Arbitration of international commercial and investment disputes: are the misgivings of developing states justifield?

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ARBITRATION OF INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES: ARE THE MISGIVINGS OF DEVELOPING STATES JUSTIFIED?

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ABSTRACT

This thesis is concerned with the attitude of countries of the developing world to international commercial arbitration. It argues that their perception of arbitration in international trade is that the process does not favour them. In an attempt to explain that perception it identifies several possible reasons, ranging from the character of arbitration as a means of settling disputes, to the judicial treatment of awards in which the states have been involved. The treatment of the subject is structured to correspond largely with the three separate stages of the arbitration process. Chapters one and two address the legal character of arbitration and its underlying philosophy. The reservations of many developing countries are explained in terms of the differences in the understanding of the nature and purpose of arbitration between, on the one hand, the countries concerned and, on the other hand, the western systems on which the international model is based. Chapter three addresses the conduct of arbitration proceedings under the International Centre for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA) as examples of institutions created specifically with the arbitration of commercial disputes involving developing states in mind. The chapter argues that both institutions are one-sided, thus contributing to the misgivings of the countries concerned. Chapter four deals with the problem of the proper law of state contracts as recently evolved by arbitration tribunals. It notes that there has been a shift from traditional principles of conflict of laws, resulting in the isolation of the transactions from the only systems of law with which they ordinarily would have the closest connection. It points out that the trend is guided by policy not principle. It criticises the trend on that and other grounds. Chapter five deals with the enforcement of awards. We point out in that chapter that little at that stage of the process suggests a trend unfavourable to developing countries.

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INTRODUCTION

Arbitration dominates all other methods of settling disputes in international trade for various reasons.[1] The conventional view is that it is cheaper, more speedy, private (and therefore confidential) and flexible.[2] It has been the chosen method of settling disputes between businessmen across Europe for well over four centuries.[3] That, however, has not been the case for most developing countries. Their involvement with international commercial arbitration is relatively recent. As in the entire domain of international law, one of the most conspicuous features of their participation is the protest against the existing order as developed in Europe.[4] Referring to that order, Professor J.H.W. Verzjil, according to R.P. Anand, "... asserts with a due sense of pride ..."[5] that it "... is not only a product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin."[6] The result is that the product of the European mind is always the object of resentment and rejection whenever it is not, or appears not to be, favourable to the interests of the other group of countries which, for historical reasons, are also the subject of the same order. Even in those parts of the developing world where the exposure to international arbitration

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[1]For its proclaimed advantages and disadvantages see generally Born, Garry B. International Commercial Arbitration in the United States: Commentary and Materials, Kluwer, Deventer, 1994, pp. 5-9.

[2]Kerr, "International Arbitration v. Litigation" (1980) JBL, 164.

[3]Schmitthoff, Clive Commercial Law in a Changing Economic Climate, 2nd Edn., Sweet and Maxwell, London, 1985.

[4]Third World Attitudes Toward International Law, (ed. by Snyder, Frederick E. & Sathirathai, Surakiart), Martinus Nijhoff, Dordrecht, 1987.

[5]"Attitudes of Asian-African States toward certain Problems of International Law" in Third World Attitudes Toward International Law, *ibid*, 5, p. 6.

[6]*Ibid*, citing Verzjil, "Western European Influence on the Foundations of International Law" (1955) 1 Int'l. Relations, 137. The European influence is present in both meanings Professor Verzjil attributes to the term "foundation". He uses the word to mean an institution or establishment, and to refer to the ethos, "the complex of inner beliefs or convictions and the outer social and economic factors" (*ibid*) upon which the entire body of international law is based.

has been relatively longer, such as in Latin America, there remains a worrying reluctance to accept the process[7], blamed on what José Siqueiros describes as a longstanding "suspicion of European and North American colonialism",[8] arising from the use by the former colonial powers of claims commissions "to achieve the ends of diplomatic intervention."[9] Writing on the reaction of Asia and Africa to international law, Professor Michel Virally warned in the 1960s that the substance of the "international law" being pressed for by the Afro-Asian countries had little in common with the traditional principles of that law. The new states, he said:

> *témoignent d'une méfiance extrème, non toujours exprimée avec clarté, mais partout perceptible. Le droit international, affirment-ils, ne leur a été d'aucun secours pendant leur lutte pour l'independence. Bien au contraire, il a constament joué contre elle, en accumulant les obstacles à l'établissement de rapports nouveau avec l'ancienne métropole. L'independence acquise, estiment les mèmes délégués, le droit international apparaît encore comme le meilleur allié du néo-colonialisme, en consolidant des positions économiques étrangères et en empêchant la formation de rapports vraiements égalitaires, sur la base du profit mutuel, entre pays parvenus à des niveau de développement très differents.*[10]

The same reaction is still manifested against the present state of international

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[7]In fact Paulsson attributes the distrust by developing countries of international arbitration principally to South America "... for the simple reason that until the watershed decade of 1955-65, other developing regions were mainly coloni[s]ed and therefore had no voice with which to raise protests against decisions imposed from abroad": "Third World Participation in International Arbitration" (1987) 2 ICSID Rev.,-FILJ, 19, note 1.

[8]"Arbitral Autonomy and National Sovereignty in Latin America", in Lex Mercatoria and Arbitration, (ed. by Carbonneau, Thomas), Dobbs Ferry, New York, 1990, p. 183.

[9]*Ibid.* There is some acknowledgment that the climate in Latin America is improving: Layton, Robert "Changing Attitudes toward Dispute Resolution in Latin America" (1993) 10 Journ. Int'l. Arb'n., Part 2, 123; Naón, Grigera "Arbitration in Latin America: Overcoming Traditional Hostility" (1989) 5 Arbitration International, 137; Garro "Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America" (1984) 1 Journ. Int'l. Arb'n., 305; although the pace of the change is rather insignificant for a region with over 100 years of exposure to the process, when compared to the speed of change taking place elsewhere.

[10]"Le Dépassement du Droit: Le Droit International en Question" (1963) 8 Archives de Philosophie du Droit, 146 p. 150.

arbitration of commercial disputes, which, like international law, also strongly reflects the unique genius of the European mind. The criticism remains the same: that the entire environment of international commercial arbitration in all respects and at all stages of the process is heavily weighted in favour of western countries. The suggestion that the system of arbitral justice put in place by international arbitration institutions and Western practitioners is impartial and fair to all is denied categorically. In a study on state contracts and international arbitrations carried out for the Hague Academy of International Law, Bernard Audit expresses the view that "... the reluctance shown to arbitration [by the developing world] arises, to a great extent, from the fact that it is felt to be the practice of a club of initiates from which the representatives of developing countries would be largely excluded."[11] But the reference to a group of "initiates" suggests that even western lawyers are excluded, given the relatively small number of international lawyers involved in the practice of commercial arbitration.[12] The relative absence of representation from the developing world, however, assumes particular significance in their perception of the institution, especially when that is associated with what is regarded as a deliberate (although unestablished) western effort to undermine their contribution.[13]

Afro-Asian jurists took the view in the 1970s in Kuala Lumpur, Baghdad and Doha that the already established arbitration institutions:

> had their own rules for conduct of arbitrations which did not work out particularly favourably for the developing countries, particularly in the matter of venue, choice of arbitrators, as also fees and charges leviable by the institutions concerned. Since most of these institutions

[11]Transnational Arbitration and State Contracts, Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, 1988, p. 83.

[12]William W. Park, an international authority on the subject of commercial arbitration, makes a reference in passing (probably insignificant, but nonetheless informative,) to "the international arbitration mafia", an indication that the field remains dominated by a small number of practitioners: "National Legal Systems and Private Dispute Resolution" (Book Review) (1988) 82 AJIL, 616, p. 624. For a socio-legal study of the dominance by this relatively small number of influential practitioners and academics of the field, see Dezalay and Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes" (1995) 29 Law & Soc. Rev., 27. I am grateful to Professor John Adams for this excellent article.

[13]Sornarajah, *infra* note 29 p. 9; Arfazadeh, Homayoon "New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur" (1991) 8 Journ. Int'l. Arb'n., Part 4, 103 p. 121.

functioned under the auspices of chambers of commerce and other associations of trade, it was difficult to visualize the manner or the means by which practical steps could be taken to effect modification of the rules of such institutions to bring them in conformity with the interests of the developing countries.[14]

In Kuala Lumpur in particular it was noted by the Afro-Asian committee of jurists that "... the majority of international commercial arbitrations were conducted by existing arbitral institutions ... the rules of some of those arbitral institutions in developed countries did not provide adequate procedures to protect the interests of parties from the developing countries."[15]

In some quarters the process is even regarded as "foreign", such that the Arab attitude, for example, is accounted for by Samir Saleh on the basis that "[i]nternational or *foreign* arbitration is generally held on foreign territory according to foreign rules of procedure and substantive laws and before a majority of foreign arbitrators"[16] (emphasis added). The suggestion there is that international arbitration in commercial matters is necessarily "foreign" to the Arab party. Gerold Herrmann also notes that in the Arab countries the attitude is one of "... hostility, disillusion or distrust ..."[17] although he qualifies his admission by adding that the attitude has been so only for some time and, if it still is, only to some extent as it is "... gradually giving way to a more positive attitude of acceptance and active participation."[18] Herrmann nevertheless agrees with Professor Mezghani[19] that the new Arab acceptance is

[14]Asian-African Legal Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), Secretariat of the Committee, New Delhi, p. 136, cited by Sornarajah, M. *infra*, note 29 p. 8.

[15]*Ibid* p. 141.

[16]"The Settlement of Disputes in the Arab World: Arbitration and other Methods - Trends in Legislation and Case Law" (1986) 1 Arab L.Q., 198, p. 199.

[17]"Presentation of the UNCITRAL Model Law" in Euro-Arab Arbitration III: Proceedings of the Third Euro-Arab Arbitration Congress, Amman (ed. by Kemicha, Fathi), Graham & Trotman, London, 1991, 165, p. 166.

[18]*Ibid.*

[19]Proceedings of the First Euro-Arab Arbitration Conference, Tunisia, 1985, references in Herrmann, ibid, note 1.

dictated by necessity[20] and therefore, in our view, inconsistent with the fact that arbitration is a consensual process excluding any form of coercion and based on the freedom and equality of the parties. Necessity may be a good reason for submitting to the process but it does not genuinely inspire acceptance of it. The specific form of coercion in this case arises from having to bargain from a weaker position, the experience of the Arab party in that respect being similar to that of other countries of the developing world.[21]

Thus, whereas parties from the developed world perceive arbitration in international trade as providing an impartial and convenient system free from the prejudices and bias of national tribunals and courts, parties from the developing world still regard it as a condition they must accept to qualify for foreign investment and technology.[22] It seems that in those circumstances, and given an alternative, the parties from those countries may not opt for arbitration at all. As Samir Saleh points out, "... it is only when left with no alternative - and racked by apprehension - that an Arab party will comply with an arbitration clause."[23] Thus, notes Saleh, "[i]f he is the more powerful party economically, he will try to ensure, when the contract is being drafted, that any arbitration clause incorporated into it is governed by local domestic laws."[24]

It is thus possible to note, even at this stage, that for this group of countries the very basis of arbitration in international trade as a consensual process is from the out-set seriously flawed. This has no doubt significantly contributed to their perception of the process. Several other conceptual factors, to which we refer later, have also contributed to the same perception. It is, however, also possible at this stage to appreciate the link between that perception of arbitration in international commercial matters and the frequent rejection by these countries of arbitration clauses when a

[20]*Ibid.*

[21]Asante, below.

[22]Asante, Samuel K.B., "The Perspectives of African Countries on International Commercial Arbitration" (1993) 6 Leiden Journal of International Law, 331.

[23](1986) 1 Arab L. Q., p. 199.

[24]*Ibid* pp. 199-200.

dispute eventually arises. Underlying the rejection of the clause is the feeling that the submission to arbitration was not regarded as negotiated freely; it is regarded as imposed. For that reason, after the the dispute has arisen, the Arab party "... will sometimes attempt to have it declared null and void by the courts in his own country. Depending on the circumstances, he will dispute the arbitrator's jurisdiction, if in extreme panic, will attempt to challenge them."[25]

While commenting on the role of the arbitrator and judge during the anniversary celebrations of sixty years of International Chamber of Commerce (ICC) arbitration, judge Kéba Mbaye, then a judge of the International Court of Justice, observed that "... for a while the notion that there is a system of international justice will not be shared by some countries, notably those of Africa, Asia, and Latin America,[26] who still see arbitration as a foreign institution imposed upon them."[27] That perception is still prevalent today.[28] Professor Mamud Sornarajah, one of the most articulate proponents of third world concerns in this field, notes that the trading nations of the west "... have had the most experience in international commercial arbitration and have evolved rules and patterns which, to a large extent, ensure their existing dominance."[29] "The charge has been made", he says, "... that international commercial arbitration as it now is has been designed to promote European trading interests ...."[30]

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[25]*Ibid* p. 199.

[26]The experience of each region differing only slightly. In addition to the concerns expressed by all the countries as a whole, Latin American apprehensions are further based on the particular circumstances giving rise to the Calvo Doctrine: see Shea, Donald Richard, The Calvo Clause: A Problem of inter-American and International Law and Diplomacy, University of Minnesota Press, Minneapolis, 1955; Siqueiros, *op. cit.* note 8.

[27]"Commentary" on "The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective", in 60 Years of ICC Arbitration: A Look at the Future, ICC, Paris, 1984, 257, p. 295.

[28]See for example Asante, *supra* note 22.

[29]"The UNCITRAL Model Law: A Third World Viewpoint" (1989) 6 Journ. Int'l. Arb'n., Part 4, 7, pp. 8-9.

[30]*Ibid.* For a general treatment of the state of international arbitration with developing countries see Sornarajah, International Commercial Arbitration: The Problem of State Contracts, Longman Singapore Ltd., 1990, The International Law on Foreign Investment, Grotius Publications, Cambridge University Press, 1994.

II

In assessing the question of the attitude of developing countries toward the institution of arbitration, two broad approaches are used. The first approach is essentially quantitative. It consist in demonstrating how the system works against the interests of countries of the developing world in relation to obvious quantifiable factors such as the venues of arbitrations, the nationalities of the members of the tribunals and of the parties in dispute, the origin and location of the administering institution, (in the case of institutional arbitrations), the nationalities of counsel and other experts, the outcome of the disputes, etc. That is the approach reflected in the concerns of Afro-Asian jurists as expressed in the passages cited earlier.[31] The reservations of African countries, for example, including lawyers and the business community as a whole, is expressed by Samuel K.B. Asante in terms that arbitration in commercial matters is "... essentially a distant and alien system, located in a foreign country, administered by foreign experts and applying foreign law with little appreciation of the conditions in African countries ... it is essentially a proceeding whose outcome African parties are powerless to affect."[32] The attitude of the Arab world is the same,[33] with that of Latin American countries being expressed in similar terms.[34]

That approach to the issue has received some attention.[35] Asante for example

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[31]*Supra*, texts to notes 13 & 14.

[32](1993) 6 Leiden Journal of International Law, p. 339.

[33]Saleh, (1986) 1 Arab L. Q., 198.

[34]Nattier, "International Arbitration in Latin America: Enforcing Arbitration Agreements and Awards" (1986) 21 Tex Int'l L. J., 397; Abbott, Alden F., "Latin America and International Arbitration Conventions: The Quandary of Non-Ratifications" (1976) 17 Harv. J. Int'l. L., 131.

[35]See for example Paulsson, *op. cit.* (1987) 2 ICSID Rev.,-FILJ, 19; "North-South Arbitration" (1984) 50 Arb, 37; Naón, Horacio A. Grigera "ICC Arbitration and Developing Countries" (1993) 8 ICSID Rev.,-FILJ, 116; Sempasa, Samson L., "Obstacles to International Commercial Arbitration in African Countries" (1992) 41 ICLQ, 387; Abbott, *supra*.

has lamented the complete absence of African lawyers in international arbitration,[36] questioned the absence of arbitrations taking place in cities of the developing world, including the participation of the same countries in the creation of arbitration institutions and rules, etc.[37] Arbitrations conducted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) reveal startling statistics.[38] The Centre has thus far entertained about 28 arbitration proceedings, at least 25 of which involve countries of the developing world, principally those of Africa, Asia and the Middle East.[39] As of 31 March 1994 about 34 tribunals had been constituted with over 102 appointments, just about 28 being from countries of the developing world. (Many arbitrators have been appointed more than once.) The International Chamber of Commerce Court of Arbitration Statistics are identical.

Even supporters of the Euro-centred consensus on arbitration have sometimes also found the imbalance reflected in such figures disturbing. Jan Paulsson admits that "... if international arbitration aspires to universalism, one would expect that the quantitative and more importantly the qualitative evolution of Third World participation in arbitration will be accompanied by something of a southward drift of the place of arbitration."[40] Referring to the case of a typical investment contract involving, for example, the government of Togo, Paulsson notes that the government

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[36]*Contra*, Professor Pièrre Lalive, who thinks that "the lack of expertise in developing countries regarding international arbitration is *rapidly* disappearing, as evidenced, for instance, by the example of Algeria, whose national companies are known to have acquired a great deal of experience and skill in arbitration techniques, sometimes with the assistance of *expensive* American Law firms, and now more than a match for many foreign investors", (emphasis added): "Some Threats to International Investment Arbitration" (1986) 1 ICSID Rev.,-FILJ, 26, p. 35. The irony is that the prospect of an *expensive* arbitration is precisely intended by the investor as a threat to secure otherwise difficult concessions (Jaslow, Graig A "Practical Considerations in Drafting a Joint Venture Agreement with China" (1982) 31 Am. J. Comp. L., 209), which itself is a basis for the reluctance by the countries to submit to arbitration.

[37](1993) 6 Leiden Journal Int'l. L. 339.

[38]See ICSID Cases, Doc. ICSID/16/Rev., Washington, 31 March 1994.

[39]With the exception of recent adhesions, Latin American countries rejected the Convention in bloc in protest that it usurped the domestic jurisdiction of local courts, in a powerful statement of protest known as the famous "El no de Tokyo": Broches, Aron "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 Hague Acad. Courses, 331, p. 348.

[40](1987) 2 ICSID Rev.,-FILJ, p. 43.

must:

> find it difficult to understand why it is that the foreign partner can send a team of energetic promoters to spend many weeks operating out of a hotel in Lomé to prepare a project and obtain government approval in principle; to come back again for other sessions, if necessary; then return for several rounds of contract negotiations and be prepared to spend many years executing the contract locally through an operating company duly established under local law - but insist that if an arbitration arises it has to be heard, say, in Zurich. Something here is disturbing, as though an entire region of the world were dismissed when envisaging the hypothesis of things getting really serious.[41]

"In asking for a situs of arbitration in his region", Paulsson points out,

> the Third World negotiator is in many instances being perfectly reasonable. When the entire centre of gravity of an investment contract - from its negotiation to its performance - is in an African country, and it resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial but truly burdensome.[42]

The response to the quantitative critique is therefore, generally, that more should be done to eliminate the material imbalances: for example train more arbitrators from, and locate more proceedings in, developing countries.[43]

In this dissertation, however, we will not be concerned with the quantitative approach to the study of the attitude of developing countries.

The second approach is qualitative. Its focus is on one or both of two aspects of arbitration. The second aspect concerns the character of the substantive and procedural rules of law applicable in arbitrations in general and in cases involving developing countries in particular. The treatment of that aspect consists in examining

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[41] *Ibid.*

[42] *Ibid* p. 44.

[43] Audit, *op. cit.*

the content of the rules and, in the context of our subject, to establish whether the rules are inherently incapable of responding adequately to the needs of the group of countries we are concerned with and, if so, why. Such a study would be based on the basic objective character of the rules, the political, economic and social setting in which the rules were evolved and are expected to operate, including their underlying policy objectives. Next, the study would be directed to consider, still within the context of our subject, whether on the assumption that the substantive and procedural rules are capable of responding to the needs of developing countries, nevertheless, in their application to arbitrations involving those countries they are worked out to produce an outcome which is invariably not favourable to developing countries. In that case the criticism would be judicial or arbitral bias vis-à-vis the countries concerned. We are not also concerned with the substantive aspect of the second approach.

The logical first aspect of the second approach is to examine the nature of the process of arbitration itself; the concept, its principal doctrines and principles, its institutions, its methods and its entire philosophy as an adjudicatory process. The purpose, within the context of our "thesis", is to establish whether in its present conception of those elements and in its practices the process sufficiently responds to the aspirations of developing countries. That aspect is the focus of our study. We regard that as the first logical step in the treatment of a topic such as ours since it constitutes the central element of arbitration and, moreso, since every study of the institution must begin with what it represents.

We start from the premise that arbitration in international commercial transactions is not looked at with much favour in the developing world on the ground that it does not favour them. We address the hypothesis from three angles to reflect the different stages of arbitration, while, however, bearing in mind that the study is limited to the character and methods of the institution. Chapters one and two are concerned with the nature of commercial arbitration. Chapter one examines arbitration as understood in the west; the concept, its legal character, its doctrinal and philosophical basis. The law and practice of arbitration in international business remains, as noted earlier, entirely of western origin in its basic principles and in the way they have been developed. We are therefore bound to begin from there. We do not consider all aspects of western arbitration. The specific issues raised in this chapter are significant in our study in that they provide the basis for the differences drawn in chapter two with the understanding in other cultures of the nature and function of arbitration as an adjudicatory procedure. They are also sufficiently representative of the extent of the different attitudes to the functioning and function of arbitration as an alternative process of settling disputes in the two groups of countries we are concerned with. The theme of chapter one is centred on the *contractual* nature of commercial arbitration.

As we point out in chapter two, however, arbitration as understood elsewhere is not necessarily, and in some cases, not at all based on contract. Even in those cases where it is initially explained on the basis of a contract, as in Islamic law, the contract is not regarded as binding unless the arrangement is brought to the notice of a judge and confirmed by him. It is merely a "permissible" contract which remains revocable, contrary to western contract doctrine. We point out that this perception is, to a diminishing extent, still present in Europe itself although increasingly regarded with disfavour. Next, we point out that the attitude in cultures of most parts of the developing world in approaching an arbitration is entirely different. As we indicate in chapter two, the arbitrators, the parties, their advisers (if any) and the society as a whole go to arbitration in the hope of "dissolving" a dispute, or, as we indicate, to "settle" and not to "decide" their differences. The other attitude, so deeply rooted in the western European approach to arbitration and to adjudication as a whole as being a "fight",[44] is absent in the cultural element in the treatment of arbitration elsewhere. Asante notes that in Africa, for example, the focus and appeal of the arbitration

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[44]That attitude may also be explained on account of what William Park sees as "a trend toward "lawyeri[s]ing" in non-judicial dispute resolution", especially arbitration: *op. cit.*, p. 616, note 1. After noting that the training of lawyers has much to do with this, John Sims of the C. I. Arb. says that as a result lawyers "come to arbitration knowing nothing of its possibilities, thinking of it in terms of litigation and assuming that the processes of litigation, which they are used to and feel comfortable with, automatically apply": "Will ADR Kill Arbitration?" (1995) 61 Arbitration, 171, p. 172. In a book describing and analysing a failed attempt in the United States to build a system of justice out of the law, Jerold S. Auerbach also concludes in respect of arbitration that it "began as an effort to tame the "growing monster" of litigation by "the gentle practice of arbitration". [citing Sturges, Wesley A. "Reduction of Costs by Arbitration Procedure", (9 June 1927) 84 Paper Trade J., 49] "But the rule of law, and the role of lawyers and judges in its preservation, easily survived its newest challenge. [That challenge being the attempt in arbitration to elude the law altogether.] In fact, the monster nibbled at arbitration until the similarities were more conspicuous than the differences.": Justice Without Law?, Oxford University Press, New York, 1983, p. 114. It seems impossible in the present climate to conceive of commercial arbitration (domestic and international) which excludes a central role for lawyers. The issue nevertheless remains one worth pursuing.

process still lies in the informality of the proceedings; "[t]his ingrained idea of the essentially informal character of the traditional African arbitration", he points out,

> collides sharply with the modern concept of international arbitration. It comes as a surprise to many African lawyers and executives to reali[s]e that a party to international commercial arbitration has to navigate through a bewildering and complex maze of arbitration institutions, rules and procedures, with rigid formalities and set deadlines, ... Modern arbitration has all the characteristics of a formal adjudication, a far cry from the informality associated with traditional customary arbitration.[45]

Asante does not fail to indicate that "[t]he highly technical nature of this process again reinforces the idea of an alien system",[46] therefore, the closer arbitration is brought to litigation, the less attractive it becomes to the African mind.

The same is valid for most of Asia. The Asian attitude also comes across as an aversion to litigation and to rigid law,[47] the very things which the informality and suppleness of arbitration should ordinarily avoid. Kumiko Oyama says of the Japanese, for example, that they "embrace arbitration with some reluctance. In fact most of them would prefer to sell snow cones in hell before arbitrating."[48] Yoshiyuki Noda also says that to the Japanese mind "the law is something that is undesirable, even detestable, something to keep as far away from as possible."[49]

That factor, we think, accounts to a large extent for the reluctancce by participants from the developing world to embrace international commercial arbitration. We suggest by way of conclusion to both chapters that to attract better participation from the developing world sufficient attention should be given to the

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[45]*Op. cit.* pp. 341-342.

[46]*Ibid.*

[47]Lubman, Stanley B & Wajnoski, Gregory C "International Commercial Dispute Resolution in China: A Practical Assessment" (1993) 4 Am. Rev. Int. Arb., 107.

[48]"Recent Developments in Japanese Arbitration Law: An Introduction to the Draft Arbitration Law of Japan" (1993) 10 Journ. Int'l. Arb'n., Part 2, 55, p. 56.

[49]Introduction to Japanese Law, (translated by Angelo, Anthony H), University of Tokyo Press, 1976, p. 159.

other perception of arbitration and of the role of adjudication as a whole. We agree with Gabriel Wilner that the effort must go beyond merely "... educating the governments and the business and legal circles [in developing countries] of the advantages of the process."[50]

Chapter three considers the neutrality of international arbitral fori. We examine the cases of ICSID and the Multilateral Investment Guarantee Agency (MIGA) as examples of international institutions set up specifically with the arbitration of contracts involving third world countries in mind. As indicated earlier the chapter is not concerned with the quantitative issues relating to ICSID and MIGA, such as the location of tribunals and the nationality of the arbitrators. It deals with the more fundamental question of the underlying philosophy and the structure of both Conventions. It should be noted that both institutions are concerned with arbitration at its second stage, i.e., the process itself, or its administration, as in the case of the ICSID. The issues raised are examined through the provisions of the Conventions and in the light, so far, of the interpretation of the provisions by arbitration tribunals and academic writers. The purpose is to demonstrate that as devices created to respond to the specific problems of foreign investments, a matter of particular concern to developing countries, both Conventions are to a large extent open to the criticism of being one sided, contrary to the conventional view. The focus is therefore on those specific provisions usually presented as neutral, or as intended specifically to benefit host states of foreign investments, or as striking the correct balance between the interests of all parties concerned. We conclude that in most respects neither of the Conventions contemplated the possibility of the investor being in breach in the performance of a contract and, thus, leaving the state party as much in need for protection as the investor.

Chapter four treats the conflict of laws methods designed specifically for application to investment contracts. We criticise, as did F.A. Mann several decades ago,[51] the new trend in international arbitration to ignore the traditional principles of

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[50] "Acceptance of Arbitration by Developing Countries" in Resolving Transnational Disputes Through International Arbitration, (ed. by Carbonneau, Thomas E), University Press of Virginia, Charlottesville, 1984, 283, pp. 285-86.

[51] "The Law Governing State Contracts" (1944) 20 BYIL, 11.

private international law in contracts involving the governments of the countries we are concerned with. We begin by setting out the traditional principles of private international law applicable to contracts generally, only to note the rejection of the same principles in the specific case of state contracts, so as to avoid the application of host state laws. The special regime of conflict of laws rules now applied to state contracts is, according to its proponents, justified by the unique character of those transactions.[52] We however question why the unique character of the contracts is recognised only to exclude the application of the only systems of law with which they bear the closest and only significant relationship but not to recognise the underlying basis of the undertakings to which the contracts relate as important instruments of economic and social development and, as a result, the overriding authority of the state to call for a modification of the contracts, if necessary, to respond to specific and sometimes immediate domestic economic and social priorities. The new conflict of laws trends call for the application of international law to the contracts even where the parties have expressly chosen the domestic law of the host country.[53] For example, according to one ICSID tribunal, the law of the receiving country must remain "... subjected to control by international law" even where the parties indicate a choice for the local law and notwithstanding that it is "... paramount within the territory of the host state."[54] It should be noted that such approaches to the issue are guided by policy and not law. The particular policy involved in this domain has to do with a self-imposed arbitral mission to establish standards for the protection of investments abroad.[55] Whether that is a desirable policy would in all cases have to take account

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[52]McNair "The General Principles of Law Recognised by Civilised Nations" (1957) 33 BYIL, 1.

[53]*Revere Copper and Brass v Overseas Private Investment Cooperation (OPIC)*, award of 24 August 1978 [1980] 56 ILR, 258.

[54]*Liberian Eastern Timber Corporation (LETCO) v Liberia*, award of 31 March 1986 [1994] 2 ICSID Reports, 343, p. 358; to which F. A. Mann responded in the context of the debate regarding the existence of the *lex mercatoria*, that, "[w]here the parties have expressly or by necessary implication agreed upon the law applicable to their contract or where ... the contract clearly has a close connection with a particular legal system, no one, it is hoped, will allow any room at all to a different legal system ... whatever it may be.": "Introduction", in Lex Mercatoria and Arbitration, *op.cit.*, p. xix.

[55]As is made obvious, for example, in the awards of Réné-Jean Dupuy and judge Pierre Cavin as sole arbitrators respectively in *Texaco Overseas Petroleum Company and California Asiatic Company (TOPCO/Calasiatic) v Libya* [1979] 53 ILR, 420 and, *Sapphire International Petroleum v National Iranian Oil Co. (NIOC)* [1967] 35 ILR, 136.

of other factors which, in the present context of international trade law are, in our view, well beyond the jurisdiction of an arbitration tribunal.

In chapter five we examine some issues arising in the recognition, enforcement and execution of arbitration awards. We reach the conclusion that trends at this stage of the arbitration process do not support our original hypothesis that present trends in arbitrations concerning developing states do not favour them. As a result our original position must be limited to the extent dictated by that factor. Although the question of enforcement and execution is of primary importance in arbitrations since, if not voluntarily complied with, an award is not worth more than the document it represents unless compliance can be compelled, our "thesis" nevertheless remains valid. As Broches once pointed out in the context of the Convention for the Settlement of Investment Disputes, what had primarily been lacking in state arbitrations and therefore in more urgent need was not so much the absence of the means of ensuring execution of more or less predictable decisions, as the absence, in the first place, of what could be regarded as neutral fori for the judicial determination of the matters in dispute.[56] It has therefore generally been felt that the existing mechanisms for the judicial enforcement of awards involving parties from developing countries do not call for an urgent international response, especially as the difficulty arising from the immunity of states against execution, the only real obstacle to the enforcement and execution of awards against states, is receiving adequate attention through domestic judicial and legislative reforms.[57]

III

The meaning of developing countries is one we take for granted in the dissertation. With the exception of a few European countries which have for specific

[56]"Aspects Proceduraux de L'Arbitrage entre un Etat et un Investisseur Etranger dans la Convention du 18 Mars 1965 ...", in Investissements Etrangers et Arbitrage entre Etats et Personnes Privées: La Convention B.I.R.D. du 18 Mars 1965, University of Dijon, Pedone, Paris, 1969, pp. 129-30 and *infra*, chapter three.

[57]See for example the United States Federal Sovereign Immunities Act 1976 as amended in 1988 and 1990; UK State Immunity Act 1978; Australian Foreign States Immunities Act 1985.

purposes been regarded as such,[58] most countries seen as developing can be identified with relative ease. They are all young states although many are relatively older.[59] They were also once regarded as the "third world"[60] because politically they saw themselves as not belonging to any of the sides in the former East/West divide. For the same reason they were also referred to as the "non-aligned countries". The countries have also been described as the "third world" for economic reasons since, as a bloc, they constituted the least advanced of the three groups of countries.

Although collectively regarded as underdeveloped, separately, however, they display great disparities in their internal political organisations and, of greater importance to us, in their levels of economic development. These economic disparities have made their collective classification as developing countries difficult in that they give rise to further categories and sub-categories within the same group of countries. Relying on the per capita income, the World Bank in its 1990 annual report, for example,[61] reclassifies the countries into three sub-groups: "low-income", "middle-income" and "high-income" oil exporting countries. It creates a further sub-category of "severely indebted" countries within the "middle-income" countries. The "high-income" oil exporting countries belong mainly to the Arabian or Persian Gulf with huge petroleum deposits, enabling some such as Saudi Arabia, Kuwait and Brunei to have per capita incomes by far exceeding those of the most advanced industrial countries. But for the fact that the per capita income is not regarded as the only indicator in classifying a country either as developing or not, those particular countries could on that ground be excluded from the group of developing countries.

Similarly, the U.N. General Assembly in 1970[62] created another sub-category of "least developed countries" among the developing countries, on account of their low

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[58]Greece, Portugal and Spain are treated as developing member countries for the purposes of the Convention establishing the Multilateral Investment Guarantee Agency, MIGA.

[59]The Latin American Republics are generally older, having for the most part gained independence over one hundred years ago.

[60]We use the following words to refer to the same group of countries: "the third world", developing countries", "less developed", "less advanced countries", "the underdeveloped countries", the "south" etc.

[61]<u>Annual Report</u>, World Bank, Washington, 1990, pp. 24-29.

[62]See Resolution No. 2724 (XXV Session) of 15 December 1970.

per capita income,[63] low literacy rates and very low contribution of manufacturing industry to the gross domestic product. The list of the countries is constantly under review by the General Assembly of the U.N., which either withdraws from the list those countries whose situations have improved in respect of the stated criteria or, as is most often the case, by adding to the list more countries from among the general list of developing countries as their economic performances get worse.

Following the spectacular performance of a few developing countries with a growing industrial base, a new category has come to be recognised since the 1970s as the "newly industrialised countries".[64] Their emergence complicates the classification of developing countries by introducing a peculiar set of characteristics not common to the rest of the developing world. They have a more advanced industrial sector, have carved out a substantial share of the world's industrial exports, and have as a result increased their gross domestic products; they no longer rely exclusively or heavily on industrial crops and mineral resources for their export earnings and so on. There is no doubt, however, that on other indicators they remain and are still considered developing although constituting a class of their own.

Regardless of the differences that exist between and within developing countries they all share a set of characteristics, reduced to social poverty and political instability, including a weak standing in the international political scene, for some, disproportionately to their size and potential. Historically most of the countries were, until recently, the colonies of an advanced country. Geographically the countries are all situated in Africa, Asia, the Middle East and South America, such that if an east-west straight line were drawn arbitrarily through the centre of the globe these countries would be seen to occupy approximately the whole of the southern half of the surface. That separates the countries from the developed economies of the northern half, hence, the collective reference to them as the "south" and to the developed countries as the "north".

In the dissertation we are concerned with all those countries geographically capable of being delimited to the economic "south", with such obvious exceptions as

[63]Then stated as $100 at 1968 value.

[64]Roughly Brazil, Hong Kong, Malaysia, Mexico, Singapore, Taiwan and South Korea.

Australia, Japan and New Zealand.

We also use the terms "commercial", "business", "international trade", "investment", etc., in their broadest sense.

IV

We are aware of the limitations of some of our conclusions, especially where, as in arbitrations with parties from the developing world, those conclusions are based almost entirely on arbitrations regarding public contracts. Unfortunately the inaccessibility of material on ordinary arbitrations in international trade transactions involving third world private parties, usually justified on the ground that arbitration is a private process, means that we are unable to take them into account in our study. It is a matter of regret that material on that category of arbitrations is, - at least as far as we are concerned, - to be regarded as not yet within the domain of academics. It is therefore possible that when they become available a closer study of the awards, in particular, may disclose trends modifying or inconsistent with some of the conclusions we reach.

CHAPTER ONE

MODERN INTERNATIONAL ARBITRATION: CONCEPT AND NATURE.

In this chapter we consider some essential aspects of commercial arbitration and their significance for the subject of the dissertation. The purpose is not to examine in general the principles of arbitration since that in itself is not the aim of this dissertation. Rather, we outline the basic principles of western arbitration and highlight what those principles represent for the concept as a whole as a background to the differences which will be drawn between it and the same concept as understood in many parts of the developing world. The objective is to show that arbitration as developed in the West is based on certain principles of law regarded as basic to the Western notion of justice and that, as an alternative to domestic courts in the settlement of international trade disputes, modern international commercial arbitration reflects exclusively those principles. It is yet to accommodate other approaches to arbitration. That, we think, accounts in some degree for the reluctance with which the process is accepted in the other parts of the world.

I. The Nature of Western Arbitration

Much has been written on the controversy surrounding the nature of arbitration.[1] At the centre of the controversy is the need to explain the basis on which

[1]See for example Lew, Julian D.M., Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards, Oceana Publications, New York, 1978, Chapter 2, especially the extensive references in the notes. The literature on the subject is abundant in French, especially in France, Belgium and Switzerland where the issue for a long time received considerable attention from academics, reaching its peak in the 1950s and 1960s: see for example Klein, Frederick-Edouard Considerations sur L'Arbitrage en Droit International Privé, Helbing & Lichtenham, Bâle, 1955; Rubellin-Devichi, Jacqueline Essaie sur la Nature de L'Arbitrage: Droit Interne et Droit International Privé, L.G.D.J., Paris, 1965; Kassis, Antoine Problèmes de Base de L'Arbitrage en Droit Comparé et en Droit International Tome 1: Arbitrage Juridictionnel et Arbitrage Contractuel, L.G.D.J., Paris, 1987. For a rare but thorough treatment of the issue in England, see Samuel, Adam Jurisdictional Problems in International Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law, Schulthess, Zürich, 1989.

such a parallel and private method of dispute settlement gained acceptance in law. what gave rise to it and how to characteris it. So far four views have been advanced to explain the legal character of the concept. First, it is said that it is in the nature of a judicial process. According to this view arbitration is comparable to the process of an ordinary court, although of a private character. It is therefore justified on the basis that it achieves the same goal as the formal judicial process. The second view regards arbitration as based on a contract. It is said to arise from an agreement between those involved, which determines both the authority and the scope of the tribunal's powers. Its legal basis is therefore contractual. The third view considers arbitration to be of a mixed character in that it arises from a contract but is conducted to resemble a court process and ends in an award comparable to a judgment. It therefore combines contractual and jurisdictional characteristics. The fourth view, suggested in 1965 by Jacqueline Rubellin-Devichi,[2] treats arbitration as a separate and autonomous institution.

A. Arbitration as a contract: "arbitrage contractuel" or "arbitrage juridictionnel"?

In reviewing each of the four views, it is useful to refer, first, to a distinction suggested by some writers in continental Europe between a strictly contractual arbitration and the conventional arbitration of continental civil procedure codes and Arbitration Acts in England and elsewhere in the world. We must state that we are, in this dissertation, only concerned with the second type, the conventional arbitration. However, we will have to refer briefly to the "arbitrage contractuel" of continental jurists for clarification.

The strictly contractual arbitration is what is described by French civilian writers as the "arbitrage contractuel".[3] As with most concepts of civil law based

[2] *Supra.*

[3] Similar concepts exist in Italy, Germany, Austria, the Netherlands: see de Vries, Henry P, "International Commercial Arbitration: A Contractual Substitute for National Courts" (1982) 57 Tul. L. Rev., 42, pp. 48-49; Habscheid, Walther, "L'Expertise-arbitrage: Etude de Droit Comparé" in International Arbitration: Liber Amocorum for Martin Domke, (ed. Sanders, Pieter) Martinus Nijhoff, The Hague, 1967, 103.

systems, its origin is traced to Roman law.[4] It is contrasted with the second type, the "arbitrage juridictionnel" (otherwise known as the "arbitrage du code de procédure civile"), which is the ordinary arbitration as understood and practised world wide. According to one of the principal writers on the "new" concept of "arbitrage contractuel", the two types of arbitration are similar in that they are both founded originally on an agreement, either in the form of a submission by the parties to the reference or an agreement to submit to future disputes.[5] Another similarity is that the decision of the third party is binding in both cases. In the case of an "arbitrage contractuel" it is binding on the basis that it is a contract. It is binding in the case of an ordinary arbitration because the parties have accepted to be bound in advance of, or during, the submission or because the agreement to refer to arbitration is regarded in law as containing an implied and enforceable undertaking to abide by the award when made.

The circumstances in which an arbitration will be regarded as of the second category, the traditional type arbitration, are well known. There would be an underlying contract in existence between the parties in the arbitration. The contract will usually include an arbitration clause referring all disputes, if and when they arise, to arbitration. The reference could take the form of a submission, in which case the arbitration agreement is made after a dispute has arisen. The situation is not exactly the same in an arbitration of the first type, the "arbitrage contractuel", (otherwise known as "l'arbitrage du code civil"). Both Kassis[6] and René David[7] mention, as few examples of the second type of arbitration, the case of an average adjuster in maritime salvage operations[8] and of "quality arbitrations", where all the third party is required

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[4]See Kassis, *supra*; Lane, P. M. M. "The Appointment of an Arbitrator - Contract or Status" (1994) Arb. & Disp. Resolution L. J., 91.

[5]Kassis, *ibid.*

[6]*Ibid*, pp. 42 and 43.

[7]"L'Arbitrage en Droit Civil, Technique de Regulation des Contrats", in <u>Mélanges Dédiés à Gabriel Marty</u>, Université des Sciences Sociales de Toulouse, 1978, 383.

[8]As to whether an average adjuster performs the duties of an arbitrator in English, and presumably many common law jurisdictions, see *Tharsis Sulphur and Copper v Loftus* (1872) L.R., 8 C.P., 1 and the doubts expressed by the House of Lords regarding the correctness of the decision in that case in *Sutcliffe v Thackrah* [1974] A.C. 727, p. 757 (Viscount Dilhorne), and particularly by Lord Salmon,

to do is to determine whether goods sold correspond with the sample or with the contract description or are merchantable and, in general, cases where the third party is required to make a determination in an expert capacity. The latter will involve, for example, the determination of the price or the true market value of an item of trade, or the amount of an indemnity due to an assured by the insurer.

According to the continental writers, a major difference between the traditional form of arbitration, i.e., arbitration within the meaning of an Arbitration Act and the suggested "arbitrage contractuel" is that in the latter the underlying contract is in a material respect not complete until the third party has determined the issue submitted to him, such as the price or value of the subject matter of the contract. Another significant difference between the two forms of arbitration is that in "arbitrage contractuel" the parties' only remedy for breach of the arbitration clause or submission to arbitration is contractual, lying rather in an action for breach of contract, whereas in an arbitration under a civil procedure code or an Aribitration Act in England the defaulting party can also be compelled to arbitration by a stay of any proceedings brought in breach of the agreement. Similarly, the parties' only remedy for failure to comply with the determination of the third party in an "arbitrage contractuel" is also to bring an action for breach of contract and not for the enforcement and execution of the "award" of the third party which, technically, is not more than a term of the underlying contract. For that reason that form of arbitration is also known as "l'arbitrage du code civil" and governed by the principles of the law of contract to the excluding rules of civil procedure, which would be applicable to ordinary arbitration. The decision of the third party in an "arbitrage contractuel" is enforceable by action and not as an award. As Antoine Kassis puts it:

> *[i]l s'ensuit que les conclusions du tiers qui indiquent la solution du litige s'incorporent à la convention des parties pour former un tout contractuel régi entièrement et exclusivement par le droit des obligations contractuelles tel que le définissent les règles du Code Civil. Ne bénéficiant pas d'un caractère juridictionnel, les conclusions du tiers ne sont pas susceptibles des recours ouverts contre la sentence*

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who regarded the Tharsis case as wrongly decided.

rendue dans un arbitrage [contractuel]. Pour la même raison, elles ne pouront pas faire l'objet d'une ordonnance d'exequatur du juge étatique pour être susceptibles d'exécution forcée. Si l'une des parties refuse de se conformer aux conclusions du tiers, l'autre n'aura d'autres resources que de recourirs, par une action de droit commun, au juge des contrats, celui qui est compétent pour connaître des litiges relatifs aux contrats en général. Ce juge traitera les conclusions du tiers comme faisant partie de la convention des parties. Le jugement qu'il rend aura les mêmes effets que tout jugement rendue par lui en matière contractuelle et sera susceptible des mêmes voies de recours.[9]

The characteristics of the "arbitrage contractuel" are, therefore, that (1) the parties accept to submit an issue to the determination of a third party; (2) the determination is binding on them and enforceable; (3) it is enforceable as a contract and not as an award and, for that reason, (4) it is not subject to judicial review as the award in the traditional arbitration. Since the role of the third party in an "arbitrage contractuel" usually requires him to determine a material term of the contract, the "arbitrage contractuel" assumes that in most cases there is no dispute, as such, to be decided. A dispute may not arise until the determination of the third party. In fact in most of the examples often given the parties submit to the decision of someone else in order to avoid a dispute! In the words of René David, "*[l']intervention du tiers ... est souvent prevue en dehors de toute contestation, et précisément pour eviter tout litige ...* "[10]

The fifth characteristic of the suggested form of "arbitration" is therefore that there need not be a formulated dispute. There lies, as we point out below, its difference with English arbitration.

Both writers refer to valuation and certification as typical examples of a strictly contractual "arbitration" in English law. There are obvious similarities between the "arbitrage contractuel" (or "arbitrage du code civil") of French and Swiss writers and the valuation and certification of English law, such as that the determination of the

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[9]Réflexions sur le Règlément D'Arbitrage de la Chambre de Commere Internationale: Les Déviations de L'Arbitrage Institutionnel, Paris, L.G.D.J., 1988, p. 18.

[10]*Supra* p. 384.

third party in both cases is not subject to review[11] and that it is binding, although not as an arbitration but as a contract, in accordance with the principles of the common law of contract. These are principles evolved by the courts (as in England) or as codified and interpreted by courts in civil law jurisdictions in mainland Europe and elsewhere.

However, the suggestion that a certification or valuation is an "arbitration", no matter how refined the concept of arbitration may have become to a continental civilian lawyer, is one which in English law should be treated with some care in the light of the two House of Lords decisions in *Sutcliffe v Thackrah*[12] and *Arenson v Arenson.*[13] Both cases decide that a reference to a third party for a settlement, however characterised, should contain a formulated dispute if it is to be regarded as an arbitration. That requirement makes out valuation and certification as activities of a different character from an arbitration. It is true that Lord Simon of Glaisdale in *Arenson v Arenson* contemplated the possibility of an arbitration at common law,

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[11]With the exception of an allegation of fraud and improper motive there is a very limited jurisdiction of the court to quash an expert determination in English law, confined to cases where the expert made a fundamental mistake. Bernstein and Reynolds state, on the authority of the Court of Appeal decision in *Jones v Sherwood Computer Services* [1992] 1 WLR 277, that for the challenge to succed it must be shown that the expert had departed from his instructions in a material respect: Handbook of Rent Review (Looseleaf, February 1995 up-date), Sweet and Maxwell, London, para 11-53. He must simply have failed to do what he was asked to. It will therefore have to be established: (i) "... precisely what where the instructions to the expert as to what he was to value ... (ii) demonstate that the expert had made a mistake ... (iii) demonstrate that in making the mistake the expert had, in a material respect, departed from the instructions as to what he was to value.": ibid.

It seems that the fundamental mistake being referred to will only arise if the expert completely fails to address the issue submitted to him. If he addresses the issue, his determination will remain binding even if wrong, and there will be no jurisdiction to quash it. The Court of Appeal stated in that case that:

> [o]*n principle, the first step must be to see what the parties have agreed to remit to* the expert, this being ... a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect - e.g., if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in Jones (M) v Jones (RR) ... the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that - either party would be able to say that the certificate was *not binding because the expert had not done what he was appointed to do.*: [1992] 1 WLR, p. 287 (emphasis added).

The Court declined to quash the expert determination in that case because it thought that the accountants had done precisely what they were asked to.

[12][1974] A.C. 727.

[13][1977] A.C. 405.

different from one under the Arbitration Acts.[14] Lord Morris of Borth-y-Gest in *Sutcliffe v Thackrah* also recognised that "[t]here may be circumstances in which what is in effect an arbitration is not one that is within the provisions of the Arbitration Act",[15] such as where a valuer, an architect or a surveyor is required by agreement of the parties concerned to act as an arbitrator. Lord Morris accepts the possibility that there could be an arbitration even in cases where "... there is no arbitration to which the provisions of the Arbitration Act [of 1950] apply ..." but where the parties "... informally agree to refer a disputed matter to the decision of some person of their own selection ...", thus placing that person "... in the position of a quasi-arbitrator ...."[16] That might give rise to an arbitration in common law.

A question therefore arises regarding the circumstances in which such an exceptional "arbitration", not falling within the Acts, can be regarded as an arbitration. In *Sutcliffe v Thackrah* and *Arenson v Arenson* the issue was addressed by the House of Lords in terms of the circumstances under which a certification and a valuation could be regarded as an arbitration to determine whether a certifier and a valuer enjoy the same immunity as an arbitrator. The law Lords appeared not to be at pains in stating what, in English law, those conditions should be. The general rule is that the third party must have been acting in a judicial capacity. It must be shown that there was "(a) a submission to him of a formulated dispute or of a matter where there must necessarily be assumed to be a difference and, (b) a decision binding on the parties."[17] For the third party to be regarded as acting in a judicial capacity, it is not his description as an "arbitrator", "valuer", "certifier" or "expert" that matters. What is relevant is the nature of the function he is required to perform, everything

[14]*Ibid* p. 422. The existence of arbitration at common law is not in dispute since only arbitration agreements in writing are within the provisions of the various Acts. An oral arbitration agreement remains valid and is governed by the common law. The question here is whether apart from arbitration in common law, for which the requirements (with the exception of writing) are the same as arbitration under the Acts, there exist another form of "arbitration" with its own requirements.

[15]*Ibid* p. 752, or within the common law.

[16]*Ibid* p. 744.

[17]Submission of Counsel in *Sutcliffe v Thackrah*, p. 733; approved: pp. 736 (Lord Reid), 745, 747 & 752-53 (Lord Morris of Borth-y-Gest), 753 (Lord Hodson); *Arenson v Arenson*, pp. 422 & 424 (Lord Simon of Glaisdale), 428 (Lord Wheatley), 439 (Lord Salmon), 442 (Lord Fraser of Tullybelton).

depending, as usual, on the circumstances of the case. Thus, Bernstein and Reynolds say that if, with the consent of the parties in dispute, the third party is appointed "... to hear evidence and submissions from [the parties], and makes his determination on that basis",[18] he may be acting in a judicial capacity and therefore entitled to the same immunity as an arbitrator. "On the other hand", they say, "... a person expressed to be appointed as an arbitrator but whose function was merely to inspect some goods and to decide the question in dispute by applying his expertise to the facts disclosed by that inspection",[19] might not be exercising judicial functions and might therefore be liable in negligence. In both cases the House of Lords declined to treat an architect's certification and an auditor's valuation as arbitrations for failure to meet the first requirement, since in neither case was there a formulated dispute. On the contrary, the submission to a certification by an architect for the amount of work done by, and money due to, the contractor from time to time in the first case and, in the second case, to the valuation of shares by an auditor to enable their sale to the chairman of the company concerned were regarded by the House of Lords as a means of avoiding future disputes.

Sutcliffe v Thackrah and *Arenson v Arenson* therefore suggest that in English law certification and valuation are not an arbitration unless the submission contains a formulated dispute[20] and the expert certifier or valuer proceeds to hear evidence in a judicial manner, in which case, his decision on the matter will be final and binding.[21] Where those requirements are satisfied the role of the expert valuer or certifier becomes similar to that of an arbitrator and make his determination subject

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[18]*Op. cit.* para. 14-12.

[19]*Ibid.*

[20]See especially Clarke, D. N. and Adams J. E, Rent Reviews and Variable Rents, 3rd Edn., Longman, London, 1990, pp. 176-182, particularly pp. 175-6 where the authors examine whether it is essential that there is a real dispute in which each party to the submission has formulated conflicting views for the determination of the third party or it is sufficient that there is a "mere failure to agree". Elsewhere, it has been suggested that a "... mere lack of agreement is not adequate. A situation where parties neither agree nor disagree about the true position does not amount to a dispute.": Mururu, Norman: "Anatomy of a Dispute" (1991) 57 Arbitration, 262, p. 262; see also Lord Simon of Glaisdale in *Arenson v Arenson*, *supra* p. 424, where he states that "[i]t is not enough that the parties who may be affected by the decision have opposed interests - still less that the decision is on a matter which is not agreed between them."

[21]*Contra*, the dissenting opinion of Lord Kilbrandon in *Arenson v Arenson*, pp. 429-432.

to the same rights of appeal as may be available in a normal arbitration. Those rights or processes will not be available against the decision of a valuer who is not acting as an arbitrator in the circumstances referred to above.[22]

So, whatever be the position in civil law systems, and although the existence of an "arbitration" other than within the provisions of the Arbitration Acts is possible under certain circumstances, the "arbitrage contractuel" of French and Swiss legal jurists finds no support yet in both English doctrinal and judicial thinking and we will not be concerned with it here.[23] We will be concerned with the other category, the "arbitrage juridictionnel" which, like the other type, is also based on a contract but differs in that it involves a process that is judicial in character. That is the conventional arbitration (or "arbitrage juridictionnel") as understood in common law and under a "code de procédure civil". It also happens to be the arbitration of international trade and economic relations.

B. The Contract Theory of Arbitration

The first of the four views mentioned earlier treats arbitration as a contract. It is said to be based on an agreement by two or more persons in dispute to have their differences settled by a neutral third party. The agreement is said to arise from their desire to see the dispute resolved in a manner and following rules determined by them or their appointees on their behalf. When seen in that sense the process is entirely theirs in that it is created and controlled by the parties. It is the parties' intention that

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[22]In common law Canada the distinction between arbitration and valuation was drawn initially on the basis of the existence or absence of a dispute. Subsequently it was extended to include a search for the actual intention of the parties in submitting to the process. According to McLaren and Palmer, "if the intention was to hold an inquiry similar to proceedings involving the courts of law, then it would be an arbitration; if what was desired was the eliciting of an opinion without such a procedure it would not.": The Law and Practice of Commercial Arbitration, The Carswell Comp. Ltd., Toronto, 1982, p. 4

[23]As stated above English law, without doubt, recognises an expert determination (such as in rent review cases) and what are known as "contractual" or "fast tract" adjudications where, for example, the adjudicator is required to determine the amount of an interim payment in a construction contract. These cases are regarded in English as contracts, no more: see Lord Denning in *Campbell v Edwards* [1976] 1 WLR 403, p. 407 and may well be the same as the French "arbitrage contractuelle", so that it is the use of the word "arbitration" by the civilian text writers in this context that may lead to confusion in English law.

appoints the arbitrators, determines the issues to be resolved and sets out the procedure for the arbitrators. In general the contract, like all other contracts, is based on and regarded as the expression of the parties' will, provided that in doing so they stay within the limits of the law.

The view that an arbitration is a contract is built on a number of factors, all pointing to the control which the parties themselves, more than the courts or the legislator, have over the process. To begin with, in a normal commercial transaction the parties are not compelled to arbitration. They would initially have volunteered into this particular method of settlement. It is also the fact that the parties have agreed to be bound by the award of the tribunal, when made, that renders it enforceable against them. If the parties chose to treat the determination as not binding, it will not have that effect, in which case it might not even be an arbitration at all. It may be regarded as a mere attempt at a friendly settlement.

The fact that ordinarily the parties cannot be compelled to arbitration probably explains why in most systems specific performance was not regarded as a practicable remedy for failure to comply with the obligation to arbitrate. It was said that not even the generosity of equity could "... entertain a suit to compel parties specifically to perform an agreement to submit to arbitration."[24] Even today specific performance is not available in English law and the second draft bill of the proposed new Arbitration Act for England and Wales[25] does not also make that remedy available. It is not even mandatory for an English court to compell submission to arbitration against a party bringing proceedings in disregard of an agreement to submit to arbitration, so that the advisory committee in its draft Bill thought it appropriate to recommend a change[26] mandating the making of such an order unless the agreement is void, inoperative or incapable of being performed. An award of damages is also unlikely as a practicable remedy for breach of the undertaking to proceed to

[24]Simpson, Sidney P., "Specific Enforcement of Arbitration Contracts" (1935-35) 83 U. Pa. L. Rev., 160, citing Selden J., in *Greason v Keteltas*, 17 N.Y. 491, p. 496 (1858). Writing in 1916, Alfred Hayes thought that "the doctrine that equity will not specifically enforce contracts for arbitration or valuation" had been established more than one hundred years earlier, although perhaps not firmly: "Specific Performance of Contracts for Arbitration or Valuation" (1915-16) 1 Cornell L. Q., 225.

[25]Consultation Paper on Recommendations for an Arbitration Bill, July 1995.

[26]*Ibid* Clause 12(4).

arbitration.[27] Redfern and Hunter also say that damages are practicable because of the difficulty of quantifying the loss sustained.[28] The solution, in those circumstances, has been for the courts to order a stay of any other proceedings within the terms of the arbitration agreement and to leave the parties with no other option than to proceed with the arbitration.[29]

However, as the example of the UNCITRAL Model Law and domestic legislation patterned on it demonstrate, specific performance of an arbitration agreement now seems to be the rule in many jurisdictions.[30] The Model Law mandates a reference to arbitration by the domestic court on application by one of the parties to the arbitration agreement where the other party brings proceedings in court in disregard of the agreement. Article 8 states that in those circumstances the court "shall, if a party so request, ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." The use of the mandatory "shall" indicates a difference with the discretionary "may" of Article 4 of the English Act of 1950 and clearly points to a determination to specifically enforce the agreement by compelling arbitration. That had long since been the position in the United States where, under Section 3 of the Federal Arbitration Act 1925, it was made mandatory for the courts to stay court proceedings pending arbitration in accordance with the agreement. Further, under Section 4, an aggrieved party can apply to the competent court for an order directing that the arbitration proceed as provided

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[27]"... since, unless the plaintiff has been put to expense by reason of the defendant's refusal to arbitrate, he can recover only nominal damages at law": Simpson, *op. cit.*, p. 161.

[28]Redfern, Alan & Hunter, Martin: Law and Practice of International Commercial Arbitration, 2nd Edn., London, Sweet and Maxwell, 1991, p. 5.

[29]See for example Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration requiring the competent court of the country adopting the law to refer the parties back to arbitration. For examples of the adoption of the UNCITRAL Model see the Nigerian Arbitration and Conciliation Decree 1988 Section 4(1) and the Canadian Federal Arbitration Act, Article 8(1).

[30]One must point out, however, that the absence of specific performance as a remedy in English law, for example, is now only of little significance since with appropriate court assistance the other party can still proceed to arbitration and obtain a default award enforceable against the recalcitrant party. Most domestic laws provide default procedures for the appointment of the second or single arbitrator (as the case may be) where one party fails to cooperate.

for in the contract, thus ensuring specific performance of the agreement.[31]

If the undertaking is honoured and the parties cooperate in the arbitration, in important respects, the law does not interfere with their freedom to direct the conduct of the process and its outcome. They define the issues to be resolved, they appoint the members constituting the tribunal, they determine the scope of the tribunal's jurisdiction (which they may further limit or terminate altogether), they set out the procedure and decide what material to accept or exclude in evidence. In general, however, the trend is to confer the tribunal with wide powers to decide on all or most of those issues. For that reason the award itself has sometimes been regarded as an act of the parties themselves, brought about through the agency of the tribunal. The parties can further vary the award if they choose to do so.

Thus, the parties retain control at all three stages of the process: they bring it into existence, they determine the procedural and substantive issues and, eventually, the outcome of the arbitration. It is particularly this capacity to exercise overall control of the process and the fact that it is the agreement of the parties which makes this possible, including an agreement to be bound (or what the law regards as such), that strengthens the contractual nature of the process.

C. The Jurisdictional Theory

Another view regards arbitration more as a judicial activity than as a process based on contract. It sees in arbitration a clear analogy with the formal judicial process. Reference is made to the similarity with the practice of ordinary courts of law in civil and judicial matters in support of the judicial character of arbitration. It is treated as judicial in that it is essentially a "method", i. e., a procedural means of settling a dispute.

The jurisdictional theory begins with the position that adjudication is an activity that is within the sovereign functions of the state, to be exercised by one of its organs. Arbitration, in Kenneth Carlston's words, "involves a delegation of the

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[31]For an overview of the specific enforceability of an arbitration agreement in the United States see Born, Gary B., International Commercial Arbitration in the United States, Commentary and Materials, Kluwer, Deventer, 1994, pp. 183-191.

power of the state."[32] Therefore,

> [t]he statement that arbitration is a creature of the parties, that its occurence, form, and scope are dependent on the will and consent of the parties, is but part of the truth. Although the arbitration agreement, as any agreement, is consensual, within its limited compass, it is also in varying degree, depending on the law of the particular jurisdiction, a delegation of the power of the state to private parties for their private ends.[33]

The process thus depends for its existence on the law of a given state, which sets out the conditions for its validity and certain minimum procedural requirements, including standards of fairness. The state delegates part of its judicial functions to the arbitral process on the assumption that the attainment of the private ends promoted in arbitration "will also subserve public interests"[34] with the advantages of arbitration over litigation in relation to matters such as speed, privacy and cost being taken for granted. For that reason the arbitrator enjoys a similar immunity to a judge in the performance of his task. He exercises judicial functions, albeit primarily in the interest of the parties in dispute, and although appointed by the parties, who can revoke his authority, the arbitrator does not act as their agent. He retains and is required to exercise his functions in full independence.

That independence is dictated by the nature of the judicial function. It is decisional, since the determination is made on the merits of the case, instead of as a compromise. Thus, in many respects, an award has the same characteristics as the judgment of a court, which is also handed down as a decision, rather than as a compromise solution. When made the award is, like a judgment, final, thereafter constituting *res judicata*. The parties cannot re-open the issue. It then becomes enforceable against the defaulting party in the same way as a judgment of the court.

The jurisdictional theory is therefore based on the view that these important characteristics of an award, together with the fact that the process itself originates in

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[32]"Theory of the Arbitration Process" (1952) 17 Law & Contemp. Probs, 631 p. 635.

[33]*Ibid.*

[34]*Ibid.*

the state's willingness to delegate a degree of its judicial functions, make arbitration closer to a jurisdictional than a contractual institution.

D. The Hybrid and Autonomous views

The dominant and probably more correct view of arbitration is that it has a mixed character. It is brought into existence by the agreement of the parties but the process itself is in many important respects judicial, both for the lawyer and the disputants. In the words of Alan Redfern and Martin Hunter: "[i]t begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law."[35]

For the disputants what this means is that although the process is theirs and under their control initially, (by virtue of a contract), its outcome could be of immense consequences, affecting their interests within and across national boundaries as they seek to enforce, execute or resist the award if not voluntarily complied with. This is so because in most respects the award of the arbitrator is in international and domestic laws given the same effect as the judgment of a court. For the rest of the public the institution of arbitration retains considerable interest in the way it is transformed from a private arrangement to an outcome with a public character, usurping in the process functions which are appropritely those of the state. The interest in the process must therefore lie in the fact that in resorting to, and in authorising it, both the parties and the state respectively confer immense public powers to a principally private institution.

For the hybrid theory, the jurisdictional and contractual elements of arbitration become "... so interconnected that it [is] impossible and undesirable to try and separate the procedural and contractual parts of the institution. Since no distinct segment of the arbitral process [is] strictly one or the other, it distort[s] the nature and hinder[s] the

[35] *Op. cit.* p. 8.

development of arbitration to apply the rules relating to either procedure or contract to any part of the arbitral process."[36] According to Rubellin-Devichi, "... all that the mixed theory achieved was to make arbitration and the rules applied to it "proteïforme" or infinitely variable. A different approach was necessary to produce arbitral law geared to the reality of the institution."[37]

As we know it, the reality of the institution in its present character is that it was created entirely by the business community, which found it a convenient means by which to settle disputes.[38] Writing in 1934, Wolaver said that it was then "very common to say that commercial arbitration had its beginning with the practices of the market and fair courts and in the merchant gilds",[39] and with that Schmitthoff agrees.[40] Citing Rubellin-Devichi, Julian Lew states:

> it is the businessmen themselves who, through pragmatic experimentation, have been responsible for the development of arbitration. Yet they have done it outside and irrespective of the law; indeed the law has, in large measure, followed existing practice. So for example, autonomy of the parties in determining the law to govern both substance and procedure in arbitration is based not on the contractual or jurisdictional character of arbitration but on the political 'necessities of the institution'. Equally both arbitration agreements and awards are enforceable, not as contract nor as a concession on the part of the enforcing sovereign state, but rather as an essential requirement for the smooth functioning of international commercial relations.[41]

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[36]Samuel, *op. cit.* p. 68.

[37]*Op. cit.* p. 234, cited by Samuel, *ibid* pp. 68-69.

[38]Lord Parker The Development of Commercial Arbitration The Lionel Cohen Lectures, The Hebrew University of Jerusalem, 1959; Sayre, Paul "Development of Commercial Arbitration Law" (1927-28) 37 Yale L. J., 595; Wolaver, Earl S. "The Historical Background of Commercial Arbitration" (1934-35) 83 U. Pa. L. Rev., 132; Kellor, Frances "Western Hemisphere Systems of Commercial Arbitration" (1946) 6 Univ. Toronto L. J., 307.

[39]*Ibid* p. 133.

[40]Commercial Law in a Changing Economic Climate, 2nd Edn., London, Sweet and Maxwell, 1981.

[41]Lew, *op. cit.* note 1 p. 60.

Those factors, according to Rubellin-Devichi, give the institution its distinct and autonomous character. The distinct character of the process calls for greater focus on the objectives of arbitration than on the legal basis of the institution itself. The role of arbitration in international commerce is to further the objectives of international trade. That approach has the advantage of telling us more about the process.[42]

As Adam Samuel points out, however,[43] the trouble with that view is that it does not explain the basis of the institution. "[I]t is necessary to know what arbitration is from a structural angle before we can design rules to fulfil its needs."[44] In a way, the autonomous theory of Rubellin-Devichi puts the cart before the horse and therefore accounts for little about the legal character of the institution.

The prevailing view of arbitration remains that it is a mixed jurisdictional and contractual process.[45] The growth of the doctrine of party autonomy dictated, however, that more emphasis be put on the agreement of the parties as the controlling element,[46] thus giving disproportionately more weight to the contractual component of the institution[47] and its emphasis on the intention of the parties.

II. The Role of the Parties' Agreement in Arbitration

In 1952, Soie Mentschikoff identified what she considered as the four essential elements of American arbitration.[48] There is little doubt that what she wrote about American arbitration is also true of arbitration in the rest of the Western hemisphere.[49] She said of the first element that arbitration "... is resorted to only by

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[42]Samuel, *supra.*

[43]*Ibid* p. 70.

[44]*Ibid.*

[45]Redfern and Hunter, *op. cit.* p. 8.

[46]Schmitthoff, Clive "Defective Arbitration Clauses" (1975) JBL 9.

[47]Eiseman, Frederic "L'"arbitrage-partie"" in International Arbitration: Liber Amicorum Martin Domke, *supra* 78, p. 79.

[48]"The Significance of Arbitration - A Preliminary Inquiry" (1952) 17 Law & Contemp. Probs., 698.

[49]David, Réné L'Arbitrage dans le Commerce International, Economica, Paris, 1982.

agreement of the parties."[50] It is a consensual arrangement arising from the "will" of the parties and deriving its validity in law therefrom. In referring to the agreement of the parties in an arbitration in those terms, Mentschikoff was only stating the obvious as it has always been recognised that an arbitration exists, and the entire institution as now known depends, on the consensus of those resorting to it[51] since, with the exception of compulsory arbitrations (invariably statutory), the parties to the process may choose not to submit to it. No one can be compelled to arbitration if he did not consent to it initially.

The principle that an arbitration is based primarily on the parties' intention finds support in judicial opinion, in academic writing on the subject and in statutes world wide.[52] Alan Redfern and Martin Hunter consider the agreement of the parties to an arbitration as "the foundation stone of modern international commercial arbitration"[53] as no arbitration will take place without the consent of the parties involved in the dispute. In an article in 1986 Alan Redfern treated the agreement of the parties to an arbitration as going to the "heart of the process"[54] since, with the exception of compulsory statutory arbitrations, unwilling parties cannot be compelled to resort to it. In fact in the article Redfern highlights the overriding importance of the consent of the disputants in all arbitration proceedings by reference to one of the now well known Pyramid cases[55] in which the Court of Appeal of Paris,[56] and later the

[50]*Supra*, p. 699. The other elements, with which we are not particularly interested for now, are: that arbitration is not a method of compromising disputes but of deciding them; that the arbitrator is a neutral third party unconnected to the parties in dispute; and that the decision of the the arbitrator is regarded as final and binding even before the award is made.

[51]David, *supra*.

[52]So generally held is the view that one need look no further than in a textbook on arbitration or on the law of contract or civil procedure for authority.

[53]*Op. cit.* p. 5.

[54]"International Commercial Arbitration, Jurisdiction Denied: The Pyramid Collapses" (1986) JBL, 15, p. 16.

[55]*Southern Pacific Properties (Middle East) Ltd. v Arab Republic of Egypt*, ICC award No. 3493 of 16 February 1989 [1983] ILM, 752; [1984] 9 Yearbook Comm. Arb'n., 111 (excerpts).

[56]Decision of 12 July 1984 [1985] 10 Yearbook Comm. Arb'n., 113.

French Supreme Court,[57] reversed an ICC award on the ground that the government of Egypt was not bound by the arbitration clause to which it was not a party,[58] to illustrate the point. Unlike litigation, therefore, one party cannot by unilaterally initiating the process compel the other disputant to a settlement by arbitration. The entire institution is thus based on the principle that the process is consensual in nature and that, in the absence of that consensus, it will not come into existence. So firmly is the point now established that the late Professor Schmitthoff was able to treat it as the "first and foremost" principle of law on the subject.[59]

III. The Importance of the Agreement in the Practice of Modern International Commercial Arbitration

The idea that an arbitration has its origin and exists only by virtue of the agreement of the parties concerned is not merely an abstract principle of western arbitration theory. It is of primary importance in arbitration practice. In the absence of an overriding rule of an applicable national law, it is the most important ground in domestic and international aribitration to give effect to an arbitration and for enforcing an award. National laws look to the intention of the parties to uphold an arbitration clause in a contract or a "submission" to arbitration. The position in domestic laws and in international conventions is to deny recognition to an arbitration or an award resulting from it if there is no valid agreement. In the absence of such an agreement, express or to be implied, the process will be set aside.

A. Its Importance in Major International Instruments

The New York Convention's widely used enforcement regime cannot be relied

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[57]Decision of 6 January 1987 [1988] 13 Yearbook Comm. Arb'n., 152.

[58]But see ICSID awards on jurisdiction of 27 November 1985 and 14 April 1988, including the annulment award on jurisdiction of 14 December 1989 [1991] 16 Yearbook Comm. Arb'n., pp. 19, 28 and 40 respectively, where an ICSID tribunal accepted jurisdiction. The award on the merits of 20 May 1992 is reported in [1993] 8 ICSID Rev.,-FILJ., 328.

[59](1975) JBL, 9.

upon unless there is a binding arbitration agreement in writing signed by the parties to the proceedings.[60] The Convention applies both to the agreement and the award resulting from it.[61] Under the Convention recognition and enforcement should be denied if it is established under the relevant law[62] that no valid agreement ever came into existence.[63] This is a requirement to be satisfied by the party against whom enforcement is brought if he challenges the award. As if to reinforce its regime, the Convention invites the courts of a contracting state to give effect to the arbitration agreement or an award made pursuant to it once evidence of the agreement is supplied.[64] In a sense it is necessary that the arbitration agreement should, like any other lawful agreement made by consenting parties, be observed. It seems that was at least one of the objectives of the Convention, i.e., to facilitate the enforcement of arbitration agreements and awards made thereunder, in territories other than where the agreement and award are made.[65] The identification of the agreement will therefore be a decisive element in determining whether or not to enforce a New York Convention award. In fact, it seems that once the existence and validity of the arbitration agreement is established in a New York Convention case, a domestic court of a signatory state is required to give effect to the resulting award unless there are overriding domestic public policy concerns, since the court cannot review the merits of the award.

