). Although under French law (a) and (b) are theoretically available by an *ex parte* procedure while measures in accordance with (c) are granted only after both sides have been heard, any arbitration tribunal will be extremely reluctant to grant interim relief on the basis of an *ex parte* application as failure to hear both sides might expose the arbitrator to an accusation of bias.¹³² Furthermore, arbitrators are not empowered to order a judicially granted guarantee¹³³ or an attachment, as attachments are seen to be part of the enforcement process, which falls within the jurisdiction of the state courts.¹³⁴ Nevertheless, as in Belgium, the arbitral tribunal is entitled to impose a fine (*astreinte*) if the opposing party does not comply with the relief granted.¹³⁵ This remedy is in practice infrequently ordered and still more rarely enforced.

b. The competence of the state courts

As the competence of the arbitrators to grant interim relief is not written into French law, a strong assumption is made that French courts maintain jurisdiction even when faced with the existence of an arbitration clause. Indeed, in domestic arbitration, the French courts consistently decide that “where a state of urgency has been duly established, the existence of an arbitration agreement cannot prevent the exercise of the powers of the courts to grant interim relief”.¹³⁶ That approach is viewed to be equally applicable to international arbitration, as the courts are the only authorities capable of taking urgent measures which are immediately enforceable, regardless of whether or not a tribunal is constituted.¹³⁷ Thus, the Paris *Cour d’appel* held that due to the urgency in the case it was able to order the escrow of disputed shares pending a decision by the arbitrators on the substance of the dispute and to prohibit a company from issuing new shares intended for the directors in breach of a shareholders’ agreement.¹³⁸ Hence, the state courts remain competent side by side with the arbitral tribunal; and in cases which do not involve the *référé-provision*, this jurisdiction is concurrent and not subsidiary.¹³⁹ It is accepted, however, that the parties can explicitly or impliedly agree not to apply to the courts for interim relief during the arbitration proceedings.¹⁴⁰

132. *Ibid.*, p. 260.

133. *Ibid.*

134. *Ibid.*; LEW, MISTELIS, and KRÖLL, *op. cit.*, fn. 72, p. 599, *Fouchard/Gaillard/Goldman, op. cit.*, fn. 93, para. 1334 et seq.

135. BUCHMAN, *op. cit.*, fn. 131, p. 258.

136. See, e.g., Cass. 3e civ., 3 June 1979, *Société d’exploitation du cinema REX v. Rex*, 1979 Bull. Civ. III, No. 122; Rev. arb. (1980) p.78.

137. *Fouchard Gaillard Goldman, op. cit.*, fn. 93, para. 1328

138. *Ibid.*, with reference to CA Paris, 12 Dec. 1990, *Terex v. Banexi*, 1991 Bull. July 595.

139. BESSON, *op. cit.*, fn. 97, para. 413.

140. *Fouchard Gaillard Goldman, op. cit.*, fn. 93, para. 1319 with reference to Cass., 1e civ., 18 Nov. 1986 *Atlantic Triton*.

French law also provides for the *référé-provision*. It enables a creditor to benefit from emergency procedures to have its rights enforced, fully or in part.¹⁴¹ In a case where the existence of the obligation is not seriously in dispute,¹⁴² i.e., a party can require a summary order for interim payment of a debt or damages from the defendant. Due to the hybrid nature of this measure, the issue of whether a party which has agreed to be bound by an arbitration agreement can nevertheless seek a *référé-provision* is a delicate matter. In order to determine whether a *référé-provision* should be granted, the French court must examine the substantive claims of the party alleging that it is the creditor since the issue whether the creditor's claim is "seriously disputable" or not, is a substantive issue. Therefore, when ruling on this issue, the court is liable to infringe the arbitrators' jurisdiction over the merits of the parties' dispute.¹⁴³ On the other hand, the decision taken by the court will have a provisional nature and does not bind the arbitral tribunal or other court which has jurisdiction over the merits. The possible infringement of the arbitrators' authority is therefore intended to be temporary only. Nevertheless, it can have considerable impact since the party whose claim has been satisfied (even if only temporarily) no longer has the burden of maintaining legal or arbitral proceedings; and it is no longer, as a paid creditor, at the same risk of its co-contractor becoming insolvent.¹⁴⁴

The option of applying to the court for a *référé-provision* remains open where the claim on which the application is founded is a substantive issue covered by the jurisdiction of an arbitral tribunal, but only under certain conditions. These conditions are, first, that the arbitral tribunal is not constituted; and, second, that the party requesting the relief proves urgency.¹⁴⁵ This will limit the infringement of the arbitral tribunal's jurisdiction over the merits of the dispute and takes into account that in the absence of urgency, the requesting party could simply promote the constitution of the arbitral tribunal and ask the arbitrators to rule on its claim.¹⁴⁶ Hence, the jurisdiction of the *référé-provision* as compared to the powers of the arbitral tribunal is considered subsidiary. As with "ordinary" court assistance related to interim relief during arbitration proceedings, the court's jurisdiction to order a *référé-provision* can be excluded by the parties, either directly or by reference to arbitration rules.¹⁴⁷ Equally, the parties may agree their own form of *référé provision*, such as the ICC's pre-arbitral referee procedure; and the French

141. For the possibility of obtaining the full payment of a debt by an emergency hearing in France: see CA Paris, 20 Jan. 1988, *V.S.K. Electronics v. Sainrapt et Brice International S.B.I.*, Rev. arb. (1990) p. 651.

142. See Arts. 809(2) and 873(2) of the French Code of Civil Procedure.

143. *Foucharde Gaillard Goldman*, *op. cit.*, fn. 93, para. 1340. See also DERAIS and SCHWARTZ, *op. cit.*, fn. 81, at pp. 277-279 re the *Eurodisney* Case, Rev. arb. (1966) pp. 191-233.

144. *Ibid.*

145. *Cour de cassation*, 1^{ère} Ch. civ., 29 Nov. 1989, *Société Balenciaga v. Société Allieri et Giovanozzi*, and *Cour de cassation*, 1^{ère} Ch. civ., 6 March 1990, *Société Horera v. Société Sitas*, Rev. arb. 1990 p. 633; *Foucharde Gaillard Goldman*, *op. cit.*, fn. 93, paras. 1343-1345; CRAIG/PARK/PAULSSON, *op. cit.*, fn. 119, p. 556, para. 31.03.

146. *Foucharde Gaillard Goldman*, *op. cit.*, fn. 93, para. 1345.

147. *Ibid.*, para. 1342.

court will not treat the referee as an arbitrator, nor subject his decision to an action to set it aside as an arbitral award.¹⁴⁸

c. *The enforcement of interim measures*

The enforcement of interim measures in France is made by the state courts. To make an interim measure more effective with regard to its enforceability, the requesting party can ask the arbitration tribunal to state in the award that it shall be provisionally enforceable against the losing party.¹⁴⁹ The award will be subject to exequatur by the French courts. The French courts will not enforce foreign protective measures originating from a foreign arbitrator or a foreign national court, unless an exequatur has been granted.¹⁵⁰

IV. CONCLUSION

There is no great overall crisis in regard to interim measures; and yet there is useful work still to be done for transnational trade. Within arbitration tribunals and the state courts at the arbitral seat, national regimes for interim measures appear to work satisfactorily, albeit differently, in the several jurisdictions surveyed above. Under these national laws, the system needs no urgent or wholesale amendment.¹⁵¹ The problem is the cross-border enforcement of an interim measure made by an arbitration tribunal or state court against a party situated in a different jurisdiction: the lack of a universal regime for cross-border enforcement is a curious gap in the modern system of international commercial arbitration. Within the European Union and other countries subject to the Brussels and Lugano Conventions, a partial solution exists, after the *Van Uden* case, for the cross-border enforcement of interim measures ordered by a state court in support of the arbitral process; and it would of course be possible to create like solutions on a regional or bilateral basis. This would be a pity. It would be far better to create a uniform solution on a broader basis, consistent with these Conventions and the 1958 New York Convention, where cross-border enforcement of both court and arbitral orders for interim measures was possible in certain circumstances, subject to safeguards. For practical purposes, the former reform regarding court-ordered interim measures is more significant, given that an arbitral tribunal can only be formed after the outbreak of the parties' dispute.

The principal barriers to reform are four-fold. First, the subject matter is juridically complicated, technical and controversial, as shown by the difficulties, past and present, arising from Art. 24 of the Brussels and Lugano Conventions and the limited progress so far made at the UNCITRAL Working Group on Arbitration. Second, the cross-border enforcement of certain interim measures made by a court (or arbitration tribunal),

148. GAILLARD and PINSOLLE, "The ICC Pre-Arbitral Referee: First Practical Experiences", *Arb Int* (2004) p. 13.

149. BUCHMAN, *op. cit.*, fn. 131, p. 267.

150. *Ibid.*, p. 268.

151. REDFERN, "Interim Measures" in *The Leading Arbitrators' Guide to International Arbitration* (NY 2004) p. 217 at p. 242.

particularly an interim order for payment, requires strict safeguards to avoid the risk of forum-shopping, oppression and injustice; and certain other measures should perhaps not qualify for cross-border enforcement at all, particularly interim measures by a state court made *ex parte*, without any prior notice to the defendant (and still more so by an arbitration tribunal). Third, it would be wrong to limit the enforcement of measures to cases of urgency: there are many interim measures which are useful, if not essential to the arbitral process, without always being urgent; and yet, as soon as urgency is dispensed with, the non-nuclear family of non-urgent interim measures will inevitably attract controversy.

The last difficulty is not the least: without an international court imposing a uniform interpretation (such as the European Court of Justice interpreting Art. 24 of the Brussels Convention),¹⁵² it is imperative that the drafting of any supplementary treaty or non-legislative text be right and be seen to be right by contracting states and users of international commercial arbitration. This debate cannot therefore be resolved within the community of international arbitration specialists: many others now have too much at stake in the debate's outcome. In particular, rightly or wrongly, there is a growing lack of confidence in the even-handedness of the international arbitral process; and there are now too many fears, in Felix Frankfurter's words, of "legal maladjustment" in regard to interim measures. To this end, the UNCITRAL project on interim measures and the Hague Conference (or its successor) may have to work closely together. It will also involve others; and it may take time, much longer than was first thought. Otherwise, all the work that has been done and remains to be done may remain a purely bureaucratic exercise. Moreover, given that what is here required is the best but not the most urgent solution, even the merely good, still more the less than good, remains paradoxically "the enemy of the best".

152. The hopeful dreams expressed by Judges Schwebel and Holtzmann (for the Creation and Operation of an International Court of Arbitral Awards and for the Enforceability of Awards) remain dreams: see HUNTER, MARRIOTT and VEEDER, eds., *The Internationalisation of International Arbitration* (1995) pp. 109 and 115.

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International Arbitration 2006:
Back to Basics?

“Oral Argument”: Report of the Session*

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I. INTRODUCTION

The Moderator opened the Session, explaining that the Panel intended to initiate a revolution at ICCA: the Speakers would all come from the floor; and all the questions would come from the Panellists. Each Panellist would be addressing in turn one of the five topics of the Moderator’s Notes (distributed to the floor and reproduced below);¹ the floor-speakers would then have to speak for at least one hour, and the Panellists’ questions could not last for more than the remaining half hour.

* The Moderator for this Session is V.V. Veeder, Essex Court Chambers, London ; Member of ICCA.

The Panellists for this Session are:

Robert Briner, Honorary Chairman, International Court of Arbitration of the International Chamber of Commerce (ICC); Past President, Iran-United States Claims Tribunal, The Hague; Member of ICCA.

Albert Jan van den Berg, Hannotiau & van den Berg, Brussels; General Editor of ICCA.

L. Yves Fortier, Past President, London Court of International Arbitration; Chair, Hong Kong International Arbitration Court; Past Ambassador and Permanent Representative of Canada to the United Nations; Member, United Nations Compensation Commission; Member of ICCA.

Teresa Cheng, Deputy President for 2007 and President for 2008, Chartered Institute of Arbitrators; Vice Chairperson, Hong Kong International Arbitration Centre; Member of ICCA.

David A.R. Williams, QC, Chief Justice of the Cook Islands; President, Arbitrators and Mediators Institute of New Zealand; Member of ICCA.

The Rapporteur for this Session is *Salim Moollan*, Essex Court Chambers.

1. See Annex, this volume, pp. 99-104.

II. TOPIC A – PURPOSES OF ORAL ARGUMENT

The first Panellist, *Mr. Robert Briner*, addressed this topic. He commenced his intervention by noting that ICCA was supposed to be to a large degree all about war-stories. He had two such stories. First, in 1980-1982, he attended a meeting in Berne for the inauguration of the ASA. After that meeting, on the train back to Geneva, he sat opposite a member of the Swiss Federal Supreme Court. This gentleman had spent all his life as a judge; and Mr. Briner asked him: “In all your experiences as a judge, has oral argument ever changed your mind following your reading of the documents?”. The judge thought long and hard and said: “Yes – once in thirty-five years.” Secondly, Mr. Briner referred to his time at the Iran-US Claims Tribunal. One Monday morning, he met an American colleague and told him about how busy his own week-end had been, reading all the files in preparation for the hearings which he was to have that week. His American colleague simply answered that he never looked at a file before the hearing.

What was the purpose, Mr. Briner asked, of oral argument? Was it just a tradition in the line of Pericles, Demosthenes or Cicero? Rhetoric is what made the reputation of ancient lawyers. Although this is still true to a certain degree, it was so mainly in criminal matters. What is the situation today? In commercial arbitration, there is an expectation that arbitrators will have actually looked at the file before the hearing. What then is the role of oral presentation and of a hearing? Mr. Briner made it clear that he was not concerned with the hearing of witnesses, but was discussing oral presentation proper. He put it to the floor-speakers that the purpose of oral submissions was twofold. First, to provide the parties with the opportunity to highlight what in their opinion the case was all about. Secondly, and more importantly, it was the time for a dialogue where the arbitrators put to the parties questions which *they* felt were important. This second purpose was the only real purpose where there was an informed tribunal who had studied the file. The Moderator stated that the real question raised by Topic A was “Why bother?” Mr. Briner concluded that the Swiss judge in his first war-story had failed to indicate whether, in the one case where oral argument had changed his mind over 35 years, it had changed its mind in favour of, or against, the party addressing him!

From the floor, *Mr. Carl Walton* stated that oral argument was the opportunity to establish your credibility with the tribunal, in particular by not overstating your evidence and position and by conceding points where this was required. It was also the time to show that you were committed to, and convinced of, your case.

From the floor, *Professor Dr. Karl-Heinz Böckstiegel* stated that he wished to continue Mr. Briner’s war-story. Mr. Briner and himself were both at the Iran-US Claims Tribunal at the same time. Mr. Briner was in Chamber Two, and he was chairman of Chamber One. He soon started to have deliberations the morning immediately following the hearing. Accordingly, he had to know the documents before the hearing. Young German judges are trained to look at a case on paper to identify what is relevant before hearing any witnesses etc. This is the tradition Dr. Böckstiegel came from, but he had to admit that a case very often developed during oral hearing.

From the floor, *Lord Slynn* described his experience at the European Court of Justice, with its panel of fifteen judges. The attitude of all fifteen judges in a particular case at the beginning of a hearing had been: “what a waste of time to have oral argument”. Five minutes later, every judge except the English judge had a question. Two hours later, the

judges stated that there seemed to be something in this. Six months later, the decision went the other way. Lord Slynn concluded: “Long live oral argument, for ever and ever.”

From the floor, *Mr. Diwan* asked the panel what an advocate should do where it was clear that one member of the arbitral tribunal was not up to speed. Mr. Briner answered that this depended on whether the advocate in question had appointed that particular arbitrator or not! The advocate should then go more into the details of the case than he otherwise would.

From the floor, a distinguished speaker from Chicago² stated that oral presentation now included PowerPoint presentations and equivalent technologies. This was now required. Outlines, time lines and video-clips were all persuasive as a roadmap.

From the floor, *Lord Mustill* stated that the English Court process had been dependent on a dialogue between the advocate and the judge for the past 700 years or so, when the English records disappear in the mist of history. Nothing had changed, and the same methods were used, in particular that of using an analogy, and of changing the analogy to test a proposition. That Socratic method enabled the law to be very thoroughly explored. Five hundred and fifty years ago, two cases were argued by the same advocate in the same Court before the same judge in the same term. In the first case the issue was: “When do hides change character when turned into boots.” The advocate was Lord Kay, and he appeared before Haleford. Kay unsuccessfully argued that the hides had not changed their substance. In the second case six weeks later, the issue was: “When does a tree change character when turned into planks.” Kay was arguing the point the other way. He lost. He told the judge: “Have you forgotten the case of the boots?” The judge answered: “Nay, it was different. The only difference is that you spell boots with two o’s and boats with one o.” Lord Mustill concluded that now that England had a mixed system where there were both written skeleton arguments and oral argument he was reminded of counsel’s usual question to a judge: “Has Your Lordship had a chance to read the affidavits?” “Yes”, the judge would answer, “but I have not taken it”. Lord Mustill was for his part not so sure about the importance of written submissions.

From the floor, a distinguished speaker from New York stated that the Court of Appeals in New York was a so-called “Hot Court”. All seven judges had received their briefs, had studied them and had preliminary opinions. The argument was strictly Question and Answer. The conclusion was that the process of oral argument in a Hot Court was a very helpful one, which helped the advocate to sharpen his or her own opinion and to see what was wrong with his or her argument. He wished to state a good word for the help which oral argument could provide in the proper context. As an arbitrator, the situation was not quite the same and oral argument did not provide him with much help; but as an appellate judge, it did.

From the floor, *Mr. John Kay* stated that two weeks before, he had attended a Circuit Conference in the United States, where the judges had opened up. The figures were consistent. In about twenty per cent of the cases, a judge would tell you that he had changed his mind after hearing oral argument. In almost fifty per cent of the cases, judges asked questions. Judges liked oral argument; and so did arbitrators.

2. Regrettably, not all speakers from the floor introduced themselves by name; and it was not therefore possible for the rapporteur to identify them here.

From the floor, *Mr. Dushyant Dave* stated that he had been acting as arbitrator for sixteen years, and that oral argument was an insurance against arbitrators who had not read their files, or who had not understood them.

Mr. Briner concluded that this was not an ideal world. From his notes, he could see that only one of the speakers from the floor was not from the common law world. The latter were the converted. That was interesting. He reminded the floor that the panel was clearly only concerned about oral argument; this should not be confused with cross-examination. The two should not be mixed.

III. TOPIC B — FORMS OF ORAL ARGUMENT

The second Panellist, *Ms. Teresa Cheng*, addressed this topic. She stated that when one came to think of this area, three matters should be considered viz. (i) the state of the proceedings, (ii) the purpose of the argument and (iii) whose perspective.

As for (i), interlocutory or procedural matters could often be dealt with over the telephone, or through video-conferencing. These were matters where “seeing people” was not of the essence. Oral argument as discussed here could properly be confined to substantive hearings. These could in turn be divided in two stages, opening and closing. Oral openings had to be done physically and in person, and the questions were: in what form and with what content. She was reminded of the instance where counsel had been addressing the Court for one-and-a-half to two hours when the judge told him: “Mr. X, I have read this.” He answered: “Yes my Lord, but I have not.” This could be one reason for oral argument.

As for (ii), there were two purposes to oral argument, the first was highlighting the case and the second to create the opportunity for a dialogue between counsel and judge. If the latter was not a purpose, then counsel might as well prepare a videotape or CD-ROM and give it to the arbitrators. That was the most important part. It involved communication skills. Body language was important and could be read. The arbitrator is frowning; he is nodding off; he has no files with him: counsel must get very worried. People tended to come out with a preconceived view; and it was not unlikely that they would change their minds. Counsel should plough on.

As for (iii), it should be borne in mind that arbitrators want a speedy resolution to cases. On the other hand, advocates and parties want a fair run. Has the arbitrator really understood their points? At the end of the day, we were all servants of the parties.

As to form, was the current mix of written and oral argument the worst of both worlds? It could in fact be the best of both worlds. Ms. Cheng wished to turn the question back to the floor and ask participants: “What form of oral hearing have you had?”

The Moderator stated that there appeared to be a difference of approach between civilists and common lawyers present on the floor. Taking the example of a terms of reference procedural meeting under the ICC Rules, these almost always took place in person. Where they did not, problems almost always developed later in the proceedings. This showed that there was something about people making personal contact. Mr. Briner expressed his full agreement and stated that exchanges of this sort were also required after a tribunal had heard the witnesses.

From the floor, a distinguished speaker from London described the experience which she had in a civil court a few years previously. The case was about the application of paint to a ship. The judges did not have a clue. She spoke about nail polish; and used it as an analogy. It worked. Ms. Cheng concluded that this proved her earlier point: the fact that the advocate could see that the judge was troubled enabled her to address the issue and find a solution. From the floor, a distinguished speaker from India stated that a judge faced with the question: “Are you with me?” faced a difficult situation. What was the correct answer, “Yes” or “I can’t say”?

IV. TOPIC C – STYLES OF ORAL ARGUMENT

The third Panellist, *Mr. David A.R. Williams, QC*, addressed this topic. He observed that the Moderator’s Notes contained a whole range of questions on the topic which were all essentially asking the following question: “What actually works in the arbitral setting, and what does not?” His view was that effective advocacy in international arbitration was founded upon the same principles that applied to advocacy in ordinary civil litigation, especially appellate litigation. Those fundamental principles had never been better articulated than in the famous article by US Solicitor General, John W. Davis, entitled “The Argument of an Appeal”. Mr. Williams said he proposed to refer to several of Davis’ ten fundamental principles in the course of his remarks.