The New York Convention was intended to replace the Geneva Protocol of 1923 and Convention of 1927 by providing a unified and more effective enforcement regime than those which were available under the Protocol and Convention. Both were applicable to separate stages of the process of arbitration. The Protocol was applicable

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[60]Article II.

[61]Articles I and II.

[62]Which, in terms of the Convention, will either be the law to which the parties have subjected the agreement or the law of the place where the agreement was made: Art.V(1)(a).

[63]Article V(1)(a).

[64]Article IV(1)(b).

[65]*Island Territory of Curacao v Solitron Devices*, 356 F. Supp. 1 (1973); affirmed 489 F. 2d 1313 (1973, 2d Cir); certiorari denied 40 L. Ed, 2d, 763.

to arbitration clauses and the Convention applied to awards made in respect of such clauses. They provided as a condition for enforcement and recognition that the proceedings and award should have come into existence pursuant to a valid agreement or submission to arbitrate. The Geneva Protocol and Convention had their own inadequacies which the New York Convention was intended to improve upon.[66] The effect of the New York Convention is that, in the absence of an agreement, a party relying on an alleged arrangement to arbitrate might be denied recourse to the only important international enforcement mechanism.[67]

The emphasis on the need for an agreement as an essential requirement is truly generalised. The 1961 European Convention on International Commercial Arbitration treats the absence of the agreement as the first ground on which an award may be set aside by a court of a signatory state. Article IX(1)(a) is almost in the same terms as the corresponding provisions of the New York Convention. It allows an award to be set aside if the arbitration agreement is "... not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Article 25 of the Washington Convention for the Settlement of Investment Disputes, (ICSID), provides that a tribunal set up under the Convention shall have jurisdiction to hear a dispute referred to it only when the parties have given their consent to submit to the Centre. The Centre was set up in 1965 to provide an appropriate neutral setting for the settlement of disputes between private foreign investors and the governments of the countries in which they invest. Prior to the Convention, there was no proper international forum to which a private person could directly bring a claim against a defaulting host state, since the private investor (individual or corporate) has no legal personality in international law.[68] The

[66]van den Berg, Albert Jan The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, Kluwer Publishers, The Hague, 1981, pp. 7-8.

[67]Articles V(1)(a) & IV(1)(b).

[68]The existence of such bodies as the International Chamber of Commerce and its Court of Arbitration in Paris and the London Court of International Arbitration were regarded as private institutions serving the needs of traders only. Paul Szasy says that "[a]lthough there [was] no formal obstacle to submitting to the International chamber of Commerce or to the Inter-American Commercial Arbitration Commission, governments [were] often reluctant to do so in connection with major investment arrangements, in view of the basically private commercial orientation of these organizations.": "Using the New International Centre for the Settlement of Investment Disputes" (1971)

Convention allows an investor (individuals and corporate) such access when arbitrating within its provisions.

Having regard to the consequences on the sovereignty of the host state of the Convention, the Centre cannot accept a referral to it in the absence of a binding agreement. Although the Convention does not expressly mention the absence of an agreement as a ground for annulment of an ICSID award, it is quite obvious that the requirement is covered by Article 52(1)(b), under which a party may request the annulment of the award if the tribunal exceeds its powers. Such a tribunal will clearly be acting in excess of its jurisdiction, if any, where it purports to make an award in circumstances where it can be successfully argued that there was no agreement to arbitrate.

Elsewhere in the Convention there are many provisions, for example, those relating to the procedure for the commencement of the proceedings and to the form of the agreement, which are intended to ensure that such situations do not arise and also to deal with them if, exceptionally, they did. Article 25, which deals with jurisdiction, provides that the Centre will entertain a request for arbitration and the Convention shall apply only when the parties to the dispute have consented *in writing* to submit to arbitration under its provisions. The absence of an agreement expressed in writing will therefore invalidate any arbitration purportedly made pursuant to the Convention.

Article 25 also forecloses the possibility of a direct challenge to the Centre's jurisdiction by making it impossible for a party to contend, for example, that the underlying contract did not contain an arbitration clause, since it is required to be *in writing*. The Convention does not cover arbitration agreements orally expressed. This leaves the possibility of such challenges arising only indirectly, in cases where the person challenging does not deny the existence of the agreement but argues that his consent was vitiated (by alleging fraud for example), or that he was never a party to

8 East African L. J., Part 2, pp. 128-29. And, in any case, a state's undertaking to submit to arbitration by the ICC will not have the same significance in international law as one arising under an international treaty, such as the ICSID.

the main contract or the agreement to submit to arbitration, if made separately.[69] Such challenges are extremely difficult to predict, and, in any case, do not directly put in doubt the existence of an arbitration agreement. It is only a matter of legal technicality that its validity is questioned in those circumstances.

The UNCITRAL Model Law on International Commercial arbitration emphasises the importance of the agreement by also requiring it to be in writing. The Model Law represents a proposal for modernisation of domestic laws on commercial arbitration in line with the new needs of international trade.[70] It is hoped that its adoption, either wholly or in substantial part by many countries should lead to the uniformisation of domestic laws on the subject, in the overral interest of intenational trade.[71] Under Article 7(1) of the Law an arbitration agreement may either take the form of an arbitration clause in a contract or a separate agreement. The importance of the agreement is re-emphasised in the provisions dealing with judicial review of awards, under which an agreement can be set aside if inexistent or invalid under its proper law, or the law of the place where the award is made.[72]

B. Its Importance in Domestic Systems

The arbitration agreement assumes even greater importance in national laws on domestic and international arbitration. No national law will compel parties to arbitration or hold them bound to an award unless it has first of all been decided

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[69]Challenges to the jurisdiction of an ICSID tribunal have been made unsuccessfully on the ground that the particular investment contract did not contain an ICSID arbitration clause: see *Southern Pacific Properties (Middle East) Ltd. v Egypt*, awards on jurisdiction 27 November 1985 and 14 April 1988 [1991] 16 Yearbook Comm. Arb'n., pp. 19 & 28. In that case the ICSID arbitration tribunal accepted jurisdiction exclusively in reliance on Egyptian government legislative provisions intended as an incentive to attract investments. There was no arbitration clause binding on the state in the contracts themselves. In reaching that conclusion the tribunal, in our view, adopted an unduly permissive interpretation of the Convention's provisions on jurisdiction.

[70]For a general view of the Model Law and its history, see Holtzmann, Howard M. & Neuheus Joseph E., A Guide to the UNCITRAL Model Law on International Arbitration : Legislative History and Commentary, Kluwer, The Hague, 1989.

[71]Hermann, Gerold "The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions" in Essays on International Commercial Arbitration, (ed. by Sarcevic, Petar), Graham & Trotman, London, 1989, 3.

[72]Article 34(2)(a)(i).

whether they have consented to it. It may be interesting to note how, like the international conventions, most national legislation in the area are drafted on the assumption that the agreement of the parties in-built in the concept of arbitration. Few domestic legislation expressly mention the agreement of the parties as a requirement for validating the arbitration agreement.[73] It is assumed that the inference is implicit and that, in any case, it is too obvious to be stated expressly. In fact the English arbitration Act of 1950, which consolidates the previous statutes codifying the common law on the subject, does not even provide for the absence of the agreement as a ground for setting aside an award, although that should not be in doubt. The reason is self-evident once arbitration is regarded primarily as a contract and therefore, in principle, should of necessity involve an agreement. Rather, English law refers to the arbitration agreement obliquely by requiring it to be in writing[74] to bring the provisions of the Arbitration Acts into operation. It seems that having taken for granted that the agreement of the parties is inherent to the nature of arbitration, the UK legislator was only concerned with its proof, the need for the agreement as a separate requirement of the process being largely to be implied. It is then used as the basis either to stay court proceedings brought in disregard of the agreement, if it exists,[75] or to deny enforcement of an award made pursuant to an inexistent or invalid arbitration agreement. The practical importance of the agreement is therefore not be doubted

French law, on the other hand, expressly provides for the challenge of an arbitration award made in the absence of an arbitration agreement or in reliance on a void agreement or one which has lapsed.[76] French law further, and expressly, requires the party seeking enforcement to provide evidence of the original agreement to submit

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[73]Whereas in domestic systems characterised by codes and statutes the requirement is stated expressly in respect of contracts generally: See for example Articles 1108 (French civil code), 1 (Swiss code of obligations), 89 (Egyptian civil code).

[74]Arbitration Act 1950, Section 32; Arbitration Act 1975, Section 7.

[75]Arbitration Act 1950 Section 4.

[76]Articles. 1484 (for domestic awards) and 1502 (for international arbitrations, pursuant to Article 1504).

to arbitration,[77] thus emphasising its significance. In Sweden, Section 20 of the Arbitration Law of 1929 states that an award shall be void "if there was no valid arbitration agreement".

Since one of the advantages of the process as a method of resolving disputes lies in the speed and effectiveness with which the award is capable of enforcement, it is usually at this stage that the practical importance of the parties' consent becomes evident. An important inquiry at that stage will be centred on finding the arbitration agreement since no national court will lend its assistance to enforce the award if, at the end of the inquiry, the submission to arbitration is inexistent or invalid. So, for example, under Article 1502(1) of Book IV of the French code of civil procedure, recognition and enforcement should not be granted if the arbitrator had entered the reference and made an award in the absence of an agreement. An award rendered pursuant to an agreement which has lapsed, or otherwise become invalid, faces the same consequence. In Germany, Article 1041(1) of the code of civil procedure provides for the setting aside of an award made to give effect to an agreement which is not valid or, *a fortiori*, did not exist. Similarly, Article 20(1)of the Swedish Arbitration Act of 1929 treats any award as void if it was handed down in the absence of a valid arbitration agreement.

IV. The Assimilation of Arbitration into Contract:

A. The Theoretical Background

We have already noted how reliance was placed on the idea of contract to explain the legal nature of arbitration in Europe. Most writers have stressed the view that arbitration rests on a contract.[78] Consent is said to provide the basis of the obligation to resolve differences through arbitration. By committing themselves to arbitration the parties make a contract which is binding on them. The making of the contract amounts to no more than the exercise of the freedom to enter into agreements.

[77]Article 1477(2); so does the United States FAA, Section 13.

[78]Redfern and Hunter, *op. cit.*; Huys, Marcel & Keutgen, Guy L'Arbitrage en Droit Belge et International, Bruylant, Brussels, 1981.

Kenneth Carlston said in 1952 that the

> fundamental legal assumption of arbitration is that it is an allowable extension of the sphere of contract. For if parties may contract concerning the affairs of their daily lives, save only in the forbidden domains of illegal and criminal enterprise, they may by the same token settle their disputes through contract. And if they should be unable to reach agreement as to the resolution of their dispute, they may instead agree to call upon third parties to decide their dispute with finality.[79]

The United States Congress House Committee Report on the draft of the U S Federal Arbitration Act 1924 had earlier indicated that "[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. *An arbitration agreement is placed upon the same footing as other contracts, where it belongs*"[80] (emphasis added).

The theory that a contract is the expression of the freedom of the contracting parties is said to be the product of the 19th century.[81] It had its source in the political and economic philosophy of the period and that immediately preceding it. It was the outcome of a philosophy that asserted and gave much importance to the will of the individual as the basis of the social order, resulting, in the domain of contracts for example, to the theory that it is the will of the parties that creates all contracts and, therefore, upon which their validity and continuous existence must depend. The political philosophy of Hobbes and, later, Rousseau, had taught that men are free and equal and that they are essentially individuals who, each for his own personal benefit, have accepted to live in society.[82] Society is the sum of individual wills, each individual conceding part of his personal liberty in return for the protection he gets

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[79](1972) 17 Law and Contemp. Probs, pp. 631-32.

[80]68 Cong., 1st Sess., House of Rep. Report, No. 96, cited by Frank J. in *Kulukundis Shipping Co. v Amtorg Trading Corporation*, 126 F.2d, 978 p. 985 (1942, Court of Appeals, 2d Cir.).

[81]Atiyah Patrick S. The Rise and Fall of Freedom of Contract, Clarendon Press, Oxford, 1979; Essays on Contract, Clarendon Press, Oxford, 1986, Essay No. 2.

[82]Gordley, James The Philosophical Origins of Modern Contract Doctrine, Clarendon Press, Oxford, 1991, pp. 214 et seq.

from the others.[83] Referring to the family, which Rousseau regarded as the only case of a society which is the direct result of nature, he stated nevertheless that if its members remain united, they "... continue so no longer naturally, but voluntarilly ..."[84], the family itself as a unit being maintained only by agreement of its members.[85] This state of affairs, Rousseau thought, "... results from the nature of man. His first law is to provide for his own preservation, his first cares are those which he owes to himself ..."[86] But Rousseau also saw the contradiction and danger inherent in asserting that man totally alienates his liberty to the collective will to derive a greater benefit from the latter for, he asks, "... as the force and liberty of each man are the chief instruments of his self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes to himself?"[87] Rousseau offers the solution in the form of an alternative statement of the same dilemma as being: "... to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."[88] In any case each individual trades part or all his liberty only because he intends it, the initial capacity of each to enter the social contract existing in his free will, acquired from nature upon birth.

In the domain of economics it was stressed that free enterprise was the best means of ensuring progress. Individuals should be left to undertake the production of goods freely, with the state providing only a minimal regulatory framework. The market place will function better and produce more efficiently if individuals are given the liberty to operate in the market without restraint, each person knowing how best

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[83]Rousseau, "The Social Contract or Principles of Political Right" in The Social Contract and Discourses, (Trans. by Cole, G.D.H.), Everyman's Library, London, 1973, Chapter 6, pp. 191-192.

[84]*Ibid.*

[85]*Ibid.*

[86]*Ibid.*

[87]*Ibid* p. 191.

[88]*Ibid.*

to protect his own interest.[89]

The new philosophy quickly gained acceptance in legal theory. It took several forms, one of the most important of which is the principle of freedom of contract. Contracts freely consented to are only one of several ways of giving expression to the freedom of the will. According to the French writer, Boris Starck, "*un lien d'obligation ne peut naître que s'il a été voulu. Vouloir être obligé et n'être obligé que parce qu'on le veut, c'est encore une manifestation de la volonté.*"[90] The result of the influence of jurists like kant, Salleils, Savigny, Domat and Pothier is that it came to be accepted that in matters of contract the will is the only basis of the parties' mutual obligations.[91]

For arbitration, to the extent that it was regarded as an extension of the law of contract, the dominance of the "will" theory and freedom of contract both meant that parties could choose to avoid the formal and regular machinery of state justice in civil matters by opting for the private process. And if in doing that the parties act in accordance and within the limits of what is accepted to guarantee the social order, the state should enforce the agreement because it is in the public interest to do so. Carlston further observed that it is well in the interest of the state:

> to ensure not only that promises involving social relations shall be kept but also that decisions of disputes by non-judicial bodies shall be binding upon parties who have appropriately consented thereto. Moreover, experience as well as logic is said to dictate the acceptance of the arbitration process as a valid social instrument, for it is a custom hallowed by centuries of social usage reaching even into recesses of Greek mythology.[92]

An immediate consequence of this development, generally, and in the area of contracts and arbitration in particular, was the increasing emphasis on individualism.

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[89] Rosenfeld, Michel "Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory" (1985) 70 Iowa L. Rev., 769.

[90] Droit Civil: Obligations, T. 2, Contrats et Quasi Contrats, 3nd Edn., Litec, Paris, 1989, p. 4.

[91] Planiol and Ripert Droit Civil Tome VI: Obligations, 2nd Edn., LGDJ, Paris, 1952, Part 1, pp. 19-22.

[92] *Op. cit.* p. 632, referring to Wolaver, (1934) 83 U. Pa. L. Rev., 132.

Individuals were to be guided in their actions by the desire to protect their own interests. Starck says of Kant that he argued that a person could not be said to act to his detriment if, with the benefit of his freedom, he contracts to confer a benefit to someone else.[93] This led the French writer, Fouillée, to say in a well known maxim,[94] that there could be no injustice in matters of contract. The will, when it acts freely, cannot do so in a manner which is detrimental to its own interest; but if it does, it would still not be regarded as an injustice since it had the choice of acting otherwise. According to Starck, "*[l]e contrat, oeuvre des volontés, est conforme aux intérêts des parties contractantes. Nul ne peut vouloir ce qui n'est pas conforme à ses intérêts.*"[95] The off-shot of this philosophy in the domain of the arbitration of state contracts is the argument that it is certainly an act of sovereignty (where sovereignty is a state's equivalent of free will for individuals) for a state irrevocably to trade away control over it's resources by concession or other public contract instruments.

B. Inconsistent with Non-western Attitude

It would be appreciated even at this stage that the attitude reflected in that approach accepted more or less for granted in Europe, quite easily found its way into the practice both of domestic and international arbitration. It is an attitude parties involved in arbitration from the developing world are still fully to come to terms with, having regard to their reaction to what are known as state arbitrations. Their repeated to disregard contractual commitments, we think, points to a failure by the countries to appreciate the full significance of contractual obligations.

What these actions also reveal, however, is the realisation by the same countries that an important element of contract doctrine is unfortunately usually absent in transactions in which the countries are involved. Fouillée's maxim is based on the assumption that, (and makes sense only when), the parties involved in the bargain are

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[93]Eléments Metaphysiques de la Doctrine du Droit (transl. Barni), 1854, p. 53, cited by Starck, *supra* p. 5.

[94]"*Qui dit contractuel dit juste*", cited by Starck, *op. cit.* p. 5.

[95]*Ibid.*

of equal strengths. Yet the position of third world parties in international arbitrations, both commercial and economic, can barely be described as one of equality, particularly given their present state of economic underdevelopment and dearth in expertise.

Full knowledge of the existing circumstances has always been a prerequisite for party autonomy.[96] Liberal thinking was based on the individual who was not only free but also well informed, for the will could not act freely unless it did so from an informed position. As Bernard Rudden says in the context of the duty under French law to disclose information which if available to the other party will be regarded as material, the absence of such information "*porte atteinte à la capacité de faire les chois rationnels, c'est-à-dire 'informés' qu'implique la théorie economique ....*"[97] In a way, economic inequality distorts a fundamental assumption of the theory of freedom of contract. What we see from the developing countries is, therefore, the reaction of parties in a contractually weak position incapable of changing or articulating certain issues to advantage, owing to the fact of bargaining from a weak position, including the failure fully to appreciate the theoretical and economic assumptions underlying the transactions they are often involved in.

C. Some Limitations

The "will theory" and freedom of contract have been the subject of much criticism and their limitations quite clearly stated.[98] We are not particularly concerned with the limits to party autonomy. We wish to mention in passing that once it was accepted that a submission to arbitration is a contract, similar consequences arising under a contractual relationship also flow. The arbitration agreement too is justifiable on the ground that it is the expression of the freedom of the parties. Subject to such obvious limitations as public policy and illegality the arbitration agreement is regarded

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[96]Rudden, Bernard "Le Juste et L'efficacité: Pour un non-devoir de Renseignements" (1985) Rev. Trim. Dr. Civ., 91.

[97]*Ibid* p. 95.

[98]Atiyah, Rise and Fall, *supra*.

as binding on the parties and irrevocable. Only the parties themselves can put an end to it; and they can only do so by agreement. One party may not act unilaterally to bring the transaction to an end. As will be seen, this perception of arbitration is not shared in many developing countries.

Of much significance, however, is the fact that the will theory is believed by some critics[99] not to have told us more than that freely made contracts are binding. We are not told, for example, whether it is the will of the parties by itself which makes the contract binding or whether the contract is binding because it has been sanctioned by the general will (the social contract) to which all private arrangements are to be subjected in the general interest. If it is the will of the parties themselves then the question that arises, as Hans Kelsen put it, is why it is that a party cannot by a subsequent expression of the same freedom revoke a previous agreement by which he had bound himself to a course he no longer wishes to pursue. Ghestin restates the question by asking why "... *en effet, c'est la volonté passée, volonté morte, qui devrait prevaloir sur la volonté vivante, de celui qui refuse d'exécuter le contrat.*"[100]

For the lawyer, the answer, suggests Ghestin, lies in the principle *pacta sunt servanda*: contracts must be binding. But the principle in itself does not explain why the contract must be binding. There ought to be a validating element not self-evident in the statement of the rule. Ultimately for Ghestin, as for Kelsen, that element is a matter both of legislative and of judicial policy, i. e., a question for the collective will, the "social contract" (today represented in the governing organs of the state) to determine.[101] The reason agreements must be binding, according to Ghestin, is that "... *le legislateur veut laisser aux sujets de droit le soin de régler eux-mêmes leurs intérêts économiques et autres, et parce qu'il estime qu'une réglementation indépendante et autonome de ces intétêrets est la solution la mieux indiquée et la plus juste.*"[102] The issue therefore resolves itself in terms of what is just. If justice is the

[99]Ghestin, "L'Utile et le Juste dans les Contrats" (1982) Rec. Dalloz et Sirey, Chronique, 1.

[100]*Ibid* p. 3, referring to Kelsen, "La Théorie Juridique de la Convention" (1939-40) 9-10 Archive de Philosophie du Droit, 33.

[101]*Ibid.*

[102]*Ibid*, citing Kelsen, *supra.*

criterion, then contracts must remain binding only if they meet that requirement, only if they are fair and just at the time they are made and at the time of performance.

The law maker in many jurisdictions has recognised that fact by introducing legislation directed at parties in arrangements which fall short of what is fair and just in some cases. It is a common practice in domestic legislation.

Implications for International Arbitration

For international arbitration, the importance of this development in disputes involving parties from the less developed world (time and again the weaker parties), especially the states, is that as a requirement for making the process also attractive to the countries arbitration tribunals should appreciate the fact that certain principles of law to which the members of the tribunals are by their training well disposed, are not immutable. From time to time the justice of the case will require that those principles be adapted to reflect the difference (in fact) of the bargaining positions of the parties. The case of *Klöckner v Cameroon*[103] was a perfect example of how the recognition of those changes was appropriately recognised by an international arbitration tribunal although unfortunately denied on appeal by another.[104] The development also dictates the need for arbitration tribunals to appreciate the fairness in the contractual arrangements not only when the contracts are made, but also during performance.

The Klöckner award was concerned with the construction in Cameroon of a fertiliser plant by Klöckner, a German multinational. The firm agreed to supply a factory on a turn-key basis and to manage it. In analysing the obligations of Klöckner and the government of Cameroon, the first ICSID tribunal appropriately acknowledged that owing to the government's reliance on the German partners in all respects, from the drawing up of the feasibility studies to the provision of expertise both in the supply and in the construction of the plant, including the technical and commercial control of the firm set up for the purpose of managing the factory, the foreign partner remained under a continuous obligation of good faith to the government. Klöckner's

[103]ICSID award of 21 October 1983 [1994] 2 ICSID Reports, 3 (in excerpts).

[104]Annulment award of 3 May 1985 [1994] 2 ICSID Reports, 95.

superior position and the government's reliance thereon were reflected in the negotiations and in the letter of the contractual arrangements. According to the tribunal,

> [t]his was a joint venture between Klöckner, a multinational European corporation, and a developing country. The plant to be built was an example of imported modern technology and engineering. Cameroon had no experience in manufacturing fertiliser products. The factory was to be acquired with the government's guarantee of payment; its output being of major importance for the country's agriculture, and agriculture being in turn the very foundation of Cameroon's economic ambitions. Cameroon counted on Klöckner to supply all that was necessary to ensure the success of the project. Klöckner had carried out the initial feasibility study. It had designed the plant and carried out the technical studies. Klöckner had undertaken to organi[s]e the long-term financing, over ten years, of the project. It built or bought from others all the machinery and all the material. It coordinated the work of supplies and sub-contractors. It was to execute, operate, and manage the project, procure necessary raw materials, and organi[s]e the marketing of output. By accepting - and indeed seeking out - these responsiblities, Klöckner had taken on a serious obligation. Klöckner claimed to be capable of supplying all the knowhow, all the material, and all the management skills necessary to ensure the project's success, the Government's only role being to supply a site and to guarantee payment of the contract price.[105]

The obligations of the parties were expressed not in one, but in a number of agreements, including a "Basic Agreement" creating a local joint venture, SOCAME, Klöckner holding 51% of the shares. Another agreement provided for Klöckner to supply the factory for which SOCAME was created to manage, the government guaranteeing SOCAME's repayments of the price of the undertaking. The "Basic Agreement" provided for Klöckner to retain exclusive responsibility for the technical

[105][1994] 2 ICSID Reports, 3, p. 26.

and commercial management of SOCAME for at least five years in the hope, (as far, it seems as the government was concerned), that within that period SOCAME would be in a position to begin the loan repayments itself.[106] A subsequent agreement between Klöckner and SOCAME (already under Klöckner's control) was signed amending the price and conditions of payment. It also assigned the government's rights to SOCAME (under Klöckner's management) without, however, releasing the goverment from its obligations to Klöckner. Thereafter all arrangements between Klöckner and SOCAME were, in fact, contracts between Klöckner as managing partner and itself.

Under those circumstances it should not have been surprising that when the multinational failed to disclose certain material facts to the government at different stages of the transaction, and also failed to manage SOCAME profitably, the arbitration tribunal held, rightly, - in our view - that the government could not be liable to Klöckner for the cost of the supply of the plant as guarantor of SOCAME's loans. In the view of the tribunal, the government had:

> trusted Klöckner. Klöckner expected that its conduct would be judged by high standards. It promised its partner, if not an unconditional guarantee of the factory's profitability at all times, at least very pronounced frankness and loyalty. Klöckner had a particularly strong obligation to keep Cameroon informed of any facts that might have a crucial influence upon the Government's decision to assume, and to continue assuming, the very onerous financial engagements upon which Klöckner now seeks to rely.
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> Klöckner failed to live up to these obligations. We do not hold that this failure was due to a fraudulent intent. But we conclude that Klöckner's failure demonstrated less than a full measure of frankness, of candor, vis-à-vis its partner, and that what it did not disclose to its partner may have been decisive in the Government's decision whether or not to

[106]Paulsson, "North-South Arbitration" (1984) 50 Arbitration, 37, p. 39. Paulsson was counsel for the state in those proceedings.

pursue the project.[107]

The tribunal thus held that the German firm had not fulfilled its own part of the contract and that it had acted in bad faith through out. It "took for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law"[108] (assumed to be the same under Cameroonian law, as the proper law of the transactions, since the relevant system of the law of Cameroon was found by the tribunal to be based on French law). Unfortunately the award was annulled by a review committee on precisely that ground. According to the annulment award, the first tribunal should not have taken the duty of good faith for granted, without specific citation of relevant authority in French law.[109] In the committee's view, the first tribunal did "not claim to ascertain the existence (of a rule or principle) but asserte[d] or postulate[d] the existence of such a "principle" which the tribunal *assume[d]* or [took] for granted"[110] (emphasis in original) to exist in French law and to be of universal recognition.[111]

The fact, however, is that the principle is now so widely accepted by French text writers[112] not to require citation of any particular authority.[113] Its acceptance

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[107][1994] 2 ICSID Reports, pp. 26-27.

[108]*Ibid* p. 58.

[109][1994] 2 ICSID Reports, 95, p. 124.

[110]*Ibid* p. 121.

[111]The appellate committee itself admitted that such a duty does in fact exist by reason of the principle of good faith of Article 1134(3) of the French civil code although it was not willing to apply it because, in the committee's own words, "the conditions of its application in positive law" have not yet been clearly worked out. That is intended as a reference to the absence of precedent for the application of that principle on the particular facts of the case: *ibid.* p. 124. But the development of French law has not been based largely on precedents like the common law; on the contrary it has always drawn extensively on the writings of jurists (*la doctrine*), who have never retreated from what in their view is correct in principle simply because of the absence of direct precedents. In fact, in the field of international commercial arbitration itself, the development of the theory of "internationalisation" of state contracts (*infra*, chapter four) is not based on any authority at all. It is the invention of arbitral practice going only as far back as the late 1950s. On the relevance of arbitral and judicial precedents in arbitrations see Klaus, Peter Berger "The International Arbitrator's Application of Precedents" (1992) 9 Journ Int'l. Arb'n., Part 4, 5.

[112]While admitting that French law recognises that a party in a dominant position is under duty in some contracts to inform the other party, Delaume, however, agrees with the ICSID appellate committee that there is no support for the duty in French law but, nevertheless, thinks that the time may have come

by the appellate committee in the Klöckner arbitration would have been a step in support of the need in those particular arbitrations to reflect the relative strengths referred to earlier of the contracting parties.

V. The Effects of Assimilating Arbitration into Contract:

A. A Primary Duty to the Disputants

The assumption that unlike a domestic court which is duty bound to the public at large, an arbitration tribunal owes a duty primarily to the disputants, follows from the very character of a contract as a relationship intended to bind only the parties concerned. It should, in principle, therefore only be of benefit to the parties in the first place. We have already pointed out that the emphasis is on the agreement of the parties; it gives rise to the process and can also terminate it. Since the process is created entirely by the will of the disputants, it is regarded as an essentially private institution which the parties can model and remodel as they wish. The emphasis on the parties' will may lead to the result that arbitral justice is by, and for, the parties in dispute and not necessarily objective as when a court of law determines an issue by reference to the law and on considerations of the interests of the wider public. The arbitration agreement is the most important source of the tribunal's powers and it is compelled to do justice only in accordance and within the limits of the powers

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to "... reassess, in the context of economic development agreements of long duration, traditional notions" to bring them in line with the demands of international trade: "The Myth of the Lex Mercatoria and State Contracts", in Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant, (ed. by Carbonneau, Thomas E), Dobbs Ferry, New York, 1990, 77, p. 89.

[113]The duty to collaborate ("le devoir de coopération), which is what was in issue in the Klöckner award, consists in not withholding information which might disable the other party from realising his expectation from the contract, particularly when, as in that case, it is a joint undertaking: Starck, *op. cit* p. 399, para. 1144; although the the application of the principle in practice will depend on the nature of the transaction and the facts and circumstances of the particular case: Terré, Simler and Leguette, Droit Civil: Les Obligations, Précis Dalloz, 5th Edn., 1993, paras. 416 & 430. Like Delaume, many authors have stressed the relevance of the principle to international transactions of the kind involved in the Klöckner award: Morin, "Le Devoir de Coopération dans les Contrats internationaux" (1980) 6 Dr. Prat. Comm. Int'l, 9; Picot, "L'Obligation de Coopération dans L'Exécution du Contrat" (1988) JCP, I, 3318; Bénabent, "Rapport Français", in La Bonne Foi, Travaux de L'Association Henri Capitant, Vol. 43, Litec, Paris, 1992, 291. See also Mestre, "D'une Exigence de Bonne Foi à un Esprit de Collaboration" (1986) Rev. Trim. Dr. Civ., 100; *contra*, Rudden, Bernard, *op. cit.* (1985) Rev. Trim. Dr. Civ., 91.

conferred upon it by the parties. The tribunal can only decide on that which the parties have agreed and in a manner directed by them. It cannot apply a principle or rule of law or a different perspective of what it considers to be appropriate on the facts of the dispute if to do so would be against the aspirations of the parties. The objective justice of the case and the effect of the decision on the rest of society are secondary considerations since a duty is owed primarily to the disputants and only incidentally to the public at large. This is consonant with the fact that arbitration is a private dispute resolution mechanism, since an institution which is private in nature cannot have as its main purpose the discharge of functions of a public character.

(1). A Trend Supported in International Practice

This perception of the role of arbitration is reinforced by recent trends in arbitration law world wide. More and more the parties and tribunals constituted by them or on their behalf are given wider powers than before to retain control over the process. At one time it was thought that judicial review of the merits of arbitration awards was desirable in the public interest to ensure conformity and consistency with the law. But as arbitration has come to be regarded over the years - wrongly or not - as a private justice mechanism affecting essentially the interests of those concerned, it has become conventional in domestic and international law to exclude judicial review of arbitration awards on the merits, and to allow review only on a limited number of procedural grounds (*infra*, chapter five).

(2). A Trend Supported in Domestic Law

The trend also finds support in domestic laws on arbitration. English law, for example, abolished the case stated procedure in 1979[114], thereafter allowing parties the choice in international arbitrations to exclude appeals on the merits[115] except in

[114]Arbitration Act 1979, Section 1.

[115]Section 3. Exclusion agreements apply to domestic arbitrations only if made after the commencement of the arbitration: Section 3(6).

respect of certain specified transactions (insurance, commodities and shipping[116]). All three exclusions were originally retained in the draft of a new arbitration bill for England as circulated in February 1994 by the Department of Trade and Industry),[117] but not retained by the second draft of the Departmental Advisory Committee issued in July 1995.[118] France passed new legislation in 1981[119] and, consistently with what was already common practice there, totally excluded appeals on the merits, with Switzerland following in 1988.[120] As far back as 1965, however, the World Bank Convention for the Settlement of Investment Disputes between foreign investors and investment receiving States (all developing countries) had already done so by excluding annulment by an ICSID "Ad hoc" (appeal) Committee of a Convention award other than on a limited number of procedural grounds.[121]

An extreme, if somewhat misguided, form of this trend was introduced in Belgium in 1985 when a law was enacted providing that Belgian courts may not entertain an action to set aside an award unless one of the parties is a Belgian or domiciled there or, in the case of a corporation, has a place of business or is incorporated in Belgium.[122] The wording of the law suggests that the section applies even to an award rendered in Belgium itself once it is characterised as "international"

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[116]Section 4(1), unless the exclusion agreement is made after the commencement of the arbitration: Section 4(1)(c)(i). Exclusion agreements regarding the same type of contracts have no effect in domestic arbitrations: Section 4(1)(c)(ii).

[117]Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill, reprinted in (1994) Arbitration International, 191.

[118]Consultative Paper on an Arbitration Bill and Draft Clauses of an Arbitration Bill, July 1995.

[119]New code of civil procedure, Book IV Part 2.

[120]Swiss Law on Private International Law, December 1987.

[121]Article 52. The consequences for ICSID arbitration of not complying strictly with those provisions are critically discussed by Michael Reisman, following two Ad hoc Committee awards in Klöckner and Amco: see "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) Duke L. J., 739. But see Broches, Aron "Observations on the Finality of ICSID Awards" (1991) 6 ICSID Rev.,-FILJ., 321. The Amco award is reported in [1993] 1 ICSID Reports, 509.

[122]Article 1717(4) of the Belgian Judicial Code.

by reason of it involving foreign parties.[123] The judicial precedent to that trend had however been set in France in 1980, where the Paris Court of Appeal, no doubt under the spell of the over liberal attitude to arbitration, declined to entertain the challenge of an award[124] made in France on the ground that the arbitration was not subject to French law because the parties and the transaction had no connection with France and the arbitration itself had not otherwise been attached to the French legal order.[125] The danger with this trend is that it could easily lead to a breakdown in the only control mechanism in arbitral justice,[126] by creating awards which cannot be set aside anywhere. Increasingly, however, the attitude adopted is that the state should make limited interference with the process, presumably because the justice of arbitration is the justice of the parties involved.

Meanwhile dispute resolution before now was a matter of public responsibility in Europe. In the Anglo-saxon world the courts regarded the final settlement of disputes as a state prerogative to be exercised by them and would recognise no attempt by private parties to evade their jurisdiction. In England and the United States, for example, the arbitration agreement was seen as an attempt to oust the courts of a jurisdiction they were jealously determined to retain.[127] Thus, an agreement which purported to exclude the parties from recourse to the courts to determine their contractual rights and obligations through arbitration was said in *Thompson v Charnock*[128] not to be "sufficient to oust the courts of law or Equity of their

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[123]The Belgian Law was received with mixed reactions: see van Houtte "La loi Belge du 27 Mars 1985" (1986) Rev. Arb., 29 (favourably) and Paulsson, "Arbitration unbound in Belgium" (1986) 2 Arbitration International, 1 (qualified).

[124]*Götaverten Arendal v Libyan National Maritime Transport Co.*, (1980) Rev. Arb., 524.

[125]But see Article 1502 of the new French code of civil procedure which sets out the grounds, pursuant to Article 1504, for the challenge of an international award in France. No court in France will make a similar ruling today. See also Gaillard, "Arbitrage Commercial International", in Juriclasseur de Droit International, Vol. 11, Fasc. 586-10 pp. 9 et seq, paras. 29 & 31.

[126]On control mechanisms in arbitration, see Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair, Duke University Press, Durham, 1992.

[127]See the judgment of Frank J. in *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 126 F.2d, 978 (1942 U.S. Court of Appeals, 2nd Cir.), where the judge goes to considerable length to account for that hostility.

[128]8 Term Rep. 139 (1799); 101 E.R. 1310 [1799].

jurisdiction."[129]

In *Scott v Avery*[130] the doctrine that parties could not contract out of the jurisdiction of the courts was justified on grounds of public policy.[131] On the prevailing view arbitration by its nature involved the exercise by private persons of a judicial function which in principle should be administered by a public constituted body such as a court of law. As the process was said to be based on two elements, one contractual and the other judicial, the latter was also said to remain within the exclusive domain of the regularly constituted courts. The exclusive character of the court's jurisdiction, as a matter of public policy, overrode the contractual element of arbitration and, hence, the prohibition against all attempts to evade the reach of the courts by submission to arbitration in exclusive terms for a final solution. As late as 1922 the Court of Appeal of England was still of the view that to allow parties in an arbitration to oust the jurisdiction of the courts by agreeing to exclude judicial review of their award on the merits by way of the then case stated procedure was contrary to public policy. The prerogative of the Regent's courts could not thus be shut out: "[t]here must be no Alsatia in England where the King's writ does not run", said Lord Justice Scrutton.[132] Lord Justice Banks added that it was necessary that the law (by which he meant the courts) should retain sufficient control over the arbitrators

> to prevent and redress any injustice on the part of the arbitrators, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitrations is to allow the arbitrator, or the arbitration tribunal, to be a law unto himself or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words, to be outside

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[129] 101 E. R., p. 1310, per Lord Kenyon, C.J.

[130] (1856) 5 HL Cas, 811; 10 E.R., 1121 [1855-56]; [1843-60] All E R, 1.

[131] For a critique of the use of public policy in that situation see Williams, Glanville L. "The Doctrine of Repugnancy - II: In the Law of Arbitration" (1944) 60 LQR, 69.

[132] *Czarnikow v Roth, Schmidt & Co.*, [1922] 2 Q.B. 478, p. 488.

the law."[133]

In France the law distinguished an agreement to refer an existing dispute (a submission) from an agreement to refer a future dispute to determination by arbitration. The old code of civil procedure expressly recognised the "submission" by providing for its validity that certain requirements be met[134] but failed even to mention the arbitration clause (the "clause compromissoire). In the circumstances the courts held that an agreement to refer future disputes to arbitration, when they arose, was not lawful and could not be enforced either on grounds of public policy or, by assimilating it to a submission ("compromis"), for failure to comply with its requirements.[135] It may be that had the statute not expressly recognised the "submission" by providing the conditions upon the fulfilment of which it would be upheld, the French courts would have disregarded it on grounds of public policy, on the basis that it constituted an attempt to shorten the arm of the courts.[136]

One should to note, however, that the French attitude was not followed all over the civilian world under Napoleonic influence.[137] It was argued,[138] convincingly in our view, that the position taken by French courts was neither correct in law, statutory or at common law ("droit commun"), nor did it reflect the customs and practices then prevalent in France. Johnson argued in Québec that neither law, principle, nor policy prohibited the use of arbitration clauses (the "clause compromissoire") as the decided cases seemed to suggest in France. Relying on the older authorities he argued that the "clause compromissoire" (the arbitration clause in

[133]*Ibid.* p. 484.

[134]Articles 1006, 1012, 1017 and 1028 of the old code of civil procedure.

[135]Cassation, 10 July 1843, Sirey, I, 561; Dalloz, I, 343. They were probably not wrong in view of the subsequent development noted below.

[136]Even today France, in principle, retains the most anachronistic attitude toward a submission to arbitration of future disputes (the "clause compromissoire") which, under Article 2061 of the civil code, is to be regarded as null and void unless otherwise provided for by legislation: "[l]a clause compromissoire est nulle s'il n'est disposé autrement par la loi." For a critique of Article 2061 see Jarrosson, Charles "Perspectives D'Evolution du Droit Français de L'Arbitrage: La Clause Compromissoire" (1992) Rev Arb, 259.

[137]See its treatment in Belgium, below.

[138]See Johnson, Walter Seeley The Clause Compromissoire: Its Validity in Quebec, Montréal, 1945.

contemplation of a future dispute) fell well outside the domain of procedural law and, therefore, did not have to comply with the provisions of the then civil procedure codes both of France and of Québec requiring, under Article 1006, that a submission to arbitration should specify the subject matter of the dispute and the appointed arbitrator, in default of which the submission would be void. The "clause compromissoire" was governed by the general principles of the common law of contract, which would have upheld its validity. It therefore remained a valid common law contract. Johnson thus argued that it would have been most illogical to suggest that "a substantive civil law contract, the clause compromissoire, is illegal because the Code of Procedure requires that a different contract, the compromis, must be made in a special form."[139]

It is therefore not surprising that in Belgium, where the same provisions were in force, the Court of Cassation consistently declined to follow the French practice. It regarded such clauses as binding either as any other term of the contract in which it was expressed or as an independent contract if expressed separately, governed by ordinary common law principles of contract law.[140] In three old cases decided almost at the same time as the French courts rejected the validity of the "clause compromissoire",[141] the Belgian Court of Cassation held consistently that an agreement to submit future disputes to arbitration was not void for non compliance with the requirements of Articles 1006, 1012, 1017 and 1028 of the Belgian code of civil procedure (which were the same as the corresponding articles of the French code, word for word).

In *Société des Bèlges Réunis c. Vanelsem,*[142] an insurance company sued an assured for, it seems, outstanding premium. The defendant requested a stay of the court action and a reference to arbitration in accordance with the terms of the policy. The court rejected the defendant's plea and ordered payment of the amount due on the ground that the clause in the policy referring future disputes to arbitration did not

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[139]*Ibid.* p. 21.

[140]See Bernard, Alfred L'Arbitrage Volontaire en Droit Privé, Ets. Emil Bruylant, Brussels, & L.G.D.J., Paris, 1937, pp. 86-91.

[141]See *Societé des Belges Reunis c. Vanelsem,* Pasicrisie, 1850, Part 1, p. 81; *De Doninck c. Cagniart,* Pasicrisie, 1879, Part 1, p. 418 and, *Dugniolle c. Ceulemans,* Pasicrisie, 1888, Part 1, p. 100.

[142]*Ibid.*

comply with the requirements of Article 1006. On appeal, however, an appellate court of Anvers and the Belgian Court of Cassation held that Article 1006 only applied to a submission to an already existing dispute, the "compromis". Article 1006 did not govern submissions to future disputes, which had not expressly been outlawed by legislation. It therefore remained valid under the common law and did not offend public policy. The position of the Belgian courts was correctly stated by the appellate court of Anvers in terms adopted by the Court of Cassation and repeated consistently in subsequent appeals. The court stated:

> *Attendue que la clause compromissoire n'est prohibé par aucune loi; qu'elle est même expressément admise dans le cas déterminé par l'art. 332 du C. de comm.; que le législateur, en portant l'art. 1006 du C. de proc. civ., n'a pas eu en vue que le compromis; qu'il a pu exiger les conditions spéciales de ce contrat pour la validité de la clause compromissoire; dont les termes généraux le plus souvent, notamment dans les entreprises, rendent impossible la précision des contestations à naître, le choix anticipé des arbitres le mieux à même pour en connaître, et que cette convention n'étant point interdite expressément par la loi, est obligatoire si, comme dans l'espèce, elle réunit les conditions essentielles requises par l'art. 1108 du C. civ. pour la validité de tout contrat.*[143]

The Belgian attitude would have appeard easier to reconcile with the doctrine of party autonomy.

B. Inconsistent with Freedom of Contract?

It is important to note that irrespective of how it might have developed in the different western jurisdictions, the doctrine that parties could not by agreement exclude the powers of the courts to enter a dispute and adjudicate on the parties' respective rights was inconsistent with the growing influence of freedom of contract. In the three Belgian cases referred to above the Court of Cassation implicitly recognised the point by relying on party autonomy as one of the grounds for rejecting the suggestion that

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[143]Pasicrisie, 1850, (Cassation) part 1, p. 83.

the arbitration clause (as distinguished from the submission) was not valid under the law of that country.[144]

The question then was whether the position in Anglo-American law on the same point (and French law, although to a lesser extent, since the French system at the time recognised the right of the parties to contract out of the courts in the case of the submission of an already existing dispute) was going to remain unchanged in the face of the increasingly assertive principle of freedom of contract.

Scott v Avery itself was only concerned with the validity of an agreement to submit to arbitration as a pre-condition to resort to the courts for a final determination of the issues. It had been argued for the defendants that no action could be brought against them until the dispute had been determined in arbitration proceedings as provided for under the contract. The House of Lords upheld the defence on the ground that the agreement was not an attempt to oust the jurisdiction of the courts. It was only a condition precedent to the right of the plaintiff to have recourse to the courts, if need be for the cause of action only arose upon the making of an award in an arbitration.[145]

Looking back, it is now obvious that the House was there indicating what way the law would develop in the future. Lord Campbell stated that "... it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract".[146] Coleridge J., one of the judges requested to advice the Lords, expressed doubts as to whether the principle that parties could not contract out of the courts was satisfactory although on the authorities he was bound to treat the principle as settled law.[147]

Neither was it truly offensive to public policy.[148] *In Scott v Avery* itself no attempt was made to justify the rule on grounds of public policy. According to Lord Campbell, what the cases (including *Thompson v Channock*) seemed to have decided

[144]Alfred, *op. cit.*

[145]10 E.R., pp. 1136 & 1138.

[146]10 E.R., p. 1138; [1843-60] All Eng Law Reps., 1, p. 6.

[147]10 E.R., p. 1133.

[148]Williams, *op. cit.* (1944) 60 L.Q.R., 69.

was that an action could still be maintained notwithstanding the existence of an agreement to refer the dispute to arbitration. That did not necessarily render the arbitration clause void. It remained valid but the courts could simply not deny a party the right to have the same dispute determined by an action in court.[149] In fact Glanville Williams denies that an agreement to refer future disputes or a submission to arbitration could possibly be against public policy, for, that would have been inconsistent with two other principles of law, the first being that an arbitration agreement was effective to the extent that an action for damages could be brought for its breach. The second rule was that if an award was made before the authority of the arbitrator was revoked the award was enforceable. As Glanville Williams put it, "[t]hese two rules would be inconceivable if an arbitration agreement were regarded as contrary to public policy."[150]

A passage of Lord Campbell in *Scott v Avery* sets out what would have been the correct explanation for the rule as far as the courts were concerned. The law Lord stated that the rule

> probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction[151] ... Where an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction. That is all, and there is no doubt about that. This is the foundation of the doctrine that coutrs are not to be

[149]We should remember that even today it remains a matter of discretion in England whether the courts will stay court proceedings brought in disregard of an agreement to submit to arbitration: Section 4(1) Arbitration Act 1950 which states that a court "may" and not "shall" stay court proceedings brought in breach of an agreement.

[150]*supra* p. 71.

[151]Contra, Derek Roebuck, who describes the conventional view based on the contest between the courts for jurisdiction as a "myth" and that on the contrary "[t]he truth seems to be that from the earliest times the courts worked in comfortable symbiosis with arbitrators": "The Myth of Judicial Jealousy" (1994) 10 Arbitration International, 395. Glanville Williams, supra, p. 70, had already indicated that the contest for jurisdiction had "lost its intensity" by the time of the "earliest recorded statement of the rule ... in 1743 ...", such that Lord Campbell's statement of its origin should be taken with care.

ousted of their jurisdiction.[152]

Both justifications would however have lost their validity with time. If the courts had persisted with the hostility[153] to arbitration, the resultin increase in commercial litigation would have given rise to unmanageable delays and certainly have reflected badly on the machinery of the courts, thereby defeating their purpose. In the process the courts have been promoting recourse to arbitration as a means of diverting pressure from themselves and to improve the administration of justice. Courts and arbitration have become partners in the same endeavour, not competitors for jurisdiction.

Subsequently the hostility toward arbitration was abandoned,[154] in essence as an undue infringement on the doctrine of party autonomy and on freedom of contract. Thus, in the absence of illegality and subject to the clear intention of the parties, which in *Scott v Avery* for example was not in dispute, there was no ground to disregard an arbitration agreement. It then became the rule that other than in exceptional circumstances the intention of the parties must be upheld. The development in favour of party autonomy was fast and it has long since been the position in all major systems that the parties can by agreement evade the courts. The courts themselves have upheld that view and have been supported world wide in domestic legislation requiring them to defer to the jurisdiction of an arbitrator where a party brings court proceedings in disregard of a submission to arbitration.[155] In fact it is mandatory in the United States.

[152]10 E.R., p. 1138.

[153]Ian MacNeil also takes the view that the picture painted of U S judicial and legislative hostility to arbitration during this period is not correct and that, on the contrary, the system was largely supportive of arbitration: American Arbitration Law: Reformation, Nationalization, Internationalization, Oxford University Press, New York, 1992.

[154]See for example the arbitration Act 1884, Section 1.

[155]See for example UNCITRAL Model Law, Article 8(1); U.S. Federal Arbitration Act, Section 3; English Arbitration Act 1950 Sectio 4(1); Nigerian Arbitration and Conciliation Decree 1988 Section 4(1).

A development similar to that in England was also taking place in France.[156] Freedom of contract has prevailed. There has been limited public interference with arbitration through the courts, sometimes intended to show that ultimately they remain in control, although in the main to lend their assistance to the smooth functioning of the process. There has been considerable legislative intervention, but rather in favour of making the parties greater masters of the process. In the main, therefore, the parties retain control from submission to award, particularly as they can also revoke the authority of the arbitrators at any time during the proceedings.

The global acceptance of party autonomy also promoted the contractual element of arbitration by diminishing in significance the judicial element. Once the analogy was drawn between private contracts and private justice, arbitration being regarded as falling under both, it became easier to accept the will of the parties as controling even when used in the pursuit of wholly private interests.

This conception of arbitration as an essentially private process intended primarily to serve the interests of individuals with limited consideration for the interests of the wider public differs sharply, as we argue in chapter two, from the perception of justice and, through it, of any organised means of redressing wrongs in many parts of the developing world.

C. The Agreement is Irrevocable

The principle that unless a contrary intention is expressed the agreement to submit to arbitration is irrevocable is, again, the result of its essentially contractual character. Contracts, once made, are binding on the parties. Since an arbitration agreement or submission is a contract it must as all other contracts be binding. One of the parties cannot unilaterally modify or terminate the agreement unless he is allowed to do so under the contract, since arbitration agreements are enforceable as such. Should one of the parties default in his obligation to submit to arbitration the other party can sue for damages for breach of contract, although he may only recover nominal damages. A better remedy would be to compel, by indirect means, the

[156]See David, René L'Arbitrage dans le Commerce International, Economica, Paris, 1982; Carbonneau, Thomas "Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce" (1984) 19 Texas Int'l. L. J., 33.

recalcitrant party to arbitration by giving effect to a valid agreement or submission. Section 4(1) of the English Arbitration Act of 1950 allows a party to apply to the High Court for a stay of proceedings brought before the court by the other party in default of the arbitration agreement. If appropriate, the court will make an order to the same effect, thus effectively compelling the party in default to have the dispute determined by arbitration. The same provision was re-enacted verbatim in the Arbitration Act of 1975, which gave effect in English law to the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In addition the 1975 Act makes the reference to arbitration by the courts mandatory.

It is not clear whether the court can in reliance on the same section stay proceedings "not originally brought before any court" as required by Sections 4 and 1 of the 1950 and 1975 Acts.[157] It may be that this situation would be assimilated to a case where there is a simple refusal by the party in breach to proceed with the settlement by arbitration, in which case, if he would have been the plaintiff in the proceedings, he may have to abandon his claim. If he were not the plaintiff, under the law, the claimant may proceed to arbitration and obtain an award by default against the recalcitrant party (respondent in the arbitration) with an order of a competent court to enforce the award on its terms.

In France Article 1458 of the new code of civil procedure requests the courts to decline jurisdiction whenever there is a valid arbitration clause or submission in respect of the matter brought before them. Meanwhile in Germany the courts are required under Article 1027 of the code of civil procedure to dismiss any action brought for any claim which ought to have been settled by arbitration.

The New York Convention and other international instruments on the subject, including institutional rules of arbitration, contain similar provisions.[158] The UNCITRAL Model Law (Article 8(1)) directs a court before which proceedings are brought in disregard of an arbitration clause to refer the parties to arbitration. Article 8(2) goes even further by allowing arbitration proceedings to be commenced or

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[157]It can, in the United States, under Section 4 of the FAA.

[158]See for example Article VI(3) of the European Convention on International Commercial Arbitration.

continued even while the issue is pending before the relevant court. This appears to be one of the unique features of the UNCITRAL initiative. It is unique in that it opens the possibility for the arbitration tribunal and the competent domestic court to consider the validity of the arbitration agreement concurrently notwithstanding the risk of conflicting decisions. It has been decided by the courts in France, for example, that arbitrators can proceed with the hearing of the main claim in the arbitration notwithstanding pending annulment proceedings of a preliminary award made in the course of the same arbitration.[159] That of course raises the important question regarding the effect and extent of such a provision, especially in the light of the overriding supervisory jurisdiction of domestic courts over the validity of an arbitration clause. Broches says that its purpose is to protect the arbitration proceedings against dilatory tactics: "[a] party should therefore not be precluded from initiating or continuing arbitral proceedimgs by the fact that the matter had been brought before a court."[160]

That reinforces the security of arbitration clauses by recognising the fact that a party may not by indirect means frustrate an undertaking to arbitrate without the consent of the other party. It also preserves the dignity of the process. Moreover, the authority given the tribunal to proceed with the arbitration although there may be proceedings in court regarding the jurisdiction of the tribunal is consistent with the "competence / competence" doctrine which gives the tribunal the authority to rule on its own jurisdiction (under Article 16 of the Model law for example) subject nevertheless to the final review of the competent court.

D. The Process is Irrevocable

It follows from above that a party cannot withdraw before the proceedings are concluded unless he is released by the other party to the arbitration agreement. If he cannot unilaterally revoke the agreement, much less can he stop the proceedings

[159] *Gatoil v National Iranian Oil Company*, Court of Appeal decision of 17 December 1991 [1993] Rev Arb., 281 and *Société Industrial Export-Import v Société GECI et GFC*, decision of 9 July 1992 [1993] Rev Arb, 303.

[160] Commentary on the UNCITRAL Model Law on International Commercial Arbitration, Kluwer, Deventer, 1990, p. 48.

already in progress. The parties consent not only to the initial submission but also to the entire course of the process. A party is therefore bound by the arbitration from agreement to award. Failing a proper release or in the absence of a settlement by both parties terminating the proceedings, a party will be at fault if he resiles at any time before the award is made. It remains the law that consent by the parties to arbitration is valid both in respect of the submission and of the conduct of the proceedings.

By consenting to arbitration the parties are also deemed to have accepted, in advance, that the award resulting from it will be final and binding. The English Arbitration Act of 1950[161] makes clear that by submitting to arbitration the parties are deemed to have accepted that the award will be final and binding on them. That is an implied undertaking, given in advance, from which the parties are not allowed to default. Thus, unlike the practice in the customary system of some developing countries,[162] no further consent is required for the award to beome binding.

Under the widely used enforcement regime of the New York Convention the courts of a contracting state are requested to enforce an award immediately upon presentation of an authenticated copy and upon proof of the original agreement or submission to arbitration. The domestic regimes of many countries are similar in requirements to that of the Convention. Invariably what is required is no more than a genuine copy of the award supported by some evidence of the original agreement.[163] Leave will then be given to enforce the award if not successfully challenged. In many countries the award is assimilated to a judgment of the court and enforced in the same way.[164]

It is important to bear that aspect of western arbitration in mind since, as we indicate in the next chapter, it differs with the practice in some other parts of the world. It is obvious that in the western understanding of arbitration there will be no need for the process if one of the parties could withdraw without constituting a breach

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[161]Section 16; see also Article 1040 of the German code of civil procedure.

[162]See the case of Nigeria, *infra*, chapter two.

[163]See for example Articles 1477 and 1499 of the new civil procedure code of France applicable respectively to domestic and international awards in that country.

[164]International Execution Against Judgment Debtors, (ed. by Campbell, Dennis), Sweet and Maxwell, London, 1993.

of contract in the traditional sense. It would be remembered that the position of the law prevailing in the common law jurisdictions after *Vynior's case*[165] was that parties could withdraw from the arbitration proceedings at any time prior to the award.

Conclusion

The usefulness of an award depends on whether it can be enforced. That is why there is such a strong domestic and international legislative framework to secure compliance with arbitration awards properly made.[166] That framework is well in line with the fact that the award is the outcome of a process based on contract and, therefore, binding. When we come to examine arbitration as understood elsewhere we discover that in some cases the the agreement is not binding, and that in others both the agreement and the award are not binding. The usefulness of arbitration in these systems does not lie in the importance placed on its binding character (since it might technically not be binding) or in the way in which compliance with its outcome is enforced, but on the overrall perception of the process and the manner in which it is conducted to lead invariably to a voluntary compliance with the settlement. That is only possible because the participants view it not as a means of attributing fault and thereafter declaring rights, but as means of healing a crack in the social order, caused by the dispute from which the arbitration arose. This other perception of arbitration in part underlies the attitude of parties from the developing world to international arbitration in its present form, particularly when applied to contracts of a certain type.

The fact that international arbitration has failed to address this feature of arbitration as understood elsewhere (including some countries with advanced economies in Asia such as Japan) leaves the institution open to at least one line of criticism: it is not global in its conception.[167] It has failed to incorporate other characteristics of arbitration as known in the other group of countries. We address those characteristics in chapter two.

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[165]8 Co. 80a, 81b (1909); 76-77 ER, 595 & 597.

[166]The principal international enforcement instrument being of course the New York Convention of 1958.

[167]David, Réné "David on Arbitration in International Trade" in The Art of Arbitration: Liber Amicorum Pieter Sanders, (ed. by Schultsz and van den Berg), Kluwer, Deventer, 1982, 89, p. 92.

CHAPTER TWO

ARBITRATION IN DEVELOPING COUNTRIES: CONCEPT AND NATURE

In the previous chapter we examined the nature of modern western commercial arbitration by looking at some of its main characteristics. We concluded that although it is a private dispute resolution mechanism, often free from the rigour in formality and substance involved in litigation, it remains a basically adjudicatory process in which the tribunal is expected to reach a decision as to the respective rights and obligations of the parties out of conflicting claims. We will below examine in a similar light the character of arbitration as understood in many developing countries. We conclude here that it is not necessarily adjudicatory in most of these countries. In the process we highlight the differences in the same institution between the two systems. These differences, we suggest, explain in part why arbitration has been accepted in the countries concerned with only little enthusiasm. The differences exist in the concept as in the practice of the process. They also reflect a fundamental difference between dispute resolution in the customary dispute settlement models of these areas and those of Europe.

I Arbitration and Dispute Settlement in Developing Countries:

A The Conflict between the Individual and the Collective

In the first chapter we indicated, with reference to the western model, that there is a difference between the individuals who make up a community and the community itself, which provides the basis for the corresponding difference between the private interests of the individuals and the general interest of the community. Although the difference was not expressed in general terms applicable to all societies, that it exists is not in dispute.[1] However, what at any given time will amount to the

[1]Johnson, Conrad D "The Idea of Autonomy and the Foundation of Contractual Liability" (1983) 2 Law and Philosophy, 271.

public interest and to what degree it should or should not prevail over the private interest also varies from one society to another. The difference is dictated partly by the members' shared perspective of the role of the individual in society. It is also dictated by other factors, such as the level of material advancement in tecnology, of the economy, and in social facilities.

In Europe, individualism was partly the product of industrialisation. Liberalism in social, political and economic thought, and particularly about the role of the individual in society, were also in part the product of the new means of production and accumulation of wealth. We noted that private arrangements were regarded as the best means of producing goods and securing progress.[2] The intervention of the state, if at all, on behalf of the rest of the community was to be minimal. Private arrangements and private interests should in all circumstances be upheld, unless the public interest was affected in a material way, and there were compelling reasons why they should not be given effect to. The interest of the general public became of secondary importance and, in any case, its success depended on the extent to which individuals were free to pursue private goals. It was the belief that it would not be in the interest of the public if the state, acting for the community, were to interfere excessively in privately arranged deals. What was just and fair for individuals was, through them, also fair and useful to the rest of the society.

In many developing countries that scheme is reversed. The emphasis shifts from the individual to the general.[3] The collective interest is paramount and individualism submerged. The group interest takes precedence over private interests and justice is regarded from the point of view of what is primarily in the public interest.[4] In these societies the "social contract", if such a thing is recognised, precedes the private contract if not in time, certainly in importance. The validity of any private arrangement (contractual or not) is measured by reference to its public utility. This might have been so because in the main the needs of the individual were

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[2]Rosenfeld, Michael "Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory" (1985) 70 Iowa L. Rev., 769.

[3]Allott, "African Law" in An Introduction to Legal Systems (ed. by Derrett, J. D. M.), Sweet & Maxwell, London, 1968, 131.

[4] Onuoha, Bede, The elements of African Socialism, Deutsch, London, 1965.

seen as part of the needs of the wider community to which he belonged. All property, including land, farms, the product of the farms and even children were regarded as belonging to the community. There was limited private ownership, so that the elements of individualism were absent. There was no mass production and no dependence on it, on trade and on accumulated wealth. On the other hand there was economic and social dependence by members of society on each other. The interdependence was bound to give rise to a collective way and a collective perspective of life. It is this collective perspective of life which in part explains the above difference in the relationship between the position of the individual and that of the group in Europe and in developing countries.

B. The Philosophical Background

We have already observed how the idea that an arbitration is a contract was based on the doctrine of freedom of contract, which arose out of the political and economic thought of 18th and 19th century Europe. The politics of Thomas Hobbes had treated the individual, instead of the group, as the ultimate and as the basic unit of society. All human activity was considered as the product of the individual's will. We found this not only in Hobbes but also in Kant[5], according to whom the free will constitutes the only source of legal obligations and of justice. Although Jean Jacques Rousseau emphasised the "social contract", he spoke of it not as an overriding social order but as the outcome of the manifestation of the will of individual members of society to ensure that the property and liberty of each are protected. The social order would therefore be nothing other than the aggregate of the individual will of the members who constitute it. The social contract exist because individual members of society have consented to its creation, with its continued existence explained on the ground that future generations, by failing to exercise their right of revocation, are assumed tacitly to have approved of it.

In third world communities, the existence of society is not accounted for on

[5]The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as a Science of Right, (translation by William Hastie), Edinburgh, Clark, 1887.

the basis of a contract, be it a "social contract". Society, it has been argued,[6] is the product of nature and not of any free will. The society is viewed not as an aggregate of individuals, each with his own personal rights and liberties, all grouped together in a "contract" but rather in terms of groups, with the family, instead of Hobbes' and Rousseau's individual, being treated as the basic social unit.[7] The village, the clan and the tribe are treated as the larger groups. Today, that unit would be extended to include the modern state, brought about by many years of foreign rule. These units are all part of one social organism and held together not by any contract but, initially, by nature through the bond of kinship[8] (for the family) and subsequently through the influence of other social and natural factors (in the case of the village, the clan, the tribe and the state). Whereas Rousseau and Hobbes saw society as an aggregate of individuals, third world communities see and treat the society itself as the basic unit. The society is an aggregate of itself. The separate identity of its individual members disappears or is simply regarded as never having existed, in preference for the collective identity of the society, against which every individual action is subject.

What then emerges is the dictatorship of the society over its individual members. Private arrangements become subject to the interest of the rest of the community which is considered paramount. It is community interest which validates or invalidates all private arrangements. It provides the standard by which private bargains are tested and upheld or rejected. The freedom of the individual does not arise independently but it is acquired from society which confers it.

In 1940, Hans Kelsen criticised the principle of party autonomy on that ground.[9] He rejected the theory that contracts are in themselves capable of creating rights. If they did, it could only be by delegated legislation. It is only by fiat of the law maker that party autonomy is conferred with the power to creat rights and obligations or to modify previous ones. Since party autonomy is not self-generative of rights, but does so only by virtue of its having been permitted by the law, it cannot,

[6]Onuoha, *op. cit.*

[7]*Ibid*

[8]*Ibid*

[9]"La Théorie Juridique de la Convention", (1939-40) 9-10 Archive de Philosophie du Droit, 33.

on its own, provide a sufficient basis for the rule that contracts are binding. In a sense, contracts are binding not so much because the parties have volunteered to it but primarily because the society, having found it to be in its own interest to do so, has conferred upon contracting parties the power to create circumstances binding on themselves. As concerns arbitration, Kenneth Carlston observed that if the general will (represented by the state) does not prohibit arbitration, it is the assumption that the private aims pursued will also serve the public interest.[10] This power is conferred by public authority to be exercised consistently with the public interest. Thus, even where party autonomy is conceded, it must still be made subject to the general will from which it arises. Individualism and the supremacy of the will become secondary to the general will.

II. A Different Perception of Adjudication and the Role of Arbitration:

The Collective View of Justice

Once the role of the individual is thus undermined, the community's perception of justice is bound to change. The nature of arbitral justice administered is also bound to reflect that conceptual background in that, in the relationship between group and private interests, the group stands out victorious. Whenever in conflict with the general interest, individual rights and freedoms, no matter how fundamental they may be, are bound to be compromised. This does not suggest that the law had little regard for the position of the individual. Keba Mbaye says that "... while only the group counts as against third parties, the individual is far from being entirely deprived of rights within that group." "However", he notes, "even within the group, the role of the individual as such is relatively minor in Negro-African legal relations." Referring to A. N. Allott, Mbaye goes on to say that "[e]ven those who hold that in the African system the group does not wholly absorb the individual, admit that this is true."[11] Allott himself regarded the view that African Law was essentially one that gave precedence to group

[10]"Theory of the Arbitration Process" (1952) 17 Law & Contemp. Probs., 631.

[11]"The African Conception of Law", in International Encyclopaedia of Comparative Law, Vol II, Chapter 1, p. 143, para. 242.

rather than individual interests as a sweeping generalisation, although he also conceded much truth in it:

> [a]s with so many generalisations, there is some truth in these. African Laws were undoubtedly dominated to a degree unmatched in modern individualist legal systems by group and community rights and powers. But African Laws did accord legal capacity to individuals to hold interests in property, to negotiate with each other, and to appear as principals in litigation. *These rights and powers were often conditioned by the prior rights of the communities of which their holders formed part*"[12] (emphasis added),

although he added that the same, it could be argued, is true of modern laws. Allott concludes, although with the same reservation as above, that "... African Laws, with their strong organisation of tribe, family, age-grades, societies and other associations, undoubtedly emphasise the corporate and collective, *at the expense of the individual element in social life and law* ..."[13] (emphasis added).

Thus, breaking a contract for example, is regarded not only as a wrong done to the other contracting party but primarily as a disruption of an existing social order.[14] The imbalance thus created has to be restored by a process which emphasises the greater need for harmony in society than to upholding the private rights of the particular individual on whose side the law might appear to be.[15] There should be no individual winner or loser. There remains only the group as winner. On the other hand, if the harmonising process breaks down, there will also be only one loser, personified in the same group.

The implications for the dispute resolution process then become what in the words of Yoshiyuki Noda, writing on the conception of law in China and Japan, considers as a question "... not of deciding which case is better founded, but of making both parties [and *a fortiori* the middleman] understand what is their duty in

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[12]*Supra* p. 147

[13]*Ibid*

[14]Holleman, J. F. Issues in African Law, The African Studiecentrum, The Hague, 1974.

[15]*Ibid*

order to restore the peace they have disturbed."[16] "What matters", the same writer says, "is not for each party to prove his case, but for each to reflect whether the position complies with the *dao*."[17] Similarly, according to Allott, reconciliation or restoration of harmony lies at the basis of the very notion of African adjudication:

> [t]he job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. The complainant will accordingly want to see that the legal rules, including those which specify the appropriate recompense for a given wrong, are applied by the court. But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be re-integrated into the community.[18]

In his reflections on the Far Eastern and African conceptions of law, Professor René David more carefully and forcefully sets out the position in words which we would do better to quote extensively than to paraphrase. While reflecting on the other view of the western notion that the principle and rule of law, strictly complied with, are the hallmark of the proper administration of justice, David says that attitude

> is not only strange, but absurd and shocking in the eyes of a very large part of humanity. The [Far East and Black Africa] reject the idea of law as a principle. For the peoples of these countries it is sadly necessary in some cases to pronounce a sentence, to impose a solution to someone who has not respected the rules in use in society, but the delivery of a judgment providing a sanction cannot be regarded as normal; still less does it deserve to be

[16]"The Far Eastern Conception of Law", in International Encyclopaedia of Comparative Law, Vol. II, Chapter 1, p. 128, para. 208.

[17]*Ibid*; the *dao* is the Chinese view of life that emphasises the importance of harmony.

[18]*Supra* p. 145. J.D.M. Derrett, the editor of the collection of articles, agrees that the view corresponds to the traditional Indian view of litigation: *ibid.*

advocated as a desirable means of settlement in human relationships. Disputes and crimes are looked on as sicknesses disturbing the proper functioning of the social "body". These accidents should be treated as such; they do not call for authoritarian solutions; conflicts, when thay occur, must be not resolved, but "dissolved" by conciliation procedures. In all circumstances, the essential is to restore harmony, for harmony among men, linked to the harmony of the cosmos, is something which must be ensured if it is desired that the world live in peace according to the natural order. At the end of a lawsuit there must be neither victor nor vanquished. A solution cannot be really good if it is imposed.

Thus an ideal of social peace and harmony is opposed to the ideal of the rule of law which dominates [western] (and [moslem]) thought. The broad and generous wisdom of [Africa] and the [East] sees in the foreground not the rights and interests of individauls, but their obligations and the needs of both sides, and many factors are taken into consideration to make both sides accept a solution, whose merit lies in its "just", not in its "legal" nature. Justice requires that the incident which has occured be liquidated fully and finally, so that peace and harmony may be restored ...

The law only looks at part of the problem. Seeing that it leaves aside this essential concern with the harmony of the body social, it cannot be considered as good. In the [West] and in [Islam] it is the object of study and veneration, but it is looked on with scorn in [China, Japan and Korea]. Traditionally, neither lawyers nor schools of law are to be found in these countries. The courts are deserted; honest men do not resort to them; .... Everything must be settled outside by conciliation .... Even arbitration is rejected; nobody wants a procedure resulting in a sentence which is imposed on the parties without their acceptance ...

The same idea reigns in [black Africa] and in [Madagascar]. In these countries, likewise, people do not understand how, except in the case of certain crimes, there can be a solution to litigation without the acceptance of those concerned. The [African] traditional courts are conciliation bodies; a case is never finally closed, and can always be reopened so long as those concerned have not agreed to the solution proposed. The President of the Supreme Court of Senegal tells of the Africans' total incomprehension when faced with the justice of European inspiration whose decisions, to them, always appear repressive in civil matters, because they are not conciliatory.[19]

It is thus possible even at this stage to say that for international commercial arbitration, the above conception of the role of adjudication dictates a change in the prevailing theoretical and practical approaches to the international arbitral process, now completely built on the western model, to accomodate the other attitude particularly when it involves parties from those parts of the world. What might be of more significance is the recognition of that other approach as a serious alternative to the perception of arbitration both in domestic and international arbitration. For example, in the foreign investment area and the domain of state contracts generally, the need to look beyond what type of relationship should remain between the investment communities and host states and to maintain a healthy climate certainly call for a modification of the present philosohpy and trends in international arbitration. The late Professor David also recognised that approach as most appropriate even in the context of international law itself. He stated that it is clearly a mistake to attempt to develop international law on the concept of vested rights; "*l'essentiel est ici*", he said, "*d'assurer la paix et, au délà de cet objectif fondamental, d'organiser une coopération, profitable à l'humanité dans son ensemble, entre des nations reconnues solidaires.*"[20]

III. The Nature of Arbitration:

A. Whether it is a Contract

[19]"Introduction", in International Encyclopaedia of Comparative Law, Vol. II, Chapter 1, pp. 5-6, paras. 7-9.

[20]L'Arbitrage dans le Commerce International, Economica, Paris, 1982, p. 29.

With that in mind it becomes necessary to ask whether in these countries arbitration is based on a contract. It may happen that in many respects the customary practices of many of the developing countries show some similarity with the practice in the West. For example the hearing may be in private and the composition of the tribunal completely determined by the parties themselves. In the main, however, there are significant differences between arbitration in the West and what has been regarded as the same process in many of the countries. These differences explain some of the fears entertained by those involved in the process from the developing world. The differences arise from the fact that whereas in the West the rules governing the process have been developed by the law and in the case of commercial arbitration further shaped by business practices, again with the support of the law, in developing countries the process remains essentially a matter of approach and perspective.

One of the main differences is that customary arbitration in many developing countries is not based on contract. It does not necessarily arise from the agreement of the disputants to submit their differences to a third party either immediately, or in advance, in anticipation of a dispute.

In the first place, resort to arbitration may not arise from a consensual arrangement. In an article on the conciliation boards set up under the 1958 Ceylon Conciliation Boards Act,[21] Goonesekere and Barry Metzger observed that an arbitration before a local tribunal did not always arise from a voluntary submission of the parties to a third party. It was not necessary that such an agreement should have been reached in advance. The process could be initiated by one party, usually the complainant, who brought his claim before a competent third party, leaving it to the latter to summon the defendant to appear and answer the complaint. J. N. Matson[22] makes the same observation in respect of customary arbitration in Ghana. The same practice is noted by A. N. Allott,[23] who states in respect of Akan customary law in Ghana that in many cases the arbitrator (especially where he was also vested with

[21] "The Conciliation Boards Act: Entering the Second Decade" (1971) 2 Journ. Ceylon Law, 35.

[22] "The Supreme Court and the Customary Judicial Process in the Gold Coast" (1953) 2 ICLQ, 47.

[23] "*Kwasi v. Larbi* (1953) A.C.164 - Akan Customary law of "Arbitration" in the Gold Coast", (1953) 2 ICLQ, 446.

political or other form of customary authority over the disputants) merely summoned the attendance of the defendant after the plaintiff's request. Thus, he says, "... the original bringing of the complaint to arbitration does not always rest on the agreement of both parties."[24] The first moves in the process did not therefore rest on a prior agreement, as it was not necessary that all the parties should have consented in advance.

In Islamic law, however, a "submission" to arbitration is classified as a contract.[25] At first sight the legal nature of arbitration in Islamic law could as a result be explained on grounds of contract. However, to a large extent, it remains a contract of an unusual character in that it is still not recognised as binding as all other contracts. The process can be brought to an end either by agreement of both contracting parties (since it is consensual) or, strangely, by a unilateral act of any of them. According to El-Ahdab, a view attributed to the Imam Shafi'i holds that "awards are only enforceable if the parties agree and thus arbitration would not have a jurisdictional nature, [binding character?] but would be closer to conciliation."[26] This is so because Moslem law, like the Roman law,[27] has not evolved a general theory of contract,[28] so that only certain specified contracts in Islamic law are binding.[29] Arbitration does not fall into any of the specified categories.

Second, according to Samir Saleh[30] and Sayed Hassan Amin,[31] arbitration

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[24]*Ibid* p. 469.

[25]Amin, Sayed Hassan: Commercial Arbitration in Islamic and Iranian Law, Vahid publications, Tehiran, 1984.

[26]El-Ahdab, Abdul Hamid, Arbitration with the Arab Countries, Kluwer, Deventer, 1990, Part 1, Section I.

[27]See Prichard, A. M. Leage's Roman Private Law, 3rd Edn., Macmillan & Co., London, 1961.

[28]Prichard says that "[t]he Romans had no unified law of contract, just a system of several distinct contracts", *ibid* p. 315. Alan Watson also states that "[t]he Romans did not develop a general theory of contract. Every contract had a separate birth and a specific raison d'être": Contract of Mandate in Roman Law, Clarendon Press, Oxford, 1961, p. 1; see also Diósdi, Gy Contract in Roman Law: From the Twelve Tables to the Glassators, Akadémiai Kiadó, Budapest, 1981, p. 79.

[29]El-Ahdab, *supra* p. 25.

[30]Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law, Graham and Trotman, London, 1984.

in Islamic law is said to be of the nature of a contract of agency, from which a party can withdraw unless it has been made for the benefit of a third party or confirmed by a judge. This view, which is shared by all the Islamic schools of jurisprudence except the Malikis, stems from the fact that the authority of the arbitrator, unless confirmed by a judge, is revocable by any of the parties at any time before the award is made. El-Ahdab states that under the "Medjella" (the first civil codification of Moslem law under Ottoman rule) the appointment of arbitrators "could be revoked at any time unless the court had authori[s]ed or approved their appointment.[32] In this case, arbitrators became delegates of the judge and their appointment could no longer be revoked."[33] In fact Amin states that in the Shi'i school the authority of the arbitrator is, at the will of any of the parties to the proceedings, revocable at any time even after it has been confirmed by a judge.[34] That seems unique to the Shi'i school. In the other schools, in the absence of the continuing consent of both parties, the authority of the arbitrator to proceed with his function ceases unless prior to entering the submission he had previously been confirmed in that role by a judge of a regular Islamic court, whereupon his authority to proceed on the reference becomes a delegation of the powers of a judge and irrevocable by the parties.[35]

Finally, we are also informed that "[a]rbitration agreements do not oust the jurisdiction of the courts because they are not binding. Thus, if one of the parties resorts to the courts despite the existence of an agreement to arbitrate, the courts can decide upon the dispute without taking into account the existence of the arbitration agreement."[36]

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[31] *Supra.*

[32] The authority of the arbitrator remained revocable under English law for a long time following *Vynior's* case, 8 Co. 80a, 81b (1609); 77 ER, 595 & 597 until the beginning of the 19th century, when it was abolished by the Arbitration Act 1889, Section 1.

[33] *Op. cit.* p. 19.

[34] *Supra* p. 35.

[35] El-Ahdab, *supra* p. 19.

[36] *Ibid* p. 26.

Saleh notes[37] that arbitration clauses (as distinguished from a "submission") are not even referred to in Sharia jurisprudence. As in the old Belgian and French civil codes arbitration is only referred to as a submission of an existing dispute to a settlement by a neutral third party. It would in the circumstances be that an undertaking to submit to arbitration before the existence of a dispute is void in Islamic law, not only because it is not recognised by the Sharia, but also on account of its not being capable of compliance with the conditions prescribed for the validity of a reference after the dispute has arisen. The requirements are stated by Saleh[38] to be: (a) that there should be a dispute in existence; (b) that the parties should give their consent to the reference of the dispute to arbitration; (c) an acceptance of the designated arbitrator(s) to enter the reference and (d) that the dispute should be determined in accordance with the principles of Islamic law. We are only concerned with the first three requirements since the fourth does not arise until after the dispute has been decided by the arbitrator.

Since an arbitration clause cannot meet the first requirement it cannot be enforced. Saleh seems at first to suggest that in that case the clause may be treated in the same way as an ordinary term of the contract and upheld as such.[39] However, the same author immediately dismisses the suggestion on the ground that by providing for an arbitration clause the parties would be relying on a future and unknown event as a condition upon which the operation of that clause depends. Such a condition will be regarded as void since Islamic contract law frowns against uncertainties.[40] Saleh points out that

> [i]f, as it is believed, the settlement of a dispute is considered the main object of an arbitration agreement, in inserting an arbitration clause the parties would be agreeing on the intervention of a future and unknown

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[37] *Supra* pp. 48-49.

[38] *Ibid* p. 21.

[39] *Ibid*, p. 49. It may be worth recollecting that in chapter 1 we noted how, faced with the same problem, the Belgian Court of Cassation consistently upheld the arbitration clause on the ground that even if it was not regulated by the Code of civil procedure, an arbitration clause (the "clause compromissoire") is in any case consistent with the principle of party autonomy (see the cases referred to in chapter 1, note 139), contrary to the attitude of the French courts and writers on the same issue.

[40] Saleh, *supra* p. 50.

event. This uncertainty, save for a few exceptions in future sales restrictively recognised by the Hanafis, would be a ground for the annulment of the arbitration clause, and it would be considered "batil" (null and void). If the existence of a dispute is considered a non-fundamental element of arbitration, a mere suspensive condition on the occurrence of which the arbitration clause - valid ab initio - would become enforceable, the arbitration clause can be challenged on another ground: arbitration contracts are among the contracts which cannot be conditional according to the Hanafi and Shafi'i schools. Furthermore, the very concept of a suspensive condition does not exist in the Maliki and Hanbali schools.[41]

Saleh further submits that if the object of an arbitration clause is the same as an undertaking to refer an existing dispute, it would be against the policy of the law to uphold the former while treating the latter as a merely permissive contract ("jaiz") which can be revoked by any of the parties. If the "submissiom" is expressly recognised by Sharia as being by its nature revocable, then, *a fortiori*, the arbitration clause inserted in a contract or expressed in a separate document and providing for the settlement of a future dispute (unknown to Islamic law) cannot be regarded as irrevocable. To hold otherwise would be to defeat the policy of the law, which is to subject all references to arbitration (being an exceptional exercise of judicial power), to specific conditions laid down by law and controlled by the courts. The absence of those conditions will render a submission void. Therefore to treat an arbitration clause more leniently would, according to Saleh, "... be contrary to Shari'i's essential nature ..."[42] since it will amount to giving an agreement to submit to arbitration of a future dispute greater legal effect than a submission to an existing dispute simply by "invoking the multivalent and all-purpose maxim *pacta sunt servanda*"[43] (italics added).

Apparently, Islamic law gives the two main stages of the arbitration process

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[41]*Ibid*

[42]*Supra* p. 50.

[43]*Ibid*

separate treatments. Whereas the arbitration agreement itself is not regarded as binding, the award, on the other hand, is binding. This is so because that system treats the award as comparable to a judgment, thus rendering it final, binding and enforceable against the parties. For Saleh, the implication is that although one party can withdraw from the process at any time by revoking the authority of the arbitrator, he forfeits that opportunity once the award is made.[44] So, although Islamic arbitration may start in law as a non-binding arrangement, it assumes considerable significance after an award is made. As far as the arbitration agreement itself is concerned the legal effect of not treating it as binding in Islamic law is that it is probably not a contract in the modern sense.[45]

The fact that arbitration is in these systems not regarded as founded on a contract has many consequences which reflect on the differences between the concept as understood in the practice of modern international commercial arbitration and in many developing countries. One of the effects is that both the agreement and the process itself are revocable. One of the parties can revoke the agreement or withdraw from the process without being in breach of contract. In many of the systems this right to resile exists at any time before the award is handed. Contrary to the weight of judicial opinion in some jurisdictions in Africa, such as Ghana, Professor Allott has shown that such is the practice among the Akan of the same country.[46] It has also been shown that the same right exists in the arbitration practice of many other groups in the same country.[47]

B. Not an Arbitration?

If arbitration in these systems is not necessarily a contract, the question that arises, as Allott indicated in relation to Ghana, is whether in dealing with "arbitration"

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[44]*Supra* p. 76.

[45]El-Ahdab, p. 26.

[46](1953) 2 ICLQ, 446.

[47]Koranteng-Addow, G., Customary Arbitration in the Legal System of Ghana, Ph.D. Thesis, University of London, School of Oriental and African Studies, 1974.

we are referring to the same process with the same legal regime and the same effects in law in Europe as in developing countries.[48] Has arbitration got the same meaning in the two groups of countries?. The question has been raised and discussed at some length in respect of Ghanaian customary law.[49]

The Privy Council, the ultimate court with appellate jurisdiction over the former British colonies and dependencies, had, on an appeal from the West African Court of Appeal sitting in Ghana, delivered an opinion on the character and legal nature of Fanti customary arbitration.[50] The issue was whether certain customary proceedings which had taken place before a panel of elders in a locality in Ghana in respect of title to a piece of land were in the nature of an arbitration and, if so, what their legal effect would have been. An action had been started before a customary court. It was withdrawn by the elders of the area and by agreement of the litigants submitted to a panel of eleven elders for a settlement. At some stage in the proceedings the appellants dissociated themselves from it and asked for the refund of the sum of £12 which they had advanced to signify their consent to submit to the proceedings. It is not clear whether the money was refunded but the appellants thereafter withdrew from the proccedings and a decision was given in favour of the respondents. The case came back before the customary court and the respondents moved for the enforcement of the decision of the elders as having finally determined the issue. The appellants objected partly on the ground that they had withdrawn from the proceedings and were therefore not bound by the panel of elders' decision.

Before the West African Court of Appeal and the Privy Council it was contended for the appellants that the proceedings were not an arbitration but a negotiation for settlement and that, even if they had been an arbitration, it was an arbitration by customary law which, it was submitted, was different from the type known under English law and under English derived Ghanaian law. It was submitted for the appellants that under the particular customary law it was right for a party who

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[48](1953) 2 ICLQ, 446.

[49]See Koranteng-Addow, *supra*; Allott, *supra*; and Matson, *supra*. See also Elombi, "Customary Arbitration: A Ghanaian Trend Reversed in Nigeria" (1993) 5 African Journal of Int'l & Comp. Law, 803.

[50]*Kwasi v Larbi* [1953] A.C. 164; 13 W.A.C.A., 76.

had consented to such proceedings to withdraw before or after the award is given. The Privy Council, affirming the West African Court of Appeal, rejected the appellant's submission and held that since the parties had submitted to arbitration without reserving the right to withdraw the appellants had not established that such a right, so inconsistent with the basic conception of (English?) arbitration, existed in customary law and that the appellants had therefore not made-out their case. The Board further held that in the absence of evidence as to whether there was a right in customary law to withdraw before the award, such a right did not exist. Presumably, the Board would have upheld the appellants' submission on that point if there had been sufficient evidence that the right to resile from an arbitration was recognised in Akan customary law.

The Privy Council's decision in *Kwasi v Larbi* was invariably followed in Ghana before independence and continues to represent the law there.[51] The then Supreme Court of Ghana had, prior to that decision, evolved a new concept of arbitration said to be "according to native customary law" out of a number of cases involving the nature of customary arbitration in Ghana.[52] During and after independence the Ghanaian courts and the West African Court of Appeal laid down in a series of cases[53] what they considered to be the essentials of customary arbitration. The courts held that for such arbitration to exist it must be shown not only that there is a voluntary submission of the dispute to the tribunal but also that there is an agreement in advance by both parties that the decision of the tribunal shall be final and binding.

In 1930 the West African Court of Appeal had attempted in *Kobina v Obeng Akese*[54] to lay down the general principles on which a court should proceed in setting aside or upholding the award of an arbitrator. The general rule was stated in terms that "... as the parties choose their own arbitrator to be the judge in the dispute between

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[51]Kom, Enoch "Customary Arbitration" (1987-88) 16 Rev. Ghana Law, 148.

[52]See for example *Ayafie v Banyea* [1884] Fanti Law Reports, 38.

[53]See for example *Kobina Foli v Obeng Akese* (1930) 1 W.A.C.A., 1; *Assampong v Amuaku* [1930] 1 W.A.C.A., 192; *Ankrah v Dabra* (1956) 1 W.A.C.A., 89; *Bodu II v Caesar* [1959] G.L.R., 411; *Nyaasemhwe v Afibiyesan* (1977) 1 G.L.R., 27, C.A.; *Zogli v Ganyo* (1977) 1 G.L.R., 297, C.A.

[54](1930) 1 W.A.C.A., 1.

them, they cannot when the award is good on its face, object to his decision, either upon the law or on the facts."[55] For that proposition, the Court of Appeal cited as authority the statement of Maule J. in *Fuller v Fenwick*,[56] an English case of 1846. The material part of the statement is to the effect that the courts "... treat a reference as an agreement by the parties to bring matters both of law and of facts to the arbitrator and to consider his award final unless there is something upon the face of it which is inconsistent ..." It is not clear whether in *Kobina v Akese* the court had been dealing with a case of customary arbitration, for, although the arbitration concerned a dispute between two local communities over title to a piece of land, the appointed arbitrator was a judge of the Supreme Court of Ghana. No reference, whether express or to be implied from the judgment, is made to suggest that the court might have been dealing with arbitration in customary law. Meanwhile it is possible to infer from the judgment that in stating its guiding principle the Court was referring to English or Ghanaian statutory arbitration (which have always been similar). This is evident from the fact that the former West African Court of Appeal in *Kobena v Abeng Akese* cites an English authority in support without explaining how an English decision with no connection with the colony could be authority for a principle of customary law.

The judgment was relied upon by the same Court of Appeal in *Kwasi v Larbi* although the court in Larbi assumed, wrongly, it is submitted, that its previous statement (in *Kobena v Akese*) also applied to arbitration according to customary law and local practices in Ghana. The Court also cited the case of *Ekua Ayafie v Kwamina Banyea*[57] as having laid down that "... where matters in dispute between parties are investigated at a meeting, and in accordance with customary law and usage, a decision is given, it is binding on the parties ..."[58], although there had been no evidence of customary law itself in the scanty report of that case. When it was submitted to the court that Fanti law differed slightly from Akan law (the latter being the relevant law

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[55]*Ibid.* p. 2, per Deane CJ.

[56]16 L. J. C. P. 79.

[57][1884] Fanti Law Reports, 38.

[58]*Ibid.*

in *Kwasi v Larbi*) in that under Akan law, a party was entitled to reject an award, the court rejected the suggestion on the ground that customary law is based on good reason and that Akan customary law could not be so repugnant to good sense as to allow a losing party in arbitral proceedings to reject the award when it was disfavourable to him.[59] Not surprisingly it is precisely on that point that the judges of the Privy Council determined the dispute when the case came before them. While declining to lay down any general principles as to customary law due to the scantiness of material before it, the Privy Council nontheless thought that the right to resile was inconsistent with the concept of (English?) arbitration and could therefore not be upheld because the parties had given their consent to the submission. That original consent was assumed to be binding on the parties through-out the proceedings and after as is the case in English arbitration.

The better approach, we suggest, would have been to refer the case back to the courts below or call more evidence for a finding on the correct position under the relevant custom. That approach would have been correct in law on account of the position in Ghana and other West African statutory courts at the time, including the Privy Council, to treat customary law as a question of fact and not of law,[60] in default of which a court will have been required to adjourn for further inquiry as to the correct position in the relevant custom. However, at the same time, it was also the position that English law would have applied as the residual law in the absence of local law (statutory or customary). In the present case the course adopted by the Privy Council was quite straight forward although also misleading. It consisted, in the absence of evidence on the custom, in treating the issue as if it were the same in English law and, in the place of the unproven custom, to substitute the rule in English arbitration law that initial consent of the parties, once given, is final and irrevocable.

We must note that in the particular case the custom was simply unproven. It was not said that it did not exist, although in the absence of evidence, the Board was willing to accept that it did not. The Board then went a step further and declared that any other view, and in particular the idea that in custom the parties could still

[59](1956) 13 W.A.C.A. 81, p. 82.

[60]See *Kobina Angu v Cudjoe Attah* (1874-1928) P.C., 43; *Amissah v Krabah* (1936) 2 W.A.C.A. 30; *Gbadamosi Adewoyin v Sanusi Adeniji* (1956) 13 W.A.C.A. 191.

withdraw, would be repugnant to the concept of arbitration. The underlying assumption in that ruling is that arbitration is a contract and according to the rules of the system under which the judges were trained, (which are not the same as those of the customary laws they had had to deal with), contracts must be strictly complied with from formation to discharge. Yet, as we indicate above, arbitration in these systems is not binding in the same way as arbitration in the West or as contracts generally and, therefore, not necessarily to be regarded as a contract. Even where it is so considered, as in Islamic law, the contract may not be binding.

Kwasi v Larbi has been applied in many cases in Ghana[61] with unfortunate consequences for customary arbitration, since its appeal to those to whom it is applicable has significantly dropped as a result.[62] The case was strongly criticised by Professor Allott,[63] who undertook the necessary inquiry and argued, with considerable evidence gathered by himself on the field in support, that not only did the right to resile before the completion of the arbitration exist and recognised under the relevant custom, it was also the position that the proceedings before the panel of elders was not an arbitration as understood in English law or under English derived Ghanaian law.[64] Rather, it was what he describes as a "negotiation for settlement".[65]

According to Allott[66] the right to resile under the customary law appeared so inconsistent with the basic conception of arbitration only because the Privy Council had failed to realise that arbitration under Akan law and under English law were not the same. He further found that under Akan customary law the agreement to be bound by the award came after and not before the making of the award. He concluded that it was wrong to draw a distinction between arbitration under Fanti law and a negotiation for settlement since an "arbitration" under Fanti law is no more than an

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[61]See the cases referred to in note 53.

[62]Kom, *op. cit.* p. 167.

[63](1953) 2 ICLQ, 446

[64]*Ibid*; see also Abgosu, L. K. " Arbitration under the Customary law" (1983-86) 15 Rev. Ghana Law, 204.

[65]*Ibid p. 475.*

[66]*Ibid.*

attempt at a reconciliation. In other words arbitration as known in English law and arbitration in Akan customary law are two different processes.

Allott is supported in his view by J. N. Matson, a one time judicial adviser in Ghana who, while commenting on a decision of the West African Court of Appeal,[67] also took the view[68] that such a distinction as said to exist between customary arbitration and an attempt at a reconciliation did not exist but that, if there were, it would only be one of degree and not of kind. The view is shared by Hannigan,[69] who also found that the parties must give their consent to the award of the arbitrator before it can become binding and by Koranteng-Addow, who devoted an entire dissertation[70] to demonstrate that in many ways, particularly in respect of the time when consent is effective to create a binding award, arbitration in Ghanaian customary law is different from Ghanaian statutory arbitration, which is similar to arbitration in English law.

Elsewhere, among the Nyakyuasa in Tanzania, it is said that "[t]he third party listened to both sides and made his decision. It was not considered binding on the parties."[71] We should point out that the third party "*made his decision*" (emphasis added). He was not merely conciliating in the modern sense. He was adjudicating. Yet, among the Nyakyusa, his decision was not binding if the parties withdrew from it or if they did not feel obliged. For, as Carlston further notes,

> [they] would carry it out only if they agreed with it. If the third party was unavailable to make a decision or his decision was not accepted by the parties and the dispute still continued, resort was then made to the village headman for a decision. Finally, appeal could be made to

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[67]*Gyesiwa v Mensah*, W.A.C.A. Civ. App. No. 50/1947 (unreported).

[68](1952) 2 ICLQ, 47.

[69]Hannigan, St. J. J., "The Impact of English Law upon the existing Gold Coast Custom and the Possible Development of the Resulting System", (1956) 8 J. A. A., 128.

[70]Customary Arbitration in the Legal System of Ghana, *op. cit.* (1974).

[71]Carlston, Kenneth S., Social Theory and African Tribal Organization: The Development of Socio-legal Theory, University of Illinois Press, 1968, p. 350.

the chief's court.[72]

Kwasi v Larbi and the Ghanaian cases before and after that decision have not been followed in Nigeria. The Nigerian Supreme Court has recently held that customary arbitration is the settlement by compromise of a dispute based on the voluntary submission of the parties to a non-judicial body with the freedom to resile if the decision were unfavourable.[73] The Court has consistently stated that for the decision to be binding it has to be accepted at the time it is made and the right to resile exists at any time before then. Kariby-Whyte, JSC, stated in *Agu v Ikewibe* that the "suggested award ... becomes binding only after ... signification of its acceptance, ... from which either party is free to resile at any stage of the proceedings up to that point."[74] The Supreme Court cited with approval the statement by T. O. Elias[75] that customary arbitration is based on subsequent acceptance (not prior agreement) of the award by the parties, with the right of either party to withdraw from the proceedings at any time before he has acknowledged his acceptance of the award. In *Equere Inyang v Essien*[76] the Nigerian Supreme Court (then, - in 1957 - still a Court of Appeal with final appeals to the Privy Council in England) had held that certain proceedings conducted by a traditional council, i. e., an Imam Council, did not result in a binding arbitration, as one of the parties had not accepted the decision of the council. That decision could therefore not be relied upon to support a plea of *res judicata*. Similarly the High Court of Owerri in Eastern Nigeria reduced the essentials of a valid arbitration under the relevant customry law (Igbo) to the acceptance of the "terms of the arbitration" and the acceptance by the parties to be bound by the decision, such acceptance being given at the time of the award.[77]

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[72]*Ibid.*

[73]*Agu v Ikewibe* (1991) 3 NWLR, Part 180, 385 (S. Ct Nigeria); *Ohiaeri v Akabezi* (1992) 2 NWLR, Part 221, 1 (S. Ct Nigeria); *Awosile v Sotumbo* (1993) 5 NWLR, Part 243, 514 (S. Ct Nigeria).

[74]*Ibid* p. 407; *Ohiaeri v Akabezi*, *ibid* pp. 23-24, per Akpata, JSC.

[75]The Nature of African Customary Law, London, 1956, p. 212.

[76][1957] S.C.N.L.R.,112.

[77]*Phillip Njoku v Felix Ekeocha* [1972] 2 E.C.L.R., 199. *Contra*, *Oline v Obodo* (1958) 3 F.S.C., 84, which, however construed, must now be considered bad law in the light of the decisions in *Agu v Ikewibe* and *Ohiaeri v Akabezi*, supra.

Islamic law does not also see arbitration in exactly the same way as Western Arbitration. Already we have pointed out that under the majority of the Sunni schools of Sharia jurisprudence, with the exception of the Maliki school, it is the general view that since arbitration is a merely permissible contract (*jaiz*), it cannot be binding unless confirmed by a judge of an Islamic court (*quadis*). Until such confirmation is obtained any party can withdraw from the proceedings by revoking the authority of the arbitrator. In such circumstances, where the validity of the process depends not on the initial consent to the submission but on its continuous acceptance, it cannot be described as a contract. To that extent, at least, the process differs from arbitration as now understood in western legal systems.

That treatment of arbitration in some of the customary laws and in Islamic law should not come as a complete surprise. Although the Privy Counsel in *Kwasi v Larbi* describes the right to withdraw as "repugnant", the position in English law itself did not change until relatively recently.[78] Given the hostility of the courts toward an arbitration agreement in England it became the law, following *Vynior's* case,[79] that a party could withdraw from the proceedings at any time before the award. Since only nominal damages were available for breach of the undertaking to submit to arbitration,[80] it became the practice to ensure that the undertaking was made with a penal bond, as in *Vynior's* case itself, or to obtain an order of the court confirming the arbitrators, thus rendering it impossible for any one party to revoke the authority of the arbitrator.[81] It may be interesting to note the similarity with the position in Islamic law, where the authority of the arbitrator to proceed with the hearing did not also become irrevocable until confirmed by a judge. The binding character of the arbitration agreement did not become definite in England until 1889 with the passing of the Arbitration Act of the same year providing in Section 1 that "[a] submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or judge, and shall have the same effect in all respects as if it had been

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[78]Arbitration Act 1889, Section 1.

[79]8 Co. 80a, 81b (1609); 77 ER, 595 & 597.

[80]Holdsworth, <u>A History of English Law</u>, Vol. 14, p. 189.

[81]*Ibid.*

made an order of court."[82] As if that were inadequate Paragraph (h) of the first Schedule to the Act added that it is to be implied from the submission of the parties that "[t]he award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Yet, even the new development itself has not totally taken root. The legislator in England, for example, still treats the binding character of an arbitration agreement with some reserve. The UK legislator thinks that the rule should still admit of exceptions in areas where it is appropriate, such that, under the Consumer Arbitration Agreements Act 1988, a consumer retains the option to litigate a dispute in relation to which he had already submitted to arbitration. The arbitration agreement as a result becomes unenforceable against the consumer so that the discretion of the courts under Section 4 of the Arbitration Act 1950 to stay court proceedings brought in disregard of an arbitration agreement ceases to exist.[83] Professor Rhidian Thomas says of the effect of the legislation that it is "... against the sentiment of the times for it detracts from the philosophy of contractual sanctity and finality now strongly associated with arbitration agreements ... for under its terms an arbitration agreement may be ignored by a consumer without legal consequences."[84]

IV. Conclusion: An Alternative

The difference between arbitration as understood in Europe and arbitration in many developing countries lies in the character of arbitration and particularly in the overall attitude to the function of adjudication generally.[85] Both have implications for arbitration as an alternative form of dispute settlement. One implication is concerned with the acceptance of arbitration in its present form in developing countries. Another implication arises in relation to the contribution of developing countries to the evolution of the concept and the practice of arbitration itself in international trade.

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[82]The provision is re-enacted as Section 1 of the Arbitration Act 1950.

[83]Section 1(3). The Act does not apply to international arbitration agreements: Section 2(a).

[84]"Consumer Arbitration Agreements Act 1988" (1991) 57 Arbitration, 48, p. 48.

[85]Fine, J. D. "Continuum or chasm? Can West meet East?" (1989) 6 Journ Int'l. Arb'n., Part 4, 27.

Both implications are related in their bearing on the general attitude to the role of adjudication. It would appear that the neglect or ignorance of the perception in many developing countries of the function of adjudication accounts to a significant extent to the attitude of third world parties to arbitration in matters of international trade.

On the question of the acceptability of modern international commercial arbitration to parties from the developing world, much has been said regarding their concerns on such issues as the absence of arbitration venues in countries of the "south" and the appointment of counsel and members of arbitration tribunals of nationalities other than of developed countries.[86] Concerns have also been expressed regarding the conduct of most arbitrations under the umbrella of institutions and by reference to national or institutional procedural rules foreign to parties from the developing world.[87] The question of the applicable substantive standards have also been addressed from time to time in both academic writings and arbitration awards although only in terms suggesting that developing countries will do better if they adhered to the Euro-centred consensus on the content of those rules. According to Paulsson, third world countries demanding for a change in the substantive legal framework on the basis that they do not receive adequate protection should simply be reassured that "... the traditional [western] analysis of the civil law of obligations do not prevent due consideration of cases of manifest inequality in contractual relations ...."[88]

Even the question of the contribution of the developing world to the development of arbitration has been approached only in terms of their participation in the creation and formulation of western inspired institutions and rules such as the UNCITRAL Model Law, ICSID, and MIGA and the adoption by the countries of new legislation consistently with Western inspired models, including their adherence, upon attaining independence, to already established instruments such as the New York Convention. In fact Gabriel Wilner says in disapproval that it is assumed, as a result,

[86]See references in Introduction.

[87]See for example Paulsson, Jan "Third World Participation in International Investment Arbitration" (1987) 2 ICSID Rev., - FILJ., 19.

[88]*Ibid.* p. 58.

" ... that the acceptance of arbitration by developing countries is merely a matter of educating the governments and the business and legal circles there to the advantages of the process."[89]

It is hardly contemplated that there could be an original alternative contribution from the developing world, original if not in the substantive rules, at least in respect of another perception[90] of the process.

That alternative approach is the one which favours compromises, not necessarily in the sense of a total disregard of the law, but in the sense of "... arriving at a decision by ... 'giving a little and taking a little.' It does not mean that legitimate clashes of interest are not resolved in a way that seems fairest to both sides, a process that lies at the foundation of any attempt to evolve a rule of law."[91]

Translated into arbitration, this approach will require the tribunal to pay considerable attention to the continuing "co-existence of the parties."[92] It is an approach based on the assumption that the function of adjudication is not to "decide" disputes but to "settle" them,[93] in the sense alluded to earlier. That, we think, is consistent with the very idea of arbitration.[94] This approach is particularly relevant to the area of state contracts and state commercial arbitrations, the principal source of "southern" hostility to arbitration. The problems involved in state contracts are, as Fatouros once put it,

> not legal; they relate to a demand for a change of existing conditions, not to the "proper construction" of the terms of an arrangement. In

[89]"Acceptance of Arbitration by Developing Countries", in Resolving Transnational Disputes Through International Arbitration, (ed. by Carbonneau Thomas), University of Virginia Press, Charlottsville, 1984, 283, pp. 285-86.

[90]On such a perception see Mnookin, Robert "Creating Value through Process Design" (1994) 11 Journ. Int'l. Arb'n., Part 1, 125.

[91]Mentschikoff, "Commercial Arbitration" (1961) 61 Col. L. Rev., 846, pp. 860-61.

[92]David, International Encyclopaedia of Comparative Law, Vol. II, Chapter 1, p. 7; Wolaver, *op. cit.* (1934-35) 83 U. Pa. L. Rev., 132.

[93]Holleman, *op. cit.*

[94]Mnookin, *supra*, p. says in that respect that the "key is to design an arbitration process in which the parties' underlying interests are identified and explored. Obviously, to the extent that common interests are revealed, the arbitrators may be able to create a resolution that serves those shared interests."

municipal law, this would be a field for legislation; in the absence of an international legislative organ it will have to be the domain of compromise rather than clear-cut solutions for or against, of variations between shades of gray rather than contrast between black and white. In the traditional language of international law, what is chiefly (although not exclusively) needed is a procedure for conciliation, rather than for judicial settlement.[95]

The absence of that perception in arbitral justice in international commercial matters strikes participants from most parts of the developing world. That partly explains their reluctance to submit to arbitration after the dispute has arisen or after an award, especially if disfavourable.

In a related context, Takeyoshi Kawashima, citing Jerome Frank, indicated how "... an overwhelmingly large number of law suits in the United States are not appealed to a higher court and that nearly 95 percent of the cases came to an end in the trial court"[96], and contrasted "[s]uch finality ... to the comparatively large number of cases appealed to in higher courts in Japan."[97] "Presumably", he observes, "... this reflects the reluctance of litigants to accept a court decision rendered and imposed upon them without being convinced of the righteousness of its contents ..."[98] Kawashima then goes on to explain the Japanese attitude on the ground that "... in the traditional way of settling a dispute the solution was, in principle, reached through agreement by both parties. The notion that a justice measured by universal standards can exist independent of the wills of the disputants is apparently alien to the traditional habit of the Japanese people. Consequently, distrust of judges and a lack of respect for the authority of judicial decisions is widespread through out the nation."[99]

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[95]"The Quest for Legal Security of Foreign Investments - Latest Developments" (1962-63) 17 Rutgers Univ. Law Rev., 257, p. 298.

[96]"Dispute Resolution in Contempory Japan" in Law in Japan: the Legal Order in a Changing Society, (ed. by von Mehren, Arthur Taylor), Harvard University Press, Cambridge, Massachusetts, 1963, 41, pp. 49-50.

[97]*Ibid.*

[98]*Ibid.*

[99]*Ibid.*

Somehow, this alternative conception should not be seen as entirely foreign to Europe too.[100] René David says that even in western countries, "... there is a popular proverb which declares that 'a bad settlement is better than a good lawsuit'."[101] That may be so and it reflects a fundamental attitude in many areas in the developing world to the function of adjudication, which, if taken into account in international arbitrations, might go a far way in building genuine confidence in the developing world in international commercial arbitration.

[100]See for example the process contemplated by Mnookin, *op. cit.*

[101]*Supra.*

CHAPTER THREE.
ICSID AND MIGA.

The International Centre for the Settlement of Investment Disputes, ICSID, and the Multilateral Investment Guarantee Corporation, MIGA, are regarded as milestones in the development of international arbitration. The creation of both institutions is attributed to the movement during the 1950s and 60s towards the protection of foreign private investments. The emergence of new states after the second world war and the out-break of economic and political nationalism associated with that period produced a wave of anxiety in capital exporting countries over the security of private investments in receiving countries.[1] The need was felt to take measures aimed at safeguarding private property acquired abroad from the unfair treatment of the governments of capital importing countries. In the main the measures proposed were substantive, usually in the nature of uniform codes of conduct to be adhered to by all parties concerned.[2] Some took the form of proposals for multilateral treaties providing different regimes of investment guarantees to be provided by governments of both capital exporting and receiving states. Such measures were initiated and promoted by parties ranging from public international organisations[3] to international private sector bodies,[4] including entirely private groups.[5] They attempted to lay down principles

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[1]Nwogogu, E.I. The Legal Problems of Foreign Investments in Developing Countries, Manchester University Press, Manchester, 1965.

[2]Brandon, Michael "An International Investment Code: Current Plans" (1959-60) JBL, 7.

[3]See for example the League of Nations Draft Convention on the Treatment of Foreigners, 1929; the "Havana Charter" of the International Trade Organisation on the Treatment of Foreign Investments; the United Nations General Assembly resolution 824(IX) of December 11, 1954 Concerning the Encouragement of Foreign Prvate Investment and the Secretary General's Report on the Promotion of the Internatinal Flow of Private Capital (U.N. Doc. No. E/3325 of February 26, 1960).

[4]See for example the International Chamber of Commerce draft code on the "Fair Treatment of Foreign Investments" (I.C.C. brochure No. 129 of 1949).

[5]See for example the 1957 draft code on the "international Convention for the Mutual protection of Private Property Rights in Foreign Countries" by the Society to Advance the Protection of Foreign Investments, published in (1960) 9 J. Pub. Law 113 and its April 1959 revised version entitled "Draft Convention on Investments Abroad".

and rules to regulate the treatment of investments made abroad by private persons[6]. The measures were attempts to codify substantive rules deemed applicable in this area. Such substantive rules and principles as were claimed to exist were not only incomplete, but also unclear, and, not surprisingly, not free from controversy.[7] As a result there was a shift of emphasis from the search for strictly substantive rules to the creation of procedural and appropriate mechanisms through which the parties could by themselves evolve applicable substantive rules acceptable to their specific case. ICSID and MIGA are two products of that endeavour. While ICSID provides legal guarantees to the investor, MIGA provides security of a financial character.

We argue in this chapter that the creation of both institutions did not adequately reflect the interests of developing countries, the states directly affected by the purposes for which they were created.

I. The International Convention for the Settlement of Investment Disputes

The drafting history of the Washington Convention for the Settlement of Investment Disputes can be stated briefly.[8] The Convention was made at the initiative of the World Bank. Pursuant to a resolution (No. 174 of 18 September 1962) of the Governors of the Bank requesting the Executive Directors to examine the possibility of establishing facilities for the arbitration of investment disputes, a report on the Convention was prepared by the Executive Directors after extensive consultation with legal and other experts from over the world in four regional meetings held at Addis-

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[6]For a brief history and treatment of the various initiatives since the 1920s see Fatouros, A. A., Government Guarantees to Foreign Investors, Columbia University Press, New York, 1962, chapter five; Sutherland, P. F., "The World Bank Convention on the Settlement of Investment Disputes" (1979) 28 ICLQ, 367; Balekjian W. H. "The Convention of the International Bank on the Settlement of Investment Disputes between States and Nationals of other States" (1967/68) 37/38 Yearbook of the A. A. A., 108-113; Nwogugu E. I., *op. cit.* pp. 135-138; Guldberg, Tatiana "The Settlement of Disputes between States and Nationals of other States" (1966) 36 Yearbook of the A. A. A., 98; Schwarzenberger G. "The Arbitration Pattern and the Protection of Property Abroad", in International Arbitration: Liber Amicorum for Martin Domke, (ed. by Sanders, Pieters) Martinus Nijhoff, The Hague, 1967, 313.

[7]Sornarajah M., International Commercial Arbitration, Longman Singapore Ltd., 1990, pp. 8-29.

[8]For a fuller description, see Convention for the Settlement of Investment Disputes between States and Nationals of other States, History of the Convention, Vol. 1, part 1, pp. 2-10.

Ababa, Santiago, Geneva and Bangkok in December 1963, 1-3 and 17-21 February 1964 and April 1964 respectively. The Directors were also assisted in their task by a committee of legal representatives designated by members of the Bank, which met from 23 November to 11 December 1964. By another resolution (No. 214, September 1964) the report of the Executive Directors was approved by the Governors of the Bank, who further requested the Directors to reformulate a Convention for the same purpose. After a series of meetings, during which the Directors considered a number of proposals for changes submitted by the General Counsel of the World Bank, the Directors on 18 March 1965 formally adopted a resolution approving the text of the Convention and requested the President of the Bank to transmit the text and its annexed report to member governments of the World Bank. Copies were then sent to Governors and Alternate Governors of member states of the Bank and the Convention signed soon after by a number of states. The Convention came into force on 4 October 1966, thirty days after the 20th instrument of ratification was deposited, as required by Article 68(2). Toward the end of 1995 there were 136 signatory states, including 122 ratifications.[9]

A. Stated Objectives

ICSID was meant to encourage the resolution of investment disputes through arbitration. A statement by the General Counsel of the World Bank transmitted to the Executive Directors had noted the inadequacies of the means then available for the settlement of disputes arising out of transactions involving foreign investments.[10] Those limitations did not encourage the flow of capital to host countries for development purposes. The need therefore arose for the creation of a structure providing an appropriate alternative for the effective settlement of the disputes. The report of the Executive Directors accompanying the text of the Convention[11] said that

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[9]News from ICSID vol. 12 No. 2 (summer 1995).

[10]History of the Convention, Vol. 2 part 1, pp. 1-2.

[11]Convention on the Settlement of Investment Disputes between States and Nationals of other States, submitted to Governments by Executive Directors and

the Convention would create a centre offering facilities for conciliation and arbitration, particularly as states and investors had indicated that it was "... in their mutual interests to agree to resort to international methods of settlement."[12] The Centre would take account of the specific nature of the disputes falling within its jurisdiction and it would, in particular, ensure that parties to the disputes could not unilaterally revoke their consent to the arbitration process once they had submitted to it. It was hoped that such a structure would "... strengthen the partnership between countries in the cause of economic development"[13] and thereby encourage the flow of capital to meet their needs for it.

The failure of previous attempts had led to the belief that an approach based on an international Convention which was essentially procedural would go a longer way than the previous ones to avoid the difficulties arising from trying to establish substantive rules on the subject. According to Aron Broches, the pioneer Secretary of the Centre, a solution based on arbitration would be more appropriate than any other approach in eliminating the "risk of confrontation of the host country and the national State of the investor".[14] The view was taken that arbitration would be more favourable not only because it was then - as now - believed to be more easily achievable but also due to the flexibility of the process.[15] There would be greater capital flow generated partly as a result of agreement by developing countries to join

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accompanying Report, Washington, 18 March 1965 para. 11.

[12]*Ibid* para 10.

[13]*Ibid* para 9.

[14]"The Convention on the Settlement of Investment Disputes between States and Nationals of other States (1972) 136 Hague Acad. Courses, 331, p. 343.

[15]History of the Convention, Vol 1, Part 1.

the Convention.

There was an underlying assumption that acceptance of commercial arbitration by countries in need of foreign investments would reflect a positive change in their attitude towards the treatment of foreign private capital. This would in turn dispell the fears of private investors for the security of their interests and as a result improve the volume of capital flow to receiving states.

Unfortunately there was no corresponding assumption regarding the obligations, if any at all, of investors in developing countries. In fact most of the codes for the treatment of foreign investments referred to earlier (notes 2-5 and texts thereto) were expressed in terms of "protection" to the investor only and that remained the primary concern of the ICSID Convention itself. The view might have been taken that the fact of investing in a developing country, by itself, constituted the transfer of a benefit by the investor to the host country.[16] If that was the assumption, it did not take into account the prospect of considerable profit to the investor provided by the opportunity of investing in the host country. Afterall why else would an investor have wanted to leave the relative security and stable financial climate of his own economic system to expose his assets to uncertain foreign risks? We argue that there was more to that.

The involvement of the World Bank was justified on the ground that the movement of capital for development purposes is an objective related to the functions of the Bank and, therefore, an initiative by the Bank to facilitate disputes arising as a result of capital flows is an activity within its sphere.[17]

To meet it objectives Article 1(2) of the Convention provides that the Centre, established by virtue of Article 1(1) of the same, is to provide facilities for arbitration and conciliation. The facilities are made available to contracting states and private investors, nationals of another contracting state, if in dispute, on the agreement both of the private investor and the state involved.

One important feature of the Convention is that the Centre itself does not engage in the settlement of disputes. It provides administrative and other support

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[16]Rodley, Nigel S. "Some Aspects of the World bank Convention for the Settlement of Investment Disputes" (1966) 4 Canadian Yearbook Int. Law, 43. p. 44.

[17]Broches, (1972) 136 Hague Acad Courses, 331

facilities for the conduct of arbitration but is not, like the I.C.C. and other institutional bodies, directly involved in the settlement of any particular dispute. That is the responsibility of arbitration tribunals and conciliation commissions set up under the Convention to resolve specific differences arising within its scope. Although it is the purpose of the Convention to provide a framework for the settlement of disputes, it was also necessary that the mechanism provided should be sufficiently flexible to enable the parties shape the process to meet the specific nature of their case. As a result the function of the Centre is almost limited to keeping a list of arbitrators and conciliators designated by member countries, from which the parties to a dispute can appoint the members of a tribunal. The disputants are, however, not restricted to the list in their selection. They are allowed to make appointments from outside the panel held by ICSID.

However, the Centre remains the administering body of arbitrations within the provisions of the Convention and, in addition, under Article 36(3), the Secretary General of the Centre as its chief administrator makes a preliminary determination on whether a particular dispute falls within the Convention. According to the Secretary's office, he may refuse to register a request for ICSID arbitration if, on the basis of the information available in the request, he finds that the dispute is manifestedly outside the jurisdiction of the Convention.[18] Although this is not described by the main stream as a judicial function, the fact that the refusal is, according to Professor Georges Delaume (a former Secretary of the Centre), unappealable and should therefore be exercised with caution,[19] suggests that the power should not be regarded as a mere act of day-to-dayadministration. It certainly involves the exercise of a judicial function and could inthe future assume immense significance.

B. Other Characteristics of the Convention:

1. Flexiblity

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[18]See ICSID, Model Clauses, Doc. ICSID/5/Rev. 1 of July 1981, p. 7. That is consistent with the provisions of Article 36(3) of the Convention.

[19]"ICSID Arbitration and the Courts" (1983) 77 AJIL 784 p. 790.

The ICSID Convention is peculiar in a number of ways. Although it was established primarily as part of the response to the treatment given to foreign investments by host countries, the Convention itself does not claim to lay down any rules of substantive law on issues arising in relation to private foreign investments. As indicated earlier, previous initiatives to protect investments abroad by attempting to lay down standards of treatment were all unsuccessful. Hence, and as concerns the applicable law for example, the Convention shows a preference for flexibility by accepting the principle of party autonomy. A tribunal constituted within the terms of the Convention is directed to decide the issues before it in accordance with such rules of law as agreed upon by the parties.[20] In the absence of choice by the parties the tribunal is required under Article 42 to apply the law of the contracting state involved in the dispute and such other rules of international law as may be relevant.[21]

That the tribunal should settle disputes in accordance with rules chosen by the parties is, however, appropriately in line with the overall scheme of the Convention, intended in substance to provide investors and sovereign states a procedural machinery to settle their differences. It was recognised from the out-set that its success would depend on the willingness of contracting states and private investors to cooperate. The scheme of the Convention reflects that belief by making the application of many of its provisions subject to what the parties may otherwise agree.[22] The parties are allowed to exclude the application of certain provisions of the Convention by agreement or, as under Article 42(3), to authorise the tribunal to apply provisions which would otherwise not be applicable, including, as in the case of the applicable law, to set a completely different standard to be followed by the tribunal in deciding the dispute: Article 42(1).

The Convention does not also create an obligation for the contracting state to

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[20]Article 42(1).

[21]The decision to include this particular default rule in Article 42 was unfortunate in our view: *infra* chapter four.

[22]See for example Articles 43 and 47 dealing respectively with the tribunal's power to order production of documents and visit the locus of the relevant investment(s), and to order provisional measures, which in all cases remain subject to what the parties may otherwise provide.

settle any specific dispute with a private person through arbitration simply by reason of its being a party to it.[23] The combined effect of Article 25 and the Preamble of the Convention is that a state comes under the obligation to refer a dispute to ICSID arbitration or conciliation only if it expresses its submission to that particular dispute to arbitration in writing. Recourse to arbitration under the Convention is therefore available on a voluntary basis only. Article 25(4) further provides that a contracting state may notify the Centre, and by implication the international business community, of certain categories of disputes it would not want submitted to arbitration under the Convention. That provision is intended to reinforce the point that submission to the Centre is entirely voluntary, by allowing a receiving state to exclude from the ambit of the Convention matters in respect of which it would not consider submitting to arbitration, especially in disputes opposing the state to an individual. It was also necessary to reassure capital receiving countries, in the face of their reluctance to accept that individuals may proceed directly against them in a non-domestic tribunal, that adherence to the Convention will not automatically compel them to arbitrate with a foreign investor. The state's consent to arbitration could only bind it on a case by case basis.

In a way the Convention was never intended to divest the states signing up to it completely of sovereignty over all areas or matters of national concern likely to attract foreign capital, although that assurance is merely artificial. It exists more in its assertion than in its real significance. The usefulness of the assurance is negatived by the fact that refusal by a contracting state to sign or otherwise agree to arbitration under the Convention may lead to adverse inferences being drawn by the foreign investment market against the state concerned. Already, the possibility of the Convention giving rise to an internationally binding obligation was never in doubt. It was the opinion of the Executive Directors "... that adherence to the Convention might be interpreted as holding out an expectation that Contracting [s]tates would give favourable consideration to requests by investors for a submission of a dispute to the

[23]Broches "Development of International Law by the International Bank for Reconstruction and Development" (1965) 59 Proc. Am. Soc. Int'l. L., 33, p. 35.

Centre."[24] Although in relation to that expectation it is pointed out in the report that a contracting state may, under Article 25(4), declare by notification to the Centre the classes of disputes it may consider unsuitable for arbitration under the Convention,[25] so as not to raise that expectation, such a declaration may be counter-productive particularly if it includes a class or classes of disputes which would otherwise have been brought under the scope of the Convention. Such a reservation may have the same effect as an out-right refusal to consent to arbitration within the terms of the Convention or a refusal to adhere to it. The opt-out of a class of arbitrable disputes available under Article 25(4) does not therefore remove or in any way diminish the expectation that is created when a developing state signs up to the Convention.

2. Capacity of an individual to proceed against a state under the Convention

An important feature of the Convention is that it recognises, by granting to an individual, the capacity to bring an action against a sovereign state in a non-domestic situation. The traditional position in international law has been to deny an individual access to an international tribunal in the event of a dispute between the individual and a sovereign state.[26] It is said that to grant an individual such status would be against the doctrine of state sovereignty[27] and will, in addition, confer to a foreigner privileges not available to nationals of the state concerned. To obtain redress for injuries done to it the aggrieved individual, corporate or physical, will be required to request the government of the state of which it is a national to take up the case on its

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[24]Accompanying Report of Executive Directors, para. 31.

[25]*Ibid* para. 27.

[26]For the rule and its exceptions see the treatment in Brownlie, I., Principles of Public International Law, 4th Edn., Clarendon Press, Oxford, 1990, pp. 580 et seq; Schwarzenberger, Georg, International Law, Vol. 1, 3rd Edn., Stevens and Sons Ltd., London, 1957, pp. 139 et seq; and Brown, A Manual of International Law, 6th Edn., Professional Books Ltd., Oxon, 1976, p. 64.

[27]Shaw, Malcolm N. International Law, 3rd Edn., Grotius Publications, Cambridge, 1991, p. 504.

behalf.[28] Such a situation was not thought particularly attractive in the area of foreign investments and other business relationships involving sovereign states and private persons as disputants. The state of the aggrieved individual may for various reasons, some involving higher considerations of state, refuse to bring the claim on behalf of its national or, having done so, decide to discontinue the case.[29] On taking up the claim of its national before an internationally constituted tribuanl the state is considered to be the proper claimant[30] and the injury, though suffered by an individual, is regarded as having been done to the state through the person of its national.[31]

The Convention considers that situation "unsatisfactory"[32] as it leaves private investors with no real forum or process to bring a claim against a host state in breach of contract. It therefore makes such a process available to a private party through Articles 1(2) and 25(1) governing jurisdiction, which provide that the Convention shall apply to investment disputes between states and private persons of a foreign nationality. In fact the entire scheme and purpose of the Convention is designed to confer such capacity to the foreign national.

It was the view that the acceptance by contracting states of the capacity of a private person to proceed against them will remove the fear of investors against political risk as an obstacle to the transfer of more capital to host states for investment purposes. The right conferred on an individual to proceed personally and directly against a sovereign state would be a guarantee to investors that proper remedies can be enforced against a contracting state in breach of its commitment, since the investor himself would be in control of the decision whether or not to initiate proceedings to

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[28]*Ibid.*

[29]Carabiber, Charles "L' Arbitrage International entre Gouvernements et Particuliers" (1950) 76 Hague Acad Courses, pp. 235 *et seq.*

[30]Shaw, *supra.*

[31]Schwarzenberger, International Law, *supra* p. 140.

[32]ICSID, History of Convention, Vol. 1, Part 1, p. 1.

enforce compliance by the state.[33]

The extension of international capacity by this Convention to the individual was of course made entirely for the benefit of investors. Its *quid pro quo* is said to be in the provisions of Article 27,[34] prohibiting the aggrieved investor from requesting the diplomatic protection of his national government in the event of a dispute, a question on which so much importance has been placed and to which we refer below. Our view is that the *quid pro quo* for the host state said to exist in Article 27 does not truly compensate for the loss of liberty which the submission to arbitration with an individual entails for a sovereign state.

C. The Convention and Diplomatic Protection

The renunciation of that right by home states of investors, exercisable in favour of their nationals based abroad, although arising in relation to a dispute with no connection at all with the home state, is said to be one of the concessions to countries receiving foreign investments for accepting the Convention. It is governed by article 27, which prohibits the state of the investor in dispute from interceding on behalf of its national and the investor himself from requesting the diplomatic protection of his own state. It had become the practice, in the face of politically inspired breaches of contractual obligations towards foreign corporations, for the latter to request their home governments to espouse their cause before international tribunals.[35] This was the result partly of the lack of capacity by those corporations as individuals on their own behalf to proceed against sovereign states and partly due to the absence of an adequate enforcement machinery for any available remedies, however limited in scope they may have been. In the result the practice was instituted by foreign corporations to appeal to their home governments for protection. Such protection would be provided by the home government through the exercise of some form of pressure on the host state, either by instituting international proceedings on behalf of its injured

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[33]Report of Executive Directors, para. 12.

[34]*Ibid* para. 33.

[35]See Brownlie, *op. cit.*; Schwarzenberger, International Law, *supra*.

subject, or through some other forms of diplomatic action.

Not infrequently, however, and in their attempt to seek justice for their nationals the home states resorted to self-help, leading to the use of armed intervention. This resulted in abuses on many occasions, amongst the most notable of which were the French and American interventions in Mexico in 1838 (and 1861) and San Domingo in 1904 respectively, and the Anglo-German and Italian occupations of Venezuela in 1902-1903.[36] The fear that the practice by foreign governments to intercede on behalf of their nationals was not limited to compelling them to submit to a solution based on the application of acceptable principles of law led in South American countries, for example, to the invention of the Calvo and Drago doctrines, including the Calvo Clause.[37] The Calvo and Drago Doctrines are well developed legal devices intended to bar stronger states both on principle and by express contractual provisions from resorting to force and other forms of undue pressure in favour of their foreign based citizens.

Article 27 was therefore introduced in recognition of the fears expressed by weaker countries. It provides that contracting states, upon signing the Convention, undertake not to provide diplomatic protection or espouse the claim of a subject concerning a dispute to which the host state has consented to arbitration under the Convention. Being a renunciation of an established practice by the stronger states, it was necessary to obtain that undertaking by way of treaty, since the validity of Calvo and Drago doctrines and the contractual devices created as alternative ways to give effect to them was in turn denied by developed states.[38] The question was whether, without a treaty or some other international undertaking by the state itself, it was possible for an individual, by contract, to opt out of his right to diplomatic protection. It was the position that whatever commitments the individual had made, once the state had accepted the appeal of its national and entered the litigation, the state was asserting its own right, whereupon, as regards the national himself, the matter became

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[36]For a detailed discussion of these incidents, see, Shea Donald R., The Calvo Clause, University of Minnesota Press, Minneapolis, 1955.

[37]*Ibid.*

[38]Schwarzenburger, International Law, *supra*; Shea, *op. cit.*

res inter alios acta,[39] thus rendering a Calvo Clause ineffective. But the home state does not enter the scene until invited to do so by its national. There should therefore be no reason, and it has not been explained why, in principle, the same national cannot contract out of his own right to request the intervention of his home government.

As far as the Convention itself is concerned the question remains whether Article 27 is a genuine concession or merely a device to induce developing countries, especially those of Latin American persuasion, to adhere to it. The orthodox view has no doubt represented the provision as an appropriate "*quid pro quo* for ICSID arbitration"[40] or as one of the "special advantages for host States"[41] or, again, as "one of the principal attractions of the Convention"[42].

The concession is however excluded by the proviso of Article 27(1), under which the home state retains the right to intercede for its national where the host state fails to submit to the award. It is thus possible to argue that the concession was only a façade, since Article 27(1) would not cover a contracting state where it defaulted with its convention obligation to comply with the outcome of the arbitration, thereby bringing into operation the proviso to that Article. In response Aron Broches has argued[43] that the host state may, prior to the award, refuse to co-operate in the proceedings, whereupon, and in the absence of the concession provided by Article 27(1), the investor would be entitled under international law to invoke the protection

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[39]Schwarzenburger and Brown, *op. cit.* p. 144. Although this may be valid for acts affecting the physical integrity of the alien, it is doubtful whether that view is consistent with the doctrine of party autonomy especially in relation to contracts.

[40]Broches, (1972) 136 Hague Acad Courses, p. 374.

[41]Amerasinghe, C. F., "Dispute Settlement Machinery in Relations between States and Multinational Enterprises - With Particular Reference to the International Centre for the Settlement of Investment Disputes" (1977) 11 Int'l. Lawyer, 47.

[42]Szasz, Paul, "The Investment Disputes Convention and Latin America" (1970-71) 11 Vand. J. Int'l. Law, 257, p. 260.

[43](1972) 136 Hague Acad. Courses, 374-75.

of his home government immediately[44] without having to await the outcome of any arbitration proceedings which, under the Convention, the investor is still bound to institute. The real concession, according to Broches, would therefore lie in the requirement imposed on the investor by the Convention to suspend his immediate right to request the assistance of his home government until the award is made.

That, to say the least, would be no more than an appearance of a concession. Broches himself acknowledges the efficient machinery provided by the Convention to ensure that arbitration proceedings properly instituted under its provisions may not be frustrated by the actions of an unwilling state in dispute with a private party.[45] The combined effect of Article 26 and paragraph 6 of the Preamble on the one hand, and Articles 38 and 45(2) (concerning the procedure adopted by the Convention in default of the respondent state) on the other hand, ensures that once properly instituted arbitration proceedings under the Convention are steered to overcome any undesirable obstacles and to lead to a successful outcome. There would therefore be no need to make recourse to diplomatic protection. The real obstacle to a Convention arbitration and an award rendered in pursuance of it arises only at a later stage when execution of the award is requested. In effect, notwithstanding the efficient mechanism set out to guarantee the success of an ICSID arbitration, Article 55 still preserves the sovereign immunity of a state against execution of awards and judgments made pursuant thereto, even though it provides a very speedy mechanism for the enforcement of the same under Article 54(1) & (2).

It is precisely at the stage of execution that Article 27 becomes of immense significance since the government of a contracting state acting in bad faith may refuse to comply with an award not in its favour by claiming immunity against execution even though it consented to, and might even have participated fully in, the arbitration. It is also precisely at this stage that the significance of Article 27 becomes obvious. In that case the right to claim diplomatic protection initially excluded by the first paragraph of Article 27(1) is immediately re-instated in the proviso of the same. The

[44]This is not accurate since under international law the investor would first of all have had to exhaust all the various remedies available under the domestic law of the host state: Shaw, *op. cit.* p. 509.

[45]*Ibid* p. 375.

practice is, in effect, merely suspended. But its *quid pro quo*, the concession to the investor giving him judicial capacity under the Convention to sue the state, is absolute. Under no circumstances, including the wrongful conduct of the investor (such as his refusal to comply with the award), can it be withdrawn.

It may therefore have been thought necessary, altough that is not often said, to retain the practice of diplomatic protection since, under Article 55, a private investor could avail himself of a favourable award in his hands against an unwilling host state only to the extent permitted by the domestic law of the place where execution is requested. In those circumstances an appeal to his country for protection would, for the foreign investor, become useful not only from a psychological point of view as suggested by a German expert during the Geneva consultative meeting of legal experts,[46] but also from a practical point of view. We refer to the advantageous position both of the investor and the home state in resorting to diplomatic protection with an award in hand below. Clearly an investor seeking redress is, legally and otherwise, in a far better position if he has already obtained an award. Even the state of which he is a national intervenes from a position of strength with an award in its national's favour than without one. But where would that leave a host state faced with an investor also acting in bad faith? That raises problems of enforcement under the Convention, which we consider below.

We may only say at this stage that from the point of view of developing countries the mere suspension of the practice of diplomatic protection meant that they had obtained no genuine *quid pro quo* for their accepting, under Article 25, to allow private investors direct access to an international tribunal. This also renders the Convention unattractive to the countries, whereas, for the investor, the revival of the practice of diplomatic intervention remains useful. Not surprisingly the Convention was objected to, and boycotted by, Latin American countries in their overwhelming majority on that and other grounds. Their attitude was bound to be so particularly in the light of the in-roads then being made into the doctrine of immunity of states against execution, the application of which was then under review in many jurisdictions in favour of confining its scope to non-commercial activities. It was then

[46] History of Convention, Vol.2, part 1, p. 432.

obvious that those in-roads,[47] when they became applicable, would expose host states to the jurisdiction and power of foreign courts to enforce and order the execution of judgments against them and, in addition to the right to diplomatic protection, render the host states more vulnerable to foreign investors than the reverse.

D. The Convention and the Enforcement of its Awards

1. Enforcement within the provisions of the Convention

While still bearing Article 55 in mind, reference should be made to Article 54(1), which requires contracting states to enforce an award rendered under the Convention as if it were a final judgment of a domestic court of a member country in which recognition and enforcement is requested. It has been said by Broches that Article 54 was provided primarily with the interest of host countries in mind."[48] Broches further states, correctly, (in our view) that Article 54(1) makes it possible for a host state to obtain a forced execution of an award in its favour in the territory of any contracting state against an investor who is refusing to comply with the award. That of course assumes that the investor has assets in a contracting state, which may not be so, in which case the usefulness of Article 54(1) for the creditor state is illusory. It was therefore not entirely correct to suggest, as did Broches, that the provision is an appropriate response to the demands of developing countries made as a result of the fact that under what was then the draft Convention there would be no available remedy against a private investor who failed to comply with an award and who had no assets within the jurisdiction of the claimant state.[49]

That provision is also regarded as exclusively in favour of a state party to an ICSID arbitration on the basis, presumably to be derived from Article 55, that a

[47]The development was fully appreciated during the drafting history of the Convention: History of the Convention, Vol 2, Part 1 pp. 342 *et seq*, 347 *et seq*, and 576 *et seq*.

[48](1972) 136 Hague Acad Courses, p. 349.

[49]*Ibid* p. 399.

private investor cannot be entitled to an advantage corresponding to the state's immunity against execution as preserved by Article 55. An investor is not a state and cannot therefore enjoy immunity against enforcement or execution.

However, any advantages said to exist under Article 54 are more apparent than real and, in any case, the grounds on which that provision can be considered as conferring an advantage exclusively to host states are too narrow, in the light of the terms of the Convention as a whole. The question here is the extent to which Article 54(1), as read alongside other provisions relating to the finality, recognition, enforcement and execution of an ICSID award confers a special advantage to contracting states not available to an investor.

The answer to that question lies in the fact that the Convention recognises the distinction between recognition and enforcement on the one hand, and the execution of the obligations arising under an award, on the other hand. Both are governed by Articles 54(1) and 54(3) respectively. Article 54(1) requires every contracting state to recognise an ICSID award by assimilating it to a final judgment of its own domestic court and to enforce the award as such a judgment. Article 53(1) then provides that the award shall be binding on the parties and creates an obligation for each party to the arbitration to comply with its terms. The argument therefore runs that where the investor is the award debtor, there is no problem for the contracting state party to the proceedings to forcefully execute the judgment entered in terms of the award by a domestic court, in compliance with the duty imposed on the state of the enforcing court to recognise and enforce the award under Article 54(1).[50] On the other hand, a foreign corporation might not be able to benefit from Articles 53(1) and 54(1) since it is still open to the state to claim immunity against execution retained under Article 55(1).

That argument fails to take account of the full significance of the above distinction. The regime of Article 54(1) is meant to govern recognition and enforcement of the award. (This only involves the process whereby the award is

[50]Delaume says that whereas against an investor, "... an ICSID award is a final title that is immediately executory", "[t]he situation may be otherwise if the non-complying party is the contracting State party to the dispute, since a plea of immunity from execution might effectively bar measures of execution against that state and its assets": (1983) 77 AJIL, p. 801.

assimilated to a similar and final judicial pronouncement of the municipal order of the place where the proceedings for enforcement and recognition are instituted.) It is admitted that the role of the domestic court in that situation is limited to verifying that the award, as presented, complies with the requirements of Article 54(2).[51] The court may not go into the merits of the dispute or otherwise scrutinise the award since any request for annulment, revision or interpretation (the only possibilities of challenge) is limited to the grounds and procedure set out in Articles 51 and 52 and further reserved to the exclusive consideration of an ad hoc committee of appeal, as provided for under the Convention. It is more likely that as a whole national courts will find it easier to comply with the requirements of Articles 53(1) and 54(2).

On the other hand, the regime contemplated under Article 54(3) leaves it to the domestic courts and the law in force in each contracting state to determine the process requiring the effective collection of the judgment or award debt against specified items of property or assets of the award debtor. The actual taking of the defendant's assets to satisfy the award debt in compliance with a judgment entered in terms of the award by the appropriate local court is governed by the relevant local laws and procedures. What is not often said[52] is that the laws and procedures in force in the contracting state in which execution is requested must be applicable equally to the investor as to the state in dispute. Both parties are exposed to the same defences against execution as may be available under the relevant domestic law, the doctrine of sovereign immunity, (which at the time of the Convention[53] was under review by writers, the judiciary and the legislature in many countries with a view to excluding its application

[51]Broches, case comment (1990) Rev. Arb., 167 p. 170.

[52]Although, see Broches, (1972) 136 Hague Acad Courses, p. 405, where he admits that those provision "... were drafted in such a manner as to be applicable generally, and to be of potential benefit to investors as well", a fatal admission, since it contradicts his own (and the conventional) view that the provision was made in response to, and primarily in the interest of, host states.

[53]See Broches, "Aspèts procéduraux de l'arbitrage entre un Etat et un investisseur etranger dans la Convention du ..." in, Investissements Etrangers et Arbitrage entre Etats et Personnes Privées, La Convention B.I.R.D. du 18 Mars 1965, University of Dijon, Pedone, Paris, 1969, p. 131. (Hereafter "Aspèts Procéduraux")

to assets used by a state for commercial activities[54]), being one of such defences only. Any other defence available under the domestic law for the stay or refusal of execution would at that stage be of the same benefit to the private party as the doctrine of state immunity, if upheld, would be useful to the state party to the dispute.

The Paris Court of Appeal did not appreciate that important distinction in December 1989 in the case of the *State of Senegal v Soabi.*[55] Pursuant to an ICSID award in its favour, the Société Ouest Africaine de Bétons Industrièls, a Panamanian company controlled by Franco-Belgian interests, applied for enforcement of the award in France. The High Court of Paris entered a judgment for the enforcement of the award (*exequatur*) in France. Senegal appealed against the judgment on the grounds that it ignored the state's immunity against execution. The Appeal Court upheld the appeal on the ground that although the government had undertaken to enforce the award in Senegal, the state had not, pursuant to Article 55 of the Convention, waived its immunity against execution and, further, that it had not been established that the specific assets of the state against which execution of the award would be levied had been used or intended for use for commercial and economic purposes. The Court further held that in the circumstances execution of the award would have been contrary to the "international" public policy of France.

That decision was criticised[56] for failing to give effect to the separate regimes of Article 54(1) and Article 55(1) of the ICSID Convention. Article 55 retains a state's immunity against execution only in respect of execution, i.e., the actual seizure of the award debtor's assets in satisfaction of the pecuniary obligations arising under the award and not at the preliminary stage of recognition and enforcement. France was, and remains, a member state. A competent French court would therefore not be in breach of the Convention so long as it limited itself to enforcing the award under

[54]For the change of government and judicial policy in the United States for example see *Flota Maritima Browning de Cuba v Motor Vessel Ciudad de la Habana*, 335 F. 2d. 619 (1964, 4th Cir. Md).

[55]Decision of 5 December 1989 (1990) 117 JDI, 141; reversed by the Court of Cassation, decision of 11 June 1991 [1991] Rev Arb., 637.

[56]See the case comments by Gaillard, Emmanuel in (1990) 177 JDI, 144 and Broches, (1990) Rev. Arb., 167; (1991) Rev. Arb., 638.

Article 54(1). In fact, failure to do so may result in France, through its courts, being in breach of its Convention obligation to ensure the observance within its territory of the requirements of Article 54(1).

It has been pointed out by Broches[57] that in refusing to enforce the award the Paris Court of Appeal was deviating from a previous decision of its own on similar facts and raising almost the same issue.[58] In *Benvenuti and Bonfant v The Government of Congo,*[59] the Paris High Court had entered a judgment in recognition and enforcement of an ICSID award in favour of Benvenuti, subject, however, to the condition that no steps to execute the award or conservatory measure could be taken against the assets of the award debtor situate in France without prior authorisation from the Court. The High Court also held that the award neither failed to comply with French law nor was it against public policy. Benvenuti applied for the condition to be struck out or modified. On the refusal of the judge to do so,[60] the company appealed, on the ground that under the ICSID Convention of 1965 the jurisdiction of a domestic court requested to grant an exequatur was limited to ensure the authenticity of the award and, if satisfied, to execute it. It did not extend to matters regarding the execution of the award and the immunity of the state against execution, since the grant of an exequatur in recognition and enforcement and the execution of the award are two seperate stages. The condition imposed by the High Court is not necessary if the request is limited to enforcement. That submission was acceded to by the Paris Court of Appeal. The Court stated that the question of immunity of the state could only arise in relation to proceedings for execution and not at the preliminary stage of enforcement.[61] It was only in relation to an action brought for execution that issues relating to the immunity of the state, preserved by Article 55, could appropriately be

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[57](1991) Rev. Arb., pp. 170-171.

[58]*Benvenuti Bonfant v Government of Congo* (1981) 108 JDI 843 (CA)

[59]*Ibid.*

[60]*Ibid.*

[61]See also Leboulanger, Phillipe (1992) Rev. Crit. Dr. Int. Privé, 331, pp. 332-3.

considered.[62]

If the distinction is retained, a foreign investor applying for execution would, depending on the relevant domestic law, be confronted with the defence of sovereign immunity in exactly the same way that a state contracting party in whose favour an ICSID award has been rendered will be faced with any available defence under the laws governing the execution of judgments in force in the jurisdiction in which execution is requested, hence, Broches' admission that the provisions were drafted to be of benefit to all parties.[63]

Moreover, Articles 54(3) and 55 are worded in terms clearly recognising that the immunity of states is not an absolute and automatic right under the Convention, but an exemption which is available subject to the laws in force from jurisdiction to jurisdiction. Thus, in jurisdictions were the exemption would not be available or, as in many countries, highly relative in its application, the contracting state will be reduced to the same level as the private foreign corporation; a result which might have been desired but which could not, in the climate of the time, be achieved directly owing to the resistance of developing countries.[64]

What is more, the scheme resulting from Articles 25(1), 53(1) and 54(1) significantly undercuts the thrust of Article 55. Under Article 25(1) a party cannot withdraw its consent unilaterally. Taken on its own Article 25(1) may be read as restricted to withdrawal of consent to the submission, i.e., to ICSID's jurisdiction only. But Article 53(1) provides that an ICSID award is binding on the parties:

> [t]he award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed

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[62]Giardini further points out that it was also wrong for the High Court to raise questions of public policy and general compliance with French law, since that is not also permitted under the Convention: "L'exécution des Sentences du Centre International pour le Règlement des Différents relatifs aux Investissséments" (1982) 71 Rev. Crit., 273.

[63](1972) 136 Hague Acad. Courses, p. 405.

[64]Broches, *ibid* pp. 404-405.