Starting with Question 12 of the Moderator’s Notes (“*As to the style of oral argument, how should an advocate address a tribunal generally?*”), the answer was that the advocate’s style should be concise and focused because of the time limits which generally apply in international commercial arbitration. Mr. Williams favoured the restrained conversational style which treated the tribunal as interested and intelligent human beings and concentrated on following John W. Davis’ advice to concentrate on the three Cs: Chronology, Candour and Clarity. The advocate should welcome dialogue with the tribunal. With respect to candour, Mr. Williams agreed with the previous intervention from the floor: the advocate should seek to earn the trust of the tribunal.

Problems frequently arose where there was no order, no clarity and no end to the oral argument. To appeal to the tribunal there should be a fairly low-key presentation which helpfully analyzed the key issues. After all, the tribunal must eventually provide an answer in the award to the issues posed and would be hoping to receive material that would provide such answers. As John W. Davis said, the advocate must “furnish the materials for decision”. This was the purpose of the pre-hearing written submissions on which the advocate should elaborate orally.

The advocate should always bear in mind the tenth principle in the Davis decalogue, namely “Sit Down!” As an arbitrator, it can sometimes be a challenge to close down a garrulous advocate. Mr. Williams referred to a three-stage approach to the problem starting with “Mr. X, your submissions were very helpful, and we fully understand your case,” hoping that this will be a signal to the advocate to cease. If the advocate continues, one moves to stage two where the arbitrator says “Mr. X, you have said all that could be said in support of your client’s case and much, much more.” Finally, if that does not have the desired result, in desperation one can move to the third stage where the arbitrator says “Mr. X, I am going to sleep now, and I don’t want to see you here when I wake up.”

This third option was inherently risky and dangerous, especially if one was sitting as a sole arbitrator!

As for Question 17 of the Moderator's Notes ("*is a legal representative more forceful on the merits when forensically angry or calm? In practice, is the advocate's audience the tribunal or the paying client, or both? Does it assist an advocate to attack an opposing counsel, as distinct from the opposing party? Whilst a client may appreciate its lawyer's libellous attacks on the opposing party, does a tribunal appreciate that style?*"), Mr. Williams stated that there was always a danger in attacking opposing counsel. As John W. Davies put it in another of his propositions: "an advocate should never irritate the mind which he or she seeks to persuade. Rhetorical denunciation of opposing counsel may create sympathy for the person so denounced and may irritate the tribunal; it can never persuade."

From the floor, a distinguished speaker from Toronto addressed Question 18 of the Moderator's Notes ("*Where arbitrations are private hearings, an advocate's style is traditionally more conversational than a ranting public speech. Now that certain arbitral hearings are held in public (such as NAFTA), has the arbitral style of advocacy significantly changed? Has this in turn provoked a different treatment of oral argument by an arbitral tribunal? Just as Judge Judy has emerged on US television, will there be an "Arbitrator Judy", particularly if NAFTA or other hearings are filmed and broadcast to the general public?*"). He stated that he currently appeared before two members of the panel. Looking at the first two sentences of the question, had there been a change? He had appeared as counsel for NAFTA claimants in both scenarios. The first such public hearing had been a jurisdictional hearing. On the first day, four members of the public attended. On the second day, three. So, is anybody really listening out there? As counsel, it made absolutely no difference to his style of advocacy; if anything his arguments were even more tampered and even-keeled, although this could have more to do with age setting in! There was no reason not to have hearings in the open; the form of the process had not changed.

From the floor, Lord Mustill stated that when he had read Question 12 drawn as it is, he had completely misunderstood it: could one use "Hi Guys" as a form of address? As for the question asked earlier by Mr. Diwan, Lord Mustill had produced for the benefit of Mr. Diwan the following formula: "If that damn idiot sitting on the left were to listen to me for more than three minutes..." That should resolve the problem. More seriously, the style of argument depended on the nature of the tribunal. It was not the same for an appellate tribunal on a patent issue as for a fraud case at first instance. The common elements were calm, lucidity and structure. The personality of the speaker must be completely submerged. The judge or arbitrator could not care less. All the great advocates after World War II shared this quality. As for attacks on opposite counsel, one is guaranteed to lose a case by attacking the opposite party, for instance with ferocious or vitriolic attacks on the other side. You see this fellow blasting away and you just think: "Oh, shut up." There should be use of the arbitrator's disciplinary powers – seriously. Modern arbitration practice was being bogged down by too many codes, rules and the like. Where was the discretion of the arbitral tribunal? One does not need Rule No. 17 paragraph No. 43 of the IBA Rules. All disputes are different. Finally, as for the question on Contingency Fees (Question 21), Lord Mustill thought this a wonderful question, and was looking forward to seeing a lawyer instructed on a contingency fee basis kneeling on a desk in front of a tribunal explaining with his hands clasped in prayer: "It's been a miserable year for me, Sir."

From the floor, *Mr. John Townsend* from Washington DC expressed “a new principle of advocacy”: never try to speak after Lord Mustill. He stated that a good advocate depended much more on his eyes and ears than his voice. He should take the cue from the judge. In an appeal hearing in New York where his opponent was given a hard time, he had simply told the Court that he would be happy to answer any questions it may have, and had sat down. The cardinal principle was to shut up at the right time.

(The Moderator observed that while there were relatively few oral contributions from civil lawyers, he was getting numerous written notes from them, as they were more used to written submissions. He invited more civil lawyers from the floor to intervene orally in the debate).

V. TOPIC D – CONTENTS OF ORAL ARGUMENT

The fourth Panellist, *Mr. Yves Fortier*, addressed this topic. He stated that everything that he had wanted to say had already been said. One of the cardinal rules was: if the point has already been made, do not belabour it. He wished to say as one would say in Court: “I adopt.” But he had five minutes which he would use. He would speak of his experience as counsel and as arbitrator. As counsel, he had been and had remained until the end of his career as an advocate an aficionado of oral argument for all the reasons given so far. He had started out as a fan with a strong bias in favour. At the end of his career, he was still convinced that the greatest satisfaction for an advocate was to engage with the judge and the arbitrators; there was no more rewarding moment than to note that you are convincing your judge or arbitrators. The advocate can usually see it when this is happening. Mr. Fortier had looked up in Black’s law dictionary the definition of an advocate; this read: “a person who assists, defends, pleads or prosecutes *for another*”. It was vital for an advocate never to forget that he was a mouthpiece or a spokesperson. Mr. Fortier stated that he did believe in the power of the spoken word. The point had been made that an advocate had to establish credibility; this was indeed crucial to the success of any argument.

Turning to more direct pointers, Mr. Fortier recommended that counsel involved in an opening argument (i) set markers, indicating to the tribunal what the issues and answers were and (ii) try to ensure that the members of the tribunal know from Day 1 where the main lines of argument will lie (the “drawing of lines in the sand”). As for closing submissions, that was the last chance. The advocate should seek to provoke questions from the tribunal and try to get the arbitrators to tell him what concerns and worries his case is causing them. It needs to be an interactive and dynamic process.

As arbitrator, Mr. Fortier had not changed his mind on the usefulness of oral advocacy, particularly with respect to closing submissions. When sitting with continental colleagues in Europe, he had often noted an initial resistance, if not actual objections to oral closing submissions. Usually however, these colleagues started being persuaded and then became in favour of the exercise. In every instance, they said: “Yves, you were right.” Even half-an-hour or one hour can be very useful. Mr. Fortier concluded with a few final recommendations. These were (1) Don’t overstate your welcome; (2) Don’t speak only to the arbitrator you appointed; (3) Don’t treat the tribunal as a jury; and (4) Be respectful. On this last point, Mr. Fortier recalled one instance of US counsel being

very respectful indeed. This was a case where both of his wingmen had not been well. The advocate was speaking; he looked at Mr. Fortier; he looked to his right; he looked to his left; but he said nothing. Mr. Fortier got the message.

From the floor, Mr. Dushyant Dave stated that this reminded him of a particular Indian judge who had a habit of sleeping post-lunch. The Attorney-General gathered a couple of advocates saying “let’s do something without being disrespectful”. One afternoon, the judge in question started sleeping some five to ten minutes into the hearing. After he had been sleeping for half-an-hour, one of the advocates took a very heavy book and dropped it. When the judge jumped, he stated: “My apologies my Lord, the recorder was sleeping; she thinks she is the judge.” Mr. Fortier answered that they had had a similar problem in the Quebec Court of Appeal. One ought to be careful however for, although the judge in question appeared at first glance to be sleeping, he was in fact very much awake and only pretending.

From the floor, *Professor Philip Capper* stated that twenty years previously he had been involved with M^c Matthieu de Boissésou, Lord Grabiner and many others in the *Eurotunnel* case. He remembered that, in the course of Lord Grabiner’s very careful oral submissions, Matthieu de Boissésou and others expressed their thoughts as to how boring he was. By contrast, the Bâtonnier on the other side said nothing: he simply slammed his documents on the table. The problem was that the slamming did not find its way into the transcript. Lord Grabiner’s careful words on the other hand did. Victor Borge actually pronounced punctuation. Transcripts thus change the nature of oral argument. There is now also a final opportunity to get one’s views across before the tribunal’s deliberations; that is written closing submissions which are now universal practice. Professor Capper wondered whether prior oral argument was still so important in the light of this development. Mr. Fortier’s answer to this question was a simple “Yes”.

From the floor, a distinguished speaker from Warsaw stated that he was a continental lawyer practicing in Warsaw in the US format, and that he had vast experience of such practice. He thought that this whole subject was intellectual provocation. Oral argument was the essence of the advocate’s profession. Without it, advocacy would be but a boring and mechanical exercise. What does the practitioner want to achieve? He wants to be effective, win a maximum number of cases and lose the minimum. Questions of style, body language and persuasiveness are essential. The lawyer who gives those up is careless. Oral argument is important in a close case; in clear cases the documents speak for themselves. His general advice was to be active, and to be a good oralist.

VI. TOPIC E – VISUAL AND OTHER AIDS TO ORAL ARGUMENT

The fifth and final Panellist, *Mr. Albert Jan van den Berg*, addressed this topic. The question is: “What makes international arbitrators listen today?” That was a question about arbitrator psychology, a subject that is still in the infancy of scientific research. This panellist professed to have no such knowledge other than his own experience. Of course, there are many scientific studies on the psychology of judges and jurors, especially in the United States, but international arbitrators may be a different population for study. Advocacy, also before international arbitrators, is in essence an exercise in

communication and persuasion. You have to convince them of your case, and to disprove the other side's case.

If you believe trial consultants (and others): "Words alone are not enough", to which they also add: "We're here to make you look good." It seems that there is indeed a psychological connection between visual aids, on the one hand, and verbal communication and persuasion on the other. It is claimed that, *inter alia*, visual aids reinforce key messages, improve memory recall and assist in explaining and simplifying key concepts or complex matters. It may also ensure a greater impact and a longer-lasting impression long after counsel have been speaking. This Panellist was inclined to accept that proposition, but not in all cases under all circumstances. Thus, he believed that you should always ask yourself the question: "Do I need it for my case?" Here, there is a tremendous challenge for counsel because you have to inquire what the arbitrator is thinking and what he or she needs for deciding the case. However, in many cases it is difficult to know before the hearing what his or her state of mind and necessity is. In many international arbitrations today, four types of visual and other aides are frequently used:

– First, hard copy. One use is the written outline of the oral argument. Many arbitrators appreciate having such an outline in front of them so they can follow counsel better. Next, there are pleading notes: much in use in civil law settings but unknown in the common law environment where they are considered a "stealth pleading". Then, you may wish to have a bundle of core documents to which you can take the arbitrators during your presentation. It is powerful and saves time, but you must be mindful that arbitrators have already seen the core documents and have annotated them. The better practice, therefore, seems to be a core bundle in advance of the hearing. Hard copy is also useful for time-lines and/or chronologies, as well as lists of *dramatis personae*, but here again it is preferable to provide them in advance of the hearing.

– Second, the whiteboard (or flip chart). That is useful to make a simple drawing or simple calculation. The problem is that in many cases it is not saved one way or the other. The preferred approach is to hand out, simultaneously or shortly thereafter, a hard copy of the drawing or calculation.

– Third, demonstrative exhibits. They are used for graphs, bar-charts, time-lines, diagrams, blowing up key passages in documents, photographs, decision trees and many other things. If well done, they can be very powerful. A few rules: (1) They should be based on what is in the record; (2) They should speak for themselves (although, first tell, then show); (3) They should not be overloaded; (4) They should be numbered sequentially (for the transcript and ease of reference); (5) Make sure that everyone can see them (and leave the really important ones in sight as long as you can); and (6) A hard copy should be given simultaneously to the arbitrators and the other side.

– Fourth, PowerPoint. This enjoys great popularity amongst counsel in international arbitrations these days. Yet, they should be aware of certain disadvantages. First, you have the visibility problem. The projection screen is usually too far away for certain distinguished international arbitrators to read what is on it. And even if your distinguished arbitrator is able to read it, the light in the hearing room has to be dimmed to nightclub level with the attendant problem that the arbitrator is unable to take notes (and some also drift away in their thoughts). Second, it may become a dazzling show in

which the succession of slides may obfuscate the message. This is not to say that PowerPoint may not be useful. This Panellist would, however, recommend: (1) always provide a hard copy of the PowerPoint presentation at the outset of your oral argument (so that the arbitrators can make notes on it); and (2) leave the lights on.

Those are the four most commonly used visual and other aids in current international arbitration. The overhead projector with transparencies is apparently no longer in favour. On the other hand, in some arbitrations (in particular, in licencing disputes) the use of the models can assist oral argument if it concerns the subject matter of a case, e.g., perfume, slot/skill machines, sportswear apparel etc.

Less common in current international arbitration is the use of the following visual and other aids, but it may well be that within five years from now that is different. First, projection of documents and transcripts. Software programs, such as TrialMax, are used to project almost instantly, with so-called “call-outs”, the document or passage in the transcript that counsel is referring to. In this Panellist’s experience, it is a useful tool in that it shows you where to look on the relevant page. Second, Excel on screen. In a damages phase, for example, it is sometimes useful to project the expert’s calculation of damages on screen and show how the change of one input dramatically affects the outcome. Here, you have to be really careful. For one, you should be fully proficient in the use of Excel. Also, there are not many international arbitrators who understand programs such as Excel. Frankly, this Panellist had seen cases in which arbitrators, who were believed to be financial experts, got hopelessly lost with Excel. Third, videos and films. Their use depends entirely on the type of case you are in. They can be powerful, but counsel should be mindful that the other side can produce a video or film that shows just the opposite. Fourth, computer animations. Here again, their use depends on the type of case. One last important word of caution: international arbitrators have a healthy suspicion for slick and fanciful computer animations and similar presentations.

That last observation led to this Panellist’s conclusion. Visual and other aids are what they are: aids. They should not overtake counsel’s *viva voce* presentation, but only support it. International arbitration is not a multimedia show for the promotion of some product. This Panellist, therefore, wished to reiterate what was said earlier: Always ask yourself the question: “Do I need it for my case?”

From the floor, *Mr. Hew Dundas* from Scotland stated that the use of the words “the learned arbitrator” by counsel could be a sign of respect, but also sometimes a sign of disdain. He asked *Mr. Fortier* whether this is something which should be taken into account by a tribunal. *Mr. Fortier* replied that it would be easy to simply answer “No”; but one had to try to ascertain whether counsel used the adjective only for the tribunal or also for opposite counsel. He would be more influenced if this was done to the other side.

From the floor, *Mr. John Kidd* from Florida stated that there had been an interesting survey in the United States over a period of twenty years as to what people remember forty-eight hours after hearing or seeing it. This had involved 20,000 “ordinary citizens” and 500 judges. The results were that they had a very sharp and good recollection of eighty per cent of the visuals presented, whereas they could only recollect about twenty per cent of what they had heard. *Mr. van den Berg* stated that most of the research

conducted had been aimed at juries and US judges. Could these be applied to international arbitrators? That may be a different population.

From the floor, a distinguished speaker stated that visual aids were very helpful in each case. One very rustic study had also shown that the colour of the visual aid was important. The best colours were blue and gold. Mr. van den Berg replied that, as counsel, he used green for his position, and red for his opponent's position.

From the floor, *Professor Hans van Houtte* from Belgium stated that one important thing to remember when using slides was not to put too much information on each slide. Mr. van den Berg replied that there were some basic rules to be adhered to for slides: they should be based on what's in the record – that's the rule of the game; they should speak for themselves; they should not be overloaded; they should be sequentially numbered; they should be positioned so that everybody can see them; and a hard copy of the slides should be given simultaneously to the arbitrators and to the other side.

VII. TOPIC F – THE THREE BEST AND THREE WORST THINGS IN ORAL ARGUMENT (AS SEEN BY AN ARBITRATOR)

The Moderator then asked each of the Panellists to state what in their experience were the three best and three worst things in oral argument by an advocate.

David Williams' "best" list was: (A) An argument which starts with a clear statement of the undisputed facts; (B) An argument that contains a short and succinct summary of the key issues for determination; and (C) An argument which uses the power of understatement. As an example, an overstatement would be something along the following lines: "the claimant's argument is a ridiculous litany of orchestrated lies". The more effective understatement would be: "The tribunal may be surprised that, even at this late stage of the case, the claimant is pursuing this claim notwithstanding that its unsoundness has been readily accepted by its main witness..." His "worst" list was: (X) Instead of presenting an attractive argument, producing a sustained tirade against the opposing party; (W) Going at a speed which makes note-taking impossible and prevents the stenographers from keeping up – failing to slow down even after repeated requests from the tribunal to do so; and (Z) Exceeding all time limits set for oral argument and refusing to take hints from the tribunal that all that needs to be said has been said.

Ms. Cheng's "worst" list was: (X) Counsel does not answer the question raised; (Y) Counsel reads from the written submissions. Ms. Cheng could remember a case where the judge told her opposing counsel: "I have been taught to read at the age of six. Now tell me what your main points are"; and (Z) Counsel does not watch the arbitrator's pen; this misses the whole point of the exercise. Her "best" list would be the reverse of the above.

Mr. van den Berg's "best" list was: (A) Keep it simple; (B) Be concise; and (C) Tell a story. His "worst" list was: (Y) Overrun of time by more than fifty per cent; and (Z) Treating the arbitrators as if they are 'missing in action'.

Mr. Fortier's "worst" list was: (X) Refusing to answer the question or obfuscating; (Y) Reading from a script; and (Z) Taking the tribunal for a bunch of idiots. His "best" list was: (A) Addressing the tribunal's real concerns; and (B) Finishing on time.

Mr. Briner stated his negative points: (Y) Jumping from one slide to another: the advocate should hand out hard copies not just of the slides but also of the record referred to; and (Z) Advocates should realize that, in most cases, not all members of the tribunal will have the same degree of fluency, especially in English. Advocates should keep it slow, consistent and coherent. It is better for the arbitrator to fall asleep for a time than for him not to understand a single word.

ANNEX

Notes from the Moderator

V.V. Veeder**

The Program Committee's Brief:

“Oral argument is one of the great challenges and, it must be said, greatest satisfactions of the arbitration practitioner. But setting aside the stories and the tradition, what actually works, and what doesn't? Do sophisticated tribunals need argument, or just answers? And how does oral argument intersect with written submissions?”

Almost invariably (but not invariably), the procedures for transnational commercial arbitration have included oral argument at an oral hearing with the parties' legal representatives, as confirmed by many arbitration rules. The following list is illustrative (without being complete):

- Art. 15(2) of the UNCITRAL Arbitration Rules provides: “If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.”
- Art. 20(2) of the ICC Rules provides: “After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.”
- Art. 19.1 of the LCIA Rules provides: “Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration.”
- Art. 25(1) of the Stockholm Rules provides: “An oral hearing shall be arranged if requested by either Party or if the arbitral tribunal considers it appropriate.”

This Session is not intended to address arbitration rules providing for oral argument, but rather to examine why, what and how is (or should be) “oral argument”.

The intensely practical nature of these questions suggests a substantial contribution from the floor, which will include, inevitably, many oral (and vocal) arbitration arbitrators and advocates with questions or comments. It has therefore been suggested that the five

** Essex Court Chambers, London; Member of ICCA.

speakers should be limited at first to about five minutes each, introducing in turn each of five topics to be followed by substantial questions and comments from the floor. The five speakers' written record of this session, to be published in the ICCA Congress Series, will incorporate much of the ideas and conclusions reached during these exchanges between the floor and the speakers.

These five topics (listed below under A-E) are intended to be self-contained for the purpose of this Session. There is, of course, a degree of overlap. Nonetheless the speakers will try to keep their topics separate; and interventions from the floor are requested to do the same. Lastly, the whole subject-matter is potentially vast: it cannot extend in this Session to other potentially overlapping topics, eg cross-examination; codes of conduct generally; good faith in the conduct of the arbitration; letter-writing and pre- and post-hearing briefs etc.

TOPIC A – PURPOSE(S) OF ORAL ARGUMENT

- (1) What is the purpose of oral argument by the parties' legal representatives to members of an arbitration tribunal? Is it in fact now necessary at all? In the early days of the English jury, oral argument was necessary because most jurors were illiterate. Is this true of arbitrators?
- (2) Is oral argument suited to any purpose? It can duplicate, almost exactly, the parties' written submissions, which can be assimilated by a tribunal more quickly, cheaply and easily than oral argument at an oral hearing. If the oral argument takes place at an evidential hearing, it can delay or obscure evidence from factual and expert witnesses testifying to the tribunal.
- (3) Given users' increasing complaints at the high cost of international arbitration, is oral argument now an expensive luxury which should be dispensed with, or at least severely curtailed?
- (4) Does the purpose change if the arbitrators or advocates are civilian or common or other lawyers?
- (5) Does the purpose change if the arbitrators are non-specialists, non-lawyers or not familiar with the applicable law(s)?
- (6) Outside of an oral hearing, no one can now seriously suggest that a tribunal should require the parties to dispense completely with all legal advisers and all representation. Given, therefore, the inevitable involvement of the parties' lawyers in the arbitral process, should oral argument by those same lawyers ever be completely curtailed by a tribunal, if desired by one or more parties?
- (7) Is it not also, possibly, a case of oral argument having not one but several different purposes? First, should the tribunal be sensitive to each parties' desire to have its case placed before and understood by the tribunal, as part of due process? Second, is there a

ANNEX: NOTES FROM THE MODERATOR

cathartic purpose in having a party's opponent listen and respond to that party's oral argument at an oral hearing? Third, does oral argument allow a tribunal a unique opportunity to understand and (if not) to pose questions to a party's legal representatives. And is there any better, or fairer, way for a tribunal to probe or clarify a party's case than during oral argument?

(8) If oral argument serves one or more essential purposes, is it now necessary to codify or otherwise regulate the procedure(s) for oral argument in arbitration rules, including new proposals to reform the UNCITRAL Arbitration Rules?

TOPIC B – FORMS OF ORAL ARGUMENT

(9) Historically, it has been necessary for oral argument to take place at oral hearings held in person between the parties' legal representatives and the members of the tribunal. (The possible exception being the use of telepathy in ancient arbitrations under the rules of the AAA, in pre-Colonial Australia).

(10) With busy arbitrators and lawyers and with arbitral venues far from their respective homes, such oral in-person hearings can be now very difficult to schedule and very expensive. Occasionally an oral hearing need last only a few hours (or less), a period of time wholly disproportionate to the time spent travelling to the venue by arbitrators, lawyers and clients. Is there another practical form to the historical oral in-person hearing?

(11) For example, increasingly oral argument for procedural meetings is taking place by telephone conference-call and multi-site video-link conference. Is this a Good Thing? Whilst a telephone conference-call may be better than a prolonged exchange of party-correspondence and whilst a video-link may be better than a telephone conference-call, there is no doubt that an oral hearing held in person is the best form of all hearings, particularly in a difficult case or a case where temperatures have risen between the parties and their legal representatives. But why is this? Do human beings respond more reasonably when meeting another human being in person? Is direct eye-contact necessary with an arbitrator? Does this depend upon the cultural background of the parties or their lawyers? Or is all this an old arbitral myth?

TOPIC C – STYLES OF ORAL ARGUMENT

(12) As to the style of oral argument, how should an advocate address a tribunal generally?

(13) Is it attractive to a tribunal to hear from a party a succession of different advocates on distinct points? Is it better for a party to have one or many voices? Can, and if so how, does a tribunal discipline an emerging Tower of Babel?

(14) Should an oral advocate encourage and prepare for questions and other interruptions from the tribunal? If so, how?

(15) Where there are language differences between the tribunal's members and the oral advocate, how does the latter prepare for them? Is there a different oral style pertaining to particular languages?

(16) Should the advocate be or only appear to be "pleasant" and "helpful" to the tribunal, treating them as interested and intelligent human beings? Is it ever wise for an oral advocate to "harangue" a tribunal on the verge of arbitral misconduct, including excess of jurisdiction? If so, when and how is this best done?

(17) Is a legal representative more forceful on the merits when forensically angry or calm? In practice, is the advocate's audience the tribunal or the paying client, or both? Does it assist an advocate to attack opposing counsel, as distinct from the opposing party? Whilst a client may appreciate its lawyer's libellous attacks on the opposing party, does a tribunal appreciate that style?

(18) Where arbitrations are private hearings, an advocate's style is traditionally more conversational than a ranting public speech. Now that certain arbitral hearings are held in public (such as NAFTA), has the arbitral style of advocacy significantly changed? Has this in turn provoked a different treatment of oral argument by an arbitral tribunal? Just as Judge Judy has emerged on US television, will there be an "Arbitrator Judy", particularly if NAFTA or other hearings are filmed and broadcast to the general public?

(19) Is there a recognisably different oral advocacy style between a party's legal representative as a qualified lawyer and as a non-lawyer, eg a claims consultant?

(20) Is there a recognisably different oral advocacy style between lawyers subject to different professional codes of conduct, or none? Is there any present attempt to impose a uniform code of conduct on oral advocates, (as suggested by Professor Catherine Rogers in the USA)?

(21) Is there a recognisably different style consequent upon the mode of payment received by a party's legal representative? Does a success fee or a conditional fee agreement affect an oral advocate's style or its reception by an arbitration tribunal?

TOPIC D – CONTENTS OF ORAL ARGUMENT

(22) As to content, what should an advocate be trying to achieve in oral argument generally? Is there a difference between particular stages of the arbitration? Oral opening argument before the evidence at the main hearing may have a different content than closing oral argument after that evidence. May there also be a difference as regards such arguments depending on the existence of pre-hearing written skeleton arguments or

post-hearing briefs? How should an advocate address procedural issues arising during an oral hearing, if different?

(23) More particularly, what are the specific aims of opening oral argument? In such oral argument before the oral evidence, is it helpful for an oral advocate to indicate what is agreed and not agreed between the disputing parties? Is it likewise helpful to list, objectively, each the legal and factual issues dividing the parties? Is it useful to provide a preview of the oral evidence, as to what will or will not be established by that evidence for the client-party, at least from the witnesses called that party?

(24) More particularly, what are the specific aims of closing oral argument? In oral argument after the oral evidence, is it helpful for an oral advocate to return to a list of issues, indicating how the oral evidence has actually affected each issue? And what else?

(25) Is it easier to say what the oral advocate should not do? First, should the oral advocate merely read aloud a written script? Second, should the oral advocate be repeating what is already written (and read by the tribunal) in pre-hearing memorials and written submissions? What other examples can be given of what an oral advocate should not do in opening or closing argument?

(26) To what extent should the oral advocate refer to written evidential materials. How should such reference be made, so as to allow the arbitration tribunal to find the materials later? Should the oral advocate give the tribunal page references to the exhibits or other materials to which reference is made? Should the oral advocate take the tribunal to particular pages in the written materials? Should the oral advocate make use of a “core” bundle or bundle of key documents? Should it be assumed that the arbitrators have brought any of their files to the hearing?

(27) Is it helpful for an oral advocate specifically to address legal materials? If so, is it more helpful to cite cases without reading the judgment (US style) or more helpful to identify the particular passage(s) on which the advocate relies as the statement of relevant legal principle (British Commonwealth style). How does a tribunal control the over-citation of legal materials, especially the string citation of duplicative authorities merely illustrative of the general principle?

(28) Does it make a difference for the oral advocate if a verbatim transcript is being made of the oral argument? Where a tribunal is relying only on its own notes, how does this affect the content of oral argument? What is the purpose of a transcript of oral argument? For what is the advocate or tribunal to use it later in the proceedings?

(29) What can a tribunal do when there is marked imbalance in the content of the disputing parties’ oral argument?

(30) What policy should a tribunal adopt in interrupting oral argument with questions? Never, until the end of the oral argument? Limited through the tribunal’s president? At will, at any time, by any arbitrator?

TOPIC E – VISUAL AND OTHER AIDS TO ORAL ARGUMENT?

(31) Does the human voice need any props for oral argument? At a low level, how useful to oral argument are written documents handed-in to the Tribunal for oral argument, including written lists of issues, dramatis personae, chronologies, summaries etc? And at a high level, how useful are elaborate visual aids, including film and models etc?

(32) In particular, how attractive is the increasing use of presentations using PowerPoint and other more sophisticated software. eg “Trial Max”? While such technology can save time (particularly by replacing the time-consuming references to hard-copy exhibits filed a short odyssey from the arbitral chair), does it impose its own tyranny in removing an oral advocate’s flexibility, particularly in response to questions from the arbitral tribunal?

(33) In presenting slides or film to a tribunal requiring the lights to be dimmed in the hearing room, is there a timing problem? After a healthy liquid lunch, as darkness looms in the afternoon, is there any danger of the arbitrators being lulled inadvertently to sleep?

(34) Where visual aids are used in oral argument, should the tribunal require the distribution of hard copies before the presentation begin? Should a tribunal provide for the marking of such visual aids as exhibits etc, particularly so as to make a written transcript subsequently intelligible; and if so how?

(35) Is there a procedural difficulty where such hard copies are distributed or exhibited if either conflicts with an earlier procedural order by the Tribunal regarding the exchange of written memorials or written submissions before the oral hearing? Where is the line drawn between old written argument, new oral argument and a fresh case?

TOPIC F – THE THREE BEST AND THREE WORST THINGS IN ORAL ARGUMENT (AS SEEN BY AN ARBITRATOR)

(36) For this session’s sixth topic, each speaker will introduce list the three most attractive and the three most irritating things any advocate can do in argument before an arbitration tribunal, based upon that speaker’s arbitration experience. The floor will be asked to add their own contributions.

(37) Lastly, in the long term, what is the role of arbitration tribunals in promoting best practice in oral argument, if any? Can a tribunal reprove a wayward advocate, without risk of unfairness or offence? Is it best done privately after the arbitration, directly or indirectly? Or not done at all?

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Dublin, 2008

50 Years of the
New York Convention

Introduction to Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games?

*V.V. Veeder QC**

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I. TWO TRIBAL TRADITIONS

Over the last forty years, as bilateral investment treaties proliferated exponentially and treaty-based arbitrations ballooned between private investors and states, arbitrators and practitioners entered this new field both from the world of international commercial arbitration and the world of public international law. Today, these two tribes of “privatistes” and “publicistes” work behind the same plough in peaceful co-existence, more or less. Yet the question arises whether such apparent co-existence obscures fundamental differences between the two tribal traditions to which we should now pay greater attention for the future of treaty-based investment arbitration. This ICCA panel examined that question from two separate viewpoints: (i) the legal regime governing treaty-based arbitrations between investors and states; and (ii) the practical conduct of such arbitrations by arbitrators and legal practitioners.

II. THE LEGAL REGIME

International commercial arbitration is the creature of a private law agreement resulting from the consent of the parties, although its effectiveness also rests upon a patchwork of national and international laws. The applicable legal norms will usually be drawn from a wide variety of national legal systems. Treaty-based arbitration between an investor and a state is a creature of international law; and its applicable norms will usually be drawn from both conventional and customary international law but rarely from a national law (although the resulting award may rely on national laws to ensure its ultimate effectiveness). The question here arises whether these different characteristics require different juridical treatment in principle, or whether the only material difference arises from the involvement of a state as a disputant party. Whatever the answer, is it still appropriate to conduct treaty-based arbitrations under procedures designed for international commercial arbitration; or do we now need to generate specialist

* Essex Court Chambers, London; Member of ICCA.

procedures (other than ICSID) expressly designed for investor-state disputes under treaty-based arbitrations, such as a modified form of the UNCITRAL Arbitration Rules?

Campbell McLachlan addresses these issues in his report below (pp. 95-145), to which Bernard Hanotiau and Brooks Daly (with Fedelma Claire Smith) respond from their different perspectives (pp. 146-150 and 151-164, respectively).

III. PRACTICAL CONDUCT

There are distinct challenges for practitioners and arbitrators in conducting a treaty-based arbitration involving a state as compared to an international commercial arbitration involving private parties only. For example, what are the different strategic and tactical choices for the legal practitioner advising the investor or the state? And what different problems await the unwary, beginning with the choice of arbitral procedure, the forum, waiting-periods, the selection of arbitrators, the pursuit of contract-based claims (as distinct from a breach of treaty), the resort to domestic courts, the exhaustion of local remedies, the distinctions between jurisdiction, admissibility, liability, causation and quantum, together with all the practical issues involving a state as a party, including legal representation, document production, interim measures, counterclaims, testimony by officials etc. The list is almost endless.

Abby Cohen Smutny addresses many of these issues in her report below (pp. 167-177), to which Sarah François-Poncet (with Caline Mouawad) and Toby Landau respond in their own particular ways (pp. 178-186 and 187-205, respectively).

It is regrettable that it has not been possible here to reproduce the many observations from the floor: delegates attending this session provided a rich variety of interesting and contrasting comments. As was apparent then and confirmed by the papers below, it is evident that this particular topic does not lend itself to any easy or comprehensive solutions – at least not yet.

ICCA Congress Series No. 15
Rio de Janeiro, 2010

Arbitration Advocacy in
Changing Times

Strategic Management in Commencing an Arbitration

*V.V. Veeder**

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I. INTRODUCTION

“Advocacy” in transnational arbitration is now largely written advocacy, beginning with the claimant’s written request for arbitration initiating the arbitration proceedings.¹ It extends through the arbitration’s written phase with the parties’ respective memorials; and after the oral phase it usually resumes with the parties’ written post-hearing submissions. Oral advocacy remains important and occasionally decisive, but for all that a party’s counsel ever says orally to a tribunal, it could not be said without the writing; and of all the writing, the most significant is often the request for arbitration. That request reflects the most important “strategic” decisions influencing the course of the arbitration proceedings, including its chances of eventual success or failure, both for claimant and, paradoxically, the respondent also.

This is true for most forms of international commercial arbitration, especially arbitration under institutional rules intended for commercial parties. It is even more true for investor-State arbitration, especially arbitration under bilateral investment treaties (BITs).

The form and content of transnational arbitration is thus largely driven initially by the claimant and not the respondent. And unlike the respondent’s initial answer, the claimant usually has months, if not years, to plan and prepare its request for arbitration. A well-advised claimant and its counsel will prepare the request with painstaking care; but, ironically, if that job is well done, after the arbitration’s initial phase, little or no

* Essex Court Chambers, London; Visiting Professor on Investment Arbitration, King’s College, London University; Member of ICCA.

1. This change extends even to litigation in certain common law countries: see A. SCALIA and B.A. GARNER, *Making Your Case: The Art of Persuading Judges* (West Publishing 2008). In the United States, that art lies in the *written* case.

reference may be made to the request for arbitration. If the claimant's counsel have done their job properly, the request is the proverbial dog that does not bark.

This paper looks first, separately, at international commercial arbitration and investor-State arbitration. They are similar in most parts but significantly different in others. It then looks at several common features to the early stages of transnational arbitration, each requiring "strategic management" by counsel (using the phrase designated for this collection of papers).

II. INTERNATIONAL COMMERCIAL ARBITRATION

Historically, it used to be so easy, cheap and quick. One ship broker would walk across the floor of the Baltic Exchange in the City of London, with a short telex in his hand (still warm), touch a colleague on his shoulder, and say "we've got a dispute, the owner wants to send his claim to arbitration, so bring your charterer's file and meet you in the pub after work tonight". That was how, traditionally many maritime and commodity arbitrations were commenced in England between arbitrator-advocates, until we invented arbitral institutions, three-arbitrator tribunals and slow-track arbitration.

Why is it now so formalistic, so labour intensive, so expensive and so necessary to engage specialist arbitration counsel, to start an international arbitration? Why is there, at that early stage, such need for any "advocacy", still less such a high degree of "strategic management"? With recent technical advances, why is the modern equivalent of the Baltic Exchange not the simple "bumping" of two iPhones?

If we look at the institutional rules setting out the requirements for a claimant's request for arbitration, the first part of the answer is obvious. These arbitration rules generally impose a heavy task, increasingly front-loaded with significant legal costs, effort and time by counsel; and the heaviest are imposed by the older European institutions. For example, the Arbitration Rules of the International Chamber of Commerce (ICC) list six separate topics under Art. 4(3) for an ICC Request for Arbitration; the LCIA Rules list seven separate matters under Art. 1; the Stockholm Chamber of Commerce (SCC) Rules list six separate matters under Art. 2; the Rules of the Netherlands Arbitration Institution (NAI) list eleven matters under Art. 6(3); and, perhaps worst of all, the new UNCITRAL Arbitration Rules (2010), influenced by the older European States and the United States, list ten items under Art. 3.

There is another burdensome requirement, namely, the need for the formal service of the claimant's notice on the intended respondent, often in multiple original versions. Art. 2 of the New UNCITRAL Rules 2010 provides for service in no less than 244 separate words, thereby creating several complicated technical procedures for what should be and what once was a short and simple exercise for most cases – a colleague's tap on the shoulder. It is noteworthy that Professor Sanders, in his magisterial historical work on "Arbitration" for the *International Encyclopaedia of Comparative Law*, did not even

think it necessary to address the commencement of an arbitration, still less the problems of service of the notice or request for arbitration.²

These modern arbitration rules impose an onerous task on claimants wishing to start an arbitration, because, over the years, the rules were modified to cater for the worst of cases, always the outliers not representative of the more traditional arbitrations. Accordingly, that task must now be discharged with the help of specialist arbitration practitioners for *all* cases. But does it need to be so in the future? We live in the age of computers, the internet, email, iPhones and apps; and there must surely be a better way to start a traditional arbitration than with a laborious and expensive drafting exercise requiring ever-more specialist counsel. Could it not be done by electronic means, with a claimant filling out a standard form template on the website of an arbitration institution: succinct, multilingual, simple, paperless and green; that form being electronically transmitted by the institution to all parties and arbitrators; and with the claimant also paying its institutional starting-fee on line? Certain new arbitral bodies have started to do this; others are considering similar procedures; but given that several barely caught up with the twentieth century before its expiry, patience may be required for users of transnational arbitration.

However, all this external rule-based activity is only the tip of the modern arbitral iceberg. Underneath, still more internal activity is required of a claimant before it can safely start an arbitration; i.e. more “strategic management”.

III. INVESTOR-STATE ARBITRATION

Under most investor-State arbitrations under BITs, the claimant investor has a choice of one of several forms of arbitration, whether non-institutional such as UNCITRAL arbitration or institutional such as ICSID, ICC or SCC. The choice will be made by the investor according to its particular claim and its own needs, whether geographic, cultural or juridical.

For example, an investor with a claim dependent on an investment qualifying under the BIT’s broad definition of “investment”, but not manifestly meeting the narrower definition of Art. 25 of the ICSID Convention, will now generally avoid ICSID arbitration in favour of another form of arbitration. Conversely, an investor with limited financial resources, wishing to avoid the intervention of State courts, will generally prefer the protection of the ICSID Convention, particularly its effect on the award’s finality and enforcement more easily ensured under the ICSID Convention than the 1958 New York Convention. The initial choice is important. It is a choice exercisable only once.

2. P. SANDERS, “Arbitration” in *International Encyclopedia of Comparative Law*, Vol. VI, Civil Procedure (1996).

IV. ARBITRATOR NOMINATION

Having settled upon the form of arbitration and the applicable rules of arbitration, the claimant's next task is directed at the composition of the arbitration tribunal. Much has been written elsewhere about this increasingly difficult, time-consuming and important task for counsel advising a client. That task now resembles an elaborate chess-game, particularly with the new problems of disclosure by and independence of arbitrators revealed (or compounded) by the IBA Guidelines on Conflict of Interest (2004) and the more recent ICC standard form (2009).

The claimant will want to nominate or appoint a safe candidate free of the risk of challenge from the respondent which could delay the arbitration proceedings significantly. For that reason, the "orange" matters in the IBA's Guidelines operate, in practice, as "red" matters, precluding a claimant from considering many arbitral candidates as arbitrators. This cautious approach is understandable on the part of claimants; it is mirrored in other areas of public life where, for example, a nation's president dare not appoint an "orange" candidate to the nation's supreme court with any previous judicial experience, out of a rational fear that a candidate's public court judgments could only provide fodder for his political opponents – whereas a person who has kept his (or her) judicial views hidden can much more easily survive legislative scrutiny. In arbitration, the new safety-factor creates an unfortunate imbalance of arms between claimant and respondent, the latter with much less to fear from delay can select both "green" and "orange" arbitrators, with the claimant limited to "green" candidates.

As regards disclosure by both a claimant and its appointed arbitrator, an emerging problem arises from the practice of arbitral "beauty-parades". It is now a fact of arbitral life that many parties undertake the beauty-parading of potential arbitrators before selecting their most favoured candidate. At worst, this exercise resembles the excesses of jury-selection in US courts; but at best, in a simple form with appropriate safeguards, it can be a necessary tool in levelling the playing field for arbitration users and counsel. The family of specialist arbitrators is relatively small and well-known to specialist practitioners (from conferences and kindred professional links); but an outside practitioner may want to know an arbitrator more than by name; or a specialist practitioner may likewise want to know a new or younger arbitrator. A short meeting, not raising any likely issue in the arbitration, under the famous guidelines long established by Mr. Aksen ("the Aksen Rules") or more recently (but controversially) by the Chartered Institute of Arbitrators, can build confidence both in the specific arbitration and the arbitral process generally.

There remains, however, the awkward question as to whether and, if so, how much of this beauty-parading should be transparent and disclosed to the other party, other members of the tribunal and the arbitral institution. Under current standards of disclosure, it should be disclosed – but does this in fact happen? It seems that disclosure of beauty-parades is inhibited because, given that such disclosure remains haphazard amongst different arbitrators, arbitral institutions and national cultures, any disclosure could immediately attract an arbitral challenge by the other party. To many, this may not now seem a good enough reason for non-disclosure; but it is significant that the ICC Court, having drafted its new form, has apparently decided that an ICC arbitrator should disclose a beauty-parade before appointment (as was confirmed by the President of the

ICC Court during the ICCA Rio Conference). If so, will the ICC Court now uphold an arbitral challenge under the ICC Rules if an arbitrator has failed to disclose a beauty-parade?

V. JURISDICTION

Under most arbitration rules, the request for arbitration determines not only the tribunal's jurisdiction but also the scope of the issues requiring determination in that particular arbitration. Under a BIT with an investor-State provision for arbitration, it will be the claimant's request which usually invokes and completes the bilateral arbitration agreement founding the tribunal's jurisdiction. Whether the resulting arbitration agreement between the claimant investor and the respondent State is governed by international law, national law or none, a wrong choice of arbitration provision by the claimant at the outset of the proceedings can prove fatal to its claim as a matter of jurisdiction. So too a misstated description of the dispute, issues or claimed relief in the request for arbitration.