> pursuant to the relevant provisions of this Convention[65]

and Article 54(1) creates an obligation for the state to comply with the award:

> [e]ach Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the percuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that State ...[66]

such that the undertaking to comply with the terms of the award has been accepted as a waiver of immunity against both enforcement and execution,[67] thus rendering Article 55 ineffective.

In failing to recognise the immunity against execution as an automatic right under Article 55, in preference to treating it as a relative exemption whose availability and conditions of exercise would depend, under Article 54(3), on the laws in force in each country, the Convention provided leeway to the courts in certain jurisdictions to attempt, with some justification, to say that a valid arbitration under the Convention constitutes a waiver of immunity against enforcement and execution of the award.[68] The District Court for the District of Columbia in the United States was persuaded in

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[65]The relevant provisions being principally Article 51(3) & (4) dealing with the stay of proceedings by the ICSID tribunal that rendered the award or a reconstituted tribunal, and, *a fortiori*, where the award has been annulled pursuant to Article 52.

[66]In fact, to the extent of which both provisions deal with the *res judicata* of an ICSID award, Andrea Giardina sees Article 54(1) as an unnecessary duplication of Article 53(1): (1982) 71 Rev. Crit., 273, p. 277, note 12.

[67]*Birch Shipping v Tanzania*, 507 F. Supp, 311 (1980 US DDC); but now of more significance in the United States see the U.S. Foreign Sovereign Immunity Act, Section 1610(d)(6), as amended on 16 November 1988, *infra*; see also Farley, "Commentary: The Convention on the Settlement of Investment Disputes between States and Nationals of other Contracting States" (1966) 5 Duquesne L. Rev., 19; Soley, "ICSID Implementation: An Effective Alternative ..." (1985) 19 Int'l Lawyer, 521.

[68]*Ibid*; see also *Société Norbert Beyrand France v République de Côte D'Ivoire*, Paris Court of Appeal decision of 9 July 1992 [1994] Rev Arb., 133, where the Court held that submission by the State to ICC arbitration constitutes an undertaking, pursuant to Article 24(2) of ICC Rules, to comply with the award and, on that basis, a court could order conservatory measures against assets of the State held in France as security for an award made against the State pending the outcome of proceedings for its annulment.

the Tanzanian case that a submission to arbitration, on its own, is sufficient to waive the state's immunity against execution, relying on Section 1610(a)(1) of the United States Foreign Sovereign Immunities Act of 1976, which includes an exception providing that a state's property used for a commercial activity shall not be immune from execution if "the foreign state has waived its immunity from attachment in aid of execution, or from execution, upon a judment entered by a court of the United States or of a state ...." The submission to arbitration was treated by the court as constituting such a waiver, although it would have been more appropriate to treat a submission to arbitration as a waiver of jurisdiction, rather than of execution.[69]

A United States court sitting today will be on safer grounds than the court that decided the Birch Shipping case. As if to give statutory force to the decision, Section 1610(a)(6) of the Federal Sovereign Immunity Act as amended in November 1988, provides that the property of a sovereign state used for commercial activities in the United States is not immune from execution if

> "the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.[70]

Clearly Article 55 cannot be regarded as such a "provision" of the arbitration agreement to prevent the execution of an award against the state concerned, and its safeguard for any state involved in ICSID proceedings with assets used for commercial purposes in the United States is therefore lost. In fact the effect of Section 1610 (a)(6) is to make the very fact of submission to arbitration the basis for execution against the host state, notwithstanding the attempt at preserving immunity under Article 55. As a result the execution of an award against a foreign state in the United States of America is easier than the execution of a court judgment, whether

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[69] *Letco v Liberia* 650 F. Supp, 73 (1986, SDNY); *Senegal v Soabi, supra*; *Benvenuti & Bonfant v Congo, supra.*

[70] 28 United States Codes (U.S.C.)

domestic or foreign![71]

What further renders the Convention more onerous for the host state than for the investor is that failure by the host state to comply with its Convention obligations under Articles 53(1) & 54(1) requiring it to accept an award made against the state as binding and to enforce it constitutes a breach of a treaty both under Article 64 and general international law.[72] This is so because Articles 53 & 54, read separately or together, create absolute obligations for the state. In that case, proceedings may be brought against the host state by the state of which the investor is a national or by any other member state party to the ICSID Convention.[73] Meanwhile an investor refusing to comply with the award cannot be in breach of a treaty to which the investor is not a party.

In those circumstances an attempt towards a genuine balance in the Convention would have been to make the state of which the investor is a nationl responsible for the award debt of the investor in the same way that it assumes the position of the investor by reviving the right of diplomatic intervention,[74] if the host state had defaulted. It is doubtful whether this extraordinary mechanism to ensure the execution of awards would have been put in place if investors were thought to be the principal debtors. The absence of a corresponding mechanism to ensure that an award made against a defaulting investor or one without sufficient assets suggests that it may not. Such an obvious imbalance certainly commands little confidence from the point of view of developing countries receiving investments.

The purpose of the Convention may also still been achieved and the confusion created by Articles 53(1), 54(3) and 55 avoided by leaving out Articles 53 and 54 altogether, since the question of recognition and enforcement was already the subject of another international instrument, viz, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. A provision in the Washingtion

[71]Joly, Françoise "Etats-Unis: Une Réforme de 1988 Restraint le domain des Immunités des Etats Etrangers en matière D'Arbitrage" (1990) Rev. Arb., 607.

[72]Delaume (1983) 77 AJIL p. 802.

[73]*Ibid.*

[74]By virtue of Article 27.

Convention treating an ICSID award as a "foreign award" for the purpose of the New York Convention would have extended the New York regime to awards made under the World Bank investment disputes Convention.[75] The UNCITRAL Model Law as a whole adopts the provisions of the New York Convention.[76]

It is therefore highly probable that in drafting the enforcement provisions of the Convention a more far reaching effect was intended than often expressly stated and than was necessary to achieve the purpose of a Convention limited to providing mere *facilities* for the conciliation and arbitration of investment disputes, including the availability of direct access by private persons to international tribunals. A quick reference to the enforcement regime of the New York Convention, for example, reveals that the ICSID provisions provide a simpler and a more effective scheme, although only against one of the parties to the arbitration. The court requested to enforce an ICSID award is compelled to do so upon presentation of an authenticated copy of the award. There is no room at this stage to resist the award by the party against whom enforcement is required. This is so because the Convention requires the domestic court to uphold an ICSID award as a similar judgment of its own by recognising and enforcing it. It is only at the stage of execution that an ICSID award becomes exposed to the same challenges to which an award enforced under the New York Convention regime would have been at an earlier stage.

2. Enforcement by Extra-legal Means

Of even greater importance is the psychological link between the Centre and the World Bank. Although established under the the auspices of the Bank, with which it has continued to retain an administrative link,[77] the Centre is said to remain in

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[75]The possibility of doing so was contemplated at the time of the Convention, although not carried: see Broches, "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution." (1987) 2 ICSID Rev.-FILJ, 229.

[76]Model Law, Articles 34 and 36.

[77]The Centre facilities are based at the Bank, The Bank President remains Chairman of the Centre's Board of Governors etc.

substance an independent structure completely seperate from the Bank in relation to the conduct of any arbitration proceedings. It is obvious, however, that as against the contracting state, the most effective guarantee of enforcement lies in the institutional link between the Convention and the World Bank as its administering body "... since the [s]tate may fear not being able to obtain further loans from the World bank."[78] Broches pointed out that failure to observe its pecuniary obligations toward the investor might bring the host state "into conflict with the capital exporting community".[79] Since that link is only perceived in terms of the adverse consequences to a host state that fails to comply with an award, and never in relation to the investor as well, it would follow that the link was not necessarily intended to work to the advantage of both parties to an ICSID arbitration, particularly of the host states. That is one of the psychological aspects of the one-sidedness of the Convention. As early as 1969 Broches, as the first Secretary of the Centre, had stated in relation to the attitude of the Bank towards a state in default that:

> *[q]uant aux sanctions, plusieurs orateurs ont soulignés qu'elles pouraient exister avec l'intervention de la Banque Mondiale ... Nous nous efforçons d'etre très discrets et de ne pas exercer de pressions même morales sur les pays qui sont des signataires potentiels de la Convention ou pour obtenir l'application effective de la Convention par les Etats signataires. Mais il se peut que si un Etat viole une obligation très nette exprimée dans la Convention, les organes de la Banque et d'autres institutions affiliées et peut-etre la communauté financière et d'aide auront des reticences considerables avant d'accueillir favorablement des demandes d'assistance de ce pays. Et c'est une des raisons pour lesquelles nous avons pris l'initiative; nous avons voulu eviter ainsi des situations tres delicates, devant lesquelles nous nous trouvons parfois lorsque des pays membres ou des investisseurs portent plainte contre un Etat X et nous demandent d'arrêter notre aide et nos operations financieres avec ce pays. Ce sont des situations delicates car l'ont se trouve*

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[78]Redfern and Hunter The Law and Practice of International Commercial Arbitration, 2nd Edn., Sweet & Maxwell, London, 1992, p. 418.

[79](1972) Hague Acad. Courses, p. 409.

devant des revandications unilaterales; il n'y pas alors de decision impartiale et nous sommes devant une situation très difficile, car nous ne voulons pas être juge. Avec la Convention, si un Etat consent a la competence du Centre, s'il y a eu sentence rendu contre cet Etat et que celui-ci n'execute pas la sentence, nous avons une situation tres nette et tres claire et les problemes de conscience ne se presenteraient pas de la meme façon ou ne se presenteraient pas du tout. C'est pour nous la seule assurance indirecte.[80]

In its mildest form, Shihata, the present Secretary of the Centre, expresses the same threat in terms that "refusal by a state involved to comply with an ICSID award would deprive it of credibility in the international business community. This is not a risk[81] that a state would be likely to assume lightly."[82]

It is thus made obvious that the decision by the Bank and its affiliated bodies whether or not to grant a loan or some other financial facility to a developing country receiving investments may be made subject to the attitude of the state in relation to the extent to which it complies with a Convention award made against it. It has, as a result, never been in doubt that the possibility that default by a developing state might result in the World Bank taking a tougher attitude towards an application for investment or other form of financial cooperation from the country concerned, was one of the principal reasons for establishing ICSID.[83] What seems clear also is that failure to comply with a World Bank Convention award will result in more serious consequences for the developing country, host state to investments, than a failure to

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[80]"Aspèts Procéduraux", p. 129-30.

[81]It is in fact a threat. The state concerned may not only lose credibility. Giardini states that it will find itself in direct conflict with the World Bank: "*[i]l semble en defitive probable que l'inexécution d'une sentence du CIRDI [ICSID] et, plus généralement, la violation de la Convention de Washington, seraient prises en consideration par la banque au moment de formuler sa politique de crédit à l'égard des Etats intéresseés*": *op. cit.* p. 293.

[82]"Towards a Greater Depolitization of Investment Disputs: The Roles of ICSID and MIGA" (1986) 1 ICSID Rev.,-FILJ, 1, p. 9.

[83]Fatouros, A. A., "Investisséments Etrangers et Arbitrages entre Etats et Personnes Privées - La Convention BIRD [IBRD] du 18 Mars 1965" (1959) 59 Rev. Crit. Dr. Int. Priv., 580

comply with an ordinary non-Convention award. The only logical explanation for that attitude would have to do with the direct involvement of the World Bank as an important source of investment financing to developing economies with the establishment and administration of the Convention and its Centre. It is this form of indirect and sometimes direct pressure which, it was believed, the Bank could bring to bear on host nations.

Broches' statement also indicates that immunity against execution was not seriously thought to be a major obstacle to execution of awards. It was the absence, in the first place, of appropriate *fori* for the adjudication of those disputes which was the controlling factor in the creation of the Centre. The World Bank was finding it difficult to justify any form of pressure on a host state in the absence of a judicial pronouncement. It would have been in conscience easier to respond to a request by an investor already credited with an award than without one. Once an award is obtained under what appears to be a neutral forum and the debtor state refuses to comply with its terms, the stage would then be set, according to Broches, for the World Bank to intervene as appropriate, being thus satisfied in conscience and otherwise. In those circumstances the World Bank would be faced with "... *une situation très nette et très claire et les problèmes de conscience ne se presenteraient pas de la même façon ou ne se presenteraient pas du tout.*"[84]

Would the same considerations have applied in the case of refusal by an investor to comply with the terms of an award rendered in favour of a host state? Apparently that was not seriously in the minds of those closely involved with the making of the Convention and nothing that has happened since the creation of the Centre itself suggests otherwise.[85]

E. The Convention and Applicable Law

Of some concern to developing countries are the provisions of the Convention

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[84]"Aspèts Procéduraux", p. 130.

[85]See *infra* conclusion of dissertation.

relating to the applicable law. Those provisions[86] have often been presented as reflecting the much acclaimed balance between the diverging interests of private investors and host countries. It should be noted that the Convention was never intended to deal with substantive questions of law relating to state contracts. It was not also meant to address the question of whether there was need for the development of a new corpus of substantive rules of law in the entire area of international economic and trade law, as rendered necessary by the emergence of new States.[87] In fact previous attempts at responding to the need to protect foreign investments and directed at laying down such rules had failed in varying degrees.[88] The Convention was therefore intended to address the problem from a completely different approach, directed not to the substance, but to the procedure, and the provision of material assistance and intellectual resources (limited almost entirely to making available a list of conciliators and arbitrators) within an institutional framework. The choice of the particular institutional framework was essential to ensure that whatever gains were made would be guaranteed in an international instrument binding on the developing states concerned as a treaty.[89] As a result no attempt is made in the Convention to lay down any rules of law on the transfer of foreign investment and the settlement of disputes arising in connection thereof. The Convention leaves it to the parties to determine, by agreement, what those rules should be in each case.

Thus, Article 42(1) provides, in the first place, that the tribunal set up under the Convention shall apply the law indicated by the parties. That clause is in recognition of the doctrine of party autonomy, on the basis of which parties to a contract are allowed to select the proper law of the contract. Whereas that doctrine is now considered settled in contracts between private parties, its extension without modification into the domain of state contracts, the subject of the ICSID Convention,

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[86]Articles 42(1), (2) and (3).

[87]See document presented by the General Counsel of the World Bank to the members of the Committee of the Whole, SID Doc. 63/2 of February 18, 1963, History of the Convention, Vol. 2, Part 1, p. 73.

[88]*Ibid.*

[89]Broches (1965) 65 Proceedings ASIL, 33.

has remained questionable on the grounds that the parties are not contracting on an equal footing.[90] The inequality is said to arise, in the first place, from the fact that corporations are not regarded in the international plane as having the same standing as states and, second, in that the corporations themselves are in bargaining terms, more powerful in some cases than most investment receiving countries on account of their immense capital resources.[91] Sornarajah points out that these inequalities make it inappropriate to extend the application of the principle of party autonomy to the area of state contracts without a careful balance. But that imbalance may shift after the investment as the state gradually asserts prerogatives associated with sovereignty within its territory.

Whatever the relative strengths of the parties may have been prior to and after the contract, in practice, the laws regulating foreign investments in many host countries require the application of the law of the state concerned as the law of the contract,[92] and it is recognised that in the overwhelming majority of those contracts provision is made for the application of the host state law.[93] It was also obvious, having regard to the general investment climate of the time, and in the face of the hostility of host states arising from the treatment given their national laws in the early Middle East petroleum arbitrations, that they would not receive with favour any attempt to set up a system that did not recognise the role of their national laws in the settlement of disputes involving state contracts.

It is in recognition of that fact that the Convention provides for the application of the law of the host state where, as happens quite frequently, the parties fail to specify the law to be applied by the tribunal.[94] This could be as a result of the

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[90] Sornarajah, M., International Commercial Arbitration: The Problem of State Contracts, Longman Singapore Ltd., 1990, pp. 130-31.

[91] *Ibid.*

[92] See for example the cases cited by Sornarajah, *ibid* p. 113; ICSID, Investment Regulations Around the World, 1983.

[93] Delaume, "State Contracts and Transnational Arbitration" (1981) 75 AJIL, 784, p. 798.

[94] Article 42.

difficulties associated with reaching agreement in the course of negotiating the contract or, after a dispute has already arisen, on the content of that clause, given that the parties would already have become aware of the potential of the clause to determine the outcome of the litigation one way or the other. The absence of a choice of law clause could also be the result of an oversight.

The Convention directs the tribunal under the second clause of Article 42(1) to apply the law of the contracting state party to the dispute in the absence of a proper law clause in the contract or a subsequent agreement indicating it. The law of the state is referred to as the law of the place where the investment is made and where the contract as a whole is located. That same law would in any case have been reached by application of the ordinary principles of conflict of laws but would not be attractive to investors since, as far as they were concerned, it would have been disfavourable. To allay their fears, Article 42(1) further provided for the application of the relevant rules of international law, together with the law of the contracting state. The ICSID tribunal is therefore invited to have regard not only to the law of the host state (as the "appropriate" proper law - so to say - of the investment) but also to such principles of international law as it may find applicable.

As pointed out by Sornarajah,[95] it was not until the 1950s that reference began to be made to international law as the governing law of contracts between states and private foreign parties. The purpose was to subject those contracts under a system of law that would provide some degree of protection to foreign investment, then believed not to be available under the domestic legal order of developing countries. Previous attempts at doing so directly had not been succesful at all.[96] The framers of the ICSID Convention thought that the same purpose could easily be achieved by subjecting ICSID arbitrations to international law and securing the acceptance of countries in need of investment in a treaty. That law, according to the Report of the Executive Directors of the World Bank, should be understood within the same meaning as that given to it by Article 38(1) of the Statute of the International Court

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[95]*Supra* p. 126.

[96]See above, notes 1 and 2; Fatouros, A. A., "The Quest for Legal Security of Foreign Investments - Latest Developments" (1962-63) 17 Rutgers Law Rev., 257.

of Justice, while bearing in mind "... the fact that Art.38 was designed to apply to inter-state disputes" only.[97] Article 38 of the Statute of the International Court of Justice is limited to disputes within the domain of international public law. Whether or not it was appropriate to extend the principles and rules of public international law into the area of state contracts is a question we will examine later when we come to deal with the question of the applicable law generally.

However, following a trend introduced by the early Middle East arbitrations, it became possible, although without using exactly the same terminology ("... general principles of law as recognised by civilised nations ..."), to bring state contracts within the regime of international law.[98]

As far as the Convention itself is concerned, the wording of Article 42(1) still left it open as a matter of construction to determine the relationship between international law and the law of the state concerned. If both laws were inconsistent on a specific issue, it would become necessary to uphold one against the other. The course to follow in such a situation has not been in doubt. According to Broches, if confronted with such a problem, the ICSID tribunal should:

> first look at the law of the host State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or the denial of the validity of the host State's law, but may result in not applying it where the law, or action taken under the law, violates international law. In that sense ... international law is hierarchically superior to national law under Article 42(1).[99]

A preference had already been indicated for that view long before the final draft of the Convention itself. Broches had, as chairman of the regional consultative meetings

[97]Report of Executive Directors, para. 40.

[98]See for example *Saudi Arabia v Aramco* [1963] 27 ILR, 117; *Sapphire International Petroleum Co.v National Iranian Oil Company* [1967] 35 ILR., 136.

[99](1972) 136 Hague Acad. Courses, p. 392.

of legal experts,[100] thought that should be the correct position in the light of the experience derived from the practice of arbitral tribunals in the past but did not consider it necessary to "... state the position too specifically",[101] since that might have attracted the hostility of receiving states, whose adherence to the proposed scheme was indispensable to its establishment.

If this view were correct,[102] then, Article 42(1) carries the thrust of the entire Convention far beyond its stated purpose. The Convention was never intended to deal with the troublesome question of substantive rules of law whether directly or, as Article 42(1) does, indirectly, by indicating a bias in favour of a particular system of law, whether international or domestic. The contents of that system, as regards inter-state matters or as applied to disputes involving private parties and states, has always been questioned by developing countries.[103]

What is more, on the suggestion advanced by one delegation at the legal experts consultative meeting in Bangkok[104] and supported by another delegation[105] that the decision to invest in another country also involved an implied submission to the application of the laws of the host state as the governing law of the investment, it was responded that apart from cases where national law was in violation of international law, thus rendering the former inapplicable, it was also "... reasonable to provide that an international tribunal will have the power to apply international law

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[100]See the proceedings of the Geneva meeting, History of the Convention, Vol. 2, Part 1, p. 420.

[101]*Ibid.*

[102]The view is not without support in all reported ICSID awards containing a statement on the issue. See for example the opinion of the Ad hoc committee in its annulment decision of 16 May 1986 in *Indonesia v Amco Asia* [1993] 1 ICSID Reports, 509; *Letco v Liberia* (1987) 26 ILM 647 p. 658, where, inspite of having noted the parties' express choice of Liberian law, the tribunal still took the view that Liberian law is nonetheless "... subject to control by international law."

[103]Sornarajah, *op. cit.* chapter four.

[104]History of the Convention, p. 513.

[105]*Ibid* p. 514-15.

...."[106] especially as the Convention was meant to establish a forum with an international jurisdiction.[107]

Therein lay the entire design of the Convention. In the absence of an internationally accepted regime for the treatment of private foreign investment, it became necessary to institutionalise by treaty - in effect a more authoritative source of international law - a process already initiated by arbitral tribunals, (although not without much resistance), to extend the application of international law into the field of state contracts in the belief that it will provide better protection to foreign invesments.[108] That is an issue we deal with in chapter four. We may only add for now that, that belief, together with the conventional view of Article 42 as construed by ICSID tribunals, completely distorts the simple objective of the Centre and the Convention as expressed in Article 1(2): "... to provide *facilities* [emphasis added] for conciliation and arbitration of investment disputes between states and nationals of other states in accordance with ..." the Convention's provisions.

Sub-conclusion

It has repeatedly been said[109] that the fear of political risks undoubtedly works to the detriment of the flow of private foreign capital. The establishment of the Centre has been justified on that ground. What is not openly said, although it underlies that belief, is the fact that it is the same fear of political risks which was the driving

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[106] *Ibid* p. 571.

[107] See also Lauterpacht "The World Bank Convention on the Settlement of Investment Disputes", in Etudes Guggenheim, 642 (1968); *contra*, Toope, Mixed International Arbitration, pp. 238-52 (1990) and Schartzenberger, "The Arbitration Pattern and the Protection of Property Abroad", in International Arbitration: Liber Amicorum Martin Domke (Ed. Sanders), 1967, who all think that although the ICSID Convention itself is an international instrument, tribunals constituted pursuant to it are not international tribunals in the strict sense.

[108] Fatouros, (1959) Rev. Crit. Dr. Int. Privé, 580.

[109] See for example Amerasinghe, C.F., "The International Centre for the Settlement of Investment Disputes and Development through the Multinational Corporation." (1976) 9 Vand. J. Int'l. Law, 795.

force of the Convention. It was assumed to be the situation that assets invested in the economies of countries receiving them were expropriated by the governments of the same countries on political considerations only. That was the evil that the Convention was meant to address and, if possible, cure. If that were the starting point, and it was so one-sided, it was theoretically difficult to conceive how, in establishing the Convention a proper balance could have been arrived at. In the circumstances, it was obvious that in trying to reach that so much needed compromise, countries which were already guilty of the course of conduct leading to the background of the Convention would have had to make more far-reaching concessions than their private investor counterparts. Also implicit in that initial position was the assumption that the absence of such political risks, including the readiness of host countries to submit to the arbitration of investment disputes, would work in favour of the flow of investment capital. That might have been theoretically attractive although, in practice, it was doubtful whether there was evidence in support of it. The Multilateral Investment Guarantee Agency was, it seems, also influenced by similar considerations.

II. THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)

A. BACKGROUND

The creation of an investment insurance scheme was being pursued by the World Bank and the international business community at the same time as the ICSID itself was under consideration. The ICSID was just one way the World Bank could contribute to reduce the incidence of disputes arising out of foreign investment transactions. The investment Convention created a centre to provide a setting for the resolution of disputes within a legal framework. An award obtained pursuant to an arbitration under the Convention is however not useful unless it is capable of enforcement and execution. With the insistence of investment receiving states the ICSID Convention retained the immunity of host states against execution by subjecting the execution of an award to the local law in force on sovereign immunity in member states in accordance with Articles 54(3) and 55.

To an extent, therefore, the immunity preserved by Articles 54(3) and 55 limited the effectiveness of the ICSID mechanism in providing recourse to an injured investor. One way to overcome that particular inadequacy was to set up, alongside the dispute settlement framework, a financial mechanism for the speedy and effective recovery of losses incurred in investments abroad. An international insurance scheme providing financial cover to investors and involving the participation of home and host states, including private investors, was thought appropriate. The scheme would involve the creation of an international insurance institution possessing legal personality in international and domestic laws to provide indemnity against a specified category of risks of special concern to private investors abroad.

That was, and remains, a commendable idea except that those associated with it did not at any stage consider the position of a developing state faced with an unco-operating investor. The state would be as much in need of financial insurance as an investor in the state's position. But the financial position of host states did not appear to be an important consideration at the time, due, in part, to the evolution of the evolution of the investment protection climate prevalent during the period leading to the establishment of MIGA.

(1). Investment Protection Treaties

Closely associated with the insurance scheme were what became known as "Investment Protection Treaties", (both bilateral and multilateral), providing a background for the insurance mechanism. These are international agreements between the governments of capital exporting and receiving countries providing minimum standards of treatment for private investments from the former to the latter. In essential part they contain provisions designed to protect investments by nationals of the states, parties to the treaties, against risks considered to be non-business related. The contents of these arrangements would vary from treaty to treaty, although, in general, standard provisions are to be found in all to cover such issues as expropriation (with or without compensation), fair and equitable treatment, national treatment, currency convertibility and transfer, and compensation for loss suffered as a result of war or civil disorder. They would also make provisions for the acquisition and ownership of property and include stabilisation clauses. With regard to dispute settlement, a provision for arbitration would be included providing for the application of international law, so as to remove any disputes from transactions governed by such a treaty from national jurisdictions and laws.[1]

Initially investment protection treaties appeared in the form of Friendship, Commerce and Navigation Treaties (FCNs), which remained in place until the late 1960s, when they were gradually substituted by the bilateral investment treaties.[2] The FCNs were concluded initially by the United States and Japan and later some European countries with the objective of promoting the expansion of trade between them. They were only gradually extended to include developing countries in the first two decades after the second World War. Owing to the involvement of developing

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[1]For a detailed study of Investment Protection Treaties see, The United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, (ST/CTC/65), 1988; UNCTC & ICC, Bilateral Investment Treaties, (ST/CTC/136), 1992.

[2]UNCTC, *ibid* pp. 3 *et seq.*

countries they also became regarded in the United States, in particular, as a means not only of encouraging but primarily of protecting investment abroad by including minimum standards of treatment to nationals of the states, parties to such treaties.

FCNs were said to be extremely broad in scope and dealt with matters as diverse as the "... entry and freedom of movement, protection of persons, right to counsel and prompt trial, ... national treatment in application of national laws, enforceability of arbitration awards, protection of acquired property, right to lease and purchase land freely, patents, trade marks, ... equal treatment, administration and exchange controls, transit of goods and persons, import and export duties and taxes, right to compete with local monopolies, consultation with restrictive business practices ...."[3]

However, following the nationalisations and expropriations of the 1950s and 1960s, FCNs became perceived as widely inadequate for the protection of foreign investments. They dealt only in a little manner with direct foreign investments, seeing that they were not then as important as they became after the second World War. It is said that the focus of FCNs was on trade and navigation and that "... purposes of investment protection were merely incidental ..."[4] to the treaties. They were therefore regarded as inadequate, especially as they were initially intended primarily for the protection of individuals, and thus criticised for not dealing with such questions as "creeping" or indirect expropriations and for containing poorly drafted arbitration clauses.[5]

(2). National Investment Insurance schemes

As a result two new initiatives were introduced in the early 1970s and 1980s. The first scheme was financial in character, in that it involved the underwriting by the

[3]*Ibid* p. 4.

[4]Vandevelde, Kenneth J., "The Bilateral Investment Protection Treaty Program of the United States" (1988) 21 Cornell Int'l L. J., 201, p. 203.

[5]Pappas, Athena J., "References on Bilateral Investment Treaties" (1989) 4 ICSID Rev.- FILJ, 189; Bergman, Mark S., "Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty" (1983) 16 N.Y.U.J.Int'l L. Pol., 1.

governments of capital exporting countries of non-business risk insurance. It took the form of an investment guarantee offered to nationals of the home state investing abroad. The guarantee is issued by a government agency which also administers the programme of the issuing country. In the United States, for example, the Overseas Private Investment Corporation was established under the Foreign Assistance Act in 1969 to offer cover against specified risks. The Export Credit Guarantee Department in Britain was able to establish an overseas investment insurance scheme under the Overseas Investment and Export Guarantees Act of 1972. Canada has been providing cover through its Export Development Corporation (EDC) and Denmark has been able to do same for Danish Investors in developing countries through the Danish International Development Agency.

A feature common to all the national insurance schemes is that they all make provision for the national agencies to become subrogated to the claims of their nationals in dispute with a foreign government after the investor has received compensation from his national guarantee scheme. Subrogation in the foreign investment setting was intended to enforce compliance by the host state with any claims embraced by the indemnifying government.

That arrangement soon ran into difficulties. In view of the fact that the debtor would be a state or a state entity, it remained doubtful whether the assignment of the investor's claim to the state of which he was a national, without the consent of the defendant state, would have been sufficient to enable the subrogating government to proceed with the claim. The host government might have " ... refuse[d] to recognise the principle and object to the transfer of the claim from the individual investor to his national state."[6] Further, it was also clear that a home state appearing as a subrogator could not, by virtue of Article 25 of the ICSID arbitration Convention (the only effective international mechanism for the settlement of such claims), proceed to arbitration under the Convention.[7] Article 25 limits the scope of the Convention to disputes in which one of the parties is a foreign investor or a foreign based corporation, or a company incorporated in the receiving state but which, for the

[6]Meron, Theodor, "The World Bank and Insurance" (1975) 47 BYIL, 301, at 309.

[7]*Ibid* pp. 306-7.

purposes of the Convention, the state has accepted to treat as a foreign corporation. The Centre's jurisdiction does not cover disputes between states. That jurisdictional limitation would not have made it possible for the subrogator state, upon paying the investor, to bring arbitration proceedings or, if they had been initiated already, to continue in the place of the substituted investor against the defendant state. In particular, and as we noted before, the Calvo doctrine and the general attitude of investment receiving states remained hostile to the intervention of foreign governments in investment disputes. As Meron further observed, "... past experience [indicated] that certain developing countries, and particularly Latin American States object in principle to the operation of subrogation with respect to foreign investments on their territory. They regard subrogation as contrary to their sovereignty and as politically dangerous in that it transforms a dispute between a state and a foreign investor into a dispute between two sovereign [s]tates"[8]

The effectiveness of domestic investment programmes was therefore bound to be limited if, notwithstanding the express provisions of national insurance agencies to become substituted to the claims of compensated investors, compliance by defaulting states could not be compelled. As a result the second initiative was put in place associating national insurance schemes with a network of what came to be referred to as bilateral investment treaties, also containing subrogation clauses.

(3). Bilateral Investment Treaties (BIT)

BITs are intended to complement the national insurance schemes. They include provisions requiring the host state to recognise the transfer of the rights of the investor, when he receives payment, to the indemnifying state, which is usually the state of which the investor is a national. This will constitute a legally binding international obligation on the receiving state, under which the home state will appear in its own right instead of as a mere subrogator. Being an international legal arrangement of a higher order, the BITs were intended to supplement and support the domestic insurance schemes by creating a treaty obligation enforceable against the

[8] *Ibid* p. 310.

host state. The first BIT was said to have been signed between Germany and Pakistan in 1959 and, by 1991, the network of those treaties had increased to about 450.[9] The scope of the treaties is however not limited to the issue of subrogation. It includes the entire issue of the treatment abroad of foreign investments and other forms of foreign owned property.

The fact that the treaties increased in numbers and in scope may still not have been regarded as having adequately dealt with the underlying suspicions of developing countries regarding the right (as retained in the treaties) of states of which investors are nationals to continue to intercede on their behalf. The retention of that right did not help to depoliticise the already charged foreign investment climate. It was pointed out that it was not the principle of subrogation itself that was being challenged by the developing countries but the particular arrangements under which the capital exporting countries became involved in the disputes by means of diplomatic protection.[10] There was therefore no reason why an international institution, involving the participation of both developing and developed countries and therefore reflecting some degree of neutrality, could not become an appropriate subrogator after compensating an investor.

(4). Objective of the MIGA

The creation of MIGA was therefore well in line with the above developments. Like the Centre for the settlement of investment disputes, it was intended as a response to a specific problem, that of protecting foreign investments with a view, it is said, to encouraging its flow. That in itself is a worthy objective but the instrument used, the MIGA, turned out to benefit investors only, without so much regard for the interests of the countries involved.

As regards the protection of foreign investments, MIGA is intended to re-assure investors with the guarantee of immediatedly available financial resources to compensate for loss irrespective of the existence of an investment protection treaty. The creation of the Agency would also overcome some of the other difficulties

[9]UNCTC and ICC, *op. cit.* note 1.

[10]Shihata, "Towards a Greater Depolitization of Investment Disputes: The role of ICSID and MIGA" (1986)1 ICSID Rev.,-FILJ, 1.

associated with making a claim for compensation.

In the first place, its status as an international organisation would make it possible in international law for MIGA to sue and be sued on its own behalf. That would resolve the procedural difficulties regarding the direct access of foreign corporations and individuals to international tribunals, since the private investor will cease to become a party to any arbitration or litigation after it has been compensated. For that reason Article 18(a) provides that

> [u]pon paying or agreeing to pay compensation to a holder of a guarantee, the Agency shall be subrogated to such rights or claims related to the guaranteed investment as the holder of a guarantee may have against the host country and other obligors. The contract of guarantee shall provide the terms and conditions of such subrogation.

Article 18(a), as read with Article 1(b) conferring the Agency with legal personality, removes the investor from the dispute and therefore resolves the need to establish his capacity in international law to bring proceedings against the host state. It further resolves the absence of any other means of redress to the investor in the event that the state of which he is a national declines to intervene on his behalf for reasons not necessarily connected with his particular dispute.

Next, subrogation is established in international law as a right, in a manner which allows the exercise of the investor's claim against the defaulting state without requiring the diplomatic intervention of the government of the investor. The involvement of home states, whether directly or through a national agency, did not help to make relations between home and host states less confrontational. Relying on grounds reminiscent of the Calvo doctrine, developing countries, especially those of Latin America, regarded with hostility arrangements (even when embodied in bilateral treaties) under which differences between a foreign corporate or physical person could easily become transformed into an inter-state dispute.[11] The establishment of a neutral international institution free from control by any group of countries was meant to be in response to that objection. The exercise of claims to which it shall have become subrogated would be regarded with less disfavour than in cases involving the

[11]See Bergman, (1983) 16 N Y U J. Int'l L. Pol., 1.

direct or indirect intervention of the government of the investor. Referring to the draft articles of agreement of a previous initiative by the World Bank to set up an International Investment Insurance Agency (I.I.I.A.) in 1972, Theordor Meron observed that "... the very raison d'être of the establishment of a multilateral insurance agency was to make subrogation into a non-political, technical, non-confrontational issue".[12] The question as to who could bring claims against defaulting states without provoking hostility of some kind became in part resolved.

The removal of these obstacles, it is believed, would encourage investors to take advantage of investment opportunities available in developing countries, which is the stated objective of MIGA. Since the existence of non-commercial risks was said to discourage the flow of investment capital, MIGA would seek to achieve this objective by issuing insurance guarantees to private investors, nationals of member states of the Agency.

The new institution is also required to encourage the flow of capital to developing countries in other ways. Under Article 23 of the Convention this additional role should include the provision of services to member states in the formulation of foreign investment policies, dissemination of information on investment opportunities, research, technical advice and assistance, cooperation with other bodies involved in the promotion of foreign investment and so on. The promotional activities should help to strengthen MIGA's image as an investment promotion, and not necessarily as an investment protection body, with the objective of benefiting one group of countries only.

B. SOME FEATURES

(1). Membership and the Significance of the Link with the World Bank

Under Article 4, membership of the organisation is open to all member states of the World Bank and Switzerland. The commentary to that Article points out that no member of the Bank is under an obligation to join the Agency. That cautionary note was in response, first, to a fear assumed to underly the Agency's creation and

[12](1975) 47 BYIL, p. 312.

points to one of the policy issues involved in the formulation of the Convention concerning the Agency's link with the World Bank. It was reasonable, in theory, to express some doubts as to the attitude of the Bank and the international investment community as a whole towards a developing country which did not sign up to the Convention and therefore failed to become a member state of the World Bank to which the Agency's guarantee could apply. It is likely that although a country would be under no obligation to join the Agency, the decision whether or not to invest in that country by a foreign investor wishing to rely on the MIGA insurance scheme might significantly be determined by that fact. Thus, although the country could not directly be compelled to join the Agency, it remains our view that the country would nonetheless be under pressure to become a member if in failing to do so it became seen as hostile to foreign investments.

In particular the fear was expressed that a country's relationship with the World Bank could become affected by any dispute which that country might have with the Agency as a member of the World Bank family, especially as under its standing policies, the Bank was known for paying particular attention to unresolved investment disputes.[13] The view that prevailed in response to that question was that the Agency should be created as an autonomous institution[14] keeping its financial and other operational activities separate from those of the Bank, although it was still thought necessary to retain a minimum administrative link with it,[15] notwithstanding that it was also known, as in the case of the ICSID, that an identical link had resulted in practice to a stronger relationship than was anticipated.[16] But that is not altogether so.

It has been suggested that the link between MIGA and the World Bank is

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[13]Shihata, Ibrahim F. I., MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency, Martinus Nijhoff, Dordrecht, 1988, p. 71 (Hereafter Miga and Foreign Investment)

[14]Article 1(b) of the Convention establishing the Agency gives it full juridical personality in international and domestic laws, including the capacity to enter into contracts, acquire and dispose of property and to institute legal proceedings in its own name.

[15]Institutionally reflected in making the President of the World Bank ex officio chairman of the Board of Directors of the Agency: Article 32(b).

[16]Shihata, Miga and Foreign Investment, p. 71.

possibly more than symbolic - contrary to what was initially intended - on the basis that the Agency has maintained a strong juridical and institutional association with the World Bank.[17] It is clear, as Touscoz observes, that the Agency is not a subsidiary of the World Bank, such as the International Finance Corporation, and that those involved in its creation have been careful not to over emphasise the link between the Bank and the Agency, preferring to highlight the view that "... MIGA is designed to be an autonomous institution which will operate on its own account and within its own responsility while maintaining a symbolic but significant linkage with the Bank"[18] Shihata's admission that the link is significant is probably correct since the suggestion that it is merely symbolic is disputed, for, as Touscoz further points out, it is more than symbolic: *"...[u]ne lecture attentive des statuts et des O.R. [Operational Regulations] fait toutefois apparaître très nettement le rattachement de l'Agence au "group" de la Banque; d'une part, l'Agence et le "group" sont liés juridiquement, d'autre part l'Agence utilise un systeme de pondération de voix qui s'apparente à la formule dite de "Bretton Woods", pratiquée par plusieurs institutions du "group".*"[19] Even if the link were merely symbolic, the psychological effect of that symbolism on a host states should not be lost since an act by the state in disregard of the Convention may invite a reaction from the World Bank, an important source of foreign investment financing.

Furthermore it was specifically envisaged that the Agency will, at least at its initial stages, establish administrative arrangements under which the facilities and personnel of the Bank, the International Finance Corporation (IFC) and the ICSID will be available to the Agency.[20] Under Paragraph 5.20 of the *Operational Regulations*, such cooperation could be extended to include "systematic consultation and exchange of relevant information with the World Bank and the IFC, subject to safeguards regarding the confidentiality of information available to each institution." The

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[17]Touscoz, J, "L'Agence Multilatérale de Garantie des Investissésments" (1987) 13 Dr. Prat. Comm. Int., 311.

[18]Shihata, (1986) 1 ICSID Rev.,-FILJ, p. 14.

[19]Touscoz, *op. cit.* p. 317.

[20]*Operational Regulations* paras. 5.01 and 5.22-23.

implementation of that paragraph will require maintaining a careful balance in the flow of information between the Agency and the other institutions. It is difficult to conceive how that would be in practice without prejudicing the required balance, given that the consultation is intended to be "systematic", including, in particular, that the *Regulations* also contemplate the overlap of personnel between the Agency, the Bank and the other institutions referred to.

(2). Participation of Developing Countries

The need for that balance raises the question as to why, in the first place, it was thought necessary to associate host states in the scheme. The central pillar of the Convention creating the Agency is without doubt the recognition of the right of subrogation, an arrangement which allows the Agency to pursue a member state after compensating the investor. Although subrogation is a well accepted principle of insurance law, a normal insurance contract is, however, an agreement between an insurer and the insured. If it is a third party liability insurance the contract is for an indemnity against the liability of the insured towards a third person. Otherwise it would be a cover against loss which the insured himself suffers either as the result of an act of himself, of a third party, or resulting from wholly extraneous circumstances. In any case the third party is not to be treated as a party to the contract and will normally not have been involved in the arrangement between the insurer and the insured.

In the case of the International Investment Insurance Agency (IIIA) proposal of the 1960s and 70s a staff memorandum of the World Bank on the principal outstanding issues[21] had reported on the extent to which developing countries could be made to contribute financially to the proposed agency, both in respect of the initial working capital, including administrative expenses, and to the payment of claims for losses should the income of the agency fail to meet these expenses. The Memorandum, based on the 1965 OECD "Report on the establishment of a

[21]IBRD, International Investment Insurance Agency (IIIA), Staff Memorandum on Principal Outstanding Issues, (197?), reprinted in Meron, Theodor, Investment Insurance in International Law, Oceana Publications, New York, 1976, 259.

Multilateral Investment Guarantee Corporation", together with the Bank's own previous drafts on the same issue, did not envisage the financial participation of developing countries except as concerns administrative cost. It proposed a "common working capital fund" to which all members (including developing countries) would be required to contribute but its purpose limited to meet the administrative expenses involved in the establishment and initial running of the proposed agency, pending the availability of income in other ways.[22] Although the Memorandum noted that the view had been expressed in committee that all members of the proposed agency should assume some responsibility for losses - with the liability of capital importing countries being limited - it nevertheless confined contribution to its working capital to capital exporting members.

These proposals were then assumed to be well in line with the overall circumstances necessitating the creation of an investment protection insurance scheme for the sole benefit of investors and other attempts to deal with threats to foreign investments. It was entirely consistent with the fact that the insurance mechanism was to be instituted principally for the benefit of capital exporters, to whom the guarantees of the proposed agency would be issued. On that basis it might also have been reasonable to envisage the possibility of making calls upon those developing countries which, eventually, also became capital exporters.

In the case of MIGA however it was thought undesirable to hold out the Agency as a one sided organisation to be established primarily for the interest of private investors. In referring to how to describe the objectives of the MIGA proposal, Shihata observes that it had become necessary to depart from the approaches of previous initiatives where "... the overall objective of the Agency became obscure and its insurance operations were discussed as if they, and the protection they brought to bear on the investments, were the ultimate objective of the proposal."[23] The concept of investment protection itself was regarded as one sided, with the interest of investing

[22]See also Shihata, Miga and Foreign Investment, p. 43.

[23]*Ibid* p. 67.

countries and investors being predominant,[24] a consideration which found favour with previous attempts at resolving the threats to investments[25] but which had become unattractive because it tended to cloud the view that was aimed at promoting the "... developmental significance of investment protection."[26] Meanwhile it was also necessary to secure the confidence and good will of developing countries toward the proposed agency so as to gain its general acceptance by them. It therefore became important to "re-explain" the Agency's role by "... depicting it as an instrument of international public policy serving common concerns, and not a one sided mechanism for the protection of investors against actions of their host governments."[27] The emphasis was, therefore, to re-explain, but not to review or re-assess the basis of previous initiatives. Merely re-explaining the role of the new initiative was thought useful in "depolitici[s]ing" the perception of the new institution and enhance its contribution to the flow of investment resources from developed to developing countries. In its essence, therefore, the "new" proposal was to remain the same in philosophy and objective as previous initiatives but with the cosmetic change of merely re-explaining to, and re-educating, developing countries that it is not.

It is said, further, that the Agency will play its depoliticising role by eliminating the avenues of dispute between foreign investors and their home states on the one hand, and receiving states, on the other hand.[28] This will be made possible first, by the conflict avoidance mechanism put in place by the Convention and, second, as an intermediary, the Agency will replace the need for diplomatic intervention of the home states on behalf of their nationals, thus eliminating the show of strength and hostility then thought to be associated with that practice.[29] It will also encourage the

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[24]Voss, Jurgen, "The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications" (1987) 21 J W T L, Part 4, 5.

[25]*Supra* notes 1 and 2.

[26]Voss, *supra* p. 23.

[27]Miga and Foreign Investment, p. 166.

[28]Shihata, Ibrahim F. I., The World Bank in a Changing World, Selected Essays, (ed. Tschofen, Franziska and Parra, Antonio R.), Martinus Nijhoff, Dordrecht, 1991, p. 337 *et seq.*

[29]*Ibid.*

amicable settlement of disputes. Next, because it establishes a quick and effective compensation scheme for losses resulting from ordinarily non-business related factors, it will contribute to restore the confidence of investors and thus provide incentive for further investments. On both sides, therefore, investment undertakings will be removed from their excessively politicised context.[30]

The Convention also introduces other mechanisms to safeguard against conflicts, such as the requirement under Article 15 that the host government approves both the issuance of the guarantee and the nature of the risk designated for cover. This would have been preceded by a careful screening by MIGA of the particular project involved to ensure that it is consistent both with the laws in force in the receiving country and its development objectives. Thus, under Article 12, the Agency will not provide cover for an investment project that fails to meet those requirements.

Another safeguard is said to be the fact that MIGA's insurance guarantee scheme focuses on the investment and not on the nationality of the investor. Under the Convention, the investment must be foreign but not necessarily the investor. MIGA will therefore provide cover to local investors of the receiving state provided the assets are transferred from abroad (Article 13(c)), thereby overcoming the objection against treating foreign investors more favourably than those of the nationality of the host state.

The participation of developing countries in the scheme, in our view, had little to do with the above reason. It is more correctly to be explained on the need to put in place a speedy and efficient machinery for the payment of claims by investors for losses claimed to have been suffered. The particular obstacles against recovery for which the Agency was intended to be a response were still numerous at the time of its establishment. First, there was the question of the capacity of an individual in international law to bring an action in an international forum for redress against a state. The ICSID Convention was an attempt to remove that particular obstacle, although to a limited extent. It failed to make it possible for a defaulting state to be compelled to submit to the execution of a claim by preserving the immunity of the

[30]Shihata, (1986) 1 ICSID Rev.,-FILJ, 1.

states against execution. The case of *Letco v The Government of Liberia*[31] is an example of the extent to which in certain jurisdictions the plea of sovereign immunity against execution could constitute a source of considerable delay in enforcing and executing awards. In that case, Letco, a French company, was unable to execute on Liberian Embassy assets in the United States a judgment entered by an American court in the terms of an ICSID award made in its favour on the ground that the state was entitled to immunity from execution on the particular assets, (made up of tonnage and registration fees and other taxes due the Liberian government from shipowners), against which Letco had levied execution.

As a result the individual could only hope to rely on assistance through the intervention of the state of which he is a national, which was achieved in mainly three ways: either the home state made a direct diplomatic approach on behalf of its injured national or it assumed the injury as a wrong done to itself and brought the claim before an international tribunal on its own behalf. The third option was for the home state to indemnify its national and become subrogated to his rights, then claim to be compensated by the debtor state by any means. In all events the government of the investor becomes involved in the dispute in a manner which has remained strongly resented by capital receiving states, thus constituting a potential source of conflict between countries on both sides of the capital movement process, without necessarily resolving the concern of investors to be put back in funds.

The MIGA Convention resolves that difficulty by transferring the rights of the claimant to the Agency after it has paid or accepted to pay the claim. The introduction of an internationally established neutral body in the transaction insulates the original claimant and the state of his nationality from disputes with the defaulting state. That then removes the necessity to establish the claimant's capacity to sue the defaulting state and the conflict in the relationship between the receiving state and the state of the claimant, if it became involved in the dispute.

Of more significance, it overcomes the difficulty arising from the state's immunity against execution since, as an insurance mechanism, the establishment of the Agency makes it possible for the claimant to obtain compensation simply upon

[31]Civil Action No. 87-177, [1988] 3 ICSId Rev.,-FILJ., 161 (DCC).

presentation of what the Agency considers a justified claim, without the need for a prior judicial process of any kind with its attendant setbacks. The agency will then become subrogated to claims which the compensated investor might have against the host country in accordance with Article 18(a).

(3). Subrogation and the Justification for the Participation of Developing Countries

For the above scheme to be effective all member countries are required under Article 18(b) to recognise the rights which the Agency might acquire as subrogator pursuant to Article 18(a). But where the claim to which the Agency might be entitled after being subrogated to the rights of the investor exists subject to arbitration between the investor and the host country in a forum to which the Agency would normally not have access, (such as the ICSID), the Agency may for that reason delay payment of the claim until after the outcome of the arbitration. Paragraph 4.10 of the *Operational Regulations* however permits the Agency to make a reimbursable advance payment to the investor pending the outcome of the arbitration. Where the Agency acquires rights in excess of the payment made to a claimant, it retains those rights but remains under a duty to repay the excess, less expenses, to the investor. On the other hand, neither the Convention nor the *Operational Regulations* make provision for the case where, following a mistaken assessment, the Agency pays the investor in excess of his rights or where the award in an arbitration of the claim to which the Agency should have become subrogated is less than the amount advanced to the investor. In both instances the investor is receiving more than his entitlements both under the contract of guarantee with the Agency and the underlying investment contract with the host state. In our view, the Agency should also be entiled to restitution of the balance between what it pays and what it receives subsequent to the arbitration.

Shihata points out, however,[32] that not every compensation or agreement to pay compensation by MIGA will result in a claim to which the Agency may claim to be repaid by the host state. Certain claims may result from covered losses (such as

[32] Miga and Foreign Investment, p. 260.

war risk) for which the host government will not be under obligation to compensate the investor at all. Subrogation cannot create new or more rights against the host country than those to which the investor himself is entitled. In such situations the case for the involvement of developing countries and, in fact, of all parties in the scheme is strong, since to encourage the flow of capital to developing countries it would be reasonable to make calls on them to fund and otherwise assist in setting up a scheme to compensate for losses arising entirely out of circumstances for which the parties have no control.

But why fail to compensate the state as well where it suffers a loss for which it is not to blame? The same cover should have been extended to host countries for the same reason. The failure of the convention to do so is certainly an indication of its underlying one-sided considerations.

The case for the participation of host countries becomes even more difficult to understand as regards cases where the event giving rise to the loss can be pointed to the actions, sometimes deliberate, of the host government itself. That will be the case where, for example, it nationalises the investment or breaches a contract. Why would a state want to nationalise or unilaterally seek to alter a contract to the detriment of the other party and then negate that action by agreeing to a treaty compelling the state to compensate indirectly, through a subrogation mechanism? The only justification, in the circumstances, becomes what Seidl-Hohenveldern, referring to the World Bank Staff Report of March 1962 on the Multilateral Investment Insurance scheme, calls the "educational" effect of the participation of developing countries in such schemes,[33] described in terms that "[i]f these countries were required to contribute to the coverage of losses caused by nationali[s]ations in other developing countries they would exercise a restraining influence within the Third World group, so as to reduce the risk of making further such contributions."[34] In other words a state which is under Convention obligation to pay compensation within a reasonable time, however indirectly, should soon realise the futility of a deliberate breach or repudiation of contract or of otherwise dispossessing an investor.

[33]"Subrogation under the MIGA Convention" (1987) 2 ICSID Rev.-FILJ, 111.

[34]*Ibid.*

That constitutes, together with the insurance scheme itself, what might be regarded as the "deterrence" effect of MIGA as also reflected in the linkage of membership of the Agency with membership of the World Bank,[35] enhanced by the Agency's own strong juridical and functional links with the World Bank group as a whole.[36] The orthodox view[37] on the link between the Bank and the Agency does not emphasise its significance, although even supporters of that view have not failed to refer to the Agency as belonging to the "World Bank Group", an expression with no precise legal meaning, which nontheless associates the Agency with the authority and influence of the Bank in the financial and capital markets.

C. Eligibility for the Guarantee

For cover to be issued by the Agency certain requirements must be met. These requirements are spread across the Convention, although the principal ones are provided for in chapter three entitled, "Operations". They touch on such matters as the insurable risks, the nature of the investment for which cover is required, the nationality of the investor and the category of the investment receiving state.

Under Article 14 cover is available only in relation to investments made or to be made in a member state described as a "developing member country" for the purposes of the Convention. The countries are listed in Schedule A of the Convention and can be extended if new members are admitted to the Agency, or reduced, when a member withdraws or is suspended for failing to fulfil its obligations under the Convention.[38] Cover is limited to investment in developing countries to encourage the flow of capital there. Paragraph 1.21 of the *Operational Regulations* allows the Agency's guarantee to be extended, pursuant to Article 66 of the Convention itself,

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[35]See Chatterjee, S. K., "The convention establishing the Multilateral Investment Guarantee Agency" (1987) 36 ICLQ, 76.

[36]Based on the provisions of the Convention (see for example, Articles 2, 3(b), 32(b), 35 and 56), its *Operational Regulations* (Para. 5.20) and the involved association of the Bank in the creation of the Agency: see also Touscoz, (1987) 13 Dr. Prat. Comm. Int'l, 311.

[37]See for example Shihata, Miga and Foreign Investment, p. 71.

[38]Articles 51 and 52.

to "dependent territories", which are defined as territories for whose international relations a member country of the Agency is responsible, upon designation by the Board as a developing country for the purposes of Article 14

Article 13 requires the investor to be of the nationality of, or, if it is a corporation, be incorporated or have its main place of business in the member country other than the host country. Exceptionally the Board could extend cover to a national or corporate person of the state receiving the investment, provided the assets are transferred from outside the host country.[39] Shihata explains the purpose of this exception as being to "... enable MIGA to assist in reversing capital flight, a problem of significant proportions to some developing countries, and it will help developing country nationals accumulating capital outside their countries to invest them at home with adequate protection against political risks"[40]

The Convention's definition of eligible investments is deliberately flexible so that MIGA might be able to cope with different forms of investment not contemplated by the Convention but which might come into being with time as business practices evolve.[41] Article 12 specifically refers to equity interests, medium and long term equity type loans and guarantees and other forms of direct investments as may be determined by the Board of MIGA, although Sub-sections (c)(i) and (ii) further make it possible to bring within the scope of MIGA's eligible investments such other forms as the use of earnings which could have been transferred outside the host country and foreign exchange intended to modernise, expand or develop an existing investment.

Article 11 spells out the types of risk for which cover may be issued. Article 11(b) and (c) specify risks for which the Agency cannot provide a guarantee in any event. In no case should cover be made available for devaluation or depreciation of the host country currency. Cover cannot also be provided for loss resulting from activities of the host government for which the investor is responsible or has consented to or for any action of the host government occurring before the contract of guarantee. The excluded risks are justified on the basis that they do not constitute

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[39]Article 12(C).

[40]<u>Miga and Foreign Investment</u>, p. 119.

[41]Shihata (1986) 1 ICSID Rev.,-FILJ, 1

"non-commercial" risks in the case of currency fluctuations, since they will normally enter into the business calculations of the investor and, in cases where the actions of the host government giving rise to the risk have been consented to by the investor or arise in circumstances where the investor is to blame, on the basis that the investor should not be allowed to claim compensation for a loss arising from his own wrong doing or to which he has acquiesced.

The eligible risks are laid down in Article 11(a)(i) to (iv) and cover host government restrictions on currency transfer into a freely usable currency, expropriations (whether direct or indirect), and other forms of administrative actions resulting in the dispossession of the investor, including the government's breach or repudiation of contract[42] and losses resulting from war or civil disorder.

(1). Major Classification of Risks Covered

The risks therefore fall under three main categories: cases arising from a culpable act of the host government (restrictions on currency transfer, expropriations, etc.); cases where the loss arises from factors which might not be entirely within the control of the government (war and civil risks); and, ordinary breaches or repudiations of contract by the host state, whether under circumstances which might also constitute an expropriation or similar measure and liable to treatment as such, or on purely commercial considerations.

For the second aspect of the third category of risk the character of the state as a public body is of little relevance, since a wholly private enterprise might also fail to honour the terms of the contract in similar circumstances.

Whereas the first two categories of risk are generally accepted as within the range of political uncertainties against which the convention was intended, i.e., risks described as "non-commercial", the extension of the eligible risks to cases of the host government's breach of contract is an innovation of the MIGA Convention. Malcolm Rowat points out that this cover was not available in national investment insurance

[42]Article 11(a)(iii).

schemes until relatively recently.[43] That cover is an innovation in the sense that it is not regarded as a politically motivated, non-commercial risk. Second, the risk is also treated as "an addition" to the expropriation risk on the basis that although it was known that an expropriatory measure could take the form of a breach of contract, (and the *Operational Regulations* acknowledge that by allowing the guarantee holder in those circumstances to base his claim on any of the available cover - Paragraph 1. 42), a claim brought for breach or repudiation of contract will not be subject to the limitations that apply to the expropriation risk cover even though the facts relied upon will produce the same effect.[44] That additional feature is also considered as indicating the innovativeness of the breach of contract risk. In fact it must be pointed out that the Discussion Paper submitted to the Executive Directors of the World Bank on the "Main Features of a proposed Multilateral Investment Guarantee Agency" (of May 1984) makes no reference to that particular risk at all.

The introduction of that risk in MIGA's scheme should have raised some concern. More than much else it suggests, contrary to the conventional view, that the agency cannot be regarded as reflecting the balance between the interest of all the parties concerned. It completely failed to appreciate the difficulties of developing countries. We therefore propose to consider that particular risk in detail.

(2). Breach or Repudiation of Contract Risk: Nature

The risk is intended to cover cases where the state refuses to perform the contract or where the state's performance fails to meet the standard expected of it in accordance with the terms of the contract.[45] In particular it meets cases where, rather than expropriate the investor directly, the state attempts to achieve the same objective indirectly, by failing to perform the contract. The investor is none the less deprived

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[43] "Multilateral Approaches to Improving the Investment Climate of Developing Countries: The cases of ICSID and MIGA" (1992) 33 Harv. Int'l. L. J., 103.

[44] See Shihata, Miga and Foreign Investment, p. 131.

[45] We constantly bear in mind that failure properly to execute a contract, whether deliberate or not, cannot be regarded as unique to developing countries even in the restricted domain of foreign investment transactions.

of the benefits of the investment. The risk therefore arises in two ways. In the first case the state could expropriate directly or otherwise interfere with the investor's rights under the contract by, for example, a unilateral withdrawal of tax and customs concessions and exemptions from royalties. An example of the factual setting in which such breaches or repudiations of contract occur is described by Shihata in the following terms:

> [i]n the hydrocarbon and mining sectors in particular, the host government may initially be dependent on the investor for the exploration of indigenous resources. Once a find is made and development begins, the investor's returns may increasingly seem to be exorbitant as the risks originally undertaken will have all but disappeared. The relationship between the investor and the host country may then appear as an "obsolescing bargain", the investor obtaining highly advantageous conditions in the initial negotiations and the host country later pressing for changes in the agreement. Such changes might be unilaterally introduced by the host government without necessarily violating its domestic law or international law.[46]

Where the change intended by the host country is in violation of its own domestic or international law it might constitute an expropriation under Article 11(a)(ii). In that case the *Operational Regulations* (Paragraph 1.42) permit the investor, in the alternative, to bring a claim for compensation on the expropriation risk cover.

The second way in which a breach or repudiation of contract claim arises is in circumstances where the state has acted purely on commercial reasons. For example the investment undertaking as any other business venture may have become a total failure and on that basis justify the decision of the state not to continue the project, although in circumstances where it will remain in breach of contract. In fact in some cases the private investor, too, might be happy that the project be brought to an end, although under the existing contractual arrangements the state remains liable to the

[46] Ibid, pp. 131-32.

investor. In the *Klöckner v Cameroon* arbitration case,[47] for example, which involved a failed attempt by both parties to set up and, under the exclusive management of the claimants profitably run a fertilizer plant in Cameroon, the principal claim was that the government remained liable under a guarantee to pay the outstanding balance of the price of the factory notwithstanding that the supply of the plant, including the technical and commercial management of the company by the claimants themselves had become a complete economic failure. Both parties were willing to see an end to the project; the state, because it had already spent too much and for Klöckner, because it had always been known to the company that the project would not be commercially viable even under their exclusive management. In those circumstances the fact that it might be a state repudiating the contract should not be material in determining whether the risk should be covered by the Agency at all since, in similar circumstances, a private party will not act or be expected to act differently. That consideration renders the addition of that element of the risk difficult to justify. An alleged breach of contract of that character is a distinctly commercial risk within contemplation of reasonable business men.

(3). Justification for the Breach or Repudiation of Contract Risk

It is not clear why the cover was included in the Convention if it was so obviously one-sided. From the background and drafting history of the Convention it is clear that the proposed Agency was intended to issue guarantees against risks of a "non-commercial" nature and Article 2, which lays down the guiding principle for eligible risks, bears that out clearly. It provides that to meet its objectives the Agency shall "issue guarantees, including co-insurance and re-insurance, against *non-commercial* risks in respect of investments in a member country which flow from other member countries" (emphasis added). That scheme is reinforced by Article 11(b), which permits the Board of the Agency to extend the cover under Article 11 as a whole to any other risks not referred to in Article 11(a), provided they are also

[47]Award of 21 Oct., 1983, [1994] 2 ICSID Reports, 9 (excepts); Paulsson Jan, "The ICSID Klöckner v. Cameroon award: The Duties of Partners in North-South Economic Development Agreements" (1984) 1 Journ. Int'l. Arb., 145 (excerpts).

non-commercial in character. It has been suggested that cover under Article 11(b) will be available for such other risks as acts of terrorists directed at the investor, kidnapping, and politically motivated strikes.[48]

The genuine breach of contract risk is distinctly of a commercial nature and should therefore be regarded as inconsistent with the underlying eligibility principle of the Convention, as expressed in Article 2(a), but which it nevertheless overrides for being a specific provision bearing on the same issue. Relying on the factual setting under which the first category of a breach or repudiation contract claim might arise, (i.e., where it could also constitute an expropriation,) Shihata justifies the introduction of the cover into the Convention on the basis that it "... will seek to enhance the reliability of contractual arrangements between host countries and investors. It will strengthen the investor's confidence that his investment agreement will be protected when his bargaining power declines as the investment matures."[49] That assumes that only a state can be in breach of contract, which is simply not correct.

(4). Critique of the Breach of Contract Risk

The objection with the breach or repudiation of contract risk is that it is questionable whether it is in line with the purpose of a Convention intended to issue guarantees for risks described as "non-commercial", in the sense that they will not traditionally arise in the normal course of business and will therefore not be within the contemplation of the MIGA guarantee holder. The reason for excluding the normal business risks is that businessmen are more willing to assume such risk or obtain a business insurance cover than for risks of a political nature.[50] The second objection is that the private investor could also be in breach of contract, thus rendering the state as much in need of protection as the private investor if the investor were in breach.

It therefore remains unclear why the cover was introduced or, at any rate, not

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[48]Voss, (1987) 21 JWTL, Part 4, 5; *Operational Regulations*, Para. 1. 53

[49]Miga and Foreign Investment, p. 131.

[50]Ocran, T.M., "International Investment Guarantee Agreements and Related Administrative Schemes" (1988) 10 U. Pa. J. Int'l Bus. L., 341.

limited to cases where the breach or repudiation will have the effect of an expropriation. To counterbalance the one sidedness of that cover, the alternative would have been to extend the cover by making it available to host countries in need of protection against investors for breach of contract.

(5). Breach of Contract and Denial of Justice

The only other reason for introducing that particular risk appears under the circumstances in which compensation for the cover is confined under Article 11(a)(iii) and is appropriately described in the *Operational Regulations* as a "denial of justice". A claim for compensation on the ground of breach or repudiation of contract will only be acceded to where:

"(i) the holder of the guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach of contract or

(ii) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or

(iii) such a decision cannot be enforced."

The difficulty here is that the Convention assumes that a state cannot be the victim of a "denial of justice". Article 11(a)(iii) assumes that in any event a state that suffers loss from a breach or repudiation of contract by the investor will still be in a stronger position than the investor if the state were the party in breach. It is however doubtful whether there are fewer obstacles for a state seeking redress before a judicial or arbitral forum to which the private party also has access, such as the ICSID, in relation both to the prosecution of the claim and the enforcement of a decision or award made in its favour.[51] It is assumed that the conditions stated will provide adequate guarantees against unfounded claims based on breach of contract.

First, the guarantee holder must satisfy MIGA that he has no access to a judicial or arbitral forum to settle his claim for breach of contract. This requirement

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[51]See for example *Government of Kuwait v Sir Frederic Snow & Partners and Others* (1981) 1 Lloyd's Report, 656, where the state involved was at considerable difficulty even to identify the proper defendants for the proceedings it brought to enforce an award in its favour.

will rarely apply since in practice, most contracts provide for the arbitration of disputes. It is conceivable that the arbitration clause could become void or incapable of performance, in which case, the investor will be put in a situation similar to the absence of a judicial or arbitral forum. The absence of a neutral and independent judiciary in the host country is treated in the *Operational Regulations* as capable of constituting a denial of justice. The investor may also be unable to have his claim determined where, under the arbitration clause as interpreted by a tribunal set up thereunder or a competent court, the tribunal has no jurisdiction over the parties or the subject matter of the claim. In that case the parties could only have recourse to the judiciary of the state party to the dispute, which, if found not to be independent of the executive, might give rise to a situation constituting a denial of justice to the investor.

The second requirement is that the judicial or arbitral decision is not rendered within a reasonable period of time. What constitutes a reasonable time in each case will be specified in the contract of guarantee. According to the *Operational Regulations* that time shall be a period of not less than two years from the date when the proceedings are initiated by the guarantee holder. The number of years to be specified in each contract will of course depend on the nature of the contract and its mode of performance. It will also depend on the nature of the event giving rise to the claim, including the complexity of the factual and legal issues involved in the dispute.

Next, the decision of the forum must be incapable of enforcement. Under Para. 1.45 of the *Operational Regulations*, the contract of guarantee with the Agency will specify the measures which the investor will be required to take to ensure the enforcement of the award. This requirement will not be satisfied where he fails to take those measures. A decision will be regarded as unenforceable and therefore constitute a denial of justice if the measures to be taken do not result in enforcement within ninety days or such other period as may be specified in the contract, or end in futility. By analogy to the first requirement it should be possible to treat an unreasonable impediment created by the host state to enforce a judgment or award as constituting a denial of justice.

The Convention does not require in the first place that the award should be one which is capable of enforcement. It is not clear, for example, whether the decision refusing enforcement by an independent judiciary at the place of enforcement[52] will be regarded by the Agency as a denial of justice irrespective of the grounds given for refusal to enforce. In the ICC arbitration involving Southern Pacific Property, (a Hong Kong company), and the government of Egypt[53], the claimants had been denied enforcement in the U.K.[54] but given leave to enforce in the Netherlands.[55] The award had further been annulled by the Court of Appeal of Paris[56], the place where the award was rendered, on the ground that Egypt was not a party to the arbitration clause and the annulment decision confirmed by the French Supreme Court, although the case was subsequently re-submitted to an ICSID panel which accepted jurisdiction.[57] The question is whether, failing the ICSID proceedings, and assuming the existence of a MIGA guarantee, the Agency could in those circumstances still pay a claim for compensation on an award which has been annulled by a competent court at the place where it is made and denied leave to enforce in a second jurisdiction, but obtained leave elsewhere.[58] There is scope to suggest that MIGA might decide to treat such cases as falling both within Paragraphs 1.44 and 1.45 of its *Operational Regulations* since the measures to be taken by the guarantee holder to enforce the award would have ended in futility or not have resulted in enforcement within ninety days or any other period specified in the contract. The Regulations do not envisage situations where the award is set aside or denied enforcement on any ground, including its failure to meet minimium standards for the enforcement of an award.

Such an outcome should be avoided since the Agency might find it difficult

[52]Such as the refusal in the U.K. to give leave to enforce the ICC award in *S.P.P. v Egypt.* [1985] 10 Yearbook Comm. Arb'n., 504 (excerpts).

[53][1983] 22 ILM, 752.

[54][1985] 10 Yearbook Comm. Arb'n., 504.

[55]*Ibid* p. 487.

[56]*Ibid* p. 113.

[57]See Decisions on jurisdiction of 27 November and 14 April 1988 and on an application for annulment of 14 December 1989, [1991] 16 Yearbook Comm. Arb'n., pp. 19, 28 and 40 respectively. The award on the merit is reported in [1993] 8 ICSID Rev.,-FILJ., 328.

[58]The French courts have for some time now consistently enforced awards annulled in the country where they were made: see for a recent example *Société Polish Ocean Line v Société Jolasry* (1993) Rev. Arb., 255, Court of Cassation decision of 1 March 1993.

to justify compensation made for breach of contract in cases where the award has been set aside or where there is a reasonable prospect that it will not be validated in the place where it is made. It is not unreasonable that the Agency's liability under a guarantee should only arise in relation to a judgment or an award which is capable of enforcement. If an award plainly falls short of the required standards and is denied enforcement, or there are reasonable grounds to think that it will be denied enforcement, the Agency should feel reluctant to compensate for the pecuniary obligations arising pursuant to the award. It should be pointed out that the annulment of an award at the place where it was made is, under the New York Convention on the Enforcement of Foreign Awards, a ground for refusing enforcement.[59] There is a strong case for saying that if an award fails to meet international minimum requirements for enforcement it should be regarded as falling below the standard entitling it to compensation by MIGA.

D. Settlement of Disputes

Articles 56-58 of the Convention envisage principally three types of disputes:

(i) **(a)** Disputes between the Agency and a member country concerning the interpretation of the Convention. This type of disputes are to be determined by the Board of the Agency, with scope being given for reference, if required by a member, to the Council of Governors, whose decision on the matter is final. Article 56(b) allows the Agency, where appropriate, to continue to act on the basis of the decision of the Board pending the determination of the reference to the Council.

(b) Disputes between the agency and a member country other than those concerning the interpretation of the Convention, or between the Agency and a state which has ceased to be a member are to be settled in accordance with the negotiation and arbitration procedure set out in Annex II of the Convention. The Annex requires the Agency and the member or former member (as the case may be) to resolve the dispute by negotiation and, failing that, by conciliation or submit to arbitration. The submission to arbitration is governed by the rules of arbitration of the ICSID. In

[59]Article V(1)(e)

resolving the dispute the tribunal applies the provisions of the MIGA Convention, any rules agreed upon by the parties, MIGA's by-laws and regulations, international law and the domestic law of the state concerned. Article 4(j) of the Annex requires all member states of the Agency to recognise an award rendered pursuant to the Annex as binding and enforceable within their territories, although its execution is governed by the relevant laws in each member state. It would be the position, too, that even a state that has ceased to be a member remains under obligation, in accordance with Article 53 of the Convention, to enforce the award.

(ii) The second main category of disputes envisaged by the Convention concern differences between the Agency and a guarantee holder. The Convention provides that such disputes are referred to arbitration in accordance with such rules as specified by the parties in the contract of guarantee. The parties could do so by reference to already established set of rules. Paragraph 2.16 of the *Operational Regulations* contemplates the use of the rules of arbitration of the ICSID with such modification as may be required, having regard to the fact that the ICSID rules were established to deal with disputes between states and private persons. Shihata points out that the reference to ICSID rules is only in the Agency's standard contract of guarantee, which need not necessarily be the case in every contract. The *Official Commentary on the Convention* (paragraph 77) also contemplates the use of other institutional rules, such as those established by the United Nations Commission for International Trade Law (UNCITRAL), and the rules of arbitration of the International Chamber of Commerce. Shihata, however, expresses a preference for the ICSID rules to the exclusion of other institutional rules on the basis that the *Operational Regulations* do not refer to the possibility of agreeing to the use of the latter. He points out that the ICSID rules were specifically referred to in the Regulations because of the familiarity of the staff of the World Bank with them, without failing to mention, however, that although the rules derive from a system of arbitration which is not subject to judicial supervision by national courts and, therefore, preferable, that advantage will not be available for arbitration proceedings outside the scope of the ICSID Convention even if conducted in accordance with its rules.