These hazards are aggravated if the claimant's request is subject to institutional registration or like procedure as a pre-qualifying condition for submission to the tribunal (such as ICSID); or where the parties' dispute is only referable to arbitration if previously subjected to a pre-arbitration procedure between the parties, such as a standstill agreement or compulsory conciliation.

It seems that where a claimant selects one of several available forms of arbitration under a BIT, that choice is final. For example, having chosen ICSID arbitration offered under the BIT, the claimant cannot later transform these ICSID proceedings by exercising a different choice in favour of other forms of arbitration offered by the same BIT. A tribunal appointed under the ICSID Convention therefore cannot, upon the unilateral act of the claimant, be converted into a tribunal appointed under the UNCITRAL or ICC or SCC Rules. There can be no switching of arbitral horses in mid-stream.

This analysis (if correct) can give rise to logical difficulties when a claimant invokes a most-favoured-nation (MFN) provision in the BIT made between its home State and the respondent host State in order to invoke a different provision for investor-State arbitration in a second BIT made by the respondent State with a third State. If, as many surmise, an arbitration provision in any BIT is a conditional offer or option granted by the State and exercisable by the claimant-investor, would it follow logically that the claimant must exercise that grant at the latest by its request for arbitration?

The first difficulty is whether the request for arbitration (invoking an MFN clause) can simultaneously invoke two different forms of arbitration: could an ICSID arbitration simultaneously be an SCC or ICC arbitration, or even a non-institutional arbitration under the UNCITRAL rules? If not, an investment arbitration remains a one-horse race.

The second difficulty is timing. After the request for arbitration invoking the arbitration grant in the first BIT (still more after any requisite institutional registration), would it then be too late to invoke the MFN clause and seek to trigger the arbitration provision in the second BIT? That attempt could produce, at best, a new arbitration agreement with different legal effects. For example, could an investor initiating

arbitration proceedings under the ICSID Convention and meeting an insuperable jurisdictional obstacle for want of an “investment” narrowly defined under Art. 25, later, midway through those ICSID proceedings, invoke an MFN clause to re-constitute the arbitration proceedings as an ICC, SCC or UNCITRAL arbitration?

If the claimant cannot invoke two or more arbitration provisions in the same BIT in its initial request, it would not seem logically possible for the claimant to switch horses using an MFN clause triggering a different form of arbitration in another BIT. Even if the MFN clause produced a second ICSID arbitration, could it really be the same ICSID arbitration as the first ICSID arbitration? Would it require re-registration and the appointment of a fresh tribunal? These are technical problems extending into substance and not mere form.

VI. LANGUAGE

The request for arbitration will seek to establish the basic elements of the arbitration, such as seat, applicable law and language. For international commercial arbitrations, the universal language of arbitration is now English which has, regrettably, displaced French. This latter change is not mitigated by Francophone arbitration specialists speaking French but using English words. Whereas the French language was generally comprehensible to the world, English is generally not. As Sir Winston Churchill said long ago, it was only the English language which divided England and the United States; and the divisions between (for example) English-English, Scottish-English, Indian-English and Australasian-English have become even more accentuated. It is now necessary in literary and political circles to distinguish between starkly different uses of native English, from “Estuarine” to “Strine”.

In transnational arbitration, however, non-native English speakers have taken over the English language. It is perhaps no accident that both the ICSID Convention and the New York Convention were drafted in Dutch-English and that the chairmen of UNCITRAL’s Working Group on Arbitration (revising the UNCITRAL Model Law and Arbitration Rules) have not been native English speakers. English works for transnational arbitration, with the most pedantic grammarians now coming from non-native English speakers. It is not a little humiliating for a native English-speaking arbitrator to have his award’s English grammar corrected by a polyglot secretary at ICSID or the SCC.

VII. PLEADING OBJECTIONS

The request for arbitration must survive what is now the almost inevitable response from the respondent in transnational arbitration, particularly investment arbitration: a challenge to the tribunal’s jurisdiction. It may serve no purpose in setting out too fully in the request a party’s detailed case on jurisdiction, still less on the merits. Here saying more early is saying less later, because it may facilitate the respondent’s jurisdictional challenge to the request for arbitration.

On the other hand, a succinct recitation of the factual basis for the claimant’s claim may be necessary to meet a jurisdictional and like challenge. Under the doctrine derived

from Judge Higgins' judgment in the *Oil Platforms Case*, such facts pleaded in good faith will usually be determined by the tribunal in the claimant's favour at the jurisdictional stage.³ There may be an exception if such facts relate only to jurisdiction: it would make no sense a tribunal assuming provisionally disputed facts alleged by the claimant in finding jurisdiction if the tribunal never again addresses those jurisdictional facts with evidence.

The request for arbitration may next meet an admissibility objection, based on a procedure analogous to the US court procedure for summary judgment or the English court procedure for striking out a claim. It is questionable whether Anglo-Saxon court procedures should play any part in transnational arbitration, still less investment arbitration, as opposed to the well-known procedures for an award on assumed facts or a partial award on a preliminary issue. The US influence, however, remains strong, even as regards arbitral terminology in English.⁴

For ICSID arbitration, the position has been formally resolved in favour of an express admissibility objection based on the Rule 41(6) of the new ICSID Arbitration Rules: "If the Tribunal decides ... that all claims are manifestly without legal merit, it shall render an award to that effect." An ICSID tribunal can thus make an "award" dismissing the claimant's claim at an early stage of the proceedings, at the first session or promptly thereafter, if it finds that the claim is manifestly without legal merit. It is perhaps only the word "manifestly" which has protected ICSID proceedings from this procedure's abuse to date.⁵ Yet, as Professor Schreuer and his distinguished co-authors warn: "In many cases it [the new rule] is likely to lead to an additional procedural layer, thereby delaying proceedings and increasing costs."⁶

VIII. STRATEGIC USE OF NATIONAL COURTS

Under the ICSID Convention, there is very limited opportunity for parties to resort to national courts, given the terms of Art. 26 of the ICSID Convention. This is not so in

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3. *The Oil Platforms case (Iran v. US)*, 1996 I.C.J. 803, 856, applied by ICSID tribunals in materials the Decision on Jurisdiction of 29 January 2004 in *SGS v. Philippines* (ICSID Case No. ARB/02/06 (para. 26)); the Decision on Jurisdiction of 8 February 2005 in *Plama v. Bulgaria* (ICSID Case No. ARB/03/24 (para. 118)); the Decision on Jurisdiction of 22 April 2005 in *Impregilo v. Pakistan* (ICSID Case No. ARB/03/03 (para. 254)), the Decision on Jurisdiction of 22 February 2006 in *Continental Casualty v. Argentina* (ICSID Case No. ARB/03/9 (para. 63)); and the Decision on Jurisdiction etc of 21 March 2007 in *Saipem v. Bangladesh* (ICSID Case No. ARB/05/07 (para. 85)), as well as by several non-ICSID tribunals.
 4. J. PAULSSON, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005).
 5. See "Suggested Changes to the ICSID Rules and Regulations", Working Paper of the ICSID Secretariat of 12 May 2005; A. PARRA, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes", 41 *Int. Law.* (2007) p. 47; Aurélia ANTONIETTI, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", 21 *ICSID Review-Foreign Inv. L.J.* (2006) p. 427 at p. 439; and Ch. SCHREUER et al., *The ICSID Convention: A Commentary*, 2nd edn. (Cambridge University Press 2009) p. 544.
 6. Ch. SCHREUER et al., *The ICSID Convention: A Commentary*, *op. cit.*, fn. 5, p. 544.

regard to arbitrations under the rules of UNCITRAL and other forms of arbitration. These differences can be illustrated by the difficulties now existing within the European Union under the Brussels Regulation I regarding the New York Convention, enacted in all EU Member States but, in several States, notoriously more honoured in the breach in the form of the “Italian torpedo” negating Art. II of the New York Convention.

The uneven decisions of the European Court of Justice in *West Tankers, van Uden* and *Marc Rich* and of the French Courts in *Putrabali, Fincantieri* and *SNF v. Sytec* have created procedural risks for transnational arbitration, not limited to the outset of an arbitration. These risks are widely regarded as unsatisfactory to users of arbitration within the European Union. To some, however, any reform entrusted to the European Commission can only promise worse for transnational arbitration; and to others, any reform has to be an improvement if based upon the European Commission’s Consultative Report and Green Paper (2009), following the earlier “Heidelberg Report” by Professors Peter Schlosser, Burkhard Hess and Thomas Pfeiffer (2008).

The position in England is now probably the most unsatisfactory of all in the European Union, given the structure of the Arbitration Act 1996 codifying the English common law rules relating to the jurisdiction of the English Court over arbitrations taking place in England. However, after *West Tankers*, the English Court cannot impede, directly or indirectly, court proceedings in EU Member States brought and maintained in deliberate violation of an arbitration agreement – not even by declaration where London is the expressly chosen arbitral seat or *lex loci arbitri*. Yet the English Courts can still issue anti-suit injunctions impeding anti-arbitration litigation outside the European Union, in support of transnational arbitration. To many, this split jurisdiction seems odd and illogical.

What is needed is better respect, in good faith, by all EU courts for Art. II of the New York Convention (to which all EU States are parties) with an effective power to compel arbitration in accordance with the parties’ arbitration agreement. “*Pacta sunt servanda*” should not be a controversial principle, together with the negative effect of *Kompetenz-Kompetenz*. But how to achieve this in the European Union may still take years, given the strength of political feeling this topic engenders and the role exercised by the European Commission. No solution is offered here, save to predict, regrettably, still more malign interference in the conduct of transnational arbitration by the State courts of certain EU Member States.

IX. CONCLUSION

There can be, of course, no general conclusion on this broad topic save to look back with a heavy heart to a foreign country far away where it all seemed to be so much easier, without any elaborate “advocacy” or “strategic management” in starting an arbitration. In moving from the recent past, progress in arbitration should be, perhaps, more simple.

ICCA Congress Series No. 16
Geneva, 2011

Arbitration – The Next 50 Years:
50th Anniversary Conference

Gala Dinner Address Memories from ICCA's First Fifty Years

V.V. Veeder*

It is a pleasant privilege for me to be invited to address you tonight at this anniversary dinner. Yet, I am uniquely unqualified to speak about the historical origins of the "International Arbitration Congress", later known as the "International Committee for Commercial Arbitration" and, since 1975, called the "International Council for Commercial Arbitration – or "ICCA".

I was not there at ICCA's foundation in 1961; and, strangely, the United Kingdom was not an active supporter of ICCA in its earliest days, at least not compared to specialists from France, the Netherlands, Italy and Switzerland, soon joined by India and the USSR.

The history of ICCA is also not the usual history of an arbitral institution because ICCA was not created as an institution. It is now an organization with a legal personality under international law and ICCA's Foundation, as separate body in Holland, has a legal personality under Dutch law; but ICCA was born as a concept; and so it remains with no formal constitution and no large building or home of its own. Moreover, ICCA is entirely independent of anything and everyone; and it does not work under the umbrella of any other body with different or even conflicting interests.

From its first beginnings, ICCA has been truly international; and it does not serve nationalistic, sectorial or regional self-interests. ICCA's unique status and origins as regards international arbitration requires an explanation by analogy.

In the world of chemistry, positive catalysts play a relatively small but highly significant part. These re-agents speed up a chemical reaction without being consumed by the reaction itself. In the world of international arbitration, those catalysts are ideas, both theoretical and practical, for which ICCA has provided a highly significant forum as an ideas-factory, now for half a century.

It began with meetings over lunch and dinner in 1961 a few kilometres from here, at the Relais de Chambésy on the road to Lausanne. Professor Pieter Sanders from Holland was there, as were M^c Jean Robert from France, Professor Arthur Bülow and Dr.Dr.

* Essex Court Chambers, London; Member of ICCA.

This historical account is drawn from several sources: Piet SANDERS, *Herinneringen*, pp. 56-59; Heinz STROHBACH, "Vom Club de Chambésy zum International Council for Commercial Arbitration" in A. PLANTEY, K.-H. BÖCKSTIEGEL and J. BREDOW, *Festschrift für Ottoarndt Glossner zum 70. Geburtstag*, p. 417; "The I ICCA Congress 1961 (Paris)", *Rev.arb* (1961, no. 2); "The II ICCA Congress 1966 (Rotterdam)", *Rev.arb* (1966, no. 3, special); "The III ICCA Congress 1969 (Venice)", *Rev.arb* (1969, no. 4) pp. 133, 226, 338 et seq; "The IV ICCA Congress 1972 (Moscow)", *Rev.arb* (1972, no. 4) pp. 426, 463 et seq; and "The V ICCA Congress 1975 (New Delhi)", *Rev.arb* (1975, no. 1) pp. 3, 131 et seq; and private communications from Jan Paulsson, Sergei Lebedev, Howard Holtzmann, Brigitte Stern, Alan Redfern, Jernej Sekolec, Martin Hunter, Jason Fry, Annette Magnusson and Sebastián Besson – to all of whom I express my profound recognition and gratitude (albeit that any errors here are mine alone).

Ottoarndt Glossner both from the Federal Republic of Germany and Professor Minoli from Italy. This group of like-minded friends, joined by others, became known as the “Club de Chambésy”.

These founders of ICCA began with a simple proposal: to hold one or more international congresses, open to all, to consider and debate good ideas for the better conduct of international arbitration, without fear or favour – good ideas which have now, fifty years later, become indispensable to arbitration, world trade and even the rule of law.

Now, an idea can be fleeting and ephemeral – born of present circumstance and quickly forgotten. For example, at a time when the Beys of Tunis were the undisputed rulers of Tunisia, it is said that one Bey, during the early part of the nineteenth century, wished to teach the haughty ambassadors of the Western powers a lesson in humility.

He requested all three diplomats in full ambassadorial uniform to prostrate themselves on the floor of his throne room at the outset of their regular audiences. All three politely declined, on the basis that it was not a useful precedent to subject the representatives of the United States of America, France and the British Empire to such unnatural indignities. And so, at the next royal audience, they bowed their heads; but they did *not* prostrate themselves on the palace floor. The Bey’s request was nonetheless repeated for the next audience; and for that audience, these proud representatives encountered an apparently insuperable diplomatic problem.

The wily Bey had built a new entrance to his throne room, a doorway less than two feet high, the better to require the ambassadors to prostrate themselves as they squeezed themselves through the new doorway – on the palace floor. But the British ambassador had an idea which was to preserve the dignity of the Empire and which he was prepared to share with his two esteemed diplomatic colleagues from France and the United States. And thus it was that the Bey of Tunis, instead of seeing the three ambassadors prostrate themselves saw, first, the feet and then the rotund behinds of the three ambassadors as they successively wiggled themselves *backwards* through the new doorway into the royal presence.

That British idea, the backward ambassadorial wiggle, however excellent at the time, is not now to be found in any book of diplomatic etiquette.

That is manifestly not so with ICCA, as the forum for ideas planned fifty years ago by the Club de Chambésy for arbitration specialists, then straddling both the massive political divisions during the Cold War and the divide between academic, professional and state practitioners, both “*privatistes*” and “*publicistes*”; and both lawyers and non-lawyers.

You will recall that in April 1961, the United States and Cuba nearly went to war over the incident at the Bay of Pigs; that in June 1961 Kennedy and Khrushchev held a most unsatisfactory summit in Vienna; and that in August 1961, the USSR and the GDR began building the Berlin Wall. Apart from ICCA’s foundation, 1961 was not a good year.

ICCA’s story begins, however, before 1961. The Club de Chambésy had its origins first at the United Nations Convention of 1958 in New York, attended by Professor Sanders and other members, including Professor Bülow and Dr. Dr. Glossner. The same group of friends was already working on the long-drawn-out negotiations for the European Convention on International Commercial Arbitration; and they were present

when this Convention was eventually signed on 21 April 1961 in Geneva. This 1961 Geneva Convention included an Annex and Special Committee intended to provide a new framework for trade between free market economies and socialist economies in the Soviet bloc. Hence the Club's meetings at the Relais de Chambésy, with a special interest in dispute resolution for East-West Trade. If Napoleon really said: "*C'est la soupe qui fait le soldat*", then we can say that the menu of this Swiss restaurant had much to do with the making of ICCA.

Within a month of the Geneva Convention, the first ICCA Congress took place in Paris over three days in May 1961, with Jean Robert as the rapporteur-general. There were 162 delegates from 14 countries, of which 74 came from France. There were, however, only three countries from outside Western Europe: the United States of America, Turkey and Yugoslavia.

This first congress was attended by, amongst others, Professor Sanders, Professor Berthold Goldman and senior French judges. One of the papers presented to the first of its four working groups was by a young Professor Frédéric-Edouard Klein from Basel University on the separability of the arbitration clause (to which we shall return).

The second ICCA Congress took place in Rotterdam in 1966, with 130 delegates from 14 countries. Again, these countries were largely from Western Europe, with the addition of the United States of America, Romania and Yugoslavia. The theme of this Congress was "Arbitration and the European Common Market". Its president was Professor Sanders. It was also attended, amongst others, by Professor Pierre Lalive.

For the United Kingdom, as with the first congress, this second congress was attended by few arbitration specialists; and, of these, only two names stand out today as representatives of the ICC's National Committee for the United Kingdom. Perhaps the European theme of the Congress put others off: the United Kingdom was not then a member of the Common Market; but, in any event, there were no Wilberforces, Diplocks, Kerrs, Mustills, Littmanns or Manns. The first well-known English name was Lord Tangle, who was a mountaineer and solicitor who later became the President of the ICC Court of Arbitration. The second was Neil Pearson, a solicitor from Manchester, who attended all these early congresses.

Neil Pearson soon became better known as the chairman of the first ICC tribunal to be ordered by the English High Court, in 1972, to state its award in the form of a Special Case for the decision of the High Court, a form of *lèse-majesté* against the ICC in Paris. That was later purged by two successive English Arbitration Acts 1979 and 1986 abolishing the Special Case; but it left England in French eyes on permanent probation as still capable of refusing to enforce a valid French ICC award under the New York Convention. In fact, of course, that is today an unthinkable impossibility. (I stress the word "valid"). It seems surprisingly hard for the French to forget Clemenceau's famous judgment, for arbitration as for much else, that England "is a French colony which failed".

The third ICCA Congress took place in Venice in 1969, with delegates from twenty-six countries and chaired by Professor Eugenio Minoli (then of Modena University and the President of the Italian Arbitration Association). These twenty-six countries now included India, Poland and the USSR, together with representatives from the United Nations and the World Bank, the latter represented by Dr. Aaron Broches, as the General Counsel of the World Bank and ICSID's first Secretary-General. It was also

attended from the USSR by Professor S.N. Bratus and Professor Sergei Lebedev. (We shall return to several of these names).

The fourth ICCA Congress was held in Moscow in 1972, with delegates from thirty-six countries, now covering East and West, North and South. By this time, ICCA had achieved what no other arbitral body had ever achieved: it was worldwide, inclusive, non-national, non-political, free-thinking and truly international; and it was attracting arbitration specialists from all walks of life, from both the developed and developing world: academics, practitioners, administrators, officers of state and, of course, arbitrators, both lawyers and non-lawyers, including (from London) the doyen of English commercial arbitrators, Cedric Barclay.

The fifth ICCA Congress took place in New Delhi in 1975, organized by Dr. M.N. Krishnamurthi, with delegates from forty-three countries. Here, ICCA's status and name were formalized with its Statements of Purposes and Procedures. This non-constitution, for a non-organization, was the product of negotiations first begun in Moscow conducted by Judge Howard Holtzmann (of the United States) and Professor Lebedev, designed to square the political circle between an international "organization" (which specialists from the USSR and other countries could not join without further awkward formalities) and a "network" or council (in which representatives from those countries could take part). With only minor amendments, that Statement of Purposes and Procedures still governs the workings of ICCA in its three complimentary roles:

As to ICCA Congresses, since 1975, there have been a further twenty-one ICCA Congresses, Conferences and Meetings, including tomorrow's, held in North and South America, Europe, the Middle East and Asia, but not Africa – at least not yet.

As to ICCA publications, ICCA has published a mass of specialist legal materials, collections and research. The records of its early Congresses were published in the *Revue de l'arbitrage* and also by host organizations; but since 1976, its materials have been published by Kluwer. These extend to the multi-volumed *International Handbook on Commercial Arbitration* and the *ICCA Yearbooks* and Special Series, to which we must now add the increasingly indispensable ICCA website.

ICCA's educational third role is now no less important than its other two roles, both for senior judges confronting the 1958 New York Convention and UNCITRAL Model Law and young arbitration practitioners, more skilled and more numerous than ever before.

But I come back to ICCA's function as a forum of ideas, or catalyst, working as a laboratory and not as a museum. I can take only one example tonight, an idea so simple but so necessary to international arbitration: the severability or separability or autonomy of the arbitration clause from the substantive contract in which it is physically embedded, whereby the non-existence or invalidity of the latter does not necessarily infect the existence or validity of the former.

This doctrine of separability is, of course, a legal fiction; the product of arbitral logic which bears no foundation in fact because no commercial person considers making two quite separate, independent agreements in one contract; but, without this simple idea, there could be no effective system of arbitration for international trade but, rather, a multiplicity of proceedings in a Legal Tower of Babel with non-stop (not one-stop) adjudications. It is an idea which shows how ICCA's forum for ideas works, both in theory and practice; and why only ICCA could have worked in this way.