Paragraph 2.17 of the Regulations requires a tribunal set up to resolve a dispute between the Agency and a guarantee holder to apply the terms of the contract, the provisions of the MIGA Convention, and, to the extent that issues in dispute are not covered by either, to have recourse to "general principles of law". No reference is made to the domestic law, whether of the investor or of the host country, as the laws most connected to the underlying investment. It would be the case, however, that in ascertaining the substance of the applicable general principles of law, the tribunal will bear in mind the relevant domestic laws, in combination with such other sources as arbitral case law, investment treaties, and international law. Shihata expresses that view in the following terms:

> [n]aturally, the tribunal would have in such instances to undertake the task of ascertaining the substance of such general principles, using comparative law analysis. While this will not be confined to the laws regulating investment guarantees, applicable principles will normally be deducted from the rules pertaining to this particular business which may be ascertained through an analysis of relevant domestic law, the practice of national agencies, inter-Arab Investment Guarantee Corporation and private insurers as well as such arbitral and other judicial decisions as may be available.[60]

The practice of the Inter-Arab Guarantee Corporation is referred to by the author as the first international organisation of its kind to deal with foreign investment insurance. The award is binding on the parties and each member of MIGA is required to recognise it as final and binding.

(iii) Next, the Convention deals with disputes arising from claims by the Agency, as subrogator of a compensated guarantee holder, against the defaulting member state. Article 57(b) directs that such disputes be settled in accordance with Annex II which provides for negotiation and, if unsuccessful, for arbitration, following the procedure set out in Article 4(a) to (k) of the Annex or any agreement between the Agency and the state concerned, with the procedure of the Annex serving as the basis of such agreement. Under Article 4(g) the arbitral tribunal set up pursuant to the Annex shall apply "... the provisions of [the] Convention, any relevant agreement between the parties to the dispute, the Agency's by-laws and regulations, the

[60] Miga and Foreign Investment, p. 278.

applicable rules of international law, the domestic law of the member concerned as well as the applicable provisions of the investment contract, if any."

Article 4(g) raises the usual but important question about the relationship between the relevant domestic law and international law, if they are in conflict. A parallel has been drawn with the corresponding provisions of the ICSID Convention (Article 42) on which Article 4(g) of the Annex was patterned[61] and the view expressed, in accordance with the construction of Article 42 of the ICSID Convention by tribunals set up thereunder, that international law has a dual function: first, it is complementary, in that it is the law to which reference should be made to supplement for any gaps in the domestic law, and secondly, that it is corrective, in the event that the domestic law of the state is not consistent with internationally acceptable standards. Aron Broches states the position in the following terms in relation to Article 42 of the ICSID Convention:

> [t]he tribunal will normally first look at the law of the state party to the dispute. Then the result of the application of that law will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law.[62]

It is now taken as settled that the statement represents the correct view on the relationship between domestic and international law and has been approved by arbitration tribunals constituted pursuant to the ICSID Convention.[63] The Ad hoc Committee in the *Amco v Indonesia* annulment proceedings took the view that Article 42(1) of the Convention "... authorises an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable law are in

[61] Shihata, note 13, p. 267-68.

[62] "Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965: Explanatory Notes and Survey of its Application" (1993) XVIII Yearbook Comm. Arb'n., 627, at 668.

[63] See for example *Klöckner v Cameroon*, Ad hoc Committee award of 3 May 1985 [1994] 2 ICSID Reports, 95, p. 122; (1986) 1 ICSID Rev.,-FILJ, 89 p. 112; *Letco v Liberia* (1987) 26 ILM, 647 658; *Amco v Indonesia*, first annulment award of 16 May 1986 [1993] 1 ICSID Reports, 509, p. 515

collision with such norms."[64] When the case was re-submitted for another hearing, the newly constituted tribunal emphasised the primacy of international law with even more force. In its view, "[i]f there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international law, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law."[65] It therefore appears that a tribunal constituted pursuant to Article 4(g) Annex II, as required under Article 57(b) of the MIGA Convention, will give precedence to international law and is in fact required by the *Official Commentary* on the Convention to do so. The Commentary[66] directs that "[i]n the case of a conflict between rules of international law and rules unilaterally issued by either of the parties to the dispute, international tribunals apply rules of international law." The supremacy of international law in this area is explained on the basis that

> in the absence of evidence to the contrary, it may nevertheless be argued that the host state by accepting an international tribunal for the settlement of disputes under an investment agreement, implicitly undertakes to have the application of its national law to the foreign investment considered in view of the applicable principles and rules of international law. An international tribunal cannot be expected to remain blind to the international obligations of the host state, and the reference of a dispute to an international tribunal carries with it the expectation of both parties that the tribunal will recognize the applicable principles and rules of international law unless the parties

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[64] *Ibid* p. 515.

[65] Re-submitted award of 5 June 1990 [1993] 1 ICSID Reports, 569, p. 580.

[66] Para. 78.

have expressly excluded the recourse to international law.[67]

It should be noted that the corresponding provisions for disputes involving the Agency and a guarantee holder refer to "general principles of law" in the place of rules of international law and the domestic law of any particular country. The reason for that difference in the applicable substantive standard is not quite obvious. It may be that the difference was intended to emphasise the fact that the application of rules of international law in a dispute involving the Agency, as subrogator, and a host state, is to check the effect of the law of the host state which, under the MIGA Convention, has no relevance in disputes between the Agency and a guarantee holder, notwithstanding that as the law underlying the investment contract it might be the closest system of law to the contract of guarantee. What seems clear is that the search for "general principles" is necessarily wider than that for "rules of international law". It is also comparative and more likely than not, to involve an inquiry into, amongst other sources, both international and any relevant domestic laws. It follows therefore that a tribunal set up pursuant to Article 58 of the Convention and pargraph 2.17 of the *Operational Regulations* (both of which deal with disputes between the Agency and a guarantee holder) will be well advised if it adopted that approach.[68]

The decision of a tribunal constituted under Article 57 and Annex II is not subject to appeal or any review. Unlike the ICSID Convention, the MIGA Convention does not provide for an internal review procedure. The tribunal's award is therefore final and binding on the Agency as the subrogator of an investor and on the host country concerned. All member countries are required to recognise the finality of the award and to enforce it. The execution of the award is governed by the law in force in each contracting state.

Chapter conclusion

There is an obvious link between the ICSID and the MIGA Conventions. The basis and the principal innovation of the MIGA Convention is the recognition of the

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[67]Jaenicke, G., "The Prospects for International Arbitration: Disputes between States and Private Enterprises" in International Arbitration: Past and Prospects (ed. Soons, A. H. A.), Martinus Nijhoff, Dordrecht, 1990, 155, p. 158.

[68]Shihata, Miga and Foreign Investment, p. 47.

Agency's right to subrogation. It is as a result, in part, of the failure of the ICSID Convention in translating the right of subrogation into a multilateral treaty[69] that the need for an insurance Convention arose.[70] MIGA probably stands out as a more ingenious device to overcome the problems reflected in the prohibition in Article 27 of the settlement of investment disputes Convention. Article 27 is concerned with the substitution of the private investor by his home state. It prohibits the home state from giving diplomatic protection to its national. It does not refer to subrogation by another private person, national of a contracting state. The question that arose, and for which MIGA was in a sense intended as a response, is whether if a private insurer of another contracting state indemnifies the investor, the insurer, as subrogator, could bring arbitration proceedings against the respondent state under the dispute settlement Convention. The question arose either as a matter of subrogation or as one regarding the standing of the insurer, not being a party to the arbitration clause, to bring proceedings before the Centre.

With regard to subrogation, although the orthodox view[71] is that "... there is no reason to consider the assignment is not permitted",[72] our own view is that the correct approach would be one which allows the issue to be examined under the applicable law of the contract. That law will determine whether, and to what extent, the private insurer can be subrogated to the rights of the investor.

As far as the ICSID Convention itself is concerned the issue is one of interpretation of Article 25, regarding the consent of the parties, the question being whether by agreeing to arbitration with the investor, the host state is to be regarded as impliedly consenting to arbitration with any assignee or other successor in interest of the private investor. The staff of the Centre once appeared to be of the view that under Article 25(1) the consent of the investor and the host state relates "... only to

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[69]Amerasinghe, C F "Jurisdiction *Ratione Personae* under the Convention for the Settlement of Investment Disputes between States and Nationals of other States" (1974-75) 47 BYIL, 227, particularly pp. 241-42.

[70]Meron, (1975) 47 BYIL, p. 309.

[71]Meron, *ibid.* pp. 305-6.

[72]*Ibid* p. 306, citing Broches, "Arbitration Clauses and Institutional Arbitration, ICSID: A Special Case", in Commercial Arbitration, Essays in Memoriam Eugenio Minoli, 1974, 77.

the dispute itself and not necessarily to the identity of the other party, ..."[73] and, as a result, the state could be considered as impliedly bound to the insurer or other transferee. Such a view remained questionable in the light of the importance of consent as "the cornerstone of the jurisdiction of the Centre"[74] For that reason the staff recommended that parties state expressly that the arbitration clause shall also apply to any successor in interest of the original parties "... should there be any possibility of the identity of one or both parties changing during the term of the agreement ..."[75] An express clause in the contract will ensure that the transferees remain bound to the same extent as the original parties. In view of the fact that from the point of view of the host state the acceptance of the capacity of a private person to proceed directly against a sovereign state in an international forum involves the waiver of an immunity and the loss of liberty,[76] together with the fundamentally "consensual character of the Convention",[77] it becomes obvious that without an agreement of the state to the contrary its consent to arbitration could only be regarded as directed to a specific investor but not with some other party. That being so the assignee could not bring proceedings against the state, hence, the importance of the assignment clause as suggested by the staff of the Centre. If the receiving state consents to such a clause it becomes bound to the assignee subject to the provisions of the Convention. If it does not, the difficulty remains.

The advantage of the MIGA Convention is that it overcomes these difficulties by providing for the automatic subrogation of the Agency to the rights of the private investor without further requiring the consent of the host state. The consent of the state is assumed from the time it becomes a member of the Agency by signing the

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[73]See ICSID, Model Clauses Recording Consent to the Jurisdiction of the International Centre for the Settlement of Investment Disputes, Doc. ICSID/5, (1968?), p. 9.

[74]Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of other States" (1972) 136 Hague Acad. Courses, 331, 351-52, citing the accompanying report of the Executive Directors of the World Bank, para. 23.

[75]Above, note 73.

[76]Fox, Hazel "States and the Undertaking to Arbitrate" (1988) 37 ICLQ, 1.

[77]Broches, (1993) 18 Yearbook Comm Arb'n., 627 where the author does not also fail "... to stress the *overriding* significance of consent not merely as a formal requirement for the jurisdiction of the Centre, but as an essential characteristic of the entire system of the Convention" (emphasis added).

Convention. MIGA therefore resolves a problem which the ICSID Convention could not, irrespective of whether the problem is characterised as one of subrogation or as a matter of construction of the Convention's consent provisions, and in particular, Article 25.

Both Conventions also fail to meet the expectations of host countries. They are extremely one sided, having been inspired by one and only one concern, the protection of private foreign investments in a well defined group of countries. They proceed on the assumption that the investor, more than the host, is in need of protection.[78] In fact the MIGA Convention does not even envisage the possibility that host states also require an insurance against the default of corporations. A corporation could also be in breach of, or repudiate, a contract, within the meaning of Article 11(a)(iii). Like the ICSID, it failed to cover the host state acting in good faith against an uncooperating investor. That concern is also reflected in the treatment of the question of the applicable law in state contracts, to which we revert in the next chapter.

[78]Fatouros A. A. "Investissément Etranger et Arbitrage entre Etats et Personnes Privées - La Convention BIRD [IBRD] du 18 Mars 1965" (1970) 59 Rev. Crit. Dr. Int. Priv., 580.

CHAPTER FOUR

THE LAW APPLIED BY ARBITRATION TRIBUNALS

In this chapter we examine the choice of law methods applied in arbitrations regarding contracts in which developing countries have been involved with private foreign parties. We conclude that the trend here undermines the domestic systems of law of these countries and does not, therefore, encourage their participation in the process. In the first part of the chapter we outline the traditional choice of law rules in contracts. In the second part we demonstrate that there has been a shift from those principles in arbitrations involving developing countries so as to isolate the contracts from their systems of law. Arbitration tribunals have taken the view that the increasing presence of those states in international transactions dictates a shift from the presumption in favour of the law of the state in dispute[1] to another presumption, in favour of international law,[2] even in cases where the parties expressly provide for the application of the domestic law of the state.[3]

The question of the law applicable in an arbitration generally involves considerations of three types, the first of which concerns the law governing the proceedings of the arbitration tribunal, the so-called *lex arbitri*. The second set of considerations deals with the law applicable to the merits of the dispute (the proper law) under arbitration and the third involves the selection of the conflict of law rules to determine the law applicable to the merits of the dispute. There may be included a fourth, which is the law governing the arbitration agreement and its performance. We are concerned primarily with the third element, the conflict of law rules to determine the proper law of the contract although reference to the second element is made from time to time for clarification. However, we also briefly consider the first aspect of the question to remove any confusion that may arise.

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[1]*The Serbian Loans* case PCIJ Selected Judgments, Series A No. 14 at p. 42; *Barcelona Traction* case, *ibid* p. 121.

[2]*Aramco v Saudi Arabia* [1963] 27 ILR, 117.

[3]*Letco v Liberia* [1993] 2 ICSID Reports, 343.

I. The Law of the Arbitration

The *lex arbitri* is the law of the arbitration. It generally determines the validity of the arbitration proceedings. As arbitration takes place within the territory of a country, the law which governs the arbitration is, subject to the agreement of the parties, normally the law of the seat of the proceedings, the *lex fori*. Since the law regulating arbitration is not the same in all countries, matters governed by the *lex arbitri* would vary in the arbitration legislation from country to country, although in general they cover essentially procedural issues. There are a few exceptions of substantive issues which might in certain jurisdictions be governed by the procedural law, such as the validity of the arbitration agreement itself and its scope, including matters of arbitrability. On the whole, however, the matters governed by the *lex arbitri* would include issues as the appointment and replacement of arbitrators, the effect of failure by one of the parties to appoint an arbitrator, interim measures of protection and other measures intended to give judicial assistance to the proceedings, the challenge of the arbitrators, their jurisdiction, the manner in which the proceedings should be conducted, matters which can be submitted to arbitration, the form and validity of the award and several other issues of a similar nature.

Some of these matters may also be subject to the law of a jurisdiction other than that of the seat of the proceedings. For example the courts of the place of recognition or enforcement of an award may re-examine the validity of the agreement and the award, including the jurisdiction of the arbitrators, if requested to do so. The parties may also subject the conduct of the proceedings to a law different from that of the seat of the arbitration in accordance with the freedom to choose the applicable procedural law, to the extent permitted by the law in force in that jurisdiction, although subject to the mandatory rules of the place where the proceedings take place. The freedom to select any rules of procedure, including the rules of another country altogether, is generally recognised in the domestic and international arbitration laws of most countries. Article 1693 of the Belgian Judicial Code[4] for example provides that the parties may decide on the rules of arbitral procedure and, failing that, the

[4]Part 6, dealing with arbitration.

arbitrators may do so. The new French code of civil procedure[5] allows the parties to determine the manner in which the arbitrators should conduct the proceedings, and, in the absence of agreement by the parties, the arbitrators may make the determination either by setting out the rules themselves or by reference to some other well established rules.[6]

Although the different Acts in force in England and Wales do not refer to the arbitration procedure, there is no doubt that in English law the parties are at liberty to determine the procedure for the conduct of the proceedings and the arbitrators required to act accordingly, subject to public policy.[7] The exact position in English law was stated by Dicey and Morris as Rule 57(2) in the following terms:

> [t]he law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held.[8]

The commentary to the sub-rule adds that "it is for the parties to choose not only the law which is to govern their agreement to arbitrate, but also the law which is to govern the arbitration proceedings." In the words of the present editors of Russell on Arbitration,[9] "... subject only to questions of matters contrary to the public policy of the system of law which as [has?] the power and ability to police the arbitration, the parties have, potentially, the ability to control every aspect of arbitration procedure." In the *Whitworth Street* case the House of Lords clearly stated that the courts should give effect to the parties' choice of the applicable procedural law. The parties can express the choice either directly, for example, by indicating the law of some state or

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[5]Article 1494, Part V of the code, dealing with international arbitration.

[6]The corresponding provision in Swiss law is in almost the same terms: Article 182(1) of the Swiss Law on Private International Law, 1987. Many other domestic laws, institutional rules and international instruments are expressed in similar terms: Article 1039 of the Netherlands Code of Civil Procedure; Article 9, Djibouti; Article V(1), New York Convention; Article 19, UNCITRAL Model Law; Article 11, ICC Rules; Article 5, LCIA Rules.

[7]Mustill, Michael J.; Boyd, Stewart, The Law and Practice of Commercial Arbitration in England, 2nd Edn., 1989, p. 15.

[8]Conflict of Laws, 8th Edn., 1967, p. 1048 (13th Edn., 1993, Vol. 1, p. 580); approved in *Whitworth Street Estates v James Miller & Partners* [1970] A.C. 583.

[9]Walton, Anthony; Vitoria Mary, Russell on the Law of Arbitration, 20th Edn., Stevens & Sons Ltd., 1982, p. 243.

indirectly, by agreeing to ad hoc arbitration in accordance with the rules of an arbitration institution, or simply by submitting to arbitration by such institution. However the choice is expressed, the English courts are required to give effect to it.

English law, however, differs from most other systems and the prevailing trend in international arbitration where the parties express no choice. The position in English law is that the arbitrators will make the determination for the parties, although in accordance with a common law rule of conflict of laws expressed in the form of a presumption. The presumption is stated by Dicey and Morris in terms approved by the House of Lords in *Whitworth Street Estates v James Miller & Partners*[10] that the "... proceedings must be considered, at any rate *prima facie*, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings."[11] The presumption therefore indicates that the law of the forum is applicable where the parties fail to specify the governing law of the proceedings but have, whether by themselves or the tribunal, selected the seat of the arbitration. Thus, by agreeing to arbitration in England, for example, the parties are presumed to have selected English law rules of arbitration procedure. In *Bank Mellat v Helliniki Techniki*,[12] Lord Justice Kerr describes the presumption as a "fundamental principle" according to which under English law rules of

> "... private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country ...",

on the basis that "... this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connections."

The difference with the trend in international arbitration practice, including the new legislation applicable in many other countries, is that in the latter there is no presumption in favour of the law of the forum. Rather, the tribunal is conferred with

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[10] *Supra* p. 607, (per Lord Hodson); 609, (Lord Guest); 612, (Viscount Dilhorne); 616, (Lord Wilberforce).

[11] *Supra.*

[12] [1984] Q.B., 291, p. 301. (C.A.).

powers to determine the procedural rules as appropriate, failing a determination by the parties. Under the UNCITRAL Model Law the tribunal may "... conduct the arbitration in such manner as it considers appropriate." The relevant Article of the Swiss Law on Private International Law,[13] which is similar in effect to the corresponding provision of the Federal law in Canada[14] and the new law governing Arbitration in Scotland[15] (both of which are modelled on the UNCITRAL Law), the Rules of the ICC[16] and of the LCIA[17] empower the tribunal to determine the procedure "... as necessary, either directly or by reference to a law or set of arbitration rules." The power is limited only by the agreement of the parties and the mandatory laws of the seat of the arbitration.

A distinction exists between the legal "seat" of the arbitration and the different geographical locations at which, for convenience, the hearings may from time to time be conducted. The Model Law treats the "seat" of the arbitration as the place specified by the parties or, failing the agreement of the parties, the place specified by the arbitrators as the place where the arbitration is held. At the same time the Model Law contemplates, under Article 20(2), that hearings by the tribunal might be at a location or locations other than at the place designated as the "seat". The distinction is re-inforced by Article 31(3) which, in anticipation of the difficulties that may arise in relation to the place where an award is made, having regard to the provisions of Article 20(2) for the purpose of determining the nationality of an award, provides that the award shall be deemed to have been made at the place designated as the "seat" by the parties or the tribunal. That place may, under Article 20(2), not be the place or the only place where the proceedings are held. Since the legal (i.e., designated) "seat" of the arbitration could also be the place where the arbitration is held, (although under

[13] Article 182.

[14] Article 19.

[15] Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Schedule 7, Article 19.

[16] Article 11.

[17] Article 5.1.

English Law not necessarily the place where the award is "made" if signed elsewhere[18]), under the Model Law, the competent court of the "seat" retains supervisory jurisdiction over the proceedings within Article 6. That court can, for example, set aside the award for failure to comply with the procedure as agreed by the parties unless the parties' agreement is inconsistent with a provision of the law of the "seat" from which they cannot derogate.

The arbitrators may also be required to have regard to the laws of the different places where the hearings may take place, especially if mandatory, although they are not the legal "seat" of the arbitration. The fact that the hearings are moved from place to place and the tribunal bound to respect the local laws of each of those localities does not, however, displace the "seat" of the arbitration from the place designated as such by the parties or the arbitrators. Even in those circumstances "... each move of the arbitral tribunal does not of itself mean that the seat of the arbitraton changes. The seat of the arbitration remains the place initially agreed by, or on behalf of, the parties."[19]

The recognition of the freedom of the parties, including the power conferred on a tribunal to select the procedural law, and, therefore, their capacity to subject the arbitration to a law different from the local law of the forum, has given rise to the much debated issue of "delocalised" arbitrations, which has an indirect bearing on the choice of law process in arbitrations involving state parties from the developing world. "Delocalisation" is designed to free international arbitration from excessive control by domestic courts. It is argued that the validity of international proceedings and the resulting award should not necessarily be linked to a specific system of national law and, in particular, that of the place where it is rendered. If it became necessary to refer to any law or standards to control the validity of an award, that should in the first place be the contract of the parties and, second, the law of the place(s) where the

[18] *Hiscox v Outhwaite (No.1)* [1991] 3 AER, 641, where both the English Court of Appeal and the House of Lords held that an award was to be regarded as "made" in Paris as the place where it was perfected, since it had been signed there, although the seat of the arbitration was London and the proceedings had been conducted there.

[19] Redfern, Alan & Hunter, Martin. Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 2nd Edn., 1991, p. 94.

award may be relied upon for recognition or enforcement.[20] "Control by the *lex loci arbitri*", it is suggested, "should be limited to ensuring respect for traditional standards of fairness, the limits of the arbitral mission and the rights of third parties."[21]

Critics point out that every arbitration exist under the authority of some domestic law or another.[22] It is by fiat of the law of the place of the proceedings that arbitration takes place there. The view that the agreement of the parties creates its own system of law to regulate the conduct of the arbitration is therefore limited both in theory and practice by the fact that it is the law of that state that gives and determines the extent of the freedom. The freedom therefore exists and can have only such effect as allowed by that law.

The relationship between "delocalised" arbitrations and the choice of the law applicable to the arbitral proceedings is argued on the basis that, if an arbitrator is not necessarily bound by the *lex fori* in determining both the procedural and substantive issues in dispute, the arbitrators should only have regard to international minimum standards since, as an international tribunal, they should be expected to apply those standards. That should remain so whether or not the nature of the dispute definitely fixes it within an identifiable domestic system of law, which, in the absence of the doctrine advanced, would have provided the relevant rules of law as the system most closely connected to the dispute and the arbitration.

II. The Applicable Substantive Law: Methods of selection

A. Ordinary Principles of Conflict of Laws

(1). Express Choice

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[20]Paulsson, Jan, "Delocalisation of International Commercial Arbitration: When and why it matters" (1983) 32 ICLQ, 53; "Arbitration unbound: Award Detached from the law of its country of origin" (1981) 30 ICLQ, 358; but see Mann F.A., "Lex Facit Arbitrum" in International Arbitration: Liber Amicorum for Martin Domke, (ed. by Sanders, Peter), 1967, 157.

[21]Park, William W., "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 ICLQ., 21.

[22]Mann, *supra.*

"Perhaps the most widely accepted private international law rule of our time is that the parties to a contract are free to stipulate what law shall govern their transaction."[23] That statement correctly reflects the general acceptance of one of the consequences of the doctrine of party autonomy. Using words intended to convey exactly the same effect, P.M. North says that "[f]reedom to chose the law to govern a commercial contract can clearly be supported by authorities going back two centuries",[24] without the need to refer to those authorities.[25] The authorities are taken for granted not only by North and Weintraub but also by most other modern authorities on the subject, to many of whom the issue is not so much the principle itself as its limits and the differences concerning them. Thus, for Ole Lando,

> [t]he parties' right to chose the law which governs an international contract is so widely accepted by the countries of the world that it belongs to the common core of the legal systems. Differences only exist concerning the limits of the freedom of the parties. Some countries seem to allow the parties an almost unrestricted freedom to chose the applicable law. Others limit their freedom either by demanding a local connection with the system chosen or by excluding some questions which are covered by mandatory rules or some contracts from being affected by the parties' choice of law.[26]

The doctrine of party autonomy and its corollary, freedom of choice, mean that in arbitration as in the domain of commercial contract law generally, the parties can

[23] Weintraub, Russell J., "Functional Developments in Choice of Law for Contracts" (1984) 187 Hague Acad. Courses, 239, p. 271.

[24] "Reform but not Revolution", General Course on Private International law (1990) 220 Hague Acad Courses, 9, p. 153.

[25] In a revised version of the Hague Academy course he however traces the doctrine back to the sixteenth century French jurist, Dumoulin: Private International Law Problems in Common Law Jurisdictions, Martinus Nijhoff, Doredrecht, 1993, chapter V, p. 10, note 4. (Hereafter PIL Problems). J H C Morris, too, traces the origin of the doctrine to civilian writers of the seventeenth century, notably the Dutch jurist, Huber, whom he represents as having stated that contracts are governed as to form and substance by the *lex loci contractus* unless the parties had another place in mind, thus suggesting that the law of that place will apply: The Conflicts of Law, 3rd Edn., Stevens and Sons, London, 1984, chapter 15, p. 267.

[26] "The Conflict of Laws of Contracts: General Principles", General Course on Private International Law (1984) 189 Hague Acad Courses, 225, p. 237.

select the law governing the substance of their differences. Almost every conceivable system of law, domestic or international, gives the parties freedom to determine expressly or impliedly the law to be applied in resolving any dispute. In fact, in civilian systems of contract law, party autonomy and freedom of choice are expressed in terms of the capacity of the contracting parties to establish a separate system of law applicable to their own transaction, subject only to the usual general limitations, such as public policy and good faith. In that sense the will of the parties retains a creative force comparable to the law itself. Thus, under Article 1134 of the French Civil Code, the agreement of the parties in contract becomes their law: "*[l]es Conventions légalément formées tiennent lieu de loi à ceux qui les ont faites*", the analogy with the law being explained on the basis that an obligation willfully contracted "... *s'impose aux contractants avec la même force qu'une obligation légale.*"[27] Therefore, in matters of contract, the parties are allowed to be their own legislators and Article 1134 bears that out by assimilating the agreement of the parties to the law: "*[l]e contrat tient lieu de loi aux parties; certes il n'a pas la généralité de la loi, ce n'est que la loi des parties, mais il en a l'autorité, les parties doivent s'y soumettre aussi bien qu'à la règle légale et le juge doit en imposer le respect aussi bien que celui de la loi.*"[28] However, the law remains overriding where it is mandatory and to that extent the will of the parties as reflected in the contract will continue to be subject to the specific provision of law which governs it. Yet, where that law is one which can be derogated from, it can also be displaced by the agreement of the parties:

> *[d]'un côté la loi est supérieur au contrat puisque celui-ci doit respecter les lois impératives, mais d'un autre côté c'est le contrat qui l'emporte sur la loi, lorsque celle-ci est simplément interprétative ou supplétive et la théorie de l'autonomie de la volonté interdit en principe au législateur de modifier les contrats en cours.*[29]

The same principle finds support in the common law systems without the need,

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[27]Mazeaud J., Chabas F., Léçons de Droit Civil, Obligations: Théorie Générale, T. 2, 8th Edn., Montchrestien, Paris, 1991, p. 854, para. 721.

[28]Marty, Gabriel & Raynaud, Pièrre, Les Obligations, Les Sources, T.1, 2nd Edn., Sirey, Paris, 1988, p. 258, para. 246.

[29]*Ibid* pp. 258-246.

however, to assimilate a contract to the law or to assimilate the freedom of the parties to create rights binding on themselves with the binding force of the general law. Simply, the doctrine is expressed and accepted in terms that the parties can create rights and obligations enforceable by law. The courts will then ensure that such agreements are observed like any other legal obligation.

The principle, without doubt, derives from the law of contract and it is primarily within the law of contract that it has been evolved. It finds particular application to contracts with an international element since it is owing to that fact that disputes involving a choice of one amongst conflicting systems of law arise. It is precisely in the domain of international contracts too that the need for freedom of choice receives its strongest support, on the basis that such transactions bring on board many considerations which are best resolved by application of a correspondingly flexible principle, allowing the parties adequate scope to shape their contractual relationship as need be. As Lando puts it,

> [i]n many international commercial contracts (...) the parties have creditable motives for their choice. They may want to use a formular which is internationally known. They may want to submit the contract to the law of the country that dominates the market. They may want to select a "neutral" law in which each of them has more confidence than in that of the domicil of the other party. A certain legal system may be well developed and well suited to the contract in question. The parties may wish to refer to a law which they have used in earlier transactions with each other. The contract may have a close relationship with some other contract which is governed by a certain law.
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> All these considerations may justify a choice of law clause, and even if they are not recognised in inland contracts they must be respected in international commercial contracts, where the parties are competitors not only with regard to the goods and services but also with regard to the legal system they may offer.[30]

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[30](1984) 189 Hague Acad. Courses, p. 285.

Although the 1980 European Convention on the Law Applicable to Contractual Obligations (Rome Convention) does not apply to arbitration and choice of jurisdiction clauses,[31] it still has as the basic rule for all contracts to which the Convention applies, that, they are "... governed by the law chosen by the parties." The freedom given to the parties under the Convention is considerably wide. They can change their choice,[32] or limit the chosen law to only part of the contract,[33] or choose one law to determine validity and another law to interprete the terms of the contract,[34] or, what is more, select a law which is totally unrelated to the contract,[35] subject to the public policy of the forum and the mandatory laws of the system of law with which the contract is otherwise more closely connected. The Convention, which came into force in 1993, is applicable in all member states of the European Community and substitutes the private international law rules of contract hitherto in force in each member country. It is therefore suggested that the Convention precludes parties to a contract to which it applies from selecting a system of conflict of law rules which is independent of it.[36] In some respect the scope of the Convention is very wide. It applies to contracts "... involving a choice between the laws of different countries",[37] i.e., whenever there is the possibility of a conflict between different systems of law. The situation involving a conflict may be brought about by a choice of law clause, thus bringing within reach of the Convention even a purely domestic transaction, if

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[31]Article 1(2)(d).

[32]Article 3(2).

[33]A process known as *dépéçage*: Article 3(1).

[34]Article 3(3).

[35]North, PIL Problems, p. 183.

[36]Kay, Peter The New Private International Law of Contract of the European Community: Implementation of the EEC's Contractual Obligations Convention in England and Wales under the Contracts (Applicable Law) Act, 1990, Dartmouth, 1993; North, PIL Problems, p. 127; *contra* Mann F.A., "The Proper Law of the Contract - An Obituary" (1991) 107 L.Q.R., 353, who argues that subject to mandatory provisions, to treat the Convention as having such effect will be inconsistent with the fundamental character of an instrument which proclaims freedom of choice as its cardinal principle.

[37]Article 1(1).

it contains a choice of law clause indicationg a foreign law.[38] The Convention also applies irrespective of whether the chosen system of law or the law otherwise indicated by its rules is the law of a member state of the European Community.[39]

What is relevant for us is that the Convention adopts in substance the principle of freedom of choice as already in existence in the different systems of law within the Community. Outside the Community the principle is also of general acceptance. The American Restatement of Conflict of Laws, Second, Section 187, provides that the contractual rights and duties shall be governed by the

> law of the state chosen by the parties ... if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

The position in Australia[40] as elsewhere in the common law world is exactly the same as under English law both before and after the Rome Convention. Switzerland's Law on Private International Law expresses the Swiss position in terms similar to the American Restatement: "[a] contract shall be governed by the law chosen by the parties."[41]

The principle also forms part of most other Conventions on commercial transactions. As one of the early international instruments on the subject the Hague Convention on the conflict of law rules on the sale of goods provided that "[a] sale

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[38]Lagarde, Paul, "Les Limites Objectives de la Convention de Rome (Conflits de Loi, Primauté du Droit Communautaire, Rapports avec les autres Conventions)" (1993) 29 Riv. Dir. Int. Priv. e Proc., 33, where the author draws a contrast with the position under the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, 1986, which excludes from its scope cases where the circumstance creating a choice between different laws "... arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration": Article 1(b). So, although the Rome Convention will apply to a purely domestic transaction in which the only foreign element is the parties' designation of a foreign law, (subject to the mandatory rules of the domestic law concerned: Article 17), the 1986 Hague Convention might not. See also Morse, C.G.J., "The E.E.C. Convention on the Law Applicable to Contractual Obligations" (1982) 2 Y E L, 107; North, PIL Problems, p. 123.

[39]Article 2.

[40]Sykes, Edward I.; Pryles, Michael C., Australian Private International Law, 3rd Edn., Law Books Co., Sidney, 1991, chapter. 16.

[41]Adopted by the Swiss Federal Parliament in December, 1987, Article 116(1).

shall be governed by the internal law of the country designated by the parties."[42] The 1955 Convention has been replaced by another Hague Convention on the same matter, the 1986 Convention on the Law Applicable to International Sale of Goods. Article 7 of the 1986 Convention is in almost the same terms as Article 2 of the previous one. It states that "[a] contract of sale is governed by the law chosen by the parties." The rule is then carried into subsequent international instruments such as the Hague Convention on the Law Applicable to Contracts of Agency, Article 5 of which provides for the "... internal law chosen by the principal and the agent ..." to govern "... the agency relationship between them."

It was also able to find its way into the two Hague Conventions of 1964 relating not to choice of law rules but to the substantive rules themselves, respectively, on formation and on the rights and duties of parties to a contract for the international sale of goods.[43] The second of the Conventions, which deals with rules on the formation of international sales contracts, excludes the application of the Convention's rules whenever "... it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage that other rules apply."[44] The Convention therefore recognises that parties to an intended sales contract can choose to regulate its formation other than in accordance with the rules of the Convention. Even more clearly stated is Article 3 of the Annex to the first of the Conventions dealing with the substantive rights and duties of the parties. It provides that the parties "... shall be free to exclude the application ... of the present law either entirely or partially. Such exclusion may be express or implied." They are free to adopt different rules varying the obligation of the parties, such as the duties of the seller regarding delivery and of the buyer in respect of the payment of price. On the other hand, under Article 4, the Uniform Law will be applicable where it has been chosen by the parties as the governing law although they do not satisfy the general requirement regarding the scope of the Convention, which applies in specific

[42]Article 2.

[43]The Uniform Law on the Formation of Contracts and the Uniform Law on the International Sale of Goods, both of July 1964.

[44]Annex I, Article 2(1).

circumstances set out in the Convention, where the parties have their places of business or habitual residence in different states. Contracting parties are thus allowed to bring their transaction within the scope of the Convention, if they choose to, even in circumstances where it would otherwise not be so. The freedom given to party autonomy in that case is considerable.

Both Hague Sales Conventions have been replaced by a single instrument, the United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980. It re-enacts the previous Conventions in substance and retains freedom of choice in Article 6, by allowing the parties "... to exclude the application of the Convention..." if they choose to or "... vary the effect of its provisions ...."

(2). Freedom of choice, express choice and international commercial arbitration

Given that arbitration itself is an extension of the doctrine of party autonomy, the rule that contracting parties retain the freedom to determine the applicable law also found its way into the domain of international commercial arbitration. A brief survey reveals that it has gained widespread support in both developing and advanced countries as embodied in almost all recent national legislation applicable both to domestic and international commercial arbitration. It also underlies all international instruments in force on the subject.

Within the European Community the Rome Convention on the Law Applicable to Contractual Obligations 1980 excludes arbitration from its scope, thus leaving the issue to be determined under the domestic law in force in each member state of the Community. In France domestic and international arbitration are governed by the relevant provisions of the new code of civil procedure. International Commercial Arbitration is governed by Book IV, Part V. Article 1496 of the code directs an arbitration tribunal to detemine the rights and obligations of the parties in dispute in accordance with the rules of law chosen by them: "*[l]'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; à defaut d'un tel choix, conformément à celles qu'il estime appropriées.*" There is a close similarity there with the position under the 1987 Swiss Law[45] which also requires a tribunal to determine the dispute between the parties in the arbitration "... *sélon les règles de droit choisies par les parties ou, à defaut de choix, sélon les règles de droit avec lesquelles la clause présente les liens les plus étroits*" (Article 187). In the Netherlands, where the law was revised by the addition to the code of civil procedure of a new chapter on arbitration in 1986 with a view to modernising the old law, the code recognises the parties' freedom to determine the applicable law and Article 1054 directs the tribunal to decide the dispute in accordance with the law chosen by the parties. In Spain the tribunal is requested, pursuant to Article 62 of the Arbitration Law of 1988, to decide the dispute in accordance with the law expressly chosen by the parties. Although the relevant provisions of the Belgian judicial code appear silent on the particular point, it is accepted that in Belgium, the parties in arbitration are free to designate the applicable law, the tribunal being required to apply it.[46]

Similarly the Arbitration Acts in force in England are silent on the parties' choice of the applicable law. The case law however indicates that the parties are free to decide the applicable law provided the choice is made in good faith and is legal.[47] *Compagnie D'Armément Maritime v Compagnie Tunisienne de Navigation,*[48] for example, was a case which did not involve an express and clear choice. It was a case in which the British courts had to determine the applicable law of a contract submitted to arbitration from a choice of law clause which had been expressed by reference to the "laws of the flag of the vessel carrying the goods." The intention of the parties was to be inferred from the terms of the contract as a whole. What is significant, however, is that the discussion in the House of Lords proceeded on the assumption that if a choice had been clearly stated it would have been upheld.[49] Lord Morris

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[45]Came into force in January 1989.

[46]Huys, Marcel and Keutgen, Guy L'Arbitrage en Droit Belge et International, Bruylant, Bruxelles, 1981, pp. 577 et seq.

[47]*Vita Food Products v Unus Shipping Co.*, [1939] A.C. 277; *Whitworth Street Estates v James Miller & Partners* [1970] A.C. 583.

[48][1971] A.C. 572.

[49]*Ibid* pp. 583 (per Lord Reid); 585 (Lord Morris of Borth-y-Gest); 603 (Lord Diplock); 577 (submission of counsel).

observed that "[i]t is first necessary to consider whether the parties themselves made an agreement as to which system of law should govern the contract. If they did, it is not suggested that any reason exists why their agreement should not determine the matter."[50] In this case they had not and the court had to determine what, in the circumstances, the parties could be assumed to have intended. For that reason the entire process itself was described in terms of a search for the "intention of the parties." So, although the court had to determine the proper law in the absence of a determination by the parties, it did so by reference to what it considerered would have been in the contemplation of the parties at the time the contract was made.

In those developing countries where the arbitration laws have recently been updated in line with new trends, the rule allowing parties the freedom to select the substantive law of the contract in an arbitration is now more unambiguously stated than before. Article 12 of the Code of International Arbitration of Djibouti[51] makes it free for the parties "... to decide which rules of law the arbitrators shall apply to the substance of the dispute." In Nigeria, the Arbitration and Conciliation Decree of March 1988,[52] provides for the tribunal to "...decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute."[53]

Freedom of choice also finds support in international Conventions on arbitration which, no doubt, reflect the need to transfer already well established principles of national laws into the international plane both for uniformity and to bring the practice in international arbitration in line with the changing requirements of world trade. Of the modern international instruments the UNCITRAL Model Law stands out as one of the clearest expression of the freedom of the parties to select the proper law

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[50]*Ibid* p. 585.

[51]Law No. 79/AN/84/IST L of February 1984, English translation as published in the World Arbitration Reporter, (ed. Smit and Pechota), Parker Sch. of Foreign and Comparative Law, Binder 2. 1986.

[52]Modelled as in Canada and Scotland on the UNCITRAL Model Law on International Commercial Arbitration.

[53]Article 47(1). See also Article 73(1) of the Tunisian Code of Arbitration (Law No. 93-42 of 26 April 1993); Article 39(1) of Egyptian Law of Arbitration in Civil and Commercial Matters 1994.

of the dispute submitted to arbitration. Article 28 states that "[t]he the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." The unofficial guide to the law[54] points out that there was wide acceptance of the policy issue as to whether "... the parties should have complete autonomy to choose any rules to govern the substance of the dispute even if the rules are territorially unconnected with the contract or the parties."[55] Aron Broches' Commentary on the UNCITRAL Model Law on International Commercial Arbitration[56] also makes it clear that there was little disagreement over that point.[57]

The first clause of Article 42 of the settlement of investment disputes Convention is also in similar terms: "[t]he tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties." An arbitral tribunal constituted under the SID Convention is bound, as required by Article 42(1), to apply the law selected by the parties. Failure to do so might constitute a ground for annulment of the award under Article 52(1). In *Agip v Congo*[58] the contract provided in clause 15 for the applicable law to be "the law of Congo, supplemented if need be by any principles of international law." The tribunal in the arbitration stated that it had to examine the merits of the dispute in accordance with the parties' choice as expressed, having regard to Article 42(1) of the Convention, to which it declared itself and the disputants bound. As the tribunal put it, "[t]he said Article [Article 15 of the contract] binds the parties and has the force of law for the tribunal by virtue of the above cited Article of the Convention." Having noted that Congolese law as it relates to civil and commercial matters applies French law as it was in force at the time of

[54]Holtzmann, Howard M. and Neuhaus, Joseph E., A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer, Deventer, 1989.

[55]*Ibid* p. 765.

[56]Kluwer, Deventer, 1990.

[57]*Ibid* pp. 141 *et seq.* although it also appears from the Holtzmann and Neuhaus Guide (pp. 767 *et seq.*) including Broches' Commentary, (p. 143 *et seq.*), that there were disagreements over some questions of technical detail, such as whether the reference to the applicable substantive law should be to "rules of law" or simply to the less broad term "law".

[58][1993] 1 ICSID Reports, 306.

the accession of the country into independence ...", the tribunal then proceeded to apply French commercial law as received in the Congo and as in force at the time the contract was made. The application of what the tribunal regarded as Congolese law in that award was well in line with the express intention of the parties. In another ICSID award involving the Italian company, Adriano Gardella, and the government of the Ivory Coast,[59] the tribunal gave effect to the law of the state party involved on the basis that "[b]oth parties admit that their agreement is governed by the law of the Ivory Coast."[60]

Both the Model Law and the ICSID Convention are pre-dated by the European Convention on International Commercial Arbitration of 1961, which contains a similar provision in Article VII(1): "[t]he parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute", a position which is re-inforced by the rules of procedure of European institutions involved in commercial arbitration, with Article 13(3) of the Rules of Arbitration of the ICC Court of Arbitration, for example, providing that the "[t]he parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute."

For their part arbitration tribunals have always upheld the parties' choice of the applicable law as expressed in the contract. In one ICC award[61] concerning a construction contract in which the parties had expressed the choice for Swiss law, the tribunal stated that in an international contract "... involving parties of different nationalities, the choice of law is entirely free, and the parties could freely decide that their relations were to be governed by Swiss law ..." and the tribunal felt bound to apply that law "... even though the case [had] no connection whatsoever with Switzerland."

(3). Implied Choice

The ordinary principles of private international law require that where the

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[59]Award of 29 August 1977 [1993] 1 ICSID Reports, 283.

[60]*Ibid* p. 287.

[61]Case No. 4629 of 1989

parties fail to specify an express choice of law the courts or arbitrators can imply one on their behalf. The process involves certain presumptions, most of which are drawn from the terms of the contract itself, or tied to factors established by law (or as determined by courts), as matters from which a choice can be inferred, such as the place of performance of the contract, the nationality of the parties and the place chosen for the arbitration. The process would require the search for "... an actual intention by the parties, but without any choice of law clause in explicit terms",[62] since implied choice does not mean the absence of choice. It is a reference to the absence of a choice of law clause explicitly stated in the contract or in another document relating to the contract such as a separately made arbitration agreement. The choice is regareded as implied on the basis that "[f]rom the express terms of the contract it is clear that the parties have addressed their minds to the question of what law should govern the contract and have made a conscious decision even though they have not written it down in express terms."[63] The Giuliano-Lagarde report on the European Union Rome Convention[64] indicates that its authors were aware of the fact that the parties may fail expressly to state a choice although it remains possible from the terms of the contract that the parties had in fact indicated a choice. For that reason, Article 3(1) of the Convention enjoins the competent court to give effect to such a choice if "... demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." The recognition of that fact was not new at the time of the Convention. It had already been the subject of Article 2 of the 1955 Hague Sales Convention, which provided for the implied designation of the applicable law by the parties to "... result without any doubt from the provisions of the contract." When the 1955 Sales Convention was replaced by the 1986 Hague Convention Article 7 of the latter provided for the choice "... to be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety", following Article 5 of the 1978 Agency Convention, which had been expressed in terms requiring the

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[62]Diamond, Aubrey L., "Harmonisation of Private International Law relating to Contractual Obligations" (1986) 199 Hague Acad Courses, 233 p. 256.

[63]*Ibid.*

[64]Official Journal of the European Communities, 1980, C282.

choice to "... be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case."

In all the Conventions implied choice is limited to those situations where it could reasonably be assumed that the parties had addressed their minds to the question of the applicable law but simply failed expressly to record their intention. In those situations arbitrators can draw an inference as to the proper law from the indicators present in the contract and other circumstances. The discretion to do so is accepted in domestic and international instruments governing arbitration and in arbitration practice itself as revealed in awards. The UNCITRAL Model law, for example, and some of the national legislation based on it[65] provide for the arbitrator to determine the substantive law in accordance with any conflict of law rules which he considers applicable. The European Convention on International Commercial Arbitration of 1961 also allows the arbitrators to "... apply the proper law under the rule of conflict that the arbitrators deem applicable."[66] The rules of the ICC Court of Arbitration[67] give the arbitrator the power to "... apply the law designated as the proper law by the rules of conflict which he deems appropriate." The powers conferred on arbitrators under those provisions are very wide and are accepted as permitting them to imply an actual, although not expressly stated, choice of law where the facts allow them to do so. The factors often taken into consideration include the use of a particular standard form of a contract which is known to be governed by a particular system of law,[68] the presence of an arbitration or choice of jurisdiction clause, previous dealings between the parties indicating a particular system of law and the fact that the parties had conducted their affairs in reliance on a particular law. In the arbitration involving AAPL, a Hong Kong corporation, and the government of Sri Lanka,[69] the tribunal decided by a majority to apply the provisions of the Sri Lanka / U.K. Bilateral

[65]Articles 28 (UNCITRAL); Sections 47(3), (Nigeria) & 28(2), (Canada)

[66]Article VII(1).

[67]Article 13(3).

[68]Giuliano-Lagarde report on the Rome Convention, *supra*.

[69]*Asian Agricultural Products Ltd. v Republic of Sri Lanka*, award of 27 june 1990 [1991] 6 ICSID Rev.,-FILJ, 526.

Investment Treaty[70] as the primary source of the applicable rules of the dispute on the basis that the parties had throughout the proceedings, particularly in their pleadings, "... acted in a manner that demonstrate[d] their mutual agreement to the application of the Treaty." The dispute arose out of a joint undertaking in Sri Lanka for the production of shrimp culture. The arbitration was commenced by AAPL after it suffered loss in its investments owing to operations conducted by the Sri Lankan security forces against local separatist rebels. Under Article 42(1) of the ICSID Convention the dispute is settled in accordance with rules of law chosen by the parties. In the absence of such an expresss choice in this case the tribunal held, by majority, that subsequent reliance by both parties on the provisions of the Treaty in their pleadings and submission to the tribunals during the hearings constituted a tacit choice of the applicable rules for the purpose of Article 42(1).[71]

(4). Complete Absence of Choice

In this situation the parties have expressed no choice at all. There is no choice of law clause whether in the contract itself, or in a separate but related document, or is it possible to infer from the terms of the contract or the dealings between the parties that they had addressed their minds to the issue. In those circumstances, as in the case of implied choice, arbitration tribunals are given the power to determine the appropriate law, the source of such power being in all cases exactly the same as in cases involving a tacit choice of law. In a case involving, for example, an ICC arbitration, it will be Article 13(3) of that institution's arbitration rules and for the UNCITRAL Model Law, Article 28.

The general approach is to apply the law with the closest connection to the transaction and the parties. The search for the law with the closest connection will take on board such factors as the place of performance of the contract, the nationality or domicil of the parties to the transaction, the law of the place where the contract was made and, of great significance, the nature of the transaction itself. A contract for the

[70]The application of which had been extended to Hong Kong.

[71]Contra, award of dissenting arbitrator, [1991] 6 ICSID Rev.,-FILJ, p. 574.

construction and management of an industrial unit should, in the absence of agreement by the parties, in principle be governed by the law of that country as the system of law almost exclusively connected with the undertaking. The advantage of the closest connection approach lies in its flexibility. It makes it possible for the arbitrator to look at the circumstances of the contract as a whole. It takes many factors into account, weighing each against the others to determine the system of law which, as a whole, has the most significant connection with the contract. This contrasts with the method once in favour in many systems[72] to refer to rigid rules in determining the law. In some jurisdictions the law of the nationality of the parties, if common, provides a fast rule. In others reliance is placed on the law of the place where the contract was made. Other presumptions include the law of the place of performance, the law of the place of negotiation and of the location of the subject matter of the contract, and the law of the place of arbitration or other method of settlement, if indicated in the contract. It has always been doubted whether all these presumptions, taken separately, can provide an appropriate link with the transaction, sufficient to determine the proper law.[73] What is certain is that they all have to be taken together.[74]

The American Restatement, Second, on the Conflict of Laws, requires in the absence of an effective choice of law by the parties that the dispute be "... determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties ..." The objective of the restatement is to identify the state having the most significant connection with the particular issue in dispute and to give effect to that law. Section 188(2) requires the factors to be taken into account in determining the system of law with the most significant relationship with the transaction and the parties, "... to be evaluated according to their relative importance with respect to the particular issue." The European Convention of 1980 (Rome Convention) also expresses a preference for the flexible rule. Article 4(1) provides for a contract to be "... governed by the law of the country to which it is most closely connected", although, in applying that test, the Convention still relies on

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[72]Italy, France.

[73]Diamond, *supra* 269 *et seq.*

[74]*Ibid.*

a number of presumptions for specified type of contracts. For example, contracts of carriage are presumed governed by the law of the place of the carrier and, for contracts in which the subject matter involves an interest in an immovable property, the presumption is for the law of the situs. Since the Convention lays down as a general rule applicable in all cases, that, for the purpose of determining the law with the closest connection, the governing law of a contract is the law of the party whose performance is characteristic of the transaction, the presumptions provided for in the specified cases must be read only as an indication of the law with the closest connection. The presumptions are therefore not conclusive. If the law of another country has a closer relationship to the contract that law is applied. Article 4(5) as a result provides that the presumptions regarding the specified contracts (contracts involving carriage and interest in immovable property) should be disregarded "if it appears from the circumstances as a whole that the contract is more closely connected with another country." In all events if the performance which is characteristic of a contract cannot be determined the same Article 4(5) refers back to the law of the country which, from the circumstances as a whole, provides the closest connection to the transaction and the parties.

Closely associated with the closest connection test is the "policy analysis" test applicable in many American states. It is also flexible in that it requires the courts to balance the factors connecting the transaction to the different States whose laws are in conflict, to determine the state having the greatest interest in the controversy and which will be most affected by the outcome of the dispute.

(5). Tronc Commun

The "tronc commun" calls for the application of the principles of substantive law which are common to the national systems of law in conflict.[75] The principal proponent[76] of the doctrine refers to clause 68 of the Channel Tunnel arbitration

[75]Rubino-Sammartano, Mauro International Arbitration Law, Kluwer, Deventer, 1990, pp. 274-276; "The Channel Tunnel and the Tronc Commun Doctrine" (1993) 10 Journ. Int'l. Arb'n., Part 3, 59.

[76]*Id.*

case[77] as an example of how the "tronc commun" could be brought into operation. That case provided for the governing law to be "... in accordance with the principles common to both English law and French law and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals."[78] Under the doctrine, the tribunal will explore all the systems of law concerned for principles of law common to them and relevant to the settlement of the matters in dispute. An important shortcoming of the doctrine is that if the parties fail to provide for an alternative, the tribunal might be unable to proceed with its search for the applicable law in the absence of principles of law common to the different systems. The Channel Tunnel arbitration clause provided for principles of international trade law as the residual law. On the other hand, if the relevant substantive rules and principles of law in both systems are the same, there is no true conflict since reliance on any of the systems will lead to the same outcome.

In all events any of the above traditional conflict of laws methods will lead to the application of a system of law with the most significant bearing on the transaction. However, in arbitrations involving state parties from the developing world, these traditional methods have not usually been followed for various reasons.

III: Choice of Substantive law and Investment Contracts

The problem of the proper law of a contract with international elements has unduly been complicated in cases where one of the contracting parties is a state or a public body. The conflict of laws debate has so far proceeded along two lines. First, it is stated that the contracts are normally governed by the local law of the state but the result of the application of that law should be denied where the state exercises its sovereignty to alter "... the local law as to end its obligations under the contract"

[77] *Channel Tunnel Group v Balfour Beatty* [1992] 2 AER 609.

[78] Similar provisions will be found in earlier arbitrations, such as the three Libyan Petroleum awards, *infra*.

before its full duration,[79] on the basis that it is contrary to international law. The question arising thereunder is whether in modifying its domestic law, in principle applicable to the contract, thus altering the obligations of the parties, the state acts in breach of international law. Many arbitration awards have answered the question in the affirmative.[80] The discussion then becomes centred on specific issues of international law, such as a state's sovereignty over natural resources within its territory, the protection of aliens, the abuse of rights, state responsibility and the tort of denial of justice.

That approach asumes that international law is automatically applicable in contracts by governments and private parties. In particular it assumes that international law provides a higher level of norms applicable to those contracts. The approach was met with the criticism - valid in our view - that it confuses the separate domains of public and private international laws, especially by ignoring the well established rules of conflict of laws referred to earlier.[81] The second approach was therefore put forward on the view that a state contract, like all other contracts, is governed in the first place by the system of law chosen by the parties.[82] In the absence of an express indication by the parties of that law the traditional principles of conflict of laws should be followed to discover what, in the circumstances, could be the appropriate law. The trend, as indicated above, is to apply the law with the closest connection to the transaction and the parties.[83] If by application of private international law rules a contract is found to be governed by the law of a state, that law, as the proper law of the contract, "... not merely sustains but, because it sustains, may modify or dissolve

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[79]Jennings, Robert Y. "State Contracts in International Law" (1961) 37 BYIL, 156.

[80]*Sapphire International Petroleum v National Iranian Oil Co.*, [1967] 35 ILR, 136; *Texaco Overseas Petroleum Company and California Asiatic Oil Company (Topco/Calasiatic) v Libya*, award on the merits of 19 January 1977 [1979] 53 ILR 420; *Revere Copper & Brass v The Overseas Private Investment Corporation*, award of 24 August 1978 [1980] 56 ILR, 258.

[81]Mann, F. A. "State Contracts and State Responsibility" (1960) 54 AJIL, 572; "The Proper Law of Contracts Concluded by International Persons" (1959) 35 BYIL, 34; "The Law Governing State Contracts" (1944) 21 BYIL, 11.

[82]*Ibid.*

[83]North, (1990) 220 Hague Acad Courses, 9.

the contractual bond."[84] "If, therefore, the debtor [in this case the state] relies on changes in the proper law, he does what he is entitled to do and cannot be charged with a breach of contract, his undertaking being limited to perform in accordance with the terms of the contract as sanctioned by the provisions of the proper law."[85] That, in our view, is logical. The position will remain the same even if the state had agreed to "freeze" the applicable law as existing at the time when the contract was made so as to exclude the application of subsequent alterations to that law by the state itself since, in any case, "... it is the proper law of the contract that decides the question whether the change overrides the clause"[86]. As Stephen Toope says, "it is not possible in international contracts effectively to exclude the application of the mandatory provisions of the proper law."[87] The effectiveness of "freezing" or "stabilisation" clauses was considered in *Government of Kuwait v The American Independent Oil Co. (Aminoil)*[88] and rejected by the tribunal, which thought that a stabilisation clause could not preclude subsequent nationalisation of the concession made to the corporation by appropriate domestic legislation. The tribunal recognised that provided adequate compensation was made, the state could still "take those steps against which it was the very object of these clauses to protect the concessionaire."[89] According to Stephen Toope, stabilisation clauses only emphasise the need to act in good faith and the requirement of adequate compensation.[90]

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[84]Mann, (1960) 54 AJIL, p. 581, citing *Kahler v Midland Bank* [1950] A.C. 24, p. 56.

[85]*Ibid.*

[86]*Ibid.*

[87]Mixed International Arbitrations: Studies in Arbitrations between States and Private Persons, Grotius Publications, Cambridge, 1990, p. 53.

[88]Award of 24 March 1982 [1984] 66 ILR, 518, where the tribunal held as a matter of principle that the state could unilaterally modify the terms of the contract, although the other party is entitled to compensation.

[89]*Ibid* p. 587.

[90]*Supra* p. 53. In *Amoco international Finance Corporation v Islamic Republic of Iran* (Iran-US claims tribunal) (199) 27 ILM 1314, the tribunal declined to enforce the clause (Article 30) simply by not treating it as a stabilisation clause at all since it referred solely to the existing Iranian law and did not affect future Iranian legislation.

For the investing community even the second approach, although it might be sound in law, leads to an unsatisfactory outcome in that it leads back to the same law under which the state had purported unilaterally to modify the contract. It therefore became necessary to add elements to that approach rendering it possible to circumvent the application of host state laws. This is achieved by "internationalising" state contracts by a truncated conflict of laws based process which leads to international law as the proper law of the contracts where the parties fail explicitly to state it. The trend, according to Professor Toope, "has been for arbitrators increasingly to ignore the traditional rules of private international law as they seek to determine the proper law of state contracts."[91]

In the view of writers with a developing world outlook, however, the process has resulted in an attempt to "... build a system of arbitration for the protection of foreign investment contracts and related business activity ..."[92] based on international law, a development they find little favour with.[93]

A. The Rejection of Host State Laws as the Governing Law of State Contracts

It was originally not disputed that in the absence of an indication of the proper law the connecting factors weighed heavily in favour of the application of the host state law as the system of law most closely connected with the particular transaction. In one of the early oil concession awards between the *Petroleum Development (Trucial Coast) Ltd* and the *Sheikh of Abu Dhabi*[94] the arbitrator recognised that "[i]f any municipal system of law were applicable it would prima facie be that of Abu

[91]*Ibid* p. 46.

[92]Sornarajah, Mamud International Commercial Arbitration: The Problem of State Contracts, Longman Singapore Ltd., 1990, Chap. 1; "The Climate of International Commercial Arbitration" (1991) 8 J Int'l. Arb'n., 48.

[93]Maniruzzaman A. F. M. "State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law" (1992) 9 Journ. Int'l. Arb'n., Part 4, 141.

[94]Award of August 1951, [1952] 1 ICLQ, 247; (1951) 18 ILR 144.

Dhabi"[95], as the law of the place where the contract was made "... and wholly to be performed ..."[96]. A trend soon developed, however, to avoid the application of those laws. The legal techniques used to achieve the result were numerous.[97]

(1). Inadequacy of Host State Laws

First, it was suggested that the legal systems of the developing countries concerned were too underdeveloped to deal with the questions arising under the contracts. In the Abu Dhabi award the arbitrator held that there could be no principles of law applicable to the kind of commercial transactions involved to be found in such a "primitive region", the reference being to the Persian Gulf generally, including the state of Abu Dhabi itself. In his view "... no such law [could] reasonably be said to exist [in Abu Dhabi]. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[98] The same ground was relied on in the Qatar arbitration two years later[99] to reject the application to a similar concession of principles drawn from Islamic law. The arbitrator was satisfied that the law of Qatar did "... not contain any principles which [could] be sufficient to interpret [the] particular contract"[100] he had to consider. In words admittedly adopted from the previous award, he stated that "... there [was] no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments."[101]

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[95][1952] 1 ICLQ p. 250.

[96]*Ibid.*

[97]The reasons and stages through which they were developed are described in considerable length by Sornarajah, *supra* chapters 1 and 4 and The Pursuit of Nationalised Property Martinus Nijhoff, Dordrecht, 1986, chapter 2

[98]*Ibid* pp. 250-51.

[99]*Ruler of Qatar v International Marine Oil Co.*, award of June 1953 (1953) 20 ILR, 534.

[100]*Ibid* p. 545.

[101]*Ibid* p. 544.

In both cases the choice of law clauses were similarly expressed in terms requiring the contracts to be interpreted "in a manner consistent with reason" or, as stated by the arbitrator in the second award, in accordance with "the principles of justice, equity and good conscience."[102] The arbitrator in the Abu Dhabi award read the clause as requiring "... the application of principles rooted in good sense and common practice of the generality of civilised nations ..."[103] and, although he did not find English municipal law applicable as such, he still considered and relied on some rules of English law for being "... so firmly grounded in reason, as to form part of this broad body of jurisprudence ..."[104] The inference is that there were no similar general rules of law "rooted in common sense" or consistent with the "modern law of nature" or "grounded in reason" to be derived from the law of Abu Dhabi or the region as a whole.

Later developments made it impossible to rely on the assumed inadequacy of the legal systems of these countries to exclude the application of the laws.[105] The effect of the enactment of laws governing different areas of domestic and foreign investments, together with the fact that the general commercial laws of these countries are in any case based on the laws and practices as inherited from the same European countries, was to render such assumption baseless. In addition some international instruments on the subject of foreign investments specifically required the application of host state laws in the absence of a specification by the parties.[106] What is more express contractual provisions were also being made by the host states for the application of their laws. According to Professor Georges Delaume,

> [i]n the vast majority of state contracts, provisions relating to the applicable law refer to some municipal law as the applicable law of the

[102]*Ibid* p. 545.

[103]*Supra* p. 251.

[104]*Ibid.*

[105]Although even in the improved climate of today it is still possible to find occasional expressions of the same attitude: *State of Dubai v Sir Francis McWilliams*, Paris High Court (Tribunal de Grande Instance) decision of 1 April 1993 (1993) Rev. Arb., 455.

[106]See for example Article 42 of the ICSID Convention.

contract. When the contract involves primarily transactions that are to be performed in the country of the state party, the law of that state normally governs the relationship.[107]

The problem with the earlier cases is that the choice of law clauses were too vaguely worded, thus allowing the arbitrators unlimited scope reading the clauses. Clear and precise proper law clauses providing for the application of host state laws, backed by an international Convention to the same effect, such as Article 42 of the ICSID, make it difficult for tribunals to avoid the laws off-hand. These developments did not, however, remove the trend against the application of host state laws whether required by Convention or by the terms of a contract.

In awards rendered pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes, which mandates the application of the host state law, an avoidance mechanism has been to rely on the civil and commercial laws of former colonising states as the general and commercial laws of the host states, so as to exclude the application of the latter. *Klöckner v Cameroon* illustrates how, in both the original and the first annulment proceedings,[108] the reference to Cameroonian law as required under Article 42(1) was treated as a reference to French law and the latter applied in the place of the former. Consequently all references to authorities in the applicable law were to French jurisprudence, French text writers and French statutory provisions. It would have been necessary, for example, to refer to the corresponding Cameroonian statutory provisions, even if the same or similar to the French statutes relied on.

A stronger expression of the preference for French law is to be found in the *Agip SPA v Congo*[109] award. There, the tribunal held that Congolese law was "... French law as it was in force at the time of the accession of the country to

[107]"The Myth of the Lex Mercatoria and State Contracts", in Lex Mercatoria and Arbitration (ed. by Carbonneau, Thomas E), Dobbs Ferry, New York, 1990, 77, p. 79.

[108]Awards of 21 October 1983, [1994] 2 ICSID Reports, 9 (excerpts); Paulsson, Jan, "The ICSID Klöckner v. Cameroon award: The Duties of Partners in North-South Economic Development Agreements" (1984) 1 J Int'l. Arb'n., 145 (excerpts) and of 3 May, 1985 [1994] 2 ICSID Reports, 59; [1986] 1 ICSID Rev.,-FILJ., 89.

[109][1993] 1 ICSID Reports, 306.

independence (1960)", so as to apply the provisions of the French civil code.[110]

Although the commercial laws of the countries concerned in the above awards are drawn principally from French Law, as a matter of principle, they are no longer to be regarded as exactly the same as French Law if the purpose for doing so is to disregard their application in circumstances where they are otherwise applicable. The dissenting arbitrator in *Société Ouest-Africaine des Bétons Industriels (Soabi) v Senegal,*[111] was pushed by the repeated reference to French Law by the majority in that award to react that "[à] partir du 4 avril 1960, date de l'independence du Sénégal, le droit Sénégalais s'est détaché du droit Français, celui-ci ne pouvant servir qu'à titre d'illustration d'une opinion quand il s'agit de situations postérieures à cette date"[112], a statement which remains valid for the other countries concerned, as recognised in a subsequent award involving the Government of Guinea.[113]

The award in *Asian Agricultural Products Ltd. v Sri Lanka*[114] introduces another device, which is to treat a treaty separately from the domestic law of the state into which the treaty has been incorporated, so as to apply the treaty provisions as if they never formed part of the law of the country involved in the ICSID arbitration. The intended objective is to consider the domestic legal order as having no bearing on the transaction as a means to avoid reliance on that law, if the need were to arise. The technique is highly questionable on the ground that it is inconsistent both with principle and with the provisions of Article 42(1) of the Convention on the Settlement of Investment Disputes, which makes the application of the domestic law of the state

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[110]See also *Benvenuti & Bonfant v Congo* [1993] 1 ICSID Reports, 330, where another ICSID tribunal reached the same conclusion almost word for word as in the Agip case; and, *Atlantic Triton Comp. v Guinea,* award of 21 April 1986 [1988] 115 J D I, 181 (excerpts) on a similar attitude towards Guinean Law.

[111]ICSID Award of 25 Feb., 1988, [1991] 6 ICSID Rev.,-FILJ, 125.

[112]Although that was not necessary since the settlement had clearly been made on the basis of Senegalese law.

[113]*Maritime International Nominees Establishment v Government of Guinea,* award of 22 December 1989 [1990] 5 ICSID Rev.,-FILJ, 95.

[114]Award of 27 June, 1990 [1991] 6 ICSID Rev.,-FILJ, 526.

party in dispute mandatory.[115]

(2). Internationalising the Contracts

As noted earlier it is admitted that international law is made for relations between states and international bodies and should therefore, in principle, have no place in contracts between states and private persons.[116] Jennings states that "[t]he proper law of a State contract is normally the municipal law of the contracting State."[117] But since the state can modify that law in its favour without being in breach of the contract according to its proper law, the contract, it is argued, must be internationalised. The contract then becomes governed by international law under certain circumstances whether or not expressly selected or otherwise indicated by the parties as the applicable law.[118] The purpose of internationalising a state contract is fairly well known, and has been objected to, the methods used being highly questionable.[119] Rigaux states the reason as being

> to protect the foreign contracting party against the exercise by the State not only of its rights to nationalize the property and contractual rights of the foreign enterprise (...), but also of its power to modify its own legislation (particularly with regards to taxation) and, by so doing, to infringe contractual rights which are held to be sacrosanct.[120]

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[115]See Elombi, "ICSID Awards and the Denial of Host State Laws" (1994) 11 J. Int'l. Arb'n., Part 3, 61.

[116]Jennings, (1961) 37 BYIL, 156.

[117]*Ibid.*

[118]*Ibid.*

[119]Rigaux, François "Transnational Corporations" in International Law: Achievements and Prospects, (ed. Bedjäoui, Mohammed), Martinus Nijhoff, Dordrecht, 1991, 126.

[120]*Ibid* p. 126. The policy arguments for internationalising are fully discussed by Sornarajah, The Pursuit of Nationalized Property, Martinus Nijhoff, 1968, pp. 86 *et seq.* In *Sapphire International Petroleum v National Iranian Oil Co.*, award of 15 March 1963 [1967] 35 I.L.R., 136, p. 171, the arbitrator thought that owing to the size in financial and technical assistance brought into the host country by the investors it seemed "... natural that they should be protected against any legislative changes which might alter the character of the contract, and that they should be assured of some legal security. This could not be guaranteed to them by the outright application of Iranian law, which it is

The writer does not however fail to point out that

> [however] audacious it may seem, the roundabout invocation of international law can be explained by the desire to justify the considerable restrictions thus placed upon state power, by appealing to a higher legal order than that of the State."

The range of circumstances under which the contract will come under international law are numerous[121].

(i). General principles of law and the internationalisation of the contracts

First, it is said that the insertion into the agreements of a proper law clause referring to "general principles of law" ought to lead to the application of international law, since "general principles of law recognised by civilised nations" constitutes a source of international law under the statute of the International Court of Justice.[122] According to F.A. Mann, "... an express reference to public international law will usually be embodied in a clause providing for the application of general principles of law."[123] The use by Mann of the term "express" is a contradiction since what he regards as "express" is not express but, in his own words, "embodied" elsewhere (in "general principles of law") from where it is to be "inferred". That which is "express" cannot be "inferred" at the same time. Mann's reason for inferring an "express" choice of public international from a clause requiring the application of "general principles of law" is that if, by referring to "general principles of law", only those principles are assumed to have been intended,

> then the internationali[s]ation of a contract would not be different in

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within the Iranian State to change.

The result of these considerstions is to reduce the likelihood of Iranian civil law being applied to the interpretation and perforance of the agreements."

[121]Apart from Sornarajah, *ibid* p. 90 *et seq* and International Commercial Arbitration: The Problem of State Contracts, Chap. 1, see also Naón, Horacio A. Grigera Choice of Law Problems in International Commercial Arbitration, J.C.B. Mohr (Paul Siebeck), Tubingen, 1992, pp. 114 *et seq*; *Topco/Calasiatic v Libya*, award on the merits of 19 January 1977 [1979] 53 ILR, 420.

[122]*Topco/Calasiatic v Libya, ibid* p. 452.

[123]*Op. cit.* [1959] 35 BYIL, 34 p. 51.

character from a contract which the parties have submitted, say, to Roman law or into which they have embodied the Sale of Goods Act, 1893: the parties would have done no more than to provide for the incorporation of certain rules of public international law, however far-reaching or extensive they may be, and the contract as such would remain subject to the legal system applicable to it, so that, to mention only one of several consequences, changes introduced in that legal system would affect it.[124]

But why, if that were the proper inference, should the parties not be taken to have intended no more than an incorporation of "general principles of law" to the exclusion of the rest of international law? Mann's response is that, if that were so, "[one] of the main purposes of a true 'internationali[s]ation' of a contract would fail in that the contract would be subject to rather than exempt from interference from its proper law. (...[t]he reference to the general principles of law will not usually be mere incorporation, but will be tantamount to a reference to or a choice of public international law as the governing law...)",[125] although he points out that this is not necessarily so, without however indicating in what circumstances it may not be. René-Jean Dupuy, the sole arbitrator in the *Topco/Calasiatic v Libya* award also justifies the assumption on the "need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State ..."[126]

For the same reason it has also been said that even words of a very general character, such as the choice of law clause in the Abu Dhabi award[127] stating that the agreement was based on the "good will and sincerity of belief of the parties",[128]

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[124] *Ibid* p. 44.

[125] *Ibid.*

[126] [1979] 53 ILR, 420, p. 454. If the suggestion there is that the private investor would be without protection if the contract were not internationalised, it is an error. Protection exists under public international law, on the basis of which the home state of the investor may intervene on his behalf for injury done to its national: see Brownlie, Ian The Principles of Public International Law, 4th Edn., Clarendon Press, Oxford, 1990, pp. 518-552, particularly pp. 531-552; Shaw, Malcolm N International Law, 3rd Edn., Grotius Publications, Cambridge, 1991, p. 504

[127] August 1951 [1952] 1 ICLQ, 247; (1951) 18 ILR 144.

[128] [1951] 1 ICLQ p. 250.

and that it should be interpreted "in a fashion consistent with reason",[129] should be regarded as a sufficiently clear reference to public international law.[130] The view is supported by reference to both the Abu Dhabi and Quartar arbitrations, where the arbitrators regarded those general words as prescribing "the application of principles rooted in the good sense and common practice of the generality of civilised nations - a sort of common law of nature."[131] The common practices of civilised nations are then taken as a reference to public international law.

The assumption that "general principles of law" is the same as international law is based on the direct connection which the movement in support of internationalising state contracts draws with Article 38(1)(c) of the Statute of the International Court of Justice, without indicating by what legal process the connection is established. Article 38(1)(c) treats "general principles of law" as one of the sources of international law, such that, in the context of the statute, "principles of international law" is regarded as wider in scope than "general principles of law",[132] which together with other sources form part of the former. The flaw in that view is that it assimilates one source of international law to international law itself,[133] thus confusing the "principles of international law" with the "general principles of law".[134] That flaw is revealed with striking force by the proper law clauses in the three Libyan oil nationalisation

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[129] *Ibid.*

[130] Mann, (1959) 35 BYIL, 34, p. 52. *Contra*, Delaume, in (Carbonneau ed., *op. cit.* p. 82) who says that a reference to "good faith", "good will", "good conscience", or related phrases is "merely a reminder of an elementary rule of contract law", i.e., the obligation to perform contracts in good faith. See also *Amoco v Iran* (Iran-US claims tribunal chamber 3) award of 14 July 1987 (1987) 27 ILM 1314, p. 1356 para. 169. Elsewhere Delaume had asked why "a different solution [should] prevail when the contracting state is a developing nation whose law is capable of supplying the basic legal framework of the transaction?": (1981) 75 AJIL, 784, p. 800.

[131] *Supra* note 128 p. 251.

[132] *Topco/Calasiatic v Libya* [1979] 53 ILR, p. 452, para. 41.

[133] *Ibid* para. 41, where the arbitrator states: "[t]herefore, the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties."

[134] See also Lalive, Pièrre in, Transnational Rules in International Commercial Arbitration (Ed. Gaillard, Emmanuel) ICC Publication No. 480, Paris, 1993 p. 56.

arbitrations.[135] The clause in each case provided for the concession to be governed "in accordance with the principles of the law of Libya common to the principles of international law and, in the absence of such common principles, ... in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals." The clause brings in the general principles of law as residual norms to which the tribunal should have recourse to supplement for the absence of principles common to Libyan and international law. It could therefore only have meaning if international law is not treated as the same as general principles of law since, if they were the same, and having already been used up in the search for rules common to Libyan and international law, the general principles could not possibly be invoked again to supplement for the absence of principles common to itself (as international law) and Libyan law. Once "general principles of law" have been used up as part of international law to determine what principles of the latter are common with Libyan law, it would be impossible to rely on "general principles of law" again as residuary law in the event that the first step proved unsuccessful.

Another difficulty with equating general principles of law to international law arises from the fact that, since Article 38(1)(c) of the statute of the International Court of Justice was intended to deal with inter-state relationships only, the Article could only have contemplated the principles of public international law. Meanwhile there are general principles of private law and private international law recognised in the systems of law of civilised nations which do not form part of public international law. The principles of private law and of private international law, although more appropriate to contracts of the type we are concerned with, stand to be excluded if the reference to "general principles of law" in the contracts is treated in international commercial arbitration as a reference to public international law.

What is paradoxical is that the reference to "general principles of law" in Article 38(1)(c) of the statute of the ICJ is in fact regarded by many writers as a reference to "... municipal jurisprudence, in particular of private law ..."[136] although

[135]See for example the same award of Professor René-Jean Dupuy in *Topco/Calasiatic v Libya* [1979] 53 ILR, 422, p. 450.

[136]Brownlie, *op. cit.* p. 16, refering to Guggenheim, "Contribution à L'Histoire des Sources du Droit des Gens" (1958) 94 Hague Acad Courses, 1, pp. 78-9.

limited to the extent to which they may be applicable to relations between states.[137] Brownlie further says that the limitation to only such of those rules as may be applicable to relations between states is "... worthy of emphasis."[138] Article 38 therefore points to the domestic law of the various countries as the source of the general principles,[139] at any rate of such of the principles as may be relevant to relations between states.[140] That, according to Guggenheim, is what is supposed to represent the true meaning of the reference to "general principles of law" in Article 38(1)(c) such that the reasoning that rejects the application of domestic law in preference of international law itself, on the basis that the reference to "general principles of law" in Article 38(1)(c) warrants the direct application of public international law, would be erroneous. Relying on the drafting history, Guggenheim concludes in respect of Article 38(1)(c)'s "general principles", that:

> *[i]l doit donc s'agir de principes juridiques appliqués in foro domestico et il n'est pas possible de leur assimiler - comme on l'a souvent prétendu - [footnote ommitted] les principes généraux de droit qui n'ont pas de caractère de règle de droit interne. Il s'agit du reste de principes qui avaient déjà été consacrés en partie dans la jurisprudence arbitrale antériure à la création de la Cour [the ICJ]. Cette jurisprudence arbitrale, lorsqu'elle s'était trouvée en situation d'appliquer les principes généraux du droit, s'était elle aussi limitée à emprunter aux droits internes certaines principes qu'elle y trouvait uniformément appliqués [footnote ommitted] et qui étaient susceptibles d'être transposés dans les relations interétatiques ... L'opinion contraire, selon laquelle les principes généraux ne devraient rien à l'analogie des ordres internes, mais auraient un caratère universel, en tant que manifestation directe de l'idée du droit, est - c'est lemoins*

[137] *Ibid.*

[138] *Ibid.*

[139] See also Verdross, Alfred "Les Principles Généraux de Droit dans le Système des Sources de Droit International Public", in Recueil D'Etudes de Droit International en Hommage à Paul Guggengeim, Faculté de Droit de Génève, 1968, 521, p. 523-26.

[140] Dolzer, Rudolf "Indirect Expropriation of Alien Property" (1986) 1 ICSID Rev.,-FILJ, 41, p. 59.

qu'on puisse dire à ce sujèt - en opposition avec les travaux préparatoires rélatifs à l'introduction de cette troisième source du droit applicable dans le statut de la Cour.[141]

It is strange, therefore, that whereas Article 38(c) itself directs the ICJ to look to domestic laws for such of their domestic principles and rules as may be relevant to relations between states and of universal acceptance, commercial arbitration tribunals and some authorities in the field of arbitration have distorted its application by drawing on traditional international law, particularly the law of treaties.

If arbitrators and writers had been confined to private law principles the problems created by equating general principles of law to international law would be avoided under clauses such as those in the three Libyan arbitrations. The clauses show that the principles of international law are, contrary to what is suggested in awards and by some writers, not exactly the same as "general principles of law." There would be no need to refer to the latter to supplement for the inadequacy of the the former if they were the same. Although within the context of the statute of the ICJ the principles of international law *may* be wider in scope than general principles of law, since the latter is only one of the sources of the former, that is not necessarily so out of the context of Article 38. Beyond that context general principles could not possibly be confined to either public or private law. They should embrace both domestic and international.[142] In fact the Libyan clauses suggest that the sources of "general principles of law" could be wider, although, under Article 38(1)(c), limited to domestic laws. The general principles could be drawn from the other sources of international law, the laws of all nations (private and public), including, in the case of commercial arbitration, the practices of international trade.

(ii). Arbitration clauses as a basis for internationalising the contracts

Next, it is suggested that the presence of a clause submitting such contracts to

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[141] *Ibid.*

[142] Friedmann, Wolfgang "The Uses of 'general principles' in the Development of International Law" (1963) 57 AJIL, 279, p. 284.

international arbitration leads to international law as the applicable substantive law of disputes arising under the agreements. René-Jean Dupuy in the *Topco/Calasiatic* award against Libya takes the view that even if the choice of international arbitration does not lead to the exclusive application of international law, "it is one of the elements which makes it possible to detect a certain internationali[s]ation of the contract."[143] For that view he relies on the *Sapphire International Petroleum v National Iranian Oil Co.* award[144], where the arbitrator also held that even if no definite conclusion could be drawn from a submission by the state to international arbitration, it remains possible at the very least to "infer a negative intention, namely to reject the exclusive application of Iranian law."[145] The contracting-out of the jurisdiction of the domestic courts of the state concerned, together with its acceptance of international arbitration, is regarded as internationalising the contract, since, by submitting to an international tribunal, the state must be assumed to have submitted to the law normally applied by international tribunals.[146] There seems to be everything wrong with that view.

The view assumes that in matters of contracts international arbitration tribunals have a law of their own in the same way that local courts have domestic law and the ICJ, for example, is bound to apply international law. That assumption is highly questionable.

The view is also based on two other equally doubtful assumptions. In the first place, it assumes that an arbitration tribunal is necessarily an "international tribunal". A tribunal does not become international in the public international law sense only because, by composition, it includes members of different nationalities. The fact that such a tribunal is also required to adjudicate on a matter involving international trade and parties from different countries or parts of the world will still not make it an international tribunal for the purposes of public international law.

Second, even assuming that an international commercial arbitration tribunal is

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[143] *Ibid* p. 455.

[144] Award of 15 March 1963 [1967] 35 ILR, 136.

[145] *Ibid* p. 172.

[146] Jaenicke, G."The Prospects for International Arbitration: Disputes between States and Private Enterprises", in International Arbitration: Past and Present Prospects (ed. Soons, A.H.A) Martinus Nijhoff, Dordrecht, 1990, 155, p. 158.

an "international" (in the public international law sense) tribunal, it does not follow that submission to it amounts to submission to public international law. Party autonomy and the doctrine of the proper law of a contract have swept away the presumption expressed in the maxim, *qui eligit judicem eligit jus*.[147] An arbitration clause merely indicates a choice of jurisdiction, not of law.[148] In England, for example, the suggestion that a choice of jurisdiction clause automatically invites a choice of law is wrong.[149] Party autonomy and the doctrine of the proper law mandate the application of the law chosen by the parties. In the absence of a chosen law, the prevailing trend is for the law with the closest connection to the transaction to apply, that law being arrived at by a process which involves weighing the different factors involved in the case. The choice of a forum remains only one of such factors. What is more in most cases the parties involved in an international commercial arbitration do not select a forum, they *create* one for themselves. There is, therefore, logically no law of "a forum" which the parties are to be presumed to have elected before "the forum" is brought into existence, particularly when, as here, tribunals are created ad hoc as disputes arise from time to time.

(iii). Other Factors

The other main method used to internationalise the contracts is to describe them as "economic development agreements", "international development contracts", "self-governing", etc. and, therefore, subject to international law.[150] In the view of the majority of the tribunal in *Revere Copper & Brass v The Overseas Private Investment Corporation*,[151] investment contracts are "... basically international in that

[147]Delaume "State Contracts and Transnational Arbitration" (1981) 75 AJIL, 784, p. 798.

[148]Bowett, Derek William "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach" (1988) 59 BYIL, 49, p. 52.

[149]*Compagnie Tunisienne de Navigation v Compagnie D'Armément Maritime* [1971] A.C. 572 (House of Lords).

[150]McNair "The General Principles of Law Recognised by Civilised Nations" (1957) 33 BYIL, 1.

[151]Award of 24 August 1978 [1980] 56 ILR, 258, p. 271.

they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries." The *Topco/Calasiatic v Libya* award points out that the subject matter of the agreements is very broad: "... they are not concerned only with an isolated purchase or performance, but tend to bring to developing countries investment and technical assistance, particularly in the field of research and exploitation of mineral resources, or in the construction of factories on a turnkey basis."[152] The same award points to the long duration of the contractual arrangements as a basis for internationalising them. The Sapphire award states that the transaction "creates rights which are not merely 'contractual' but are concessions giving Sapphire, for the time being, possession and, to a certain extent, control over the territory. These concessions give the contract a particular character, which lies partly in public law and partly in private law ... the contract involves special tax arrangements ... which are evidence of its public character."[153]

Apart from such general and in many cases disputable assertions about the significance for the development of the host countries of the transactions, it has never been demonstrated how, in the absence of agreement by the parties, the importance of the contracts as tools of development makes international law relevant to disputes arising under the contracts. On the contrary the pronounced public character of the transactions ought, in our view, to bring them closer within the control of the state to ensure that their execution fulfils the public purposes for which they would have been intended in the first place. What should therefore be asked (although it is often not, but if at all, without the same emphasis,) is why the unique character of that particular category of contracts is recognised only to assert the rights of the investor, but fail to emphasise the overriding public interest of the country concerned. Jaenicke says that "... no cogent reasons can be found why the dimension of the investment should be sufficient justification for treating such agreements differently from other transnational contracts, and there are no precedents for such a privileged treatment except in those cases where the parties have manifested their intention to remove the investment agreement from the local jurisdiction by providing for the submission of their disputes

[152] [1979] 53 ILR, p. 456.

[153] [1967] 35 ILR, p. 171.

to international arbitration."[154] To the extent that Jaenicke considers the submission of those disputes to arbitration as a reason for internationalising them,[155] we disagree, for the reasons stated in (ii) above. Bowett himself, referring to Fatouros,[156] says that "the fact that Western, developed States concluding the same type of so-called 'development' contracts involving investment by foreign investors do not accept the theory of 'internationali[s]ation' inevitably raises the question why such contracts are only 'internationali[s]ed' if concluded by developing states."[157] He describes the theory as "an essentially self-serving theory designed to support a very partisan, capitalist approach to contractual disputes."[158] "For it is important", he says, "to grasp the essential aim of this theory ...: first, to remove the contract from the control of the law of the contracting State (i.e., by substituting international law as the proper law) and, second, to deprive the State of the right to change its law and thereby affect the contract (i.e., by invoking the international law maxim *pacta sunt servanda*."[159]

B. Internationalising State Contracts and Article 42 of the ICSID Convention

What is peculiar about the regime of the World Bank Convention is that it makes international law undeniably relevant. In the absence of choice by the parties, the Convention requires the tribunal to apply the domestic law of the host state and "... such rules of international law as may be applicable." Article 42(1) is in the

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[154]"Consequences of a breach of an Investment Agreement governed by International Law, by General Principles of Law, or by Domestic Law of the Host State" in Foreign Investment in the Present and a New International Economic Order, (ed. by Dicke) 1987, 177, p. 180, cited by Bowett, *op. cit.* p. 51.

[155]He expresses the same view in a subsequent contribution: "The Prospects for International Arbitration ..." *op. cit.* p. 158.

[156]"International Law and the Internationalized Contract" (1980) 74 AJIL, 136.

[157]*Op. cit.* p. 51.

[158]*Ibid.*

[159]*Ibid* pp. 51-52.

following terms:

> [t]he tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The accompanying report of the Executive Directors of the Bank[160] says that the term 'international law' as used in Article 42 "... should be understood in the sense given to it by Article 38(1) of the statute of the International Court of Justice ...", which suggests that the makers of the Convention had public international law in mind, although limited to *such* of its rules as *may* be relevant. That limitation was made in recognition that public international law is only relevant to disputes between sovereign states and does not contain rules dealing with contracts. Thus, the report specifies that the ICSID tribunal should bear in mind and make allowance for the fact that Article 38 of the ICJ statute is intended to apply to inter-state disputes only. Article 4(g) of Annex II of the MIGA Convention also makes international law directly relevant to disputes involving the insurance agency after it has become subrogated to the rights of a compensated investor, against a host state.

The significance and, for the proponents of internationalisation, the advantage of Article 42 is that it provides a plain and clear rule as to the relevance of public international law in matters of contracts governed by the Convention. It makes it unnecessary for an ICSID tribunal to have to rely on any of the questionable grounds discussed earlier to bring a state contract within the sphere of public international law. The Convention, therefore, not only facilitates the task of a tribunal wishing to internationalise such contracts, it in fact mandates the application of public international law, albeit jointly with the law of the receiving state of the investment.

Yet, the joint application of the host state's law and public international law may lead to the familiar difficulty arising when, exceptionally, relevant rules of public international law are asserted but found to be inconsistent with the domestic law of the host state. The position of ICSID tribunals in those circumstances has so far been

[160] Para. 40.

to treat international law as overriding. The process by which that conclusion has been arrived at involves two aspects.

(1). International law as "supplementary"

First, it is asserted that in the relationship between international law and the domestic law of the contracting state party to the dispute, international law assumes a "supplementary" role. The tribunal, it was said in the first *Amco v Indonesia* ad hoc committee award, must begin with the law of the host state. Recourse is made to international law only to "fill up lacunae in the applicable domestic law"[161] of the state receiving the investment. The re-submitted award also envisages the application of international law in its 'supplementary' role only "[i]f there are no relevant host-state laws on a particular matter"[162], in which case, "a search must be made for the relevant international laws."[163]

That interpretation does not, in our view, correspond with the plain wording of Article 42. Its provisions mandates the application of the "law of the Contracting State party to the dispute (...) *and* such rules of international law as may be applicable." In its plain meaning Article 42 requires that the application of the relevant domestic law and international law be made *concurrently*. Therefore, in the absence of choice, the ICSID tribunal should state the applicable rules of the domestic law concerned, then search for such rules of international law as may be recognised relevant to contracts. The two sets of norms are applied concurrently and, if they are similar in nature and lead to the same result, the tribunal's function under Article 42 is fully and properly discharged. This is reminiscent of the proposed "tronc commun" approach so strongly advanced by some writers.[164] In our view, the Convention does not, in the absence of agreement by the parties, treat international law as a secondary source of the applicable norms, whether described as "residual" or "supplementary".

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[161]Award of 16 May 1986 [1993] 1 ICSID Reports, 509 p. 515, para. 20.

[162]Award of 31 May 1990 [1993] 1 ICSID Reports, 569, p. 580, para. 40.

[163]*Ibid.*

[164]Rubino-Sammartano, *op. cit.*

Like the host State law it remains primarily applicable and, what is more, also mandatory, provided it contains rules relevant to the contract. The fact that the host state law is stated first does not, for this particular purpose, indicate that international law is secondary or that the domestic law of the state is hierarchically superior.[165] The tribunal in the *Amco* re-submitted award therefore correctly describes it as "fully applicable".[166]

(2). International law as "corrective"

Next in the process of asserting the supremacy of international law under the Convention it is said both in the awards and by commentators that the role of international law is also "corrective". In the view of the tribunal in the *Amco* re-submitted award, the applicable laws of the host state party to the contract "... must be checked against international laws, which will prevail in case of conflict."[167] The ad hoc Committee before it stated the role of international law in situations of conflict with domestic law as being "... to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms."[168] The corrective function attributed to public international law under the Convention completes the process of subordinating the domestic law of the host state to international law.

The difficulty with that view is that it is not supported by the plain wording and meaning of the provisions of Article 42(1) or does any other provision of the Convention, directly or indirectly. In fact it is significant that of all ICSID tribunals

[165]Broches, (1972) 136 Hague Acad. Courses, p. 390, although he however thinks (incorrectly as we attempt to show below) that the reverse is true.

[166]*Supra* p. 580, para. 40. The tribunal regarded the description of international law as "'only' 'Supplemental' and 'corrective'" as a distinction without a difference. That might have been so if the tribunal had limited the remark to the former. The reference to the role of international law as 'corrective', if accepted, suggests a distinction with a significant difference. However, as argued below, we do not also accept the "corrective" role ascribed to international law in the intepretation of Article 42.

[167]Award of 31 May 1990 [1993] 1 ICSID Reports, 569 p. 580, para. 40.

[168]First annulment proceedings award of 16 May 1986 [1993] 1 ICSID Reports, 509, p. 515, para. 20.

that have dealt with the point none has relied on the wording of Article 42 itself to reach the conclusion which gives precedence to international law. So far, only one ICSID tribunal has attempted to find support for that view in the Convention as a whole (although not on Article 42 itself) and its legislative history.[169] The other tribunals have been content merely with asserting the supremacy of international law. Unfortunately Article 42 itself gives no guidance as to which of the laws, if in conflict, is to prevail. It should come as no surprise, therefore, that ICSID tribunals have not attempted to rely on its provisions in support of the conventional view. In the first *Amco* annulment proceedings, however, the tribunal justified its preference for international law on the basis of the tribunal's own "overall evaluation of the system established by the Convention", under which, in the tribunal's view,

> [t]he law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (Art. 54(1) ...). Moreover, the national state of the investor is precluded from exercising its normal right of diplomatic protection during the pendency of the ICSID proceedings and even after such proceedings, in respect of a Contracting State which complies with the ICSID award (Art. 27 ...). The thrust of Art. 54(1) and Art. 27(1) of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.[170]

That statement of what the tribunal considers to be the overall scheme of the Convention regarding the role of international law is seriously misleading. In the first place Article 42 states no "principle" proclaiming the primacy of any of the applicable sets of norms. It does not provide that in the event of a conflict international law should prevail or, for that matter, should the domestic law of the host state in dispute. It simply states a "rule", which does not also provide that "[t]he law of the host State

[169] *Amco v Indonesia*, first annulment proceedings, *ibid* paras. 21 & 22.

[170] *Ibid* para. 21.

is ... the law to be applied in resolving the dispute." On its plain terms Article 42(1) merely directs that both laws be applied together: "the tribunal shall apply the law of the Contracting State party to the dispute (...) *and* such rules of international law as may be applicable." The use of the conjunctive "and" clearly indicates the concurrent application of the applicable domestic and international laws. The fact that the host state law is stated first is not relevant for this purpose.

Second, the tribunal's reasoning suggests that a Convention state is bound to enforce an ICSID award under Article 54(1) only if the award complies with international law. Ultimately that might be so, since failure to apply the relevant rules of international law, (if any), as part of the applicable law, may be a ground for annulment provided it is manisfest.[171] But that merely begs the question since the award must also comply with the host state law as part of the applicable law too.

Moreover, the Convention nowhere requires that international, domestic, or/and both laws be "complied" with for the award to be enforceable. It requires that the tribunal "apply" domestic and international law. Non-compliance with, (in the sense of misapplication of) the applicable law, unless it is manifest,[172] is not a ground for the annulment of an ICSID award and therefore not also a ground for refusal to enforce an award under the Convention. The only grounds on which a Convention state may decline to enforce a Convention award are, pursuant to Article 53(1), those exhaustively provided for in Article 52. If those limited grounds are satisfied, every Contractiong state is under obligation to enforce the award under Article 54(1). It would be irrelevant that the tribunal misconstrued Article 42, or any other provision of the Convention. With respect to the proper law, the only relevant grounds for annulment will arise either where the tribunal "manisfestedly exceeds its powers" (Article 52(1)(b)) or "fails to state the reasons on which it is based" (Articles 52(1)(e) and 48(3)). In the first *Klöckner v Cameroon* annulment proceedings[173] the Ad hoc Committee drew a distinction between 'non-application' and 'mistaken application' of the applicable law so that only non-application would constitute a ground for

[171]Article 48.

[172]Klöckner; Amco; Mine etc.

[173][1994] 2 ICSID Reports, 95, p. 97, para. 3; p. 119, para. 60,

annulment, although the committee itself failed to appreciate the consequence of the distinction in its ultimate determination of the dispute, by setting aside the original award for "mistaken application" of the proper law! The *Amco v Indonesia* Ad hoc Committee in the first annulment proceedings also acknowledges the same distinction and draws the correct conclusion from it when it states that only "[f]ailure to apply [the proper law pursuant to Article 42(1)], as distinguished from mere misconstruction of that law, would constitute a manisfest excess of powers ... and a ground for nullity under Article 52(1)(b) of the Convention."[174]

Third, the passage also suggests that international law must prevail as what is given in return for the preclusion of the national state of the investor under Article 27 from exercising the right of diplomatic protection during and after the proceedings. Article 27 does not suggest that view at all. Article 27 itself provides *the quid pro quo* for the preclusion of the practice of diplomatic protection in the host state's consent to submit to arbitration under the Convention and, in particular, to cooperate in the proceedings and "to abide and comply with the award rendered ..." The host state's submission to ICSID arbitration cannot therefore be regarded as a submission to international law by virtue of Article 27. The exercise of diplomatic protection does not depend on compliance by the ICSID tribunal with the provisions of Article 42(1). In fact, nothing an ICSID tribunal does will affect the right of the state of the investor to interfere diplomatically. The exercise of that right under the Convention is determined entirely by the attitude of the host state.

Finally, the thrust of Articles 54(1) and 27(1) has no bearing on the question as to what set of the applicable norms ought to take precedence in the event of a conflict. It has to do with the obligation of the contracting states to give full effect to

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[174][1993] 1 ICSID Reports, 509, p. 515 para. 23. But the Committee soon falls into error again when it treats "misinterpretation of the applicable law as a ground for appeal" if, by so saying, the Committee suggests that an ICSID award can be "appealed" against in the domestic courts of Convention States. It will be noticed that the Convention excludes any remedy by way of an "appeal" before domestic courts and further excludes "any other remedy except those provided for in this Convention": Article 53(1). The only remedies provided for in the Convention are those of interpretation, revision, annulment and stay of enforcement under Articles 50-54. The most important remedy is that of annulment, for which the Convention provides its own internal procedure, under Article 52. The only weapon available to the court at which enforcement is requested is to insist that the party seeking enforcement should supply an authenticated copy of the award, which, under Article 54(2), is a copy properly "certified by the Secretary-General" of the Centre. That should not be difficult to obtain.

ICSID awards, and in particular, with the duty of host states to cooperate in the proceedings and after. Questions of compliance with the award do not arise until after the tribunal has, in the first place, determined what obligations have to be complied with. To do so, the tribunal needs to apply a system of law and until the problem of the applicable law is resolved, and the dispute determined accordingly, no obligation arises for which non-compliance might activate the exercise of the right of diplomatic protection under Article 27. The Ad hoc Committee's reasoning "sets the cart before the horse."

The Committee then relies on the legislative history of the Convention[175] to say, wrongly, it seems, that there was overwhelming support at the meeting of the Legal Committee during the preparation of the Convention for the view which gives prevalence to international law in the case of conflict with the law of the investment receiving state. What was at issue, and in favour of which a vote was taken, was whether international law should in the first place have been made applicable to those transactions.[176] A vote was not taken to determine whether international law should override the relevant domestic law in the case of a conflict. In fact the chairman of the discussion specifically adviced against a text "couched in terms whereby international law would become applicable where the domestic legislation of the host state was inconsisitent with it"[177] even though it was obvious that reflected his, as well as the view of, the delegates of capital exporting countries.[178] That explains why that position is not plainly or clearly stated in the text of the Convention. The question whether that should have been done was raised at the Geneva meeting of legal experts[179] but the then General Counsel of the World Bank and chairman of the meetings of legal experts had always thought it "preferable not to state the position

[175] *History of the Convention,* Vol 2, part 2, p. 804.

[176] *Ibid* pp. 802-804.

[177] *Ibid* p. 804.

[178] *Ibid* part 1, pp. 418-21 & 571.

[179] *Ibid* p. 420.

too specifically", a preference which is reiterated later[180] without saying why. The reason, it seems, is that the chairman, together with most other experts who saw the proposed Convention primarily as a means of protecting foreign investments, thought that not to state the position too specifically will not result in any difficulties in practice, since, in any event, the view which gave precedence to international law merely reflected the attitude and practice of arbitral tribunals[181]; a practice which was intended to remain the same after the Convention. In that way, even if the Convention failed to spell out the position in clear terms, tribunals to be set up pursuant to the Convention could nevertheless be trusted to reach that conclusion. It was therefore not absolutely necessary to state the position plainly, particularly as the making of the Convention also involved a careful balancing act and the compromise which was required to secure the general acceptance of the Convention by host nations could itself be compromised if the position was stated too specifically.

However, the question of the proper law of investment contracts touched on the very sensitive issue of substantive standards, about which there were, and remain, serious disagreements. What the makers of the Convention had chosen to overlook is the fact that the ICSID Convention was never intended, whether directly or indirectly, to deal with the issue of substantive standards for the treatment of private foreign investments. At least in public the then President of the World Bank and all those associated with the making of the Convention never failed to emphasise that it was to "... have only limited scope. It would provide machinery but it would not make the use of that machinery compulsory. *Nor would it lay down substantive rules of law regarding the treatment of foreign investments. I do not consider that it would be realistic to try for a more far-reaching agreement at this time*"[182](emphasis added). The position was consistently repeated by the General Counsel through out the preparatory stages of the of the Convention[183] and after.[184] It is unambiguously

[180]*Ibid* part 2, p. 804.

[181]*Ibid* part 1, p. 420.

[182]Note to the Executive Directors of the Bank, *History of the Convention*, Vol 2, part 1, p. 6.

[183]*Ibid* pp. 309, 369, & 462.

implicit in Article 1(2), which states "[t]he purpose of the Centre [as being] to *provide facilities* for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States ..." (emphasis added). Facilities ought to have meant facilities, no more, given the background to the Convention. The preamble also bears that out. The reason for not attempting a "more far-reaching" solution was that previous attempts at resolving the problem of foreign investments based on substantive standards had lead to more confrontation between the different interest groups. To avoid poisoning the investment climate further, the ICSID's solution to the problem was envisaged only within a procedural framework. It was not intended to involve substantive issues.

A choice of law provision in the Convention does precisely that. It addresses the issue head-on and therefore falls well beyond what was intended to come within the scope of the Convention. In those circumstances it would have been absolutely necessary to specify which set of legal norms were to prevail under Article 42(1) in case of a conflict. The failure to do so renders Article 42(1) abortive in the context of this particular Convention, not simply for lack of clarity, but particularly because any attempt at rationalising that provision would lead to the consideration of the same issues, including a solution, which are not to be countenanced within the framework of the Convention. In hoping that eventually tribunals to be set up under the Convention will determine the issue one way or the other, specifically, in favour of international law, the makers of the Convention overlooked the fact that the principle embodied in Article 42(1) or any other applicable law provision goes far beyond the purpose of a Convention which, as was stated by a Chinese expert at the time of the preparatory works, had been limited to dealing with the problem of investment disputes "*from a procedural angle only*"[185] (emphasis added).

In those circumstances the only juridically sound solution would be for an

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[184]Broches, "Settlement of Investment Disputes between States and Nationals of Other States" in, World Peace through Law, the Geneva World Conference, The World Peace through Law Centre, 1969, 258, p. 260: "[i]t is worth stressing finally, that the Convention is limited to matters of procedure. It contains no rules of substantive law governing the mutual rights and obligations of governments and foreign investors. *In other words, the Convention is not concerned with the merits of investment disputes, but solely with the methods for solving them*" (emphasis added).

[185]Vol 2, part 2, p. 800

ICSID tribunal to fall back to the traditional principles of conflict of laws to determine the applicable law of the contract.[186] In the majority of ICSID cases, although not all, that will be the law of the host state both as the law which bears the closest connection to the transaction and as the law of the only state which is affected by the outcome of the dispute. Any interpretation which gives precedence to one system of law or the other will be attempting to deal directly with an issue which the Convention could not address. We would only add that if the Convention itself could not address the issue, tribunals deriving their authority and jurisdiction from it cannot do so. ICSID tribunals should not be allowed to assume such powers.

That should not, as we pointed out earlier, assume that in an appropriate case the investor will be without a remedy. Such a remedy would exist within the framework of international law itself.[187] If the authors of the Convention had been hoping to re-introduce the same into the Convention through Article 42, it was clearly against the spirit of the Convention. In addition, they failed effectively to achieve that objective, given the difficult climate in which they operated. That explains why Schwartzenberger describes that provision of the Convention as the weakest link in its chain.[188] "This weakness", he said, "[was] not accidental, but was of the essence of the matter".[189] We also think so.

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[186]Bowett, (1988) 59 BYIL, 49, pp. 52-53

[187]Bowett (1988) 59 BYIL, pp. 59 *et seq.*

[188]"The Arbitration Pattern and the Protection of Property Abroad", in International Arbitration: Liber Amicorum martin Domke, (ed. by Sanders, Peters), Martinus Nijhoff, the Hague, 113.

[189]*Ibid* p. 319.

CHAPTER FIVE

ENFORCEMENT OF AWARDS

In the previous chapters we dealt with the perception of developing countries as revealed by factors related to aspects of the first two stages of the arbitration process. We concluded, on the basis of the trends identified, that the process does not adequately reflect the concerns toward international commercial arbitration as it affects their interests. In this chapter we come to a different conclusion. As indicated in the introduction, and contrary to the main thrust of our argument this far, we note in this chapter that trends regarding the enforcement and execution of awards in which the countries are involved do not support the view that the process is entirely one-sided. We examine those trends by reference to the grounds on which the enforcement or execution of an award would be granted or denied, or an award set aside, by the domestic court before which proceedings are brought for any of those purposes.

Owing to the fact that the grounds and, in particular, the circumstances under which they may be raised to set aside or to resist the enforcement of an award are numerous, we limit the discussion to a selected number of grounds which have frequently arisen in court proceedings in which a developing country has been involved. These are principally grounds recognised under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the international instrument widely in use for the enforcement of non-domestic arbitration awards. However, although the grounds and cases treated are few, the selection is sufficiently representative to allow a general view of the situation, since they are all based on the grounds most often relied on, as reflected in the application of the Convention by domestic courts.

We begin with what appears to be a general judicial and legislative attitude towards the review of arbitration awards which, globally, is that there should be very limited rights of recourse against arbitration awards[1] and, further, that those grounds

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[1]Redfern and Hunter, The Law and Practice of International Commercial Arbitration, 2nd Edn., Sweet and Maxwell, London, 1991, p. 417.

should separately and as a whole be interpreted restrictively. The purpose is to provide a basis for the finding in the second part that, the application of the same judicial policy to cases involving countries of the developing world, is therefore not unique. We demonstrate that the extension to cases concerning developing countries of a generalised judicial attitude favourable to the enforcement of arbitration awards discloses nothing to suggest a less favourable treatment to the countries than others in this domain. We justify that finding on two factors: the absence of a special regime specifically regulating the enforcement of awards in which third world countries are parties and, second, the fact that in the first place no need was felt for such a regime, since the only real obstacle to the enforcement of those awards (the doctrine of foreign state immunity) in domestic law could otherwise be resolved. In a way the enforcement of these awards is not seen as creating a particular problem.

I. Pro-enforcement Bias

The enforcement of awards is an important consideration in submitting to arbitration, given that the process would only make sense if compliance with its outcome can be secured.[2] The disadvantage of an arbitration award is that it does not have the same effect as the judgment of a domestic court[3] since, as Mustill and Boyd say, "the award does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party ..."[4] In most domestic systems the award creditor is first required to apply to an appropriate court to convert the award into a

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[2]*Ibid* p. 416.

[3]In *Murmansk Trawl Fleet v Bimman Realty Inc.*, (unreported), Ontario Court of Justice, General Division, December 1994 (Lexis, 3751) Somers J., citing Mme Justice Feldman in *Schreta v Gasmac Inc.* (1992) 7 O.R. (3d.) 608, p. 623 said: "[i]t is true that arbitral awards have been viewed with less confidence than judgments of a court because the procedures of the courts are more regulated and standardized and judges are sworn to uphold those procedures and to apply the law, while the qualifications and training of arbitrators may diverge greatly. And it is a concern to a court in this jurisdiction that a party to a foreign arbitration may feel that justice was not done or that the award is perverse in law, although the judge declined to re-open the merits of an award in that case on the basis that "the enforcement procedure of the [UNCITRAL] Model Law [adopted in Canada in 1988] would be brought to disrepute" if that were allowed."

[4]The Law and Practice of Commercial Arbitration in England, 2nd Edn., Butterworth, London, 1989, p. 416.

judgment or an order of the competent domestic court.[5] The process of converting an award into a judgment of a domestic court generally exposes the award to various forms of challenge from jurisdiction to jurisdiction, thus rendering it vulnerable in jurisdictions where the courts may not take a restricted view of the grounds under which challenges to awards are instituted. Some awards may not even be, in the words of Professor Pièrre Lalive, "worthy of being respected and enforced"[6] if they are found completely wanting in every conceivable respect. Lalive thinks that "[n]o more than there is 'sanctity of contract' ... is there 'sanctity of awards'. The result is that appeals against awards and the refusal of enforcement can, in certain cases, be justified, not only for the needs of the case, but also in the general interest of arbitration and that of a better quality of awards."[7] However, as pointed out by Delaume recently, there has been a growing tendency world wide in favour of treating awards as final and binding[8] with the result that "the odds have been turned against the award-debtor"[9] in a global effort to "ensure the effectiveness of international awards."[10] The prevailing judicial attitude in most major arbitration centres is to interpret the grounds on which awards are challenged or enforcement resisted restrictively,[11] with the overall effect that most awards are enforced.

The Desire to Achieve Finality

That goal has been achieved through the repeated emphasis of the need to see

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[5]*Ibid*; pp. 416 *et seq*; for the position in France, Articles 1477 (domestic awards) and 1498 (international awards); Switzerland, Articles 44 (Concordat) and 180 (statute on Private International Law, which merely incorporates the relevant provisions of the New York Convention).

[6]"Enforcing Awards" in 60 Years of ICC Arbitration: A Look at the Future, ICC Publication No. 412, Paris, 1984, 317, p. 330.

[7]*Ibid.*

[8]"Reflections on the Effectiveness of International Arbitration Awards" (1995) 12 Journ Int'l Arb'n., Part 1, 5, p.

[9]*Ibid* p. 6.

[10]*Ibid.*

[11]See for the United States, for example, *Parsons and Whittemore Overseas Co. v Société Générale de L'industrie du Papier (Rakta)* 508 F. 2d, 969 (1974, CA 2d Cir.).

an end to litigation. In the words of an American Federal Court of Appeals, "[t]o allow undue challenges to arbitration awards would defeat the finality and speedy dispute resolution expected of the arbitration procedure and would up set the basic goal sought by [the United States Congress] in enacting the Federal Arbitration Act"[12] of that country. This reflects a concern applicable to litigation and to all forms of adjudication generally. In the *Ampthill Peerage case*[13] in England, which involved rival claims by the sons of a deceased peer of the Upper House of Parliament over his titles and honours, following several sets of proceedings each involving long and extended hearings in the High Court, the Court of Appeal and the House of Lords, Lord Simon of Glaisdale felt compelled to state, in what is certainly a clear expression of the need for finality in litigation, that:

> The law itself is fully conscious of the evil of protracted litigation. Our forensic system, with its machinery of cross-examination of witnesses and forced disclosure of documents, is characterised by a ruthless investigation of truth. Nevertheless the law recognises that the process cannot go on indefinitely. There is a fundamental principle of English law generally expressed by a latin maxim (going back to Coke's Commentary on Littleton, p. 330) which can be translated: 'it is in the interest of society that there should be some end to litigation.' This fundamental principle finds expression in many forms. Parliament has passed statutes (...) limiting the time within which actions at law must be brought. Truth may thus be shut out; but society considers that truth may be bought at too high a price, that truth bought at such expense is the negation of justice ... Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says, 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own

[12] *Revere Copper and Brass Inc. v Overseas Private Investment Corporation*, 628 F. 2d, 81 (1980).

[13] [1977] A.C. 547 (House of Lords Committee of Privileges).

> fallible best to correct error. But in the end you must accept what has been decided. Enough is enough.' And the law echoes: 'res judicata, the matter is adjudged.' the judgement creates an estoppel - which merely means that what has been decided must be taken to be established as a fact, that the decided issue cannot be reopened by those who are bound by the judgment, that the clamouring voices must be stilled, that the bitter waters of civil contention (even though channelled into litigation) must be allowed to subside.[14]

The circumstances giving rise to such a strong statement involved four sets of proceedings, each reaching the House of Lords, and one intervention by Parliament through the Judicial Proceedings (Regulation of Reports) Act 1926. Lord Simon described the proceedings in the following terms:

> In the early 1920s there were two long hearings in the Divorce Division of the High Court, in the first of which the jury disagreed. Some of the most famous and expensive counsel of the day were briefed for the petitioner, for the respondent and (ultimately) for no less than three named co-respondents. The most private and embarrassing marital intimacies were investigated and extensively regaled to a salacious public: parliament was apparently so disturbed as in consequence to pass the Judicial Proceedings (Regulation of Reports) Act 1926. The decree based on the verdict of the second jury was appealed to the Court of Appeal and then to your Lordships' House. New counsel of great eminence were brought in to argue the point of law. The case was remitted to the Divorce Division for yet a third hearing. Although this time the proceedings were to prove, ultimately, formal, famous counsel again appeared. Then there ensued the legitimacy proceedings with which your Lordships are particularly concerned.[15]

The same concerns have been expressed regarding appeals to courts arising

[14] *Ibid* pp. 575-76.

[15] *Ibid* p. 575.

from dissatisfaction with arbitration awards. Appeals to courts from arbitrations give more cause for concern because in principle an arbitration is supposed to be a separate process, sometimes with its own internal appeal mechanism, with further appeals to the courts creating the lamentable possibility of an added and parallel means of recourse against awards. Lord Roskill said that in those circumstances "[t]he arbitral process [becomes] even more protracted than the judicial, with one or sometimes, as in commodity trade arbitrations, two extra tiers of tribunal added below the High Court, the Court of Appeal and [the House of Lords]."[16] Thus, if the decision of an arbitrator were not allowed to be regarded as final in matters within his remit, but as the basis for another round of adjudication in the courts, the perceived advantages of the process, said to lie in speed, less cost (not always), informality and a general perception of fairness, will largely be lost. Lord Roskill himself lamented in one case[17] how the House of Lords constituted the fifth tribunal to hear the case, thus bringing the number of adjudicators to fourteen, including six members of the relevant trade association's board of appeal (GAFTA), one High Court, three Court of Appeal and 5 House of Lords judges. That, to the senior judge, was a serious cause for concern.

The concern for finality is largely reflected in recent developments in domestic law on appeals from arbitration awards. A selective illustration of the position in a few major enforcement jurisdictions evidences a strong determination to see an end to frivolous challenges to arbitration awards by dissatisfied losers.

A. England

England quickly modified its law on judicial supervision of arbitration proceedings and awards to bring it in line with the liberalising forces in international commercial arbitration by replacing the previous more permissive law with a "limited

[16] *Antaios Compania Naviera v Salem Rederiema (The Antaios)* [1985] A.C. 191, p. 208.

[17] *Bunge Corporation v Tradax Export* [1981] 2 Lloyd's Rep. 1, p. 11.

right of appeal to the High Court"[18] in 1979.[19] The English system of judicial supervision of arbitrations and awards in force prior to 1979 had come under severe criticism for not encouraging finality in arbitrations.[20] The criticism had come not only from abroad but also from within,[21] including in particular the English judiciary itself[22] and some concerned members of the legislature.[23] In fact, the final impetus for legislative reform came from the same judiciary through the report of the Commercial Court Committee on Arbitrations[24] with the active involvement of senior judges in the parliamentary debates leading to the 1979 Act.[25]

It had become obvious since 1922, following the case of *Czarnikow v Roth, Schmidt & Co.*[26], that as a matter of public policy the parties to English arbitration could not by contract exclude judicial review of an award on the merits, much less on procedural grounds. The High Court intervened extensively to review arbitration awards on substantive grounds. It retained the power to do so both under statute and at common law. At common law the jurisdiction of the High Court could be invoked whenever the party requesting the review could show on the award itself or any other document forming part of it that there was an error of law. The award would then be set aside by the High Court for "error of law on its face".[27] The error, although supposedly so obvious as to be detectable on the "face" of the award, could not be

[18]Park, William and Paulsson, Jan "Binding Force of International Arbitral Awards" (1983) 23 Va. J. Int'l L., 253, p. 272-73.

[19]Through the Arbitration Act 1979, Section 1.

[20]Commercial Court Committee Report on Arbitration, 1979, Cmnd 7284.

[21]Schmitthoff, Clive "The Reform of the English Law of Arbitration" (1977) JBL, 305.

[22]Lord Diplock, "The Alexander Lecture" (1988) 44 Arbitration, 107.

[23]Lord Hacking "The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979" (1980) 14 Int'l Lawyer, 95.

[24]*supra.*

[25]Hansard, 12 December 1978; 18 January and 5 & 15 February 1979.

[26][1922] K.B. 478, Court of Appeal.

[27]Mr. Justice Donaldson "Future Trends in Arbitration" (1978) 44 Arbitration, 235.

corrected by the court quashing the award,[28] its great disadvantage being that the parties had to begin the process all over again.[29] William Park says, however, that arbitration tribunals could prevent awards being reversed by the courts under the common law for error of law on the face of the award by "failing to include reasons for the award or by justifying the decision in a document which was expressly not made a part of the award."[30] "Consequently", Park says, "that particular procedure became of little practical importance to modern commercial arbitration",[31] the only other important means of judicial supervision of awards remaining under statute.

English statutory law also provided a "special case" procedure under Section 21 of the Arbitration Act 1950, whereby a question of law arising out of an award could be stated for the opinion of the High Court, a procedure often used before 1979 by parties acting in bad faith to delay the process. Section 21 provided:

(1) An arbitrator or umpire may, and shall if so directed by the High Court, state

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award,

in the form of a special case for the decision of the High Court.

Sub-section (2) extended the procedure to interim awards, and in all cases, made the procedure applicable "notwithstanding that proceedings under the reference [were] still pending." The procedure of Section 21 was always regarded as a right to parties submitting to English arbitration and in 1973, some 50 years after *Czarnikow v Roth Schmidt*,[32] the Court of Appeal, then presided by the judge now regarded as one of the most outstanding in England this century (Lord Denning), decided that a case could be stated over the objection of arbitrators for the opinion of the High Court on a point of substantive law on the basis that the submission to arbitration is made on

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[28]*Ibid.*

[29]*Ibid.*

[30]"Judicial Supervision of Transnational Arbitration: The English Arbitration Act of 1979" (1980) 21 Harv. Int'l L.J. 87, p. 92.

[31]*Ibid.*

[32]*Supra.*

the assumption by the parties that questions of law could be referred to the court for a decision binding on all.[33] The Court of appeal decided that arbitrators had to accede to a request to state a case, and, if they declined, the court could order that a case be stated unless the party making the request was not acting in good faith, but for some "ulterior motive", such as where he sought to use the procedure as a means of delaying the arbitration proceedings. Lord Scarman stated that

> [t]he discretion conferred by Section 21(1) of the Arbitration Act 1950 upon an arbitrator or umpire to state an award in the form of a special case and upon the High Court to direct one [was] unqualified. The Statute impose[d] no restrictions, formulate[d] no guidelines: but it declare[d] the purpose of such an award - to obtain upon the case stated the decision of the court.
>
> By declaring this purpose the statute [made] plain that our law offere[d] to those who referre[d] their disputes to arbitration the opportunity of seeking a decision of the court upon a point of law, the decision of which [was] necessary to the proper determination of their dispute.
>
> ... generally, [the court's] approach appears to have been that, once satisfied that a point of law needed to be decided, they would not refuse unless there were special circumstances ...[34]

Lord Justice Megaw thought that "in the great majority of cases" a case should have been stated by the arbitrators "on request or, if necessary, directed by the courts" whenever there was "a clear cut question of law which [was] seriously arguable, substantial in the sense of being important for resolution of the dispute and to the parties, and ... raised *bona fide* and not merely for the purpose of delay ..."[35]

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[33]*Halfdan Grieg & Co v Sterling Coal & Navigation Co. (The Lylands)* [1973] 1 Q.B. 842.

[34]*Ibid* pp. 868-69.

[35]*Ibid* p. 865, citing Kerr J., who at first instance had, however, declined to order a case to be stated on the request of the applicants.

Sir Michael Kerr,[36] an outstanding authority on English and international arbitration, later said of the decision that it "virtually removed any remaining discretion [of the judges] to refuse applications for orders that arbitrators make their awards in the form of a special case"[37] That was even more so in relation to any discretion of an arbitrator to refuse, upon request by one of the parties to the arbitration, to state his award in the form of a special case. Lord Diplock commented that following the decision of the Court of Appeal it had become "notorious" that "if such request were made it was virtually impracticable for an arbitrator to refuse it."[38] Michael Kerr further described the case as having "opened the flood-gates to what was already an increasing trend",[39] that being the misuse of the special case procedure to "delay the outcome of commercial arbitrations."[40]

The prohibition against excluding judicial review of arbitration awards for error of law made by an arbitration tribunal was also regarded as unique to English law, Lord Diplock describing it as "peculiar to England and those present and former Commonwealth countries, such as Australia, Canada and South Africa where arbitration statutes have followed the English pattern",[41] and Sir Michael Kerr that it still has "no counterpart in the United States or in civil law systems."[42] It is that fact, and the adverse publicity that it brought, including the fear that it might cause a loss of substantial invisible earnings from commercial litigation in London, that prompted the reforms of 1979.[43]

The 1979 Act (Section 1(1)) repeals the statutory and common law procedures for review of awards:

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[36]His decision in that case was the subject of the appeal and was reversed by the Court of Appeal.

[37]"The Arbitration Act 1979" (1980) 43 Mod L. Rev., 45, p. 46.

[38]*Pioneer Shipping Ltd. v B T P Tioxide (The Nema)* [1982] A.C. 724, p. 740.

[39]*Supra.*

[40]*Ibid.*

[41]"The Alexander Lecture", *supra* p. 107.

[42]*Supra* p. 45.

[43]Bentil, Kodwo J., "Making England a more Attractive Venue for International Commercial Arbitration by Less Judicial Oversight" (1988) 5 Journ Int'l Arb, Part 1, 49.

> ... the high Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of error of fact or law on the face of the award.

In their place, it substitutes a single statutory regime set out in Section 1(2), (3), (4) and (8) which confines appeals to questions of law, the appeal being limited to proceedings to confirm, vary or set aside an award or to remit an award to the reconsideration of the arbitrator: Section 1(2). Section 3 allows parties to arbitration in England to exclude by contract the statutory right of appeal under Section 1, except, (by Section 4), in matters falling within the admiralty jurisdiction of the High Court or arising out of contracts of insurance or a commodity contract. Exclusion agreements do not apply to domestic arbitration agreements (Section 3(6)) and in other cases must be entered into after the commencement of the arbitration in relation to which the award was made, or, the award relates to a contract not governed by English law: Section 4(1)(c)(i) and (ii).

The principal innovation of the 1979 Act is that it abolishes the right to judicial review of arbitration awards on the merit. Even its new statutory appeal regime based on reasoned awards is not available as of right. An appeal may only be brought by leave of the High Court or with the consent of all the parties to the reference to arbitration, the policy of the Act being to discourage recourse to the courts as a means of delaying arbitrations or flouting the original intention of the parties to avoid the courts, in submitting to arbitration. In the result, finality is encouraged by curtailing the exposure of awards to challenge even at the risk of certainty of the law. Lord Diplock said in *The Nema*[44] that

> in weighing the rival merits of finality and meticulous legal accuracy there are, in [his] view, several indications in the Act itself of a parliamentary intention to give effect to the turn in the tide in favour of finality in arbitral awards (particularly in non-domestic arbitrations ...), at any rate where this does not involve exposing arbitrators to a temptation to depart from "settled principles of law.[45]

[44][1982] A.C. 724.

[45]*Ibid* pp. 739-40.

It was further said by counsel in *The Antaios*[46] that "[i]t is to be remembered in this field that the parties have chosen their tribunal, namely arbitrators, and their decision should be the end of the matter".[47]

Although the movement towards greater finality and increasing party autonomy is not too obvious on the face of the Act, the policy has been carried through by the courts. In both *The Nema* and *The Antaios*, the House of Lords repeatedly warned judges of the lower courts against allowing any practices which may have the effect of "frustrating the intention of parliament" in enacting the Act.[48] In *The Nema*, Lord Diplock took the view that the Act further leans to finality by creating a statutory right to exclude by contract what remains of the limited right of appeal on a point of law. He states that

> Section 3 gives effect to a reversal of public policy in relation to arbitration as it had been expounded more than half a century before in *Czarnikow v Roth, Schmidt & Co.* ... Exclusion agreements, which oust the statutory jurisdiction of the High Court to supervise the way in which arbitrators apply the law in reaching their decision in individual cases, are recognised as being no longer contrary to public policy.[49]

The most significant contribution, however, of the English Arbitration Act of 1979 is in the wider liberalising tendency it ushered into the English law of arbitration and its practice. In contrasting the position of English arbitration law prior to the Act with the changes it introduced, Professor Rhidian Thomas says that the Act "has created a judicial mood significantly more greatly committed to a hands-off style of judicial supervisory management. The finality of awards and the autonomy of the arbitral process, although to some degree ever present in the modern law, have in the

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[46][1985] A.C. 191.

[47]*Ibid* p. 197.

[48]Even attempts to "frustrate the intention of parliament" by limiting the stringent Nema guidelines to commercial cases was rejected by Lord Donaldson in the Court of Appeal in *Ipswich Borough council v Fisons plc.* [1990] Ch. 717.

[49]*Supra* p. 740.

result become values more firmly implanted in the philosophical bedrock of the law."[50] He says that English judicial attitude and philosophy toward arbitration as a whole contrasted "sharply with many foreign systems of arbitration law where the judicial role was more reserved and with greater emphasis given to arbitral autonomy. English law subscribed to the maxim 'arbitration for better or for worse' but it proved to be a maxim more revered in the breach than the adherence."[51]

That attitude has been changed by the passing of the Act, whose new philosophy has been carried through by the courts ceasing on its initiative, although on its face limited to the specific area of judicial review and challenge of awards, by extending its underlying philosophy to other areas of English international commercial arbitration. Step by step the courts have come to recognise alongside other laws in Europe, and what is now the orthodox view in international arbitration, that, for example, an arbitration clause may survive the invalidity of its main contract[52] because powerful commercial reasons so dictate and no higher policy consideration requires that the situation be otherwise. Arthur Marriott points out along the same lines that the case of *Ashville Investments Ltd. v Elmer Contractors*[53] is also important in its liberal interpretation of arbitration clauses in deciding what matters may come under the jurisdiction of an arbitrator and expresses the wish that the "case sweeps away the academic and sterile debate over the meaning of phrases in arbitration clauses such as 'under', 'arising from', 'in connection with', and the like."[54] What is important, he thinks, is that the courts have regard and give effect to the original intention of the parties, which is to have their disputes referred to arbitration.[55]

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[50]The Law and Practice relating to Appeals from Arbitration Awards, Lloyd's of London Press, London, 1994, p. 64.

[51]*Ibid* p. 3.

[52]*Harbour Assurance Co. (UK) Ltd v Kansa General International Insuarance* (1993) Q.B. 701. See also Clause 3(2) of the draft arbitration bill. For a recent commentary see Gross, Peter " Separability comes of Age in England: Harbour v Kansa and Clause 3 of the Draft Bill" (1995) Arbitration International, 85.

[53][1989] Q.B. 488.

[54]"Changes in Arbitration Law and Practice" (1993) 59 Arbitration, 41, pp. 44-45.

[55]*Ibid.*

Another example of the liberal attitude is reflected in the Court of Appeal decision in *Deutsche Schachtbau-und Tiefbohrgesellschaft v R'as Al Khaimah National Oil*,[56] where Lord Donaldson, MR, expressed a willingness to enforce an arbitration award made on the basis of general principles of law (or *lex mercatoria*) without reference to any particular system of municipal law.[57] Although it might be that the law in England will not recognise as valid or, at any rate, give effect to an "equity" or *ex aequo et bono* clause[58] purporting, in the words of one judge, "... to free arbitrators to decide without regard to the law and according, for example, to their own notions of what would be fair ...",[59] it seems that on the whole English law will regard as valid an arbitration clause which permitted the arbitrator to decide the case without insisting on a strict application of the law and by having regard more generally to commercial considerations, to give effect to the purpose of the contract.[60] Even though the enforcement of awards not based on any particular system of law has been common practice elsewhere,[61] that did not appear to be the conventional view in England, and, even today, it is still uncertain whether an English court will recognise an award made *ex aequo et bono*.

The House of Lords, however, recently took the liberalising attitude to the extreme by declining to review an award made pursuant to proceedings conducted entirely in London, the seat of the arbitration, on the basis that the award was not a "domestic award" under the New York Convention as in force in England since it had

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[56][1990] 1 A.C. 295; reversed on another ground, *ibid.*

[57]*Ibid* pp. 312-316.

[58]Marriott, *op. cit.* p. 49. For a criticism see Goode, Roy "The Adaptation of English Law to International Commercial Arbitration" (1992) 8 Arbitration International, 1, p. 7.

[59]Per Parker L.J., in *Home and Overseas Insurance v Mentor Insurance Lt.* [1990] 1 WLR, 153, p. 161.

[60]*Ibid* pp. 162 (Parker L.J.); 163-167 (LLyod L.J.) and 167 (Balcombe L.J.).

[61]E.g. France: *Valenciana* [1992] JDI 177; *Fougerolle v Banque du Proche Orient*, Court of Cassation decision of 12 September 1981 [1982] Rev Arb, 183; *Pabalk Ticaret Sirketi v Norsolor Paris* Court of Appeal of Paris decision of 4 March 1981 (1981) 108 JDI, 836; and same case in Austria where the Supreme Court accepted the same practice [1984] 10 Yearbook Comm. Arb'n. 161. See generally Rivkin, David W "The Enforceability of Arbitral Awards Based on Lex Mercatoria" (1993) 9 Arbitration International, 67.

been signed in Paris, and, therefore, "made" there.[62] The House reasoned that an award is "domestic" to the place where it is "made" and "made" where it is "perfected", that being in that particular case Paris, as the place where it was signed.

Marriott concludes that as a whole the development since 1979 suggests "continuing support, encouragement and development by the judges of the autonomy of the arbitral process."[63] As far as challenges to awards are concerned, the tendency toward finality is now deeply rooted and has probably come to stay. In declining to reverse the award of an arbitrator on cost, Lord Bingham, M.R., (dissenting) in *Everglade Maritime Inc. v Schiffahrtsgesellschft Detlef (The Maria)*[64] stated that the "effect of the Arbitration Act 1979 has been (in the absence of misconduct and procedural irregularity) to limit challenges to arbitral decisions to cases of more or less clearly demonstrable legal error. Whether those who framed the legislation fully intended that effect is not now a practical issue: the House of Lords decisions [in *The Nema* and *The Antaios*] laid down rules which have been followed for over a decade and appear to have been well received. It is generally accepted that those who entrust decisions to arbitrators do so because they wish to rely on the judgment, skill and fairness of those arbitrators. If a decision of the courts was what the parties had wanted they would not have chosen to arbitrate."[65]

B. The United States

The liberalising tendency favouring the finality of arbitration awards had long since been in place in the United States. It has always been the view of the courts

[62]*Hiscox v Outhwaite* [1992] 1 A. C. 562. It has also been held in the United States that an award made within the territory of that country could be "non-domestic" under Article 1 of the Convention if it involves foreign parties and the transaction envisages performance abroad: *Bergesen v Joseph Muller Corporation* 710 F. 2d. 929 (1983, 2d. Cir.). The Advisory Committee in its second draft has recommended a change which in effect reverses the decision in the Hiscox case. Clause 52 recommends that unless otherwise agreed by the parties "an award shall be treated as made at the seat of the arbitration (...), regardless of where it was signed, despatched or delivered to any of the parties."

[63]*op. cit.* p. 46.

[64](1993) 3 All E R 748.

[65]*Ibid* p. 754.

there that the challenge of an arbitration award "is not available for every party who manages to find some generally accepted principle which is transgressed by the award"[66] and that an award "must be upheld unless it is completely irrational."[67] But, like the English courts, American courts also had to rely on the provisions of a statute to carry forward that policy. In their case it was the Federal Arbitration Act (FAA) of 1925[68] as amended from time to time. The American courts have consistently interpreted the provisions of that Act as indicating a federal policy in favour of arbitration.[69] In *Saxis Steamship v Multifacs Int'l Trades*[70] the Court of Appeals for the second circuit took the view that "extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings."[71] The result is that the review of an arbitration award by American Courts is extremely limited.[72] *In Andros Compania Maritima v Marc Rich*,[73] the Court of Appeals stated that "[w]hen arbitrators explain their conclusions (...) in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result."

What further facilitated the U.S. attitude towards finality is the fact that the grounds for judicial review of arbitration awards in the United States, both domestic and foreign, are fully laid down in the FAA. Section 10 provides only four grounds

[66]*Revere Copper and Brass Inc. v Overseas Private Investment Corporation*, 628 F. 2d. 81, (1980) p. 83.

[67]Nelson J. in *James French v Merrill Lynch*, 784 F. 2d. 902, p. 906 (1986, 9th Cir.), citing *Swift Industries v Botany Industries* 466 F. 2d. 1125, p. 1131 (1972, 3rd Cir.).

[68]9 U.S.C.

[69]See for example *Fukaya Trading Co. v Eastern Marine Corp.* 322 F. Supp, 278 (1971, E D Louisianna), where the District Court held that the purpose of the FAA is neither to "dilute the general advantage of speedy and effective resolution of disputes by arbitration nor to weaken the traditional reluctance with which courts view efforts to re-examine awards", *ibid* p. 281.

[70]375 F. 2d. 577 (1967).

[71]*Ibid* p. 582.

[72]*Nordell International Resources v Triton Indonesia* 999 F. 2d. 544 (1993, 9th Cir.); *Mobile Oil Indonesia v Asamera oil* 487 F. Supp, 63 (1980, SDNY)

[73]579 F. 2d 691, p. 704 (1978, 2d Cir).

for setting aside (vacating) an arbitration award, namely: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient course shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Since the Act is regarded as codifying the general law on arbitration, those four grounds are treated as exhaustive. To succeed, an application brought to challenge an award must come within one of those grounds.[74] Moreover, the grounds are narrowly construed, so as, in the words of the District Court in *Barbier v Shearson Lehman Hutton*,[75] "to avoid frustrating the basic purposes of arbitration: disposing of disputes quickly and avoiding the expense and delay of litigation."[76]

C. France and Switzerland

France and Switzerland too adopt an attitude to the judicial review of arbitration awards which encourage finality by limiting the grounds for review to those specifically mentioned in the relevant statutes.[77] French law is probably the most progressive on questions of appeals against arbitration awards. Unlike English and US law, appeals on substantive issues, whether on a point of law or fact, are totally excluded[78] even in cases where there has been a "manifest" disregard of the law by

[74]*Ottley v Schwartzberg* 819 F. 2d. 373, p. 375 (1987, 2nd Cir.).

[75]752 F. Supp, 151 (1990, SDNY).

[76]*Ibid* p. 159, repeating the Court of Appeals in *Saxis Steamship v Multifacts Int'l Trades, supra.*

[77]Article 1502, pursuant to article 1504, Code of civil procedure (France); and Article 180 Swiss statute on Private International Law which adopts the New york Convention grounds.

[78]In fact it seems that the prohibition against appeals on points of law had always existed in Sweden following the introduction of the Swedish Arbitration Law of 1929: Paulsson, Jan "Arbitrage International et Voies de Recours: La Cour Supreme de Suede dans le Sillage des Solution Bèlge et Helvétique" (1990) JDI 589, in which he describes the Swedish law as "un modèle de liberalism" because of the wide powers it confers to arbitrators, but more so in its early recognition of the finality

the arbitration tribunal.[79] There is therefore no room for even a limited ground of appeal. As Gaillard states, "... *la cour d'appel [the competent court for enforcement of foreign awards] ne saurait, à l'occasion d'une instance en annulation ou en exequatur, se livrer à une révision au fond de la sentence qui lui est soumise.*"[80] The parties cannot also contract in a right of appeal on the merits.[81] The only grounds for the challenge of a non-domestic award rendered in France are the same as the grounds for resisting enforcement of a foreign award and are confined to a limited number of procedural grounds intended as a safeguard against procedural unfairness. The grounds, as set out in Article 1502 of the new code of civil procedure, are concerned with matters related to the inexistence of the arbitration agreement, public policy, fair hearing, the constitution of the arbitration tribunal and where the tribunal exceeds its authority or fails to exercise its jurisdiction in full in accordance with the submission. An award cannot be denied enforcement on any other ground than those provided for in Article 1502, and, further, the grounds are interpreted restrictively.[82]

In Switzerland the grounds of appeal are exactly the same as in France, the new Swiss statute on private international law of 1987 having, as a matter of

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of the decision of an arbitrator over issues properly within his jurisdiction, a fact which, as Paulsson informs us, makes the Swedish Act the forerunner to recent domestic legislation on the subject. The Swedish Supreme Court itself did not fail to re-assert in *Soleh Boneh International v Uganda and the National Housing Construction Corporation of Uganda* (decision of 18 April 1989 [1991] 16 Yearbook Comm. Arb'n., 606) that "[u]nder Swedish law, a party to arbitration proceedings may *not file an appeal on the merits* of the arbitral award before a court. *The Swedish Arbitration Act is based on this principle*": *ibid* p. 609 (emphasis added).

[79] *Société Fougerolle v Société Butec Engineering*, Court of Cassation decision of 20 December 1993 [1994] Rev. Arb., 126; Court of Cassation decisions of 15 June 1994 in *Société Sonidep v Société Sigmoil* and *Communauté Urbain de Casablanca v Société Degrémont*, both [1995] Rev. Arb., 88. In commenting on the last two decisions Gaillard states that in France "... une fausse application du droit applicable au fond du litige, même grossière, ne constitueraient pas un chef de recours en annulation au sens de l'article 1502(3) du nouveau code de procédure civile", *ibid* p. 95. For a general treatment of challenges of awards under French law see Gaillard, "Arbitrage Commercial International: Sentence Arbitrale: Contrôle Etatique" in, Juriclasseur de Droit International, Vol. 11, Fasc. 586-10 and 586-11, (Looseleaf, 1992 re-issue).

[80] *Ibid* Fasc. 586-10, para. 44.

[81] *Ibid.*

[82] *Ibid* where, relying on the Court of Cassation decision in *Southern Pacific Properties Ltd v Republic of Egypt* (1987) Rev. Arb., 469, Gaillard states that "*[l]a mission de la cour d'appel saisie en vertu des articles 1502 et 1504 du Nouveau code de procedure civile est limité à l'examen des vices enumérés par ces textes.*"

legislative policy, been intended to "discourage as much as possible the number of appeals *disguised as challenges*"[83] (emphasis added). Swiss law therefore does not also allow even limited appeals on points of law, and goes further, by allowing the parties to the arbitration to contract out of the right to challenge the award if they are not domiciled or resident or established there.[84]

Even more far reaching is the position under the law of Belgium, where the courts are prevented by law from entertaining proceedings for any form of judicial review of an international award, whether or not made in Belgium, unless one of the parties to the arbitration proceedings is a Belgian national or resident or a company incorporated or with a place of business there.[85]

The trend in France and Switzerland to confine appeals and challenges to arbitration awards to narrow procedural ground are totally in line with the international trend toward according finality to awards, as is reflected in Articles 34 and 36 of the UNCITRAL Model Law on international commercial arbitration, which do not at all countenance the possibility of judicial review of an award on the merits. The Model law has been adopted in many countries in the same spirit, the grounds for reviewing or resisting enforcement being equally narrowly circumscribed.[86] The grounds under all these new domestic legislation and international instruments[87] are much the same as those under the older New York Convention of 1958 which, notwithstanding its already low threshold for enforcing awards, encourages member states to adopt an even lower threshold by allowing domestic courts, pursuant to Article VII of the Convention, to grant award creditors the benefit of a more favourable domestic law. French courts have accepted the invitation and enforced awards annulled at the place where they were made on the basis that the grounds for resisting enforcement under French law, following the 1981 changes in the arbitration provisions of the civil

[83]Bucher, Andreas & Tschanz, Pièrre-Yves, International Arbitration in Switzerland, Helbing & Lichtenhahn, Basle, 1988, p. 135.

[84]Article 178(1).

[85]Article 1717(4).

[86]See Nigeria, Sections 29 & 30; Canada, Articles 34 & 36; Scotland, Law Reform (Miscellaneous Provisions) Act 1990, Schedule 7, Articles 34 & 36; Djibouti, Articles 21 & 24.

[87]See for example Article 5 of the Inter-American Convention on Commercial Arbitration 1975.

procedure code, are more favourable to enforcement than the new York Convention.[88]

It is with this background of an overall favourable attitude to the enforcement of awards that we approach the grounds for enforcement and execution of awards in arbitrations involving developing countries in the cases discussed below. In some cases enforcement or execution has been ordered against the countries and in others they have obtained enforcement of awards issued in their favour. In all cases, however, the emphasis of the courts called to enforce awards has been on the need to ensure that awards are honoured, subject to minimum safeguards. There is nothing that can be referred to as a development particular to arbitration in which the countries are involved with or without a view to advantage or disadvantage them.

II. Grounds for Enforcing or Denying Enforcement of Arbitration Awards

A. Absence or Invalidity of the Arbitration Agreement

To challenge the existence or validity of the arbitration clause brings the entire proceedings into question. Arbitration is based on an agreement by the parties to the submission and its existence or invalidity necessarily invalidates the award itself. Article V(1)(a) of the New York Convention allows the courts of a contracting state to deny enforcement of an award made pursuant to a void arbitration agreement. Questions regarding the invalidity or inexistence of the arbitration agreement may arise in several ways. In *Société Bomar Oil N.V. v Entréprise Tunisienne D'acvitivités Pétrolières (ETAP)*[89] the question was whether an arbitration clause in the Tunisian state corporation's standard term contract was properly incorporated into the main contract by a mere reference in the latter. Bomar Oil was the buyer of some 65000 tons of petroleum from ETAP, the Tunisian state oil corporation. The contract was evidenced by a number of telexes, the first of which was the offer sent by the sellers to the buyers and referring to the state oil corporation's standard contract containing

[88] *Infra*; *Société Hilmarton v Société OTV* Court of Cassation decision of 23 March 1994 [1994] Rev Arb, 327.

[89] (1987) Rev. Arb., 482.

an arbitration clause under ICC Rules in Switzerland. In a counter-offer Bomar Oil varied some of the conditions of sale and, in its return telex, requested that the remaining terms be subject to the "Standard Industry Practice." Some of the terms of Bomar Oil's counter-offer were accepted and others rejected, including in particular the reference to the "Standard Industry Practice", in place of which ETAP referred back to its own standard terms and conditions in a third and final exchange of telexes between the parties. The parties subsequently varied the seat of the arbitration to Paris and subjected the proceedings to French law. The main contract contained a clause allowing for renegotiation of the contract price in line with changes in the spot market for oil. The parties then commenced performance on the basis of the terms in the telexes.

Following disagreements over the correct interpretation of the renegotiation clause ETAP commenced ICC arbitration in Paris and obtained an award in which the arbitrators determined, on a preliminary point, that there was a valid arbitration agreement. Bomar Oil instituted proceedings before the Paris Court of Appeal for the annulment of the award on the ground that the arbitration clause contained in the state corporation's standard terms and conditions of contract, incorporated by a mere reference in the telexes, had not been signed by the parties and, therefore, did not satisfy Article II(2) of the New York Convention requiring an "agreement in writing" "signed by the parties or contained in a telegram (which would be read to include a telex and other modern means of communication) or an exchange of letters. The question was whether it is possible under the New York Convention to provide for an arbitration by reference to a second document containing the clause, although that document had not been signed by the parties. As the Convention does not directly answer the question the Court of Appeal of Paris chose to give effect to what it regarded as the primary purpose of the Convention, that parties who had committed themselves to arbitration should be held to their agreement and domestic courts should facilitate the enforcement thereof. On the facts, the court held that the arbitration clause, although contained in a document which had not been signed, but read together with the telexes constituting the main contract, had properly been incorporated into the latter as argued by the Tunisian parties.

It seems that courts in many other jurisdictions would have come to the same conclusion.[90] That does not appear to be in doubt as far as the domestic laws are concerned.[91] In England, for example, the Court of Appeal has held in relation to Section 32 of the Arbitration Act 1950 that, "an arbitration agreement need not be signed and that the definition in s. 32 of the Act [requiring arbitration agreements "in writing"] is satisfied provided there is a document or documents in writing which ... 'recogni[s]e, incorporate or confirm the existence of an agreement to submit'."[92] The Court was concerned with the incorporation of an arbitration clause in a GAFTA standard form of contract by reference in a broker's note. The question remained whether the law would be the same under the New York Convention as enacted in England to govern the enforcement of foreign awards.