Let me explain. At ICCA's first congress in Paris in 1961, as recited above, one topic was the autonomy of the arbitration clause; and the report and discussion were published by ICCA. At the third congress in Venice in 1969 and the fourth in Moscow in 1972, Professor Bratus attended as one of the foremost Soviet lawyers and arbitrators. It is inconceivable that Professor Bratus and his colleagues were not exposed through ICCA to the legal developments in France, Germany, Switzerland (and elsewhere) on the separability of an arbitration clause, including the French decision in *Gosset* (1962), the US Supreme Court decision in *Prima Paint* (1967) and the Bundesgerichtshof decision of 27 February 1970.

Much later, in 1984, Professor Bratus, as an arbitrator in a Soviet arbitration in Moscow, issued an award recognizing and applying under Russian law the doctrine of separability in a case where the substantive agreement was legally invalid ab initio, thereby assuming jurisdiction over the merits of the parties' non-contractual dispute. That had never been done before by any Russian arbitrator or judge; and it was achieved as a matter of legal logic, independently from any express provision in the Russian Civil Code or Code of Civil Procedure.

In 1989, that award was then enforced under the 1958 New York Convention by the Bermuda Court of Appeal in proceedings where legal experts had testified as to the comparative laws and practices on the separability of an arbitration clause. These experts were Professor Goldman and Dr. Broches, both, of course, well-known participants in ICCA Congresses. Dr. Broches was also assisted by the former legal secretary to Professor Sanders, who was by now the General Editor of the ICCA *Yearbook*, as he is still: Professor Albert Jan van den Berg.

But this story does not end here. The successful Counsel in this Bermudian case was a well-known advocate in England, originally from South Africa, Sir Sydney Kentridge QC. In a subsequent English case argued in 1993, before the English Court of Appeal, Sydney Kentridge cited this Bermudian judgment in support of his argument on separability under English law. The Court of Appeal decided to adopt the same approach, based on the Soviet award and the expert evidence and materials cited in the Bermudian legal proceedings. That was done in England at common law, likewise as a matter of legal logic, without benefit of any statute; and the principle is now codified in Sect. 7 of the English Arbitration Act 1996.

So, an idea which was propagated in Paris at the first ICCA Congress in 1961 led to statutory recognition by the British Parliament in 1996, thirty-five years later, which is a relatively short period for arbitral history. Some might say "better late than never" (although it took France almost fifty years to codify *Gosset*); but let us rather thank ICCA and its early supporters for pursuing an idea as a cause with a manifestly good effect in very different legal systems.

So much for history. As to the future, what good ideas may come from ICCA over the next fifty years, which several of you here tonight will surely celebrate in 2061? There are certain catalytic reactions which are already taking place. Let me list four:

First, there were no women at Chambésy; and there were, apparently, no women speakers at ICCA's first five congresses. Yet, in many countries now, over 50 per cent of law students are women. That change is not reflected in the composition of arbitration tribunals and senior practitioners. We do not know the identity of the first woman arbitrator in modern times; but it was certainly not before 1961. It may have been

Margaret Rutherford QC in England, or Professor Bastid in France, or Madame Simone Rozés as an ICC arbitrator or possibly Judge Birgitta Blom as an arbitrator at the SCC. Fifty years later, changes are taking place; and we shall see further changes.

Second, ICCA in 1961 was inevitably Euro-centric. Its founders made determined efforts to break the European mould, with increasing success. We shall certainly see further changes in the practice of international arbitration, particularly in Asia and Africa; and, as you will know, the next ICCA Congress in 2012 will take place in Singapore.

Third, there were few young practitioners in ICCA's early days. That has now changed with the emergence of a new young arbitral élite, with specialist education, training and experience in all forms of international arbitration, with multiple skills, multiple languages and evermore glittering résumés. These young specialists will influence significantly the future practice of international arbitration.

Fourth, there were no computers, electronic aids or e-mails for arbitrators and arbitration practitioners in 1961. Now we have not only personal computers but also iPhones, iPads, Skype and apps (as with the SIAC App). Soon, we shall each have an "EAB", an Electronic Arbitral Bag with ready access to all electronic tools and materials in an electronic super-cloud, including ICCA publications and much, much more. Our system of work is about to undergo a massive technological change.

So the future is bright both for ICCA and international arbitration, as the attendance at this anniversary event demonstrates. ICCA's positive catalyst still works. I shall stop here, because, tomorrow morning, we too must work.

ICCA Congress Series No. 17
Singapore, 2012

International Arbitration:
The Coming of a New Age?

Judicial Debate on the General Theme: “State Courts and International Arbitration: The Future”

*Silvia Borelli**

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I. INTRODUCTORY REMARKS, V. V. VEEDER

The closing session of this ICCA Singapore Congress 2012 is a unique event for which there is no historical precedent – save for a wonderful idea. Twenty years ago, two international jurists presented joint papers in London calling for an international court to decide, on a uniform and consistent basis, the interpretation and application of the 1958 New York Arbitration Convention for the recognition and enforcement of all international arbitration awards in all states parties to the Convention. These two jurists were Judge Schwebel, then a judge of the International Court of Justice, later its president and a well-known arbitrator, then and today; and Judge Holtzmann, then a judge of the Iran-US Claims Tribunal, a well-known arbitral figure in ICCA, UNCITRAL and elsewhere.¹

It was an ambitious idea; and like many ambitious good ideas in arbitration, nothing came of it – until now. Today, for this closing session, we have eleven senior judicial figures from all five continents who will address in turn scenarios under the New York Convention from their specialist knowledge and experience as national appellate judges in arbitration matters. This is the dream dreamt by Steve Schwebel and Howard

* Secretary to the session; Managing Editor, ICCA Publications.

1. Howard M. HOLTZMANN, “A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards”, and Stephen M. SCHWEBEL, “The Creation and Operation of an International Court of Arbitral Awards”, in Martin. HUNTER, Arthur MARRIOTT and V.V. VEEDER, eds. *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Kluwer 1992) pp. 109 and 115.

Holtzmann come to life, only for one morning here but, possibly, the first of many more in years to come.

The New York Convention is nothing without judges: arbitrators write mere words on paper: they have no imperium, no bailiffs and no tipstiffs; but judges exercise the full legal powers of the state to give those mere words the force of law. It is judges who make the New York Convention work; and we welcome the closest co-operation between national judges and ICCA.

Let me first briefly introduce our eleven judges (in alphabetical order, by jurisdiction):

Australia: The Hon. Murray Gleeson, the former Chief Justice of Australia and currently a Judge of the Hong Kong Court of Final Appeal;

Brazil: The Hon. Ellen Gracie, the former Chief Justice of the Federal Supreme Court of Brazil;

People's Republic of China: The Hon. Xi Xiangyang, a Judge of the 4th Division of the Supreme People's Court in Beijing;

France: The Hon. Dominique Hascher, currently the Presiding Judge at the *Cour d'appel de Reims*;²

Hong Kong, SAR: The Hon. Robert Ribeiro, currently a Permanent Judge of the Hong Kong Court of Final Appeal;

India: The Hon. Bellur Narayanaswamy Srikrishna, the former Chief Justice of the High Court of Kerala and a former Judge of the Supreme Court of India;

Iran: The Hon. Hossein Abedian Kalkhoran, currently a Judge at the Iran-US Claims Tribunal at The Hague;

Russian Federation: The Hon. Oksana Kozyr, currently a Judge of the Supreme *Arbitrazh* Court of the Russian Federation in Moscow;

Singapore: The Hon. Sundaresh Menon, currently Singapore's Attorney-General and soon to be a Judge of Appeal of the Supreme Court of Singapore;³

United Kingdom: The Hon. Lord Jonathan Mance, currently a Judge of the Supreme Court of the United Kingdom;

United States of America: The Hon. Judith Kaye, the former Chief Judge of New York State's highest court, the Court of Appeals and Chief Judge of the State of New York.

These eleven judges have studied our several scenarios under the New York Convention and have selected those they wish to address. However, although prepared in advance, this session is not scripted; and none of us quite knows what is about to happen. You will hear a judicial debate which may spring surprising convergences and, no doubt, surprising differences from, inevitably, different perspectives.

The debate will be moderated by Professor Albert Jan van den Berg, the General Editor of the ICCA Yearbooks collecting (inter alia) court decisions on the New York Convention and also a member of ICCA's Judicial Committee conducting seminars on

2. Since November 2012 a Judge at the French *Cour de Cassation*.

3. Since November 2012 Chief Justice of Singapore.

the application of New York Convention for many judges in different parts of the world. He is also the author of the leading and oldest work on the New York Convention, which will soon appear in a second edition. Our Secretary is Silvia Borelli, Managing Editor of ICCA Publications, who has helped us with the scenarios and the collection of legal materials relevant to the judges' comments.

II. FIRST TOPIC: INTERPRETATION OF THE CONVENTION

How do you interpret the New York Convention?

- (a) *As an international treaty on the basis of the rules of interpretation of international customary law as codified in Articles 31-33 of the Vienna Convention on the Law of Treaties?*
- (b) *As a statute?*
- (c) *According to other rules, and if so, which ones?*

Moderator Albert Jan van den Berg introduced this topic by highlighting the underlying issue as to the manner in which the enforcement country has made the New York Convention effective in its legal system, either by direct application or by an implementing act which reproduces (literally) the text of the Convention.

Judge Judith Kaye (United States) opened her discussion by noting how jurisprudence in the United States evolved from a suspicious approach to arbitration in the earlier part of the century, to an enthusiastic embrace of arbitration today. As Judge Kaye explained, judges and arbitrators had much to learn from each other. Judge Kaye then stressed that arbitration should not be seen as a gateway to litigation, quite the opposite. The arbitral process, and resulting award, must strive to be consistent with law, so that arbitral awards can be recognized and enforced throughout the world with minimal court intervention. On the question posed, Judge Kaye stated that she— like other US judges — interprets the New York Convention with deference and respect, as an international treaty. As a result, the New York Convention is to be interpreted on the basis of the rules of interpretation of international customary law, including the Vienna Convention. However, as a quirk of American law, US judges will also interpret the New York Convention as a statute, because the Convention was incorporated by reference in Chapter 2 of the United States Federal Arbitration Act. As a result, there is no separate United States legislative gloss on the New York Convention. As a consequence, her reply to both (a) and (b) was yes and a reply to (c) unnecessary.

Lord Jonathan Mance (United Kingdom) first mentioned the long-standing judicial embrace of arbitration in the United Kingdom and the fact that the interplay of international conventions and domestic legislation is an everyday occurrence in the English courts. English courts will ascertain the proper effect of the New York Convention on the basis of the Vienna Convention; once that proper effect has been ascertained, the presumption that the domestic legislation — the Arbitration Act 1996, which gives effect to the New York Convention — is in accord with the Convention is a very strong interpretative force. The assumption is that the slightly different wording of the Act with respect to the Convention gives proper effect to the Convention's letter and

spirit, even going beyond it by applying a very broad definition of “agreement in writing” that also covers oral agreements or agreements made by conduct.

Judge Ellen Gracie (Brazil) reported that Brazil has a dual system: treaties are signed by the executive but are not part of the Brazilian legal system until they are ratified by Parliament. She also pointed out that Brazil is a latecomer to the system of the New York Convention, to which it acceded in 2002, and that its arbitration legislation was only passed in 1996. Until a decade ago, even the constitutionality of arbitration clauses was uncertain, as it was argued that they fell under the prohibition in Art. 535 of the Brazilian Constitution, which provides that no breach of right can be taken from the jurisdiction of the courts. This argument was squarely rejected by the Supreme Court in 2002.

Moderator Van den Berg asked **Judge Gracie** why Brazilian courts virtually never expressly mention the New York Convention, while still deciding according to its spirit. Judge Gracie replied that in her opinion Brazilian judges are not yet comfortable citing a treaty. This situation is rapidly changing, however, particularly since the Brazilian legislation fully mirrors the New York Convention.

Moderator Van den Berg also asked **Judge Kaye** whether the position expressed by the Second Circuit in *Kahn Lucas Lancaster*⁴ – that the New York Convention is to be interpreted as a statute – is the correct position under United States law. As Judge Kaye explained, under US law, the difference between “treaty” and “statute” interpretation may be a distinction without much substance; for example, as the *Kahn Lucas* decision notes, “treaties are construed in much the same manner as statutes”. Judge Kaye then re-emphasized that US courts can read the Convention both as a treaty, referring to international customary treaty interpretation and as a statute, giving it a very liberal statutory interpretation. Under both approaches, she said, courts pay great deference and respect to the Convention.

III. SECOND TOPIC: ARBITRAL AWARD

(a) Do you require the award to be authenticated as contemplated by Article IV(1)(a) of the New York Convention? If so, what constitutes an authentication?

(b) Article IV(1)(a) also offers the possibility of submitting a certified copy. What do you accept as being correctly certified under Article IV(1)(a)?

Judge Hossein Abedian Kalkhoran (Iran) opened with the remark that the New York Convention’s silence as to the law applicable to authentication and the authorities competent to authenticate awards was probably intentional when the Convention was negotiated. As a result, the law applicable to authentication is to be determined under the law of the place of enforcement. Judge Abedian noted that the law and practice of

4. United States Court of Appeals, Second Circuit, 29 July 1999 (*Kahn Lucas Lancaster, Inc. v. Lark International Ltd*), reported in ICCA Yearbook Commercial Arbitration XXIV (1999) (hereinafter *Yearbook*) pp. 900-908 (US no. 287).

different countries vary considerably with regard to the formalities for authentication, ranging from a liberal, arbitration-friendly approach to stricter conditions. Iranian law does not specify the formalities for the authentication of foreign arbitral awards; the prevailing view among Iranian authors, as well as the practice of Iranian courts, is that, in principle, the rule applicable to judgments rendered by foreign civil courts – which requires authentication by the diplomatic mission or consular officials of the country of rendition in Iran –⁵ applies to awards by analogy. In recent cases, however, the Iranian enforcement courts have assimilated foreign awards to domestic awards, which do not require authentication, and have therefore foregone the authentication requirement. This was the case, in particular, of an ICC award rendered in Switzerland whose enforcement was sought in Iran.⁶ It should be noted that in none of these cases was the authenticity of the award contested by the other party. Iran therefore appears to follow, in practice, the practical approach adopted, for instance, by the German and Swiss courts, that authentication is only required when the authenticity of the award is contested.

Judge Oksana Kozyr (Russian Federation) noted first that there is a dual judicial system in Russia, which distinguishes between courts of general jurisdiction and commercial, or *arbitrazh*, courts. *Arbitrazh* courts do not yet have extensive practical experience in arbitration cases, since arbitration became their exclusive competence only in 2003. In particular, there are not many cases on the issue of authentication. According to Judge Kozyr, the formal requirements made by the Russian courts in respect of awards are in accordance with the New York Convention. A written text signed by the arbitrators is required. In the case of originals, there is no need in principle for legalization or an apostille; in practice, however, authentication of the signatures of the arbitrators, either by a notary public or by the arbitral institution, and an apostille are often required, because the Russian courts are accustomed to having documents submitted to them together with an apostille. When copies are submitted, certification by a notary public (preferably) or the arbitral institution will be required; this is also the case for copies of domestic awards. Translations into Russian, certified by a sworn translator, are always required. Certification by a Russian notary public will also be required if there is an apostille on the award. Judge Kozyr mentioned that since November 2010 all these documents can be filed electronically before the Russian courts.

Judge Bellur Narayanaswamy Srikrishna (India) prefaced his intervention by the general remark that the Arbitration Act 1996, the Indian law implementing the New

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5. As to foreign judgments, the 1977 Act relating to the Enforcement of Civil Judgments – Chapter IX of which deals with the issue of recognition and enforcement of foreign judgments – provides in Art. 173 that an “authenticated copy” of the judgment must be among the documents submitted by the party who seeks enforcement. The same Article describes authenticated judgment as an original – or a certified copy of – judgment, which has duly been authenticated by the diplomatic mission or consular officials in Iran of the country where the judgment was rendered.
 6. Tehran Civil Court I (Chamber 23), Case No. 476/73, writ of enforcement dated 15 May 1995; see also Tehran Civil Court (Chamber 3), Case No. 110/78, writ of enforcement dated 24 April 1999 (cited in L. JONEYDI, *Enforcement of Foreign Commercial Arbitral Awards*, 2nd edn. (The Shahr-e Danesh Institute of Legal Research 2008)).

York Convention, slightly modifies the Convention's wording. On the specific issue of authentication and certification, Sect. 47(1) of the Act provides that documents must be duly authenticated in the manner required by the law of the place of rendition.⁷ In one case, which was affirmed by the Indian Supreme Court, the Bombay High Court held that authentication of a French award was unnecessary because there was no issue as to the award's authenticity, but that if there were a question of certifying a copy, then certification by a French diplomatic officer would suffice. A problem could arise in respect of *ad hoc*—as opposed to institutionally made—awards: does the law require the party wishing to enforce an *ad hoc* award to have that award certified by a consul or a notary public in all cases? The answer, in Judge Srikrishna's opinion, should be no. Authentication by a consul or a notary public should be required only if there is a question of authenticity of the original award, such as an allegation of forgery or fabrication. In the case of a copy, then the law of the country of rendition should be followed. Judge Srikrishna concluded that this would be the best way to flesh out the words of the New York Convention, which does not provide explicitly on the manner of authentication and certification.

IV. THIRD TOPIC: ARBITRATION AGREEMENT IN WRITING

In your opinion, which of the following situations constitutes an arbitration agreement in writing as defined in Article II(2) of the New York Convention:

- (a) Arbitration clause in a contract signed by both parties?
- (b) Arbitration clause in a contract not signed by the parties?
- (c) Sales confirmation, including an arbitration clause, signed by the seller and subsequently performed by the buyer?
- (d) Written standard conditions, including an arbitration clause, to which conditions the contract signed by the parties refers?
- (e) A contract, including an arbitration clause, that is contained in an exchange of emails?
- (f) Conditions, including an arbitration clause, to which a buyer agrees online by ticking off the box "I agree with the conditions of sale"?

Moderator Van den Berg introduced this topic by remarking that the issue of what constitutes an agreement in writing is much debated. The New York Convention provides for two manners in which the arbitration agreement can be in writing, namely

7. Sect. 47(1) of the Indian Arbitration and Conciliation Act, 1996 (No. 26 of 1996) reads:

"47. Evidence

- (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court –
 - (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
 - (b) the original agreement for arbitration or a duly certified copy thereof; and
 - (c) such evidence as may be necessary to prove that the award is a foreign award."

if the agreement is either contained in a contract or separate document and signed by the parties, or contained in an exchange of documents, in which case it does not necessarily need to be signed. The New York Convention seems to exclude – and the *travaux préparatoires* make it clear that it does exclude – tacit acceptance as a manner of concluding a valid arbitration agreement under the Convention. Van den Berg added that this topic presents several practical situations the audience would recognize from their practice.

Judge Robert Ribeiro (Hong Kong) was the first to discuss this topic. He noted that the Hong Kong Ordinance of 2011 implements and supplements both the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration. In respect of the issue at hand, the Ordinance defines an arbitration agreement by reference to the very liberal regime of the first option of Art. 7 of the UNCITRAL Model Law, which includes agreements concluded orally or by conduct, or by reference.⁸ This legislation sidesteps the problems highlighted in the questions made to the panel: the answer in the Hong Kong context would be yes to all the situations described above.

Judge Xi Xiangyang (PR China) said that courts in the People’s Republic of China would deem that there is a valid arbitration agreement where the arbitration clause is contained in a contract signed by both parties or concluded through an exchange of emails, and where the arbitration clause is one of the conditions of sale to which a buyer

8. Art. 7 Option I of the UNCITRAL Model Law on International Commercial Arbitration reads:

“Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

agrees online by ticking off the box “I agree with the conditions of sale” (questions **(a)**, **(e)** and **(f)**). Conversely, the situation under **(b)** – arbitration clause in a contract not signed by the parties – would not constitute an arbitration agreement in writing. The answer is more nuanced in respect of the situation described under **(c)**, the case of a sale confirmation containing an arbitration clause, signed by the seller and subsequently performed by the buyer. Judge Xi noted that sale confirmations are often based upon an order sent by the buyer. If the order does not contain an arbitration clause, then an arbitration clause in the sale confirmation does not constitute an arbitration agreement in writing, because the arbitration clause is neither signed by both parties nor contained in an exchange of letters or telegrams. On the other hand, if the order does include an arbitration clause and the sale confirmation contains the same clause, the clause constitutes an arbitration agreement in writing, because there is an exchange of letters or telegrams between the parties. The answer to **(d)** also depends on the facts: the arbitration clause in the written standard conditions to which the contract signed by the parties refers constitutes a valid arbitration agreement only if the party can be aware of it by exercising reasonable prudence.

Judge Sundaresh Menon (Singapore) made two preliminary remarks in respect of the situation in Singapore. First, he noted that case law suggests that the courts of Singapore will take an expansive and liberal interpretation to what constitutes an agreement in writing under the New York Convention. In essence, the philosophical approach is that Art. II(2) is an illustrative provision that does not set out an exhaustive list of what constitutes an agreement in writing. This interpretation – he added – is borne out by the use of the words “shall include” in Art. II(2). In practice, the courts simply look for some record that evidences the fact that there has been an agreement to arbitrate between the parties. For example, they hold that a written agreement does not require signatures, thereby pre-empting a frequently invoked objection. This flexible and pragmatic approach allows the Singapore courts to keep pace with the developments in contracting practice. Second, Judge Menon mentioned that for arbitrations seated in Singapore the law was amended to include the first option of Art. 7 of the UNCITRAL Model Law, which broadens the definition of “arbitration agreement” to include agreement concluded orally and by conduct. Again, the motivation behind this legislative choice was the desire to keep pace with commercial reality. Judge Menon then concluded that, given that background, the answer to **(a)** is that there is clearly an agreement in writing if the arbitration clause is contained in a contract signed by the parties, and that in the situation under **(b)** – arbitration clause in a contract not signed by the parties – there is no issue as long as there is evidence that there was an agreement and its terms are recorded in some writing. The same analysis applies in respect of situation **(c)** – arbitration clause in a sale confirmation signed by the seller and performed by the buyer – though of course the answer may depend on the facts, for instance if the arbitration clause was sufficiently brought home to the buyer. Judge Menon then agreed with Judge Ribeiro that he would apply the same standard to the remaining situations highlighted in this topic and would have no difficulty finding that there is an agreement in writing in those situations.

Judge Dominique Hascher (France) remarked that issues of form of an arbitration agreement should only be addressed as a matter of evidence of the existence of the parties’ consent to arbitration. In view of the foregoing, arbitration clauses that

are not contained in the contract between the parties can still be validly stipulated if they are known to and accepted by the parties, even tacitly. Judge Hascher concluded that according to this approach, the answer to all questions above is yes. The French Arbitration Act 2011 supports this conclusion, since it provides that international arbitration agreements shall not be subject to any requirements as to form.⁹ This solution complies with the New York Convention through the “more favourable right” route of Art. VII of the Convention as can be inferred from the judgments of the *Cour de cassation* in *Bomar*¹⁰ and its progeny¹¹ which, without any indication of Art. II of the New York Convention, held that an arbitration clause, if not mentioned in the main contract, may be validly stipulated by reference to a document which contains it. An example is the general conditions or a standard contract, when the party against which the clause is invoked was aware of the contents of this document at the moment of concluding the contract and when it has, albeit tacitly, accepted the incorporation of the document in the contract. In sum, this solution relies on two presumptions: a first presumption of awareness of the parties of the existence of the arbitration agreement, grounded in a clear reference to the arbitration agreement, and a second presumption of the parties’ acceptance, even tacit, of the arbitration clause. Consent – he added – should not be seen in subjective terms; rather than looking at the psychological aspects of consent, an objective rule should apply. In sum, the parties’ consent still plays a role, though reduced and almost cosmetic.

Moderator Van den Berg noted that the liberal approach adopted by the courts, as illustrated in some of the interventions under this topic, is based on the reading of the New York Convention, by reference to its English text, that “shall include” in Art. II(2) means “not limited to”. However, the French text of this Article provides that “*On entend par ‘convention écrite’ une clause compromissoire ...*”. **Judge Hascher** confirmed that “*On entend*” should be translated as “means” rather than “shall include”. **Judge Kaye** added that certain US courts give full significance to all terms in Art. II, and that this might include, as well, the comma found in paragraph 2 of the Article. Thus, in the phrase “‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”, certain US courts have taken the position that the “comma” limits what will constitute an “arbitration agreement” in the context of the New York Convention to signed agreements or exchanges.

9. Art. 1507 of the French Code of Civil Procedure, Book IV – Arbitration, as amended by Decree No. 2011-48 of 13 January 2011, reads: “An arbitration agreement shall not be subject to any requirements as to its form.”

10. *Cour de cassation*, 9 November 1993 (*Bomar Oil NV v. ETAP – L’Entreprise tunisienne d’activités pétrolières*) *Yearbook XX* (1995) pp. 660-662 (France no. 22)

11. *Cass. civ.*, First Chamber, 3 June 1997 (*Prodexport*), *Rev. arb.* 1998 p. 537.

V. FOURTH TOPIC: SUBMISSION OF ARBITRATION AGREEMENT

A party seeking enforcement of a Convention Award (“petitioner”) submits a certified copy of an arbitration agreement. The party against whom enforcement is sought (“respondent”) contends that the document that the petitioner submitted as constituting an arbitration agreement is not an arbitration agreement and that the petitioner should prove that it is a valid arbitration agreement between the petitioner and the respondent. The petitioner, to the contrary, contends that the respondent should prove that the document is not an arbitration agreement. How would you decide on this issue?

Moderator Van den Berg noted at the outset that the situation in which the party resisting enforcement maintains that there is no arbitration agreement and requests the applicant to prove the existence and validity of the arbitration agreement is a frequently recurring one.

Lord Jonathan Mance (United Kingdom) first said that Arts. II and IV of the New York Convention postulate, on the face of it, that the party seeking enforcement produce an existing award and an existing arbitration agreement giving rise to the award. Equally on the face of it, Art. V(1)(a) of the Convention puts the onus on the party resisting enforcement to disprove the validity of the arbitration agreement. A strong argument can be made that “validity” includes every aspect of the agreement’s existence. Lord Mance then referred to a case he decided on the Court of Appeal in 2002, *Yukos v. Dardana*,¹² in which he held that once the applicants had produced an apparently valid award based on an arbitration agreement that the arbitrators had held to apply between the parties – though one of them, Yukos, was not a party to it – the onus shifted to the respondent to prove that there had been no valid arbitration agreement. An exception would be the case in which the award or agreement were held to be a forgery.

Judge Hossein Abedian Kalkhoran (Iran) commented that when looking at Art. IV and Art. V(1)(a) of the Convention in this context the assumption should be that the validity, rather than the existence, of the arbitration agreement is in dispute. Under the general law of contracts in many countries, including Iran, the party relying on an agreement bears the burden to prove its *existence* if that existence is disputed by the other party, while in case of a dispute over the *validity* of an existing agreement, the party claiming invalidity bears the onus of proof. In Iran, this rule is explicitly provided for in the law.¹³ In the case under examination, however, the critical point is that the arbitral award, whose enforcement is being sought, has presumably been rendered based on the assumption of the existence and validity of the arbitration agreement. Judge Abedian noted that there are three possible scenarios: (i) the party resisting enforcement had the opportunity to and did contest the validity of the arbitration agreement in the

12. Court of Appeal, Civil Division, 18 April 2002 (*Yukos Oil Company v. Dardana Limited*), reported in *Yearbook XXVII* (2002) pp. 570-592 (UK no. 60).

13. Art. 223 of the Iranian Civil Code provides: “Any contract entered into is presumed to be valid unless its invalidity is proven.” This has given rise to the doctrine of the “presumption of validity” which is only applicable with respect to a contract whose *existence* is not in dispute.

arbitration; (ii) the party did not have this opportunity; (iii) the party had the opportunity but did not take it. In the first case, the party resisting enforcement carries an even heavier burden to prove the invalidity of the arbitration agreement; in the second case the party will have the opportunity to raise this defense in the enforcement proceedings but shall bear the onus of proof; in the third case the party will be estopped from raising this defense at the enforcement stage (although estoppel is not recognized in Iranian law as such, a general principle of waiver could however be argued to constitute a basis for such a view). Judge Abedian concluded that it appears to be irrelevant in respect of raising the defense of the invalidity of the arbitration agreement in the context of enforcement proceedings whether the party resisting enforcement did or did not challenge the award on the same ground (i.e., the invalidity of the arbitration agreement) before the courts of the country of rendition. He referred in this respect to the 2010 decision of the UK Supreme Court in *Dallah*.¹⁴

Judge Sundaresh Menon (Singapore) said that the courts in Singapore follow the jurisprudence of the United Kingdom mentioned by Lord Mance, namely the *Yukos* case. He also pointed out that Sect. 30 of Singapore's International Arbitration Act implements Art. IV of the New York Convention but specifies that the court must treat the document that is produced as reflecting the arbitration agreement as prima facie evidence of such agreement. Further, the Rules of Court provide for a two-stage process for enforcement of an award in Singapore: in the first stage, the ex parte application, the court takes a very mechanistic approach based on a prima facie examination of the documents submitted. It is only in the second stage, when the party resisting enforcement applies to set aside the leave for enforcement, that the issue of the burden of proof arises. As a consequence, the agreement will generally be held valid if it appears valid prima facie, unless the challenger proves to the requisite standards of proof that it is not.

VI. FIFTH TOPIC: JURISDICTION

Assuming that an arbitral award is an award that comes within the field of application of the Convention, do you impose (additional) requirements regarding jurisdiction over the petitioner and/or respondent? In particular, can the request for enforcement be dismissed on grounds of forum non conveniens?

Moderator Albert Jan van den Berg summed up the question under this topic as being whether courts may impose jurisdiction requirements (in personam, in rem, quasi in rem) on the party seeking enforcement of a New York Convention award. He noted that this issue came up recently in court decisions where the defense of forum non conveniens was raised.¹⁵

14. Supreme Court, 3 November 2010 (*Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*), reported in *Yearbook XXXVI* (2011) pp. 357-362 (UK no. 92).

15. United States Court of Appeals, Second Circuit, 14 December 2011 (*Figueiredo Ferraz e Engenharia de Projeto Ltda v. The Republic of Peru*), reported in *Yearbook XXXVII* (2012) pp. 346-349 (US no. 756).

Judge Murray Gleeson (Australia) delivered the first comment. He said that Australian courts would reply to this question in the negative, because Sect. 8(3) of the International Arbitration Act provides that courts may refuse enforcement only on the grounds listed at paras. (5) and (7), which in turn mirror Art. V of the New York Convention and Art. 36 of the UNCITRAL Model Law. At any event, the principle of forum non conveniens has a narrower application in Australia than in other common law countries: the test applied by the courts is whether Australia is a clearly inappropriate forum. The reasons why it should be so are not easy to imagine, he added, as the International Arbitration Act gives effect to Australia's international obligations and it is those international obligations that engage the jurisdiction of the court. Judge Gleeson remarked that if the United States case of *Figueiredo Ferraz v. Peru* would be heard in Australia, the Australian court would not follow the majority of the United States Court of Appeals for the Second Circuit, which in 2011 reversed the district court's decision to deny a motion of forum non conveniens. Rather, the Australian court would agree with the dissenting opinion of one of the judges in the Second Circuit, who opined that the defense of forum non conveniens is not available in enforcement proceedings under the New York Convention and the 1975 Panama Convention.

According to **Judge Robert Ribeiro (Hong Kong)**, as a matter of statute the Hong Kong courts would also answer the question above in the negative, as Hong Kong has the same provision as Sect. 8 of the Australian International Arbitration Act: the only grounds for refusing enforcement of an award are the New York Convention grounds (Sect. 89 of the Hong Kong Special Administrative Region Ordinance No. 17 of 2010). Though Hong Kong follows the doctrine of forum non conveniens as applied by the courts of the United Kingdom rather than the Australian approach, Hong Kong courts would also take the view that it would be odd to allow a forum non conveniens objection to be raised against enforcement. After all, he said, the law says that when an award and arbitration agreement that are proved prima facie valid by authentication are submitted to the court, the court will pass judgment. A forum non conveniens objection would precede this stage, and it would be hard to think of such a defense being raised at this stage.

Judge Bellur Narayanaswamy Srikrishna (India) noted that in India awards are enforceable by themselves without further ado unless the party resisting enforcement proves the existence of grounds for refusal (essentially those of Art. V of the New York Convention). The situation in India is therefore the same as in Hong Kong and Australia. Also, in India too the Arbitration Act does not provide for the defense of forum non conveniens.

Judge Judith Kaye (United States) noted that, in the United States, issues of personal jurisdiction can be predicate issues of constitutional law, as described in the US Supreme Court's seminal 1945 decision, *International Shoe*.¹⁶ In *International Shoe*, the Supreme Court considered issues of personal jurisdiction and determined the level of connection that must exist between a non-resident corporation and a state in order for that corporation to be sued within that state. Subsequent US jurisprudence has thereafter described a variety of factors which might be used to show that a party is subject to a

16. 326 U.S. 310 (1945). Available online at <<http://supreme.justia.com/cases/federal/us/326/310/case.html>>.

court's personal jurisdiction. This raises the question of whether, in the context of proceedings brought to recognize, enforce and execute an arbitral award under the New York Convention, US courts will also require that there be some form of personal jurisdiction – not necessarily physical presence – over the responding party. Here too there is no single, absolutely conclusive answer. Several US federal courts, as a matter of due process, have mandated some measure of personal jurisdiction over a judgment debtor. Recent US state court cases, however, have concluded that personal jurisdiction is not essential to the recognition and enforcement of foreign country money judgments.¹⁷

VII. SIXTH TOPIC: BINDING AWARD

Do you determine the binding force of an arbitral award, as contemplated by Article V(1)(e) of the New York Convention, under

- (a) the law applicable to the award;*
- (b) the law of the enforcement court; or*
- (c) on the basis of an autonomous interpretation of the Convention?*

According to **Judge Ellen Gracie (Brazil)**, an answer to this question in the Brazilian context necessarily cannot rely on existing jurisprudence as no case on this subject matter was ever decided by the Brazilian courts. She said that she would read this provision to refer to the law of the country of rendition. The point of the New York Convention was to do away with the requirement of double exequatur; therefore, if the party has exhausted all possible means of appeal in arbitration, the award must be deemed to be final and binding.

Lord Jonathan Mance (United Kingdom) noted that the view in the United Kingdom is similar to that in Brazil. He would also refer to the law applicable to the award in order to determine the award's binding force, or give an autonomous interpretation under the New York Convention. He would not refer to the law of the enforcement court, an unacceptable solution that would lead to patchy results. The inference from Art. VI – he added – is that an award may be binding even if steps are taken to set it aside in the country of rendition. In a recent High Court decision in *Dowans*,¹⁸ the judge held that the right answer is the answer given under (c) above, and that what matters is whether the contractual agreement of the parties has been fulfilled by the award. Obviously, an appellate arbitration mechanism would also be part of the parties' contractual agreement.

17. *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D.2d 42 (N.Y. App. Div. 4th Dep't 2001), available online at <<http://caselaw.findlaw.com/ny-supreme-court-appellate-division/1283811.html>>; *Abu Dhabi Commercial Bank P.J.S.C. v. Saad Trading, Contracting & Financial Services Co.*, 36 Misc. 3d 389 (N.Y. Sup. Ct., County of New York, 2012), available online at <www.courts.state.ny.us/REPORTER/3dseries/2012/2012_22134.htm>.

18. High Court of Justice, Queen's Bench Division, Commercial Court, 27 July 2011 (*Dowans Holding SA et al. v. Tanzania Electric Supply Co Ltd*), reported in *Yearbook XXXVI* (2011) pp. 363-365 (UK no. 93).

Finally, **Judge Bellur Narayanaswamy Srikrishna (India)** remarked that the Indian Arbitration Act 1996 provides that a foreign award is not enforceable in India if it is under challenge or has been set aside in a competent court in the country of rendition or in the jurisdiction adopted by the parties.¹⁹ This is the only possible exception.

VIII. SEVENTH TOPIC: AWARD ANNULLED IN THE COUNTRY WHERE MADE

An arbitral award that has been set aside (annulled) by a competent court in the country where it was made is a ground for refusal of enforcement of the award mentioned in Article V(1)(e) of the New York Convention:

- (a) Do you refuse enforcement on this basis alone?*
- (b) Do you use a discretionary power to grant enforcement notwithstanding the existence of a ground for refusal of enforcement (i.e., the award has been set aside by a court in the country where made)?*
- (c) If the answer to (b) is in the affirmative, does your decision as to whether or not to refuse enforcement depend on whether the court in the country where the award was made has set aside the award on the basis of an internationally recognized ground for setting aside an arbitral award?*
- (d) If the answer to (b) is in the affirmative, does your decision as to whether or not to refuse enforcement depend on other considerations, and if so, which?*
- (e) Do you consider and decide on the recognition of the foreign court judgment setting aside the arbitral award before deciding on the setting aside as ground for refusal of enforcement of the award under Article V(1)(e) of the New York Convention?*
- (f) Does the domestic law on the enforcement of foreign arbitral awards prevailing in your country (by statute or case law) provide that the fact that the award has been set aside in the country where made is not a ground for refusal of enforcement of the annulled award in your country? If so, do you rely on the more-favourable-right provision of Article VII(1) of the New York Convention to grant enforcement of the annulled award in your country?*

Judge Dominique Hascher (France) replied to the questions above in the order they were made. In respect of **(a)**, he said that the answer was no and that he as a French judge would give no deference to the annulment decision of a court of the country in which or under the law of which the award was rendered. The answer to **(b)** was in the affirmative: he would use his discretionary power to grant enforcement, as an award rendered in international arbitration is not integrated in the legal system of the state where it was rendered and remains in existence even if it has been set aside there. An international award is a decision of international justice and remains a valid decision in international law even if set aside, as ruled by the *Cour de cassation* in *Putrabali*.²⁰ The assumption behind this approach is that the country where enforcement is sought and the

19. See Sect. 48. of the Indian Arbitration and Conciliation Act, 1996 (No. 26 of 1996), which mirrors Arts. V and VI of the New York Convention.

20. *Cour de Cassation*, First Civil Chamber, 29 June 2007 (*PT Putrabali Adyamulia v. Rena Holding, et al.*), reported in *Yearbook XXXII* (2007) pp. 299-302 (France no. 42).

assets of the defendant are generally located has a greater interest than the country of rendition in controlling the award. As a rule, the country of the seat has no connection to the dispute and is chosen for reasons of neutrality or convenience. Judge Hascher added that there are exceptions to the *Putrabali* holding, for instance where the rules of the arbitral institution provide for an internal review system, an appeal. Another exception is a review system as provided for in the 1993 OHADA Treaty,²¹ or the 1965 Washington Convention in respect of ICSID awards. Judge Hascher then answered the question under **(c)** in the negative, because the examination of the grounds on which the foreign court set aside the award – be they internationally recognized or not – assumes that the setting-aside decision can be internationally recognized, which is not the view in French case law.²² In respect of **(d)**, Judge Hascher said that he would decide whether or not to refuse enforcement on the basis of a review of the grounds for refusal under French law: the foreign setting-aside decision, which a French court would not recognize, would not bar review by the enforcement court of all other grounds for refusal listed in Art. 1520 of the Code of Civil Procedure.²³ It may very well be that in the end the award would be refused recognition and enforcement in France for the same reasons that led to annulment in the country where made if such reasons come within the grounds of Art. 1520. This will be the result of an independent review of the enforcement court and not the contrived conclusion mandated by Art. V(1)(e) of the New York Convention because of the setting aside of the award by the courts of the country where made. In respect of **(e)**, Judge Hascher remarked that focusing on the validity of the foreign setting-aside decision prior to deciding on the setting aside as ground for refusal of enforcement would be an additional requirement that is not in the New York Convention, an asymmetry in the uniform fabric of the New York Convention. He agreed with the opinion expressed by Albert Jan van den Berg that by doing so the enforcement court would engage in the vain exercise of stigmatizing the work of a foreign court and the quality of the justice administered there,²⁴ and concluded that setting-aside decisions, just like enforcement decisions, have no effect internationally. Finally, as to **(f)**, Judge Hascher answered that French domestic law indeed does not provide that the fact that the award has been set aside is a ground for refusal of enforcement.²⁵ In reply to a question by the moderator, Judge Hascher then confirmed that in the *Cour de cassation*'s judgment and in his view the London pepper

21. *Traité Relatif à l'Harmonisation en Afrique du Droit des Affaires* (Treaty on the Harmonisation of Business Law in Africa).

22. *Cour d'appel*, Paris, 29 September 2005 (*Direction Générale de l'aviation civile de l'Emirat de Dubaï v. International Bechtel*), Rev. arb. 2006 p. 695.

23. See Arts. 1525(3) and 1520-1 to 5 of the Code of Civil Procedure.

24. Albert Jan VAN DEN BERG, "Enforcement of Arbitral Awards Annulled in Russia: *Case Comment on Court of Appeal of Amsterdam, 28 April 2009*", 27 *Journal of International Arbitration* (2010, no. 2) pp. 179-198.

25. Having exceeded the time at his disposal, Judge Hascher said he would answer the question whether French courts rely on the more-favourable-right provision of Art. VII(1) of the New York Convention to grant enforcement of the annulled award when the panel dealt with Topic Ten – More-Favourable-Right Provision. Topic Ten, however, was not discussed due to time constraints.

traders who rendered the award at issue in *Putrabali* were considered as part of the system of international justice.

Judge Judith Kaye (United States) focused her discussion on sub-questions (a) and (b) under this topic. She noted that there was some disagreement in the US courts as to whether annulment in the seat of arbitration prevents any recognition and enforcement of the underlying award, and that much may depend on the circumstances of the case before the court. For example, in the noted 1996 decision in *Chromalloy*,²⁶ the DC district court ruled that it *would* enforce an arbitration award rendered in Egypt, even though the award had been set aside by the Egyptian courts. In rendering its judgment, the district court took notice of two important factors. First, in its view, because Art. V of the New York Convention provides only that a court “may” refuse to recognize an arbitral award upon one of its enumerated grounds, the court found that it still had discretion to recognize such an award, even if a specific ground were met. Second, the court found it was important that, in their arbitration agreement, the parties had purportedly disallowed review of the arbitral award, by providing that the award would not “be made subject to any appeal or other recourse”. The court’s decision also rested on the basis of the more-favourable-right provision in Art. VII Convention and the pro-arbitration policy of the United States. *Chromalloy* is still the object of varied commentary, but Judge Kaye was not aware of other cases which went in the same direction and enforced an award that had been annulled in the seat of arbitration. By contrast, she was aware of several cases refusing enforcement where the award had been set aside, one clear example being the 2006 decision of the District of Columbia and the 2007 decision of the United States Court of Appeals for the District of Columbia Circuit in *TermoRio*.²⁷ In that case, the District Court and Circuit Court of Appeals both refused to enforce of an award that had been annulled in Colombia. In its decision, the Circuit Court of Appeals stated that it was a “a principal precept of the New York Convention” that “an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully ‘set aside’ by a competent authority in the state in which the award was made”. The Circuit Court did, however, hold out the possibility that “extraordinary circumstances” could justify a US court “go[ing] behind” the decision of a “competent foreign court [that] has nullified a foreign arbitration award”, suggesting a mechanism by which the *Chromalloy* decision could be conformed to the decision in *TermoRio*. Judge Kaye concluded by saying that she would put the accent on *TermoRio* but underscored that this point is not absolutely settled in United States jurisprudence.