In *Zambia Steel & Building Supplies v James Clark & Eaton Ltd*[93] the Court of Appeal in London, like that of Paris in Bomar Oil, was dealing with Article II(2) of the New York Convention as enacted into law in England.[94] The matter in dispute was whether terms of sale printed on the reverse of a contract quotation (which was not the offer) and containing an arbitration clause were properly incorporated into a purchase order made pursuant to the quotation. The Court applied its previous decision in the *St. Raphael* and held that the requirements of Sections 1 and 7(1) of the Arbitration Act 1975 are satisfied if the document containing the arbitration clause to which reference is made in the main contract is in writing, even though unsigned. That appears to be consistent with Article 7(1) of the 1975 Act, which defines an arbitration agreement simply as "an agreement in writing", omitting the words "signed by the parties" as contained in Article II(2) of the New York Convention. On that basis the

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[90]See the cases referred to by Loquin, case commentary (1987) JDI, 941.

[91]Under Article 1443 of the new French code of civil procedure the document containing the arbitration clause and to which reference is made in the main contract need not be signed. It is sufficient that the arbitration clause is in writing (which is not a problem if it is contained in a "document") and it is incorporated by reference into the main contract. Articles 32 and 7 of the English Arbitration Acts 1950 and 1975 defining an agreement neither require that the document to which reference is made is signed nor do they even require that the arbitration agreement itself is signed! It is sufficient that it is in writing.

[92]*Excomm Ltd v Ahmed Abdul-Qawi Bamaodah (The St. Raphael)* [1985] 1 Lloyd's Rep, 403, p. 409.

[93][1986] 2 Lloyd's Rep, 225.

[94]Arbitration Act 1975, Sections 1 and 7(1).

Court of Appeal stated, correctly in our view, that the omission of those words by the English legislature "was intended to leave the requirement the same as it is under s. 32 of the 1950 Act",[95] in effect leaving the position under English law unaltered by the Convention. What is necessary is that it appears sufficiently from the reference in the main contract that the existence of the arbitration clause, to which reference is made in writing, even though in a separate and unsigned document, is self-evident having regard to all the documents read together. What must be established is certainty of the existence of the clause. There should be no room for ambiguity. As the Court of Appeal of Paris cautioned, "... *la Convention [of New York] n'admet l'adoption de la clause compromissoire par reférence que dans la mésure où l'accord des parties ne représente aucune equivoque.*"[96] Article 7(2) of the UNCITRAL Model Law too only requires the reference to be "such as to make the clause part of the contract" between the parties.[97] Once it can be established with certainty that the document to

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[95][1986] 2 Lloyd's Rep, p. 234.

[96](1987) Rev. Arb., p. 486.

[97]It seems, on the other hand, that the Supreme Court of Germany has gone further and decided that an arbitration agreement can be implied into a contract by trade usage where the parties failed expressly to include it: *Claimant v W. S. KG* (III ZR 30/91) [1993] 8 Int'l. Arb'n. Rep., No. 8, p. 9. The contract in that case had been concluded on the basis of a standard contract that did not contain an arbitration clause. That notwithstanding the German Supreme Court held that if arbitration in that particular trade had developed into a commercial custom, the parties should be referred to arbitration to settle their dispute whether or not they had specifically referred to an arbitration agreement in their contract. In the words of the court:

> if the trade contract concluded by the parties is typical for that branch of trade and the parties are active in this market on a regular basis, they are presumed to have knowledge of the custom and the normative force of the trade custom pertaining to dispute settlement by arbtration applies to their contract irrespective of a prior agreement of the parties" (*ibid* p. 10).

Although the decision was apparently well received as reflecting a progressive tendency toward arbitration in Germany (Berger, Klaus, *ibid* p. 10), it has been seriously criticised elsewhere for undermining the contractual basis of arbitration (Carbonneau, Thomas ""A-Legality" and Arbitration: The German Supreme Court joins the Fray" (1993) 4 Am. Rev. Int. Arb., 217) in that it reverses the fundamental assumption that arbitration is resorted to as an exception to the inherent jurisdiction of the courts. According to Carbonneau, the German Supreme Court decision leads to the result that even the absence of an arbitration agreement in certain trades "is not sufficient to rebut the presumption. Indeed, in order to avoid the automatic reference to arbitration, a party doing business in the area would need to include express language in the contract rejecting the arbitral remedy" (*ibid* p. 223) since the arbitration agreement is implied into the contract by law. We agree with Professor Carbonneau that this, indeed, would be a strange development since it woud follow that not one, but even both parties, can thus be compelled to arbitration by the court unless they expressly contract out of an implied arbitration agreement!. That will reduce arbitration to a process based on compulsion, not consensus.

which reference is made contains an arbitration clause and that document can properly be read together with the main contract, the courts, it seems, will not allow the arbitration to be frustrated by an unwilling party. It follows that an award made pursuant to it will not be set aside for lack of an arbitration agreement or for its invalidity as Bomar Oil learned, to the advantage of ETAP, the Tunisian state oil corporation.

The desire to hold parties who have committed themselves to arbitration to the award has also led French courts to enforce an award even though made pursuant to an arbitration agreement which might have been void under its proper law and under the proper law of the underlying contract. In *Municipalité de Khoms El Mergeb v Société Dalico*,[98] the Local Authority of Khoms El Mergeb in Libya had contracted with the Danish company, Dalico Contractors, for the construction of a drainage system. The arbitration clause was contained in an annex to the Local Authority's standard terms and conditions of contract which, together with the documents inviting tenders, were referred to in the main contract. Clause 32 of the standard terms and conditions of the Local Authority was both a choice of law and choice of jurisdiction clause providing for the contract to be governed by Libyan law and for the jurisdiction of Libyan courts in the event of a dispute. The annex to the standard terms modified clause 32 by providing for ICC arbitration, the contract remaining subject to Libyan substantive law. Neither the annex nor the Local Authority's standard terms and conditions of contract were signed by the parties and on that basis, it seems, the annex was void under Libyan law. The arbitration tribunal nevertheless made an award in favour of the Danish company which the Local Authority challenged. The Court of Appeal of Paris upheld the award and the Court of Cassation confirmed on the ground that by virtue of a substantive rule of international arbitration, the arbitration clause is "*indépendante juridiquement du contrat principal qui la contient directement ou par référence, et son existence et son efficacité s'apprécient, sous réserve des règles impératives du droit français et de l'ordre public international, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique.*"[99]

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[98]Court of Cassation decision of 20 December 1993 [1994] Rev. Arb., 116.

[99]*Ibid* p. 117.

One commentator[100] says that the significance of the decision lies in the fact that, unlike Bomar Oil, Dalico involved not one but a double reference, first, to the standard conditions of contract, then to its annex (containing an arbitration arrangement modifying clause 32 of the standard terms and conditions and, it seems, supplementing a reference to arbitration in the material published inviting tenders from the public), none of which had been signed. Also significant is the fact that the decision of the Court was made not by reason of the character of the defendant in the award (a Libyan Local Authority) but by reason of, and consistently with, the already liberal attitude of the French judiciary in relation to the principle of severability,[101] by which an arbitration clause is now regarded as autonomous from its underlying contract.[102] Nothing that affects the validity of the contract itself will invalidate the arbitration clause. But, by disregarding the rules of private international law which would otherwise be applicable, the French courts probably take the principle too far in treating it as applicable irrespective of the law governing the arbitration agreement.[103] In the words of the Court of Appeal of Paris:

> *... en matière d'arbitrage international, le principe de l'autonomie de la clause compromissoire est d'application générale, en tant que règle matérielle internationale consacrant la liceité de la convention d'arbitrage, hors de toute reférence à un système de conflits de lois, la validité de la convention devant être contrôlée au regard des seules*

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[100]Gaudemet-Tallon, Hélène, (1994) Rev Arb, pp. 118-125.

[101]See for example two decisions of the Court of Appeal of Paris of 14 November 1991 in both of which the Court states: "*... la clause compromissoire est licite en tant que telle dans l'ordre international, en vertu du principe général d'autonomie de la convention d'arbitrage, règle matérielle qui lui assure une efficacité propre indépendamment de la loi applicable au contrat dans lequel elle est stipulée ou aux parties à ce contrat, sous la réserve de l'ordre public international*" : *Cts. Legrand v Société European Country Hotels Ltd* and *Forestier v Epoux Drif* [1992] Dalloz, Informations Rapides, p. 57.

[102]For the position in England see *Harbour Assurance v Kansa General International Insurance* (1993) Q.B. 701.

[103]Especially when we bear in mind that Article V(1)(a) of the New York Convention states just the contrary by providing that enforcement of an award may be denied if the arbitration agreement pursuant to which the award was made "is not valid under the law to which the parties have subjected it ..."

exigences de l'ordre public international.[104](Emphasis added)

This is a rather dangerous trend since it might lead to the enforcement in France of an award made pursuant to an arbitration agreement which is invalid by its applicable domestic law[105] even if that were French domestic law on arbitration which, under Article 1443 of the new code of civil procedure, for example, states that an arbitration agreement (the "clause compromissoire") must be regarded as void if it does not designate the arbitrators or fails to indicate the method by which they are to be appointed.

Yet, the same French Courts have often exercised restraint in declining to uphold arbitration agreements and awards even in circumstances where what is in issue is not the existence of the arbitration agreement itself but whether it is binding on the parties to the submission, although a decision recognising the award could quite easily have been justified on one of the traditional reasons in support of the need for finality. In *Southern Pacific Properties Ltd v The Arab Republic of Egypt*,[106] the government of Egypt successfully challenged an ICC award on the ground that the State was not a party to the underlying arbitration agreement between Southern Pacific Properties and the Egyptian General Organisation for Tourism and Hotels (EGOTH), a separate legal entity of the Egyptian State, even though the government had "approved, agreed and ratified" the contract between SPP and EGOTH containing the arbitration agreement. The government and EGOTH, on the one hand, first entered a head agreement with SPP for the construction of a tourist site close to the ancient pyramids of Egypt. The Head agreement did not contain an arbitration clause and turned out to be the only agreement to which the government was a party with the SPP. Pursuant to the head agreement, EGOTH alone subsequently signed a supplementary agreement with SPP creating a local company, the Egyptian Tourist Development Company (ETDC), effectively charged with the construction of the projects. The supplementary agreement contained an ICC arbitration clause including

[104]Decision of 17 December 1991 in *Gatoil v National Iranian Oil Company* [1993] Rev Arb, 281, pp. 284-85.

[105]That should however not come as a surprise since French courts will also enforce an award already set aside at the place where it was made: *infra*.

[106]Decision of 12 July 1984 [1985] JDI, 129; [1986] Rev. Arb., 75.

a statement recognising that EGOTH's undertakings under the agreement could not become effective until validated by the competent government authorities. The Egyptian Minister of Tourism duly validated the agreement by signing the same with the indorsement "approved, agreed and ratified" on behalf of the government. On that basis, and on other grounds not directly relevant here, SPP successfully persuaded the arbitrators that the government was a party to the supplementary agreement between the tourism organisation, EGOTH, and the Southern Pacific Properties company. The government argued that its validation of the state tourism organisation's undertaking did not render the government a party to the contract. It was a mere administrative formality without which EGOTH's commitments to SPP would have no legal effect.

The Court of Appeal of Paris accepted the government's submission and annulled the award on the ground that the arbitration agreement was not binding on the state and the annulment confirmed by the French supreme court.[107] It would have been quite conceivable for the Court of Appeal to refuse to annul the award by conceding the so-called "unified contractual scheme" argument accepted by the arbitrators in the award,[108] according to which, it was submitted by the Southern Pacific Properties Company, both the Head agreement and the supplementary agreement were so closely connected that although the government did not sign the supplementary agreement as a contracting party, nevertheless, it should have been regarded as bound when both agreements are read together, so as to bring the government within reach of the arbitration clause contained in the supplementary agreement it did not sign.[109] Both agreements were to be read as one transaction so that, in the view of the tribunal, "[i]rrespective of specific rights and obligations cast upon each individual party under each of the said agreements (...), the three parties were to be involved throughout the venture; ..."[110] The tribunal had accepted that the

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[107]Court of Cassation decision of 6 January 1987 (1987) Rev. Arb., 469.

[108]ICC award No. 3493 of 16 February 1983 [1984] IX Yearbook Comm. Arb'n, 111, p. 115.

[109]The Paris Court of Appeal decision in this case is consistent with a previous decision of the same Court in *Société Swiss Oil v Société Petrograd & Republic of Gabon* of 16 june 1988 [1990] 29 ILM 562 where it held, upholding an ICC award, that the Gabonese state oil corporation (Petrograd) was not a party to the agreement between the state and Société Swiss Oil, on the basis that Petrograd had been involved in the transactions as an agent for the state.

[110]*Ibid.*

government was bound because "there was an essential governmental identity between EGOTH and the Government."[111] The Court of Appeal of Paris rejected that view, although the claimants obtained enforcement in the Netherlands,[112] where the District Court of Amsterdam held that the government was a proper party to the ICC arbitration clause for the reasons set out in the arbitration tribunal's award, which the District Court was content to adopt.[113] It was not willing to review the award on the merit. The District Court of Amsterdam did not accept the fact that the award was subject to annulment proceedings in Paris as relevant in determining whether or not to enforce it in the Netherlands. In the view of the Court, the need to encourage finality would be defeated if the annulment proceedings in France were accepted as a ground to suspend or deny recognition of the award in the Netherlands.

What the different treatment of the same award in France and the Netherlands suggests is that there is no discernable trend in the enforcement or annulment of the awards.

B. Public Policy

The public policy ground is that most frequently in use to resist the enforcement of arbitration awards or to challenge their validity. This is so because unlike other grounds, it would embrace not only the substantive aspects of an award, including in particular its contents, but also the procedure by which the award was made.[114] In civilian systems it would also cover the mandatory rules of the domestic court which the parties to the arbitration cannot contract out of. It also seems to be that by which the courts are least likely to annul an award. Although public policy is

[111]*Ibid* p. 114.

[112]Decision of 12 July 1984 [1985] 10 Yearbook Comm. Arb'n., 487.

[113]*Ibid* pp. 488-89.

[114]de Enterría, García J, "The Role of Public Policy in International Commercial Arbitration" (1990) 21 Law & Pol Int'l. Bus., 389.

a very elastic concept,[115] capable of application to a limitless range of circumstances, domestic courts have generally taken a restricted view in its application to challenges of arbitration awards. American courts, for example, limit its application to cases where there has been a serious violation of the "most basic notions of morality and justice",[116] thus clearly indicating that they will take a strict attitude to proceedings for annulment based on public policy, particularly when brought to disguise a substantive point of law. The French attitude, as reflected in the legislation[117] and decisions of the courts,[118] goes further by creating a distinction between domestic and international public policy. If domestic public policy is strictly construed, more so is the case in the context of international transactions.

The various ways in which public policy may be pleaded by a party resisting the effect of an award made in favour of the other party to the dispute are wide. The ground for resisting enforcement of the award in *Imperial Ethiopian Government v Baruch-Foster Corporation*[119] was the alleged bias of the arbitrator. Ethiopia had requested confirmation of an award made in its favour under the New York Convention. Baruch-Foster claimed that the chairman of the arbitration tribunal, Professor Réné David of France, was at the relevant time (between 1954 and 1974) so closely connected to the Ethiopian government as to raise a reasonable suspicion of bias, thus disqualifying him from serving as an arbitrator. The link arose from his involvement with the drafting of the Ethiopian civil code. Baruch-Foster corporation requested extensive discovery to establish that the link was sufficiently material to warrant the disqualification of the arbitrator. Both the District Court and the Court of Appeals for the 5th Circuit refused to accede to the request on the basis, at least as

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[115]de Enterría says that the concept defies any attempt at a clear definition and approves its description as "one of the most elusive and divergent notions in the world of juridical science", *ibid* p. 401, citing Ferrante, "Enforcement of Foreign Arbitral Awards in Italy and Public Policy" in Hommage à Fréderic Eisemann, 1978, p. 86.

[116]*American Construction v Mechanised Construction of Pakistan* 659 F. Supp, 426, p. 429 (1987, SDNY), affirmed 828 F. 2d 117 (1987, 2d. Cir).

[117]Sections 1484 and 1502(5) of the new civil procedure code.

[118]For example the Paris Court of Appeal decisions of 12 March 1985 (1985) Rev Arb., 299 and 21 March 1986 [1991] Rev. Arb., 350.

[119]535 F. 2d. 334 (1976, 5th Cir.).

far as the appellate court was concerned, that the corporation had failed "to come forward with anything tending to show that the claim was asserted in good faith and for any reason other than the delay."[120] Since the burden of proving a ground for refusing enforcement under the Convention is on the party resisting enforcement, the appellate court proceeded to enforce the award in line with what it regarded as the goal both of the Convention and its implementing legislation in the United States, to encourage the recognition of arbitration agreements and awards.

In dismissing the challenge to the enforcement of an award made in favour of the Fertilizer Corporation of India (FCI) in similar circumstances, involving an alleged bias[121] of the FCI appointed arbitrator, another United States court held in *Fertilizer Corporation of India v IDI Management*[122] that, on analysis, the material presented to establish that the arbitrator had not been independent and impartial did not meet the court's threshold of what would be required to annul an award on public policy grounds. Having regard to the need for finality, which the court treated as the "paramount consideration"[123] in that case, the District Court concluded that the public policy of the United States had not been offended and on that basis declined to reverse its previous decision[124] treating the award as final and enforced it.

In related proceedings,[125] the same District Court had already decided that the fact that FCI, applicants for the enforcement of the award, had failed to disclose their relationship with one of the arbitrators could not on itself so affect the arbitration proceedings that enforcement of the ensuing award could be denied in the United States on public policy grounds. Relying on the Court of Appeals decision in *International Produce Inc. v A/S Rosshavet,*[126] the District Court came to the view

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[120]*Ibid* p. 337.

[121]Arising from the fact that the same arbitrator had previously acted as counsel for FCI.

[122]530 F. Supp, 542 (1982, S.D. Ohio, W.D.).

[123]*Ibid* pp. 545-46.

[124]517 F. Supp, 948 (1981).

[125]*Ibid.*

[126]638 F. 2d 548 (1981 2d. Cir.).

that the public policy defense of the New York Convention should be narrowly construed so as to prevent awards being set aside out of a mere "appearance of bias".[127] It also applied the "wise advice" of the same Court of Appeals in another case[128] requesting the courts to "invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States."[129] The court then concluded that the stronger policy of the United States "is that which favours arbitrations, both international and domestic ..."[130]

The District Court also had to decide in the FCI case whether, notwithstanding that India (being a party to the proceedings and the place were the award was made) was a party to the New York Convention, and on the claim that the country would not have enforced the award had it been made in the United States in favour of IDI, a foreign corporation, the U.S. District Court should also deny enforcement of the award made in favour of India. The United States and India adopted the Convention with the two reservations of Article I(3) allowing states, in signing to the Convention, to give effect only to awards made in the territory of another Convention state (the reciprocity reservation) or in connection with a commercial transaction (commercial reservation). The Court was convinced that the reciprocity requirement was met since both countries were and are signatories to the Convention. But the defendants had further submitted that "Indian Courts had "adopted various evasive devices ... to avoid enforcement of awards adverse to Indian parties",[131] to which the Court responded that it was satisfied that "Indian Courts are not engaged in a devious policy to subvert the Convention by denying non-Indians their just awards", citing some examples in support.

The claim that the courts of most developing countires are not independent of

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[127]*Supra* p. 955.

[128]*Parsons and Whittemore Overseas Co v Société General de L'Industrie du Papier (RAKTA)*, 508 F. 2d, 969 (1974).

[129]*Ibid* p. 974.

[130]*Supra* p. 955.

[131]517 F. Supp, 948, p. 952.

the executive and, therefore, incapable of deciding against their own governments is quite frequently made.[132] United States courts have had to deal with the same allegation more than once before and have in all cases rejected the allegations as unfounded. For example, in *Caribbean Trading and Fidelity Corporation v Nigerian National Petroleum Corporation,*[133] the foreign corporation claimed that the Nigerian National Petroleum Company would enjoy "great advantage before the High Court in Nigeria" on the basis that the country is "not a democratic country but is ruled by the military and its principal foreign assert earner is NNPC", a claim to which the District Court for the Southern District of New York responded that "[w]ild accusations made without any basis in fact are of little persuasive value ..."[134] The award in that case had been rendered in Nigeria in favour of the foreign company by a panel of two arbitrators of Nigerian nationality, one of whom was a former Major-General of the same military regime. The NNPC instituted proceedings before the High Court in Lagos, Nigeria, to set aside the award on the ground that the Caribbean Trading company was not a party to the underlying contract. The CTFC requested confirmation of the award by the District Court in New York and the NNPC applied for a stay of the New York proceedings pending the outcome of the challenge in Lagos. The New York Court granted a stay and held that the American corporation's "fears of receiving unfavourable treatment in the Nigerian courts [were] belied by the treatment it [had] received thus far"[135] both from the Nigerian arbitrators and from the High Court of Lagos. There was therefore no basis for alleging that it would receive less than fair treatment from a Nigerian court. Similarly, in *Sonatrach v Shaheen,*[136] Shaheen, the U.S. corporation against whom the Algerian national oil marketing corporation instituted proceedings in New York to enforce an ICC award obtained in its favour had attempted to resist enforcement on, among other grounds, the claim that if the

[132]Paulsson, "Third World Participation in International Arbitration" (1987) 2 ICSID Rev.,-FILJ, 19.

[133][1991] 6 Int'l Arb Rep, Part F-1.

[134]*Ibid* p. 17.

[135]*Ibid.*

[136]*Société Nationale pour la Recherche, la Production, le Transport, la Transportation et la Commercialisation des Hydrocarbures v Shaheen Natural Resources*, 585 F. Supp, 57 (1983, S.D. New York), affirmed 733 F. 2d. 260 (1984, 2d Cir.).

award had been in Shaheen's favour it would not be enforced against the Algerian party by an Algerian court. The District Court described the argument as "wholly without merit"[137] and, in any case, not a ground on which enforcement of an arbitration award can be denied within the limits of the New York Convention. It further appeared from the affidavit of counsel that, as a matter of fact, Algerian courts would enforce an ICC award rendered in a New York Convention country regardless of the nationality of the parties. There was therefore no ground for claiming that United States public policy would be violated in enforcing the award. In both cases the decisions respectively to deny enforcement and to enforce the awards were in favour of the parties from the developing world and nothing suggests that the decisions were based other than on the determination to check unnecessary challenges of arbitration awards by the loosing side.

C. Award Judicially Challenged or Set Aside where it is made

This ground is covered by Article V(1)(e) of the New York Convention, which provides that enforcement of an award may be refused if

> the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

That Article gives much importance to the place of the arbitration. It is generally accepted that, under the Convention, only the place where, or under the law of which, the award was made can set aside an award. It thus would follow, logically, that if an award is set aside at that place, the rights created by the award become extinct, thus conferring considerable significance to the law and the courts of the place where the award is made. It had been suggested, on that basis, that the so-called "floating award" (i.e., an award that is not attached to any particular state or system of law) cannot benefit from the favourable enforcement regime of the New York Convention since

[137] *Ibid* p. 64.

its regularity cannot be judicially supervised anywhere.[138] At the same time Article VII(1) provides that the Convention should not be read to deprive a party to an arbitration "any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied upon." Article VII(1) is interpreted as indicating that an award creditor can rely on the more favourable provisions of the domestic law of a state, such that in the context of Article V(1)(e) an award may still be enforced in a country where, under the domestic law, that would still be possible notwithstanding that it has been set aside elsewhere.[139] The French courts have consistently taken that view of Article VII(1) of the New Convention to enforce awards even though set aside or pending challenge proceedings at the place where the awards were made.[140] In *Polish Ocean Line v Jolasry*,[141] in declining to reverse a lower court decision to enforce an award made in Gdansk but suspended there, the French Court of Cassation stated that the fact that an award might have been annulled at the place where it was made is no bar to its enforcement in France, since the more favourable provisions of Article 1502 of the new code of civil procedure[142] do not require that the award should not have been set aside at the place where it was made. In the words of the

[138]van den Berg, Albert "Non-domestic Arbitral Awards under the 1958 New York Convention" (1986) 2 Arb. Int'l, 191; van Houtte, Hans "La Loi Belge du 27 Mars 1985 sur L'Arbitrage International" (1986) Rev. Arb., 29.

[139]*Société Pabalk v Société Norsolor*, Court of Cassation decision of 9 October 1984 [1985] Rev Arb, 431. See generally Gaillard "Arbitrage Commercial International, Sentence Arbitral: Contrôle Etatique" in Juriclasseur de Droit International, Vol. 11, Fasc. 586-11, (Looseleaf, 1992 re-issue) paras. 24-31. However, in Belgium, an award creditor seeking to benefit from the more favourable Belgium domestic law under Article VII(1) may have to request enforcement exclusively on the basis of Belgian domestic law or some other applicable treaty to the exclusion of the New York Convention itself: Storm, Marcel and Demeulenaere, Bernadette International Commercial Arbitration in Belgium, Kluwer Law & Taxation Publishers, Deventer, 1989, p. 114-15. In Germany too, a court has held that the most favourable right principle "does not justify combining more favourable individual provisions taken from different legal systems [regimes?]. On the contrary, a legal system [regime?] should be applied in its entirety": *Danish Buyer v German Seller*, decision of the Oberlandesgericht (Court of Appeal) of Cologne of 10 June 1976 [1979] 4 Yearbook Comm. Arb'n, 258, p. 260.

[140]For a recent example see the Court of Cassation decision of 23 March 1994 (1994) Rev Arb., 327, affirming the Court of Appeal of Paris decision of 19 December 1991 in *Société Hilmarton v Société OTV* [1993] Rev. Arb., 300.

[141]Decision of 10 March 1993 (1993) Rev. Arb., 255.

[142]Governing the grounds for setting aside an international award in France.

French supreme court, since Article VII of the New York Convention

> *ne prive aucun intéressé du droit de se prevaloir d'une sentence arbitrale, de la manière et dans la mésure admise par la legislation du pays où la sentence est invoquée; il en resulte que le juge français ne peut, lorsque la sentence a été annulée ou suspendue par une autorité compétente du pays dans lequel elle a été rendue, refuser l'exécution pour ce cas qui n'est pas au nombre de ceux énumérés par l'article 1502 NCPC, bien qu'il soit prévu par l'article V 1, e) de la Convention de 1958* ..."[143]

That decision is clearly in line with the pro-enforcement bias of the Convention. It makes it possible to enforce an award in one country although the same award has been set aside at the place where, or under the law of which, the award was made if the law of the place of enforcement is more liberal. Although that view of the New York Convention has been criticised,[144] it appears to have judicial support in some other major enforcement jurisdictions. In the Netherlands the District Court of Amsterdam held in *Southern Pacific Properties (Middle East) Ltd v Egypt*[145] that the fact that the award rendered against Egypt by an ICC tribunal was still subject to proceedings for annulment in France, the place where it was made, was no bar to the enforcement of the award in the Netherlands on the basis that it might defeat the pro-enforcement policy of the New York Convention. The District Court reasoned that "[h]aving regard to the purpose of the Convention to enhance the recognition and enforcement of foreign arbitral awards by subjecting the recognition and enforcement to a minimum number of conditions, the *recours en annulation* initiated by respondent [government of Egypt] is no reason for [the Court] to adjourn the decision on enforcement."[146] Like the French courts, the District Court of Amsterdam seems to have been saying that it would not deny enforcement to an award where enforcement is permitted under the domestic law, irrespective of whether the award is still subject

[143][993] Rev. Arb., 255, p. 258.

[144]van den Berg (1986) 2 Arbitration International, 191.

[145]Decision of 12 July 1984 [1985] 10 Yearbook Comm. Arb'n, 487.

[146]*Ibid* p. 490.

to proceedings for annulment at the place where, or under the law of which, the award was made. The French attitude is also based on the rule that the enforcement of an award made abroad (and, *a fortiori*, in France,) in a dispute with an international dimension is always subject to the control of French courts.[147]

On the other hand it is clear that under statute an award will not be enforced in England if it has been annulled at the place where it was made.[148] A New York Convention award will be denied enforcement in England if, in accordance with Section 5(2)(f) of the Arbitration Act 1975,[149] the award creditor can establish that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made." A foreign award which is not a New York Convention award[150] may, pursuant to Section 37(1)(e) of the Arbitration Act 1950, be denied enforcement in England if the competent English court is satisfied that the award "has been annulled in the country in which it was made." Where a foreign award is also a New York Convention award it is only enforceable under the 1975 Act[151] and will therefore be denied enforcement in accordance with Section 5(2)(f) if it has been annulled at the place where, or under the law of which, it was made. However, Section 6 of the 1975 Act gives effect to the more favourable domestic law option of Article VII(1) of the New York Convention when it states that nothing in the Act "shall prejudice any right to enforce or rely on an award otherwise than under [the same Act] or part II of the Arbitration Act 1950." Meanwhile, under Section 5 of the 1975 Act, an English court may, if it thinks fit, adjourn proceedings for the enforcement of an award which is still subject to annulment at the place where, or under the law of which, it is made but should order the award debtor to give security on the application of the award creditor. The interplay of those various provisions was considered by the Court of Appeal in *Soleh Boneh International Ltd*

[147]*Sté Unichips Finanziaria v Gesnouin*, Paris Court of Appeal decision of 12 February 1993 (1993) Rev. Arb., 255.

[148]Arbitration Act 1975 Section 5; Arbitration Act 1950 Section 37(2)(a).

[149]Which gives effect in England to the New York Convention.

[150]That would be the case if it is not made in the territory of another Convention state.

[151]Section 2, Arbitration Act 1975.

v Government of the Republic of Uganda and National Housing Corporation,[152] where the Court laid down what, for now, would be the position of awards which are still subject to challenge at the place where, or under the law of which, they were made.

In that case Soleh Boneh had obtained an ICC award in Sweden, subsequent to which the government applied for the award to be set aside there on the ground that the award was not binding on the state. Soleh Boneh contended that the Swedish District Court had no jurisdiction to examine the validity of the award, a contention accepted by the District Court but reversed by the Court of Appeal. Soleh Boneh's appeal to the Supreme Court was dismissed and the case remitted to the District Court for a decision on the validity of the award. Thereafter, Soleh Boneh instituted proceedings in England for leave to enforce the award *ex parte* under Section 26 of the Arbitration Act 1926 or Section 3(1)(a) of the Arbitration Act 1975. The High Court declined to grant leave to enforce the award as requested and adjourned the application. The Court however made an order for security to be given by the State pursuant to Section 5 of the 1975 Act. The government applied to set aside the order but the application was refused. They appealed. The Court of Appeal varied the order (by substituting the sum ordered as security with a smaller sum) but further held that if security was not provided as varied, within four weeks, leave would be given to enforce the award as requested.

Giving judgment for the Court of Appeal, Staughton LJ said that the need for uniformity in interpreting an international instrument made it necessary to have regard to the practice elsewhere, although there was no uniformity in interpretation among the different foreign jurisdictions to which they had been referred, regarding that particular issue. One attitude, depicted by the Swedish case of *AG Gotaverken v General National Maritime Transport Company*,[153] shows that the existence of proceedings to challenge the award did not by itself prevent its enforcement. On the other hand, in the Cayman Island case of *Republic of Gabon v Swiss Oil*

[152] [1993] 2 Lloyd's Rep 208.

[153] (1980) Rev. Arb., 524.

Corporation,[154] proceedings for enforcement had been suspended and security for cost refused on the ground, among others, that there was a strong case for setting aside the award and that a decision on its validity was expected elsewhere.[155] The Court noted that the general tendency was to order security and did not accept the view of Michael Tupman[156] that " ... it is difficult to think of any circumstances in which security would not be warranted."[157] Tupman took that view on the basis that "security is the essential guarantee that whatever harm might result from any delay in enforcement is counterbalanced, theoretically by the certainty that there will be known, fixed assets against which to recover if and when the award is confirmed in the country of origin."[158] The Court of Appeal stated that "[i]f, for example, the challenge to the validity of the award is manifestedly well-founded, it would be ... quite wrong to order security until that is demonstrated in a foreign Court."[159] The Court of Appeal then stated what it considered should be the general approach of courts in England. It said:

> ... two important factors must be considered on such an application ... the first is the strength of the argument that the award is invalid, as perceived by a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestedly invalid, there should be an adjournment and no order for security; if it is manifestedly valid, there should either be an order for immediate enforcement, or else an order

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[154](1988) Int'l Arb Rep,

[155]See also *Société Norsolor v Pabalk Tikaret Sirketi*, Paris Court of Appeal decision of 15 December 1981 [1983] Rev Arb, 409, where the Court declined to enforce an award still subject to challenge in Austria in anticipation of the consequences of conflicting decisions, in the event that the award were to be set aside in Vienna: "*... si la sentence arbitrale etait annulée par la Cour de Vienne, la présente demande d'exéquatur deviendrait sans objet;*", *ibid* p. 472.

[156]"Staying Enforcement of Arbitral Awards under the New York Convention" (1987) 3 Arbitration International, 209.

[157]*Ibid* p. 223 "[e]ven though", he says, "under Article VI of the New York Convention a court petitioned with enforcement has discretion to require security": ibid.

[158]*Ibid.*

[159][1993] 2 Lloyd's Rep, p. 212.

for substantial security ...

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The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient [sufficient?] assets within the jurisdiction, the case for security must necessarily be weakened.[160]

The courts in England will therefore not take a blanket attitude as in France or the Netherlands to enforce the award irrespective of the existence of proceedings for annulment elsewhere.[161] If they would not do that, it follows, *a fortiori*, that they will not also enforce an award which has already been set aside at the place where, or under the law of which, it was made. This should be so since even the mere giving of security should, according to Lord Justice Staughton, not be ordered if " ... the challenge to the validity of the award is manifestedly well-founded ..."[162], which by necessary inference should be the case where the award has already been successfully challenged and as a result set aside by a competent court.

In the United States it is not entirely clear whether the courts will enforce an award which has been set aside or is pending proceedings for annulment at its place of origin. In one case[163] the District Court enforced an award made in favour of FCI, although the American corporation resisting enforcement had instituted proceedings for annulment in India itself, the place where the award was made. The District Court

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[160] *Ibid.*

[161] " ... my own view is that section 5(5) means precisely what it says, namely that in a situation in which the enforcing court does not know whether the appropriate court is going to annul the award, the enforcing court - that is to say the British Court in this case - can order the respondents to the arbitration to give security" per Lord Donaldson, M.R., in *Southern Pacific Properties Ltd. v the Arab Republic of Egypt and Others* [1985] 10 Yearbook Comm. Arb'n., 504, p. 507.

[162] *Supra* p. 212.

[163] *Fertilizer Corporation of India v IDI Management*, 517 F. Supp, 948 (1981, District Court, Southern District Ohio).

took the view, citing Professor Gerald Aksen[164] with approval, that an award should be "considered 'binding' for the purpose of the [New York] Convention if no further recourse may be had to another arbitral tribunal (that is, an appeal tribunal). The fact that recourse may be had to a court of law does not prevent the award being 'binding'. This provision should make it more difficult for an obstructive loser to postpone or prevent enforcement by bringing or threatening to bring proceedings to have an award set aside or suspended."[165]

The United States courts take an even more hostile attitude to a defense against enforcement of an award on the basis that the award has been set aside at a place other than where, or under the law of which, it was made. In *American Construction v Mechanised Construction of Pakistan*[166] the award had been made against a Pakistani state corporation in favour of a Cayman Island corporation in Geneva, and, in the view of the New York Court, pursuant to Swiss law. The state corporation obtained judgment in Pakistan invalidating both the arbitration clause and the proceedings, the pakistani Court having asserted jurisdiction to do so on the basis that the supplementary agreement to the main contract had provided for the governing law of the main contract to be that of Pakistan. The arbitrator had found that New York law governed the main contract, after finding that the supplementary contract was invalid under New York and Pakistani law. The District Court declined to reverse the arbitrators's decision on the effect of the supplementary agreement, stating that could only be done if the arbitrator had been manifestedly irrational. The Court then held that since the award had been made pursuant to Swiss law its enforcement in the United States could not be refused by virtue of a Pakistani judgment invalidating the arbitration agreement and the proceedings.

III. Immunity Against Enforcement and Execution

[164]"American Arbitration Arrives in the Age of Aquarius: United States Implements United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards" (1971) 3 Sw. U. L. Rev, 1, p. 11.

[165]517 F. Supp, p. 958.

[166]659 F. Supp, 429 (1987, S D New York).

The only serious obstacle to the enforcement or execution of arbitration awards against states is the defence of sovereign immunity, available in most jurisdictions, although only to the extent allowed by the particular domestic system of law. In most major enforcement jurisdictions the doctrine is limited in its application, so that the defence is not available if enforcement or execution is requested against assets of the state used for commercial purposes.[167] With respect to enforcement specifically, sovereign immunity arises at two stages. First, it will be necessary to establish whether the domestic court has jurisdiction over the state to entertain the proceedings. That is a preliminary question for, if the state is entitled to jurisdictional immunity, the court cannot hear the case.[168] Although it would have been expected that jurisdictional immunity is not available in respect of proceedings related to the submission of a state to arbitration,[169] that is not necessarily so in all major enforcement jurisdictions. In England the State Immunity Act 1978 provides in clear terms that

> [w]here a State has agreed in writing to submit to a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration,[170]

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[167]See for example the Foreign Sovereign Immunities Act 1976, Section 1605 (United States); State Immunity Act 1978, Section 3 (UK); Bucher, Andreas & Tschanz, Pierre-Yves "International Arbitration in Switzerland, Helbing & Lichtenhahn, 1989, pp. 176-179.

[168]It seems that in Switzerland the courts draw no distinction between immunity from jurisdiction and immunity from enforcement or execution. Since the latter derives from the former, the courts take the view that once immunity from jurisdiction is resolved against the state, it also ceases to enjoy immunity from execution: Bernini and van den Berg, "The Enforcement or Arbitral Awards against a State: The Problem of Immunity from Execution" in Contemporary Problems in International Arbitration, (ed. Lew, Julian D.M.), Centre for Commercial Law Studies, Queen Mary College, University of London, 1986, 359. p. 364. But the courts will order enforcement or execution of an award against a state only if the arbitration has some relevant territorial connection with Switzerland, which might not arise merely from the designation by the tribunal of a Swiss location as the place of arbitration: *Liamco v Libya*, decision of the Federal Court of 19 June 1980 [1987] 114 JDI, 994, although if the location results from the choice of the parties the relevant connection might exist: Bucher and Tschanz, *op. cit.* p. 178.

[169]Which appears to be the position in Australia: Section 17(2)(a) & (b) of Australian Foreign States Immunities Act 1985; that seems to be the position too in Sweden: *Liamco v Libya* [1981] 20 ILM, 893, Svea Court of Appeal and in France: *Société Européene D'etude et D'entreprises (SEEE) v Yougoslavie*, Court of Cassation decision of 18 November 1986 [1987] 114 JDI, 120 and, Bourel Pièrre "Conflits de Jurisdictions: Immunités de Juridiction et D'exécution", in Juriclasseur de Droit International, Vol 9, Fasc. 581-50 (Looseleaf, 1993 re-issue) para. 182.

[170]Section 9(1).

so that the jurisdiction of an English court to entertain proceedings to enforce the arbitration agreement or for judicial review of the award, for example, exists by virtue of the state's submission to arbitration.[171] However, that is not necessarily so with respect to the enforcement of the award itself,[172] which is the primary concern here. Section 9(1) exists as an exception to the general rule that a foreign state is immune from the jurisdiction of United Kingdom courts (Section 1). The present editors of Dicey and Morris take the view that the exception does not apply to the enforcement of arbitration awards, apparently, on the basis that the parliamentary bill which resulted in the Act said so expressly.[173] If that were correct, it would follow that an English court's in personam jurisdiction over a foreign state to enforce an award against the state is not automatic, unless the state expressly waives that immunity.

The position in the United States now appears to have been clarified by a 1988 amendment to the Foreign Sovereign Immunity Act,[174] following conflicting decisions by U.S. courts based on Section 1605(a)(1) of the original Act,[175] which provided that a state could not be immune from the jurisdiction of American Courts in any case where the state had "waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." One U.S. court took the view that a submission to arbitration, even when it does not include an express waiver of immunity before U.S. courts, could be the basis of such a waiver "by implication", thus rendering the state amenable to the jurisdiction of United States

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[171]Dicey and Morris Conflict of Laws, Vol. 1, 13th Edn., Sweet & Maxwell, London, 1993, p. 256.

[172]*Ibid.*

[173]Mann thought that the Section applies to all proceedings arising from the arbitration agreement, including an arbitration taking place outside the U.K.: Further Studies in International Law, Clarendon Press, Oxford, 1990, 302, p. 319. For an assessment of both views see Fox, Hazel "States and the Undertaking to Arbitrate" (1988) 37 ICLQ, 1; "Sovereign Immunity and Arbitration", in Contemporary Problems in International Arbitration, *supra* 323.

[174]Section 1605(a).

[175]Foreign Sovereign Immunities Act 1976 Section 1605(a)(1).

courts for the purpose, among others, of enforcement of the award against the state.[176]

The only difficulty that arose in the United States was whether the agreement should have contemplated arbitration within the United States. Initially the courts appear to have taken the view that it would not have been necessary for the arbitration to take place there.[177] But in *Libyan American Oil Company (Liamco) v Libya*[178] the original agreement provided that any ensuing arbitration should take place in Tripoli, Libya. That particular clause of the contract was, on the proposal of Liamco, subsequently amended for arbitration either where the parties agreed or at a place to be determined by the arbitrators. In the event the proceedings were held in Geneva. Although *Ipitrade v Nigeria* had resulted in the enforcement of an award made outside the United States,[179] the judge in the Liamco case appeared to have been under the impression that immunity was waived only if the arbitration had some bearing with the United States. He accepted jurisdiction only on the basis that "[a]lthough the United States was not named, consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States"[180] presumably on the ground that the arbitrator might well have selected a U.S. venue for the conduct of the proceedings. He therefore accepted jurisdiction only on that likelihood. The implication is that if the parties had specifically excluded the possibility of the proceedings taking place in the United States the judge would not have admitted jurisdiction.

The United States Supreme Court declined to express a view on the issue when given the opportunity.[181] The Supreme Court expressly declined to "decide whether, by waiving its immunity, a foreign state could consent to suit based on activities

[176]*Birch Shipping Corporation v The Embassy of Tanzania*, 507 F. Supp., 311 (1980, DDC).

[177]*Ipitrade International v Federal Republic of Nigeria* 465 F. Supp, 824 (1978, DDC) where the agreement was for arbitration under ICC Rules in Paris in accordance with Swiss Law.

[178]482 F. Supp, 1173 (1980, DDC).

[179]We should point out that the award in the Birch shipping was enforced by the same Judge (John Lewis Smith Jr.) who heard the Liamco case and had been made in New York.

[180]*Supra* p. 1178.

[181]*Verlinden B.V. v Central Bank of Nigeria*, 76 S. Ct Reports, L. Ed, 2d, 81 [1985].

wholly unrelated to the United StateS",[182] although the view would have been *obiter*, since the case was not directly involved with proceedings arising out of an arbitration.[183] The action had been brought for anticipatory breach of an irrevocable letter of credit issued by the Central Bank of Nigeria in connection with an underlying cement supply contract made by the government of Nigeria. The question was whether Nigeria had implicitly waived its immunity to jurisdiction in respect of an action in court to collect on the letter of credit. The District Court held that the State had not, on the ground that Nigeria's waiver of immunity under the contract (the underlying cement supply contract containing the arbitration agreement) could not bind a state instrumentality - the Central Bank - under a different obligation (arising out of the letter of credit), particularly as the Central Bank itself was not a party to the underlying arbitration agreement.[184] That case should therefore properly be regarded as one in which there was no arbitration agreement binding on the parties directly involved in the proceedings in court, viz, the Central Bank and the foreign company.[185]

There was a divergence of judicial opinion in the United States even as regards the ICSID Convention. The Convention itself, to which the United States is a party, specifically confers enforcement jurisdiction to domestic courts of member states under Article 54. In fact Article 54 creates an obligation for member states to recognise and enforce an ICSID award, such that, in the context of the Convention, immunity from enforcement jurisdiction is not available to a state. It is on that basis that the United States District Court for the Southern District of New York accepted jurisdiction in *Letco v Liberia*.[186] The Court stated that "as a signatory to the Convention" Liberia "waived its sovereign immunity in the United States with respect

[182] *Ibid* p. 90, note 15.

[183] See District Court, Southern District New York, 488 F. Supp, 1284.

[184] *Ibid* p. 1301.

[185] The District Court was affirmed by the Court of Appeals, Second Circuit, on another ground, that, the transfer of jurisdiction to Federal Courts operated by the Federal Sovereign Immunity Act was in violation of Article III of the U. S. Constitution: 647 F. 2d. 320 (1981); reversed by the Supreme Court: 76 S. Ct. Reports, L. Ed, 2d, 81 [1985].

[186] 650 F. Supp, 73.

to the enforcement of any arbitration award entered pursuant to the Convention."[187] The arbitration proceedings in that case appear to have been conducted at more than one location, including Washington, London and Paris. Meanwhile in declining jurisdiction in the case of *Maritime International Nominees v Republic of Guinea*,[188] the U S Court of Appeals for the District of Columbia took the view that an ICSID arbitration agreement could not implicitly waive the immunity of the state, because, as the agreement did not contemplate a role for U S courts in compelling arbitration if that became necessary before or during the proceedings, the ICSID arbitration clause did not have any relation to the United States even though the arbitration might have taken place there.[189] It should be pointed out, though, that instead of ICSID arbitration as provided for in the contract, the claimant in that case chose to refer the case to American Arbitration Association (AAA) arbitration under that associations' rules, pursuant to which the award concerned was made in its favour. In those circumstances it would have been improper to enforce the ensuing award since by compelling arbitration other than in accordance with the contract, the claimant was not only acting in breach of the arbitration agreement but appeared at the same time to be subverting the very purpose of the ICSID Convention,[190] which states that submission to ICSID arbitration is to "be deemed consent to such arbitration to the exclusion of any other remedy."[191]

It was as a result of the above uncertainty in judicial pronouncements that an amendment was introduced to the U S Foreign Sovereign Immunities Act (FSIA) in 1988 providing that a foreign state is not immune from the jurisdiction of U S courts in any case

> in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to

[187]*Ibid* p. 77.

[188]693 F. 2d. 1094 (1982, 2d Cir.).

[189]*Contra*, Delaume "ICSID Arbitration and the Courts" (1983) 77 AJIL, 784, pp. 790-92.

[190]Sullivan, Gary B "Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits" (1983) 18 Texas Int'l. L. J., 329; Chukwumerije, Okezie "ICSID Arbitration and Sovereign Immunity" (1990) 19 Anglo-American L. Rev., 166, p. 176.

[191]Article 26.

arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the united States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.[192]

The second stage at which the immunity of a state is relevant arises when, and whether, having claimed jurisdiction over the state, a domestic court could exercise that jurisdiction to enforce the award and, subsequent to that, to order execution against identified or identifiable assets of the state. As far as enforcement is concerned Article 54 of the ICSID Convention mandates all member states to do so. Since, if it did not have jurisdiction, a court cannot ensure the enforcement of a Convention award pursuant to the duty imposed by Article 54, that Article must therefore also be read as conferring *in personam* jurisdiction, discussed above.[193]

In the cases referred to below we are concerned with situations where, having asserted that it has jurisdiction, a domestic court at the place of enforcement has proceeded to exercise that jurisdiction either to enforce or order execution of the award on the basis that the state concerned does not enjoy immunity against enforcement and execution, or denied enforcement or execution on the ground of foreign sovereign immunity.

The cases suggest that there is no established trend across, and, sometimes,

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[192]Section 1605 (a)(6). Section 1607 deals with cases where the state itself brings a suit and there is a counter-claim and paragraph (1) of sub-section (a) concerns cases of express and implied waivers. In both situations the state is not immune from jurisdiction.

[193]*Letco v Liberia*, 650 F. Supp, 73 (1986, SDNY); *Senegal v Soabi* (1990) 119 JDI, 141, CA Paris; rev'd on another ground: (1991) Rev. Arb., 639, Court of Cassation; *Benvenuti & Bonfant v The Government of Congo*, (1981) 108 JDI, 843, CA Paris.

even within the same jurisdiction. Some courts have enforced awards against the states and others have withheld enforcement.

Of the United States cases referred to above, *Ipitrade v Nigeria*[194] and *Letco v Liberia*[195] are cases in which the courts enforced awards against the states on the ground that the original submission to arbitration constituted a sufficient waiver of immunity against enforcement of the resulting award. However, in Letco, the court declined to order execution against specific assets[196] of the government against which the award was to be collected on the ground that they were not used or intended for commercial purposes. They were to be applied toward the operation and "maintenance of governmental functions", stated by the Court to be clearly in "exercise of powers particular to a sovereign."[197] In *Birch Shipping Corporation v Tanzania*,[198] the judge issued an order against a "checking account" (current account) held by the Tanzanian embassy with a US Bank on the ground that although the account was used to "pay the salaries of the staff" and for services incidental to the operation of the embassy, that description was within the meaning of the definition of "commercial activity" under the US FSIA 1976. A state's assets used for commercial activities are not generally immune from execution in the United States and elsewhere.[199] The Court also took the view that it did not matter that the account was not in use solely for commercial activities.[200] In *Liamco v Libya*[201] the award was not enforced against Libya on the ground that the subject matter of the underlying dispute "was not capable of settlement by arbitration under the law of the [United

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[194]645 F. Supp, (1978).

[195]650 F. Supp, 73 (1986).

[196]Tonnage and registration fees and other taxes due from Liberian registered shipowners to the Liberian government.

[197]*Ibid* p. 78.

[198]507 F. Supp, 311 (1980, DDC).

[199]See for example Section 3 of the UK State Immunity Act 1978.

[200]*Supra* p. 313.

[201]482 F. Supp, 1175 (1980, DDC).

States]",[202] because the nationalisation decree of the Libyan government abrogating the contract came under the "act of state doctrine", under which, in the view of the District Court, the Courts of the United States will not sit in judgment on the acts of the government of another country.[203]

Of the greatest significance is a 1988 amendment to the FSIA 1976 which permits the execution of arbitration awards against a sovereign state on the very basis that the state had submitted to arbitration.[204] The effect, as George Kahale puts it, is that the "same agreement which supports jurisdiction ... will now suffice to remove immunity from execution."[205] This means that the enforcement of an arbitration award in the United States against a foreign state is easier than the enforcement of a United States court judgment against the same.[206]

In France the result has been almost similar to the United States with some awards being enforced and others denied enforcement on the ground of the states' immunities. *Benvenuti and Bonfant v Congo*[207] was an ICSID award made in favour of the foreign corporation. The French Court did not feel constrained in enforcing the award pursuant to Article 54 of the ICSID Convention, to which France is a contracting state. However in *Soabi v Senegal*[208] the same Court declined to enforce

[202]By virtue of Article V(2)(a) of the New York Convention as enacted in the United States: US Federal Arbitration Act, 9 U. S. C. Section 207.

[203]*Underhill v Hernandez*, S. Ct. Reports, L. Ed, 456 (1897); *Alfred Dunhill of London v The Republic of Cuba*, 48 L. Ed., 2d. 301; *KirkPatrick & Co. v Environmental Tectonics Corporation*, 107 L. Ed., 2d. 816 (1990); but see FAA as amended in 1988, Section 15, which provides that "[e]nforcement of arbitral awards, confirmation of arbitral awards, and execution upon judgements based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."

[204]Section 1610(a)(6). It provides that the property of a sovereign state used for commercial activities is not immune from execution if "the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision of the arbitral agreement."

[205]"New Legislation in the United States Facilitates Enforcement of Arbitral Agreements and Awards against Foreign States" (1989) 6 Journ. Int'l. Arb'n., part 2, 57, p. 64.

[206]Joly, F "Etat-Unis: Une Réforme de 1988 Restraint le Domain des Immunités des Etats Etrangers en Matière D'Arbitrage" (1990) Rev. Arb., 607. For an overview of the changes in the United States see O'Neill, Philip D. "American Legal Developments in Commercial Arbitration involving Foreign States and State Enterprises" (1989) 6 Journ. Int'l. Arb'n., part 1, 117.

[207]Paris Court of Appeal decision of 26 June 1981 (1981) JDI, 843.

[208]Decision of 5 December 1989 (1990) 117 JDI, 141.

another ICSID award against Senegal on the ground that the State had not waived its immunity to execution pursuant to Article 55 of the Convention. Article 55 of the Convention preserves the immunity of states against execution, subject to the laws in force in the state where such measures are requested. The decision was criticised for failing to draw the distinction between enforcement, as required under Article 54 and immunity to execution retained under Article 55,[209] a distinction that had already been pointed out by the same Court in Benvenuti.[210] On appeal, the decision was reversed by the Court of Cassation,[211] which stated that so long as the award creditor had merely requested leave to enforce (exequatur), the state could not properly assert immunity which, under the ICSID Convention, could not arise until at the subsequent stage of execution.

What the treatment of enforcement of awards probably suugests is that any attempt at creating a special international regime for the settlement of state contracts by arbitration, such as the ICSID, may create more problems than those it may be intended to resolve.

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[209]See Gaillard (1990) 117 JDI, 144; Broches (1990) Rev Arb, 638.

[210]*Supra.*

[211]Decision of 11 June 1991 (1991) Rev. Arb., 637.

GENERAL CONCLUSION

Arbitration is about processes. It is not law, and it is not also the product of any principles or rules of law. It developed spontaneously from a basic desire to see to it that disputes are settled. That says much about what ought to be its true nature. I take the view that the character of the process should not be explained in terms of the extended jurisdictional authority of the state or in terms of contract. As it arises from the basic desire to resolve disputes, arbitration should be analysed in those terms, in the same way that business enterprises are analysed in terms of the need to produce goods and services. The fact that the state intervenes from time to time to determine the limits within which the institution functions ought not, in itself, or in any other way, distort the fundamental character of arbitration. Business organisations and other institutions, too, are subject to the pervasive nature of state control as the state exercises its powers to regulate. A business unit, nevertheless, remains defined as a mechanism to produce goods and services for profit although, like arbitration, its activities are regulated by the state in different ways, including by means of the law. The law regulates business associations for the same reason that it regulates other institutions, in the interest of order; and yet the need to produce goods and services, on its own, sufficiently justifies the existence of business associations and other units created for similar purposes. The same should apply to arbitration. The need to resolve disputes, in itself, explains the existence of arbitration and provides the basis for compliance with its outcome.

The fact that parties consent to have disputes resolved by arbitration does not necessarily imply that the process is based on 'contract', or should the doctrine of 'contract' be allowed to over-influence its functioning; after all, contract as mere 'consent' or 'agreement' is inherent in most other acts of day-to-day activities. The fact that the process of arbitration could also be 'procedural' is not particularly significant. It could have been any of several other mechanisms, provided the operation of the chosen mechanism is consistent with the need for social cohesion. It is not entirely inconceivable that modern technology may provide mechanisms to determine disputes if fed with all the elements, including the contentions of the disputants, provided such mechanisms are able to take into account non-tangible factors, such as the need to preserve business good will. Disputants may well prefer such mechanisms in their search for objective or ideal justice. Arbitration, however, operates in the complex sphere of social and human relationships and cannot thus be simplified. The analysis of its nature based on 'contract' (as a 'binding' arrangement) or on the jurisdictional authority of the state, in my view, limits the meaning and may in fact undermine the true character of arbitration as primarily a means of settling disputes.

The merit of emphasising the basis of arbitration on the need to resolve disputes is that it obviates the difficulties associated with inflexible concepts or theories founded on contract and drawn from rules and principles of law. If the outcome of arbitration is then binding, it is so by virtue of the fact that it is sensible that differences are resolved speedily and without disrupting harmonious relationships, and not necessarily on the basis that it arises from a contract. The legitimacy or legality of the process, thus, arises directly in response to its perceived social function. The choice of a particular procedure or device may well only be a matter of practicality, in the general sense of the word.

Inherent in the nature of arbitration, therefore, is the perception that ought to emphasise what Cappelletti describes as 'mending justice',[1] including flexibility, a much preached and much desired, although in the present climate much less practised, virtue of arbitration. One must admit, however, that there is a growing recognition of that alternative perception of the function of arbitration through the development of the multiple techniques of alternative dispute resolution (ADR). ADR is now very developed in the United States[2] and is in an advanced stage of acceptance in England,[3] where it appears to have had a favourable reception by the judiciary, the bar and the academic

[1] Cappelletti: "Alternative Dispute Resolution Processes within the Framework of the world-wide Access-to-Justice Movement" (1993) 56 MLR 282, p. 287.
[2] Goldberg, Sander, & Rogers: Dispute Resolution: Negotiation, Mediation, and Other Processes, 2nd Edn., Little, Brown & Co., Boston, 1992; Murray, Rau & Sherman: Processes of Dispute Resolution: The Role of Lawyers, Westbury, New York, 1989. For a short history of the ADR in the United States see Salem, "The Alternative Dispute Resolution Movement: An Overview" (1985) 40 Arbitration International, No. 3 pp. 3-11. An extensive bibliography on ADR is provided by Hinchcliff: Dispute Resolution: A Selective Bibliography, American Bar Association, Washington, D.C.
[3] See Dispute Resolution: Civil Justice and its Alternatives, special issue, MLR, volume 56 No. 3 (May 1993)

community.[4] Brown and Marriott say that it arose from the dissatisfaction with the traditional methods of dispute settlement.[5] What is common to the several techniques of ADR as developed in the United States and England is the shift from adversary tactics, to dispute solving by consensus; and we know that same approach, i.e., dispute settlement by consensus, has for centuries been inherent in the perception of adjudication and dispute resolution as a whole in other parts of the world, including many parts of the developing world. In fact, one cannot fail to mention the (conscious or unconscious) influence of China, Japan, and South East Asia in general as important players in international economics, in that development. What at one time may have been condemned as a backward perception suited only to small communities in underdeveloped economies, and therefore not adequate for use in an industrialised complex society, is in relation to China and Japan described as just another way of doing things and, therefore, worthy of emulation. The successful economic performance of China, Japan, and the East has contributed to a better understanding of the generally conciliatory approach to resolving conflicts in that part of the world. Gradually, too, the contribution of the less industrialised regions of the world to this other perception of adjudication is also being acknowledged. Professor Mauro Cappelletti says in that respect that Western countries "should be humble enough to recognise that [they] might have a lot to learn from African and Asian traditions"[6] on this "conciliatory", "non-contentious" alternatives to dispute settlement.

That approach applies to private, as well as to state party arbitration. The absence of material on the participation of third world private parties in international arbitration makes it difficult to form any view on their experience with the process. Similarly, the absence of a developed regime of commercial arbitration within the countries themselves, (notwithstanding the sudden explosion of arbitration statutes enacted in the same countries through-out the 1980s and 1990s with a strong international coloration), makes it impossible to come to an accurate view of their attitude to domestic commercial

[4] See Lord Woolf: Access to Justice: Final Report to the Lord Chancellor on Civil Justice Systems in England and Wales, HMSO London, July 1996; The General Council of the Bar: Report of the Committee on Alternative Dispute Resolution, November, 1991; Brown & Marriott: ADR Principles and Practice, Sweet & Maxwell, London, 1993.
[5] *Ibid.* p. ix.
[6] *supra.*

arbitration. What the absence of a developed practice of commercial arbitration within the countries suggests, however, is that as participants, whether as individuals, as corporations (private or public), or in their capacity as states, they became involved with the process before they had experimented with it in the domestic commercial setting. The result is that they were inexperienced in arbitration of the type practised in international trade, and that was bound to affect their attitude.

With respect, however, to the arbitration of state contracts, it should be pointed out that states (underdeveloped and industrialised alike) have ordinarily been resistant to submit to arbitration with private parties. Haxel Fox states that a submission to arbitration was often regarded as a loss of liberty.[7] If it was so regarded, it is not surprising that new states also adopted a similar attitude. In the particular case of state contracts by developing countries, arbitration clauses were intended as a contractual device to protect the investor. That distorted the role of arbitration, for, the impression created has not been one that portrays arbitration as a neutral facility to which both parties have recourse whatever the outcome, but as a means of safeguarding the position of one of the parties in dispute. In the circumstances, it would not have been surprising or unreasonable for the countries to ask, as did Professor Lowenfeld in a related context, whether developed states and private investors who requested and insisted on arbitration "... simply made a choice of forum, with the expectation that that choice had no effect on the substance of any dispute that may arise, or whether some difference in the source of law as well as in the decision-making process is part of the understanding ..."[8]

The answer would appear to have been in the positive, at least in relation to the creation of the International Centre for the Settlement of Investment Disputes, (ICSID), as the only international mechanism set up specifically to deal with state arbitration with host countries, and also in relation to the application of international law a the governing law of the transactions by arbitration tribunals. The background to the making of the Convention suggests that it was taken for granted that the choice of forum indicated both the choice of law and the substance of the outcome of the process. Although the creation of the Centre

[7] "States and the Undertaking to Arbitrate" (1988) 37 ICLQ 1. The position has, however, improved.
[8] "Lex Mercatoria: An Arbitrator's View" (1994) 6 Arbitration International, 133, p. 149.

was to be merely a choice of forum, it is obvious that the choice was intended to affect the substance of disputes, and nothing that has happened since then suggests otherwise.[9] It would of course be a matter of pure guesswork to assess the impact of ICSID and its sister institution, MIGA, on the overall flow of investment capital to host countries, especially as such an impact could only be indirect. What seems clear, unfortunately, (as far as one can tell from the nature of the transactions so far involved in ICSID arbitration), is that the Centre and the Agency have been concerned not with 'investment' transactions, in the sense of transactions which generate a flow of capital to developing countries, (since that was the stated purpose of both instruments), but with transactions producing a net *outflow* of investment resources from the countries concerned, such as construction contracts.[10] Most other ICSID cases concern petroleum and other natural resources contracts, which commercially hold-out a strong attraction of substantial profits often outweighing the risks involved. They are in most cases transactions which investors would undertake irrespective of the jurisdictional and financial guarantees of ICSID and MIGA.

That the subject of state contracts by many of the countries may be expropriated, nationalised, confiscated, or the obligations under such contracts unilaterally modified by the regimes concerned, is ultimately not so much a matter of legality and financial guarantees as a problem of democracy and the accountability of those in power. Government officials who negotiate contracts in disregard of their own domestic laws[11], and who too frequently infringe upon the basic human and property rights of their own citizens, are likely to behave similarly towards others.

As far as the future of commercial arbitration in the same countries is concerned, the solution may lie, in the first place, in encouraging its use within the countries themselves by business and industry with a view, ultimately, to generate a genuine belief in its merits at the international level.[12]

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[9] The creation of the Multilateral Investment Guarantee Agency, MIGA, reflected a similar concern, i.e., the protection of investments.

[10] Nathan: "Submission to the International Centre for Settlement of Investment Disputes in Breach of the Convention" (1995) 12 J. Int'l. Arb'n., part 1, 27.

[11] Paulsson: "Third World Participation in International Investment arbitration" (1987) 2 ICSID Rev.,-FILJ, 19 p. 60.

[12] Elombi "L'arbitrage Commercial International dans le nouveau Code Tunisien" (book review) (1996) 8 Afr. J. Int'l. Comp. Law 278, pp. 279-80.

APPENDIX I

ICSID Awards and the Denial of Host State Laws

George ELOMBI*

The emergence of developing countries as participants in international commercial arbitration was met with a robust rejection of the application of their laws to what are now known as "State contracts". In the early State arbitrations, it was claimed that the legal systems of the countries concerned were too under-developed to deal with the complex nature of the transactions involved. It was suggested, as reflected in the now too well-known phrase of the arbitrator in an award involving Abu Dhabi, a Gulf State,[1] that it would, as regards the proper law of the contract, have been "fanciful to suggest that in this very primitive region there (was) any settled body of legal principles applicable to the construction of modern commercial instruments."

Parallel with that development, it was also argued that the very nature of the transactions,[2] together with the fact that they usually contain a submission to arbitration by the host State concerned, necessarily brings the contracts within the realm of international law. In the vocabulary of the trade, they become "internationalised". This approach to the question of the proper law of State contracts was criticised on the ground that it confuses the separate domains of public and private international laws. If, under the relevant private international law rules, a contract is found to be governed by any particular law, that law, said F.A. Mann, as the proper law, " . . . not merely sustains but, because it sustains, may modify or dissolve the contractual bond."[3] Mann however recognised that a State contract could still be internationalised, although only by means of the same private international law process. Nothing stops parties to the State contract from making international law the governing law of the contract, by agreement. In the absence of an express or implied choice, the same traditional principles of conflict of laws might lead to the application of international law, particularly as Mann not only expressly denied the existence of the presumption in favour of the host State law, but also warned against overrating its significance, if it exists.[4] His critics also admitted that the contracts are normally

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[1] *Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi*, award of August, 1951, [1952] 1 ICLQ, 247.

[2] It is said that they are contracts *sui generis*, sometimes regarded as a treaty, sometimes as a quasi-international contract, or an economic development agreement, owing to the size of the financial commitment of the investor, or as a self-contained contract, and for those reasons subject to international law.

[3] *State Contracts and State Responsibility* (1960) 54 AJIL, 572 at 581, citing *Kahler v. Midland Bank*, [1950] A.C., 24 at 56.

[4] *The Proper Law of Contracts Concluded by International Persons* (1959) 35 BYIL, 34.

governed by the local law of the host State, but argued that the result of the application of that law should be denied where the State exercises its sovereignty to alter "the local law as to end its obligations under the contract "[5] before its full duration, on the basis that it is contrary to international law. This view received the growing support of arbitration awards.[6]

Thus, at the time the International Convention on the Settlement of Investment Disputes (ICSID) Convention came onto the scene, two views were prevalent. One directly rejected the application of host State laws on the basis that they were lacking in sophistication. The other did so indirectly, both by treating international law as the governing law of State contracts and by subjecting the local law to international law. Both grounds were, of course, not acceptable to the countries concerned. The ICSID Convention did not resolve the issue. In what has always been regarded as a compromise solution, it made both systems of law—domestic and international—relevant to investment disputes to which the Convention applies. The question, thus, is whether, nearly thirty years since the Convention, the then prevalent trends have been modified in favour of the much acclaimed compromise.

I. THE CONVENTION: ITS AWARDS AND THE INADEQUACY OF HOST STATE LAWS

Three factors rendered the application of host State laws directly relevant to the type of contracts to which the World Bank ICSID Convention applies. First, Article 42 directs that, in the absence of agreement by the parties regarding the proper law of the contract, an ICSID tribunal should "apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws)." Next, as noted by Sornarajah,[7] the States themselves began to introduce legislation to cover the area of investments generally, and that of natural resources in particular. Finally, express contractual provisions were also being made by the countries concerned for the determination of the disputes by reference to their laws. In those circumstances, it became increasingly impossible to suggest that the State laws could not be applied because they were not adequately developed. However, ICSID tribunals have, in many cases, found other legal techniques to avoid the laws.

In cases where the reference is to the general law as against a specific legislation of the receiving State, an avoidance mechanism has been to refer to the principles of commercial law of the former colonial power of the State concerned on the ground that the host State's laws are drawn from the former, and the dispute determined accordingly. In *Klöckner v. Cameroon*,[8] the Tribunal found that the relevant Cameroonian law was derived from French law and on the basis of that finding, felt

[5] Jennings, *State Contracts in International Law* (1961) 37 BYIL, 156.

[6] See for example, *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, award of 15 March 1963 [1967] 35 I.L.R., 136.

[7] *International Commercial Arbitration: The Problem of State Contracts*, Longman Singapore Ltd., 1990, at p. 20; *The Climate of International Commercial Arbitration*, 8 J. Int. Arb. 2, June 1991, 48.

[8] Award of 21 October 1983 published in excerpts: see Jan Paulsson, *The ICSID Klöckner v. Cameroon Award: the Duties of Partners in North–South Economic Development Agreements*, 1 J. Int. Arb. 2, July 1984, 145.

comfortable to draw directly on French law without any further reference to Cameroonian law. Thus, to deal with the duty of good faith (full disclosure), the Tribunal "took for granted" that the duty is a "basic principle of *French* law, as is indeed the case under other national codes" (emphasis added)[9] without the need for reference to the position in Cameroonian law. There is no suggestion as to whether the Tribunal should have had regard to the local jurisprudence and statute, if any, on the duty of full disclosure.

In considering the second legal issue involved in the dispute, the defence of *exceptio non adimpleti contractus*, extensive citation and discussion of French case-law is made and relied upon, together with general principles of English and international law, as systems which both reach similar conclusions on the defence as under French law. For that purpose, a good section of the award is concerned with the discussion of "[general] principles under French, English and international law".[10] Nowhere in the award is reference made to Cameroonian jurisprudence, academic writing or statutes on the principle of good faith, its resulting duty of full disclosure and the defence of *exceptio non adimpleti contractus.*

It is clear both from the award and the ensuing annulment proceedings that all parties to the award were concerned not with Cameroonian law based on French law but with *French civil law*. Thus, Klöckner's application for annulment against the original Tribunal's award on the question of full disclosure, alleging that the Tribunal had failed to apply the law of the contracting State in accordance with Article 42 of the ICSID Convention, was not based on the absence of reference to Cameroonian law itself, but on the Tribunal's assumption that partners in a close contractual relationship must deal in good faith is a "basic principle of *French civil law*" (emphasis added).[11] In the application for annulment, it was claimed that such an assumption was not founded on a "specific principle of *French law*, but on a sort of declaration, as general as it is imprecise, of principles which are allegedly universally recognized." (emphasis added).[12] The objection was accepted by the *Ad Hoc* Committee, which pointed out that the original Tribunal:

> "... does not claim to ascertain the existence (of a rule or principle) but asserts or postulates the existence of such a 'principle' which ... the Tribunal assumes or takes for granted that it is a basic principle of *French law*." (emphasis added).[13]

The Committee then questions whether without "reference whatsoever to legislative texts, to judgments, or to scholarly opinions"[14] (presumably French), the assumed "basic principle" can be held to exist in French positive civil law. By way of contrast, the *Ad Hoc* Committee points to the fact that in considering the defence of *exceptio non adimpleti contractus*, the Tribunal made extensive references to French case-

[9] Ibid., p. 157.
[10] Ibid., p. 159.
[11] Ibid., p. 157.
[12] *Ad Hoc* Committee first annulment award of 3 May 1985 [1986] 1 ICSID Rev., FILJ. 89, p. 111, paragraph 67.
[13] Ibid.
[14] Ibid., p. 113, paragraph 71.

law and academic writing, and expresses the view, without however denying the existence of the duty to disclose, that, as regards that duty, the Tribunal:

> "... either began a similar search for authority but found it unproductive or, more likely, thought that a search for positive law was unnecessary."[15]

The Committee then held that:

> "... [in] any event, in the absence of any information, evidence or citation in the award, it would seem difficult to accept, and impossible to *presume*, that there is a general duty under *French civil law*, [emphasis added] or for that matter other systems of civil law, for a contracting party to make a 'full disclosure' to its partner. If we were to *presume* anything, it would instead be that such a duty (the basic idea of which may, of course, be accepted as it follows from the principle of good faith ...) must, to be given effect in positive law, have conditions for its application and limits!" (emphasis in original).[16]

It then concludes that:

> "[it] is not the responsibility of the ad hoc committee under Article 52[17] to determine instead of the Tribunal what rules of *French civil law* might be applicable, to insert them in some *a posteriori* way into the Award ... " (emphasis added).[18]

The repeated reference to French law points to the fact that the tribunal was not concerned with Cameroonian law at all.[19]

What is objectionable about that process is that it fails to acknowledge that the general laws of these countries, including their commercial laws, although drawn from, are not exactly the same as French law. Although the laws are similar in general principles, they show some significant differences in detail, owing not only to the fact that the local courts evolved a separate jurisprudence before and after independence, alongside modifications introduced by new local statutes, but also to the method by which French law was extended into the then colonies. In response to the extensive, if somewhat unnecessary, reference to and reliance placed on French law as the basis for the applicable domestic statutes, in another case[20] the dissenting arbitrator felt compelled to state[21] that as far as the particular State party to the dispute, Senegal, was concerned, French law remains relevant only for the purposes of illustration:

> "... [à] partir du 4 avril 1960, date de l'indépendence du Sénégal, le droit Sénégalais s'est détaché du droit Français, celui-ci ne pouvant servir qu'à titre d'illustration d'une opinion quand il s'agit de situations postérieures à cette date." ("Upon attaining independence on 4 April 1960, Senegalese law became separated from French law, which, in relation to causes arising thereafter, remains relevant only for the purpose of illustration."—translated by the author).[22]

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[15] Ibid.