Lord Jonathan Mance (United Kingdom) quoted from an article by Albert Jan van den Berg opining that the French theory described by Judge Hascher leads to inconsistent and bizarre results. In the United Kingdom, he said, he would refuse enforcement of an annulled award in any ordinary case, though he allowed that there can

26. United States District Court, District of Columbia, 31 July 1996 (*Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*), reported in *Yearbook XXII* (1997) pp. 1001-1012 (US no. 230).

27. United States District Court, District of Columbia, 17 March 2006 (*TermoRio S.A. E.S.P., et al. v. Republic of Colombia*), reported in *Yearbook XXXI* (2006) pp. 1457-1473 (US no. 575) and United States Court of Appeals, District of Columbia Circuit, 25 May 2007 (*TermoRio S.A. E.S.P., et al. v. Electranta S.P. (Colombia), et al.*), reported in *Yearbook XXXIII* (2008) pp. 955-969 (US no. 621).

be extreme cases in which enforcement might be granted. Suppose for instance that a court in Nazi Germany set aside an award on the sole ground that it was in favour of a Jew; in that case, that would not be a judgment one would take any notice of. Or suppose a case where corruption was clearly proved in the annulment decision. Lord Mance added that while it is true, as Judge Hascher said, that courts should not pass judgment on the quality of the justice in other countries – and he was sure judges keep that factor well in mind and show great reluctance in doing so – there are cases in which judgment has necessarily to be passed. In fact, the Commercial Court did consider the quality of the justice in a foreign country in a recent case,²⁸ and so did the Privy Council to a certain extent. As to the question under (c), asking whether it is relevant to a decision to grant or deny enforcement that the award has been set aside on the basis of an internationally recognized ground for annulment – which he read to mean one of the grounds of Art. V(1)(a) to (d) of the New York Convention – Lord Mance said that the English courts certainly do not limit themselves to those grounds, which are not referred to in Art. V(1)(e) of the Convention (though they are in the 1961 European Convention on International Commercial Arbitration). In respect of Judge Hascher’s comment that the reasoning in French jurisprudence is that the award is not integrated in the legal system of the country of rendition, Lord Mance noted that the common law reply is “what are the parties choosing”? What does a London arbitration clause subject to English law mean? Certainly, he said, if you are choosing English law and an English seat you are choosing the whole package. This is confirmed by the 1996 English Arbitration Act, which states explicitly that its provisions apply when the seat of arbitration is in England.²⁹ Buying the whole package means that parties also accept the risk that the award may be set aside in that country. Lord Mance stated that for an enforcement court to enforce an award that has been set aside, or even replaced by another one as happened in *Putrabali*, seems to a common lawyer very curious. He then noted that it is a fundamental principle of contractual interpretation, at least in the common law world, that all contracts are made in a context. When you choose for arbitration in France you opt to a certain degree for French law, and indeed French courts do set aside international awards made in France. He concluded that it is therefore curious that French courts do not recognize the annulment decision of a foreign court.

Judge Dominique Hascher (France) replied that he would not assume that parties arbitrating in a country buy “the whole package”, including agreeing to annulment of an award that may be perfectly up to international standards though not to local annulment standards, if those local standards are very low and totally unacceptable. In the cases that came before the French courts, the grounds on which the award had been annulled gave rise to concerns regarding the international efficacy of arbitration. He concluded that it would be too far-reaching to give the meaning advocated by Lord

28. High Court of Justice, Queen’s Bench Division, Commercial Court, 14 June 2011 (*Yukos Capital S.a.r.l. v. OJSC Rosneft Oil Company*), reported in *Yearbook XXXVI* (2011) pp. 607-610; see also Court of Appeal (Civil Division), 27 June 2012 (*Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Company*), reported in *Yearbook XXXVII* (2012) pp. 312-316 (UK no. 94).

29. Sect. 2(1) of the English Arbitration Act, 1996 reads: “(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.”

Mance to the consent of the parties. Again, the situation is different if the award was set aside within an internalized system of arbitral review, in which case a French court would take the annulment decision into account.

IX. EIGHTH TOPIC: ARBITRABILITY

The lack of arbitrability (not capable of settlement by arbitration) is a defence under both Article II(1) and Article V(2)(a) of the New York Convention. What would you give as a clearly non-arbitrable matter?

Judge Murray Gleeson (Australia) said that in Australia the most obvious example of a non-arbitrable matter is a dispute in respect of a matter for which arbitration is prohibited by law, for example in respect of insurance contracts, where the relevant statute prohibits arbitration. However, there is also a wider range of matters that were recently described in a New South Wales court decision³⁰ as being the exclusive domain of court jurisdiction because there is an element of legitimate public interest in the subject matter: criminal prosecutions, determination of status such as bankruptcy, divorce or the winding up of corporations and insolvency, and certain disputes concerning intellectual property such as whether or not a patent or trademark should be granted. When the dispute involves questions of status or questions relating to third parties that may indicate non-arbitrability, Judge Gleeson said that a practical test would be whether the dispute concerns rights or obligations that can be created, varied or discharged by agreement between the parties. If the answer is yes then there seems to be no reason why these rights or obligations should not be capable of being created, varied or discharged by decision of an arbitrator acting under the agreement of the parties.

The intervention of **Judge Oksana Kozyr (Russian Federation)** focused mainly on the issue of arbitrability at the stage of enforcement of arbitral awards. Disputes arising under administrative law or in respect of public law relationships, such as labour or tax disputes, are not arbitrable in the Russian Federation. Civil law disputes are not arbitrable when they are indicated as such in the federal statutes – rare cases including, most importantly, bankruptcy and insolvency once the bankruptcy proceedings have started. Disputes concerning subsoil are no longer completely excluded from arbitration. In the original Law of the Russian Federation “On Subsoil”, from 1992, property disputes relating to the use of subsoil were non-arbitrable. Following amendments to the law, parties may now agree to submit such disputes to arbitration. Judge Kozyr then noted that there are some other sensitive areas in respect of arbitrability: for a long time one such area was the right to immovable properties located in Russia. From 2005 to 2011, the Russian *arbitrazh* courts considered such disputes as falling under their exclusive jurisdiction, because Russian law requires that the transfer of the title to immovable

30. Supreme Court of New South Wales, 1 April 2011 (*Larkden Pty Limited v. Lloyd Energy Systems Pty Limited*) [2011] NSWSC 268; available online at <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWSC/2011/268.html>>.

property in Russia be registered, and registration is regulated by public law. In 2011, however, the Constitutional Court of the Russian Federation issued a Resolution ruling out this interpretation; this point has therefore been clarified once and for all and there can be no misunderstanding any longer.³¹ Of course, disputes with the registrar offices remain non-arbitrable, but civil law disputes in respect of immovable property may be arbitrated. One further sensitive area is corporate disputes. There is no unanimity in court practice in this respect and the issue has not yet been settled by the Supreme *Arbitrazh* Court. Judge Kozyr described a case where a dispute was held not to be arbitrable within the context of Art. II of the New York Convention, at the stage of enforcement of the arbitration agreement.³² The dispute concerned a civil law issue – unjust enrichment – with some aspects of a public law nature, which is why Judge Kozyr found it particularly relevant to her presentation. The dispute was eventually held not to be arbitrable because the claim for unjust enrichment was based on VAT to be paid on certain services, while the other party claimed that payment of VAT on those services was improper. The lower court found that the matter should be heard in arbitration in Stockholm as agreed by the parties in their contract, but two upper courts came to a different conclusion, holding that arbitrators cannot decide on the correct implementation of Russian tax legislation.

Judge Xi Xiangyang (PR China) said that only commercial disputes are arbitrable in the People’s Republic of China, which made the second, commercial reservation when acceding to the New York Convention. Chinese Arbitration Law provides that the following disputes shall not be submitted to arbitration: disputes arising out of marriage, adoption, guardianship, support among family members and inheritance. Judge Xi recognized that these examples may be of little interest to commercial lawyers, and discussed two other, more relevant examples, namely bankruptcy and the validity of patents. Both are deemed commercial matters. However, if the dispute concerns a Chinese patent, in Judge Xi’s opinion it cannot be submitted to arbitration, because the Patent Law of China stipulates that the Patent Review Board has the power to decide on the validity of a Chinese patent. A party dissatisfied with the Patent Review Board’s decision may then take legal action before a court. As to bankruptcy, the Bankruptcy Law of China provides that only courts have jurisdiction over bankruptcy matters; therefore, bankruptcy of a Chinese company is a non-arbitrable matter.

31. Resolution of the Constitutional Court of the Russian Federation, dated 26 May 2011, N10-P “Regarding the Review of the Constitutionality of Article 11.1 of the Russian Civil Code; Article 1.2 of the Russian Law on Domestic Arbitration; Article 28 of the Russian Law on State Registration of Real Estate Objects and Transactions; Articles 33.1 and 51 of the Russian Mortgages Law; in Connection with the Application to Review Said Articles Filed by the Russian Supreme *Arbitrazh* Court”.

32. Supreme *Arbitrazh* Court of the Russian Federation, 22 March 2010 (*OAO Company Neftyanaya Company Rosneft v. Neftyanoy Terminal Belokamenka*), reported in *Yearbook XXXVI* (2011) pp. 315-316 (Russian Federation no. 29).

X. NINTH TOPIC: PUBLIC POLICY

(a) Do you distinguish between domestic and international public policy?

(b) Can you give examples in which case you would refuse enforcement of a Convention award on grounds of public policy?

Moderator Albert Jan van den Berg noted that this topic was the most popular with the judges on the panel.

Judge Hossein Abedian Kalkhoran (Iran) said preliminarily that he very much doubted that the term public policy in the New York Convention was used in 1958 in any meaning other than the domestic public policy of the contracting state where enforcement may be sought. The drafters clearly intended to attract as many signatories as possible by giving assurance that being bound to the New York Convention would not lead to ignoring the public policy of the contracting state. However, he also believed that an international convention, as rightly put by some international tribunals and courts, should be considered as a living instrument and should thus within certain boundaries be given an interpretation that is attuned to the requirements of current conditions.³³ With these two points in mind, Judge Abedian opined that in order to achieve uniformity of international arbitration in general and of the enforcement of final arbitral awards specifically, the term public policy should be given a narrow interpretation by the national courts in the context of requests for enforcement of foreign arbitral awards, regardless of whether it is called international public policy or even the more restrictive and sometimes confusing concept of transnational public policy.³⁴ Judge Abedian praised the reading of public policy in the New York Convention by the German and United States courts, which apply the notion of public policy to deny enforcement only when

33. The concept of treaty as a “living instrument” has arisen mainly in the context of evolutive interpretation of Human Rights treaties: see, e.g., the European Court of Human Rights in *Tyrer v. The United Kingdom* (Application No. 5856/72), Judgment of 25 April 1978, para. 31 where the Court noted that “the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of the present-day conditions”; *Marckx v. Belgium* (Application No. 6833/74), Judgment of 13 June 1979, para. 41; *Loizidou v. Turkey* (Application No. 15318/89), Judgment of 23 March 1995 (Preliminary Objections), para. 71. Also see the Inter-American Court of Human Rights in the Case of “*White Van*” (*Paniagua-Morales et al.*) v. *Guatemala*, Judgment of 25 January 1996 (Preliminary Objections), Series C No. 23, paras. 40-42. However, having due regard to the scope of evolutionary interpretation and the importance of durability of a treaty which requires its adaptability to take into account changes in the perceptions of certain “evolving notions” contained in the treaty, it may be submitted that where a notion in a specific treaty, due to its nature, features an evolutive character which is sensitive to developments occurring in the society as a whole, such notion may be interpreted in light of the evolutive nature of the notion in question, having always in mind the object and purpose of the treaty. On the scope of “evolutionary interpretation” see Pierre-Marie DUPUY, “Evolutionary Interpretation of Treaties: Between Memory and Prophecy” in Enzo CANNIZZARO, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) pp. 123 et seq.

34. See Hossein ABEDIAN, “Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review”, 28 *J.Int.Arb.* (2011, no. 6) p. 553 at pp. 574-575.

the most basic principles or notions of morality and justice of the forum state are affected.³⁵ Judge Abedian added that he believed this reading to be in line with the 2002 recommendations of the international arbitration committee of the International Law Association which, having considered the legislation and judicial practice of several countries, conclude that the concept of public policy has generally been applied restrictively by legislators and courts, and recommend the application of “international” public policy, meaning that part of the public policy of a state which if violated would prevent a party from invoking a final judgment or a final award.³⁶

In his intervention, **Judge Sundaresh Menon (Singapore)** noted that the provision of Art. V(2)(b) of the New York Convention, on public policy, is carried through to Sect. 31(4) of the Singapore International Arbitration Act.³⁷ The relevant standard, he said, is of course the public policy of Singapore, although as a matter of comity Singapore courts may refuse to uphold an award if they consider that it contradicts the laws of a foreign nation. Jurisprudence shows that when one is concerned with the enforcement of a foreign judgment, the threshold to be crossed is a higher threshold than that applicable in a domestic context, in the sense that enforcement shall be refused only where the judgment offends fundamental ideas of morality, decency and justice. This is a narrower concept than public policy in the domestic sense of protecting the public interest in general. In the context of international arbitration specifically, the Singapore Court of Appeal held in its leading case in *PT Asuransi v. Dexia Bank*,³⁸ which concerned an application for annulment, that an arbitral award under the International Arbitration Act would only be set aside on grounds of public policy if upholding it would shock the conscience or be clearly injurious to the public good or be wholly offensive to the ordinary, reasonable and fully informed member of the public or violate the most basic notions of morality and justice. This is a very narrow scope indeed. In a subsequent

35. In line with this construction is the narrow interpretation given to the term “public policy” by the Iranian courts in the context of the enforcement of foreign arbitral awards: see, e.g., Tehran Civil Court (Chamber 27), Judgment 489, 11 August 2008 (Case No. 460/27/87).

36. International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, 2002.

37. Sect. 31(4) of the Singapore International Arbitration Act (Chapter 143A) (Revised Edition 2002) reads:

“Refusal of enforcement

(...)

(4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that –

(a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or

(b) enforcement of the award would be contrary to the public policy of Singapore.”

38. Court of Appeal of Singapore, 1 December 2006 (*PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*) [2006] SGCA 41; available online at <<http://www.commonlii.org/sg/cases/SGCA/2006/41.html>>.

decision, *AJU v. AJT*,³⁹ the Court of Appeal stated that the standard of public policy is the same whether you are dealing with setting aside or resistance to enforcement, because ultimately all awards under the International Arbitration Act have an international focus. Judge Menon then said that there was a further point he should mention, namely that the Singapore courts have been quite rigorous in insisting that if a party raises public policy as a ground for resisting enforcement, it must plead and identify the particular public policy interest that allegedly is implicated and the specific part of the award that allegedly offends that public policy interest. Judge Menon concluded that against this background it is unsurprising that no awards have been set aside on grounds of public policy in Singapore. In respect of some specific examples raised in the questions under this topic, Judge Menon said that mistakes of law or evidence certainly would not pass muster as a basis for the award being set aside on public policy grounds. The court deciding *PT Asuransi* considered the reasoning of the Supreme Court of India in *SAW Pipes v. ONGC*⁴⁰ and rejected that Court's analysis as a way of looking at public policy, and it would be hard to say what else could qualify as a public policy ground for refusal of enforcement or annulment, because of the lack of cases that have succeeded. Last, Judge Menon said that he would expect a breach of natural justice, mentioned in the materials provided for his debate, not to be caught under public policy.

Judge Xi Xiangyang (PR China) remarked that Chinese statutes do not distinguish between domestic and international public policy, but that some of his colleagues on the Supreme People's Court in Beijing do make this distinction and deem that international public policy has a narrower meaning. He noted that it is difficult to give details because the concept of public policy is rarely applied in respect of arbitration, even in domestic cases. As far as the New York Convention is concerned, infringement upon China's sovereignty and violation of fundamental morality are considered to be contrary to the public policy of China. In general, the Supreme People's Court of China deals with public policy with caution and prudence. Chinese courts received hundreds of applications for enforcement of Convention awards in the past eleven years. Only twenty-one awards were refused recognition and enforcement until October 2011. According to sample statistics, 96.34 percent of Convention awards were granted recognition and enforced, and only one foreign award was refused recognition and enforcement for reasons of public policy.⁴¹ Judge Xi explained that there is a reporting mechanism in China under which lower courts wishing to refuse enforcement must report to the Supreme Court and obtain the Supreme Court's approval. Many Chinese corporations complain that foreign arbitral awards are unfair against them and violate the basic principles of Chinese law, but it is the Supreme Court's opinion that mistakes in the arbitrator's fact findings and ensuing conclusions do not in themselves mean a violation of public policy. Usually, those mistakes shall not be taken into account.

39. Court of Appeal of Singapore, 22 August 2011 (*AJU v. AJT*) [2011] SGCA 41; available online at <<http://www.commonlii.org/sg/cases/SGCA/2011/41.html>>

40. Supreme Court of India, 17 April 2003 (*Oil and Natural Gas Corporation v. SAW Pipes*) (2003) 5 S.C.C. 705; available online at <<http://indiankanoon.org/doc/919241/>>.

41. Intermediate People's Court of Shandong Province, Jinan, 27 June 2008 (*Hemofarm DD, et al. v. Jinan Yongning Pharmaceutical Co. Ltd.*), reported in *Yearbook XXXIV* (2009) pp. 478-484 (China no. 5).

In the last intervention of the debate, **Judge Bellur Narayanaswamy Srikrishna (India)** said at least one decision of the Indian Supreme Court on public policy created wide discussion. In earlier decisions, the Supreme Court recognized that there is a fine distinction between public policy as understood in international law and as understood in domestic law; however, the Court then obliterated the distinction in its judgment in *SAW Pipes*, to which Judge Menon referred in his intervention. As a result, public policy in India has now become what the judge thinks it is. Judge Srikrishna said that this is a most unfortunate situation and that he is one of the foremost critics of the *SAW Pipes* judgment, which now rules the field but will hopefully be reviewed one day by a larger bench. Moving on to specific issues relating to public policy, Judge Srikrishna referred in particular to questions of morality. One such question is mentioned specifically in the Indian Arbitration Act, which says that public policy will include a situation of a contract induced by corruption or bribery: this is a clear provision that does not give rise to problems. But suppose, continued Judge Srikrishna, that there is a public policy against smoking, that tobacco is looked at askance all over the world, and then suppose a contract between two manufacturers or distributors of tobacco, and an award rendered in a foreign country on a dispute between them. Can the Indian courts then say that they will not uphold this award because it is opposed to public policy? Another example would be the trading in gold, which was at one time considered to be immoral. In sum, said Judge Srikrishna, no problems arise where there is a substantive provision dealing with a matter, and thus a prohibition by law, but public policy is such an elastic concept that each judge will interpret it subjectively. He gave a further example: in the State of Gujarat, beef-eating is considered unworthy because of the political color of that state. Suppose – he said – there is a contract between two producers of beef products, an award is rendered in a foreign country and then enforcement is sought in India because there is property available for attachment in Gujarat. Can the judge hold that the award is opposed to public policy? These, said Judge Srikrishna, are all questions that may arise, and while cases regarding trading in opium or drugs may pose no problems, the fine distinction between international and domestic public policy should be maintained to answer them.

Moderator Albert Jan van den Berg thanked the judges for their unique and insightful participation.⁴²

XI. CLOSING REMARKS

V.V. Veeder asked Judge Ellen Gracie and Judge Judith Kaye whether they believed that this experiment was worthwhile and whether it should be repeated.

Judge Gracie commented that this was a truly interesting experience for the judges involved, an opinion in which she believed her colleagues on the panel concurred. Understanding each other's mind, she said, is very important for building bridges

42. The following topics were not discussed due to time constraint: More-Favourable-Right Provision; Outrageous Costs or Interest; Raptor Funds.

between the judicial branch and the arbitration community, which are in this joint venture together.

Judge Kaye agreed. She added that the field of arbitration law is in a new era, as is the role of the judiciary in international arbitration. Consequently, she believes that exchanges of this sort are particularly worthwhile, both for the participants and for their audience. She underscored the words of the Introductory Remarks that this closing judicial session was indeed a wonderful idea, now with solid historical precedent.

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International Arbitration:
Myths, Realities and Challenges

Who Are the Arbitrators?

V.V. Veeder QC*

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I. INTRODUCTION

If the proverbial green creature from Mars arrived on this planet to study diversity in the practice of international arbitration, it would find a complicated situation where not all is what it seems. No arbitrator is green; and neither Kermit nor Ms. Piggy has ever been appointed an arbitrator. Despite eccentric exceptions in ancient times, the world's modern arbitrators are limited to the human species, discriminating against all other forms of intelligent life.

As the creature learnt English, it would soon find discrimination in the language of arbitration between human left-handers and right-handers. Thus, a good arbitrator is "adroit" and "dexterous", but a bad arbitrator is "maladroit", "gauche", "cack-handed" and even "sinister". Yet this Martian creature would soon learn that linguistic discrimination against lefties amongst the human species (50 percent of the world's population and comprising, so it is said, the best of the world's arbitrators) counts for nothing within the arbitration community, no more than the absence of green and porcine animals.¹ Yet, our Martian friend would eventually discover other forms of discrimination as regards gender and race, which, in his view, threatened to tarnish the legitimacy of international arbitration.

As regards gender, the creature would find in four different continents Meg Kinnear at the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC, Teresa Cheng at the Hong Kong International Arbitration Centre in China, Annette Magnusson at the Stockholm Chamber of Commerce and Bernadette Uwicyeza at the Kigali International Arbitration Centre in Rwanda. Had the creature arrived a decade ago, it would have found Anne Marie Whitesell and earlier still Tila Maria de Hancock at the ICC International Court of Arbitration in Paris; and also Rosalyn Higgins at The Hague as the President of the International Court of Justice, only temporarily interrupting her even more illustrious career as an international arbitrator. If it delayed its arrival for only a few months hence, it would find Jackie van Hof at the LCIA in

* Essex Court Chambers, London; Governing Board Member of ICCA.

1. It should be disclosed that this author is left-handed, as also Leonardo da Vinci, Joan of Arc, Napoleon Bonaparte, Julius Caesar, Greta Garbo, King George VI, Jimmy Connors, John McEnroe, Shirley MacLaine, Harpo Marx, Marilyn Monroe and Pablo Picasso.

London. This Martian creature might therefore at first conclude that gender discrimination by users of arbitration and arbitral institutions plays no significant role in the appointment of arbitrators, just as with left-handers and right-handers.

However, having studied Latin on Mars, the creature would be troubled at the masculine form of “arbitrator”, for which there seems to be no feminine equivalent. Next, it would study the available statistics. Women make up half (if not more than half) of the entrants to the legal profession in developed economies; but after entry, something happens. In the field of international commercial and investment arbitration, one commentator has calculated that of the top ten international teams listed by Global Arbitration Review, only 11% of their members are women and that of all arbitrators appointed in, respectively, ICSID arbitrations and commercial arbitrations, only 5% and 6% are women.² Many ICCA members have recently completed a questionnaire for the European Commission for arbitration users, practitioners and arbitrators in Europe: only 11.6% of such responses came from women; and only 0.5% were from Afro-Caribbean men and women.³ These figures cannot of course be precise; but to the discerning Martian, these statistics would suffice to show that something is wrong with diversity in the practice of arbitration as regards both gender and race.

The situation for international arbitration is of course complicated, given its global reach amongst different participants from disparate cultures and jurisdictions. Here, as in many respects, arbitration is not always for the best, but also not always for the worst. Yet, it is surprising that the practice of arbitration does not reflect the broad diversity available to the arbitral community; and that the collective attention of many in that community has still not succeeded in removing the unfairness and sheer waste of discrimination based on grounds of gender and race. It is equally surprising how little reliable research has been done, outside the United States.

This is not an indictment. Few in the arbitral community actually intend to practice discrimination on grounds of gender and race. It is more a matter of habit and unconscious or institutionalized discrimination. Moreover, in a relatively short time, diversity in arbitration has already come a long way. In England, women lawyers and judges are relatively new. In the United Kingdom’s archives, there is an extraordinary exchange in 1922 between the Czechoslovak *Chargé d’Affaires* in London (the Czech Republic then being a newly independent state establishing its own legal system) and the British Government:⁴

“The Czechoslovak Chargé d’ Affaires would esteem it a favour if his Lordship [Lord Curzon of the British Foreign Office] could cause him to be informed about the following questions: (1) Are women permitted to act as professional judges, and are they admitted to the preparatory practice necessary for an appointment as judge to the same extent as men?; (2) If so, have they the same rights and duties as men? Also as regards salary and pension?; (3) Are women judges allowed to

2. C. TEVENDALE, Kluwer Arbitration Blog of 28 September 2012.

3. This survey was being conducted by Brunel University (London) on the Law and Practice of Arbitration in the European Union.

4. PRO Archives, Kew (London): LCO2/604 XC 25358; L 560/560/405.

marry unconditionally, or does their marriage affect their service relation and their claims and duties?; (4) If so, what are the consequences of pregnancy and childbirth upon their official positions, and in particular, what amount of leave is granted them in this case?; and (5) Has the employment of women judges proved satisfactory in general?"

The Lord Chancellor replied as follows:

"As regards Question 1: "Judges in England, of whatever status, are appointed only from amongst members of the Bar (*'avocats'*). The statutes regulating the qualifications which must be possessed by persons appointed to these offices require in each case that a specified period of time should have elapsed since entry into the profession before a barrister can be appointed to a judicial office. Until the 23rd December, 1919, when the Sex Disqualification (Removal) Act, 1919 (9 and 10, Geo. V, c. 71), passed into law, women could not be admitted to the English Bar. In order to be admitted to the English Bar it is necessary that a candidate for admission should have passed a certain defined period as a student and have passed certain specified examinations. As until 1919 women could not be called to the Bar, it followed that women were not admitted as students. As a consequence, although some women have lately passed through the period of studentship and been admitted to the Bar, no woman has yet fulfilled the conditions relating to length of service which are requisite to qualify the candidate for appointment to any judicial position. No legal decision has as yet been given upon the interpretation of the Act of 1919 so far as it concerns the holding by a woman of a judicial office. It is, however, apprehended that, since the passing of that Act, any woman who fulfils the other statutory condition would be eligible for appointment to a judgeship."

As regards Questions 2 to 5:

"No occasion has arisen for considering the questions asked in paragraphs 2, 3, 4 and 5 in the memorandum from the Czechoslovak Legation. It is, however, apprehended that if and when any woman becomes in fact eligible for appointment as a judge, and if the appointing authority should then see fit to appoint her, she would hold office upon the same conditions as would a man. So far as question 4 is concerned [i.e. maternity leave], judges in England are seldom appointed until they have reached an age which renders the conditions described in the question unlikely to arise."

This was written in 1922. Yet, the first woman High Court Judge was only appointed in 1974, more than fifty years later: Mrs. Justice Heilbron who was born in 1919, called to the English Bar in 1939 and appointed one of Her Majesty's Counsel in 1949, at the

young age of thirty-four.⁵ In England, woman lawyers began to appear as arbitrators in the 1970s, but not in significant numbers.⁶

II. GENDER, RACE AND NATIONALITY

In South Africa, notwithstanding its extraordinary first President, Nelson Mandela, race still plays, so it is said, a significant part in the practice of domestic arbitration, with the business community (predominantly white), preferring white arbitrators to black judges and arbitrators. There are, however, no reliable statistics. In the United States, Professor Benjamin Davis has conducted two most interesting studies. The figures are striking; and it is probable that the figures would be similar in England.

In his survey of 2013,⁷ Professor Davis, a former officer of the ICC Court for many years, examined US diversity in international arbitration across a target population comprising minorities, women, those with disabilities and LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) lawyers. (These four groups are the target population described in the American Bar Association's Goal III: Eliminate Bias and Enhance Diversity). In addition to sending a survey to 413 international arbitration practitioners, he approached a diverse group of international arbitral institutions around the world. He concluded:

“It appears safe to conclude that as of today there are a significant number of American women (most likely white) in international arbitration in all phases of being counsel but not so many as arbitrators. To a much lesser extent than American women, while recognizing there may be double-counting, it appears safe to conclude that as of today there are a few American minorities active in international arbitration but even less as arbitrators. To a much lesser extent than American women and minorities (and given the paucity double-counting here is unlikely), there are an infinitesimal number of American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to

5. See H. HEILBRON, *Rose Heilbron* (2012). This wonderful biography is written by the subject's daughter, herself a Queen's Counsel and arbitrator. In 1949, Rose Heilbron had taken silk with Helena Normanton (of 4 Essex Court) as the first women to be granted silk in English legal history. (In England and most common law countries, senior judges are appointed from senior trial lawyers of a mature age – hence it is pointless to compare judicial statistics under civilian and socialist systems with career-judges appointed at an early age).

6. Margaret Rutherford QC was one the first women arbitrators in England, a remarkable lawyer who proudly confessed that her favourite bedtime reading included the English Arbitration Act 1996. Elsewhere, others included Professor Bastid, Mme Simone Rozès and Judge Birgitta Blom.

7. Benjamin G. DAVIS, “American Diversity in International Arbitration 2003-2013”, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364967>. (This survey updates Professor Davis' earlier work: “The Color Line in International Commercial Arbitration: An American Perspective”, 14 *American Review of International Arbitration* (2004) p. 461; “International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism”, 4 *Journal of American Arbitration* (2005) p. 79 and 20 *ABA Dispute Resolution Magazine* (2014, no. 1).

when I worked in the field in the 1980s and 1990s is best captured in the paraphrase of an old Negro spiritual: there are not as many as there ought to be, but it is slightly better than it was.”⁸

It is indeed better; but it is most certainly not for the best. What can be done? We must begin necessarily with party autonomy and legal restrictions on such autonomy. In no legal system worthy of the name can a party appoint a corrupt or partial arbitrator. Equally, parties cannot jointly agree under most arbitration rules the appointment of unsuitable arbitrators, with non-waivable impediments as regards independence, conflicts of interest and availability.

Such limitations on party autonomy were raised in a London ad hoc arbitration in a case under English law and the laws of the European Union. Under EU law, there are several legislative texts intended to promote diversity in many forms, proscribing discrimination on grounds of gender and race. In the Charter of Fundamental Rights of the European Union (2000), Art. 21 prohibits discrimination based on the ground of gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The EU’s Race Directive 2000/43/EC also provides that the principle of equal treatment means that there shall be no direct or indirect discrimination based on racial or ethnic origin. The Race Directive excludes nationality discrimination from its scope (Art. 3(2)); but that is prohibited generally under Art. 12 of the EC Treaty. Art. 10 of the Treaty on the Functioning of the European Union (TFEU) provides that, in defining and implementing its policies and activities, the European Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁹

The EU Directive 2000/78/CE of 27 November 2000 also provides a general framework under EU law for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards “employment and occupation”. For religion and belief, this 2000 Directive was first enacted in the United Kingdom by the Employment Equality (Religion or Belief) Regulations 2003 (now superseded, in like terms, by the United Kingdom’s Equality Act 2010 and its Regulations). These texts gave rise in the curious case of *Jivraj v. Hashwani*, raising a legal issue regarding discrimination in appointing an arbitrator based on religious grounds, with many considering that similar issues (requiring similar answers) would arise from discrimination based on nationality and, possibly, gender and race.

III. *JIVRAJ V. HASHWANI*

This case arose under the 2003 Regulations and the 2000 Directive. It illustrates the tension between party autonomy and legal rules precluding discrimination. The case has special facts, but the decision of the UK Supreme Court (2011) has been understood to

8. *Ibid.*, p. 10.

9. Arts. 18 and 19 TFEU [Art 23 with Art 6 of EC Treaty].

establish that parties and arbitral institutions can lawfully discriminate against the appointment of an arbitrator on the grounds of religion and nationality, under English and EU law.

Under the 2003 Regulations, the UK Supreme Court decided, in robust terms, that an arbitrator was not an “employee”; that accordingly discrimination in the appointment of an arbitrator on religious grounds was not impermissible under the parties’ arbitration agreement; and that, even if prima facie impermissible, it was nonetheless made permissible under a legislative exception for “genuine occupational requirement” (also known as “GOR”). The UK Supreme Court thereby reversed the decision of the Court of Appeal (2010), which had unanimously reversed the decision of the Commercial Court (2009),¹⁰ to widespread acclamation from many users of arbitration in the European Union (including the ICC and the LCIA which had intervened in the appeal as *amici curiae*). The unusual facts of the case are not directly material to this paper and can, for present purposes, be left aside.¹¹

Unfortunately, even with the final decision of the UK Supreme Court, the controversy remains far from over. Implicitly, the effects of the decision are not limited to discrimination in the appointment of arbitrators by users and arbitral institutions on grounds of religion, but extend to other forms of discrimination, particularly those based on nationality (the latter being expressed, albeit in different terms, in almost all rules of international arbitration institutions).¹²

After the UK Supreme Court’s decision, Mr. Hashwani complained to the European Commission that the Supreme Court had improperly failed to apply EU law (in the form of the 2000 Directive) and had also declined wrongly, with its Nelsonian view of “*acte clair*”, to refer the case to the Court of Justice of the European Union (CJEU) in Luxembourg under Art. 267 TFEU, as formally requested by Mr. Hashwani. Far from dismissing this complaint summarily, the European Commission recorded the complaint under Art. 258 TFEU and, in December 2013, ordered the United Kingdom to respond in writing to Mr. Hashwani’s complaint. There has been, as yet, no such response. Depending on such response and the Commission’s resulting opinion, the European Commission may bring infraction proceedings against the United Kingdom (being responsible for the UK Supreme Court) under Art. 260 TFEU; and, if so, the CJEU may

10. *Jivraj v. Hashwani* [2011] UKSC 40; [2011] 1 WLR 1872, also reported in ICCA *Yearbook Commercial Arbitration* XXXVI (2011) p. 611; and *Revue de l’arbitrage* (2011) p. 1007. For the decision of the Court of Appeal, see [2010] EWCA Civ 712; [2010] ICR 1435; and for that of the Commercial Court (Steel J), see EWHC 1364.

11. For those interested, see the author’s article on the decision of the Court of Appeal: “Arbitral Discrimination Under English and EU Law” in Yves Derains and Laurent Levy, eds., *Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator*, Dossier VIII, ICC Institute of World Business Law (2011) p. 91.

12. This paper does not address nationality discrimination under international law in state-state or investor-state arbitrations. Given the terms of so many bilateral investment treaties and the ICSID Convention, discrimination on the ground of nationality is there firmly entrenched as the universal badge of neutrality recognized by states. That need not be so as regards international commercial arbitration; nor is it in the European Court of Justice.

direct the United Kingdom to take necessary measures, i.e. for the UK Supreme Court to reconsider its decision leading to a different result.

It is therefore necessary to see what that result might be, starting with the decision of the Court of Appeal which was reversed by the UK Supreme Court. The Court of Appeal decided that this non-discrimination provision encompassed an arbitrator under a contract personally to do any work, being a form of words long used by the UK Parliament to cover those working under both a contract of service (i.e. an employee) and a contract for services (i.e. not an employee):¹³

“The paradigm case of appointing an arbitrator involves obtaining the services of a particular person to determine a dispute in accordance with the agreement of the parties and the rules of law, including those to be found in the legislation governing arbitration. In that respect it is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his [sic] services falls within the definition of ‘employment’, and it follows that his appointor must be an ‘employer’ within the meaning of Regulation 6(1) [of the 2003 Regulations]” (para. 16).

As Professor Racine rightly notes in his case-note, apart from its special technical meaning under the 2003 Regulations (with the Directive), the Court of Appeal did not decide that an arbitrator was in fact an employee of the disputing parties, it therefore being necessary to dismiss such simplistic criticism as a “caricature”.¹⁴

The UK Supreme Court, in reversing the decision of the Court of Appeal, decided that the distinctive feature was an “employment” relationship, whether in form the person was employed or self-employed and that a difference should be drawn (as also reflected in EU law) between a person who was, in substance, “employed” and a person who was an independent provider of services not in a relationship of subordination with the person(s) receiving those services. Accordingly, so the Supreme Court decided, the role of an arbitrator “is not one of employment under a contract personally to do work” (para. 40), despite the receipt of contractual fees from and the provision of non-delegable services to the disputing parties.¹⁵ As already indicated above, the UK Supreme

13. It appears to have been first used in the UK’s Equal Pay Act 1970; and it now forms part of the Equality Act 2010 (Sect. 83). At least two decisions of the House of Lords supported a broad interpretation of this wording: *Kelly v. NIHE* [1999] 1 AC 428 and *Percy v. Church of Scotland* [2006] 2 AC 28 (now, *sed quaere*).

14. Jean-Baptiste RACINE, “Much Ado About Nothing”, *Revue de l’arbitrage* (2011) p. 1026 at p. 1031.

15. For commentaries on the decision of the UK Supreme Court, see (inter alia) *ibid.*: where the second footnote lists the significant number of commentaries already then in existence, in the blogosphere and elsewhere; see now also C. STYLE and P. CLEOBURY, “*Jivraj v. Hashwani*: Public Interest and Party Autonomy”, *Arb Int* (2011) p. 563; C. MCCRUDDEN, “Two Views of Subordination: The Personal Scope of Employment Discrimination Law in ‘*Jivraj v. Hashwani*’”, 41 *Industrial Law Journal* (2013) p. 30; A.K. HOFFMANN, “Selection and Appointment of

Court also recognized and applied an exception for “genuine occupational requirement”. This exception had been applied by the Commercial Court (Mr. Justice Steel); but not by the Court of Appeal, which interpreted this exception more restrictively. Even broadly interpreted, it can only apply in a rational and proportionate manner. It cannot therefore apply by way of general application to all cases.

Even after the Supreme Court’s decision, it would be incorrect to assume that party autonomy is unlimited. Under English and EU laws, It would not be permissible for parties to agree always that only men (or only women) could be appointed as arbitrators; or that only WASPs but no Afro-Caribbeans were ever qualified as arbitrators; but it would be permissible for parties to stipulate that only persons religiously qualified or qualified by nationality could be appointed if religious or nationality factors were sufficiently relevant so as to justify such appointments in particular cases, such as (as regards religion) the *Beth Din* or certain Shari’a tribunals (including Ismaili tribunals), applying Jewish law and the Shari’a respectively. It is difficult to imagine any factors which could rationally justify discrimination based on gender and race. As Professor Racine points out, party autonomy regarding arbitration is circumscribed by the European Convention on Human Rights (Art. 14 and Protocol 12, ECHR) and rules of both national and international public policy, of which the French *Dutco* decision (1992) is only one example.¹⁶

Regrettably, Art. 11(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration does not restrict party autonomy in regard to discrimination based on gender and race. In regard to nationality, it provides: “No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.” This provision, expressly respecting the principle of party autonomy, was intended only to remove restrictions in national laws preventing the appointment of foreigners as arbitrators.¹⁷ The UNCITRAL Analytical Note A/CN.9/264 (25 March 1985) records that there was no intention to preclude parties, arbitral institutions and trade associations “from specifying that nationals of certain States may, or may not, be appointed as arbitrators”. This reference to national laws has its roots, amongst others, in the infamous amendment to Art. 1032(2) of Germany’s ZPO of 7 April 1933, disqualifying all “non-Aryan” persons from appointment as arbitrators in arbitrations and, as originally intended, invoked against non-German arbitrators.

Accordingly, however uncertain in scope, there are clearly legal limits to party autonomy in the selection and appointment of arbitrators, whether directly by each party or indirectly on their behalf by an arbitral institution. The *Jivraj* case, albeit still

Arbitrators” (Chapter 13) in M. ARROYO, ed., *Arbitration In Switzerland: The Practitioner’s Guide* (2013); U.A. OSENI and H.A. KADOUIF, “The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration”, 29 *Journal of Int Arb* (2012, no. 5) pp. 519-544; For an unusual and critical commentary, see Sir Richard BUXTON, “Discrimination in Employment: The Supreme Court Draws a Line”, *LQR* (2012) p. 128. (This author was a member of the Court of Appeal in *Jivraj v. Hashwani*.)

16. J.-B. RACINE, *op. cit.*, fn. 14, “*la discrimination serait tout aussi automatique et évidente . . . que le critère soit tiré de la race ou de l’ethnie, du handicap, de l’orientation sexuelle, de l’âge, etc*”, p. 1037.

17. See H.M. HOLTZMANN and J.E. NEUHAUS, *A Guide to the UNCITRAL Model Law* (1989) at pp. 359 and 381.

unfinished business, demonstrates that international arbitration is not independent from national and international rules of law, but that it is part of the main, within England and Wales, the European Union and elsewhere.

IV. CONCLUSION

What can be done? The answer lies primarily with major users and arbitral institutions. It does not lie in more laws, legal rules and regulations. The objective is indisputable: inadvertent discrimination based on gender and race damages arbitration, because it assumes, unthinkingly, that a class of persons have always the relevant qualities and that another class always do not, thereby wasting the human resources available to arbitration. Such discrimination is also grossly irrational in a process otherwise founded upon rationality: the choice of an arbitrator should not be exercised arbitrarily; and if a distinction is to be drawn between arbitral candidates, it should have a rational basis related to the particular requirements of the parties for their arbitration. Lastly, but not least, such discrimination is wrong; and, if allowed to continue, it will bring arbitration into disrepute. Hence, let us support the idea of a voluntary “pledge” by parties, appointing authorities and arbitral institutions, consciously, before appointing an arbitrator, to consider the broadest spectrum of suitable candidates, without unconscious discrimination based on gender and race. It could work, as have like pledges in favour of ADR (before litigation) promoted by the International Institute for Conflict Prevention and Resolution (CPR) for almost thirty years.¹⁸ It would also have the advantage of being the right thing to do. And it might even work on Mars.

18. More than 4,000 companies and 1,500 law firms have signed the CPR Pledge, committing the signatory to consider, before litigation, ADR in the form of appropriate negotiation, mediation and other ADR processes (see <www.cpradr.org>; last visited 20 May 2014).



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VV Veeder QC Memorial Volume, ICCA Congress Series
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This "VV Veeder QC Memorial Volume, ICCA Congress Series" pays tribute to Johnny Veeder's immense contribution to the work of the International Council for Commercial Arbitration (ICCA). For nearly three decades, Johnny Veeder lent his unique voice to ICCA's publications, authoring the ICCA Handbook National Report for England and Wales between 1997-2015, contributing to the ICCA Yearbook Commercial Arbitration, addressing multiple ICCA Congresses between 1990 and 2014, and chairing the Programme Committee for the 2012 Singapore Congress.

Elected to the ICCA Council (later the ICCA Governing Board) in 2006, Johnny Veeder played a key role in shaping ICCA's post-2012 renewal and governance: through the ICCA Nominations and Membership Committee, Inclusiveness Committee and Initiatives Committee; through his contributions to ICCA's New York Convention Roadshow Programme; and by acting as mentor in five cycles of the Young ICCA Mentoring Programme (2011-2020).

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