[16] Ibid., paragraph 73.

[17] Which sets out the grounds of appeal against an ICSID award.

[18] *Op. cit.*, footnote 12, p. 113, paragraph 73.

[19] The same approach is adopted in *Agip v. Congo* [1993] 1 ICSID Reports, 306, and *Benvenuti & Bonfant v. Congo*, ibid., 330 where the Tribunals concluded that the relevant Congolese law was the same as the law of France in force in the country at the time of independence, omitting any further reference to the law of the Congo. See also *Atlantic Triton Co. v. Guinea*, award of 21 April 1986, [1988] 115 J.D.I., 181 (excerpts).

[20] *Société Ouest-Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID award of 25 February 1988, [1991] 6 ICSID Rev., FILJ, 125.

[21] Although that was not necessary, since the settlement had clearly been made on the basis of Senegalese law.

[22] See footnote 20, *supra*, p. 242.

The point would appear to have been taken, seeing that in a subsequent ICSID *Ad Hoc* Committee award involving the State of Guinea, the Committee recognized "the fact that Guinean law is independent of French law, although derived from it."[23] It noted that prior to independence, French law was applied in Guinea, as elsewhere in the French colonies under certain conditions, and in due course rapidly replaced the local customs in civil and commercial matters:

> "... [nevertheless], French laws and regulations were not automatically applicable in the colonies in these matters. They had to be introduced in accordance with the principle of *spécialité législative* ... and the modifications locally enacted were not necessarily the same as those applicable in France. Consequently, certain discrepancies may be found between French law as applied in France, and local Guinean Law ..."[24]

although that was not the situation in relation to the particular provision of law involved in that case.

It is necessary to bear that in mind and, therefore, to undertake a proper search of the applicable domestic laws in each case, as indicated by the parties and the provisions of such Conventions or other legal instruments as are in force requiring the application of host State laws. In any event, since independence, the laws of the former colonial powers are only a source of, and not the actual laws of the "new" States. The attempt to undermine these laws by over-emphasising the link with the European laws from which they are drawn so as to apply the latter, without doubt suggests a thinking process based on the assumed inferiority of the legal systems concerned. It also indicates a determined attempt to subordinate these laws to a different and preferred legal order—an objective which has been so well achieved by the process of internationalisation.

That process assumes a curious form where the law concerned is a special piece of legislation governing foreign investments, particularly if it takes the form of an international agreement, such as a bilateral investment treaty. The technique, as used in the award in *Asian Agricultural Products AAPL v. Sri Lanka*[25] is to treat the particular treaty separately from the rest of the law of the host State, so as to ignore the latter. The award was concerned essentially with the interpretation of a Sri Lanka–United Kingdom Bilateral Investment Treaty (BIT), which had been extended to Hong Kong. The contract between the AAPL and the government did not contain an applicable law clause. In the arbitration, both the claimant and the State relied heavily on the provisions of the Treaty, and on that basis, the majority of the Tribunal thought that the Treaty constituted the primary source of the applicable legal rules for the determination of the dispute. In the view of the majority, the existence of the Treaty and the parties' reliance on it, together with the fact that the parties had failed to select the proper law in advance, meant that the Tribunal could not determine the applicable law in accordance with the scheme set out in Article 42. In those circumstances, the

[23] *Maritime International Nominees Establishment v. Government of Guinea*, award of 22 December 1989 [1990] 5 ICSID Rev., FILJ, 95.
[24] Ibid., p. 112.
[25] Award of 27 June 1990, [1991] 6 ICSID Rev., FILJ, 526.

proper law fell to be determined "by observing and construing the conduct of the parties throughout the arbitration proceedings."[26] Reliance by the parties on the Treaty provisions was therefore construed by the majority of the panel as indicating "their mutual agreement" as to the proper law of the contract for the purposes of Article 42.

As pointed out by the dissenting arbitrator, that approach to the issue is flawed in many respects, the principal one being that it is inconsistent with the scheme of Article 42, which, in the absence of choice, mandates the application of the host State law, together with the relevant rules of international law, if any. If, as was submitted by the defendants in that case, the Sri Lanka–United Kingdom BIT provisions were relevant to the determination of the dispute and relied upon by the parties, it could only be on the basis that the Treaty had become part of the law of Sri Lanka. This approach would, as stated by the dissenting arbitrator, have emphasised the importance of the domestic law of the State as the primary source of rules on the protection of property or governing all forms of investments in receiving States. The majority did not seem to appreciate that treaties signed by the government of Sri Lanka became applicable in that country by virtue only of Article 157 of its Constitution, which incorporates them into the domestic law.

To consider the Treaty as part of the law of Sri Lanka would still not have made a difference in the outcome of the particular proceedings since in any case the Tribunal would have been led to the same Treaty provisions as the relevant rules of the applicable law of the contract. What is at issue, however, is a question of principle regarding the place of the domestic law in resolving these disputes. In failing to interpret the provisions of the Treaty as part of the law of the State party to the contract, the Tribunal undermines the significance of that law and in particular, of Article 42. The majority of the Tribunal appeared to be under the impression that to admit the Treaty provisions as applicable only as part of the law of Sri Lanka would have amounted to a recognition of host State laws as governing investment contracts, at a time when the main current of legal opinon is still against such a view.

II. The Convention: Its awards and international law

The rejection of the laws of the State party to the contracts under Article 42 is supported on the basis that, in the relationship between that law and international law, Article 42 envisages that international law shall be overriding in the event of a conflict. Aron Broches states the position in the following terms:

> "The tribunal will normally first look at the law of the State party to the dispute. Then the result of the application of that law will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law."[27]

[26] Ibid., p. 533, paragraph 20.

[27] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application* (1993) XVIII Yearbook Comm. Arb'n., 627 at 668.

The view has received the overwhelming support of ICSID tribunals.[28] The conclusion reached in ICSID awards is that international law is the superior norm, against which the suitability of the domestic law of the investment receiving State is checked. If the law of the State fails to meet the required standard, it must be denied application.

Without doubt, the role and significance of international law under Article 42 of the ICSID Convention is one of interpretation. The Convention did not, however, set out to undermine the laws of host States. The compromise in Article 42 is that both domestic and international law are made relevant to a legal dispute to which the Convention applies. The wording of Article 42[29] itself does not indicate a preference for any of the laws potentially in conflict. Against the interpretation which favours international law and with which ICSID tribunals have so far found favour, it must be pointed out that Article 42 does not assume that international law is relevant and applicable in the same way that domestic law is. The application of the law of the State party to the dispute is stated first, and juridically, as a matter of course.[30] International law, on the other hand, is made to apply concurrently with the law of the host State only to the extent that it contains rules which are appropriate to such contracts, since international law is normally relevant only in relationships between sovereign States. The wording of Article 42, for that reason, calls for the application only, of "*such* rules of international law as *may* be applicable." (emphasis added). If it had been intended otherwise, that is, as is suggested in the awards, the makers of the Convention would have done so by providing clearly for the application of "rules of international law". However, if, exceptionally, such appropriate rules of international law relevant to contracts governed by the Convention were discovered, but found to be inconsistent with the relevant domestic law, the letter of Article 42 unfortunately does not provide the solution. It fails to indicate what set of rules should take precedence. Therefore, any view which seeks to give precedence to one system or the other cannot be supported by reference to the wording of that Article. In those circumstances, the solution would lie in the spirit both of the Article and the entire Convention. The spirit of the Convention calls for the search for a compromise in all events.

Where, unfortunately, that compromise is absolutely impossible to achieve, the ICSID tribunal must fall back to the ordinary principles of conflict of laws. No doubt, in the majority of ICSID cases although not all, those principles will lead to the application of the law of the host State, both as the law which bears the closest connection to the transaction, and as the law of the only State whose interests are significantly affected by the contract and the outcome of the dispute. It must be

[28] See for example, *Klöckner v. Cameroon*, footnotes 8 and 12 *supra*; *Amco v. Indonesia*, *Ad Hoc* Committee and re-submitted awards of 16 May 1986 and 31 May 1990 [1993] 1 ICSID Reports, 509 and 569, respectively.

[29] Article 42(1) provides: "The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[30] In the absence of choice and without the provision of the Convention, ordinary principles of law will lead to the host State law.

remembered that the ICSID Convention, in the first place, never intended to deal with the controversial issue of substantive standards applicable to foreign investments. Its stated objective was limited to providing "facilities for conciliation and arbitration of investment disputes."[31] The substantive standards which such a forum would have had to apply are a consideration which was expressly admitted not to be within the scope of the Convention, but which, it must be regretted, Article 42 indirectly attempted to deal with. Not surprisingly it failed in that objective, which could not be achieved merely by juxtaposing international and domestic laws as relevant to those disputes. Where, therefore, a genuine conflict arises between the applicable host State law and *such* rules of international law as *may* be found relevant to contracts of that nature, however described, the tribunal should declare that part of Article 42 inoperative,[32] and on that basis, fall back on well-established principles of private international law. That would be juridically sound.

The approach which seeks to give precedence to one set of the competing norms—in this case international law—is based entirely on considerations of policy. The policy involved is the protection of foreign investments by the use of such substantive standards as may be available in international law. Unfortunately, the ICSID Convention itself was built on the realisation that previous attempts at resolving the issue of foreign investments through the formulation of substantive standards had met with little success. Drawing on that failure, the makers of the Convention therefore opted for a *procedural* solution, based exclusively on providing a *neutral forum* for the settlement of investment disputes. The then President of the World Bank made it clear that the Convention was intended to:

> "... have only limited scope. It would provide machinery but it would not make the use of that machinery compulsory. *Nor would it lay down substantive rules of law regarding the treatment of foreign investments. I do not consider that it would be realistic to try for a more far-reaching agreement at this time.*" (emphasis added)[33].

The argument here is that if the Convention itself could not do something directly, ICSID tribunals cannot do it indirectly. The forum for the discussion of that issue must therefore be elsewhere.

31 Article 1 (2) of the Convention.

32 In that it fails to disclose the intention, whatever that might have been, of the makers of the Convention.

33 Note to the Executive Directors of the Bank, *History of the Convention*, Vol. 2, Part 1, p. 6. See also the General Counsel's opening statements at the consultative meetings of legal experts in Santiago, Geneva and Bangkok, and of the Executive Secretary, Economic Commission for Africa, at the Addis Ababa meeting, ibid., pp. 301, 369, 462 and 239, respectively.

APPENDIX II

CUSTOMARY ARBITRATION: A GHANAIAN TREND REVERSED IN NIGERIA

GEORGE ELOMBI*

The majority decision of the Supreme Court of Nigeria in the case of *Agu v. Ikewibe*[1] has, for Nigeria, put an end to a trend introduced in Ghana over the nature of customary arbitration. The Supreme Court held that arbitration in the customary law of Nigeria is the voluntary submission of a dispute to a third party for a solution based on the subsequent (and not prior) acceptance of his decision, which becomes binding only upon such acceptance by the parties to the dispute. The issue has arisen in mainly two ways before the courts of Nigeria and Ghana, including the former West African Court of Appeal.[2] In one set of cases, the question arises indirectly, when it is pleaded as an estoppel. *Agu v. Ike-wibe* falls in this group of cases. The question has been whether the customary dispute settlement processes involved can be regarded as an "arbitration" in the English law sense of the word, leading to a final and binding award which may then become available to one of the parties to the proceedings to preclude the other party from re-litigating the same matter. As an incidental issue, the courts have had to determine whether a party in those proceedings can withdraw from the process at any stage before or after the award.[3]

While declining to lay down any general principles on the second point, the Privy Council nevertheless held in *Kwasi v. Larbi*[4] that in the absence of sufficient evidence to the contrary, a right so inconsistent with the very nature of arbitration, especially where it allowed one party to resile after the award, did not exist in the customary law of the Akan in Ghana. The decision was expressly stated to have been made in the absence of evidence to suggest the contrary. Presumably, the Privy Councillors would have recognised such a right if there had been sufficient evidence to that effect. However, in rejecting the suggestion advanced for the appellants in that case, that under the customary law, a party who had voluntarily submitted to arbitration still retained the right to withdraw, the Privy Council, and the West African Court of Appeal before it, thought such a view would be repugnant to good sense. The Court of Appeal had looked up to a previous decision of its own in *Foli v. Abeng Akese*[5] for authority to reject the

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1. (1991)3 N.W.L.R., 385; followed in *Ohiaeri v. Akabezi* (1992)2 N.W.L.R., 1. (Sup.Ct.of Nig.)
2. Otherwise known by its acronym, W.A.C.A., an Appeal Court for the former British West African colonies of Nigeria, including the part of Cameroon then under British administration - Ghana, Sierra Leone and Gambia, with final appeals being made to the Privy Council in London.
3. See for example, Kwasi v. Larbi(1956)13 W.A.C.A., 76, Privy Council.
4. Ibid.
5. (1930)1 WACA, 1; reversed on another ground: (1934)2 WACA, 46, Privy Council.

same suggestion. In the latter case, Deane C.J., who gave the decision of the Court, stated in relation to the guiding principles which the courts should follow in setting aside the award of an arbitrator that, "... as the parties choose their own arbitrator to be the judge of the dispute between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts."[6] In response to a similar argument by the appellants before the Court of Appeal in *Kwasi v. Larbi*, Blackall, P., who also delivered the judgment of the Court, admitted that it would no doubt be true under the custom that a party could resile but felt compelled to add that "... the general principles of native customary law are based on reason and good sense and it would take a lot to convince me that Akan customary law is *so repugnant to good sense*[7] as to allow the losing party to reject the decision of the arbitrators to whom he had previously agreed."[8] Then, as now, the language of repugnancy was used in Africa to deny recognition to any aspect of the customary laws which *did not* correspond with the judges' perspective of justice. It is therefore not unlikely that the Privy Council's advice in the case would have remained the same even if there had been adequate evidence of the existence of the right to resile in the relevant customary law. That right may have been tested against the repugnancy doctrine and refused recognition on that ground.

1. THE CENTRAL QUESTION.

The cases made it necessary for the judges to consider the nature and essential requirements of arbitration under the applicable customary law in each case. After referring to *Foli v. Abeng Akese*, Nnaemeka-Agu, J.S.C. (dissentient) in *Agu v. Ikewibe*, reviewed the other decisions of the former West African Court of Appeal on the subject and stated what, in his view, are the requirements of customary arbitration, as deduced from the cases:

(i) a voluntary submission to the arbitration;
(ii) an express or implied agreement by the parties that the decision in the arbitration will be final and binding;
(iii) *that the proceedings were in accordance with the custom* and,
(iv) that the award was published.

The second requirement is that around which much of the difference in opinion in and out of the courts has arisen. It is central to the concept of arbitration in international law and in European law, as understood in Europe itself, as well as under the received European laws in force in most Africa countries.[9] There was a difference in opinion between the majority [Karibi-Whyte, J.S.C. delivered the leading judgment-Obaseki, Kawu and Wali, JJ.S.C. agreeing] and Nnaemeka-Agu, J.S.C., on this requirement. The leading judgment *expressed no opinion on* the fourth. The court was unanimous in its agreement on the first requirement.

6. Ibid, at p.2.
7. My emphasis. All other italics are mine.
8. (1956)13 W.A.C.A. 81 at p.82.
9. See for example, S.2 of the Nigerian Arbitration and Conciliation Act, 1988.

2. AGU V. IKEWIBE AND THE REQUIREMENTS OF CUSTOMARY ARBITRATION.

In the Supreme Court of Nigeria, the respondent in *Agu* v. *Ikewibe* relied on the outcome of an arbitration under customary law against the appellants. As in most of the cases in which the question of customary arbitration has arisen, the claim concerned title over land. The respondent brought the action and relied, among other grounds, on the arbitration in customary law in which an award had been made by the chief and elders of the locality in his favour. The appellant denied that any arbitration had taken place between the parties and that in any case, the arbitration referred to by the respondent was different from that in which a decision had been given for the respondent. The High Court of Okigwe dismissed the respondent's claim. The Court of Appeal of Nigeria [Enugu Division] reversed the High Court and held that there had been a binding arbitration between the parties and as a result, the appellant could not deny the respondent's title to the land. On further appeal to the Supreme Court of Nigeria, two issues arose to be decided:

(i) whether the alleged arbitration had been properly pleaded and on the evidence, established;

(ii) if so, could it constitute res judicata?

On the first point, the court unanimously held that on the pleadings and the evidence, there had been only one arbitration which had been satisfactorily established. The Court of Appeal had therefore decided correctly, in reversing the lower court on that ground. However, the outcome of the arbitration could only constitute res judicata if, in the first place, the customary law knew of such a thing as an "arbitration" and second, on whether the proceedings, having been conducted in accordance with the local customary law, could become binding on the parties in the same way as any other judicial process. Two points thereupon arose to be considered: does Nigerian law recognise customary arbitration and if so, what are its characteristics? Second, could it constitute *res judicata*? We will consider the second point first.

A. Customary "Non-Judicial" Proceedings and Res Judicata

On the second question, the appellants argued that the award could not be binding because, being a mere decision of a body of elders, it was lacking in the requisite authority of a body duly constituted and competent to exercise judicial functions.[10] Nnaemeka-Agu, J.S.C., (dissenting) accepted a distinction drawn on the basis of the case of *Equere Inyang v. Simeon Esien*[11] between arbitration by

10. As distinguished from judicial powers. The question as to whether customary arbitration would be a usurpation of the judicial power in the light of the provisions of S.6 of the Nigerian Constitution of 1979, vesting such powers in the courts mentioned in, or established by virtue of that section, had been answered by the Supreme Court in the negative in *Idika v. Erisi* (1988)2 NWLR, 563. It is an important constitutional question bearing on the effect of S.6 on the validity of arbitrations as a whole in Nigeria, but which does not fall within the scope of this article.
11. (1957) 2 F.S.C., 39.

people exercising the judicial function by customary law, such as chiefs, and arbitration by persons who lack the authority to exercise such functions. It was advanced for the appellants that the case of *Inyang v. Esien* was authority for the view that a decision by a group of persons acting as a non-judicial body, could not be binding and that since the body of elders in the present case fell within that category, their decision could not become *res judicata*. In *Inyang*, the action for a declaration of title had been withdrawn and the case submitted for settlement by an Iman Council. The Council was not a Customary Court and it was also said that it had no powers to make a binding order. The decision of the Iman Council was rejected by the appellants, as a result of which the action was initiated. It was held by the then Federal Supreme Court of Nigeria that the decision of the Iman Council was not binding. The case has often been cited as having decided that the decision of such a council or group of elders cannot constitute res judicata because they are not judicial bodies properly constituted as such. The appellants therefore submitted that *Inyang v. Esien* limited the binding effect of out-of court decisions to those of a judicial body. In dismissing the submission, Karibi-Whyte, J.S.C., said:

> I do not think that it [Inyang *v. Esien]* could be so restricted. In my view the ratio decidendi... was that the parties not having accepted the settlement of the Iman Council, the arbitration failed. A judicial tribunal for the purpose of estoppel has been given a more liberal and broader definition.[12]

On the evidence both of the plaintiff and the defendant, its mandate was limited to the purpose of making peace between the parties. The settlement had simply failed and the parties could not be held to the outcome of an unsuccessful attempt at effecting a settlement between, and acceptable to them. After referring to the record of the appeal on the evidence on both sides, Jibowu, F.J., delivering the judgment of the Federal Supreme Court[13] in that case said:

> ... it [was] abundantly clear that the Iman Council was only instructed to bring the parties together and make peace between them. It follows that whatever decision they gave which was not acceptable to one of the parties had no binding effect and cannot constitute res judicata. The evidence showed that the attempt to settle the matter failed. The plaintiffs reported the failure to the District Officer who advised them to take a new action, which was accordingly taken and transferred to the Supreme Court.[14]

Inyang v. Esien was therefore a case where the jurisdiction of the Council was limited. It is doubtful whether it was strictly an "arbitration", even under the

12. Note 1, p.413.
13. Then, appeals from the Fed.Sup.Ct.Nig. lay direct to the Privy Council in London.
14. Note 11, p.41.

customary law, since the Council was not adjudicating. That limitation did not apply to the body of chiefs and elders in the *Agu case*, where the elders had been called upon to adjudicate on the dispute and not simply to make peace between the parties. Although their decision could not become binding until accepted by the parties, they nevertheless were vested with a wider jurisdiction than the Iman Council in *Inyang*.

The question remained whether as a non-judicial body, the group of elders were competent under customary law to exercise judicial functions. If they were not, their purported arbitration would still not be binding until subsequently accepted by the parties to the arbitration. The Supreme Court majority was in no doubt that they were. Karibi-Whyte, J.S.C., referred to the WACA case of *Kweku Assampong v. KWEKU Amuaku*[15] and said:

> I think it is well settled and judicial authority is not lacking for the view that persons exercising judicial functions in accordance with native law and custom and are duly authorised to adjudicate among their community have always been recognised as having such powers... The provisions of the Constitution of 1979, sections 6 (1) and (5) have not altered the judicial position...[16]

That should be so, since elders, family and quarter heads have normally been recognised under customary law as having the power to exercise judicial functions out of the framework of a customary law court. They are vested with adjudicatory power in the same way as an arbitrator in Europe or under the received European laws in force in many African countries. *Kweku Assampong v. Kweku Amuaku* itself involved a dispute as to the ownership of land in circumstances where both the land and the parties to the proceedings belonged to two neighbouring administrative districts. A group of persons was appointed by the two chiefs concerned, consisting of members from both sides, in accordance with custom. It was held that the decision of that body was binding and constituted res judicata although the group could neither be regarded as a court of law nor as arbitrators. They were no more than persons exercising judicial functions by customary law. Kingdom, C.J., put it in the following words:

> I think that the evidence establishes that the tribunal consisted of a body of persons exercising judicial functions by custom, and duly invested with authority to adjudicate upon the dispute. In loose language its proceedings might be spoken of as an arbitration, but there was no arbitration in the technical English sense, and all the arguments of counsel for the plaintiff based on the assumption that such was the contention are beside the point.[17]

15. (1930) 1 W.A.C.A., 192.
16. Note 1, p.412.
17. Note 15, p.196.

The decision of the chiefs and elders in *Agu* was therefore binding on both grounds. First, unlike the Iman Council in *Inyang* v. Esien, their jurisdiction was neither restricted to a mere attempt to effect a settlement between the parties nor was it otherwise limited. They were required to adjudicate upon the dispute and give a decision clear in its terms and definitive. Second, as elders, they remained vested with authority to exercise judicial functions by, and in accordance with the custom. That power was not withdrawn by the Nigerian Constitution of 1979.

B. Customary Arbitration in Nigeria: Its Requirements

It was earlier argued for the appellants, on the basis of some statements in a previous Nigerian Court of Appeal decision in the case of *Okpuruwu* v. *Okpokam,*[18] that the concept of customary arbitration is unknown to Nigerian law. It was submitted for the appellants that Nigerian law did "... not recognise the practice of elders or natives constituting themselves as customary arbitrations (arbitrators?) to make binding decisions between parties in respect of land or other disputes." That was a bold submission which was treated by the Supreme Court as a "surprise" and, in relation to the Nigerian Constitution of 1979, as a "... misconception about some of [its] provisions ..., and the freedom between disputing parties to settle their differences in a manner acceptable to them."[19] The Constitution could not be interpreted in a manner which denied individuals the freedom to determine how best to resolve their differences. The Supreme Court then went on to describe customary arbitration as a process founded on the voluntary submission of the disputants to the decision of the tribunal and the agreement to be bound by such decision or freedom to resile whether or not the decision was unfavourable. The leading judgment stated:

> It is well accepted that one of the many African customary modes of settling disputes is to refer the dispute to a family head or an elder or elders for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after the signification of such acceptance, and from which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies.[20]

The Supreme Court considered a series of Nigerian cases at first instance and some decisions of the former West African Court of Appeal on the subject, out of which it extracted the following three requirements of customary arbitration in Nigeria:

18. (1984)4 NWLR, 554.
19. Note 1, p.407.
20. Ibid.

(i) the voluntary submission of the dispute to a non-judicial body for determination. It is important to note under this heading that the dispute must have been *submitted for determination* and not simply to make peace between the parties or otherwise reach some other loose arrangement. That is what distinguishes *Inyang* from the other cases. The role of the tribunal, (usually elders) must be *adjudicatory*, i.e., *to decide*, and not merely to arrange a compromise settlement, although, as would become clear under the second and third requirements, that "decision" does not become binding unless accepted by the parties when pronounced, or within a reasonable time thereafter. That subsequent acceptance could be implied or express;

(ii) the willingness of the parties to be bound by the decision or freedom to reject it if not satisfied;

(iii) that neither of the parties resiles from the decision or, a fortiori, withdraws from the proceedings before the award is made. It must of course be assumed as a fourth requirement that the arbitration was conducted in accordance with the relevant custom.

Prior to the *Agu* case, the attitude of Nigerian courts, both at first instance and on appeal had not been altogether consistent. It is not clear why *Philip Njoku v. Felix Ekeocha*[21] for example, was considered by the Supreme Court and approved, although, one would think, the decision in that case was not in some respects exactly along the same lines as the Supreme Court decision in *Agu*. The action was for title and damages for trespass to land. The defendant claimed that the chief and council of elders had, on the request of the plaintiff's father and the defendant, allowed the former to produce the customary oath to be sworn to by the defendants as owners of the land. The effect of the oath in the custom was that the plaintiff's father would forfeit his claim to the land if the defendant survived the prescribed period of the oath. He did. Both the plaintiff's father and the defendant accepted the settlement thereafter. It was held that the settlement created an estoppel against the plaintiff on the ground, based on the judge's finding upon the evidence, *that the parties had accepted the settlement*. The difference between the decision in this case and the judgment of the majority in *Agu* is that the judge, Ikpeazu, J., regarded the chief and his councillors as being in the same position as the Iman Council in *Inyang v. Esien*, i.e., as a body which, not being vested with judicial authority, its decision could not become binding until accepted at the time it was given. He explained the legal position of a decision of such a body in the following terms:

> The legal position seems to me to be that where the decision of such a non-judicial body [although in this particular case, plainly exercising judicial functions, since its jurisdiction was not, as in *Inyang*, expressly or impliedly limited] has been accepted by the parties, it will

21. (1972)2 ECNLR. 199.

> not be open to any of them to turn round at a later stage and reject it. In such a case the decision will be binding on him, the operative factor being the initial acceptance of the decision at the time it was given.[22]

That acceptance having been signified, the decision in this case became binding on the plaintiff's father and every person claiming through him, including the plaintiff himself. The plaintiff's father's acceptance of the settlement also operated against the plaintiff in relation to the second point on which that case was decided. Ikpeazu, J., held that although the panel of elders, including the chief, were a non-judicial body[23] they could still sit as arbitrators and their decision, while sitting in that capacity, will be binding subject to three requirements: that the parties submitted to the arbitration; that they accepted its terms and thirdly, that they agreed to be bound by the award. The crucial point here is the third and the question in relation to that element is whether the agreement could be *irrevocably* made prior to the delivery of the award. The point did not directly fall to be decided since on the evidence, the judge was already satisfied that the parties gave their consent to the settlement after it was made. In *Agu*, the Supreme Court thought on the facts, that all three requirements were present and satisfied in *Njoku*. It remains doubtful however, whether, in the absence of the specific finding that the parties accepted the settlement, the judge would still have held the arbitration binding, on the basis that the voluntary submission to the arbitration and the acceptance of its terms operated as an implied acceptance of the award, from which the parties could not withdraw. It is our view that he may not have done so, in the light of his own observations in respect of the time when the parties' acceptance of the decision of a non-judicial body would be operative. The judge considered the acceptance to be binding when the decision is made, not before. To that extent, *Njoku is* similar to *Agu*.

Nicholas Mbagbu v. Agbarakwe Agochukwu[24] was a case in which the court had to consider which of conflicting decisions of two separate arbitrations was binding. The decision of the group of elders in the first set of proceedings, initiated at the request of the plaintiff had been in favour of him. Not being satisfied, the defendant took the case to what was treated as a higher body, chaired by a chief and consisting of himself and a group of elders. According to the plaintiff, the chief in the second arbitration was "a local tyrant who could not be trusted to do justice..." and had completely failed to give him a fair hearing by refusing to consider his evidence. Being also dissatisfied with the outcome of the arbitration by the "local tyrant", he commenced proceedings in court against the defendant. The judge discarded both arbitrations and proceeded to determine the dispute [over title to land] afresh. With reference to the first arbitration, he

22. Ibid, p.205.
23. Within the judge's understanding of the meaning of that term as explained in *Assampong v. Amuaku*, i.e., as a body "not properly constituted as a court", ibid.
24. (1973) 3 ECSLR, Part 1, 90. Ibid, p.95.

commented that "... there was no evidence of the identity of the other co-arbitrators. Nor was there any evidence of the procedure adopted and whether it was in conformity with the custom of Isi Ake people.[25] In relation to the second set of proceedings, he said "... it is clear from the evidence of the plaintiff that he did not accept the decision of Nnadi [the chief] who according to him violated rules of natural justice by refusing to consider his case and those of his witnesses.[26] Referring to both arbitrations, he said "... it is not clear how the arbitrators were appointed and by whom. None of them in my view was vested with judicial powers and their decisions unless accepted by the parties concerned could have no binding effect on either party."[27] Nwokedi, J.'s ruling in this case is similar in terms to the first ground on which *Njoku* was decided. In *Njoku*, as in *Mbagbu*, the courts are saying that a decision of elders not vested with judicial authority[28] cannot be binding unless agreed to by the parties in dispute. In disregarding the outcome of the arbitrations, Nwokedi J., referred with approval to the statement of Ikpeazu J., cited above and stated that in the case before him, it was clear from the evidence that both plaintiff and defendant did not accept the decisions of the councils of elders in the two arbitrations. He did not take the further step as did Ikpeazu J. in *Njoku* to consider whether the councils could in the alternative, be regarded as arbitration panels and if so, on what conditions their decisions, sitting, as such, would become binding. However, his statement as to the validity of "any non-judicial body" such as the one he was dealing with, was wide enough to include a panel of arbitrators. It follows that he would also have applied as a condition for the validity of the decision of such a panel, the same two requirements he relied upon to disregard the decisions of the two councils, namely, voluntary submission to the arbitration and acceptance to be bound by the award. That step would also have required him to consider at what stage the acceptance would be operative. Having conceded that the arbitration panels were in the same position as the Iman Council and the council of elders and chiefs, i.e., as non-judicial bodies, that stage, one should think, would have arisen and rendered the acceptance binding only after the making of the award or upon a reasonable time thereafter. The effect would be that the outcome of an arbitration in customary law is regarded in the same way as the decision of a "non-judicial body", as both would not become binding unless accepted by the parties at the time the decision is handed. We will consider the difference between customary arbitration and the decision of such a "non-judicial body" later.

Ofomata v. Anoka[29] was a casé of a conditional award. The decision of the elders had gone in favour of the plaintiffs but provided that if the defendant deemed it necessary, they could produce the customary oath for the defendants to

25. Ibid. p.95.
26. Ibid.
27. Ibid.
28. That is, within the judges' understanding, as a body whose decision cannot be regarded as that of a properly constituted customary law court.
29. (1974)4 ECSLR, 251.

swear. Since the oath swearing exercise was an entire part of the arbitration, the award could not become final and operative until the oath had been taken. However, some statement of the judge in that case suggest that a party to the proceedings still retained the right to withdraw at any stage of the process. The judge observed that,

> Although the parties failed to meet for the purpose of oath-swearing *there is no evidence that any party withdrew or resiled before the arbitrators pronounced their decision* and accordingly it is similarly easy to hold that there was a properly constituted customary law arbitration [subject to the oath swearing exercise referred to] possessing the prerequisites and essentials of a tribunal and upon the basis that its decisions could be binding on the parties thereto".[30]

The suggestion that the parties could still resile after a valid submission is the main consideration here and, it will be recalled, the one in relation to which both the Privy Council and the WACA in *Kwasi v. Larbi* had held that if conceded, would render customary arbitration repugnant to good sense.

Another line of Nigerian cases however went the other way. *Oline v. Obodo*[31] was a judgment of the former Federal Supreme Court of Nigeria.[32] In that case, the validity of the arbitration was challenged on the basis that it was merely a settlement which was not binding on the parties. Quashie-Idun, Ag.F.J., who delivered the unanimous judgment of the court rejected that submission in plain terms. He followed the Privy Council decision in *Kwasi v. Larbi* and held that,

> "... where the parties submitted their dispute for settlement by arbitration in accordance with Native Customary Law and one party withdrew from the arbitration before it was completed the award of the arbitration was nevertheless binding on all the parties. In the present case there is a finding of fact against the appellants that they attended the arbitration and that they agreed to be bound by the award of the arbitrator."[33]

This is therefore a case where the court held that a submission to arbitration in customary law is irrevocable and the resulting award binding on the parties without the need for a subsequent acceptance. Thus stated, that ruling is at odds with the passage in *Ofomata v. Anoka* quoted above and the statements of the High Court in *Njoku v. Ekeocha*, in relation to the validity of the decision of a council of elders constituted as arbitrators. The passage in *Ofomata* and the statements in *Njoku* are also inconsistent with the decision of another first

30. Ibid, 253.
31. (1958)3 F.S.C., 84.
32. It replaced the WACA as a Court of Appeal for Nigeria, including Cameroon, with further appeals being referred to the Privy Council in London.
33. Note 31, p.86.

instance court in *Ekweme v. Mohamed Zakari*[34] which involved a claim for a sum of money as part of the returns for a joint venture.

In that case, the plaintiff claimed that there was an arbitration binding on the defendant. The judge invalidated the arbitration on the ground that the jurisdiction of the arbitrators was limited to an attempt to arrange a settlement between the parties and that attempt failed when the defendant refused to accept the decision of the panel and, further, that there had been no prior agreement by the disputants to be bound by the award. The trouble with this case is that it was not clear whether the court was dealing with an arbitration under customary law. It was submitted for the plaintiff that it was an arbitration under the common law and not under custom and for the defendant, that the parties could only be bound by an arbitration under statute. [Cap.10 of the then Laws of Eastern Nigeria.] The judge himself stated that there was no evidence of the applicable custom, if he was to rely on any, since the difference in the places of origin of the parties gave rise to a problem of internal conflict of laws. The defendant was a Northern Nigerian and the plaintiff, an Igbo, but no evidence was lead on any of the customary laws potentially in conflict. The judge may however have regarded the case as one under customary law since all the authorities cited on customary arbitration are Nigerian and Ghanaian. He reviewed the cases[35] and accepted the requirements of customary arbitration as stated in them, namely, a voluntary submission and a *prior agreement* by both parties to accept the award of the arbitrators. That agreement being absent, the outcome of the purported arbitration could not be binding. In the judge's view, it was not an arbitration at all. It was a failed attempt at a negotiated settlement. The material part of this judgment is consistent with *Oline v. Obodo* and the line of the WACA cases referred to, in so far as they decided that an arbitration under customary law is binding on the basis of a prior agreement of the parties to accept the award.

Although in *Joseph Aguocha v. Edward Ubiji*[36] the judge had already found as a matter of evidence, that the defendant, by his brother, had accepted the outcome of the second of three arbitrations, thus making that particular arbitration binding, he nevertheless stated that parties who have voluntarily submitted to an arbitration of their differences by a third person cannot be allowed to withdraw from his decision simply on the basis that it did not favour them.

Agu and *Ohiaeri in* a sense reversed this second line of first instance cases, including the former Federal Supreme Court of Nigeria case of *Oline v. Obodo*, to the extent by which they decided that a prior agreement to be bound by the outcome of an arbitration is an element of customary arbitration. The two cases have resolved that it is not and that the proceedings will be binding in the same way as an arbitration under statute only if the parties accepted the decision after it has been pronounced. Before such acceptance, which could be express or

34. (1972)2 ECSLR, 631.
35. *Kwasi; Inyang; Ankrah v. Dabra* (1956)1 WALR, 89; *Twumasi v. Badu* (1957)2 WALR, 204 and *Akumanyi v. Peprah* (1957)2 WALR, 112.
36. (1975)5 ECSLR, 221.

implied, each of the parties retained the freedom to resile whether or not the award favoured him. Karibi-Whyte, J.S.C., treated a submission to arbitration in customary law in *Agu* as an "... agreement to be bound by such a decision (of the arbitrators) *or freedom to resile where unfavourable.*" In *Ohiaeri*, Akpata, J.S.C., re-stated the four requirements of customary arbitration as stated by Nnaemeka-Agu (dissentient) in the *Agu case* and added a fifth, that being, "... *that the decision or award was accepted at the time it was* made."[37]

It must be the position therefore, that the line of the WACA cases referred to above, including *Oline v. Obodo* are no longer good law in Nigeria. It is surprising that the Supreme Court did not appear to be aware of those cases at the time it delivered the judgments in *Agu* and *Ohiaeri*, including the dissenting opinion in *Agu*, for which *Oline v. Obodo*, being an appeal court decision, taken together with the WACA cases, (although not binding on the Supreme Court of Nigeria itself) would nevertheless have provided a strong line of authorities. *Aguocha v. Ubiji* could be explained as a case in which on the evidence, the parties had already indicated their acceptance of the award and *Ekweme v. Zakari* was said by the judge himself to be one in which the function of the arbitrators was limited by the parties to negotiating a settlement between them. It was therefore decided along similar lines as *Inyang*, as explained in the leading judgment in *Agu*. The judge might also have had the common law arbitration in mind since he clearly did not rely on any of the local customs in conflict. The line of the WACA cases from Ghana referred to, supported a view of customary arbitration which is consistent with arbitration under common law. He may therefore have assumed the two to be the same, hence, the failure to make a specific finding on the practice in, and to resolve the conflict over the applicable custom. *Oline v. Obodo* was on the other hand, plainly decided on the basis that the settlement involved an arbitration under customary law, since the former Federal Supreme Court rejected the argument that the arbitration could not be binding for non compliance with the Arbitration Ordinance (Cap. 13 of the Laws of the Federation, 1958) requiring the submission to be in writing. The Court held that the parties were natives and there was nothing to stop them from agreeing to have the dispute settled in accordance with the customary law, which recognises an oral agreement to arbitrate. The Court reasoned that the oral agreement and the process arising from it would be governed by the custom of the parties, who in this case were from the same area. It then proceeded to decide the case on that basis, relying, as in Ghana, on *Kwasi v. Larbi* and a long line of cases by the WACA which all decided that arbitration under customary law is neither based on post award acceptance nor is a party entitled to withdraw before the award.

37. Nnaemeka-Agu, J.S.C., agreed with Akpata's leading judgment in that case. The matter would in fact have been laid to rest with his agreement, were it not for the opinion of the judge in the subsequent case of *Awosile v. Sotunbo (1992)5* NWLR, *514*, in which he expressed a view in terms similar to his dissent in the *Agu case*. It is unhelpful that the judge failed to refer specifically to the difference between his position and that of the majority in *Agu*, and in particular, to the leading judgment in *Ohiaeri*, with which he agreed, so as to clarify his own frequent change of mind.

3. KWASI V. LARBI, CUSTOMARY ARBITRATION AND THE ATTITUDE OF THE COURTS OF GHANA.

The Judicial Committee of the Privy Council in *Kwasi v. Larbi*, dismissed the appellant's case and upheld the decision of the then WACA, which had approved a previous decision of its own[38] in which it had attempted to lay down the requirements of arbitration according to customary law. The custom in question was Akan and the action, involving title to land, having been started in a customary court, was withdrawn by the elders of the area and with the consent of the litigants submitted to a panel of eleven elders for an out of court settlement. At some stage, the appellants dissociated themselves from the proceedings and asked for the refund of the sum of £12 which they had advanced to signify their agreement to submit to the process. The report of the case makes it plain that it was not clear whether the money was refunded but the appellants thereafter withdrew and an award was given in favour of the respondents. The case came back before the customary court and the respondents moved for the enforcement of the award, as having finally determined the issue. The appellants argued that they had withdrawn from the proceedings and could not thereafter, be bound by the decision of the elders.

Before the WACA and the Privy Council, it was contended for the appellants that the proceedings were not an arbitration but a mere negotiation for settlement, which could not be binding and that even if there had been an arbitration, it had been conducted in accordance with customary law, which, it was argued, is different from arbitration in common law. It was submitted for the appellants that in the particular custom, a party in an arbitration could withdraw from the proceedings before or after the award is pronounced unless, subsequent to it, he had signified his acceptance. The Privy Council rejected the plaintiff's case and held that since the parties had consented to arbitration without reserving the right to withdraw, the appellants had not established that a right, so inconsistent with the basic conception of arbitration, existed in customary law and that the appellants had therefore not made out their case. In the Board's view, in the absence of evidence as to whether there was a right in customary law to withdraw before the award, such a right did not exist.

Kwasi v. Larbi was the high water mark of a new concept of arbitration said to be in accordance with the local customary laws [particularly Akan and Fanti] introduced into the then colony of the Gold Coast by non-native courts established under colonial statutes. The Supreme Court of the Gold Coast and the WACA took the lead in the development of that concept. In *Agu v. Ikewibe*, Nnaemeka-Agu J.S.C. attributed the origin of the elements of the concept and their introduction into the customary law of Nigeria to the WACA case of *Foli*, referred to above. The case, in effect, decided that parties who had submitted to arbitration could not withdraw from the process. In that case, the appellant had

38. *Omanhene Kobina Foli v. Ohene Abeng Akese* (1930) 1 WACA. 1; reversed on another ground: (1934) 2 WACA. 46, P.C..

obtained a judgment from a Circuit Judge. The defendant appealed and on the matter coming before the Full Court of the Gold Coast, the dispute was referred to arbitration on the application and consent of both parties. An order was made by the Court pursuant to Order 52 of the then Rules of the Supreme Court and a judge of that Court appointed to sit as arbitrator. The judge, as arbitrator, published his award and the appellant moved to set it aside. It is not clear on what ground that case could be regarded as providing guidance on the nature of customary law arbitration. There is no evidence that the WACA had been dealing with a case involving it. Quite the contrary, for, although the dispute involved two local communities over title to land, and some of the observations of the court are broad enough to cover all forms of arbitration, the appointed arbitrator was a judge of the Supreme Court [in 1929]. Then, the courts were required under Order 52 of the Rules [Cap. 158 of the Laws of the Gold Coast] to refer matters in dispute to arbitration if the parties had applied to the court, and to appoint an arbitrator if the parties could not agree on a nomination or if the person or panel chosen refused to accept the appointment. Arbitration proceedings brought under Order 52 were governed by the provisions of that Order, which, as it were, reflected the law and practice under the received English law on the subject. Any action brought in relation to such proceedings was subject to the same law.[39] *Foli v. Abeng Akese* should therefore have been read in the light of those circumstances and the observations of the court as to the "general rule" that the initial submission of the parties was binding, limited to common law arbitration as received in Ghana and within Order 52. It is significant that no reference is made to any custom in that case and that all the other authorities cited are English decisions. *Fuller v. Fenwick*,[40] to which both Deane C.J. and the dissenting opinion in *Agu v. Ikewibe* refer with approval, had no connection either with the colony or its laws and it is further doubtful whether in referring to it, Deane C.J. had intended to use the case in support of any principles relating to the requirements of customary arbitration, which were not in issue. The circumstances of the case suggest that in making those statements, the Chief Justice had in mind arbitration under statute or the common law as in force in the country.

Both the Privy Council and the WACA nevertheless relied on this case in *Kwasi v. Larbi* and cited *Ekua Ayafie v. Kwamina Banyea*[41] as having laid down that "...where matters in dispute between parties are investigated at a meeting, and in accordance with customary law and usage, a decision is given, it is binding on the parties..." The report of that case is rather scanty and discloses nothing as to whether the judge had been presented with, and carefully considered evidence of the Fanti custom. In a series of appeals however, the WACA also relied on both its own and the Privy Council's decision in *Kwasi* to rule from case to case

39. See for example, *Yamike Kweku v. Annor Adjaye*, (1926) A.C., 755; *Omahene Otuababio II v. Kofi Aigin* (1921-25) Div. Court, 38; *Kobena Angoe v. Kobena Nketsia* (1923) Full Court, 1920-21, 75, P. C.

40 (1846) 16 L.J.C.P.,79.

41 SARBAH, J., Fanti Law Reports, 2nd Edn., London, 1904, pp.38-39.

that the initial submission to an arbitration in customary law, if valid, remains binding throughout the proceedings and a party could neither withdraw before the award nor, in the absence of agreement to the contrary, retain the right to reject the award. What is essential is the prior agreement of the parties to accept the award of the arbitrator.[42] The trend was adopted by Ghanaian courts which, unlike the courts in Nigeria, have since then been consistent in their decisions to the same effect. In 1958, the Court of Appeal of Ghana held in *Yaw v. Amobie*[43] that there was no right to resile once the parties have submitted to arbitration by customary law. The Supreme Court of Ghana also held in *Manu v. Kontre*[44] that the parties to an arbitration in customary law cannot resile from it, and was followed by the Court of Appeal on three separate occasions in 1977,[45] in one of which the court stated that the important point to note in relation to customary arbitration is that its requirements are "...satisfied not at the time of the award when an adverse decision may cause one of the parties to reconsider his participation in the proceedings, but at the opening of the proceedings."[46] The court further noted that an arbitration involves "... an agreement to be bound by the decision made as a precondition for the arbitration taking place."[47] That trend resulted in treating customary law arbitration in exactly the same way as statutory and common law arbitration. That in turn made it necessary for the courts to distinguish between the former and conciliation, or what they termed "a negotiation for settlement."

4. CUSTOMARY ARBITRATION AND CONCILIATION.

The distinction was drawn on two grounds, both of which are related in terms of their bearing on the distinction between arbitration under the received law and arbitration in customary law. It is the view, in relation to the first ground on which the distinction is made, that a conciliation is generally understood not to include a clear-cut adjudication of the issues between the parties, a feature inherent in the nature of an arbitration, since the arbitrator is required to consider the substance of the issues in dispute and to reach a decision based on the respective merits of the parties' cases. Customary arbitration, to the extent that the arbitrator is required to make a decision, whether or not accepted, – and not merely to find a compromise solution for the parties – would, in this regard, be similar to arbitration in common law. In *Budu II v. Caesar*,[48] Ollennu, J. stated in respect of that similarity: "The words "on its merits" mean *arbitration according to customary law is not an arbitrary decision*. It is exactly the same thing as arbitration under

42 *Ankrah v. Dabrah* (1956) 1 WALR. 89 and *Twumasi v. Badu* (1957) 2 WALR. 204.
43 (1958) 3 WALR. 406.
44 (1965) G.L.R.. 375.
45 *Nyaasehmhwe v. Afibiyesan, Akunor v. Okan* and. *Zogli v. Ganyo*, all (1977) 1 G.L.R.. pp.27, 173 and 297 respectively.
46 *Akunor v. Okan*, supra, at p.176.
47 Idem.
48. (1959) 3 G.L.R.. 410.

English law. It is the reference of a dispute or difference between not less than two parties, for determination after the hearing of both sides *in a judicial manner*, by a person or persons other than a court of competent jurisdiction..." The statement, adopted from Halsbury,[49] represents the position in English law, which we think, on the particular point, also reflects the position in customary law, although the judge's reference to English arbitration in those terms has elsewhere been misunderstood as a reference to arbitration under the common law as a whole.[50]

That statement could not have been intended as a complete definition of arbitration whether under customary or common law, in that it leaves out the requirements and effect of the process, to be dealt with elsewhere in the judgment. The statement is limited to, and adequate as a description of the basic nature of the concept in terms of the functions which the arbitrator exercises in that capacity. His mandate as an arbitrator whether in customary or common law involves the exercise of judicial functions[51] which, among others, requires him to give both parties a fair hearing and to reach a decision on the merits of the parties' cases based on the evidence. The arbitrator's duty in that respect is the same both in custom and in common law but different from that of a conciliator, given that the conciliator's mission is limited to guiding the parties to reach a compromise solution of their differences. Karibi-Whyte, J.S.C., in *Agu*, explained the decision in *Inyang* on that ground. He treated *Inyang* as a case in which the duty of the Iman Council was limited by the parties themselves to arrange a settlement for them. To consider arbitration in customary law in the same way as arbitration under statute or the common law in this regard, comes to no more than that a valid submission to arbitration under both systems will result in constituting the arbitrator, like a judge of a regularly constituted court, but not a conciliator, a person exercising judicial functions. To that extent, arbitration in customary law is exactly the same as arbitration in common law.

The difference between arbitration in both systems on this particular ground does not, as a result, become completely lost. It remains, by analogy, in the difference between judicial proceedings in a customary law court and a common law court set up under statute. That difference lies in the court's, or, with respect to arbitration, the third party's perspective of the role of a body called upon to adjudicate between parties in dispute. It has been said with respect to Sudan, that, "...according to the traditional concept of litigation under the customary law, *the court* [and surely the arbitrator] *must look beyond [the] legal rights of the parties to see what type of relationship is likely to prevail between them after the adjudication... The* idea is that the successful party should not be made to feel that he is a loser while the other is the victor..."[52] Giving allowance for the flexibility of arbitration under both systems, in contrast to the rigidity of proceed-

49. *Laws of England*, Vol.2, 3rd Edn., p.2, para. 1. (4th Edn., p.332, para. 601)

50. Agbosu, L.K., *Arbitration under Customary Law* (1983-86)15 Rev.Ghana Law, 204.

51. *Kweku Assampong*; *Caesar*, *Agu*.

52. Makec, John Wwol: *The Customary Law of the Dinka people of Sudan*, Afroworld Publishing Co., London, 1988, pp.221-22.

ings in court, the third party adjudicator in an arbitration under customary law is, like a properly constituted customary law court, more flexible in applying the law than an arbitrator or a court operating within the common law. The difference in this respect between arbitration in common law and in customary law would be not so much in the peculiar nature of the process itself, as in the overall difference in attitude to the idea of dispute settlement as a whole in customary and common law. That feature of the customary system of dispute settlement probably shows one area in which customary arbitration could contribute to the development of modern arbitration, including even areas as far removed from the customary law setting as that involving international commercial and investment disputes, where the need to create an economic and political climate favourable to foreign investments makes it necessary for arbitrators to bear in mind the effect of the outcome of awards on the continuing relationship between parties in the international investment market.

On the second ground, the courts, both in Ghana and Nigeria drew a distinction between arbitration according to customary law and a negotiated settlement on the basis that customary arbitration requires a prior agreement to be bound by the award whereas a negotiated settlement does not.[53] This lead the courts to ascribe to customary arbitration the same characteristics as arbitration under common law. Although *Agu* and *Ohiaeri* have reversed the trend for Nigeria, the position remains the same in Ghana, where the courts have distinguished customary arbitration from what would be an attempt at a conciliation on the basis that the latter does not include a prior agreement to be bound. In *Zogli v. Ganyo*, the Court of Appeal of Ghana stated the distinction in the following terms:

> The feature which marks the customary arbitration from the negotiation for a settlement is the requirement that for the arbitration to be valid, the parties must have agreed before hand to be bound by the award made. The parties to a negotiation for a settlement do not have so to agree. It is this feature which leads to the consequential rule that once the award is made the parties cannot reject it... As compared with this feature of an arbitration, it is well known that the result of a negotiation for settlement is not binding on the parties until it is accepted by both. But once it is accepted, it is as binding on them as an arbitration award.[54]

The courts also held that a negotiation for a settlement is only binding on the parties upon their acceptance of the settlement. Therefore, if, as in *Agu*, a customary arbitration does not also become binding until the parties signify their acceptance of the award, then the real distinction in customary law between arbitration and a negotiated settlement must lie elsewhere. We should think that distinction is to be found in the first ground on which we distinguished an arbitration from a

53. See for example, *Ankrah v. Dabrah*; *Yaw v. Amobie*; *Zogli v. Ganyo*. Supra cited.
54. Note 45, p.301.

conciliation, i.e., that the jurisdiction or the function of the "arbitrator" in a negotiated settlement is limited to bringing the parties to a compromise. That limitation is imposed by the parties themselves and is a matter to be ascertained on the facts and the evidence in each case. The distinction can otherwise be expressed by saying that the third party in a negotiated settlement is not exercising judicial functions. That is the basis of Karibi-Whyte's explanation of *Inyang*, although we think that it is a distinction without effect. It is without effect because the position remains all the same in Ghana, as well as in Nigeria, that the two processes, although different in character, would only become binding upon their acceptance by the parties. This is particularly truer of Nigeria in the light of the decision in *Agu* and *Ohiaeri* that a customary law arbitration does not become binding until the award has been pronounced and accepted by the parties thereafter.

5. THE CUSTOMARY LAW RECONSIDERED.

There is available evidence that the trend adopted by the Ghanaian courts and the second line of Nigerian cases discussed above never reflected the correct position in customary law. The Privy Council itself had reached the position it took on the basis that there was no evidence to the contrary. Subject possibly to the repugnancy doctrine, it might have recognised the existence in customary law, if only the Akan customary law, of the rights alleged in that case. Some of the decisions subsequently relied upon by the courts of Ghana were themselves not forcefully expressed. In Gyesiwa v. *Mensah*[55] the WACA clearly refused to lay down any precise rules on the matter. *Mensah v. Takyiampong*[56] for example, was a case in which the court below had already found that in accordance with the custom "*...both parties* [had] *agreed* to the arbitration, *to the award, and to the subsequent demarcation of the boundaries.*" The point was therefore not strongly in issue and the Court of Appeal went no further than to agree with the lower court's findings. That should not be surprising since in none of those cases was evidence considered as to the practice in customary law. Any strong views would have required some consideration of the practice in the relevant customs. *Yardom v. Minta III*[57] was not concerned with the requirements of customary arbitration. What was in issue in that case was the question about whether it is open to parties to a court judgment, by consent, to vary their rights and obligations under the judgment by a subsequent submission to arbitration. It was held in that case that they could. The court assumed that the award-involved was binding, on the basis that the arbitration had been conducted in accordance with the relevant customary law. Of more significance to us however, the question did not arise and was not considered by the court, whether parties to such an arbitration could resile from the proceedings or reject the award. On the other hand, it has been argued with

55. (1947) WACA Cyclostyled Judgments, 1947, 45.
56. (1940)6 WACA, 118.
57. Full Court, 1926-29, 76.

much evidence in support[58] that those features exist in the customary laws of the particular customs in which most of the Ghanaian cases arose. The existence of the features is exemplified by a few cases decided by the Gold Coast Divisional Courts and, after them, the Lands Division of the then Supreme Court, being courts which, apart from the customary law courts themselves, heard many of the cases at first instance and had, on each occasion, to make specific findings on the existence or not of these features.

Although the head note in *Okyeame Kwasi Mire v. Kwasi Dansos*[59] for example, refers word for word to that in *Ekua Ayafie v. Kwamina Banyea*, the judgment itself, apart from making no reference at all to it, is completely at variance with the latter case. The action by the plaintiff was for a sum of money or, in the alternative, for the delivery of a vehicle for the purchase of which the money had been advanced to the defendant. The defendant obtained another vehicle but used one key for both. The plaintiff received no returns from the business for which the vehicles were being used. The arbitrator awarded that one of the vehicles be given to the plaintiff by the defendant. Michelin, J., upheld the arbitration on the basis of the following findings reached by himself on the evidence:

"(a) that an arbitration, valid in accordance with Native Law, was held to investigate into the dispute between the plaintiff and the defendant, ... and the defendant consented to the holding of such arbitration and agreed to abide by the award of the said arbitrators;

(b) that *it was ordered by the arbitrators and agreed by the defendant that* one of the lorries should be returned by him to the plaintiff in working condition;

(c) that the award of the arbitrator has not been carried out by the defendant."

The important finding in this case was that the defendant agreed to the order and thereafter became bound. Similarly, in *Elisabeth Manu v. Kwabene Kumah*,[60] subsequent to the award, the appellant gave the respondent £1, which she accepted. She nevertheless brought an action and the defendant pleaded a binding arbitration. It was held that since the respondent had not withdrawn from the arbitration but had accepted the £1 to indicate her agreement to be bound by the award, she was so bound. Spooner, Acting Assistant Chief Commissioner for Ashanti said: "If as alleged by the Plaintiff -Respondent that certain of her witnesses were not heard, *she could have withdrawn before the award. Instead of this she signified agreement by accepting the £1 from the appellant after the award*. It follows that the award should stand." What is significant about these cases is the specific finding that the defendant agreed to abide by the awards.

58. Matson, J.N., *The Supreme Court and the Customary Judicial Process in the Gold Coast* [1953]1 I.C.L.Q., 47; Allott, A.N., *Kwasi v. Larbi-Akan Customary Law of 'Arbitration' in the Gold Coast*, idem, 466; Koranteng-Addow, G., *Customary Arbitration in Ghana*, Univ. of London Ph.D. Thesis, 1974.

59. Div. Court, 1921-25, 95.

60. Div. Court (Land) 1938-47, 311.

Odikro Ntiamoah Rofi v. Kweku Sesu[61] was a case in which the evidence on the practice in customary law was thoroughly considered by the judge, assisted by an assessor on the relevant customary law. Jackson, J., considered the evidence of one of the witnesses on cross examination and observed:

> Now, the argument advanced by Mr. Johnson, Counsel for the plaintiff, is that on some occasions arbitrators, before retiring to consider the evidence and their judgment, will ask first whether the parties will accept their decision as being final and binding and if so they will then retire, consider the evidence and deliver their judgment. That request is not made in so many words. It is implied by the demand for "gontuadzi" before they retire.
>
> On the other hand they may wish to take their hearing fee and leave it open to the parties to accept or reject their finding. In such cases "gontuadzi" is not demanded but upon delivery of the award "aseda" is paid to them by the successful party and the matter is then left open for the other party to gracefully accept the award and symbolize his acceptance by reimbursing the successful party with the amount which he has expended on "Aseda."[62]

The judge then considered the opinion of the assessor on the customary law and stated:

> It is quite clear upon the evidence that the reimbursement of the "Aseda" by the loser to the winner is the acceptance of the award by the former. Without that acceptance it appears to be only logical to assume that custom did not impose any obligation upon the loser to accept the award in the absence of that re-imbursement and it appears to me that the payment or non-payment of "gontuadzi" does truly symbolize whether there had not been an irrevocable intention to abide by the decision of the arbitration. On this ground alone I am of the opinion that there has been no award which by customary law can be regarded as final and binding upon the plaintiff.[63]

Thus expressed, those passages reflect the correct position in many customary laws, as now judicially approved in Nigeria by the Supreme Court decisions in *Agu v. Ikewibe* and *Ohiaeri v. Akabeze*. Apart from the findings of A.N. Allott and J.N. Matson referred to above, there are statements elsewhere and out of the reports in support of that position. Karibi-Whyte refers with approval to a statement of T.O. Elias[64] in which the late judge also asserts that an award did not become binding until the parties had indicated their acceptance of it, from which either party is at liberty to withdraw at any time before such acceptance or upon a

61. Div. Court [Land] 1948-51, 91.
62. Ibid, p.94-5.
63. Idem.
64. *The Nature of African Customary Law*, Univ. of Manchester Press, Manchester, 1956, at p.212.

reasonable time after the award. Although judicial opinion is difficult to come by from other jurisdictions in the continent, it has been extra-judicially stated, with respect to the position in Zaire that: "La decision des arbitres n'a d'autres force que celle derivant de la volonte des parties. *Celles-ci avaient le droit de refuser de s'incliner devant la sentence.* Lorsqu'elles l'acceptaient, elles faisaient un cadeau a l'arbitre qui constituait a la fois un salaire at une promessee d'executer la decision."[65] It is significant to point out the similarity with the practice in Ghana as described by Matson and Allott. Not only do the parties retain the right to reject the award, the "gift" (cadeau) would be the Zairean equivalent of "aseda" in Ghana and intended to signify the parties' acceptance of the award, including their willingness to comply with its terms. While describing the same process in neighbouring Ruanda, one other author states: "*Si l'une des parties n'acceptait pas la décision des arbitres, elle pouvait porter le différent par devant une des autres juridictions régulières.* Lors de l'evocation de l'affaire les arbitrs etaient alors entendu en qualite de temoins."[66] The right to reject the award is therefore also recognised in the Tutsi and Barutsi customs of Ruanda being described. The writer however adds that a subsequent action, if instituted as a result of the refusal of one of the parties to accept the award, invariably resulted in a judgment by the customary law court similar in terms to the decision at the arbitration. That was adequate indication to a party to the arbitration of the futility of any attempt to flout an award solely on the basis that it did not favour him.

It is disappointing to note that in Ghana, the courts have persisted in treating customary arbitration other than in accordance with its own characteristics as known to those to whom it applies. Whether those characteristics, as articulated by the Supreme Court of Nigeria in the *Agu* and *Ohiaeri* cases are satisfactory and adapted to the setting in which customary law now operates, is altogether a separate question. It is certainly time for some of those practices to be reviewed. It is true, and the Supreme Court of Nigeria did not fail to point out, that customary law is flexible and can easily be shaped to respond to change. It is a dynamic law. The role of the courts in that process, like that of all other institutions involved in the development of the law as a whole, is crucial. In this particular area however, it is our view that such change must be left to be spearheaded by the institutions of the customary law itself, including its own courts and arbitrators, with little interference by other legal institutions operating outside the context of the customary law. Change, even where inspired from without, is more easily acceptable if carried forward by those for, and by whom the change is made. One writer, having noted with overall approval, the new character of customary arbitration as evolved by courts in Ghana under the influence of English law, observed how it is now possible to say "...that customary arbitration instead of wearing "batakari" or "kente" now appears in a three

65. SOHIER, Antoine, *Traité Elémentaire du Droit Coutumier du Congo Belge*, 2nd Edn., Maison F. Larcier S.A., Brussels, 1954, pp.91-92, para.106.
66. Sandrart, Georges, *Cours de Droit Coutumier*, Vol. 2, 1951, p.206.

reasonable time after the award. Although judicial opinion is difficult to come by from other jurisdictions in the continent, it has been extra-judicially stated, with respect to the position in Zaire that: "La decision des arbitres n'a d'autres force que celle derivant de la volonte des parties. *Celles-ci avaient le droit de refuser de s'incliner devant la sentence.* Lorsqu'elles l'acceptaient, elles faisaient un cadeau a l'arbitre qui constituait a la fois un salaire at une promessee d'executer la decision."[65] It is significant to point out the similarity with the practice in Ghana as described by Matson and Allott. Not only do the parties retain the right to reject the award, the "gift" (cadeau) would be the Zairean equivalent of "aseda" in Ghana and intended to signify the parties' acceptance of the award, including their willingness to comply with its terms. While describing the same process in neighbouring Ruanda, one other author states: "*Si l'une des parties n'acceptait pas la décision des arbitres, elle pouvait porter le différent par devant une des autres juridictions régulières.* Lors de l'evocation de l'affaire les arbitrs etaient alors entendu en qualite de temoins."[66] The right to reject the award is therefore also recognised in the Tutsi and Barutsi customs of Ruanda being described. The writer however adds that a subsequent action, if instituted as a result of the refusal of one of the parties to accept the award, invariably resulted in a judgment by the customary law court similar in terms to the decision at the arbitration. That was adequate indication to a party to the arbitration of the futility of any attempt to flout an award solely on the basis that it did not favour him.

It is disappointing to note that in Ghana, the courts have persisted in treating customary arbitration other than in accordance with its own characteristics as known to those to whom it applies. Whether those characteristics, as articulated by the Supreme Court of Nigeria in the *Agu* and *Ohiaeri* cases are satisfactory and adapted to the setting in which customary law now operates, is altogether a separate question. It is certainly time for some of those practices to be reviewed. It is true, and the Supreme Court of Nigeria did not fail to point out, that customary law is flexible and can easily be shaped to respond to change. It is a dynamic law. The role of the courts in that process, like that of all other institutions involved in the development of the law as a whole, is crucial. In this particular area however, it is our view that such change must be left to be spearheaded by the institutions of the customary law itself, including its own courts and arbitrators, with little interference by other legal institutions operating outside the context of the customary law. Change, even where inspired from without, is more easily acceptable if carried forward by those for, and by whom the change is made. One writer, having noted with overall approval, the new character of customary arbitration as evolved by courts in Ghana under the influence of English law, observed how it is now possible to say "...that customary arbitration instead of wearing "batakari" or "kente" now appears in a three

65. SOHIER, Antoine, *Traité Elémentaire du Droit Coutumier du Congo Belge*, 2nd Edn., Maison F. Larcier S.A., Brussels, 1954, pp.91-92, para.106.
66. Sandrart, Georges, *Cours de Droit Coutumier*, Vol. 2, 1951, p.206.

piece suit without a bowler hat and an umbrella."[67] Meanwhile, referring to the use being made of the new arbitration by those for whom it is intended, the same author regrets that customary arbitration is now less resorted to. That should not have come as a surprise. The users are simply unable to recognise a "... three piece suit without a bowler hat and an umbrella." Either it comes complete with the suit, hat and umbrella and recognised as such, or it appears fully in kente or batakari. The only other way may be for it to appear in suit, hat and umbrella all made out of kente or batakari but above all, designed and manufactured by the same people who will be required to identify with it. Then, and probably only then, will they return to using it as an attractive alternative to the courts.

67. Kom, Enoch D., *Customary Arbitration*, [1987-88]16 Rev.Ghana Law, 148 at p.167.

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Addendum: **The enactment of the new Arbitration Act 1996 calls for the following:**

1. Page 44, footnote 26, add "Now see Arbitration Act 1996 Sections 9(1) & (4) and 86 (for domestic arbitration)".

2. Page 45, paragraph 2, line 8, the sentence "The use of ... by compelling arbitration." should read "The use of the mandatory "shall" indicates a difference with the discretionary "may" of Article 4 of the English Arbitration Act of 1950 and clearly points to a determination to specifically enforce the agreement by compelling arbitration, an objective effected by Sections 9(4) and 86 of the new Arbitration Act."

3. Page 57, paragraph 1 line 9, between "an award," and "although", insert "(nor does the new Act of 1996)"

(ii) line 15, replace "was only concerned" with "has only been concerned"

(iii) at the end of footnote 74 add "See now Arbitration Act 1996 Section 5(1). Writing is a requirement of all arbitration governed by the Acts. A common law arbitration, i.e., one pursuant to an oral arbitration agreement, is not governed by the Acts: see Arbitration Act 1996 Section 81 and, by implication, Sections 9(4); 30(1)(a), 66(3) & 67(1) read together; and 58(1).

4. Page 70, footnote 115 should read: "Section 3. See now Arbitration Act 1996 Section 69(1). Exclusion agreements apply to domestic arbitration only if made after the commencement of the arbitration: Arbitration Act 1979 Section 3(6); Arbitration Act 1996 Section 87(1)."

5. Page 71, at end of footnote 118 add "They are not also retained in ensuing Act of 17 June 1996."

6. Page 81, line 2, between "1950" and "allows" insert "(see now Sections 9 and 86 of the 1996 Act)"

(ii) in paragraph 2, line 1, for "is" and "can" substitute "was" and "could" respectively.

(iii) in paragraph 2, line 3, sentence commencing "It may be that this situation ..." should read "It may be that this situation would have been assimilated to a simple refusal by the party in breach to proceed with the settlement by arbitration, in which case, if he had been the plaintiff in the proceedings, he may have had to abandon his claim."

(iv) same paragraph, line 7, for " ... may proceed to arbitration and obtain an award ...", substitute " ... may have proceeded to arbitration and obtained an award ..."

(v) at the end of that paragraph add "Section 9 of the Act of 1996 resolves the matter by referring to "legal proceedings", thus including out-of-court proceedings."

7. Page 83, footnote 161, after "Section 16" add "(there is no comparable provision in the new Act of 1996);"

8. Page 108, in paragraph 2 line 8, between "Arbitration Act 1950" and "to stay court proceedings ...", insert "(now mandatory powers under Sections 9 and 86 of new Act)"

(ii) at the end of footnote 82 add "but omitted in the new Act of 1996."

9. Page 245, paragraph 3 line 1, substitute "repeals" with "repealed"

10. Page 246, at the beginning of line 4, add "Section 81(2) of the new Act is to the same effect." and, in the place of the words "substitutes" and "confines" (line 5), read "substituted" and "confined" respectively.

(ii) in line 7, "Section 1(2). Section 3 allows parties ..." should read "Section 1(2); (see Sections 67 & 68 of the Act of 1996). Section 3 allowed parties ..."

(iii) in line 11, substitute "did" for "do" and the phrase "would have had to" for "must"

(iv) in line 13, substitute "related" for "relates"

(v) at the end of paragraph 1, add "The new Act of 1996 also allows for exclusion agreements (Section 69(1)) and, further, entirely omits the exceptions relating to contracts of insurance, commodities, and shipping. Exclusion agreements are also allowed in domestic arbitration, although valid only if entered into after the commencement of the arbitration in respect of which they are made."

(vi) paragraph 2, line 1, substitute "... 1979 Act is that it abolishes ..." with "... 1979 and 1996 Acts is that they abolish ..."

(vii) in line 6, substitute "delaying arbitrations or flouting the original intention of the parties, to avoid the courts in submitting to arbitration." with "delaying arbitration or of flouting the original intention of the parties, in submitting to arbitration, to avoid the courts."

(viii) in the same paragraph, line 9, substitute "Lord Diplock said in *The Nema* that" with "Following the Act of 1979, Lord Diplock said in *The Nema*, in terms which would also be relevant to the new Act of 1996, that". Retain footnote 44 after the name of the case.

11. Page 247, paragraph 2, in line 2 substitute "is not too obvious" with "may not have been too obvious" and insert "of 1979," between "Act" and "policy"

(ii) paragraph 2, line 5, between "the Act" and the sentence commencing "In *The Nema*, ...", insert "the same is true of the new Act" and in line 6, insert "1979" between the words "the" and "Act". In the next two lines substitute "remained" and "stated" for "remains" and "states" respectively.

(iii) in paragraph 3, lines 1 & 2, substitute the phrase "Act of 1979 is in the wider liberalising tendency it ushered into English law" with "Act of 1979 and, much so, the new Act of 1996, is the wider liberalising tendency ushered into English law"

(iv) in the same paragraph, line 3, substitute "prior to the Act" with "prior to 1979"; delete the word "it" (line 4) and insert "1979" between "the" and "Act" (in line 4).

12. Page 248, paragraph 2, in line 1 substitute "has been" with "was"

13. Page 249, line 5, substitute "be" with "have been"

(i) in line 6, substitute "will" with "would"; insert "have" between "not" and "recognise" and "give" should read "given"

(ii) in line 9, substitute "will regard" with "would have regarded"

(iii) paragraph 1 lines 15 and 16, the phrases after note 61 should read "that did not appear to be the conventional view in England where, before the new Act, it remained uncertain whether an English court would recognise an award made *ex aequo et bono*. At the end of that paragraph add "Section 46(1)(b) now makes that possible."

(iv) at the end of footnote 57 add "Section 46(1)(b) of the new Act provides a statutory basis for that decision."

14. Page 250, at the end of footnote 62, add "See Section 53 of the new Act."

Errata

1. Page 38, para. 2, line 17, substitute "excluding" with "exclusion of".

2. Page 36, line 1, replace the full stop with a comma.

(i) line 2, "characteris" should read "characterise".

3. Page 45, line 1, insert "not" between "are" and "practicable".

4. Page 62, para. 1, line 10, "off-shot" should read "off-shoot".

(i) para. 2, line 6, delete the first "to" and insert "of" between "disregard" and "contractual".

5. Page 74, para. 2, line 1, delete the word "to".

6. Page 78, last line, read "courts" for "coutrs".

7. Page 79, line 3, read "resulting" for "resultin".

8. Page 80, para. 3, last line, insert "l" in "controling".

9. Page 83, para. 2, last line, insert "c" in "beome".

10. Page 84, line 9, delete the second "the".

11. Page 218, line 3, read "Qatar" instead of "Quartar".

12. Page 248, para. 2, line 6, delete the commas after "Europe" and "arbitration".

George Elombi

Arbitration of International Commercial and Investment Disputes: Are the Misgivings of Developing Countries Justified? (Ph.D. Thesis, 1996 - Centre for Commercial Law Studies, Queen Mary & Westfield College, University of London)

CORRIGENDUM **(to reflect the provisions of the new Arbitration Act 1996)**

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